E95/8/1/4

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

អង្គជំនុំជម្រះតុលាការកំពូល
Supreme Court Chamber
Chambre de la Cour suprême

សំណុំរឿងលេខ: ០០២/១៩-០៩-២០០៧-អ.វ.ត.ក-អ.ជ.ស.ជ/អ.ជ.ត.ក(១០)

Case File/Dossier N°. 002/19-09-2007-ECCC-TC/SC(10)

Before: **Judge KONG Srim, President**
Judge Motoo NOGUCHI
Judge SOM Sereyvuth
Judge Agnieszka KLONOWIECKA-MILART
Judge MONG Monichariya
Judge Chandra Nihal JAYASINGHE
Judge YA Narin

Date: **19 March 2012**
Original Language(s): **Khmer/English**
Classification: **PUBLIC**

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

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THE SUPREME COURT CHAMBER of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") is seised of the immediate appeal filed by IENG Sary ("the Accused") against the decision of the Trial Chamber to grant the Co-Prosecutors' request to exclude the armed conflict nexus requirement from the definition of crimes against humanity ("Appeal"):[1]

I. PROCEDURAL HISTORY

1. On 15 February 2011, the Pre-Trial Chamber ("PTC") held as part of its decision on the appeals against the Closing Order issued by the Co-Investigating Judges[2] that the definition of crimes against humanity applicable during the ECCC's temporal jurisdiction included "an armed conflict nexus requirement [...] such that there needs to be a link to war crimes or crimes against peace, i.e. a link between the underlying acts charged as crimes against humanity and an armed conflict."[3] On 15 June 2011 the Co-Prosecutors filed a request with the Trial Chamber seeking an amendment to the Amended Closing Order to the effect that the armed conflict nexus requirement was not an element of crime against humanity ("Request").[4] On 26 October 2011, the Trial Chamber granted the Request ("Impugned Decision").[5]

2. On 25 November 2011, the Co-Lawyers for IENG Sary ("the Defence") filed the Appeal. On 2 December 2011, the Co-Prosecutors filed a Response,[6] and on 12 December 2011 the Defence filed a Reply.[7]

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[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, E95/8/1/1.
[2] Closing Order, 15 September 2010, D427 ("Closing Order").
[3] Decision on Appeals by NUON Chea and IENG Thirith Against the Closing Order, D427/3/15, 15 February 2011 ("Amended Closing Order"), para. 144.
[4] 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.
[5] Decision on Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, 26 October 2011, E95/8.
[6] 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.
[7] Ieng Sary's Request for Leave to Reply & Reply to the 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, 12 December 2011, E95/8/1/3.

II. SUBMISSIONS

a. Admissibility

3. The Defence argues that the Appeal is admissible pursuant to Internal Rule 104(4)(a), which establishes a right of immediate appeal against decisions which "have the effect of terminating the proceedings." The Defence observes that, in its order issued on 22 September 2011, the Trial Chamber severed the trial in Case 002 into several discrete "cases" ("Severance Order").[8] The Defence further observes that the first trial provided for by the Severance Order is limited to crimes against humanity arising out of the phase 1 and phase 2 population movements.[9] As the first trial does not contemplate any evidence concerning the alleged nexus between the crimes charged and an armed conflict, the Defence argues that the proceedings would have terminated "automatically" for lack of evidence had the Trial Chamber rejected the Co-Prosecutors' Request and found that such a nexus was an element of crimes against humanity.[10] The Defence further maintains that it would not have been possible for the Trial Chamber to admit new evidence "at this late stage" without infringing on the fair trial rights of the Accused.[11] Finally, the Defence argues that, if this Chamber fails to definitively resolve the definition of crimes against humanity prior to trial, it would prejudice the Accused's right to be informed of the case against him.[12] The Defence requests a public, oral hearing.[13]

4. The Co-Prosecutors respond that the plain meaning of Internal Rule 104(4)(a) contemplates only appeals from decisions which terminate the proceedings. Since the Impugned Decision plainly does not terminate the proceedings, the Co-Prosecutors assert that the Appeal is inadmissible under Internal Rule 104(4)(a).[14]

5. In reply, the Defence argues that, in order to protect the equality of arms and maintain a balance between the prosecution and defence's rights of appeal, Internal Rule 104(4)(a)

[8] Severance Order Pursuant to Internal Rule 89*ter*, 22 September 2011, E124.
[9] Severance Order, para. 5. *See* Closing Order, paras 221-282 (defining Phase 1 population movement as occurring in 1975 in Phnom Penh, and Phase 2 as occurring in the Central, Southwest, West and East Zones between 1975 and 1977).
[10] Appeal, paras 10-12.
[11] Appeal, para. 12.
[12] Appeal, paras 13-15.
[13] Appeal, para. 19.
[14] Response, para. 4.

must be interpreted so as to include those decisions which would have terminated the proceedings had the outcome been different.[15]

b. Merits

6. The Defence contends that the Trial Chamber erred in its interpretation of the relevant sources of customary international law[16] and in failing to consider whether, even if customary law did not require a nexus with an armed conflict between 1975 and 1979, such was foreseeable and accessible to the Accused in that time period.[17] The Co-Prosecutors did not respond to the Defence arguments on the merits of the Appeal.

III. DISCUSSION

7. Pursuant to Internal Rule 109(1), the Supreme Court Chamber considers that written submissions are sufficient in this case and that no public hearing is necessary.

a. Admissibility

8. The Supreme Court Chamber finds that the Appeal falls beyond the scope of Internal Rule 104(4)(a), which is limited to appeals from decisions which "have the effect of terminating the proceedings."[18] The Impugned Decision does not have the effect of terminating the proceedings. The contention on the part of the Defence that the Appeal is admissible because the Impugned Decision would have terminated the first phase of the trial in Case 002 but for the Trial Chamber's errors is not tenable from the plain words of Internal Rule 104(4)(a).

9. The equality of arms is not infringed by Internal Rule 104(4)(a), which is neutral on its face and grants a right of appeal to any party who would have a legal interest in appealing a decision of the Trial Chamber which has the effect of terminating the proceedings.[19] Furthermore, the equality of arms does not require that the procedural rights of the

[15] Reply, paras 2-4.
[16] Appeal, paras 27-56.
[17] Appeal, paras 57-61.
[18] Co-Prosecutors' Response, para. 4.
[19] For example, the defence might appeal a decision of the Trial Chamber which stays proceedings, seeking instead dismissal of the charges. *See* Decision on Immediate Appeal against the Trial Chamber's Order to Release the Accused IENG Thirith, 13 December 2011, E138/1/7, para. 15 (Internal Rule 104(4)(a) permits appeals against a decision of the Trial Chamber to stay the proceedings where there is no prospect of resumption).

prosecution and the defence are identical in every respect.[20] The right of appeal provided for in Internal Rule 104(4)(a) ensures that an avenue of appeal exists where the proceedings are terminated without arriving at a judgement and therefore without an opportunity to appeal against it. By contrast, where the Trial Chamber refuses a request to terminate proceedings, the parties concerned may challenge that decision as part of the judgement.[21] Moreover, Article 14(5) of the International Covenant on Civil and Political Rights, which provides that everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law, relates to the right to appeal against a conviction and sentence and not to interlocutory decisions.[22] The authority cited by the Defence does not disturb this conclusion.

10. The Defence has furthermore failed to demonstrate that if the Supreme Court Chamber does not resolve the merits of the present Appeal, the Accused will be denied his right to know the case against him. It is not uncommon for a criminal trial to involve contentious issues of the law on which there is divergent jurisprudence. As the Trial Chamber in any event is not bound by the legal characterisation of the charges provided by the Pre-Trial Chamber,[23] the level of uncertainty in the case against the Accused is not unusual.

FOR THE FOREGOING REASONS the Supreme Court Chamber:

REJECTS the request for an oral hearing; and

DECIDES to reject the Appeal as inadmissible.

Phnom Penh, 19 March 2012
President of the Supreme Court Chamber

Kong Srim

[20] *See Prosecutor v. Kordic & Cerkez*, IT-95-14/2-A, "Decision on Application by Mario Cerkez for Extension of Time to File his Respondent's Brief", Appeals Chamber, 11 September 2001, paras 6-9 (decision to grant the prosecution and not the defendant additional time to file a brief does not violate the equality of arms because prosecution showed "good cause"; equality of arms requires a "fair balance" between the rights of the parties).
[21] Internal Rule 104(1).
[22] *See Prosecutor v. Norman*, SCSL-2003-08-PT, "Decision on the Application for a Stay of Proceedings and Denial of Right to Appeal", Appeals Chamber, 4 November 2003, paras 18-25.
[23] Internal Rule 98(2).