

BEFORE THE SUPREME COURT CHAMBER**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 002/19-09-2007-ECCC-TC/SC () **Party Filing:** The Defence for IENG Sary**Filed to:** The Supreme Court Chamber**Original language:** ENGLISH**Date of document:** 19 November 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 RESPONSE TO THE CO-PROSECUTORS' IMMEDIATE APPEAL OF DECISION CONCERNING THE SCOPE OF TRIAL IN CASE 002/01

Filed by:**Distribution to:****The Co-Lawyers:**ANG Udom
Michael G. KARNAVAS**The Supreme Court Chamber Judges:**Judge KONG Srim
Judge SOM Sereyvuth
Judge Agnieszka KLONOWIECKA-MILART
Judge MONG Monichariya
Judge Chandra Nihal JAYASINGHE
Judge YA Narin
Judge Florence Ndepele Mwachande MUMBA**Co-Prosecutors:**CHEA Leang
Andrew CAYLEY

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby responds to the Co-Prosecutors’ Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01 with Annex I and Confidential Annex II (“Appeal”).¹ The Appeal is manifestly inadmissible at this stage of the proceedings; it is time barred, and even if it were not, an immediate appeal concerning the scope of the trial is not allowed under the ECCC Internal Rules (“Rules”). On this basis, and in the interests of judicial economy, the Defence will limit this Response to issues of jurisdiction and admissibility only.² For contextual purposes, particularly in relation to whether the Trial Chamber abused its discretion in failing to sufficiently consider OCP arguments in regard to the scope of trial, the relevant background is set out below.

I. BACKGROUND

1. On 22 September 2011, prior to the start of trial, the Trial Chamber severed the proceedings in Case 002 into “a number of discrete cases that incorporate particular factual allegations and legal issues.”³ The Trial Chamber “determined separation of proceedings to be in the interests of justice,”⁴ noting the severance would “safeguard[] the fundamental interest of victims in achieving meaningful and timely justice, and the right of all Accused in Case 002 to an expeditious trial.”⁵
2. On 23 September 2011, the OCP notified the Trial Chamber that it would seek reconsideration of the Severance Order.⁶ In this notification, the OCP stated that it “fully support[ed] the need for severance in Case 002 and defer[red] to the authority of the Trial Chamber to issue severance orders in the interests of justice and to otherwise manage the allocation of time and resources at trial.”⁷ The OCP noted that it would “prepare focused recommendations for the inclusion of a small selection of representative criminal acts alleged in the Closing Order.”⁸

¹ Co-Prosecutors’ Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01 with Annex I and Confidential Annex II, 7 November 2012, E163/5/1/1.

² This is an approach commonly taken by the OCP. *See, e.g.*, 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.

³ Severance Order Pursuant to Internal Rule 89ter, 22 September 2011, E124, para. 2.

⁴ *Id.*, para. 5.

⁵ *Id.*, para. 8.

⁶ Co-Prosecutors’ Notice of Request for Reconsideration of the Terms of “Severance Order Pursuant to Internal Rule 89ter”, 23 September 2011, E124/1.

⁷ *Id.*, para. 4.

⁸ *Id.*, para. 5.

3. On 3 October 2011, the Defence responded to the OCP's notice and requested a public oral hearing, should the Trial Chamber grant the OCP's request for reconsideration of the terms of the Severance Order.⁹
4. On 3 October 2011, the OCP requested that the Trial Chamber reconsider its Severance Order and include several additional crime sites in Case 002/01, or in the alternative, give all parties an opportunity to be heard on the substance of the Severance Order orally or in writing.¹⁰ The OCP made this request noting that Case 002/01 would "likely [be the] only trial of the Accused" and "would not be representative of their alleged criminal conduct."¹¹ It argued that the Severance Order "would diminish the legacy" of the ECCC and "would not safeguard the fundamental interests of victims."¹²
5. On 13 October 2011, the Defence responded to the OCP's request for reconsideration. Taking a neutral position as to whether a basis for reconsideration existed, the Defence submitted that: **a.** reconsideration was permissible; **b.** severance had to be consistent with Rule 89*ter* of the Rules; **c.** guidance on severance could not be taken from the ICTY because of the difference in their underlying legal systems (a party-driven adversarial system versus a civil law system) and applicable rules; **d.** the OCP's questioning of whether there would be future trials was unseemly; **e.** the OCP had not demonstrated that the Severance Order was not in the interest of justice; and **f.** the alternative severance proposed by the OCP would not result in an expeditious trial.¹³
6. On 18 October 2011, the Trial Chamber rejected the OCP's request for reconsideration and for a public hearing.¹⁴ In this Decision, the Trial Chamber explained its rationale for severing the case in the manner it did,¹⁵ and further explained that "as no allegations or charges in the Indictment are discontinued in consequence of the Severance Order, there

⁹ IENG Sary's Conditional Support to the Co-Prosecutors' Notice of Request for Reconsideration of the Terms of the "Severance Order Pursuant to Internal Rule [89]*ter*", 3 October 2011, E124/3.

¹⁰ Co-Prosecutors' Request for Reconsideration of "Severance Order Pursuant to Internal Rule 89*ter*", 3 October 2011, E124/2.

¹¹ *Id.*, para. 3. See also para. 24: "[t]he Severance Order foresees the Accused facing more than one trial. This is unlikely."

¹² *Id.*, para. 3.

¹³ IENG Sary's Response to the Co-Prosecutors' Request for Reconsideration of "Severance Order Pursuant to Internal Rule 89*ter*", 13 October 2011, E124/6.

¹⁴ Decision on Co-Prosecutors' Request for Reconsideration of the Terms of the Trial Chamber's Severance Order (E124/2) and Related Motions and Annexes, 18 October 2011, E124/7.

¹⁵ *Id.*, para. 10.

is no need for the first trial to be reasonably representative of the totality of charges in the Indictment.”¹⁶ The OCP filed no appeal.

7. On 4 November 2011, the OCP requested clarification of the scope of Case 002/01,¹⁷ and requested the Trial Chamber, *inter alia*, to “confirm that paragraph 7 of the Severance Order does not limit in any way the Trial Chamber’s discretion, referred to in paragraph 6, to include any other charge or count in the Indictment in addition to those identified in paragraph 5 of the Severance Order in the first trial.”¹⁸
8. On 16 November 2011, the Defence responded to the OCP’s request for clarification, asserting that the request was simply a vehicle to request reconsideration of the Severance Order a second time.¹⁹
9. On 29 November 2011, the Trial Chamber issued a memorandum notifying the parties of its disposition of a number of motions, including the OCP’s 4 November 2011 request for clarification. The Trial Chamber stated: “The Chamber ... wishes to emphasize that Internal Rule 89ter, pursuant to which the Chamber’s Severance Order was made, confers upon the Trial Chamber a discretionary trial management competence and is without right of appeal.”²⁰ The Trial Chamber additionally stated that “[f]urther motions seeking reconsideration of the Severance Decision – whether styled as requests for ‘clarification’, responses or otherwise – will also not receive a response from the Trial Chamber and may be considered a deliberate attempt to delay proceedings.”²¹ The OCP filed no appeal.
10. On 27 January 2012, the OCP again attempted to enlarge the scope of the trial, requesting the Trial Chamber to include three additional crime sites in Case 002/01,²² arguing, *inter*

¹⁶ *Id.*, para. 9.

¹⁷ Co-Prosecutors’ Request for Clarification of the Scope of the First Trial, 4 November 2011, E124/9.

¹⁸ *Id.*, para. 3.

¹⁹ IENG Sary’s Response to the Co-Prosecutors’ Request for Clarification of the Scope of the First Trial, 16 November 2011, E124/9/1, introduction.

²⁰ Notice of Trial Chamber’s disposition of remaining pre-trial motions (E20, E132, E134, E135, E124/8, E124/9, E124110, E136 and E139) and further guidance to the Civil Party Lead Co-Lawyers, 29 November 2011, E145, p. 1 (emphasis added).

²¹ *Id.*, p. 2.

²² Co-Prosecutors’ Request to Include Additional Crime Sites within the Scope of Trial in Case 002/01, 27 January 2012, E163.

alia, that enlarging the scope was necessary for a “reasonably representative factual scope in the trial.”²³

11. On 3 February 2012, the Defence responded to the OCP’s request to add three additional crime sites, noting that the request “is yet another attempt by the OCP to request the Trial Chamber to reconsider its Severance Order,” and requesting that the Trial Chamber summarily dismiss the request.²⁴
12. On 17 February 2012, the Trial Chamber issued a memorandum setting out the next group of witnesses to be heard in Case 002/01. In this memorandum, the Trial Chamber noted:

The Chamber is also in receipt of the Co-Prosecutor’s [sic] request to include additional crime sites within the scope of trial in Case 002/01 (E163) and in the responses of the IENG Sary and KHIEU Samphan Defence [teams] (E163/1 and E163/4, respectively). As the Chamber has previously indicated in the Severance Order and in other related decisions, it may *on its own motion* decide in due course to extend the scope of trial in Case 002/01, in the exercise of its trial management discretion. Should this occur, the parties will be informed in a timely manner. This constitutes the Chamber’s official response to Motion E163.²⁵

The OCP filed no appeal.

13. On 3 August 2012, the Trial Chamber issued a memorandum scheduling a trial management meeting to enable planning of the remaining phases in Case 002/01 and to implement further measures designed to promote trial efficiency.²⁶ This memorandum stated that it is “the intention of the Chamber to conclude the hearing of evidence in Case 002/01 in 2013, and to commence Case 002/02 soon after the conclusion of the evidence in Case 002/01...”²⁷ The memorandum indicated that the Trial Chamber *might* be willing to consider a modest expansion in the scope of Case 002/01, set out in an attached annex, and invited focused submissions from the parties on this issue at the trial management meeting.²⁸ The Trial Chamber directed the parties to raise any issues for discussion at the

²³ *Id.*, para. 5.

²⁴ IENG Sary’s Response to the Co-Prosecutors’ Request to Include Additional Crime Sites within the Scope of Trial in Case 002/01, 3 February 2012, E163/1.

²⁵ Next Group of Witnesses, Civil Parties and Experts to be Heard in Case 002/01, 17 February 2012, E172, p. 4 (emphasis added).

²⁶ Scheduling of Trial Management Meeting to Enable Planning of the Remaining Trial Phases in Case 002/01 and Implementation of Further Measures Designed to Promote Trial Efficiency, 3 August 2012, E218.

²⁷ *Id.*, para. 1.

²⁸ *Id.*, paras. 13-15.

trial management meeting “*to the Senior Legal Officer*” and “*no later than Friday 10 August 2012.*”²⁹

14. On 15 August 2012, the OCP filed a Notice of Co-Prosecutors’ Position on Key Issues to be Discussed at 17 August 2012 Trial Management Meeting (with Confidential Annex A),³⁰ five days past the time requested by the Trial Chamber. In this Notice, the OCP proposed that several additional witnesses be heard and proposed the inclusion of three additional crime sites: S-21, District 12 and Tuol Po Chrey. It also set out a proposed trial schedule with the inclusion of these sites in Case 002/01.
15. On 16 August 2012, the Defence filed a motion to strike the OCP’s notice of key issues to be discussed at the trial management meeting³¹ because the OCP blatantly disregarded the Trial Chamber’s direction to raise any issues for discussion at the trial management meeting “*to the Senior Legal Officer*” and “*no later than Friday 10 August 2012.*”³² The OCP filed the 15-page Notice only one full day before the trial management meeting, did not seek leave to file the Notice and did not provide any justification for the untimeliness of its submission or for its formal filing as opposed to making submissions to the Trial Chamber’s Senior Legal Officer as directed.
16. On 17 August 2012, the Trial Chamber held a full-day trial management meeting to discuss, *inter alia*, the scope of the trial. During this meeting, none other than the International Co-Prosecutor, Andrew Cayley, appeared in court to make the OCP’s

²⁹ *Id.*, p. 1 (emphasis added).

³⁰ Notice of Co-Prosecutors’ Position on Key Issues to be Discussed at 17 August 2012 Trial Management Meeting (with Confidential Annex A), 15 August 2012, E218/2.

³¹ IENG Sary’s Motion to Strike Notice of Co-Prosecutors’ Position on Key Issues to be Discussed at 17 August 2012 Trial Management Meeting and its Annex, or, in the Alternative, Request to Respond, 16 August 2012, E218/3.

³² Trial Chamber Memorandum entitled “Scheduling of Trial Management Meeting to Enable Planning of the Remaining Trial Phases in Case 002/01 and Implementation of Further Measures Designed to Promote Trial Efficiency”, 3 August 2012, E218, p. 1 (emphasis added).

submissions³³ for expanding the scope of Case 002/01, expressing the view that this was a “fundamental issue.”³⁴

17. On 23 August 2012, the Trial Chamber’s Senior Legal Officer emailed the parties to note that at the 17 August 2012 trial management meeting: “the final phases of the discussion on the OCP’s proposal to expand the scope of the trial had to be brought to a hasty conclusion. To avoid prejudice stemming from this to any party, the Chamber indicated that the parties would instead be able to address the Chamber in writing on the few remaining issues on this topic which could not be discussed at the TMM due to time constraints.”³⁵
18. On 14 September 2012, the Defence filed a Response to the request for additional experts and witnesses that the OCP made in its notice of key issues to be discussed at the trial management meeting.³⁶ The Defence submitted that the OCP failed to meet its burden to demonstrate that there is “compelling justification” for any of the proposed new witnesses to appear before the Trial Chamber and that the request was an attempt to circumvent the Severance Order and would defeat the purpose of severing the case, which was to have a streamlined, efficient trial and to reach judgment during the lifetimes of all the Accused.
19. On 8 October 2012, the Trial Chamber issued a memorandum notifying the parties of its decision on the OCP’s request to add additional crime sites (“Impugned Decision”).³⁷ The Trial Chamber decided to include Tuol Po Chrey in Case 002/01, but not to add S-21 or District 12, considering that this would not be “a prudent exercise of its trial management discretion.”³⁸

³³ It bears highlighting that upon his appointment as the ECCC’s international Co-Prosecutor, Mr. Cayley publicly announced that “*I will lead from the front. I will be in the courtroom.*” (See Douglas Gillison, *New KRT Prosecutor Vows to Stay for Duration*, CAMBODIA DAILY, 3 March 2010, emphasis added). Mr. Cayley, however, has very rarely put in an appearance in court: he has only spoken in court in Case 002 on approximately 7 occasions. It would follow, therefore, that the significance of this atypical appearance by Mr. Cayley would not have been lost on the Trial Chamber; Mr. Cayley’s cameo appearance unquestionably would have daunted the Trial Chamber into giving added weight to the OCP’s positions before rendering its decision.

³⁴ Transcript, 17 August 2012, E1/114.1, p. 95-102, quote p. 95.

³⁵ Email from Trial Chamber Senior Legal Officer to all Parties, titled: “Follow-up from last Friday’s TMM”, 23 August 2012.

³⁶ IENG Sary’s Rule 87(4) Response to the OCP’s Request to Call TCW-505, TCW-754, TCW-100, TCE-33, TCW-720, TCW-781 and TCW-164, 14 September 2012, E218/3/1.

³⁷ Notification of Decision on Co-Prosecutors’ Request to Include Additional Crime Sites within the Scope of Trial in Case 002/01 (E163) and Deadline for Submission of Applicable Law Portion of Closing Briefs, 8 October 2012, E163/5.

³⁸ *Id.*, para. 2.

20. On 7 November 2012, the OCP filed its Appeal. As to admissibility, the OCP asserts that the Appeal is admissible as an immediate appeal pursuant to Rule 104(4)(a) and that it is filed within the applicable deadline.³⁹

II. RESPONSE

A. The Appeal is time-barred and should be rejected

21. The Appeal is nothing short of a belated, thinly veiled attempt to appeal the scope of Case 002/01 set out in the Severance Order. The appeal is untimely.

22. Rule 107(1) states that “[i]n the case of a decision of the Trial Chamber, which is open to immediate appeal as provided for in Rule 104(4) paragraphs (a) and (d), the appeal shall be filed *within 30 (thirty) days* of the date of the decision or its notification.”⁴⁰ The OCP made no efforts to appeal when it became obvious that the first segment of Case 002 would be limited to the extent (and barring any self-indulgence by the Trial Chamber to modestly expand the contours) set out in the Severance Order.

23. Over one year ago and prior to the start of trial, the Trial Chamber issued on 22 September 2011 the Severance Order.⁴¹ The OCP tactically chose not to (or otherwise failed to) appeal that Order. Instead, the OCP requested reconsideration of the Order.⁴² The Trial Chamber rejected this request over a year ago, on 18 October 2011.⁴³ The OCP again tactically chose not to, or failed to, appeal.

24. On 17 February 2012, five months after the Severance Order, the Trial Chamber yet again rejected, albeit implicitly, the OCP’s request to extend the scope of the trial. The Trial Chamber gave no guarantees regarding the scope of the trial, making it clear that if it did choose to modify the scope, it would do so on its own motion and pursuant to its own trial management discretion (i.e. rather than pursuant to an OCP request).⁴⁴ This was the risk the OCP took when it tactically chose not to appeal the Severance Order or the Trial Chamber’s decision not to reconsider the Severance Order (unless it did not act diligently,

³⁹ Appeal, paras. 10-20.

⁴⁰ Emphasis added.

⁴¹ Severance Order Pursuant to Internal Rule 89ter, 22 September 2011, E124, para. 2.

⁴² Co-Prosecutors’ Notice of Request for Reconsideration of the Terms of “Severance Order Pursuant to Internal Rule 89ter”, 23 September 2011, E124/1.

⁴³ Decision on Co-Prosecutors’ Request for Reconsideration of the Terms of the Trial Chamber’s Severance Order (E124/2) and Related Motions and Annexes, 18 October 2011, E124/7.

⁴⁴ Next Group of Witnesses, Civil Parties and Experts to be Heard in Case 002/01, 17 February 2012, E172, p. 4.

calling into question the competency of the OCP in light of its abundance of talented legal experts).

25. The OCP had at least two opportunities (after the issuance of the Severance Order and again after the decision on reconsideration) to timely file an appeal within the applicable time period provided by Rule 107(1). The OCP did not even attempt to appeal later memoranda which made it clear that any modification in scope would not be made pursuant to an OCP request, but on the Trial Chamber's own motion and at its discretion.
26. The Appeal simply reiterates the OCP's past submissions to the Trial Chamber. The OCP now seems to pin its hopes on the Supreme Court Chamber to assist it in circumnavigating the Trial Chamber's discretionary decision.
27. The OCP is brazenly shifting blame to the Trial Chamber to conceal its own failure to act with due diligence. If the OCP were indeed so "profoundly concerned"⁴⁵ that the manner in which the Trial Chamber chose to sever the trial would tarnish the ECCC's "legacy" (an issue which should have no bearing on how legal issues should be resolved, unless judicial decisions should be result-driven with a purpose such as legacy in mind), the OCP should have appealed the Severance Order or the denial of its request for reconsideration. Perhaps – as is most likely the case – the OCP realized (and begrudgingly accepted for the time being) that there existed no grounds for immediate appeal.
28. The OCP never explains why it did not appeal. None of the reasoning set out the present Appeal is new: in its request for reconsideration made in October 2011, the OCP argued that Case 002/01 would likely be the only trial, due, *inter alia*, to the age and health of the Accused and practical considerations, and argued that the ECCC's legacy would be diminished by charges that were not representative of the alleged criminal conduct.⁴⁶ The question that begs an answer is why the OCP did not avail itself of the appeal mechanisms at its disposal. Diligence requires prompt action, not surety in result before an action – such as filing an appeal – is taken.

⁴⁵ Appeal, para. 2.

⁴⁶ Co-Prosecutors' Request for Reconsideration of "Severance Order Pursuant to Internal Rule 89ter", 3 October 2011, E124/2, paras. 3, 24-25, 29, 31-32, 36.

29. The OCP is now time-barred from filing the Appeal. Given the OCP's generous use of ICTY jurisprudence in advancing its arguments, it surely is aware of the *Čelebići* Appeals Chamber's cautionary guidance: "as a general principle, a party should not be permitted to refrain from making an objection to a matter which was apparent during the course of the trial and to raise it only in the event of an adverse finding against that party."⁴⁷ Hedging its bets,⁴⁸ the OCP gambled: instead of appealing, it unwisely assumed the Trial Chamber would reverse itself, and now that the Trial Chamber has not, the OCP invokes "legacy" and "victim's justice" as the bases of its appeal.

B. The Appeal is not admissible as an immediate appeal

1. Immediate appeals are strictly limited to the grounds for appeal set out in Rule 104(4)

30. The OCP seeks an immediate, interlocutory appeal concerning the scope of Case 002/01. In previous submissions, however, the OCP championed a strictly limited scope for interlocutory appeals,⁴⁹ repeatedly arguing against any expansion of Rule 104.⁵⁰ The Supreme Court accommodated. It has held that "[t]here is no general right to interlocutory appeal,"⁵¹ and that jurisdiction over immediate appeals is *strictly limited* and

⁴⁷ *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeal Judgement, 20 February 2001, para. 640.

⁴⁸ The phrase to *hedge your bets* is commonly understood to mean to avoid committing yourself to a position or action so as to leave space for retreat. In this instance, by not appealing the Severance Order or subsequent decisions when it should have, the OCP is foolishly attempting to create the space it needs now to retreat by appealing the Impugned Decision.

⁴⁹ 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, para. 5; 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, para. 9; Co-Prosecutors' Response to IENG Sary's Two Notices of Appeal Against the Trial Chamber's Decisions Refusing the Extension of Time and Page Limits for the Filing of Preliminary Objections, 18 March 2011, E9/7/1/1/1/1, para. 5.

⁵⁰ The OCP has previously argued that "[t]he clear intent of the limited scope of Rule 104 is ... confirmed by the rejection, at the plenary of ECCC judges held in February 2011, of an amendment to expand the scope of the rule to a wider range of immediate appeals." Co-Prosecutors' Response to IENG Sary's Two Notices of Appeal Against the Trial Chamber's Decisions Refusing the Extension of Time and Page Limits for the Filing of Preliminary Objections, 18 March 2011, E9/7/1/1/1/1, para. 5. Most recently, with respect to an amendment to Rule 104 proposed by the Defence in September 2012, International Deputy Co-Prosecutor William Smith stated: "the Co-Prosecutors wish to confirm their position that they strongly oppose an interlocutory appeal mechanism particularly where the criteria for admissibility is broad and we are moving towards the end of the trial. In short, the Co-Prosecutors are of the view that the costs would far outweigh the benefits at this stage of the proceedings." Email from William Smith to Mao Sea, the Rules and Procedures Committee Secretariat, titled, "Re: OCP and DSS Requests to brief the RPC Members on the Rules amendment proposals", 10 September 2012.

⁵¹ 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, E51/15/1/1, p. 2; Decision on IENG Sary's Appeal Against the Trial Chamber's Decision on its Senior Legal Officer's Ex Parte Communications, 25 April 2012, E154/1/1/4, para. 15.

decisions outside the scope of Rule 104(4) can only be appealed following the final judgement.⁵²

31. The OCP's appeal hinges on the sole issue of abuse of discretion by the Trial Chamber. Effectively, the OCP claims that the Trial Chamber erred by failing to exercise *more* as opposed to *less* of its judicial discretion once it chose to actually exercise it. Put differently, no error would have been committed had the Trial Chamber elected not to exercise its discretion, but once it elected to do so, then its use or abuser of discretion – in this instance – triggered the interlocutory appeal mechanisms of Rule 104(4).
32. Contrary to the OCP's claims, the Trial Chamber considers that an appeal concerning its use of judicial discretion is not admissible as an immediate interlocutory appeal. The Trial Chamber has noted that "Internal Rule 89ter, pursuant to which the Chamber's Severance Order was made, confers upon the Trial Chamber a discretionary trial management competence *and is without right of appeal.*"⁵³ It would appear that the OCP concurred with Trial Chamber on its interpretation of Rule 89ter since no appeal – or even a request for clarification – followed.

2. The Appeal is inadmissible under Rule 104(4)

33. The OCP makes the rather far-fetched claim that its Appeal is admissible on the basis of Rule 104(4)(a),⁵⁴ which "contemplates appeals only against decisions that have the effect of terminating the proceedings...."⁵⁵ The Impugned Decision simply declined to *add* additional crime sites to the already determined scope of Case 002/01. The Decision did not terminate the current proceedings, nor did it terminate future proceedings in relation to these crime sites.⁵⁶ On the contrary, the Trial Chamber has explicitly stated: "*no*

⁵² Decision on IENG Sary's Appeal Against the Trial Chamber's Decision on its Senior Legal Officer's Ex Parte Communications, 25 April 2012, E154/1/1/4, para. 12; Decision on Notice of Appeal from Civil Party Lead Co-Lawyers, 21 September 2011, E62/3/10/5/1; Decision on IENG Sary's Appeal Against the Trial Chamber's Order Requiring His Presence in Court, 13 January 2012, E130/4/3; 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, E51/15/1/1, p. 2.

⁵³ Notice of Trial Chamber's disposition of remaining pre-trial motions (E20, E132, E134, E135, E124/8, E124/9, E124110, E136 and E139) and further guidance to the Civil Party Lead Co-Lawyers, 29 November 2011, E145, p. 1 (emphasis added).

⁵⁴ Appeal, para. 10.

⁵⁵ 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, p. 2.

⁵⁶ In the OCP's own words: "The plain meaning and purport of Rule 104[(4)(a)] is to grant recourse to immediate appeal where a party alleges that an error by the Trial Chamber *terminates* the proceedings, not where the alleged error *continues* the proceedings...." Co-Prosecutors' Response to IENG Sary's Appeal

*allegations or charges in the Indictment are discontinued in consequence of the Severance Order...*⁵⁷ and has recently announced its intention “*to commence Case 002/02 soon after the conclusion of the evidence in Case 002/01...*”⁵⁸

34. The OCP bases its argument that the Appeal is admissible pursuant to Rule 104(4)(a) on the Supreme Court Chamber’s Decision on Immediate Appeal Against the Trial Chamber’s Order to Release the Accused IENG Thirith.⁵⁹ The circumstances of the IENG Thirith Decision are manifestly distinguishable from the present case, calling into question the OCP’s sincerity. In that Decision, the Supreme Court Chamber found the OCP’s appeal admissible under Rule 104(4)(a) *because* the Trial Chamber had declared the proceedings against Ms. IENG Thirith to be stayed and:

A stay that does not carry a tangible promise of resumption effectively terminates the proceedings from continuing and bars arriving at a judgment on the merits. These disruptive consequences of a stay for the course of proceedings are grave enough to conclude that such a decision on stay must be subject to appeal. In these circumstances, the only reasonable reading of Internal Rule 104(4)(a) is that ‘decisions which have the effect of terminating the proceedings’ include a decision to stay the proceedings where there is no prospect of resumption.⁶⁰

The Trial Chamber’s decision in Ms. IENG Thirith’s case was effectively a final decision which ensured that, barring a miraculous recovery, there would *never* be a final judgement in that case. The OCP perilously flirts with deception.

35. The Impugned Decision does not stay the proceedings. The Impugned Decision creates no bar to arriving at a judgement on the merits (either in respect of Case 002/01 or any future trials). The Impugned Decision has no disruptive consequences. The Impugned Decision does not terminate the proceedings. The Impugned Decision simply determines the scope of the current trial; it does not discontinue any counts or allegations in the

Against the Trial Chamber Decision to Exclude the Armed Conflict Nexus from the Definition of Crimes Against Humanity, 2 December 2011, E95/8/1/2, para. 4.

⁵⁷ Decision on Co-Prosecutors’ Request for Reconsideration of the Terms of the Trial Chamber’s Severance Order (E124/2) and Related Motions and Annexes, 18 October 2011, E124/7, para. 9 (emphasis added).

⁵⁸ Scheduling of Trial Management Meeting to Enable Planning of the Remaining Trial Phases in Case 002/01 and Implementation of Further Measures Designed to Promote Trial Efficiency, 3 August 2012, E218, para. 1.

⁵⁹ Decision on Immediate Appeal Against the Trial Chamber’s Order to Release the Accused IENG Thirith, 13 December 2011, E138/1/7.

⁶⁰ *Id.*, para. 15.

Indictment.⁶¹ The Impugned Decision is a forthright trial management decision, well within the Trial Chamber's discretion.

36. The OCP bases its entire argument that the Impugned Decision has effectively terminated proceedings on speculation that future trials in Case 002 are "intangibly remote."⁶² The OCP's bases for this claim are: "Counsel for Ieng Sary, Nuon Chea and the Lead Co-Lawyers for the Civil Parties have all expressed this view";⁶³ the age and health of the Accused;⁶⁴ and the "numerous unresolved issues as to how and when any potential Case 002/02 trial could go forward."⁶⁵ None of these demonstrate that the Trial Chamber has issued a decision which effectively terminates the proceedings, as required by Rule 104(4)(a) for admissibility.
37. While the Defence is flattered that the OCP considers the proclamations of International Co-Lawyer Michael G. Karnavas as to the likelihood of future trials in Case 002 to be authoritative, this is hardly reason to admit the appeal.⁶⁶ The Trial Chamber has repeatedly proclaimed its intention to hold future trials in Case 002 and, the current budget crunch notwithstanding, multiple Case 002 trials lasting through 2018 (including appeals) have been factored into the Court's budget.⁶⁷
38. The age and health of the Accused and practical issues to be resolved as to how and when Case 002/02 will start do not mean that the proceedings have been effectively terminated. In every case, there is always the possibility that an accused could become unfit or could die prior to judgement. This possibility may be greater in some cases than in others, but it is incorrect and misleading to suggest that possible future unfitness or death of the Accused causes future proceedings to be effectively terminated at this stage. In any trial severed by the charges there will be practical issues to resolve; these issues, too, do not indicate effective termination, but only potential delays.

⁶¹ Decision on Co-Prosecutors' Request for Reconsideration of the Terms of the Trial Chamber's Severance Order (E124/2) and Related Motions and Annexes, 18 October 2011, E124/7, para. 9.

⁶² Appeal, paras. 15-19.

⁶³ *Id.*, para. 15.

⁶⁴ *Id.*, paras. 16-17.

⁶⁵ *Id.*, para. 18.

⁶⁶ On other occasions the OCP has not hesitated to point out that counsel's representations as to facts were of no value: *see, e.g.*, Transcript, 12 November 2012, E1/143.1, p. 29.

⁶⁷ *See* Annex A to ECCC 2012-2013 Budget, available at <http://www.eccc.gov.kh/en/about-eccc/finances/annexes-eccc-budget-2012-2013>.

39. Rule 104(4) simply does not allow appeals based on speculation such as that put forth by the OCP. Rule 104(4) is explicit that appeals which do not fall within 104(4)(a)-(d) “may be appealed *only* at the same time as an appeal against the judgment on the merits.”⁶⁸ The Supreme Court Chamber has previously interpreted this provision strictly, finding that Mr. IENG Sary could only appeal the Trial Chamber’s decision that it had jurisdiction to try him despite his Royal Amnesty and Pardon and the principle of *ne bis in idem* as part of his appeal against the judgement.⁶⁹ This determination was made despite the obvious problem that *ne bis in idem* prevents the *re-trial* and not simply the *re-conviction* of an accused based on the same conduct as at issue in a previous trial – thus, at judgement there would be no effective remedy for any violation of Mr. IENG Sary’s right not to be re-tried.
40. Similarly, the Supreme Court Chamber found that Mr. IENG Sary’s Appeal against the Trial Chamber’s decision on the OCP’s request to exclude the armed conflict nexus requirement from the definition of crimes against humanity was inadmissible as an immediate appeal pursuant to Rule 104(4)(a).⁷⁰ The Supreme Court Chamber made this decision even though Case 002/01 does not contemplate any evidence concerning the nexus between the crimes charged and an armed conflict, so proceedings would have terminated automatically for lack of evidence had the Supreme Court Chamber considered the merits of the appeal and reversed the Trial Chamber. Failure to consider this issue directly impacts legal certainty.
41. In the present case, on the contrary, there is no reason why an appeal following the judgement would not adequately protect the OCP’s interests. The OCP claims that its rights can only be protected at this juncture or else there will be “no effective remedy before this Chamber in relation to the errors alleged, as no legal basis would be available and feasible to include the excluded crime sites on appeal.”⁷¹ This is incorrect. Rule 104(1) provides that in cases involving an error on a question of law invalidating the judgment or decision, or an error of fact which has occasioned a miscarriage of justice,

⁶⁸ Emphasis added.

⁶⁹ 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, E51/15/1/1, p. 2.

⁷⁰ Decision on IENG Sary’s Appeal Against Trial Chamber’s Decision on Co-Prosecutors’ Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, 19 March 2012, E95/8/1/4.

⁷¹ Appeal, para. 13.

“the Supreme Court Chamber may itself examine evidence and call new evidence to determine the issue.”

3. Rule 21 does not support admission of the Appeal

42. The OCP asserts that Rule 21 supports the admissibility of the Appeal, since Rule 21 “directs that the Internal Rules ‘shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings.’”⁷² The OCP asserts that allowing immediate appeal would have no adverse impact on any party but would protect the rights of victims and promote transparency “regarding the validity of, and the reasoning behind, the severance process, and whether there is any realistic expectation that the Court will adjudicate allegations concerning the excluded crime sites in the foreseeable future.”⁷³
43. There is no need for further transparency regarding the validity and reasoning behind the Severance Order. The OCP has already accepted the validity of the Severance Order,⁷⁴ which was made pursuant to Rule 89*ter*. The Trial Chamber has repeatedly explained the reason behind its decisions to sever the trial in the manner it did and has set a timeline for hearing future trials in the foreseeable future.⁷⁵ There is additionally no need to resort to Rule 21 to protect the rights of victims. The rights of the victims are adequately safeguarded by the provision of a right to appeal the Impugned Decision at the final stage of the proceedings, should this even be necessary, considering that the Trial Chamber fully intends to hear evidence relating to the requested crime sites in later Case 002 trials.
44. As the OCP has previously argued, Rule 21 is a “general provision operating primarily as a rule of interpretation” that “cannot override the clear and unambiguous terms of Rule 104(4).”⁷⁶ The Supreme Court Chamber has held that “far from automatically ensuring ... a favourable interpretation of the Internal Rules in every instance, [Rule 21] ‘is to be interpreted to mean that the interpretation of the Internal Rules must not lead to [the]

⁷² *Id.*, para. 19.

⁷³ *Id.*

⁷⁴ The OCP stated that it “fully support[ed] the need for severance in Case 002 and defer[red] to the authority of the Trial Chamber to issue severance orders in the interests of justice and to otherwise manage the allocation of time and resources at trial.” Co-Prosecutors’ Notice of Request for Reconsideration of the Terms of “Severance Order Pursuant to Internal Rule 89*ter*”, 23 September 2011, E124/1, para. 4.

⁷⁵ See Background section, *supra*.

⁷⁶ 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, para. 9.

infringement of any interests of the Accused that emanate from fundamental rights guaranteed under statutes and applicable international legal instruments.”⁷⁷

45. Mr. IENG Sary’s rights would be infringed if the Appeal is found to be admissible. Admission of the Appeal would demonstrate disparate treatment of the OCP and the Defence, since Defence appeals made pursuant to Rule 104(4)(a) were found inadmissible after Rule 104(4)(a) was interpreted narrowly, even though the Defence will have no adequate remedy if the appeals are heard after the judgement.⁷⁸ Furthermore, it is quite late in Case 002/01 to add additional crime sites and, if these are added, the Defence will need adequate notice and time to prepare before any evidence on these additional crime sites is heard. This was one factor specifically considered by the Trial Chamber in its decision not to expand the scope in the manner requested by the OCP.⁷⁹

III. CONCLUSION AND RELIEF REQUESTED

46. Fueled by presumptuousness, the OCP now gambles for redemption. Since its initial gamble not to appeal yielded unsatisfactory results, the OCP through its untimely and inadmissible Appeal beseeches the Supreme Court to ride to its rescue.

47. To mask its pure lack of due diligence and the fact that its appeal is manifestly inadmissible at this stage, the OCP engages in pressurizing tactics. It is doing so by putting political pressure on the Supreme Court Chamber to do what the Trial Chamber will not do, expressing in the Appeal its “profound concern” that the Impugned Decision jeopardizes the legacy of the ECCC,⁸⁰ and taking its case to the media.⁸¹

⁷⁷ Decision on IENG Sary’s Appeal Against the Trial Chamber’s Decision on its Senior Legal Officer’s Ex Parte Communications, 25 April 2012, E154/1/1/4, para. 14.

⁷⁸ See 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, E51/15/1/1; Decision on IENG Sary’s Appeal Against the Trial Chamber’s Decision on Co-Prosecutors’ Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, 19 March 2012, E95/8/1/4.

⁷⁹ The Trial Chamber specifically requested the following from the Defence at the 17 August 2012 trial management meeting: “reasoned oral submissions regarding the time required by them to adequately prepare their defence to the areas of the indictment described in the confidential annex (and thus the earliest date on which they consider the individuals listed in this annex might be called before the Chamber).” Scheduling of Trial Management Meeting to Enable Planning of the Remaining Trial Phases in Case 002/01 and Implementation of Further Measures Designed to Promote Trial Efficiency, 3 August 2012, E218, para. 15(b). This issue was discussed by each Defence team at the trial management meeting. Transcript, 17 August 2012, E1/114.1, p. 105-18.

⁸⁰ Appeal, para. 2.

⁸¹ Mr. Cayley has used a similar tactic in the past with regard to Cases 003 and 004, issuing public statements in an attempt to influence the judicial investigations in those cases. See Statement from the International Co-Prosecutor regarding Case File 003, available at <http://www.eccc.gov.kh/en/articles/statement-international-co>

48. In a recent Cambodia Daily article, International Co-Prosecutor Andrew Cayley, exhibiting exuberant enthusiasm, is reported as having stated that he is “absolutely confident” that the Supreme Court Chamber will hear the Appeal and that he expects a ruling to be made in a few weeks’ time.⁸² Mr. Cayley stated: “The most important crime for the people of Cambodia is the killings. I’m not prepared to see the legacy of this court, in respect of the most senior people, limited just to forced movements of people.”⁸³ The Supreme Court – as all ECCC Chambers – must ignore any use of the bully pulpit by the OCP (through the international Co-Prosecutor) as a public pressurizing instrument in effecting legally unwarranted results. The legacy of this Court will be determined by the quality of its judicial decisions; decisions which must be made according to law and without regard for such public political pressure, passion or prejudice.

49. The OCP’s Appeal is time-barred and is inadmissible under Rule 104(4). It must be rejected. In doing so, the Supreme Court will cast a pall of prudence over the OCP, perhaps stimulating it so that in the future it acts with the diligence required and expected of all parties to the proceedings in Case 002. The OCP does not enjoy exorbitant privilege.

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Supreme Court Chamber to find the Appeal INADMISSIBLE.

Respectfully submitted,



 ANG Udom





 Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 19th day of **November, 2012**

prosecutor-regarding-case-file-003; Statement by the International Co-Prosecutor regarding Case File 004, available at <http://www.eccc.gov.kh/en/articles/statement-international-co-prosecutor-regarding-case-file-004>.

⁸² Lauren Crothers, *Prosecutors Appeal Exclusion of Two Crime Sites in Case 002*, CAMBODIA DAILY, 9 November 2012, p. 20.

⁸³ *Id.* See also Julia Wallace & Kuch Naren, ‘Mini-Trials’ a Mixed Blessing for KR Victims, CAMBODIA DAILY, 11 July 2012, p. 1: “Prosecutors agree [that future trials are highly unlikely], and have bluntly stated several times that there will never be a second trial. On October, they asked judges to expand the scope of Case 002/001 to include a more representative variety of worksites, cooperatives and purges in the first mini-trial. After their proposal was rejected, they asked simply for several execution sites and prisons related to the evacuations to be dealt with. Again, their request was denied.”