

Dissenting Opinion of Judges Klonowiecka-Milart and Jayasinghe:

1. We concur with the majority that this Appeal does not fit under the plain language of Rule 104. We furthermore concur that there is no right to interlocutory appeal as such. We reject, however, the implicit proposition that this Chamber's jurisdiction over immediate appeals is strictly limited to the narrow circumstances listed in Rule 104(4). This conclusion is inconsistent with the jurisprudence of the ECCC, the practice of all existing international criminal tribunals, the needs of a fair and expeditious trial and the rights of the accused. We would hold instead, invoking Article 33new of the ECCC Law, that the Supreme Court Chamber may assume appellate jurisdiction over any immediate appeal which concerns an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which an immediate resolution by the Supreme Court Chamber may materially advance the proceedings. We would decide moreover that the present appeal qualifies as such a case.
2. Proceedings at international criminal courts have proven to be lengthy. Trials at other international criminal tribunals have regularly taken multiple years from the hearing of the evidence until the trial judgement.¹ In Case 001 at the ECCC, trial proceedings lasted for eight months, with a further nine months before issuance of the trial judgement.² The trial in Case 002, which involves four defendants instead of one, adds charges of genocide and concerns a far broader scope of factual allegations,³ is estimated to last for at least another four years.⁴ Any appeal that cannot be heard on an interlocutory basis will necessarily be delayed until 2014, at the earliest.⁵

¹ Antonio Cassese, "Statistics on Efficient Use of Courtroom Space and Judicial Productivity", Annex D to "Report on the Special Court for Sierra Leone", 12 December 2006, p. 49 <<http://www.sc-sl.org>>.

² Judgement, Case No. 001/18-07-2007/ECCC/TC, 26 July 2010, E188, para. 9.

³ Closing Order indicting Kaing Guek Eav alias Duch, Case No. 001/18-07-2007/ECCC/TC, 8 August 2008, D99 ("Case 001 Closing Order"), paras 10-128; Closing Order, 15 September 2010, D427 ("Case 002 Closing Order"), paras 18-1298.

⁴ "ECCC Indicative Court Schedule – Case 1 and 2", Annex to ECCC Proposed Budget for 2012-2013 <<http://www.eccc.gov.kh/sites/default/files/Annex%20A-D.pdf>> ("ECCC Budget Estimate").

⁵ Pursuant to the severance order of the Trial Chamber, an initial verdict will be delivered on limited charges concerning the phase I and phase II population movements. *See* Severance Order Pursuant to Internal Rule 89ter, 22 September 2011, E124. This first phase of the trial is estimated to terminate in June 2013 (*see* ECCC Budget Estimate), at which point appeal proceedings will begin.

3. The rules and practice concerning appellate jurisdiction at other international tribunals account for this reality. The ICTY, ICTR, SCSL and ICC each provide a right of immediate appeal from any decision on jurisdiction and a further opportunity to apply for leave to appeal in connection with any issue “that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of a trial.”⁶ The tribunals have often granted leave to appeal pursuant to this discretionary power where a decision on appeal concerns an issue central to an ongoing trial, including the authority of the chamber to exercise its jurisdiction over the defendant.⁷ Against this background the scope of appeals under ECCC’s Internal Rule 104 (4) appears inexplicably narrow. We consider that the Supreme Court Chamber should follow the practice of international tribunals and accept the appeal in the exercise of its discretionary power. At the ECCC, the Pre-Trial Chamber has similarly adopted a broad interpretation of its appellate jurisdiction in circumstances under which the rights of accused are at stake.⁸
4. The case for the immediate resolution of the present Appeal is particularly compelling because *ne bis in idem* protects not against multiple convictions but against multiple trials.⁹ The time, stress and (although not relevant here) financial demands of a trial are widely understood to constitute a serious prejudice to the Accused even in the event of an acquittal.¹⁰ That prejudice is extreme where, as here, the Accused is held in custody during the pendency

⁶ ICTY Rules of Procedure and Evidence, Rule 72(B), 73(B); ICTR Rules of Procedure and Evidence, Rule 72(B), 73(B); SCSL Rules of Procedure and Evidence, Rule 72(E), (F), 73(B); ICC Statute, Art. 82(1)(d).

⁷ *Prosecutor v. Tadic*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para. 6 (“Such a fundamental matter as the jurisdiction of the International Tribunal should not be kept for decision at the end of a potentially lengthy, emotional and expensive trial.”).

⁸ Decision on appeal of co-lawyers for civil parties against order on civil parties’ request for investigative actions concerning all properties owned by the charged persons, 4 August 2010, D193/5/5, para. 19 (“An appeal may be admissible under IR 21 if a party alleges the infringement of the exercise of a right protected by Internal Rule 21”); Decision on Ieng Sary’s Appeal against CIJ’s 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 proceedings, 20 September 2010, D390/1/2/4, para. 13 (“[T]he Pre-Trial Chamber has determined that...Internal Rule 21 requires that the Pre-Trial Chamber adopt a broader interpretation of the Charged Person’s right to appeal in order to ensure that the fair trial rights of the Charged person are safeguarded in this particular instance. As this is a matter involving principles of “equal treatment before the law” and “equality of arms”, taking into account the Chamber’s duty as prescribed under Internal Rule 21, and the particular circumstances of this Appeal, the Pre-Trial Chamber found this Appeal admissible.”); Decision on IENG Sary’s Appeal Against Co-Investigating Judges’ Order Denying Request to allow audio/video recordings of meetings with IENG Sary at the Detention facility, 11 June 2010, A371/2/12, para. 18.

⁹ See International Covenant on Civil and Political Rights, Art. 14(7) (“No one shall be liable to be *tried or* punished again for an offence for which he has already been finally convicted or acquitted”) (emphasis added).

¹⁰ *Green v. United States*, 355 U.S. 184, 187-88 (1957).

of the trial.¹¹ If the Supreme Court Chamber ultimately determines that *ne bis in idem* debars the ongoing proceedings against the Accused in Case 002, he will have been subjected to years of baseless and avoidable detention, coupled with occasional physical compulsion to attend at court proceedings.¹² The potential prejudice to the fundamental right to liberty is substantial, and thus the Supreme Court Chamber is obliged by Internal Rule 21(1), Article 14(3)(c) of the ICCPR and Article 33new of the ECCC Law to give the Appeal full consideration at the earliest possible juncture.

5. Finally, we note that admitting the Appeal at this stage would have no adverse effect on the the Case 002 trial or on proceedings before the ECCC more generally. The issues raised by the Appeal will be resolved by this Chamber eventually, and if addressed on an interlocutory basis concurrent with the ongoing trial, will reduce the length and complexity of the appeal judgement proceedings. As we have already noted, those savings could be yet greater if this Chamber ultimately overturns the decision of the Trial Chamber on the merits.
6. We would have deemed the Appeal admissible pursuant to Article 33new of the ECCC Law and issued a decision on the merits. However, as the issues are open to be considered by the full Chamber as part of the appeal judgement, after a hearing of the parties, we consider that our opinion on the merits is not warranted at this time.

¹¹ See e.g., Closing Order, 15 September 2010, D427, paras 1622-1624; Decision on Ieng Sary's Appeal against the Closing Order's Extension of his Provisional Detention, D427/5/10, 21 January 2011.

¹² T. (EN), 21 November 2011, E1/13.1, pp. 36-37; T. (EN), 22 November 2011, E1/14.1, p. 8.