

E9/15/1

**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: 28 March 2011

CLASSIFICATION

Classification of the document suggested by the filing party: PUBLIC

Classification by OCIJ or Chamber: សាធារណៈ / Public

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:

CO-PROSECUTORS' RESPONSE TO "IENG SARY'S MOTION IN SUPPORT OF CERTAIN WITNESSES PROPOSED BY THE OTHER DEFENCE TEAMS"

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

Copied to:

Accused
NUON Chea
IENG Sary
IENG Thirith
KHIEU Samphan

Civil Party Lead Co-Lawyers
PICH Ang
Elisabeth SIMONNEAU FORT

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

ឯកសារដើម	
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL	
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/date de reception): 28 / 03 / 2011	
ម៉ោង (Time/Heure) : 16:00	
មន្ត្រីទទួលបន្ទុកសំណុំរឿង / Case File Officer/L'agent chargé du dossier: SANN RADA	

I. INTRODUCTION

1. On 16 March 2011, Ieng Sary through his Defence (the “Defence”) filed a “Motion in Support of Certain Witnesses Proposed by the Other Defence Teams”¹ (the “Motion”). The Defence assert that certain witnesses proposed by Nuon Chea and Khieu Samphan would assist the Trial Chamber in determining material facts in issue, and requests that the Trial Chamber call these witnesses at trial.² For the reasons set out below, the Co-Prosecutors request that the Motion be dismissed as the Defence fail to provide reasons why this late filing should be admitted and they fail to show that it is in the interests of justice to call the witnesses identified.

II. RELEVANT FACTS

2. On 13 January 2011 the Pre-Trial Chamber issued its decision on the Closing Order Appeals thereby making the Closing Order final.³ On 17 January 2011 the Trial Chamber issued its Preparation Order which required all parties to file: (1) a list of proposed witnesses; experts and Civil Parties not seeking protective measures; (2) a list of proposed new witnesses or Civil Parties seeking protective measures; (3) information required in relation to all proposed witnesses, Civil Parties and experts; (4) a list of uncontested facts, including those adjudicated by the Chamber in Case 001; and (5) lists of documents and exhibits.⁴ The Chamber set a deadline for the Co-Prosecutors to file their lists of proposed witnesses, experts and Civil Parties 15 days from 14 January 2011. The other parties were ordered to file their proposed witness, experts and Civil Party lists within 15 days after the Co-Prosecutors filed their lists.
3. On 28 January 2011 the Co-Prosecutors filed their Rule 80 Expert, Witness and Civil Party Lists (the “Co-Prosecutors’ Witness List”),⁵ notified on 31 January 2011. On 8 February 2011 the Trial Chamber notified the parties that extensions of time to file witness, expert and Civil party lists as requested by Ieng Sary, Nuon Chea and Ieng

¹ Document No. E9/15, “Ieng Sary’s Motion in Support of Certain Witnesses Proposed by the Other Defence Teams”, 16 March 2011, ERN 00652121-23.

² Motion, paras.1-3.

³ Document No. D427/4/14, “Decision on Khieu Samphan’s Appeal against the Closing Order,” 13 January 2011, ERN 00634903-06; Document No. D427/2/12, “Decision on Ieng Thirith’s and Nuon Chea’s Appeal against the Closing Order,” 13 January 2011, ERN 00634916-22; Document No. D427/1/26, “Decision on Ieng Sary’s Appeal against the Closing Order,” 13 January 2011, ERN 00634887-91.

⁴ Document E9, Trial Chamber’s “Order to File Material in Preparation for Trial,” 17 January 2011.

⁵ Document No. E9/4, “Co-Prosecutors’ Rule 80 Expert, Witness and Civil Party Lists, including Confidential Annexes 1, 2, 3, 3a, 4, and 5,” 28 January 2011, ERN 00640669-76.

Thirith would not be granted.⁶ On 14 February 2011 the Defence filed “Ieng Sary’s List of Proposed Experts and Notification Concerning his Witness and Civil Party Lists” (the “Defence Expert List”).⁷ Here the Defence informed the Chamber it would not be filing a witness list at this time ;

“Mr.IENG Sary, through his Co-Lawyers (“the Defence”), hereby submits his list of proposed experts and notifies the Trial Chamber that *he does not intend to call any witnesses or Civil Parties at this time and thus will not be providing the Trial Chamber with these lists as required by its Order to File Materials in Preparation for Trial* (emphasis added). Should the OCP be granted leave to request additional witnesses throughout the trial, as it has requested, the Defence submits that it must equally be afforded the opportunity to call any witnesses it deems necessary to Mr. IENG Sary's defence as the trial progresses. Should need arise at any point during the trial to call any witnesses, the Defence will seek leave to do so and will provide the requisite reasoning as to why it would be in the interest of justice to hear the witness(es).”⁸

4. On 15 February 2011 Nuon Chea⁹ and Ieng Thirith¹⁰ filed their proposed witness and expert lists. On 16 February 2011 the Trial Chamber notified Khieu Samphan that an extension would be granted to file their lists on the basis of a translation issue until 18 February 2011.¹¹ On 21 February 2011 Khieu Samphan¹² filed its proposed witness and expert lists. On 23 February 2011 the Co-Prosecutors,¹³ Ieng Sary,¹⁴ Nuon Chea¹⁵ and Khieu Samphan¹⁶ all filed their Rule 80 witness summaries.

III. RELEVANT LAW

5. Rule 80 (2) of the ECCC Internal Rules (the ‘Rules’) states that where the Accused wishes to summon any witnesses...they shall submit an additional list... within 15 (fifteen) days from notification of the Co-Prosecutors’ list. Rule 39 states “*that all time*

⁶ Document E35, Trial Chamber’s “Advance Notification of Chamber’s Disposition of Motions E14, E15, E9/2, E9/3, E24 and E27, 3 February 2011 (notified 8 February 2011), ERN 00642291.

⁷ Document No. E9/4/2, “IENG Sary’s List of Proposed Experts and Notification Concerning his Witness and Civil Party Lists”, 14 February 2011, 00644216-17.

⁸ Defence Witness List at para. 1.

⁹ Document No. E9/4/4, “List of Proposed Witnesses, Experts, and Civil Parties,” 15 February 2011, ERN 00644407-16.

¹⁰ Document No. E9/4/5, “Ieng Thirith List of Witnesses and Expert,” 15 February 2011, ERN 0064447-53.

¹¹ Document E9/6/1, Trial Chamber’s “Notification of Trial Chamber’s Disposition of Request of Extension of Deadlines (E9/6)” 14 February 2011 (notified 16 February 2011), ERN 00644101.

¹² Document No. E9/4/6, “Listes de Témoins et Experts Proposés,” 21 February 2011, ERN 00646238-42.

¹³ Document No. E9/13, “Co-Prosecutors’ Rule 80 Witness, Civil Party and Expert Summaries,” 23 February 2011, ERN 00646780-84.

¹⁴ Document No. E9/12, “IENG Sary’s Rule 80 Summaries of Expertise and Qualifications of Each Proposed Expert and Points of the Indictment to which Each is Expected to Testify,” 23 February 2011, ERN 00646776-77.

¹⁵ Document No. E9/10, “Summaries of Proposed Witnesses, Experts, and Civil Parties,” 23 February 2011, ERN 00646439-43.

¹⁶ Document No. E9/11, “Précisions sur les Témoins et Experts Proposés,” 23 February 2011, ERN 00646535-38.

limits set out in the applicable laws and these IRs, the applicable Practice Directions and, where appropriate, by decision of the judges, must be respected. Subject to this Rule, failure to do so shall lead to the invalidity of the action in question.” Rule 39 (4) allows for the Chambers to extend any time limits set by them...on such terms, if any, as they see fit.

6. Article 9 of the Practice Directions states that a document may be filed outside the time limits as set out in Rule 39 however, in such cases, the person filing the document *shall indicate the reasons for the delay* on the Filing Instructions. The Rule authorizes the Judges or Chamber before which the document is filed to accept or reject the document despite its late filing.
7. The trial preparation provisions outlined in Rule 80 have been adopted from similar trial preparation provisions at international courts charged with prosecuting similar large scale human rights violations. At the International Criminal Tribunal from the Former Yugoslavia (the ‘ICTY’) these parallel provisions are found in Rule 65 *ter* of their Rules of Procedure and Evidence.¹⁷ The question as to whether parties witness lists could be added or amended after the deadline set by the Trial Chamber was considered by an ICTY Trial Chamber in the case of *Milan Lukic*.¹⁸ In this case, the Chamber held that it was settled jurisprudence that witness lists could be amended if the Trial Chamber is satisfied that it is in the interests of justice to do so.¹⁹ In determining whether it would be in the interests of justice to allow the parties to amend the Trial Chamber held the following factors to be considered would ;

“include whether the moving party has shown good cause for its request, the stage of the proceedings at which the request is made, whether granting the amendment would result in undue delay of the proceedings and the repetitive or cumulative nature of the testimony. The Trial Chamber may also consider the complexity of the case, on-going investigations, and translation of documents and other materials. *(footnote removed)* This Trial Chamber is also of the view that it is relevant to consider whether the moving party has exercised due diligence in identifying proposed witnesses at the earliest possible moment in time.”²⁰
8. Within the context of parties obligations to file their witness and document lists for trial as outlined in ICTY Rule 65 *ter* the Trial Chamber confirmed the importance of parties to

¹⁷ International Criminal Tribunal for the Former Yugoslavia (“ICTY”), Rules of Procedure and Evidence, IT/32/Rev.45, 8 December 2010.

¹⁸ *Prosecutor v. Milan Lukic and Sredoje Lukic*, Decision on Prosecution’s Motion to Amend Rule 65 *ter* Witness List and on Related Submissions, IT-98-3211-PT, 22 April 08 at para.9.

¹⁹ *Prosecutor v. Milan Lukic and Sredoje Lukic*, para.9.

²⁰ *Prosecutor v. Milan Lukic and Sredoje Lukic*, para.10.

meet deadlines and the necessity of imposing sanctions if the parties do not meet their obligations. The Chamber held :

“While it is in principle for each party to decide which witnesses to call to prove its case, the parties are under a general obligation to meet set deadlines and to act with due diligence in their preparations. The Trial Chamber notes that, pursuant to Rule 65 *ter* (N), and provided that the procedure laid down therein has been complied with, it may impose sanctions upon parties that do not meet their obligations pursuant to Rule 65 *ter*.”²¹

9. ICTY Rule 65 *ter* (N) states :

“the Trial Chamber shall decide should the case arise, on sanctions to be imposed on a party which fails to perform its obligations pursuant to the present Rule. Such sanctions may include the exclusion of testimonial or documentary evidence.”

IV. ARGUMENT

10. As a preliminary matter as this Motion requesting witnesses to be called has been filed 29 days after the deadline ordered by the Trial Chamber - with no indication for the reason for the delay (at least in the body of the Motion) – it should be dismissed. Rule 39 and Article 9 of the Practice Directions require as such and consequently authorize the rejection of filings in breach of these provisions. If parties fail to comply with the deadlines set by the Chamber unless good reasons can be shown the ability of this Trial Chamber to manage this trial to ensure that it is fair and expeditious is significantly reduced. Parties have an obligation to comply with Trial Chamber’s orders and when they cannot they are obliged to state the reasons why.
11. As to the substance of the request using the test provided in the case of *Milan Lukic*²² the Defence has not shown good cause that it would be in the interests of justice to now call these witnesses after stating on 14 February 2011 that it “did not intend to call any witnesses or Civil Parties at this time and thus will not be providing the Trial Chamber with these lists as required by its Order to File Materials in Preparation for Trial.”²³
12. First, the Motion does not conform to the Trial Chamber’s requirements as outlined in its Preparation Order. The Trial Chamber required the Parties to file 8 different pieces of information for each witness in order to assist the Chamber in determining which witnesses should be summoned to trial.²⁴ More significantly, the witnesses identified are not accompanied by the requisite summaries of facts and points to the Indictment which

²¹ *Prosecutor v. Milan Lukic and Sredoje Lukic*, para. 15.

²² *Prosecutor v. Milan Lukic and Sredoje Lukic*.

²³ Defence Expert List at para. 1.

²⁴ Preparation Order, para. 2.

each proposed witness is expected to testify.²⁵ Each Party was ordered to file their witness lists and summaries in the appropriate form. The order did not authorize one party to another party's proposed witnesses. By doing so it circumvents the purpose of the exercise to understand from each Accused why these individuals are specifically called and what particular information they are expected to give and moreover what relevance they have in either proving or disproving material facts contained in the Indictment.

13. Second, the Motion is vague in that it fails to define precisely the full list of witnesses the Defence seek to propose for trial. The Defence asserts that it supports Nuon Chea and Khieu Samphan's proposals to call "former members of the Office of the Co-Investigating Judges, *such as* Judges You Bunleng and Marcel Lemonde and Mr. Wayne Bastin" [emphasis added].²⁶ This part of the proposal lacks definition as to the numbers of witnesses that it intends to call. The Trial Chamber should not be expected to speculate as to the actual intent of how many witnesses this Defence seek to testify at trial. The Defence must explain specifically which witnesses it seeks to call to allow the other Parties to prepare their case.
14. Third, the Defence has failed to demonstrate that it exercised due diligence in identifying these proposed witnesses at the earliest moment in time. This small group of witnesses, at least those identified sufficiently in the Motion, have been the subject of extensive litigation by this Defence - before the Investigating Judges and the Pre-Trial Chamber throughout this process, as evidenced by the references in the Motion. The Defence must have been aware of these witnesses when deciding to notify the Trial Chamber that it proposed to not call any witnesses on 14 February 2011.
15. The Trial Chamber's Order does not allow the Defence to decide when to provide the Trial Chamber information regarding the witnesses it seeks to call as it is their responsibility to manage the trial as it sees fit in the interest of determining the truth. Therefore, in the absence of an explanation, as to why the Defence has either (1) chosen to withhold information from the Trial Chamber regarding its intention to call these witnesses or (2) why these witnesses could not be identified with the exercise of due diligence when the Defence filed their notice to not call witnesses as of 14 February 2011 - they should not be permitted to add further witnesses to their list of experts.


²⁵ Preparation Order, para. 6.

²⁶ Motion, para. 1.

V. RELIEF REQUESTED

16. In conclusion, the Defence have (1) failed to provide reasons for the late filing, (2) failed to provide the relevant witness and testimony details required by the Trial Chamber, (3) failed to identify the exact number of witnesses they seek to call and (4) failed to provide reasons why the witnesses it does identify were not included in a witness list due 29 days ago as part of their duty to act with due diligence. In view of the above reasoning, it is respectfully submitted that the Motion be dismissed.

Respectfully submitted,

Date	Name	Place	Signature
28 March 2011	YET Chakriya Deputy Co-Prosecutor	Phnom Penh	
	William SMITH Deputy Co-Prosecutor		