ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះតុលាការកំពូល
Supreme Court Chamber
Chambre de la Cour suprême

សំណុំរឿងលេខ: ០០២/១៩-កញ្ញា-២០០៧-អ.វ.ត.ក-អ.ជ.ស.ដ/អ.ជ.ត.ក(១៤)
Case File/Dossier N°. 002/19-09-2007-ECCC-TC/SC(14)

Before: **Judge KONG Srim, President**
Judge Motoo NOGUCHI
Judge SOM Sereyvuth
Judge Agniezska KLONOWIECKA-MILART
Judge MONG Monichariya
Judge Chandra Nihal JAYASINGHE
Judge YA Narin

Date: **25 April 2012**
Language(s): **English/Khmer**
Classification: **PUBLIC**

DECISION ON IENG SARY'S APPEAL AGAINST THE TRIAL CHAMBER'S DECISION ON ITS SENIOR LEGAL OFFICER'S EX PARTE COMMUNICATIONS

Accused
IENG Sary

Lawyers for the Accused
ANG Udom
Michael G. KARNAVAS

Co-Prosecutors
CHEA Leang
Andrew CAYLEY

Civil Party Lead Co-Lawyers
PICH Ang
Elisabeth SIMONNEAU-FORT

THE SUPREME COURT CHAMBER of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") is seised of an immediate appeal by the Co-Lawyers for IENG Sary ("the Defence") against the Trial Chamber's memorandum concerning *ex parte* communications between the Trial Chamber's Senior Legal Officer ("SLO") and other Defence teams;

I. PROCEDURAL HISTORY

1. On 21 December 2011, the Trial Chamber issued a memorandum dismissing the Defence's request[1] for the Trial Chamber to direct its SLO to copy all parties to all communications concerning trial management issues ("Impugned Decision").[2]

2. On 20 January 2012, the Defence filed an immediate appeal against the Impugned Decision ("Appeal") in English only.[3] The Khmer translation was notified on 25 January 2012[4] and therefore the deadline for the Supreme Court Chamber's decision falls on 25 April 2012.[5]

3. On 1 February 2012, the Co-Prosecutors filed their Response,[6] which was notified on 2 February 2012.

4. On 8 February 2012, the Defence filed its Reply.[7]

II. SUBMISSIONS ON ADMISSIBILITY

5. The Defence submits that the Appeal is admissible under 3 grounds: (i) Internal Rule 104(1); (ii) Internal Rule 104(4)(d); and, (iii) Internal Rule 21.

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[1] IENG Sary's Request for the Trial Chamber to direct the Trial Chamber Senior Legal Officer to maintain open and transparent communication with all parties concerning trial management issues, 14 December 2011, E154 ("Request").
[2] Trial Chamber Memorandum entitled "IENG Sary Request that the Trial Chamber direct the Senior Legal Officer to maintain open and transparent communication with all parties concerning trial management issues (E154)", 21 December 2011, E154/1.
[3] IENG Sary's Appeal against the Trial Chamber's Decision refusing his request for the Trial Chamber to direct its Senior Legal Officer to maintain open and transparent communication with all the parties, 20 January 2012, E154/1/1/1 ("Appeal").
[4] Pursuant to Article 7.2 of the Practice Direction on Filing (Rev.7), the Supreme Court Chamber granted permission to file the Khmer version of the Appeal "at the first opportunity".
[5] Internal Rules 108(4)(*bis*)(a) and 108(2) (Rev.8); Summary of the Reasons for the Decision on Immediate Appeal by NUON Chea Against the Trial Chamber's Decision on Fairness of Judicial Investigation, 30 January 2012, E116/1/6, fn. 7.
[6] Co-Prosecutors' Response to IENG Sary's Appeal against the Trial Chamber's Decision refusing his request for the Trial Chamber to direct its Senior Legal Officer to maintain open and transparent communication with all the parties, 1 February 2012, E154/1/1/2 ("Response").
[7] IENG Sary's Reply to Co-Prosecutors' Response to IENG Sary's Appeal against the Trial Chamber's Decision refusing his request for the Trial Chamber to direct its Senior Legal Officer to maintain open and transparent communication with all the parties, 8 February 2012, E154/1/1/3 ("Reply").

6. The Defence submits that the Appeal is admissible pursuant to Internal Rule 104(1) as the Trial Chamber erred in law by not providing a "reasoned decision" and directing other parties not to respond to the request.[8] Further, the Defence submits that the Trial Chamber erred in fact by ignoring the violation of fair trial rights caused by *ex parte* communications and abused its discretion by directing its Senior Legal Officer to engage in *ex parte* communications.[9]

7. The Defence submits that the Appeal is also admissible pursuant to Internal Rule 104(4)(d) because it concerns an interference with the administration of justice under Internal Rule 35(6).[10] The Defence argues that the Trial Chamber's direction to its Senior Legal Officer to engage in *ex parte* communications amounts to "unconscionable conduct…analogous with and equal in gravity" to the examples of interference with the administration of justice expressly listed in Internal Rule 35.[11] The Defence finally submits that the Appeal is admissible under Internal Rule 21 alone, because if the Appeal is not accepted, the Accused's fundamental fair trial rights would be violated.[12]

8. The Defence requests that the Supreme Court Chamber set aside the Impugned Decision, direct the Trial Chamber to halt *ex parte* communications on matters of trial management, and hold a public hearing pursuant to Internal Rule 109(1) to address the issues raised in the Appeal.[13]

9. The Co-Prosecutors respond that the Appeal should be deemed inadmissible under all three grounds submitted by the Defence. Firstly, Internal Rule 104(1) is a general provision providing the grounds on which the Chamber shall decide all appeals and Internal Rule 104(4) is a specific provision which lists the only four categories of decisions that are subject to immediate appeal.[14] Secondly, as the Defence's original request did not call for an investigation pursuant to Internal Rule 35(6), or in any way allege that the practice in question amounted to an interference with the administration of justice, they are unable to appeal pursuant to Internal Rule 104(4)(d).[15] Furthermore, a decision by the Trial Chamber itself cannot constitute a knowing and wilful interference with the administration of justice.[16] Finally, they submit that Internal Rule 21 is a

[8] Appeal, para. 5.
[9] Appeal, paras 6-7.
[10] Appeal, paras 8-10.
[11] Appeal, para. 9.
[12] Appeal, para. 11.
[13] Appeal, p. 23.
[14] Response, paras 4.
[15] Response, para. 7.
[16] Response, para. 8.

"general provision operating primarily as a rule of interpretation" and cannot override the clear and unambiguous terms of Internal Rule 104(4).[17]

10. The Co-Prosecutors request that the Chamber refer the Appeal to the Defence Support Section for an assessment of whether the work was both necessary and reasonable.

11. In its Reply, the Defence maintains that the Supreme Court Chamber should find the Appeal admissible and grant the relief sought therein.

III. DISCUSSION

a. Admissibility

i. Internal Rule 104(1)

12. The jurisdiction of the Supreme Court Chamber to hear appeals is governed by Internal Rule 104. This Chamber has previously found that its jurisdiction to consider immediate appeals is "further limit[ed]"[18] by Internal Rule 104(4) and therefore decisions outside the scope of Internal Rule 104(4) can only be appealed following the final judgement.[19] Other decisions have similarly dismissed appeals as inadmissible because they do not fall within the scope of Internal Rule 104(4).[20] Therefore the Defence's admissibility arguments made under Internal Rule 104(1) are dismissed.

ii. Internal Rule 104(4)(d)

13. Internal Rule 104(4)(d) contemplates appeals against "decisions *on*" Internal Rule 35(6). Although Internal Rule 104(4)(d) does not require that the decision "refer to itself" as a "decision on interference with the administration of justice",[21] the request itself should not "present[...] allegations to which Internal Rule 35 is manifestly inadmissible."[22] This Chamber furthermore reiterates that "an erroneous judicial holding is not, by itself, legally sufficient to satisfy the Internal

[17] Response, para. 9.
[18] Decision on the Appeals filed by Lawyers for Civil Parties (Groups 2 and 3) against the Trial Chamber's Oral Decisions of 27 August 2009, 28 December 2009, E169/1/2, para. 10.
[19] Internal Rule 104(4).
[20] *See, e.g.* Decision on Notice of Appeal from Civil Party Lead Co-Lawyers, 21 September 2011, E62/3/10/5/1 (dismissing the Appeal as it does not fall within Internal Rule 104(4)(a)-(d) which provides the Supreme Court Chamber's jurisdiction to hear immediate appeals); Decision on IENG Sary's Appeal against the Trial Chamber's order requiring his presence in Court, 13 January 2012, E130/4/3 (dismissing the Appeal as it does not fall within the Chamber's "limited jurisdiction for immediate appeals under Rule 104(4)").
[21] Reply, para. 2.
[22] Decision on IENG Sary's Appeal Against the Trial Chamber's Decision on Motions for Disqualification of Judge Silvia Cartwright, 17 April 2012, E137/5/1/3, para. 12.

Rule 35 standard."[23] The Defence only asserted in its Appeal that the conduct interfered with the administration of justice and there is no mention of it in its Request. Instead, the Defence referred to previous unsuccessful requests and applications where they had alleged that interference with justice occurred in *ex parte* communications between judges and parties.[24] These requests and applications are not factually analogous to the current situation and the Defence's brief reference to them cannot be considered an allegation of interference with the administration of justice.

iii. Internal Rule 21

14. The Pre-Trial Chamber has previously ruled that Internal Rule 21 requires it to "interpret the Internal Rules in such a way that [an] Appeal is also admissible on the basis of Rule 21."[25] However, the Pre-Trial Chamber described this decision as a "liberal interpretation of the right to appeal in light of Internal Rule 21" and not a general rule conferring competence over appeals on any matter implicating the fairness of proceedings.[26] Instead, admissibility of an appeal under Internal Rule 21 was considered exceptional, involving only those cases where particular facts and circumstances require a broader interpretation of the right to appeal.[27] The Supreme Court Chamber has furthermore held that Internal Rule 21, far from automatically ensuring the Accused a favourable interpretation of the Internal Rules in every instance, "is to be read to mean that the interpretation of the Internal Rules must not lead to [the] infringement of any interests of the Accused that emanate from fundamental rights guaranteed under statutes and applicable international legal instruments."[28]

15. In this respect, the Supreme Court Chamber reiterates that there is no general right to interlocutory appeal that might be curtailed by the narrow jurisdiction under Internal Rule 104(4).[29] The Accused has failed to demonstrate how the *ex parte* communications resulted in a denial of his rights or how this conduct amounts to an exceptional circumstance requiring the Chamber to admit the Appeal under Internal Rule 21.

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[23] Decision on IENG Sary's Appeal Against the Trial Chamber's Decision on Motions for Disqualification of Judge Silvia Cartwright, 17 April 2012, E137/5/1/3, para. 13.
[24] Request, para. 10.
[25] Decision on IENG Sary's Appeal against Co-Investigating Judges' Order denying request to allow audio/video recording of meetings with IENG Sary at the detention facility, 11 June 2010, A371/2/12, para. 18.
[26] Decision on Appeal against the Response of the Co-Investigating Judges on the motion on confidentiality, equality and fairness, 29 June 2011, A410/2/6 ("Decision on Appeal against the Response of the CIJ"), para. 10.
[27] Decision on Appeal against the Response of the CIJ, para. 10.
[28] Decision on Immediate Appeals by NUON Chea and IENG Thirith on urgent applications for immediate release, 3 June 2011, E50/2/1/4, para. 39.
[29] 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), 20 March 2012, E51/15/1/2, 7th dispositive paragraph citing *Prosecutor v. Norman*, SCSL-2003-08-PT, "Decision on the Application for a Stay of Proceedings and Denial of Right to Appeal", Appeals Chamber, 4 November 2003, paras 18-25.

16. For these reasons, the Supreme Court Chamber finds that the Appeal fails to fulfil the admissibility requirements of an immediate appeal under Internal Rule 104(4) and is therefore inadmissible.

b. Co-Prosecutors' Request for the Appeal to Be Referred to the Defence Support Section ("DSS")

17. The Co-Prosecutors request that the Appeal be referred to the DSS for an assessment of whether the work performed thereupon was both necessary and reasonable. It is submitted that the Defence has engaged in a practice of filing manifestly inadmissible appeals that "abuses the process of the ECCC [and] burdens the scant resources and time of the Chamber."[30]

18. At the *ad hoc* tribunals, the respective Rules of Procedure and Evidence ("RPE") empower the chambers to sanction defence counsel who bring motions that are considered frivolous or constitute an abuse of process.[31] Pursuant to these provisions the chambers have frequently sanctioned frivolous motions by directing the Registrar to withhold, in whole or in part, the fees and costs associated with such motions.[32] Notably, the international counsel for IENG Sary, Mr. Michael Karnavas, has already been admonished and sanctioned by chambers of the ICTY for bringing frivolous motions.[33]

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[30] Response, para. 11.
[31] ICTY RPE, Rule 73(D); ICTR RPE, Rule 73(F); SCSL RPE, Rule 46(C). *See also* ICTY RPE and ICTR RPE, Rules 46; Code of Professional Conduct for Counsel Appearing Before the International Tribunal, Article 25 ("Counsel shall not bring or defend a proceeding or action unless there is a basis for doing so that is not frivolous . . .").
[32] *See, e.g. Nahimana et al. v. Prosecutor*, ICTR-99-52-A, "Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Submit Additional Grounds of Appeal, to Amend the Notice of Appeal and to Correct his Appellant's Brief", Appeals Chamber, 17 August 2006, para. 56 (denying fees for a motion "devoid of any arguments" in relation to certain requirements (*ibid.*, para. 19) and for another motion containing claims with which the Chamber "strongly disagree[d]" and found "unacceptable" (*ibid.*, para. 51)); *Prosecutor v. Nyiramasuhuko et al.*, ICTR-97-21-T & ICTR-98-42-T, "Decision on Nyiramasuhuko's Motion for Separate Proceedings, a New Trial, and Stay of Proceedings Rules 82(B) and 72(D), Rules of Procedure and Evidence", Trial Chamber, 7 April 2006, para. 84 (denying fees associated with a motion considered frivolous because it purported to re-litigate matter previously addressed); *Prosecutor v. Brđanin et al.*, IT-99-36-T, "Decision on "Request for Certification to Appeal Against the Decision to Separate Trials" and on "Motion to Extend Time-Limit for Filing Brief in Support of Request for Certification to Appeal"", Trial Chamber, 3 October 2002, paras 10-13 (finding the motion and the request manifestly ill-founded and frivolous since they were aimed at "ultimately bring[ing] chaos in this case"; the Registrar was consequently directed to withhold fees and costs thereof).
[33] *See, e.g. Prosecutor v. Prlić et al.*, IT-04-74-T, "Decision on Request for Reconsideration, or in the Alternative, for Certification to Appeal the 1 February 2010 Decision Applying Rule 73 (D) of The Rules to the Prlic Defence", Trial Chamber, 28 June 2010, p. 6 and *Prosecutor v. Prlić et al.*, IT-04-74-T, "Decision on Motion for Reconsideration of Decision of 21 January 2010 and Application of Rule 73(D) of the Rules to Prlić's Defence", Trial Chamber, 1 February 2010, pp. 4-5 (finding that the motion constitutes abuse of process since "by systematically calling into question the Chamber's decisions and making use of its time and resources in a highly disproportionate manner, the attitude of the *Prlić* Defence is frivolous." This finding led to the payment of fees and costs associated with the motion being withheld by the Registrar); *Prosecutor v. Prlić et al.*, IT-04-74-T, "Decision on Prlić Defence Request for Certification to Appeal", Trial Chamber, 7 December 2009, pp. 2-3 (warning the defence that "its excessive persistence" on questions already extensively litigated may lead to sanctions pursuant to Rule 73(D) of the ICTY RPE); *Prosecutor v. Blagojević et al.*, IT-02-60-T, "Decision on Motion to Seek Leave to Respond to the Prosecution's Final Brief", Trial Chamber, 28 September 2004 (admonishing Mr Karnavas for filing a frivolous motion and for making certain allegations regarding the professionalism and ethics of the members of the Prosecution team).

19. The Supreme Court Chamber notes that at the ECCC the DSS is called upon to evaluate whether proposed tasks or unforeseen tasks already performed by lawyers are "necessary and reasonable" for the preparation of the defence.[34] In Case 002, the Trial Chamber has ruled in several instances that defence filings be referred to the DSS, and has also recommended that remuneration to the Defence for certain motions be denied.[35] The Supreme Court Chamber observes that the DSS is statutorily bound to make such determination independently of a chamber's referral. In this regard, the ICTR Trial and Appeals Chambers have emphasised that the power to impose sanctions on counsel should "be exercised cautiously, bearing in mind the interests of justice[,] the right to a fair trial [... and] the absence of appellate review."[36]

20. The Co-Prosecutors submit that the present Appeal aligns with a "practice of filing manifestly inadmissible immediate appeals"[37] that is allegedly being carried out by the IENG Sary Defence. As evidence of such practice, however, the Response indicates no more than one immediate appeal, in which case the Supreme Court Chamber implicitly rejected a similar request from the Co-Prosecutors' to refer the appeal to the DSS for an assessment of its necessity and reasonableness.[38] This Chamber recalls that finding an appeal inadmissible is not tantamount to finding it frivolous, unreasonable or unnecessary in the light of the Accused's fair trial rights. The present Appeal does not appear to, nor could it,[39] be aimed at causing delay in the proceedings. Moreover it does not purport to re-litigate matters already addressed or abuse the process of the ECCC, nor is it based on a blatant misreading of the applicable law. The Co-Prosecutors' request is accordingly dismissed.

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[34] DSS Administrative Regulations, Articles 13.1 and 14.2.
[35] *See, e.g.* Decision on NUON Chea Defence Request for Internal Rule 35 Investigation following Unauthorized Disclosure of Confidential Documents, 20 December 2011, E147/1, p. 4; Decision on IENG Sary's Motion Regarding Judicial Notice of Adjudicated Facts from Case 001 and Facts of Common Knowledge being applied in Case 002, 5 April 2011, E69/1, p. 3; Decision on IENG Sary's Motion for a Hearing on the Conduct of the Judicial Investigations, 8 April 2011, E71/1, p. 3; Memorandum in response to request filed by IENG Sary (E53/2), 16 March 2011, E53/2/1, p. 1, para. (c); Memorandum on IENG Sary request to file motion seeking "confirmation that he will be entitled to present oral arguments at the Initial Hearing concerning each of his Preliminary Objections", 16 March 2011, E65/1, p. 2, para. (c). *See also* Memorandum from DSS OiC to Co-Lawyers for IENG Sary (dated 25 April 2011), 25 April 2011, E130/4/1.1.2.
[36] *Prosecutor v. Karemera et al.*, ICTR-98-44-PT, "Decision on Motion to Vacate Sanctions Rules 73(F) and 120 of the Rules of Procedure and Evidence", Trial Chamber, 23 February 2005, para. 6 (citing *Karemera et al. v. Prosecutor*, ICTR-98-44-AR73.4, "Decision on Interlocutory Appeals Regarding Participation of *Ad Litem* Judges", Appeals Chamber, 11 June 2004, p. 4, incorrectly cited as *Karemera et al.*, Decision on Counsel's Appeal from Rule 73(F) Decisions (AC), 9 June 2004).
[37] Response, para. 11.
[38] Decision on IENG Sary's Appeal Against Trial Chamber's Order Requiring his Presence in Court, 13 January 2012, E130/4/3 (implicitly rejecting the Co-Prosecutors' request advanced in Co-Prosecutors' Response to IENG Sary's Appeal Against the Trial Chamber's Decision Requiring the Accused to Be Physically Present to Hear Charges and Opening Statements, 12 January 2012, E130/4/2, paras 11-12).
[39] Internal Rule 104(4) ("Unless otherwise provided in the IRs or decided by the Trial Chamber, an immediate appeal does not stay the proceedings before the Trial Chamber").

IV. DISPOSITION

FOR THE FOREGOING REASONS, THE SUPREME COURT CHAMBER:

DECLARES the Appeal inadmissible.

Phnom Penh, 25 April 2012

President of the Supreme Court Chamber