

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

FILING DETAILS

Case No: 002/19-09-2007-ECCC/SC **Party Filing:** Co-Prosecutors
Filed to: Supreme Court Chamber **Original Language:** English
Date of document: 26 November 2012

CLASSIFICATION

**Classification of the document
suggested by the filing party:** PUBLIC

Classification by Supreme Court Chamber: សាធារណៈ/Public

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:



**CO-PROSECUTORS' REPLY TO IENG SARY RESPONSE TO APPEAL OF DECISION
CONCERNING THE SCOPE OF TRIAL IN CASE 002/01**

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I. INTRODUCTION

1. The Co-Prosecutors submit the following reply to Ieng Sary's Response to the Co-Prosecutors' Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01 (the "Response").¹ While the Co-Prosecutors have requested an oral hearing or, alternatively, leave to file a joint reply to the responses of the three Accused,² the Supreme Court Chamber has yet to rule on that request. The Co-Prosecutors thus submit this filing in order to ensure that they do not waive their right to reply to the Response filed by the Ieng Sary Defence.³

II. THE CO-PROSECUTORS' APPEAL IS TIMELY AND ADMISSIBLE

2. The Response does not dispute that the Trial Chamber erred by excluding the District 12 and S-21 crime sites from the scope of trial in Case 002/01. Instead, the Ieng Sary Defence limits its challenge to the Co-Prosecutors' Appeal to arguments about the timeliness and admissibility of the Appeal. The Co-Prosecutors will therefore limit this reply to those issues, and will not respond to the *ad hominem* attacks made against the International Co-Prosecutor in the Response,⁴ other than to note that those personal attacks are inappropriate, completely irrelevant to the Appeal issues and indicative of the lack of merit of the Defence arguments.

A. The Trial Chamber's Ruling on Severance and the Scope of Case 002/01 Was Not Complete Until the 8 October 2012 Decision

3. The Defence first argues that the Appeal is time barred, because the Co-Prosecutors should have appealed either the original Severance Order or the denial of the request for reconsideration.⁵
4. However, the Co-Prosecutors did not appeal the earlier order or decision because the Trial Chamber did not make a final determination on the scope of the Case 002/01 trial, and the additional crime sites that would be included, until the Impugned Decision. In its original Severance Order, the Trial Chamber stated that it "may at any time decide to include in the first trial additional portions of the Closing Order in Case 002."⁶ In its Reconsideration Decision one month later, the Trial Chamber reiterated that it "did not exclude the possibility of adding

¹ E163/5/1/3 Ieng Sary's Response to the Co-Prosecutors' Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01, 19 November 2012 ("Response").

² E163/5/1/6 Co-Prosecutors' Request for a Public Oral Hearing of the Immediate Appeal of the Decision Concerning the Scope of Trial in Case 002/01 or in the Alternative Request to File a Joint Reply to the Three Defence Responses, 21 November 2012.

³ The Ieng Sary Response was notified in English on 20 November 2012 and in Khmer on 21 November 2012, thus the reply to that Response is due on 26 November 2012. As of this date, the response of the Nuon Chea Defence (E163/5/1/4) has only been notified in English. The Khieu Samphan Defence has been granted an extension, and its response is not due until 30 November 2012. E163/5/1/2/1 Decision on Request by Co-Lawyers for Khieu Samphan for Extension of Time to Respond to Co-Prosecutors' Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01, 20 November 2012.

⁴ E163/5/1/3 Response, para. 16 (fn. 33), para. 48.

⁵ E163/5/1/3 Response, para. 21-29.

⁶ E124 Severance Order Pursuant to Internal Rule 89ter, 22 September 2011, para. 6.

additional charges or counts to the first trial in Case 002 where circumstances permit.”⁷ On 17 February 2012, the Trial Chamber noted the Co-Prosecutors’ 27 January 2012 request to include three additional crime sites,⁸ and responded that it “may on its own motion decide in due course to extend the scope of trial in Case 002/01.”⁹

5. In August 2012, the Trial Chamber notified the parties that it was considering a “modest extension” of the scope of trial to include the 3 crime sites that had been proposed by the Co-Prosecutors in January 2012 - the District 12 and Tuol Po Chrey execution sites, and the S-21 security centre.¹⁰ Contrary to the argument made by the Defence in its Response, the Trial Chamber made clear that it had not yet disposed of and was still considering the Co-Prosecutor’s 27 January 2012 request: “Although the principal focus of the Chamber’s efforts to date has been to ensure greater streamlining and trial efficiency, the Chamber has nonetheless also devoted significant time and resources to assessing the impact of acceding to the Co-Prosecutor’s request to expand the scope of Case 002/01 in the manner proposed by E163.”¹¹
6. The Trial Chamber did not make a definitive and final decision on the scope of the Case 002/01 trial, including which crime sites would be included and which would be excluded, until its 8 October 2012 “Notification of Decision on Co-Prosecutors’ Request to Include Additional Crime Sites within the Scope of Trial in Case 002/01 (E163).”¹²
7. The Supreme Court Chamber has recognized that the time to file an appeal does not begin to run until the Trial Chamber issues a complete decision that disposes of the issues raised by a party’s request. In holding that the Nuon Chea Defence’s time to appeal a Trial Chamber decision was not triggered by an earlier oral ruling, this Chamber noted that a judicial decision must “dispose of a legal matter before it in a definite manner,” and that the Trial Chamber’s original decision did not become “complete” until a subsequent written ruling that fully addressed and disposed of

⁷ **E124/7** Decision on Co-Prosecutors’ Request for Reconsideration of the Terms of the Trial Chamber’s Severance Order (E124/2) and Related Motions and Annexes, 18 October 2011, para. 12.

⁸ **E163** Co-Prosecutors’ Request to Include Additional Crime Sites Within the Scope of Trial in Case 002/1, 27 January 2012.

⁹ **E172** Trial Chamber Memorandum titled “Next group of Witnesses, Civil Parties and Experts to be heard in Case 002/01,” 17 February 2012, pg. 4.

¹⁰ **E218** Trial Chamber Memorandum titled “Scheduling of Trial Management Meeting to enable planning of the remaining trial phases in Case 002/01 and implementation of further measures designed to promote trial efficiency,” 3 August 2012, para. 13; **E218.1** Annex to Memorandum titled “Co-Prosecutors’ proposed extension of scope of trial in Case 002/1 (E163),” 3 August 2012, para. 1-5.

¹¹ **E218** *Ibid* at para. 13.

¹² **E163/5** Notification of Decision on Co-Prosecutors’ Request to Include Additional Crime Sites within the Scope of Trial in Case 002/01 (E163) and deadline for submission of applicable law portion of Closing Briefs, 8 October 2012, para. 1-3 (“To permit planning by the parties and to provide certainty in relation to the remaining portions of Case 002/01 to be heard at trial, the Trial Chamber wished to notify the parties and public of its decision on the Co-Prosecutors’ Request to Expand the Scope of the Trial”).

the Rule 35 issues that had been raised by the Defence.¹³ In the instant matter, the Trial Chamber did not make a complete and definitive decision on the scope of trial in Case 002/01 until the Impugned Decision issued on 8 October 2012.

8. The Impugned Decision was communicated to the parties by way of a memorandum. The Ieng Sary Defence has previously recognized that a memorandum “acts as a decision of the Chamber which may be appealed pursuant to Rule 104,” noting that the Trial Chamber “regularly issues decisions in this form.”¹⁴ The Trial Chamber itself has confirmed that such memoranda are “decisions” that are “issued on behalf of the entire Chamber,” pursuant to a “practice familiar before both Cambodian courts and other international tribunals.”¹⁵ In this instance, the title of the memorandum itself reflects this – it is a notification of a *decision*. The Supreme Court Chamber has consistently referred to such memoranda as “decisions” on each occasion that they have been appealed by the Defence.¹⁶
9. There can thus be no question that the Trial Chamber’s 8 October 2012 “Notification of Decision on Co-Prosecutors’ Request to Include Additional Crime Sites” was a decision that is subject to appeal, and that the Co-Prosecutors’ Appeal was filed within the 30-day time limit of Rule 107(1).

B. A Decision that Effectively Terminates the Prosecution of Certain Crimes is Subject to Immediate Appellate Review under Rule 104(4)(a)

10. The Co-Prosecutors recognize, as they have in all prior filings with this Chamber, that the grounds for immediate appellate review are limited to those set forth in Internal Rule 104(4). The Ieng Sary Defence, by contrast, has repeatedly argued in its appeals that both Rule 104(1) and Rule 21 provide independent grounds for interlocutory appeals.¹⁷ In relation to Rule 104(4),

¹³ **E176/2/1/4** Decision on Nuon Chea’s Appeal Against the Trial Chamber’s Decision on Rule 35 Applications for Summary Action, 14 September 2012, para. 25-27.

¹⁴ **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, 20 January 2012, para. 1-2.

¹⁵ **E74** Trial Chamber Response to Motions E67, E57, E56, E58, E23, E59, E20, E33, E71 and E73 following Trial Management Meeting of 5 April 2011, 8 April 2011, pp. 3-4.

¹⁶ **E154/1/1/4** Decision on Ieng Sary’s Appeal Against the Trial Chamber’s Decision on its Senior Legal Officer’s Ex Parte Communications, 25 April 2012; **E9/7/1/1/4** Decision on Two Notices of Appeal Filed by Ieng Sary, 8 April 2011 [referring to E9/7/1 as one of the “decisions by the Trial Chamber”]; **E62/3/10/5/1** Decision on Notice of Appeal from Civil Party Lead Co-Lawyers, 20 September 2011 [referring to E62/3/10/4 as a “decision by the Trial Chamber concerning access to medical reports”].

¹⁷ See, e.g., **E9/7/1/1/1/2** Ieng Sary’s Reply to Co-Prosecutor’s 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, 22 March 2011, para. 2-3; **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, 20 January 2012, para. 3-7, 11.

the Defence has consistently argued for a “broad interpretation of the right to an immediate appeal.”¹⁸

11. While the Supreme Court Chamber has limited immediate appeals to the grounds contained in Rule 104(4), it has not taken a strict or narrow interpretation of those grounds, but instead has adopted a purposive approach, examined the rationale of the rules and considered how the rights of the parties would be affected if limited to a post-judgment appeal.¹⁹ Accordingly, in determining the admissibility of Defence appeals pursuant to Rule 104(4)(d), which authorizes immediate appeals of “decisions on interference with the administration of justice under Rule 35(6),” the Chamber has not interpreted that provision to be strictly limited to decisions that are titled “decisions on interference with the administration of justice” or requests that were expressly based upon Rule 35(6).²⁰ Rather, the Chamber has applied a test which prefers substance over form and considered whether the underlying request “can be characterized at least in part as a request for investigation pursuant to Internal Rule 35,” deeming such appeals admissible “unless it presents allegations to which Internal Rule 35 is manifestly inapplicable.”²¹
12. Similarly, as discussed in the Co-Prosecutors’ Appeal, in deciding the admissibility of appeals pursuant to Rule 104(4)(a), the Chamber has stated that the Rule must be subject to a “reasonable reading” in light of its purpose, rather than a strict one, and should encompass a Trial Chamber’s action that while not amounting to a formal termination of proceedings, nevertheless “does not carry a tangible promise of resumption” and thus “effectively terminates the proceedings from continuing and bars arriving at a judgment on the merits.”²²

¹⁸ **E130/4/1** Ieng Sary’s Appeal Against the Trial Chamber’s Decision Denying his Right to Waive his Presence in the Courtroom During Trial and Denying his Constitutional Right to Assist in his Own Defence, 5 January 2012, para. 11; **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, para. 16; **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, 20 January 2012, para. 4.

¹⁹ **E154/1/1/4** Decision on Ieng Sary’s Appeal Against the Trial Chamber’s Decision on its Senior Legal Officer’s Ex Parte Communications, 25 April 2012, para. 15 (“The Accused has failed to demonstrate how the *ex parte* communications resulted in a denial of his rights or how this conduct amounts to an exceptional circumstance requiring the Chamber to admit the Appeal under Internal Rule 21”); **E95/8/1/4** Decision on Ieng Sary’s Appeal Against Trial Chamber’s Decision on Co-Prosecutors’ Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, 19 March 2012, para. 9-10.

²⁰ **E154/1/1/4** Decision on Ieng Sary’s Appeal Against the Trial Chamber’s Decision on its Senior Legal Officer’s Ex Parte Communications, 25 April 2012, para. 13; **E137/5/1/3** Decision on Ieng Sary’s Appeal Against the Trial Chamber’s Decision on Motions for Disqualification of Judge Silvia Cartwright, 17 April 2012, para. 12.

²¹ **E137/5/1/3** Decision on Ieng Sary’s Appeal Against the Trial Chamber’s Decision on Motions for Disqualification of Judge Silvia Cartwright, 17 April 2012, para. 11-12.

²² **E138/1/7** Decision on Immediate Appeal Against the Trial Chamber’s Order to Release the Accused Ieng Thirith, 13 December 2011, para. 15.

13. Contrary to the Response, the Trial Chamber’s assertion that future trials will take place and that no charges are “discontinued in consequence of the Severance Order”²³ is not dispositive of the issue of effective termination, just as it was not dispositive that the Trial Chamber expressly stated in its decision on Ieng Thirith’s fitness that “the proceedings were stayed and not terminated.”²⁴ Rather, the issue before this Chamber is whether the “effect” of the Trial Chamber’s decision is to terminate proceedings relating to the District 12 and S-21 crime sites.
14. In that regard, the parties (including the Ieng Sary Defence) agree with the Co-Prosecutors that, at present, there is no tangible prospect of future trials at which the Accused will be prosecuted for the crimes that have been severed by the Trial Chamber. Counsel for Ieng Sary has stated that “factoring the evidence involved and ages of the accused,” the odds of trying the remainder of Case 002 is “nil” or “fantasy.”²⁵ Counsel for Nuon Chea has stated: “I think we should absolutely dispense once and for all with the notion that there’s going to be another trial in Case 2. Clearly, we’re stuck with Case 002/001 [sic], that is the trial we’re hearing now, and there will never be another one. I think everyone agrees with that.”²⁶ The Civil Parties have also confirmed their agreement with this conclusion.²⁷
15. Contrary to the Response, an appeal following judgment would serve no purpose, and would not adequately protect the interests of the victims and the Co-Prosecutors. If, as the parties and informed observers agree, a second trial against these Accused is highly unlikely, a post-judgment appeal will not be able to remedy the Trial Chamber’s error. An immediate appeal is the only remedy that can protect the interests of the victims and the Co-Prosecutors, by determining while trial is still ongoing whether the crimes connected to the District 12 and S-21 sites should be adjudicated on the merits as part of this trial. It would simply not be feasible for the Supreme Court Chamber to hear *de novo* all the evidence relating to the District 12 and S-21 crimes sites, as suggested by the Defence.²⁸
16. The Co-Prosecutors also dispute the Defence assertion of “disparate treatment” – that its appeals have been found inadmissible because Rule 104(4) has been “interpreted narrowly.”²⁹ The Defence has attempted to appeal to the Supreme Court Chamber a ruling denying an extension of time and page limits, an order that Ieng Sary attend opening statements and a decision

²³ E163/5/1/3 Response, para. 33.

²⁴ E138 Decision on Ieng Thirith’s Fitness to Stand Trial, 17 November 2011, para. 64.

²⁵ Julia Wallace, “Justice in the dock at Khmer Rouge Trials,” 30 September 2012 *available at*: <http://www.aljazeera.com/indepth/features/2012/09/2012925141556917463.html>.

²⁶ E1/136.1 Transcript, 22 October 2012, p 9 ln. 3-12.

²⁷ E163/5/1/5 Civil Party Lead Co-Lawyers Support to the Co-Prosecutors’ Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01, 21 November 2012, para. 6.

²⁸ E163/5/1/3 Response, para. 41.

²⁹ E163/5/1/3 Response, para. 45.

regarding e-mail communications between the Senior Legal Officer and parties. The Chamber properly concluded that such appeals fell far outside of the bounds of Rule 104(4).³⁰ It ruled similarly when the Civil Parties appealed a decision regarding access to medical reports.³¹

17. In its appeals of the Trial Chamber's decisions on amnesty and the requirement for a nexus between crimes against humanity and armed conflict, the Defence could not make a good faith argument that those decisions had the effect of terminating proceedings. Instead, the Defence could only argue hypothetically that if the Trial Chamber had ruled differently, in its favor, such decision would have terminated the proceedings.³² The Supreme Court Chamber rejected that argument, holding that the Defence position was not a "tenable" reading of Rule 104(4)(a), which was intended to "ensure that an avenue of appeal exists where the proceedings are terminated without arriving at a judgement."³³ Those Defence appeals are not analogous to the instant matter, in which the Trial Chamber's decision actually severed a number of crimes from the ongoing trial proceedings, in circumstances in which there is no tangible prospect of them being resumed later and tried on the merits.
18. Finally, there should be no doubt that the consequences of the Trial Chamber's decision to indefinitely halt proceedings relating to the excluded crime sites are "grave enough"³⁴ to warrant immediate appellate review. The issue at stake is whether or not the Accused will ever face trial on the most serious charges of the Case 002 Closing Order. The consequences of this matter could not be more "grave."

³⁰ **E9/7/1/1/4** Decision on Two Notices of Appeal Filed by Ieng Sary, 8 April 2011; **E130/4/3** Decision on Ieng Sary's Appeal Against Trial Chamber's Order Requiring his Presence in Court, 13 January 2012; **E154/1/1/4** Decision on Ieng Sary's Appeal Against the Trial Chamber's Decision on its Senior Legal Officer's Ex Parte Communications, 25 April 2012.

³¹ **E62/3/10/5/1** Decision on Notice of Appeal from Civil Party Lead Co-Lawyers, 20 September 2011.

³² **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, section III.B.2 ("The Impugned Decision would have terminated the 'first trial' proceedings but for the Trial Chamber's errors"); **E51/15/1/1** 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), 5 December 2011, para. 9.


³³ **E95/8/1/4** Decision on Ieng Sary's Appeal Against Trial Chamber's Decision on Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, 19 March 2012, para. 8-9.

³⁴ **E138/1/7** Decision on Immediate Appeal Against the Trial Chamber's Order to Release the Accused Ieng Thirith, 13 December 2011, para. 15.

III. CONCLUSION

19. The Co-Prosecutors thus respectfully request that the Chamber reject the arguments made by the Ieng Sary Defence in its Response, and determine that the instant Appeal is admissible.

Respectfully submitted,

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26 November 2012	CHEA Leang Co-Prosecutor	Phnom Penh	
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