



**Expert Commentary on Legal Filings:  
Interpreting the Right of Appeal in the Interest of Fair Proceedings**

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Ieng Sary has sought dismissal numerous times from the second case at the Extraordinary Chambers in the Courts of Cambodia (ECCC). He continually focuses his petitions on the claim that the Court has no jurisdiction to try him due to the royal amnesty and pardon he received when he defected to the government with thousands of Khmer Rouge forces in 1996. His arguments have been reviewed twice by the Co-Investigative Judges, twice by the Pre-Trial Chamber on appeal, *de novo* by the Trial Chamber, and once more by the Supreme Court Chamber on appeal. Because a super-majority of the Supreme Court found his appeal inadmissible under its narrow interlocutory jurisdiction [Decision on Ieng Sary’s Appeal Against the Trial Chamber’s Decision on Ieng Sary’s Rule 89 Preliminary Objections (*Ne Bis in Idem* and Amnesty and Pardon), March 20, 2012], there will be no final resolution for several more years. Only upon conviction can Ieng Sary ask the Supreme Court to address the fundamental question: Did the ECCC have the competence to try him in the first place?

The ECCC Internal Rules provide opportunity for intermediate appeal against very few trial rulings: decisions that have the effect of terminating proceedings, decisions on detention and bail, decisions on some protective measures, and decisions on interference in the administration of justice. [Internal Rule 104(4)]. The right is exceedingly narrow because, as the court is rooted in Cambodia’s civil law system, the ECCC’s procedural rules are premised on the erroneous assumption that there will be a long judicial investigation and a short trial, when in reality the ECCC has been cursed with both long judicial investigations and long trials.

Ieng Sary argued that his jurisdictional questions fall within the criteria for immediate appeal because they could have the effect of terminating the proceedings. [Ieng Sary’s Appeal against the Trial Chamber’s Decision on Ieng Sary’s Rule 89 Preliminary Objections (*Ne Bis in Idem* and Amnesty and Pardon) Dec. 5, 2011]. The super-majority rejected this argument, finding that although the Co-Prosecutors would have had the right to file an immediate appeal had the Trial Chamber ruled in favor of Ieng Sary, the accused did not have the same right because the Chamber upheld the Court’s jurisdiction over him.

Two Supreme Court judges issued a strongly worded dissent. Although agreeing that the issue did not fall within the plain language of the rules, they asserted the Chamber’s inherent right “to assume appellate jurisdiction over any immediate appeal which concerns an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which an immediate resolution by the Supreme Court Chamber may materially advance the proceedings” — criteria applied by all international courts and satisfied by this appeal. They note:

Any appeal that cannot be heard on an interlocutory basis will necessarily be delayed until 2014, at the earliest... If the Supreme Court Chamber ultimately determines that *ne bis in idem* debars the ongoing proceedings against the

Accused in Case 002, he will have been subjected to years of baseless and avoidable detention, coupled with occasional physical compulsion to attend at court proceedings. [Dissenting Opinion of Judges Klonowiecka-Milart and Jayasinghe, E51/15/1/2.1, posted June 11, 2012].

As highlighted by the dissenting judges, the ECCC Pre-Trial Chamber has always taken an admirably expansive view of its appellate authority, finding that even when there is no explicit right of review under the rules, “Internal Rule 21 requires that the Pre-Trial Chamber adopt a broader interpretation of the Charged Person's right to appeal in order to ensure that the fair trial rights of the Charged Person are safeguarded[.]” [Decision on Ieng Sary's Appeal against OCIJ Decision Refusing to Accept the Filing of Ieng Sary's Response to the Co-Prosecutors' Rule 66 Final Submission, Sept. 20, 2010]. Rule 21(1) protects fundamental principles, providing in part: “The applicable ECCC Law [and] Internal Rules ... shall be interpreted so as to always safeguard the interests of ... Accused,” ensuring that proceedings are “fair and adversarial” and preserve “a balance between the rights of the parties.”

For example, the Pre-Trial Chamber found that there was no rule allowing Khieu Samphan to appeal an order setting forth the scope of the parties' right to document translation, stating “[t]his list is exhaustive and the Pre-Trial has jurisdiction to decide only the appeals against the mentioned orders and decisions.” Nevertheless, it undertook a thorough review of the order to determine if Khieu's Rule 21 rights had been violated. [Decision on Khieu Samphan's Appeal Against the Order on the Translation Rights and Obligations of the Parties, Feb. 20, 2009].

In advancing the Supreme Court Chamber's power to interpret its appellate authority broadly in conformity with international tribunal and ECCC Pre-Trial precedent, the dissenting judges noted, “The potential prejudice to the fundamental right to liberty is substantial, and thus the Supreme Court Chamber is obliged by Internal Rule 21(1), Article 14(3)(c) of the ICCPR and Article 33new of the ECCC Law to give the Appeal full consideration at the earliest possible juncture.” Due to the significance of the issue, which could potentially invalidate the entire trial, it is difficult to understand why the super-majority did not agree that this matter should be finally, and immediately, laid to rest.