

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

FILING DETAILS

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**CO-PROSECUTORS' RESPONSE TO KHIEU SAMPHAN'S REQUEST FOR A
STAY OF PROCEEDINGS**

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I. INTRODUCTION AND PROCEDURAL HISTORY

1. The defence for Khieu Samphan (“Defence”) have filed a Request¹ that this Chamber stay the proceedings against their client in the Trial Chamber, alleging that the Trial Chamber has effected a variety of infringements on their client’s rights. The Co-Prosecutors hereby respond, and submit that the Request is inadmissible.

II. THE APPEAL IS INADMISSIBLE

2. The Defence’s filing is inadmissible because: the Appeal is untimely as the deadlines for appealing the vast majority of the decisions the Defence object to passed well before the Request was made; the Defence has not carried their burden in demonstrating the Request’s admissibility pursuant to Internal Rule 104(4); and, the alternate jurisprudence the Defence cites does not support the admissibility of their Request under the circumstances.

A. The Submission is Not Timely

3. As discussed further *infra*, the Defence have not even attempted to justify the admissibility of their appeal in relation to Rule 104(4). It is therefore impossible to determine if they were required to file their appeal within the fifteen days applicable to Rules 104(4)(b) and (c), or within the thirty days applicable to Rules 104(4)(a) and (d). Regardless, however, the Defence’s appeal is untimely. The Defence filed the instant Appeal on 7 August 2013 allowing them, for some claims and at a maximum, to challenge decisions notified as of 8 July 2013. Yet in the course of their filing they seek to challenge decisions made, *inter alia*, in June 2013², April 2013³, and April 2012⁴. At one point the Defence even admit that they raised the same argument to this Chamber in February 2013.⁵ Furthermore, the close of evidentiary proceedings at trial does not provide parties with an opportunity to appeal any decision with which they disagreed in the course of trial, and therefore that date is irrelevant for purposes of determining the timeliness of the Request. The Defence’s Request is therefore untimely.

B. The Submission is not Admissible under the Rules

4. The Defence’s Submission fails to satisfy the grounds for admissibility under the Internal Rules or the jurisprudence of this Chamber. Tellingly, the Defence do not even attempt to

¹ E275/2/1/1 Mr Khieu Samphan’s Defence Team’s Urgent Request for an Immediate Stay of Proceedings, 1 August 2013 [Provisional English Translation] (hereinafter “Request”). Notified 8 August 2013.

² E275/2/1/1 Request, at paras. 10, 34, 36, 85, 86, 92.

³ E275/2/1/1 Request, at paras. 58, 60.

⁴ E275/2/1/1 Request, at paras. 56, 80.

⁵ E275/2/1/1 Request, at paras. 63, 64.

argue that it does. The Defence make no attempt to justify the admissibility of their filing under Rule 104(4), which governs “decisions of the Trial Chamber [that] are subject to immediate appeal”, and in fact fail to reference Rule 104(4) anywhere in their filing. The Defence also strenuously avoid the jurisprudence of this Chamber, which has repeatedly held that interlocutory appeals are limited to those grounds covered by Rule 104(4).

5. Internal Rule 104(4) delineates the four types of Trial Chamber decisions that are “subject to immediate appeal.” The Defence’s Submission does not fall within any of the permissible categories, and this Chamber has previously rejected appeals that “fail[] to fulfil the admissibility requirements of an immediate appeal under Internal Rule 104(4).”⁶

As this Chamber has previously held:

The jurisdiction of the Supreme Court Chamber to hear appeals is governed by Internal Rule 104. This Chamber has previously found that its jurisdiction to consider immediate appeals is “further limit[ed]” by Internal Rule 104(4) and therefore decisions outside the scope of Internal Rule 104(4) can only be appealed following the final judgement. Other decisions have similarly dismissed appeals as inadmissible because they do not fall within the scope of Internal Rule 104(4). Therefore the Defence’s admissibility arguments made under [other Internal Rules] are dismissed.⁷

6. The Submission is therefore not admissible as an immediate appeal. All the Defence’s alleged claims fall into the residual category of decisions that must be appealed, if at all, “at the same time as an appeal against the judgment on the merits.”⁸
7. In addition to the Defence’s claims not being subject to immediate appeal under the Rules and jurisprudence of this Chamber, many of them are not yet ripe for review. For example, the Defence make extensive arguments claiming error in regards to the JCE

⁶ **E154/1/1/4** Decision on Ieng Sary’s Appeal Against the Trial Chamber’s Decision on its Senior Legal Officer’s Ex Parte Communications, 25 April 2012, at para. 16; *see also* **E62/3/10/5/1** Decision on Notice of Appeal from Civil Party Lead Co-Lawyers, 20 September 2011, at p.2 (where a “filing purports to effectuate an appeal which is not permissible under Internal Rule 104(4)” this Chamber has rejected it as inadmissible); **E130/4/3** Decision on Ieng Sary’s Appeal Against Trial Chamber’s Order Requiring His Presence in Court, 13 January 2012, at p.2 (rejecting admissibility where “substance of the appeal does not fall within the Chamber’s limited jurisdiction for immediate appeals under Rule 104(4).”); **E9/7/1/1/1/4** Decision on Two Notices of Appeal Filed by Ieng Sary, 8 April 2011, at p.2 (“the 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)”); **E163/5/1/13** Decision on the Co-Prosecutors’ Immediate Appeal of the Trial Chamber’s Decision Concerning the Scope of Case 002/01, 8 February 2013, at para. 12 (noting the four issues that are the subject of immediate appeal under Rule 104(4), and holding that “[o]ther decisions may only be appealed at the same time as an appeal against the judgment on the merits”); **E189/3/1/8** Decision on Nuon Chea’s “Immediate Appeal Against Trial Chamber Decision on Application for Immediate Action Pursuant to Rule 35”, 25 March 2013, at para. 12 (same).

⁷ **E154/1/1/4** Decision on Ieng Sary’s Appeal Against the Trial Chamber’s Decision on its Senior Legal Officer’s Ex Parte Communications, 25 April 2012, at para. 12 (emphasis added, internal citations omitted).

⁸ Internal Rule 104.

findings they anticipate the Trial Chamber will make in the judgement in Case 002/01, as well as the effect they hypothesize those findings will have in any subsequent trials in Case 002. The Defence speculate: that “a second trial chamber composed of new judges will determine the role of the Accused in the ‘implementation’ of the three remaining policies.”⁹; and that “it is difficult to see how the new judges will determine the liability of the Accused for the crimes charged in the second trial [based on speculation that] the policies from which these crimes stem will already have been determined by the present Chamber in Case 002/01.”¹⁰ It would be premature and an inefficient use of the Court’s limited resources for this Chamber to consider claims challenging what the Trial Chamber might decide in its judgement, when it will have the opportunity to consider arguments on appeal from the judgement based on what the Trial Chamber actually decided. Likewise, arguments related to claims premised on speculation regarding decisions that might be made by a Trial Chamber in any Case 002/02 that might go to trial¹¹ should only be raised if and when they become concrete.

C. The Submission is not Admissible Under the Jurisprudence Cited by the Defence

8. Rather than attempt any argument that their submission satisfies the admissibility standards laid out by the Rules or the jurisprudence of this chamber, the Defence attempt to rely on inapposite jurisprudence from the Pre-Trial Chamber, the International Criminal Court, and the Special Tribunal for Lebanon. In addition to the referenced jurisprudence being wholly irrelevant given this Chamber’s clear explication of the standards for admissibility before it, the Defence also fail to satisfy the standards of the cited jurisprudence.
9. The Pre-Trial Chamber, in interpreting a completely different Rule than Rule 104(4), has found that “where the facts and circumstances of an appeal require it, ... it has competence to consider grounds raised by the Appellants that are not explicitly listed under Internal Rule 74(3) through a liberal interpretation of a charged persons’ [*sic*] right to appeal in light of Internal Rule 21.”¹² In referencing this holding, however, the Defence

⁹ E275/2/1/1 Request, at para. 46.

¹⁰ E275/2/1/1 Request, at para. 50.

¹¹ E275/2/1/1 Request, at para. 38 (making arguments relating to “each successive trial segment”); *Ibid.*, at para. 41 (making arguments based on the impact in “subsequent trials”);

¹² D427/2/15 Decision on Appeals by NuonChea and IengThirith Against the Closing Order, 15 February 2011 (hereinafter “PTC Decision”, at para. 71; *see also* D264/2/6 Decision on IengThirith’s Appeal Against the Co-Investigating Judges’ Order Rejecting the Requests for Stay of Proceedings on the Basis of Abuse of Process (D264/1), 10 August 2010, at para. 14.

fail to apprise the Supreme Court Chamber of the Pre-Trial Chamber's significant limitation of this holding just a few sentences later:

[T]he Pre-Trial Chamber emphasizes that ... it did not hold that as a general rule it will automatically have competence under Internal Rule 74(3) or Internal Rule 21 to consider any grounds of appeal in which an Appellant raises matters implicating the fairness of the proceedings. Rather, the Pre-Trial Chamber carefully considered, in each case, whether, on balance, "the facts and circumstances" of the appeals required a broader interpretation of the right to appeal.¹³

10. The Pre-Trial Chamber then concluded that in regards to the appeal in question the interests of expeditious proceedings outweighed any interest in granting admission to the appeal.¹⁴ The Pre-Trial Chamber noted

...that Article 33 (new) of the ECCC Law states that "[t]he Extraordinary Chambers of the trial court shall ensure that trials are fair *and expeditious*." Furthermore, Internal Rule 21(4) provides that a fundamental principle applied by the ECCC is that "[p]roceedings shall be brought to a conclusion within a reasonable time." Similarly, Article 14(3) of the ICCPR, which is reflected in Internal Rule 21, states that "[i]n the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees [...]: c) To be tried without undue delay."¹⁵

11. Elsewhere, the Pre-Trial Chamber noted that "interests in the preservation of judicial resources and acceleration of legal and procedural processes" were also relevant considerations.¹⁶ In holding that these interests "are greater and outweigh the interests to be gained by considering these grounds of appeal at this stage"¹⁷, the Pre-Trial Chamber also noted that the arguments being raised in that appeal could be raised at a later date.¹⁸
12. Thus, even under the Pre-Trial Chamber's jurisprudence, where the "facts and circumstances" counsel against granting admission, such as where the interests of expediency, judicious use of resources, and the ability to raise the claims at a later time caution against granting admission, as they do here, appeals will be deemed inadmissible.
13. Furthermore, this Chamber itself has addressed the Pre-Trial Chamber holdings that the Defence seek to enlist here, noting their limited scope, stating:

¹³ D427/2/15 PTC Decision, at para. 73 (internal citations omitted).

¹⁴ D427/2/15 PTC Decision, at para. 74.

¹⁵ D427/2/15 PTC Decision, at para. 74 (internal citations omitted; emphasis in original).

¹⁶ D427/2/15 PTC Decision, at para. 73, quoting D97/15/9 Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise, 20 May 2010, at paras. 34, 35.

¹⁷ D427/2/15 PTC Decision, at para. 76.

¹⁸ D427/2/15 PTC Decision, at para. 76.

The Pre-Trial Chamber has previously ruled that Internal Rule 21 requires it to “interpret the Internal Rules in such a way that [an] Appeal is also admissible on the basis of Rule 21.” However, the Pre-Trial Chamber described this decision as a “liberal interpretation of the right to appeal in light of Internal Rule 21” and not a general rule conferring competence over appeals on any matter implicating the fairness of proceedings. Instead, admissibility of an appeal under Internal Rule 21 was considered exceptional, involving only those cases where particular facts and circumstances require a broader interpretation of the right to appeal.¹⁹

14. Significantly, this Chamber further noted in its assessment of the Pre-Trial Chamber’s jurisprudence that “there is no general right to interlocutory appeal that might be curtailed by the narrow jurisdiction under Internal Rule 104(4).”²⁰
15. The *Lubanga* decision from the International Criminal Court cited by the Defence is irrelevant because it relates not to admissibility, but to remedy. The admissibility question in that decision was decided by the fact that the Prosecutor had applied to the Trial Chamber for, and received, leave to appeal the Trial Chamber’s decision staying the proceedings.²¹ That Appeals Chamber’s decision as to remedy is therefore irrelevant. Nevertheless, it is noteworthy that the Appeals Chamber similarly interprets its authority to institute a “stay of proceedings” in the trial court narrowly, and only when necessitated “in the circumstances of the case”,²² those being that “there was no prospect of a fair trial”²³ because “the essential preconditions of a fair trial are missing and there is no sufficient indication that this will be resolved during the trial process”.²⁴
16. Significantly, the *Lubanga* Trial Chamber itself had reached the determination that a fair trial was not possible, and it was that decision by the Trial Chamber that the Appeals Chamber affirmed and granted “a margin of appreciation, based on its intimate understanding of the process thus far, as to whether and when the threshold meriting a stay of proceedings has been reached.”²⁵ In regards to the instant Request, the Trial Chamber has made no finding that a stay of proceedings is warranted.

¹⁹ E154/1/1/4 Decision on Ieng Sary’s Appeal Against the Trial Chamber’s Decision on its Senior Legal Officer’s Ex Parte Communications, 25 April 2012, at para. 14 (internal citations omitted).

²⁰ E154/1/1/4 Decision on Ieng Sary’s Appeal Against the Trial Chamber’s Decision on its Senior Legal Officer’s Ex Parte Communications, 25 April 2012, at para. 15.

²¹ *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06 OA 13, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”, 21 October 2008, (hereinafter “Lubanga Decision”) at para. 7.

²² Lubanga Decision, at para. 75.

²³ Lubanga Decision, at para. 75.

²⁴ Lubanga Decision, at para. 76.

²⁵ Lubanga Decision, at para. 84.

17. In the decision by the Appeals Chamber of the Special Tribunal for Lebanon that the Defence cite, the Chamber did exercise “inherent jurisdiction” to consider the interlocutory appeal,²⁶ however that holding is in direct opposition to the decision by this Chamber not to recognize inherent jurisdiction for interlocutory appeals outside of Rule 104(4). Furthermore, the Appeals Chamber noted that utilizing such jurisdiction was a rare exception, stating: “The Appeals Chamber will not normally consider interlocutory appeals outside the scope of the Rules... .”²⁷ It was willing to make such an exception where “a situation has arisen that was not foreseen by the Rules, and it is alleged that a jurisdictional error has been committed and injustice may result if such an error as is alleged were left uncorrected.”²⁸ The instant Request, on the other hand, satisfies none of these three prongs. The Rules did foresee the types of claims the Defence make here, and determined they should only be appealed following judgement on the merits. The Defence’s claims do not go to jurisdiction or similar core issues. And, injustice will not result if the alleged errors are left unaddressed at this time because they may be addressed on appeal following judgement on the merits, or during any subsequent trials in Case 002. Thus, there is no reason to deviate from the normative interlocutory appellate jurisdiction of the Internal Rules under the circumstances.

D. The Defence are Disrespectful to the Trial Chamber

18. The Co-Prosecutors recall that “[c]ounsel appearing before the ECCC are required by Cambodian law to ‘preserve for the judges, in independence and dignity, the respect due to their position.’”²⁹ In the Co-Prosecutors’ view the Defence violated this obligation when, in the course of their Request, the Defence assert that the Trial Chamber told a “lie”³⁰, that “from the start, the Chamber never intended to conduct a fair trial”³¹, that “[i]t is now evident that the Chamber never wanted to give Mr Khieu Samphan the means to defend himself and be heard”,³² that the Trial Chamber is biased,³³ and state that the Trial Chamber “lacks both the capacity and intention to conduct a fair trial.”³⁴

²⁶ Special Tribunal for Lebanon, *In the Matter of El-Sayed*, Case No. CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge’s Order Regarding Jurisdiction and Standing, 10 November 2010, (hereinafter “STL Decision”), at para. 54.

²⁷ STL Decision, at para. 54.

²⁸ STL Decision, at para. 54.

²⁹ E214 Decision on Nuon Chea Defence Counsel Misconduct, 29 June 2012, at para. 8.

³⁰ E275/2/1/1 Request, at para. 58.

³¹ E275/2/1/1 Request, at para. 68.

³² E275/2/1/1 Request, at para. 69.


³³ E275/2/1/1 Request, at para. 99.

³⁴ E275/2/1/1 Request, at para. 102.

III. CONCLUSION

19. For the reasons stated above, the Co-Prosecutors respectfully request this Chamber to **DISMISS** the Request in full.

Respectfully submitted,

Date	Name	Place	Signature
19 August 2013	CHEA Leang Co-Prosecutor	Phnom Penh	
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