

**BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

FILING DETAILS

Case No: 002/19-09-2007-ECCC/TC **Party Filing:** Co-Prosecutors
Filed to: Trial Chamber **Original Language:** English
Date of document: 24 May 2011

CLASSIFICATION

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

PUBLIC

**Classification by OCIJ
or Chamber:**

សម្ងាត់/Confidential

Classification Status:

សាធារណៈ/Public 04/11/2011

Review of Interim Classification:

Records Officer Name:

Signature:



**CO-PROSECUTORS' RESPONSE TO "IENG SARY'S MOTION TO SUMMON
KING FATHER NORODOM SIHANOUK, PRIME MINISTER HUN SEN, PRINCE
NORODOM RANARIDDH AND SAMDECH CHEA SIM"**

Filed by:
Co-Prosecutors
 CHEA Leang
 Andrew CAYLEY

Distributed to:
Trial Chamber
 Judge NIL Nonn. President
 Judge Silvia CARTWRIGHT
 Judge YA Sokhan
 Judge Jean-Marc LAVERGNE
 Judge THOU Mony

Civil Party Lead Co-Lawyers
 PICH Ang
 Elisabeth SIMONNEAU FORT

Copied to:
Accused
 NUON Chea
 IENG Sary
 KHIEU Samphan
 IENG Thirith

Lawyers for the Defence
 SON Arun
 Michiel PESTMAN
 Victor KOPPE
 ANG Udom
 Michael G. KARNAVAS
 PHAT Pouy Seang
 Diana ELLIS
 SA Sovan
 Jaques VERGES

1. INTRODUCTION

1. On 9 May 2011, IENG Sary, through his defence team (the “Defence”) filed his “Motion to Summon King Father Norodom Sihanouk, Prime Minister Hun Sen, Prince Norodom Ranariddh and Samdech Chea Sim”¹ (the “Motion”). The Defence request that the Trial Chamber summon witnesses at the Initial Hearing to testify on the “background to, the scope of and intention behind” IENG Sary’s Royal Pardon and Amnesty (“RPA”).² They argue that the scope of the RPA had only been assessed through hearsay evidence and consequently witness testimony should be heard to ascertain its full scope. Moreover, they argue these witnesses should be called as the Trial Chamber has the authority to ensure their appearance at the Court under the ECCC Internal Rules (the “Rules”) and the Cambodian Criminal Procedure Code (the “CCPC”).³ For the reasons set out below, the Co-Prosecutors request that this Motion be dismissed.

II. PROCEDURAL HISTORY

2. Following the filing of this Motion on 9 May 2011, two days later, on 11 May 2011 the Trial Chamber issued its memorandum “Scheduling of Initial Hearing” (the “Scheduling Order”) in which the Chamber decided it would only consider the issues related to the “list of potential witnesses and experts submitted by the parties in accordance with the Internal Rules”; the “preliminary objections” and the “initial specification of the substance of the reparations awards the Lead Co-Lawyers intend to seek [...]”.⁴ On 12 May 2011, the Trial Chamber then issued two orders on additional preliminary objections submitted by this Defence, the first one concerning the RPA⁵ and the second one dealing with the *ne bis in idem* principle.⁶ In both orders, the Trial Chamber ruled that the Defence Team was allowed to file additional preliminary objections but limited this possibility to the Pre-Trial Chamber’s Decision on IENG Sary’s Appeal Against the Closing Order.⁷

¹ Document E85, IENG Sary’s “Motion to Summon King Father Norodom Sihanouk, Prime Minister Hun Sen, Prince Norodom Ranariddh and Samdech Chea Sim” (the “Motion”) 9 May 2011, ERN 00686959 – 00686970.

² Motion at page 1.

³ Motion at page 1.

⁴ Document E86, Trial Chamber’s “Scheduling of Initial Hearing,” 11 May 2001, ERN 00687015-00687016.

⁵ Document E51/8, Trial Chamber’s request for “Additional preliminary objections submissions” (amnesty and pardon), 12 May 2011, ERN 00687378.

⁶ Document E51/9, Trial Chamber’s request for “Additional preliminary objections submissions” (*ne bis in idem*), 12 May 2011, ERN 00687381.

⁷ Document D427/1/30, Pre-Trial Chamber’s “Decision on IENG Sary’s Appeal Against the Closing Order,” 11 April 2011, ERN 00661785-00661994.

III. ARGUMENT

3. As the Trial Chamber issued its Scheduling Order two days after this Motion the Trial Chamber has, by the terms of the Order, therefore already considered the request and rejected this Defence's proposal for the calling of witnesses at the Initial Hearing. The Trial Chamber decided that it will not hear any other oral arguments apart from those listed in the Order, as the other issues have been "conclusively determined by the Chamber during the Trial Management Meeting", "will be the subject of further directives" or "may instead be raised before the Chamber by the parties in the course of trial if and when relevant and necessary."⁸ The issue therefore of the calling of witnesses at the Initial Hearing to determine the scope of the RPA has already been considered and rejected in the Trial Chamber's Scheduling Order.⁹
4. The Defence state that under Rules 87(4), the Chamber may summon any person as a witness. While this is true, Rule 80*bis* of the Rules which refers solely to the Initial Hearing states – in relation to witnesses and experts - that the purpose of the Hearing is to allow the Chamber to consider the lists of potential witnesses and experts submitted by the parties.¹⁰ Consequently, the aim of the Initial Hearing is to make oral submissions on the calling of witnesses and experts but not in fact to hear those witnesses at that time. This is further confirmed by the overall construction of the ECCC Rules "Part E. Proceedings Before the Trial Chamber" particularly Rules 79 to 91. On a plain reading of these Rules it is clearly not contemplated to call witnesses at the Initial Hearing nor anytime before the Substantive Hearing.
5. For example Rule 84(2) states that witnesses shall be summoned once the schedule has been decided which by implication of Rule 80*bis* can only be done after the Initial Hearing when the Chamber "shall consider the lists of potential witnesses and experts submitted by the parties in accordance with these IRs" and where the Chamber considers that a proposed witness or expert would be conducive to the good administration of justice.¹¹ It is submitted that it is only after this hearing that the Rules contemplate the Trial Chamber should make its final determination on which witnesses or experts to call.

⁸ Scheduling Order.

⁹ Scheduling Order.

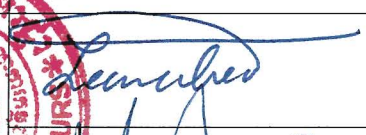
¹⁰ Rule 80(2)*bis*.

¹¹ Rule 80(2)*bis*.

IV. RELIEF REQUESTED

6. Accordingly, as this Motion has already been decided by the Trial Chamber's Scheduling Order and, in any event, the Rules do not contemplate the calling of witnesses at the Initial Hearing, this Motion should be dismissed.

Respectfully submitted,

Date	Name	Place	Signature
24 May 2011	LEANG Chea Co-Prosecutor	Phnom Penh	
	William SMITH Deputy Co-Prosecutor		