

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

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**CO-PROSECUTORS' RESPONSE TO IENG SARY'S TWO NOTICES OF APPEAL
AGAINST THE TRIAL CHAMBER'S DECISIONS REFUSING THE EXTENSION OF TIME AND
PAGE LIMITS FOR THE FILING OF PRELIMINARY OBJECTIONS**

FILED BY:

Co-Prosecutors:

CHEA Leang
Andrew CAYLEY

DISTRIBUTE TO:

Supreme Court Chamber

Judge KONG Srim, President
 Judge Motoo NOGUCHI
 Judge SOM Sereyvuth
 Judge A. KLONOWIECKA-MILART
 Judge SIN Rith
 Judge C. N. JAYASIINGHE
 Judge YA Narin

Civil Party Lead Co-Lawyers:

PICH Ang
Elisabeth SIMONNEAU FORT

**Charged Persons and
Defence Teams:**

NUON Chea
SON Arun
Michiel PESTMAN
Victor KOPPE

IENG Sary
 ANG Udom
 Michael G. KARNAVAS

KHIEU Samphan
 SA Sovan
 Jacques VERGÈS
 Philippe GRÉCIANO

IENG Thirith
 PHAT Pouv Scang
 Diana ELLIS

I. RESPONSE

1. In this combined response to “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)” (the ‘First Notice’)¹ and “Ieng Sary’s Notice of Appeal Against Order to Ieng Sary Defence on Filing of Preliminary Objections” (the ‘Second Notice’)² the Co-Prosecutors request that the Supreme Court Chamber declare that the appeals identified in both First and Second Notice are inadmissible. It is further requested that the Chamber order that the Defence be prohibited from filing any further appeal submissions arising from these two notices on the basis that they are manifestly ill-founded and would lead to a waste of the Chamber’s, Parties’ and ECCC resources.

II. APPEALS ARE INADMISSIBLE

2. Rule 104 (1) defines the jurisdiction of the Supreme Court Chamber. Parties can appeal against a judgment or a decision of the Trial Chamber on the following grounds : (a) an error on a question of law invalidating the judgment or decision; or (b) an error of fact which has occasioned a miscarriage of justice. Immediate appeals against Trial Chamber decisions may be made on a discernible error in the exercise of the Trial Chamber’s discretion which resulted in prejudice to the appellant. However, these immediate appeals are strictly limited by Rule 104 (2) to :
 - (a) decisions which have the effect of terminating the proceedings;
 - (b) decisions on detention and bail under Rule 82;
 - (c) decisions on protective measures under Rule 29(4)(c); and
 - (d) decisions on interference with the administration of justice under Rule 35(6).
3. All other appeals against Trial Chamber decisions may only be lodged at the same time as an appeal against the judgment on the merits.³ Rule 105 (1) and 107 (1) which regulate admissibility and time limits of appeals respectively further confirm that immediate appeals against Trial Chamber decisions are restricted to the four categories defined in Rule 104 (2).
4. The First Notice and the Second Notice move to impugn decisions that have no immediate appeal rights. They both squarely fall outside those appeals permitted by Rule 104 (2). The First Notice indicates an intention to appeal against a decision rejecting requests for an

¹ Document No E-9/7/1/1, ‘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, ERN 00649214-9215.

² Document No E-51/5/5, ‘Ieng Sary’s Notice of Appeal Against Order to Ieng Sary Defence on Filing of Preliminary Objections’, 9 March 2011, ERN 00649910-9911.

³ Rule 104 (2).

extension of time for the filing of objections to the OCP proposed witnesses, Civil Parties and experts; and for leave to file supplementary submissions to the Defence initial objections within 30 days of notification of the OCP's summary of experts' qualifications and expertise.⁴

5. The Second Notice indicates an intention to appeal against a decision directing the Defence to file a single preliminary objections submission of no greater than 35 pages (English) or 50 pages (Khmer) by Monday 28 February 2011.⁵ Neither the First Notice nor the Second Notice are appeals against decisions concerning: (1) the termination of proceedings; (2) detention and bail; (3) protective measures; or (4) the interference with the administration of justice as permitted by Rule 104 (2). Thus both appeals are inadmissible. The limited scope of immediate appeals from the Trial Chamber is obvious from the Rules. The clear intent of the limited scope of Rule 104 is further confirmed by the rejection, at the plenary of ECCC judges held in February 2011, of an amendment to expand the scope of the rule to a wider range of immediate appeals.

III. APPEALS SHOULD BE DISMISSED NOW

6. The Co-Prosecutors submit that now is the time to address the admissibility of the appeals contained in the First and Second Notice. The Supreme Court Chamber must be able to filter the *prima facie* merits of an appeal by an analysis of the content of the Notices of Appeal and without the need to consider the full appeal submissions. The good administration of justice at the ECCC demands that the Supreme Court Chamber be permitted to declare as inadmissible those Notices of Appeal which contain grounds of appeal which are manifestly ill-founded. In this case the Defence have intentionally ignored the plain language of Rule 104 (2). They have filed in quick succession two Notices of Appeal with no legal basis in Rule 104 (2). If these manifestly ill-founded appeals are permitted to continue a counter-productive pleading practice will develop which will unnecessarily consume the resources and time of this Chamber, the Parties and the Interpretation and Translation Unit ("ITU").
7. The early dismissal of motions, with no basis in law or the Rules, is becoming the practice of the Trial Chamber at the ECCC. On 15 and 16 March 2011 the Trial Chamber summarily dismissed two requests from the Ieng Sary Defence on the grounds that they

⁴ See Document No. E-9/7/1, 'Trial Chamber's Disposition of Requests for Extension of Deadlines (E9/7 and E9/4/9), 28 February 2011, ERN 00648637-00648637.

⁵ See Document No. E-51/6, 'Order to Ieng Sary Defence on Filing of Preliminary Objections', 25 February 2011, ERN 00648420-00648421.

had no legal basis. Both of these decisions were filed prior to the other parties responding and included, *inter alia*, orders that: (1) no translation of the requests was to be undertaken by the Interpretation and Translation Pool; and (2) the other parties refrain from responding to the requests.⁶

8. Although the Internal Rules are silent on the issue of dismissals of immediate or interlocutory appeals *ab initio* Article 345 of the Cambodian Criminal Procedure Code is instructive on the legality of such a practice :

“If an interlocutory question is raised *and admitted* by the court, the court shall adjourn the hearing and set the time for the objecting party to clarify the issue with the competent court (emphasis added).”⁷

9. This article clearly envisages that a court (a lower court in this instance) has the power to admit or *reject* an interlocutory question before the full merits of an appeal are adjudicated. Similar practice in the international courts confirms the broad acceptance of the practice that appeals should not be heard in full if there is no justifiable basis for them in the first instance. In deliberating on the admissibility of appeals the ICTY Appeals Chamber in *Delalić* held that its appellate jurisdiction over preliminary motions was limited to certain issues set out in Rule 73. it ruled that:

“... any appeal on matters other than those enumerated in Rule 73(A)(ii), (iii), (iv), (v), *should be dismissed out of hand*, as being beyond the competence of the Appeals Chamber (emphasis added).”⁸

10. The Appeals Chamber, went further and found that even where an application for leave to appeal fell within its appellate jurisdiction, the court was also required to consider:

“whether the application is frivolous, vexatious, manifestly ill-founded, an abuse of the process of the court or so vague and imprecise as to be unsusceptible of any serious consideration...”⁹

11. Although at the ECCC leave of the Trial Chamber is not required to appeal to the Supreme Court Chamber, the principles underlying the “leave to appeal provisions” at the ICTY

⁶ Document E53/2/1, “Memorandum in Response to Request filed by Ieng Sary”, 15 March 2011, ERN00651551-00651551 and Document E65/1, “Memorandum on Ieng Sary request to file motion seeking confirmation that he will be entitled to present oral arguments at the Initial Hearing concerning each of his Preliminary Obligations”, 16 March 2001, ERN00651599-00651599.

⁷ Article 345, Cambodian Code of Criminal Procedure.

⁸ *Prosecutor v. Delalić*, IT-96-21-AR72.1, Decision on Application for Leave to Appeal (Separate Trials), 14 October 1996, para. 18.

⁹ *Prosecutor v. Delalić*, IT-96-21-AR72.1, Decision on Application for Leave to Appeal (Separate Trials), 14 October 1996, para. 19, see also, *inter alia*, : *Prosecutor v. Dokmanović et al*, IT-95-13a-AR72, Decision on Application for Leave to Appeal by the Accused Slavko Dokmanović, 11 November 1997, para 3; *Prosecutor v. Delić et al*, IT-96-21-AR72.5, Decision on Application for Leave to Appeal by Hazim Delić.

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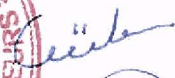
provide useful guidance to this court. Notices of Appeal containing manifestly ill-founded appeals should not be allowed to go to full argument before the Supreme Court Chamber. Accepting each and every notice of appeal, regardless of its *prima facie* inadmissibility, would leave the appeals process open to abuse. Allowing the appeal process to be misused in this manner, even in a few instances, has the potential for creating hundreds of hours of unnecessary work for the Supreme Court Chamber, the parties and the ITU.

12. If pleadings before the ECCC have no regard for the Internal Rules of the Court or its Practice Directions there is a high likelihood that Case 002 will be delayed. The judges of the ECCC have a duty to ensure that precious time and resources are not consumed on manifestly ill-founded submissions that detract them from their primary duty of ensuring a fair and expeditious trial.

IV. RELIEF SOUGHT

13. Therefore, the Co-Prosecutors respectfully request the Supreme Court Chamber declare the First and Second Notices of Appeal are inadmissible and order that no further submissions be filed by the Defence in relation to either notice.

Respectfully submitted,

Date	Name	Place	Signature
18 March 2011	YET Chakriya Deputy Co-Prosecutor	Phnom Penh	
	Andrew CAYLEY Co-Prosecutor		