BEFORE THE SUPREME COURT CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

Case No: 002/19-09-2007-ECCC/SC

Party Filing: Mr KHIEU Samphân

Filed to: The Supreme Court Chamber

Original Language: French

Date of Document: 30 November 2012

Classification

Classification of the document suggested by the filing party: Public

Classification by the Trial Chamber: Public

Classification Status:

Review of Interim Classification:

Records Officer's Name:

Signature:

Response to Co-Prosecutor's Immediate Appeal of Decision on Scope of Trial in Case 002/01

Filed by:

Lawyers for Mr KHIEU Samphân
KONG Sam Onn
Anta GUISSÉ
Arthur VERCKEN
Jacques VERGÈS

Assisted by
SENG Socheata
Marie CAPOTORTO
Shéhérazade BOUARFA
Mathilde CHIFFERT
OUCH Sreyphat
CHUN Sotheary
Pierre TOUCHE

To:

The Supreme Court Chamber
Judge KONG Srim
Judge Agnieszka KLONOWIECKA-MILART
Judge SOM Sereyvuth
Judge Chandra Nihal JAYASINGHE
Judge MONG Monichariya
Judge YA Narin
Judge Florence Ndepele MUMBA

Co-Prosecutors
CHEA Leang
Andrew CAYLEY

All Civil Party Lawyers

All Defence Teams

MAY IT PLEASE THE SUPREME COURT CHAMBER

I. Procedural history

1. On 22 September 2011, the Trial Chamber ordered separation of the case ("Severance Order") of which it was seised pursuant to the Closing Order in Case 002.[1] It thus limited the scope of the present trial to consideration of the factual allegations pertaining to forced movement of population phases 1 and 2 and the facts characterised as crimes against humanity including murder, extermination, persecution (except on religious grounds), forced transfers and enforced disappearance (insofar as they pertain to the movement of population phases 1 and 2).[2]

2. On 3 October 2011, the Co-Prosecutors requested that the Trial Chamber reconsider the terms of its Severance Order.[3] On 18 October 2011, the Trial Chamber rejected all the requests to reconsider the terms of the Severance Order.[4]

3. On 27 January 2012, *"concerned that this first trial within Case 002, relating to the forced movement of population, may constitute the legacy of this Chamber to the Cambodian people"*, the Co-Prosecutors requested that the Trial Chamber bring other crimes sites within the scope of the present trial[5] ("Case 002/01").

4. On 3 August 2012, the Trial Chamber called a Trial Management Meeting to discuss the Co-Prosecutors' Request, among other matters. In this regard, the Trial Chamber noted that *"acceding to even a relatively modest request for extension of the scope of Case 002/01 entails resolution of a number of issues and prolongation of proceedings in Case 002/01."*[6]

5. On 8 October 2012, the Trial Chamber issued its decision on the Request via memorandum.[7] It partially acceded to the Request by granting the Co-Prosecutors' request to

---

[1] Severance Order Pursuant to Internal Rule 89*ter*, 22 September 2011, **E124**.
[2] *Ibid.*, para. 5.
[3] Co-Prosecutors' Request for Reconsideration of "Severance Order Pursuant to Internal Rule 89*ter*", 3 October 2011, **E124/2**.
[4] 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**.
[5] Co-Prosecutors' Request to Include Additional Crime Sites Within the Scope of Trial in Case 002/1, 27 January 2012, **E163**.
[6] Scheduling of Trial Management Meeting to enable planning remaining trial phases in Case 002/01 and implementation of further measures designed to promote trial efficiency, Memorandum, 3 August 2012, **E218**.
[7] Notification of Decision on Co-Prosecutors' Request to Include Additional Crime Sites within the Scope of Trial in

include the charges relating to the Toul Po Chrey site.[8] However, it rejected the proposal to extend the scope of the trial to include S-21 and District 12, specifying that *"incorporation of these elements (...) would risk a substantial prolongation of the trial in Case 002/01"*.[9]

6. On 8 November 2012, the parties were notified with the English and Khmer versions of the Co-Prosecutors' appeal (the "Appeal") against the Trial Chamber's decision on the Co-Prosecutors' request to extend the scope of the trial in Case 002/1.[10]

7. On 12 November 2012, Mr KHIEU Samphân's Defence requested that the Supreme Court Chamber extend the time limit for filing its response in order for it to start to run from service of the Appeal in all three ECCC official languages.[11] On 20 November 2012, the French translation of the Appeal was notified, and the Supreme Court Chamber acceded to Mr KHIEU Samphân's Co-Lawyers' request.[12]

II. The Appeal is inadmissible

Does Internal Rule 104(4)(a) envisage appellate review where the prospect of future proceedings is intangibly remote?[13]

8. The Appeal is inadmissible and should therefore be rejected *in limine*. The reason is because the Co-Prosecutors filed their Appeal under Rule 104(4)(a). However, this Rule is not applicable to the matter at hand, in that it provides that only decisions which have the effect of terminating the proceedings are subject to immediate appeal. This is not the case for the Trial Chamber's Memorandum of 8 October 2012.[14]

9. The Co-Prosecutors assert that the Supreme Court Chamber previously gave broad interpretation to Rule 104(4)(a). According to them, this includes the Trial Chamber's decisions,

---

Case 002/01 (E163) and deadline for submission of applicable law portion of Closing Briefs, Memorandum, 8 October 2012, **E163/5,** ("Impugned Decision").
[8] *Ibid.*, para. 3.
[9] *Ibid.*, para. 2.
[10] 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**, (the "Appeal").
[11] *Demande urgente formulée par la Défense de M. KHIEU Samphân de prorogation de délai de réponse*, 12 November 2012, **E163/5/1/2**.
[12] Decision on Request by Co-Lawyers of KHIEU Samphân for Extension of time to Respond to Co-Prosecutors' Immediate Appeal of Decision Concerning the Scope of Case 002/01, 20 November 2012, **E163/5/1/2/1**.
[13] Appeal, paras. 11-19.
[14] Impugned Decision.

which, while not legally terminating the proceedings, nonetheless *"[do] not carry a tangible promise of resumption [and therefore] effectively terminate the proceedings"*.[15] The Co-Prosecutors' assertion is inaccurate and is based on a partial reading of the decision it relies upon. The truth of the matter is that the Supreme Court Chamber's decision is much more to the point, in that it states: *"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****"*.[16] In this instance, the Impugned Decision is not a "*stay*" and does not have the effect of barring a judgement on the merits. Rather, the decision relates to management of the present trial.

10. Furthermore, it is noteworthy that in their October 2011 Request for Reconsideration of the Severance Order, the Co-Prosecutors themselves pointed out that the Order was *"a case management decision"* and that *"immediate appeal [was] unavailable"*.[17] The Impugned Decision is no different: the Trial Chamber issued a case management decision mindful of the fact that "*incorporation of these elements (...) would risk a substantial prolongation of the trial in Case 002/01"*.[18] Thus, in arguing that the Impugned Decision terminates the proceedings, the Co-Prosecutors seek to overly extend the ambit of Internal Rule 104(4).

11. Yet, already in October 2011, the Trial Chamber recalled that *"no allegations or charges in the Indictment are discontinued in consequence of the Severance Order"*.[19] Despite that, the Co-Prosecutors are now moving for a broader interpretation of the phrase *"the effect of terminating the proceedings"*, on the grounds that the only available alternative is appeal at the same time as an appeal against the judgement on the merits and that in this instance no judgement will be available.[20] That clearly runs counter to the narrow scope of Rule 104(4), according to which appeals may be taken in only four clearly defined sets of circumstances.

12. Moreover, it will be recalled that on some other occasions, the Co-Prosecutors themselves highlighted the narrow scope of Rule 104(4), recalling the rejection at the Plenary

---

[15] Appeal, para. 11.
[16] Decision on Immediate Appeal against the Trial Chamber's Order to Release the Accused IENG Thirith, 13 December 2011, **E138/1/7**, para. 14. (Emphasis added)
[17] Co-Prosecutors' Request for Reconsideration of "Severance Order Pursuant to Internal Rule 89ter", 3 October 2011, **E124/2**, para. 16.
[18] Impugned Decision, para. 2.
[19] 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.
[20] Appeal, paras. 12 and 13.

held in February 2011 of an amendment to expand the scope of this rule to a wider range of immediate appeals.[21]

13. Likewise, the Co-Prosecutors' argument that the Appeal should be found admissible, or they would otherwise have no effective remedy as no legal mechanism would be available and feasible to include the excluded crime sites cannot be allowed. It will be recalled that the Supreme Court Chamber has previously rejected immediate appeals although an appeal at the same time as the judgment on the merits could not, in practice, remedy the prejudice.[22]

14. The Co-Prosecutors additionally claim that it is reasonable to conclude that future trials in Case 002 will not occur, or that the possibility of such trials occurring is at best intangibly remote.[23] They base their claim on the advanced age of the Accused, the fact that the life expectancy of males in Cambodia stands at 57 and the risk of deterioration of the Accused's physical and mental health with age.[24] It should be noted that none of these details is new. For instance, Mr KHIEU Samphân was 76 when he was placed in detention.

15. In reality, at the aforesaid Trial Management Meeting, the Co-Prosecutors seemed more preoccupied with practical considerations pertaining to funding of the ECCC. The international Co-Prosecutor pointed out that *"there are compelling reasons to believe that there will not be a second trial. [...] The financial resources of this Court are in a crisis. There is an article in the Phnom Penh Post today about this. The prospects of finding further resources for another trial, in my view, are remote [Translation] and I am acutely aware of what that means]"*.[25] It cannot be asserted with any certainty that no further trials will occur, based on rumours appearing in a national newspaper. In any event, the administrative and financial issues facing all international

---

[21] 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.
[22] See for example: Decision on the Appeals filed by Lawyers for the Civil Parties (Groups 2 and 3) against the Trial Chamber's Oral Decisions of 27 August 2009, 24 December 2009, **D288/6/169/1/2**; Decision on Two Notices of Appeal Filed by IENG Sary, 8 April 2011, **E9/7/1/1/1/4**; 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**.
[23] Appeal, para. 15.
[24] *Ibid*., para. 16.
[25] Transcript of Proceedings – Trial Management Meeting (redacted version), 17 August 2012, **E1/114.1**, p. 97, lines 22-25, p. 98, lines 1-3.

tribunals which rely on funding from various sources do not feature among the criteria laid down in Rule 104(4).

16. In support of their assertion that no further trials are likely to occur, the Co-Prosecutors state that *"the Trial Chamber itself has noted that 'there is a real concern as to whether the Accused will be physically and mentally able to participate in a lengthy trial'".*[26]

17. In this instance, this statement is taken out of context by the Co-Prosecutors, in that the Trial Chamber adopted the opposite reasoning. It decided that *"[g]iven, as the Co-Prosecutors allege, that there is real concern as to whether the Accused will be physically and mentally able to participate in a lengthy trial, the Chamber considered these measures to be essential in order to "[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".*[27]

18. Finally, the Co-Prosecutors move that the Supreme Court Chamber interpret Internal Rule 104(4) in light of Rule 21, which provides that the Internal Rules are to be interpreted *"as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings".*[28]

19. Here again, the Co-Prosecutors show bad faith by arguing in favour of what they argued against in the past. For example, in their challenge to the admissibility of an appeal lodged by Mr IENG Sary's Defence, the Co-Prosecutors wrote that *"Rule 21 is a general provision operating primarily as a rule of interpretation. It cannot override the clear and unambiguous terms of Rule 104(4) which provides that only four categories of decision can be the subject of an immediate appeal and reserves appeals against all other decisions to a later stage of the proceedings".*[29]

20. If everyone is to abide by the same rules, invoking Rule 21 must not have the effect of distorting the unambiguous meaning of Rule 104(4) simply because this is an appeal by the Co-Prosecutors. The Supreme Court Chamber is therefore requested to reject the Appeal.

---

[26] Appeal, para. 17.
[27] 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. 11.
[28] Appeal, para. 18.
[29] 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.

Was the Appeal filed within the prescribed time limit?[30]

21. The Co-Prosecutors affirm that the Appeal was filed within the time limit prescribed in Internal Rule 107(1), namely within 30 days of the Impugned Decision. They assert that this time limit starts to run from the Impugned Decision and not from the Severance Order or the Decision on the Reconsideration Request insofar as these two decisions left the possibility of including further charges and factual allegations.[31]

22. In themselves, the time limits for filing an appeal reveal that finding the Appeal admissible would compromise the current trial. Indeed, Rule 108 (4)*bis* (b) provides: *"The Supreme Court Chamber shall decide on immediate appeals: against decisions made pursuant to Internal Rule 104(4)(a), within three months after receipt of the items referred to in paragraph 2 of this Rule. In exceptional circumstances, however, the Supreme Court Chamber may extend this period by one further month. If a decision is not issued within the prescribed period, the decision of the Trial Chamber shall stand".*

23. In practice, the Supreme Court Chamber decision may come more than four months after the Impugned Decision. Such a period is justified where the decision has the effect of terminating the proceedings. However, that is not the case in this instance. There is no stay of the substantive hearings. In August 2012, after assessing the impact of a limited extension of the scope of Case 002/01, the Trial Chamber decided that *"acceding to even a relatively modest request for extension of the scope of Case 002/01 entails resolution of a number of issues and prolongation of proceedings in Case 002/01. As many witnesses potentially relevant to this proposed extension have yet to be heard before the Chamber, Defence concerns as to adequacy of notice may nonetheless be accommodated within the confines of the current trial".*[32]

24. Deciding to include additional crimes sites in Case 002/01 in four months would have a profound impact on the current trial. In itself this period shows that the Appeal was essentially

---

[30] Appeal, para. 20.
[31] *Ibid.*
[32] Scheduling of Trial Management Meeting to enable planning remaining trial phases in Case 002/01 and implementation of further measures designed to promote trial efficiency, Memorandum, 3 August 2012, **E218**, paras. 13-14.

filed late considering the advanced stage of the proceedings in Case 002/01. The Supreme Court Chamber is therefore also requested to reject it on this ground.

III. The Trial Chamber did not abuse its discretion

25. The Co-Prosecutors argue that the Trial Chamber exceeded its discretion by incorrectly applying international legal standards for severance of charges.[33]

26. They assert that in failing to make Trial 002/01 a "mini-trial" that is representative of the crimes charged, the Trial Chamber acted to the detriment of the interests of justice,[34] the rights of victims,[35] the goal of national reconciliation,[36] and might occasion irreparable prejudice to the Co-Prosecutors.[37]

27. Relying upon the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY), the Co-Prosecutors request that the Supreme Court Chamber note that the Impugned Decision is *"1) based on an incorrect interpretation of governing law; 2) based on a patently incorrect conclusion of fact; or 3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion"*.[38]

28. By that, they are seeking to impress upon the Supreme Court Chamber that decisions on severance of charges not only involve practical considerations relating to trial management, but also affect the fundamental rights of the parties.[39]

29. As to supporting their contention that the Trial Chamber's decision amounts to a termination of the proceedings, this assertion is based entirely on the premise that no further trial will occur,[40] notably owing to the life expectancy of the Accused.[41]

---

[33] Appeal, paras. 21 *et seq*.
[34] *Ibid*., paras. 23 and 36.
[35] *Ibid*., paras. 23, 38 and 39.
[36] *Ibid*.
[37] *Ibid*., para. 23.
[38] *Prosecutor v. Jadranko Prlić et al*., Case No. IT-04-74, Decision on Prosecution's Appeal against the Trial Chamber's Decision on Slobodan Praljak's Motion for Provisional Release, ICTY Appeals Chamber, 8 July 2009, para. 5.
[39] Appeal, paras. 29 and 30.
[40] *Ibid*., para. 15.
[41] *Ibid*., para. 16.

30. In the Co-Prosecutors' view, the Severance Order should be considered as a reduced Closing Order that is to serve as a basis for a single, truncated trial. That is why they argue that the Trial Chamber should have mainly taken account of the "representativeness" of the charges against the Accused.[42]

31. However, the Trial Chamber did not issue the Severance Order with a view to "summarising" the Indictment, but rather to permitting a detailed review of all its components. As the Trial Chamber has previously explained, in issuing the Severance Order, its reasons were: *"1) To divide Case 002 into manageable parts that each take an abbreviated time to determine 2) To ensure that the first trial encompasses a thorough examination of the fundamental issues and allegations against all Accused 3) To provide a foundation for a more detailed examination of the remaining charges and factual allegations against the Accused in later trials; 4) To follow as far as possible the chronology and/or logical sequence of the Closing Order (approximately 1975-1976); 5) to select those factual allegations that affect as many victims as possible".*[43] These reasons do not lead to the conclusion that the Trial Chamber abused its discretion.

32. The Co-Prosecutors' appeal is not only late because it should have been filed immediately following the Severance Order,[44] it is also without merit in that the Co-Prosecutors are requesting the Supreme Court Chamber to substitute its own discretion as to the appropriateness of the severance to that of the Trial Chamber.

33. However, as recalled by the ICTY Appeals Chamber, to which the Co-Prosecutors make ample reference:

> *It is well established in the jurisprudence of the Tribunal that an interlocutory appeal challenging the exercise of discretion by a Trial Chamber is not a hearing de novo. In reviewing the exercise of a Trial Chamber's discretion, the issue is not whether the Appeals Chamber agrees with the decision of the Trial Chamber but whether the Trial Chamber has abused its discretion in reaching that decision. For the Appeals Chamber to intervene in a Trial Chamber's exercise of discretion, the Appellant must demonstrate that the Trial Chamber misdirected itself either as to the principle to be applied or as to the law which is relevant to the exercise of the discretion or that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, or made an error as to the facts upon which it has exercised its discretion, or that its decision was so unreasonable and plainly unjust that the*

---

[42] *Ibid*., paras. 31 *et seq*.
[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**, para. 10.
[44] See first part of the present Response regarding inadmissibility of the Co-Prosecutors' Appeal, para. 23.

> *Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.*[45]

34. By relying solely on the premise that no further trials will occur, based on mere speculation, the Co-Prosecutors fail to demonstrate that the Trial Chamber *"misdirected itself either as to the principle to be applied or as to the law which is relevant"*. In fact, all the arguments presented to the Supreme Court Chamber have already been raised by the Co-Prosecutors before the Trial Chamber,[46] and the latter has already disposed of them.[47]

35. The Trial Chamber has already informed the parties that *"no allegations or charges in the Indictment [have been] discontinued"* and therefore that *"there is no need for the first trial to be reasonably representative of the totality of the charges in the Indictment"*.[48]

36. Furthermore, the Co-Prosecutors assert in their Appeal that the notion of "the interests of justice" should be interpreted according to international practice.[49] They argue that since this notion is not defined in the Rules, the ECCC Law or in the Cambodian Criminal Procedure Code, the Supreme Court Chamber should look to the jurisprudence of the ICTY Trial Chambers and Appeals Chamber for guidance on this matter.[50]

37. Accordingly, they assert that pursuant to Rule 73 *bis* (D) of the ICTY Rules:

> *After having heard the Prosecutor, the Trial Chamber may fix a number of crime sites or incidents comprised in one or more of the charges in respect of which evidence may be presented by the Prosecutor which, having regard to all the relevant circumstances, including the crimes charged in the indictment, their classification and nature, the places where they are alleged to have been committed, their scale and the victims of the crimes,* ***are reasonably representative of the crimes charged***.[51]

38. Yet, as the Trial Chamber stated in its Decision on the Co-Prosecutors' Request for Reconsideration of the Severance Order, *"ICTY Rule 73bis evolved in the context of adversarial*

---

[45] *Prosecutor v. Halilović*, Case No. IT-01-48, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar, ICTY Appeals Chamber, 19 August 2005, para. 5.
[46] See Co-Prosecutors' Request for Reconsideration of "Severance Order Pursuant to Internal Rule 89*ter*", 3 October 2011, **E214/2**, paras. 24-35.
[47] 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, **E124/4**, para. 9.
[48] *Ibid*., para. 9.
[49] Appeal, para. 31.
[50] *Ibid*.
[51] International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, IT/32/Rev. 47, 28 August 2012, Rule 73 *bis* (D). [Emphasis added].

proceedings, where indictments are initiated and amended by the Prosecution. ***A similar rule is, by contrast, ill-suited to the ECCC, where proceedings are instead inquisitorial*** *and whose indictments are judicially controlled".*[52]

39. Even so, the Co-Prosecutors claim that the Trial Chamber did not address the contention that where future trials are unlikely, the charges in the first trial should be reasonably representative of the Indictment as a whole.[53] The Co-Prosecutors' submission is wrong, in that they are comparing two entirely different procedural circumstances where the governing rules are also different.

40. Rule 73 *bis* of the ICTY Rules of Procedure and Evidence, and the associated jurisprudence[54] can have meaning only in a context where the governing procedure precludes holding several trials within the confines of the same case.

41. This is not exactly the case before the ECCC. To the contrary, in February 2011, the ECCC Plenary Session chose not to merely replicate Rule 73*bis* but instead to enact the provisions of Internal Rule 89*ter*.[55] As the Trial Chamber pointed out, *"the rule was intended to grant the Trial Chamber, where the interests of justice so require, a discretionary trial management mechanism enabling it on its own motion to separate proceedings and to examine in different trials different parts of the Indictment".*[56]

42. The ICTY jurisprudence on "interests of justice" cited by the Co-Prosecutors, is therefore clearly ill-suited to the context of the trial in Case 002/01. The Co-Prosecutors attempt to demonstrate that the possibility of a further trial is so intangibly remote that it amounts to terminating the proceedings at the end of the first trial. However, they fail to provide any legal

---

[52] 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, **E124/4**, para. 4. [Emphasis added].
[53] Appeal, para. 33.
[54] In this regard, the Co-Prosecutors cite, *inter alia*, *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-0484-A, Decision Pursuant to Rule 73 *bis* (D), ICTY Trial Chamber, 22 February 2007, para. 11; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, Decision on Application of Rule 73 *bis*, ICTY Trial Chamber, 8 November 2006, paras. 10 and 12, and *Prosecutor v. Milutinović,* Case No. IT-05-87, Decision on Application of Rule 73 *bis*, ICTY Trial Chamber, 11 July 2006, para. 11.
[55] See 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, **E124/4**, para. 5.
[56] *Ibid*.

basis for their assertion, but merely cite jurisprudence that is based on legal norms that differ from the ECCC's.

43. As a consequence, the Appeal not only fails to demonstrate that the Trial Chamber abused its discretion, it also raises no new legal issues that must be addressed by the Supreme Court Chamber.

IV. Alleged inconsistency of the Impugned Decision with procedural and substantive rules

44. The Co-Prosecutors also allege that the Trial Chamber erred in law by failing to provide adequate reasons for the Impugned Decision and to make it in appropriate form.[57]

45. Mr KHIEU Samphân's Co-Lawyers have already highlighted the legal uncertainty surrounding the issuance of the Trial Chamber's directives via memorandum, and they do not challenge the Co-Prosecutors' submissions in regard to this practice.

46. However, the Defence does not agree with the arguments that the Trial Chamber failed to provide adequate reasons. By Memorandum dated 3 August 2012, the Trial Chamber put all the parties on notice regarding a forthcoming Trial Management Meeting on "*planning the remaining trial phases in Case 002/01* ***and implementation of further measures designed to promote trial efficiency.***"[58]

47. At the meeting, each Defence team made submissions as to why they believed that extension of the scope of Case 002/1, however modest, would result in a substantial prolongation of the trial and risked impairing the right of the Accused to be tried within a reasonable time.

48. It is in light of the parties' submissions that the Trial Chamber rendered its decision, together with the following reasons:

> *Following discussion of [the] proposed extensions at the recent Trial Management Meeting (...) and careful consideration of all submissions of the parties made at the TMM and subsequently [...] the Chamber considers that it is unable to entertain proposals to extend the scope of trial in Case 002/01 so as to include factual allegations concerning S-21 and District 21.* ***The reasons for this***

[57] Appeal, paras. 42 *et seq*.
[58] Scheduling of Trial Management Meeting to enable planning remaining trial phases in Case 002/01 and implementation of further measures designed to promote trial efficiency, Memorandum, 3 August 2012, **E218**. [Emphasis added].

> ***are, firstly, that incorporation of these elements*** *(whether due to the number of witnesses sought by the parties, anticipated difficulties in limiting the scope of these proposed extensions, or likely Defence objections to them)* ***would risk a substantial prolongation of the trial in Case 002/01****".*[59]

49. The Co-Prosecutors' assertion that the Trial Chamber adopted a significant change of view by failing to provide reasons for its decision[60] is therefore entirely false. The truth is that, contrary to the Co-Prosecutors' assertion, the Trial Chamber clearly gave adequate reasons for its decision by taking into account the risk involved in extending the scope of Case 002/01 at this stage of the proceedings.

V. Evaluating the risk of "substantial prolongation of the trial"

50. According to the Co-Prosecutors, the Trial Chamber's consideration of likely Defence objections as a factor that would risk substantial prolongation of the trial is an error of law and of fact.[61]

51. They assert that while the Trial Chamber's decisions are subject to appeal, they are not open to objections or critique in the course of proceedings.[62] They therefore conclude that no Defence "objections" made after a ruling on the scope of the case is likely to cause a prolongation of the trial.[63]

52. The Co-Prosecutors further impugn the Trial Chamber's Decision, claiming that it relied on "anticipated difficulties in limiting the scope of [the] proposed extensions".[64]

53. This amounts to denying the Trial Chamber's role in ensuring the fairness of the proceedings and respect for the fundamental rights of the Accused. The Trial Chamber must discharge its duty by ensuring that the right of the Accused to be tried within a reasonable time is respected. Further, as has been raised several times in international jurisprudence, this right must be considered in conjunction with other rights of the Accused, including the right to be informed

---

[59] Impugned Decision, para. 2. [Emphasis added].
[60] Appeal, para. 48.
[61] *Ibid*., para. 51.
[62] *Ibid*., para 53.
[63] *Ibid*.
[64] Appeal, para. 54.

in detail of the nature of the charges brought against them.[65]

54. That is why the Defence called the Trial Chamber's attention to the difficulties that may arise as to the organisation of their teams and preparation of the defence of their clients if the scope of the trial were to be expanded at this stage given that the trial opened close to one year ago pursuant to the Severance Order of 8 October 2012.[66]

55. As a consequence, the Trial Chamber's decision is based on these legitimate considerations and is not open to review by the Supreme Court Chamber as being *"so unfair and unreasonable as to constitute an abuse of the Trial Chamber's discretion"*.[67]

56. **FOR THESE REASONS**, it is requested that the Supreme Court Chamber:

- **FIND** the Co-Prosecutors' Appeal inadmissible;

And, in any event,

- **REJECT** the Appeal in its entirety.

	KONG Sam Onn Anta GUISSÉ Arthur VERCKEN Jacques VERGÈS	Phnom Penh Phnom Penh Paris Paris	[signed] [signed] [signed] [signed]
Date	Name	Place	Signature

[65] See paras. 23 and 32 *supra*. See also *The Prosecutor v. Karemera*, Case No. ICTR-98-44, Decision on Severance of Andre Rwamakuba and for Leave to File Amended Indictment, 14 February 2005, para. 35; *The Prosecutor v. Simba*, Case No. ICTR-2001-76-I, Decision on Motion to Amend Indictment, 26 January 2004, para. 8, and *The Prosecutor v. Muhimana,* Case No. ICTR-1995-1b-I, Decision on Motion to Leave Indictment, 18 October 2005, para. 17.
[66] Severance Order Pursuant to Internal Rule 89*ter*, 22 September 2011, **E124**.
[67] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74, Decision on Prosecution's Appeal against the Trial Chamber's Decision on Slobodan Praljak's Motion for Provisional Release, ICTY Appeals Chamber, 8 July 2009, para. 5.