

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

**FILING DETAILS**

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**IENG SARY'S REQUEST FOR LEAVE TO REPLY  
&  
REPLY TO 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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**Co-Prosecutors:**  
CHEA Leang  
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**All Defence Teams**

**All Civil Parties**

## REQUEST FOR LEAVE TO REPLY

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby requests leave to reply to the Co-Prosecutors’ Response to IENG Sary’s Appeal<sup>1</sup> Against the Trial Chamber Decision to Exclude the Armed Conflict Nexus from the Definition of Crimes Against Humanity (“Response”).<sup>2</sup> A Reply is made necessary because the OCP errs in asserting that the Appeal is inadmissible because the Impugned Decision<sup>3</sup> continues rather than terminates proceedings.<sup>4</sup> The Impugned Decision does have the effect of terminating the proceedings and is thus admissible pursuant to Rule 104. It is also admissible pursuant to Rule 21. The OCP has waived its right to file a response to the substance of the Appeal by limiting its Response to admissibility. As the OCP has already responded to the Appeal, the OCP’s request that the Supreme Court Chamber “direct that no responses be filed by the Parties” is meaningless. This Reply should not preclude a public, oral hearing on the substance of the Appeal, as the Defence has requested, since it is limited to the issue of admissibility.<sup>5</sup>

## REPLY

1. The Trial Chamber, granting a motion filed by the OCP,<sup>6</sup> violated the principle of legality by altering the definition of crimes against humanity set out in the amended Closing Order to exclude a nexus with armed conflict. Mr. IENG Sary now faces prosecution for a crime that lacks an element that existed in customary international law during the period of the ECCC’s temporal jurisdiction. Because of the Trial Chamber’s error, evidence relating to a nexus with armed conflict will not be adduced during the first trial. The Defence appealed against this violation of the principle of legality and explained that because of the Trial Chamber’s error, the proceedings will be terminated.
2. The Appeal is admissible pursuant to Rule 104(4)(a), which gives the Supreme Court Chamber jurisdiction over immediate appeals where an impugned decision has the effect of terminating the proceedings. Rule 104(4)(a) applies when an impugned decision

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<sup>1</sup> IENG Sary’s Appeal Against the Trial Chamber’s Decision on Co-Prosecutors’ Request to Exclude the Armed Conflict Nexus Requirement From the Definition of Crimes Against Humanity, 25 November 2011, E95/8/1/1 (“Appeal”).

<sup>2</sup> 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, E95/8/1/2.

<sup>3</sup> Decision on Co-Prosecutors’ Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, 26 October 2011, E95/8.

<sup>4</sup> Response, para. 2.

<sup>5</sup> Practice Direction 8.4 states that a reply to a response shall only be permitted where there is to be no oral argument on the request.

<sup>6</sup> Co-Prosecutors’ Request for the Trial Chamber to Exclude the Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, 15 June 2011, E95.

*necessarily* terminates proceedings, not only when an impugned decision *immediately* terminates proceedings.

3. The Impugned Decision has the effect of terminating the proceedings of Case 002's first trial because the first trial deals solely with crimes against humanity.<sup>7</sup> Evidence relating to an element of crimes against humanity – nexus with armed conflict – will not be adduced during the first trial because of the Impugned Decision which found that there was no nexus requirement in customary international law in 1975-79. The Supreme Court Chamber *will* eventually, even if not now, hear the Defence's Appeal because the Trial Chamber has erred on a question of law invalidating the Impugned Decision.<sup>8</sup> The Supreme Court Chamber may, and, for the reasons set out in the Appeal, *should*, determine that the definition of crimes against humanity in 1975-79 did require a nexus with armed conflict. Since evidence relating to this nexus will not have been adduced, none of the Accused will ultimately be convicted of crimes against humanity; a necessary element of this crime will not have been proven. The proceedings will thus necessarily terminate as a direct result of the Impugned Decision. Thus, the OCP errs by asserting that there is no legal basis to support an immediate appeal under Rule 104(4)(a) and that the Impugned Decision continues rather than terminates proceedings.<sup>9</sup>
4. Rule 104(4)(a) must not be limited to impugned decisions which have the effect of *immediately* terminating the proceedings. The Defence invites the Supreme Court Chamber to be guided by the Appeals Chamber of the International Criminal Tribunal for Rwanda ("ICTR"), which faced a somewhat similar issue in *Théoneste Bagosora and 28 Others*. In that case, the prosecutor appealed a decision dismissing an indictment against Théoneste Bagosora and 28 others. It was not clear whether Article 24 of the ICTR Statute, which deals with appellate proceedings, would allow such an appeal.<sup>10</sup> In interpreting Article 24, the Appeals Chamber found that:

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<sup>7</sup> Severance Order Pursuant to Rule 89*ter*, 22 September 2011, E124, para. 5. *See also* Decision on the Co-Prosecutors' Request for Reconsideration of the Terms of the Trial Chamber's Severance Order, 18 October 2011, E124/7.

<sup>8</sup> *See* Rule 104(1), which states that the Supreme Court Chamber has jurisdiction to hear appeals where the Trial Chamber has erred on a question of law invalidating its decision.

<sup>9</sup> Response, paras. 2, 4.

<sup>10</sup> Article 24 of the ICTR Statute states:

**Article 24: Appellate Proceedings**

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:
  - (a) An error on a question of law invalidating the decision; or

this reading of Article 24, which would grant the Prosecutor an unfettered right of appeal, while that of the accused is limited, would violate the principle of equality of arms. Indeed, the principle of equality of arms requires that the parties enjoy corresponding rights of appeal.... Consistent with this principle, the Appeals Chamber finds that, in the instant case, where the matter affects the right of the accused, the Prosecutor can have no greater power of appeal than accused persons.<sup>11</sup>

Similarly, the Supreme Court Chamber should broadly interpret Rule 104(4)(a) so as to respect the principle of equality of arms. In other words, Rule 104(4)(a) should not be read as being limited to decisions with the effect of *immediately* terminating the proceedings, since such decisions would only ever be appealed by the OCP and the Civil Parties. It would be illogical to assert that if the Trial Chamber decides an issue correctly, the OCP could appeal immediately, but if it decides the issue incorrectly, the Defence must wait until after the Judgement to seek a remedy. This would amount to a legal perversion and a miscarriage of justice.

5. The constitutional principle of *in dubio pro reo* and Rule 21 require that Rule 104(4)(a) be interpreted in such a way as to safeguard Mr. IENG Sary's interests and ensure legal certainty.<sup>12</sup> There is no need to wait until a judgement before determining what the elements of crimes against humanity are. The Appeal relates to a pure matter of law which should be decided immediately in order to protect Mr. IENG Sary's fundamental fair trial right to be informed promptly and in detail of the nature and cause of the charge against him.<sup>13</sup> Mr. IENG Sary must not be forced to undergo a lengthy trial when a material question exists as to the elements of crimes against humanity and this material question impacts the taking of evidence.
6. The OCP erroneously equates the Appeal with certain previous appeals which were rejected on admissibility grounds by the Supreme Court Chamber.<sup>14</sup> Unlike the three appeals referenced by the OCP, the current appeal is based on Rule 104(4)(a). The

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(b) An error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

<sup>11</sup> *Prosecutor v. Bagosora et al.*, ICTR-98-37-A, Decision on the Admissibility of the Prosecutor's Appeal from the Decision of a Confirming Judge Dismissing an Indictment against Theoneste Bagosora and 28 others, 8 June 1998, paras. 34-35.

<sup>12</sup> Article 38 of the Constitution states in pertinent part: "Any case of doubt shall be resolved in favor of the accused." The principle of *in dubio pro reo* applies to findings of law, subject to Civil Law rules of interpretation. *See* Decision on Immediate Appeal by KHIEU Samphan on Application for Immediate Release, 6 June 2011, E50/3/1/4, para. 31.

<sup>13</sup> International Covenant on Civil and Political Rights, Art. 14(3)(a).

<sup>14</sup> Response, para. 5.

