

**BEFORE THE SUPREME COURT CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**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**

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RESPONSE

1. On 5 January 2012, the Defence for Ieng Sary (the “Co-Lawyers”) filed an appeal¹ to the Supreme Court Chamber (the “Chamber”) against two related oral decisions of the Trial Chamber during trial proceedings on 21 and 22 November 2011 which required Ieng Sary to remain physically present in the courtroom during the hearing of opening statements (the “Impugned Decision”).² The parties were notified of the Khmer version of this Appeal on 6 January 2012 and the English version on 10 January 2012. Pursuant to Practice Directions 8.3 and 8.5,³ the present Response is filed within the prescribed time limit, calculated from the day following 10 January 2012.
2. The Co-Lawyers purport to rely on Rules 104(1), 104(4)(d) and 105(2) as the grounds for admissibility of this immediate appeal.⁴ The Co-Prosecutors submit that the Appeal is manifestly inadmissible at this stage of the proceedings. On this basis, and in the interests of judicial economy, the Co-Prosecutors will limit their written submissions to jurisdiction and admissibility only.

There is no legal basis for the admissibility of the Appeal under Rule 104(1)

3. The Co-Lawyers first assert that an immediate appeal is available as the Impugned Decision is “an abuse of discretion, resulting in prejudice...”⁵ This argument misreads the jurisdiction of the Chamber over immediate appeals. Rule 104(1) is a general provision setting out the jurisdiction of the Chamber over all appeals, including immediate appeals, while Rule 104(4) is a specific provision setting out jurisdiction over immediate appeals. The Chamber has previously determined that its jurisdiction over immediate appeals is strictly limited to the grounds set out in Rule 104(4).⁶
4. On the ordinary meaning of the Internal Rules, as applied by the Chamber, an *immediate* appeal is available only for four specific categories of decisions of the Trial Chamber: (i) decisions that have the effect of terminating proceedings; (ii) decisions on detention and

¹ E130/4/1 Ieng Sary’s appeal against the Trial Chamber’s decision on denying his right to waive his presence in the courtroom during trial and assist in his own defence, 5 January 2012 (“Appeal”).

² E1/13.1 Transcript, 21 November 2011 at pp. 36-37; E1/14.1 Transcript, 22 November 2011 at p. 8.

³ Practice Direction ECCC/01/2007/Rev.7, Filing of documents before the ECCC.

⁴ E130/4/1 Appeal, *supra* note 1 at para. 6.

⁵ E130/4/1 Appeal, *supra* note 1 at para. 7.

⁶ E169/1/2 Decision on the appeals filed by lawyers for civil parties (groups 2 and 3) against the Trial Chamber’s oral decisions of 27 August 2009, 24 December 2009 at paras. 10-12.

bail under Rule 82; (iii) decisions on protective measures under Rule 29(4)(c); and (iv) decisions on interference with the administration of justice under Rule 35(6).⁷ All other Trial Chamber decisions “may be appealed only at the same time as an appeal against the judgment on the merits.”⁸

5. The reasoning of the Co-Lawyers, if accepted, would grant recourse to immediate appeal for any alleged abuse of judicial discretion by the Trial Chamber in any context. Such an outcome cannot be sustained on the ordinary meaning of the Internal Rules and runs counter to Cambodian procedural law,⁹ the criminal procedure of other civil law jurisdictions¹⁰ and international practice.¹¹ In all these cases, jurisdiction over immediate (or “interlocutory”) appeals is strictly limited, whether by subject-matter or through certification or leave-to-appeal mechanisms. These limitations are justified on the basis of considerations of fairness and judicial economy: for example, where a Trial Chamber considers that immediate resolution of the issues by an Appeals Chamber may “materially advance the proceedings.”¹²

There is no legal basis for the admissibility of the Appeal under Rule 104(4)(d)

6. The Co-Lawyers further assert that the Impugned Decision *itself* amounts to “an interference with the administration of justice”,¹³ and thus is subject to immediate appeal under Rule 104(4)(d). The Co-Prosecutors submit that there is no plausible legal basis to construe the Impugned Decision as a “*decision on* interference with the administration of justice under Rule 35(6).”¹⁴ In his oral ruling on behalf of the Trial Chamber, the President makes no reference to Rule 35, to the concept of interference with the administration of justice or to any cognate matter. In this respect, the submissions on appeal are entirely devoid of merit.

⁷ Rule 104(4).

⁸ *Ibid.*

⁹ See Cambodian Code of Criminal Procedure, Art. 343.

¹⁰ See e.g. French Code of Criminal Procedure, Art. 507.

¹¹ See e.g. ICTY Rules of Procedure and Evidence, Rule 72B; ICTR Rules of Procedure and Evidence, Rule 73B; Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90 (entered into force 1 July 2002), Art. 82 (“Rome Statute”); ICC Rules of Procedure and Evidence, Rules 154-155.

¹² *Ibid.*

¹³ **E130/4/1** Appeal, *supra* note 1 at para. 8.

¹⁴ Rule 104(4)(d) [emphasis added].

7. The Co-Lawyers attempt to convince the Chamber to apply Rule 35 to “the Trial Chamber itself”¹⁵ – that is, as a judicial organ – on the spurious basis that the body of Trial Chamber judges somehow interfered with the administration of justice merely by exercising their proper judicial function and issuing the Impugned Decision. As the Co-Lawyers admit, this position directly contradicts the jurisprudence of the Pre-Trial Chamber in the exercise of its ancillary jurisdiction under Rule 35.¹⁶ In that instance, the Pre-Trial Chamber noted that the Co-Lawyers for Ieng Sary had filed applications to disqualification under Rule 34 on the basis of the same factual allegations. The Pre-Trial Chamber held that the Co-Lawyers’ Rule 35 request “is an attempt to expand the jurisdiction of the ECCC, which is rejected.”¹⁷
8. In this light, the true intention of the present Appeal becomes readily apparent: finding Rule 104 inconvenient, the Co-Lawyers once again attempt to misuse Rule 35 to conjure a second line of appeal. This intention is apparent from the Appeal itself: “...the relief sought does not request *sanctions* as a remedy but merely the *reversal* of judicial error...”¹⁸ Reversal of alleged judicial error is the *raison d’être* of appellate review. Setting aside “all due modesty”,¹⁹ the Co-Lawyers once again seek to circumvent the proper mechanisms for appeal. Far from a “robust defence”,²⁰ this abuses the process of the ECCC and can hardly be considered as necessary and reasonable in the circumstances.

There is no legal basis for the admissibility of the Appeal under Rule 105(2)

9. The Co-Lawyers finally asserts that the Appeal is admissible on the basis of Rule 105(2), but does not demonstrate how Rule 105(2) could possibly be read to extend the range of decisions subject to immediate appeal as prescribed in Rule 104(4).

¹⁵ E130/4/1 Appeal, *supra* note 1 at para. 8.

¹⁶ E130/4/1 Appeal, *supra* note 1 at para. 8; See Decision on Ieng Sary’s Rule 35 application for Judge Marcel Lemonde’s disqualification, Case No. 002/07-12-2009-ECCC/PTC(06), 29 March 2010 at paras. 11-15.

¹⁷ *Ibid.* at para. 15.

¹⁸ E130/4/1 Appeal, *supra* note 1 at para. 8 [emphasis in original].

¹⁹ E130/4/1 Appeal, *supra* note 1 at para. 47.

²⁰ E130/4/1 Appeal, *ibid.*

Consequences of the manifestly inadmissible character of the Appeal

10. The Chamber “may decide” to determine immediate appeals on the basis of written submissions alone.²¹ In view of the manifestly inadmissible character of the Appeal, and basic considerations of expeditiousness and judicial economy, the Co-Prosecutors can see no justification for the Chamber to grant a public, oral hearing as requested by the Co-Lawyers.²²
11. The Co-Prosecutors observe that in March 2011, the Co-Lawyers for Ieng Sary attempted to file two similarly unfounded immediate appeals.²³ The Chamber summarily disposed of these attempts, directing that no further submissions in relation to those appeals be filed by the Co-Lawyers.²⁴ In November 2011, the Defence for Ieng Sary filed a further manifestly inadmissible immediate appeal,²⁵ based on assertions contradicting the plain meaning and purport of Rule 104(4).²⁶ A decision on this latter appeal is pending before the Chamber. This pattern of wholly unfounded submissions on appeal abuses the process of the ECCC, and burdens the scant resources and time of the Chamber as well as the parties. On this basis, the Co-Prosecutors submit that the Chamber should refer the work performed by the Co-Lawyers for Ieng Sary on the present Appeal to the Defence Support Section for an assessment of whether the submission was both necessary and reasonable.²⁷

²¹ Rule 109(1).

²² **E130/4/1** Appeal, *supra* note 1 at para. 15 and p. 30.

²³ **E9/7/1/1** Ieng Sary’s notice of appeal against Trial Chamber’s decision entitled: Trial Chamber’s disposition of requests for extension of deadline (E9/7 and E9/4/9), 2 March 2011; and **E51/5/5** Ieng Sary’s notice of appeal against order to Ieng Sary defence on filing of preliminary objections, 9 March 2011.

²⁴ **E9/7/1/1/1/4** Decision on two notices of appeal filed by Ieng Sary, 8 April 2011 at p. 2 (“[T]he decisions by the Trial Chamber against which the Co-Lawyers are attempting to appeal in the Notices of Appeal do not fall within the Chamber’s limited jurisdiction for immediate appeals under Internal Rule 104(4) (Rev.7)”).

²⁵ **E95/8/1/1** Ieng Sary’s appeal against the Trial Chamber’s decision on the Co-Prosecutors’ request to exclude armed conflict nexus requirement from the definition of crimes against humanity, 26 October 2011.


²⁶ See **E95/8/1/2** Co-Prosecutors’ response to Ieng Sary’s appeal against the Trial Chamber decision to exclude the armed conflict nexus from the definition of crimes against humanity, 2 December 2011 at para. 4.

²⁷ In accordance with Internal Rule 11(2)(h) and Article F10 of the Guide to the ECCC Legal Assistance Scheme.

12. For these reasons, the Co-Prosecutors respectfully request the Chamber to:

- (1) find the appeal wholly inadmissible;
- (2) dismiss the Co-Lawyers' request for a public, oral hearing; and
- (3) refer the submissions on Appeal to the Defence Support Section for an assessment of whether the work performed was both necessary and reasonable

Respectfully submitted,

Date	Name	Place	Signature
12 January 2012	CHEA Leang Co-Prosecutor	Phnom Penh	
	Andrew CAYLEY Co-Prosecutor		