

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

FILING DETAILS

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**CO-PROSECUTORS' RESPONSE TO IENG SARY'S APPEAL AGAINST THE TRIAL
CHAMBER'S DECISION REFUSING HIS REQUEST FOR THE TRIAL CHAMBER TO
DIRECT ITS SENIOR LEGAL OFFICER TO MAINTAIN OPEN AND TRANSPARENT
COMMUNICATION WITH ALL THE PARTIES**

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I. INTRODUCTION

1. On 20 January 2012, the Defence for Ieng Sary (the “Defence”) filed an appeal¹ to the Supreme Court Chamber (the “Chamber”) against a decision of the Trial Chamber dated 20 December 2011 (the “Impugned Decision”).² The Impugned Decision rejected a request, filed by the Defence, for the Trial Chamber to direct the Senior Legal Officer to copy all parties to all communications concerning trial management issues (“Request”).³ In the Appeal, the Defence requests the Chamber: to hold a public oral hearing on the matters raised in the Appeal; to annul the Impugned Decision; and to direct the Trial Chamber to “cease and desist from instructing its Senior Legal Officer to engage in *ex parte* communications”.
2. The Defence purports to rely on Rules 104(1), 104(4)(d) and 21 as the grounds for admissibility of the Appeal. The Co-Prosecutors submit that the Appeal is manifestly inadmissible at this stage of the proceedings. Accordingly, the Co-Prosecutors’ request the Chamber to declare the Appeal inadmissible and to dismiss the request for a public hearing. Further, in view of the Defence’s ongoing practice of filing manifestly inadmissible appeals, the Co-Prosecutors’ request the Chamber to refer the matter to the Defence Support Section for an assessment of whether the work performed on the Appeal was both necessary and reasonable.

II. THE APPEAL IS INADMISSIBLE

There is no legal basis for the admissibility of the Appeal under Rule 104(1)

3. The Defence asserts that the Appeal is admissible under Rule 104(1) as the Impugned Decision involved errors of law, an error of fact, and an abuse of discretion.⁴
4. This argument deliberately misreads Rule 104 and conflates the Chamber’s general jurisdiction provisions of Rule 104(1) with the list of matters subject to immediate appeal delineated in Rule 104(4). Rule 104(1) is a general provision setting out the grounds on which the Chamber shall decide *all* appeals. Rule 104(4), on the other hand, is a specific provision which sets out, in exhaustive form, four categories of decisions which are subject to *immediate* appeal. Rule 104(4)

¹ **E154/1/1/1** Ieng Sary’s appeal against the Trial Chamber’s decision refusing his request for the Trial Chamber to direct its senior legal officer to maintain open and transparent communication with all the parties, 12 January 2012 (notified in English on 23 January 2012 and Khmer on 25 January 2012) (“Appeal”).

² **E154/1** Memorandum of the Trial Chamber entitled *Ieng Sary request that the Trial Chamber direct the Senior Legal Officer to maintain open and transparent communication with all parties concerning trial management issues*, 20 December 2011 (“Impugned Decision”).

³ **E154** Ieng Sary’s request for the Trial Chamber to direct the Trial Chamber Senior Legal Officer to maintain open and transparent communication with all parties concerning trial management issues, 14 December 2011 (“Request”).

⁴ **E154/1/1/1** Appeal, *supra* note 1 at paras. 5-7.

further provides that “[o]ther decisions may be appealed *only* at the same time as an appeal against the judgment on the merits.”⁵

5. When these provisions are read together, and given their ordinary meaning, it is abundantly clear that Rule 104(1) does not set out an independent basis for an immediate appeal against a decision of the Trial Chamber. Rather, only those matters set out in Rule 104(4) (a)-(d) may be the subject of an immediate appeal. This interpretation is consistent with prior decisions of the Chamber, including a decision dated one week prior to the filing of the present Appeal, in which the Chamber found its jurisdiction over immediate appeals to be limited to matters set out in Rule 104(4).⁶

There is no legal basis for the admissibility of the Appeal under Rule 104(4)(d)

6. The Defence further asserts that the Appeal is admissible because it “concerns an interference with the administration of justice under Rule 35(6)”,⁷ and thus is subject to immediate appeal under Rule 104(4)(d) which refers to “[a] decision on interference with the administration of justice under Rule 35(6).”
7. There is no plausible legal basis to construe the Impugned Decision as a “*decision*” on interference with the administration of justice under Rule 35(6). The Impugned Decision did not refer or relate in any way to interference with the administration of justice within the meaning of Rule 35. This is understandable as the Request itself did not call for an investigation pursuant to Rule 35 or otherwise allege that the practice in question amounted to an interference with the administration of justice. The fact that the Defence now seeks to construe the very issuance of the Impugned Decision as interference in the administration of justice does not suffice to bring the Impugned Decision within Rule 35(6). Such an interpretation would lead to an absurd result whereby any party could file an immediate appeal against *any* decision of the Trial Chamber merely by alleging that the decision interfered with the administration of justice.
8. As a matter of substance, the allegation that the Trial Chamber, by issuing the Impugned Decision, “knowingly and wilfully interfered with the administration of justice” is an entirely unfounded and offensive attack on the integrity of the Trial Chamber. Moreover, it ignores the clear spirit and meaning of this Chamber’s decision of 12 January 2012, which held that “neither an error of law

⁵ Rule 104(4) (emphasis added).

⁶ **E130/4/3** Decision on Ieng Sary’s Appeal Against Trial Chamber’s Order Requiring his Presence in Court, 13 January 2012, p. 2. See also, **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.

⁷ **E130/4/1** Appeal, *supra* note 1 at paras. 8 -10.

nor an abuse of discretion on the part of the Trial Chamber can, by itself, constitute a knowing and wilful interference with the administration of justice within the meaning of Rule 35.”⁸ Attempting to distinguish this inconvenient decision, the Appeal alleges that in the present case the Trial Chamber “did not merely err in fact or law or abuse its discretion” but rather engaged in “unconscionable conduct” equal in gravity to the examples listed in Rule 35 and demonstrated “requisite malfeasance” to violate rule 35.⁹ However, beyond pointing to the issuance of the Impugned Decision and recalling the interests that have been potentially harmed thereby, the Appeal does not offer a shred of evidence to substantiate this very serious allegation.

There is no legal basis for the admissibility of the Appeal under Rule 21

9. The Defence finally asserts that the Appeal is admissible on the basis of Rule 21 alone as that rule requires the Chamber to “always safeguard Mr IENG Sary’s interests.”¹⁰ The Co-Prosecutors submit that Rule 21 is a general provision operating primarily as a rule of interpretation. It cannot override the clear and unambiguous terms of Rule 104(4) which provides that only four categories of decision can be the subject of an immediate appeal and reserves appeals against all other decisions to a later stage of the proceedings. As mentioned above, this Chamber has previously ruled that its jurisdiction over immediate appeals is limited to matters set out in Rule 104(4).¹¹
10. The Defence seeks to rely on two decisions of the Pre-Trial Chamber in support of its argument that Rule 21 provides an independent basis of appeal.¹² However, these decisions related to the interpretation of Rule 74(3), a differently worded provision governing the availability of appeals by charged persons at the pre-trial stage. Rule 74(3) enumerates certain categories of orders or decisions of the Office of the Co-Investigating Judges which are subject to appeal. Unlike Rule 104(4), it does not provide any mechanism for appeals against other orders or decisions to be appealed at a later stage of proceedings. The Pre Trial Chamber relied on Rule 21 to broadly interpret the right to appeal at the pre-trial stage as the accused person would otherwise have had no opportunity to appeal. In the present case there is no need to resort to Rule 21 as the accused person’s fair trial rights are adequately safeguarded by the provision of a right to appeal the Impugned Decision at the final stage of the proceedings.

⁸ **E130/4/3** *Decision on Ieng Sary’s Appeal Against Trial Chamber’s Order Requiring his Presence in Court*, 13 January 2012, p. 2.

⁹ **E130/4/1** Appeal, *supra* note 1 at paras. 9-10.

¹⁰ **E130/4/1** Appeal, *supra* note 1 at para. 11.

¹¹ **E130/4/3** *Decision on Ieng Sary’s Appeal Against Trial Chamber’s Order Requiring his Presence in Court*, 13 January 2012, p. 2. See also, **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.

¹² **E130/4/1** Appeal, *supra* note 1 at para. 11 and decisions cited therein.

III. THE DEFENCE HAS A PRACTICE OF FILING MANIFESTLY INADMISSIBLE IMMEDIATE APPEALS

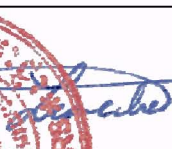

11. As the Co-Prosecutors have previously noted, the Defence has a practice of filing manifestly inadmissible immediate appeals.¹³ Indeed the present Appeal was filed less than one week after the Chamber issued a decision rejecting, as inadmissible, an earlier appeal by the Defence which relied on substantially the same legal arguments relating to Rules 104 and 35(g).¹⁴ This on-going practice abuses the process of the ECCC, burdens the scant resources and time of the Chamber as well as the parties and demonstrates a clear disregard for the rulings of the Chamber on the admissibility of immediate appeals. On this basis, the Co-Prosecutors submit that the Chamber should refer the work performed by the Co-Lawyers for Ieng Sary on the present Appeal to the Defence Support Section for an assessment of whether the work was both necessary and reasonable.¹⁵

IV. RELIEF REQUESTED

12. For the foregoing reasons, the Co-Prosecutors respectfully request the Chamber to:

- (1) find the appeal wholly inadmissible;
- (2) dismiss the Co-Lawyers' request for a public, oral hearing; and
- (3) refer the matter to the Defence Support Section for an assessment of whether the work performed on the Appeal was both necessary and reasonable.

Respectfully submitted,

Date	Name	Place	Signature
1 February 2012	CHEA Leang Co-Prosecutor	Phnom Penh	
	Andrew CAYLEY Co-Prosecutor		

¹³ See **E130/4/2** Co-prosecutors' response to IENG Sary's appeal against the Trial Chamber's decision requiring the accused to be physically present to hear charges and opening statements, 12 January 2012 at para. 11.

¹⁴ **E130/4/3** Decision on Ieng Sary's Appeal Against Trial Chamber's Order Requiring his Presence in Court, 13 January 2012.

¹⁵ In accordance with Internal Rule 11(2)(h) and Article F10 of the Guide to the ECCC Legal Assistance Scheme.