

**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 DECISION TO EXCLUDE THE ARMED CONFLICT NEXUS
FROM THE DEFINITION OF CRIMES AGAINST HUMANITY**

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RESPONSE

1. On 25 November 2011, the Defence for Ieng Sary filed an appeal¹ to the Supreme Court Chamber (the “Chamber”) against the Trial Chamber’s *Decision on Co-Prosecutors’ request to exclude armed conflict nexus requirement from the definition of crimes against humanity* (the “Impugned Decision”).²
2. The Defence relies on Rule 104(4)(a) as the sole grounds for admissibility of an immediate appeal.³ The Co-Prosecutors submit that the Appeal is manifestly inadmissible at this stage of the proceedings. There is no legal basis to support the assertion that the Impugned Decision has “the effect of terminating the proceedings”⁴ against Ieng Sary.
3. 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 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).⁵ All other Trial Chamber decisions “may be appealed only at the same time as an appeal against the judgment on the merits.”⁶ Also, an immediate appeal generally “does not stay the proceedings before the Trial Chamber.”⁷
4. The Defence asserts that an immediate appeal is available based on the proposition that the Impugned Decision “would have terminated the ‘first trial’ proceedings *but for the Trial Chamber’s errors*.”⁸ The plain meaning and purport of Rule 104 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, as is the case here. The reasoning of the Defence, if accepted by the Chamber, would conjure an illusory ground of appeal by turning Rule 104(4)(a) on its head.

¹ E95/8/1/1 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, 25 November 2011 (“Appeal”).

² E95/8, Decision on the Co-Prosecutors’ request to exclude armed conflict nexus requirement from the definition of crimes against humanity, 26 October 2011 (“Impugned Decision”).

³ E95/8/1/1 Appeal, *supra* note 1 at paras. 8-18.

⁴ Rule 104(4)

⁵ Rule 104(4).

⁶ *Ibid.*

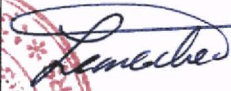

⁷ *Ibid.*

⁸ E95/8/1/1 Appeal, *supra* note 1 at III.B.2 (emphasis added).

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5. The Chamber has previously determined that its jurisdiction over immediate appeals is strictly limited to the grounds set out in Rule 104(4).⁹ In March 2011, the Defence for Ieng Sary attempted to file two similarly unfounded immediate appeals.¹⁰ The Chamber summarily disposed of these attempts, directing that no further submissions in relation to those appeals be filed by the Co-Lawyers for Ieng Sary.¹¹
6. The Chamber “may decide” to determine immediate appeals on the basis of written submissions alone.¹² In view of the manifestly unfounded 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.¹³
7. For these reasons, the Co-Prosecutors respectfully request the Chamber to:
- (1) find the appeal wholly inadmissible;
 - (2) dismiss the Defence request for a public, oral hearing; and
 - (3) direct that no responses be filed by the Parties.

Respectfully submitted,

Date	Name	Place	Signature
2 December 2011	CHEA Leang Co-Prosecutor	Phnom Penh	
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⁹ 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.

¹⁰ 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.

¹¹ 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)”).

¹² Rule 109(1).

¹³ E95/8/1/1 Appeal, *supra* note 1 at para. 19 & p. 30.