

BEFORE THE SUPREME COURT CHAMBER**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 002/19-09-2007-ECCC/SC**Party Filing:** The Defence for IENG Sary**Filed to:** The Supreme Court Chamber**Original language:** ENGLISH**Date of document:** 7 February 2012**CLASSIFICATION****Classification of the document suggested by the filing party:** PUBLIC**Classification by OCIJ or Chamber:** សាធារណៈ/Public**Classification Status:****Review of Interim Classification:****Records Officer Name:****Signature:**

**IENG SARY'S REPLY TO CO-PROSECUTOR'S 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**

Filed by:Distribution to:**The Co-Lawyers:**ANG Udom
Michael G. KARNAVAS**The Supreme Court Chamber Judges:**Judge KONG Srim
Judge SOM Sereyvuth
Judge MONG Monichariya
Judge YA Narin
Judge MOTOO Noguchi
Judge Agnieszka KLONOWIECKA-MILART
Judge Chandra Nihal JAYASINGHE
Reserve Judge SIN Rith
Reserve Judge Florence MUMBA**Co-Prosecutors:**CHEA Leang
Andrew CAYLEY**All Defence Teams****All Civil Parties**

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby replies to the Co-Prosecutors’ Response¹ to IENG Sary’s Appeal against the Trial Chamber’s Decision Refusing his Request for the Trial Chamber Senior Legal Officer to Maintain Open and Transparent Communication with all the Parties.² The OCP asserts that the Appeal is inadmissible as there is no legal basis for this immediate Appeal under Rules 104 or 21. This Reply is made necessary because the OCP misinterprets the Appeal’s admissibility under Rule 104 and misinterprets the proper application of Rule 21. This Reply is limited to the issue of admissibility and, as such, should not affect the Defence’s request for a public oral hearing on the substance of the Appeal.

I. REPLY

A. The Appeal is Admissible Pursuant to Rule 104

1. In paragraphs 3 through 5 the OCP asserts that the Defence argued that the Appeal was admissible pursuant to Rule 104(1) and that this “deliberately misreads” Rule 104, since only Rule 104(4) deals with immediate appeals. The Defence did not misread Rule 104. Rule 104(1) states that the Supreme Court Chamber “*shall decide* an appeal against a judgment or a decision of the Trial Chamber on the following grounds: a) an error on a question of law invalidating the judgment or decision; or b) an error of fact which has occasioned a miscarriage of justice.”³ It was therefore necessary for the Defence to explain the Trial Chamber’s errors of law and fact. This was also necessary in the event the Supreme Court Chamber determines that Rule 21 requires it to admit the Appeal, either by taking a broad reading of Rule 104 or by admitting the Appeal directly pursuant to Rule 21.
2. In paragraph 7 the OCP asserts that the Impugned Decision⁴ was not a “‘decision’ on interference with the administration of justice under Rule 35(6)” because the Impugned Decision did not refer or relate to an interference with the administration of justice within the meaning of Rule 35. This is an incorrect interpretation of Rule 104(4)(d). There is no

¹ Co-Prosecutors’ Response to IENG Sary’s Appeal against the Trial Chamber’s Decision Refusing his Request for the Trial Chamber Senior Legal Officer to Maintain Open and Transparent Communication with all the Parties, 1 February 2012, E154/1/1/2 (“Response”).

² IENG Sary’s Appeal against the Trial Chamber’s Decision Refusing his Request for the Trial Chamber Senior Legal Officer to Maintain Open and Transparent Communication with all the Parties, 12 January 2012, E154/1/1/1 (“Appeal”).

³ Emphasis added.

⁴ 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),” 20 December 2011, E154/1 (“Impugned Decision”).

requirement that a decision refer to itself as a “Decision on Interference with the Administration of Justice” in order for it to *be* a decision on interference with the administration of justice. The Impugned Decision is a decision on interference with the administration of justice: the Trial Chamber Senior Legal Officer – on behalf of the Trial Chamber – interfered with the administration of justice by conducting *ex parte* communications with certain parties about important trial management matters which impact upon all the parties. The Trial Chamber, through the Impugned Decision, decided that this behavior was acceptable and thus was not an interference with the administration of justice. Furthermore, the Impugned Decision is *itself* an interference with the administration of justice because it condones this behavior and tacitly authorizes it to continue. The Supreme Court Chamber has jurisdiction to address this interference pursuant to Rule 104(4)(d) and Rule 35.

3. In paragraph 7 the OCP asserts that finding the Appeal admissible under Rule 104(4)(d) would open the floodgates to allow immediate appeals of any Trial Chamber decision, asserting that if this Appeal is admitted under Rule 104(4)(d), “any party could file an immediate appeal against *any* decision of the Trial Chamber merely by alleging that the decision interfered with the administration of justice.”⁵ It matters not whether other appeals may be found admissible if the present Appeal is accepted. What is at issue is whether the present Appeal is admissible under the Rules. Suffice it to say, a simple allegation that a decision interferes with the administration of justice would not be sufficient on its own to require the Supreme Court Chamber to admit any appeal.
4. In paragraph 8 the OCP asserts that the Appeal “ignores the clear spirit and meaning of this Chamber’s decision of 12 January 2012, which held that ‘neither an error of law nor an abuse of discretion on the part of the Trial Chamber can, by itself, constitute a knowing and wilful interference with the administration of justice within the meaning of Rule 35.’”⁶ This is incorrect. The Supreme Court Chamber stated that an error of law or an abuse of discretion cannot *by itself* constitute a knowing and willful interference with the administration of justice. As explained in the Appeal, the Trial Chamber did not merely err in law or abuse its discretion. It actually instructed its Senior Legal Officer to

⁵ Emphasis in original.

⁶ *Quoting* Decision on IENG Sary’s Appeal Against Trial Chamber’s Order Requiring his Presence in Court, 13 January 2012, E130/4/3, p. 2.

conduct *ex parte* communications (and allows her to continue to conduct such communications), in clear violation of the parties' rights.⁷

B. The Appeal is Admissible Pursuant to Rule 21

5. In paragraph 9 the OCP asserts that the Supreme Court Chamber "has previously ruled that its jurisdiction over immediate appeals is limited to matters set out in Rule 104(4)." In the two decisions cited by the OCP, the Supreme Court Chamber held that Rule 104(4) is limited. It did not consider, because it was not requested to do so, whether the appeals at issue would have been admissible pursuant to Rule 21 alone. Appeals may be admissible pursuant to Rule 21 alone where this is necessary to protect an Accused's fundamental fair trial rights. The Pre-Trial Chamber recognized this, both by interpreting Rule 74(3) broadly to permit appeals which may not clearly fall within its exhaustive list of appealable orders and decisions,⁸ and by admitting appeals directly through Rule 21.⁹ This interpretation remains valid, and, as submitted by the Defence,¹⁰ should be upheld and duly applied by the Supreme Court Chamber.
6. In paragraph 10 the OCP asserts that the Pre-Trial Chamber "relied on Rule 21 to broadly interpret the right to appeal at the pre-trial stage as the accused person would otherwise have had no opportunity to appeal" and that in the present case "there is no need to resort to Rule 21 as the accused person's fair trial rights are adequately safeguarded by the provision of a right to appeal the Impugned Decision at the final stage of the proceedings." In fact, this is precisely why Rule 21 must be applied so that the present Appeal is immediately admissible. Rule 104 provides no protection to Mr. IENG Sary if this Appeal is not admitted immediately; his rights will not be safeguarded. Mr. IENG Sary will have no redress if he cannot appeal the Impugned Decision until the final stage of proceedings. At that point, it will be too late to correct the Trial Chamber's actions. Indeed, it will be next to impossible to determine in which situations the Trial Chamber conducted *ex parte* communications, let alone to determine the way in which Mr. IENG Sary was harmed by such communications or how Mr. IENG Sary could be appropriately

⁷ See Appeal, paras. 9, 22-29.

⁸ See, e.g., Decision on IENG Sary's Appeal against the 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.


⁹ See Decision on IENG Sary's Appeal against the Co-Investigating Judges' Decision Refusing to Accept the Filing of IENG Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, and Request for Stay of the Proceedings, 20 September 2010, D390/1/2/4, para. 13.

¹⁰ Appeal, paras. 4, 11.


compensated for such harm. *Ex parte* communications tarnish the integrity of the trial. The only appropriate remedy may be a new trial, which may not be feasible considering the time and expenses involved. As explained in the Appeal, Article 2(3) of the International Covenant on Civil and Political Rights, which the Chambers of the ECCC must respect and uphold pursuant to the Constitution,¹¹ requires that Mr. IENG Sary shall have an *effective* remedy. The Supreme Court Chamber must find the Appeal admissible immediately in order to provide Mr. IENG Sary an effective remedy to the harm he has suffered and continues to suffer because of the Trial Chamber's actions.


WHEREFORE, for all the reasons stated herein and set out more fully in the Appeal, the Supreme Court Chamber should find the Appeal admissible and grant the relief sought therein.

Respectfully submitted,



 ANG Udom





 Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 7th day of **February, 2011**

¹¹ Article 31 of the 1993 Cambodian Constitution, as amended in 1999, states that the Kingdom of Cambodia *shall* recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human rights, the covenants and conventions related to human rights, women's and children's rights.