

**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:** 8 January 2013

**CLASSIFICATION**

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

**Classification by the Trial Chamber:** សាធារណៈ/Public

**Classification Status:**

**Review of Interim Classification:**

**Records Officer Name:**

**Signature:**

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**CO-PROSECUTORS' RESPONSE TO IENG SARY'S REQUEST FOR  
INFORMATION CONCERNING TCE-33**

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## I. INTRODUCTION

1. On 7 December 2012, the Defence for Ieng Sary (“the Defence”) filed *Ieng Sary’s Request for Information Concerning TCE-33* (“the Request”)<sup>1</sup> by which it “requests the Trial Chamber to obtain and provide the parties with information concerning TCE-33’s background and professional activities, prior to his appearance in court.”<sup>2</sup> The Defence claims to only have “limited information regarding the nature of TCE-33’s background and professional activities” and that “to determine whether TCE-33 can be an independent and impartial witness, the Defence must have a complete picture of his background and professional activities prior to his testimony.”<sup>3</sup>
2. In contradiction with the alleged limited information at its disposal and with the very purpose of its own Request, the Defence appears to have already drawn the conclusion that “TCE-33’s history of employment with the ECCC and his professional activities lead to the inescapable conclusion that TCE-33 simply cannot be an impartial witness”,<sup>4</sup> that “the information that the Defence does have nevertheless makes clear that TCE-33 has pre-judged this case and has pre-determined Mr. IENG Sary’s guilt”<sup>5</sup> and that “the nature of TCE-33’s professional activities and his long association with ECCC investigative and prosecutorial entities impact his credibility as an impartial witness.”<sup>6</sup>
3. The Co-Prosecutors hereby submit that the request should be entirely dismissed as it lacks both legal and factual basis.

## II. PROCEDURAL HISTORY

4. This Request follows a long series of Defence requests and motions concerning TCE-33 filed between January 2008 and September 2010 before the Co-Investigating Judges and the Pre-Trial Chamber, in unsuccessful attempts to obtain information regarding alleged bias and conflicts of interest,<sup>7</sup> to disqualify TCE-33 as an OCIJ Investigator,<sup>8</sup> to limit the

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<sup>1</sup> E236/2/2, Ieng Sary’s Request for Information Concerning TCE-33, 7 December 2012

<sup>2</sup> E236/2/2, Introduction, p. 1.

<sup>3</sup> E236/2/2, para. 14.

<sup>4</sup> E236/2/2, para. 12.

<sup>5</sup> E236/2/2, para. 14.

<sup>6</sup> E236/2/2, Introduction, p. 1.

<sup>7</sup> A121, Ieng Sary Request for Information Concerning Potential Conflict of Interest, 10 January 2008, as rejected by the Co-Investigating Judges in A121/I; A121/II, Ieng Sary Request Concerning the Interview of Mr. Ieng Sary on his Conditions of Detention on 2 May 2008, 24 April 2008 and OCIJ Response A121/III dated 26 May 2008; A252, Ieng Sary Request for Information Concerning the Potential Existence of Conflict of Interest of OCIJ Investigator [TCE-33], 30 January 2009, as rejected by the CIJs Response A252/2 on 29 May 2009.

scope of duties of TCE-33, including his exclusion from drafting the Closing Order<sup>9</sup> or to annul all investigative acts performed by or with the assistance of TCE-33.<sup>10</sup>

5. The Co-Investigating Judges rejected all those repetitive requests directed against TCE-33 on grounds they lacked any legal basis. The Pre-Trial Chamber also rejected both Defence appeals against the OCIJ Orders regarding disqualification<sup>11</sup> and annulment.<sup>12</sup> In the latter decision, the Pre-Trial Chamber found that “the facts forming the foundation of the Request are repetitious of the allegations in the Disqualification Application”, that the Defence “allegations in the Request are merely assertions” and, more meaningfully for the present Defence Request, that “the fact that [persons are experts] in their field and that they have, over the course of their career, expressed opinions based on their academic research and knowledge of a particular subject, without more, does not render them biased or partial employee[s] of the Office of the Co-Investigating Judges.”<sup>13</sup>

### III. ARGUMENT

#### *No change of procedure is justified for the questioning of TCE-33*

6. The Defence does not put forward any legal basis or reasonable argument that necessitates a change to the Trial Chamber’s current procedure by allowing the Defence or any other party to question extensively witnesses in writing prior to their public

<sup>8</sup> **PTC Doc. No 1**, Ieng Sary's Application for Disqualification of OCIJ Investigator [TCE-33] and OCIJ Legal Officer [...] in the Office of the Co-Investigating Judges, 8 July 2009, ERN ENG 00348412-40; see also **PTC Doc. No 2**, Co-Prosecutors’ Response to Ieng Sary’s Application for Disqualification of Investigators [...] of the Office of the Co-Investigating Judges, 23 July 2009, ERN ENG 00354190-4201.

<sup>9</sup> **D377**, Ieng Sary’s Request to Limit the Scope of Duties of OCIJ Investigator [TCE-33], 13 April 2010; see also **D377/1**, OCIJ Greffiers’ Response dated 29 April 2010; **D377/2**, Ieng Sary’s Response to the OCIJ Letter Responding on his Request to Limit the Scope of Duties of OCIJ Investigator [TCE-33], 4 May 2010.

<sup>10</sup> **D381**, Ieng Sary's Application to Seize the PTC with a Request for Annulment of all Investigative Acts Performed by or with the Assistance of [TCE-33] and [...], 19 May 2010; **D381/1**, Ieng Sary Notice of Appeal against the Constructive Dismissal of the Application to Seize the PTC with a Request for Annulment of all Investigative Acts Performed by or with the assistance of [TCE-33] and [...], 31 August 2010; **D412**, Ieng Sary’s Expedited Request to Stay the Proceedings Pending a Pre-Trial Chamber Decision on his Annulment Appeals on the Investigative / Analysis Work Performed by OCIJ Employees [...] and [TCE-33] and DC-Cam Evidence Relied Upon by the OCIJ, 1 September 2010; **D381/1/1**, Ieng Sary’s Appeal against the OCIJ Constructive Denial of Ieng Sary’s Application to Seize the PTC with a Request for Annulment of all Investigative Acts Performed by or with the Assistance of [TCE-33] and [...], 3 September 2010; **D402/1/2**, Ieng Sary’s Appeal against the OCIJ’s Order Rejecting Ieng Sary’s Application to Seize the PTC with a Request for Annulment of all Investigative Acts Performed by or with the assistance of [TCE-33] and [...], 15 September 2010; see also **D402**, Co-Investigating Judges’ Order Refusing Ieng Sary’s Requests for Annulment (D381 and D387), 3 September 2010.

<sup>11</sup> **PTC Doc. No 3**, PTC Decision dated 22 September 2009, ERN ENG 00378097-8103; the PTC found the appeal inadmissible.

<sup>12</sup> **D402/1/4**, PTC Confidential Decision on Ieng Sary’s Appeal against the OCIJ’s Order Rejecting Ieng Sary’s Application to Seize the PTC with a Request for Annulment of all Investigative Acts Performed by or with the assistance of [TCE-33] and [...], 30 November 2010.

<sup>13</sup> **D402/1/4**, paras. 33 & 36.

appearance before the Court. An unsubstantiated allegation of lack of impartiality or independence of a summonsed expert witness cannot suffice to render necessary such a change of practice, especially towards the end of the trial of Case 002/01.

7. The total time allocated to the three defence teams for questioning TCE-33 at the hearing -two days in total- is more than sufficient to include a line of questioning on the professional background of TCE-33. By the Request, the Defence manifestly intended to outsource its obligation to prepare for trial and to obtain additional information that should be elicited during the questioning time allocated to the Defence by the Chamber.<sup>14</sup> As stated above, the information sought does not even appear to be necessary to the Defence as it has already determined, based presumably on information at its disposal, that “TCE-33 simply cannot be an impartial witness.”<sup>15</sup>

*The Defence’s observations about the alleged impartiality  
of TCE-33 are irrelevant and untimely*

8. The Trial Chamber made its decision to hear TCE-33 “in view of the large number of documents on the Case File and put before the Chamber of which he has personal knowledge and/or was the author”.<sup>16</sup> This reasoning is in line with the definition of an expert witness stated by the jurisprudence of the *ad hoc* international criminal tribunals and incorporated by the Trial Chamber in paragraphs 15 and 16 of its 5 July 2012 Decision on Assignment of Experts.<sup>17</sup> For example, according to the ICTY jurisprudence, an expert is “a person whom by virtue of some specialised knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute”.<sup>18</sup> In determining whether a particular person meets these criteria, a judicial authority should take into account “the person’s former and current positions and professional experience

<sup>14</sup> Should the Defence find it necessary or helpful, it could request to follow the procedure used previously in relation to expert witnesses pursuant to the Trial Chamber's Order of 25 May 2012 (E172/24), whereby the parties may provide to the expert witness, through the Witness and Expert Support Section, “further particulars about the scope of their intended questioning”.

<sup>15</sup> E236/2/2, para. 14.

<sup>16</sup> E236/2, p. 1, para. 2, as quoted in E236/2/2, para. 1.

<sup>17</sup> E215, Trial Chamber Decision on Assignment of Experts, 5 July 2012, paras. 15 & 16.

<sup>18</sup> ICTY, *Prosecutor v. Stanislav Galic*, Case No. IT-98-29-T, Decision Concerning the Expert Witnesses Ewa Tabeau and Richards Philipps, 3 July 2002, p.2. Before the ICTR, a similar definition has been adopted: “the evidence of an expert witness is meant to provide specialized knowledge – be it a skill or knowledge acquired through training- that may assist the fact finder to understand the evidence presented”, in ICTR, *Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-A, Appeal Judgment, 28 November 2007, para. 198.

through references to the person's curriculum vitae, as well as scholarly articles, other particulars or any other pertinent information".<sup>19</sup>

9. The Co-Prosecutors note that the Trial Chamber has already decided to summons the expert witness TCE-33 -and therefore to admit his live testimony- and has scheduled four days of hearings, on 25-28 March 2013. Before summoning TCE-33, the Trial Chamber has necessarily taken into consideration the professional background of TCE-33, including his previous deployment to the Office of the Co-Prosecutors (OCP) for six months in July to December 2006 (during the preliminary investigation phase, more than six months prior to the filing of the Introductory Submission dated 19 July 2007) and his previous work as an investigator and consultant with the Office of the Co-Investigating Judges (OCIJ). Moreover, the decision to summons TCE-33 has been taken by the Trial Chamber after considering the objections made by the Defence in two separate filings, in which the Defence underlined the same arguments of alleged lack of impartiality and independence.<sup>20</sup> It should also be mentioned that unlike the Defence, the Defence for Nuon Chea, in addition to the OCP, requested the Trial Chamber to add TCE-33 to its tentative list of live witnesses and experts.<sup>21</sup>
10. The situation of TCE-33 is somewhat similar to that of expert witness Craig ETCHESON who testified for several days in May 2009 before this Chamber during the Case 001 trial while working with the OCP.<sup>22</sup> Unlike Craig ETCHESON, TCE-33 worked during the entire judicial investigations phase of Case 001 for neutral and impartial co-investigating judges, rather than a party to the proceedings such as the OCP. Regarding TCE-33's six-month of work with the OCP during the preliminary investigations phase, ICTY case law underlines that "the mere fact that an expert witness is employed by or paid by a party does not disqualify him or her from testifying as an expert witness".<sup>23</sup>

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<sup>19</sup> ICTY, *Prosecutor v. Momcilo Perišić*, Case No. IT-04-81-T, Decision on Defence Motion to Exclude the Expert Report of Morten Torkildsen, 30 December 2008, para.8.

<sup>20</sup> **E9/4/9**, Ieng Sary's Initial Objection to the OCP Proposed Experts, 24 February 2011, para. 27; **E93/12**, Ieng Sary's Joint Observations to Certain Witnesses and Experts Requested by the Co-Prosecutors, Civil Parties and Nuon Chea Following the Trial Chamber's Tentative List of Witnesses, 15 July 2011, paras. 5, 6, 9 & 11.

<sup>21</sup> **E93/9**, Nuon Chea Request for Additional Witnesses & Continuation of Initial Hearing, 5 July 2011, and its Annex **E93/9.1**, where the name of TCE-33 appears at pages 11-12 under no. 24.

<sup>22</sup> *Case of Duch 001*, Trial Chamber's transcripts bearing the references **E1/20.1** (18 May 2009), **E1/21.1** (19 May 2009), **E1/22.1** (20 May 2009), **E1/23.1** (21 May 2009), **E1/25.1** (26 May 2009), **E1/26.1** (27 May 2009) and **E1/27.1** (28 May 2009).

<sup>23</sup> See for example, ICTY, *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Decision on Prosecution's Submission of Statement of Expert Witness Ewan Brown, 3 June 2003, p. 4.

11. Further, the Defence assertion that TCE-33, testifying under oath, cannot be an impartial or independent witness is irrelevant at this stage. This type of observation relates to the probative value of the testimony, not its admissibility.<sup>24</sup> According to ICTR jurisprudence, “the party alleging bias on the part of an expert witness may demonstrate such bias through cross-examination, by calling its own expert witnesses or by means of an expert opinion in reply. Just as for any other evidence presented, it is for the Trial Chamber to assess the reliability and probative value of the expert report and testimony”.<sup>25</sup>
12. Internal Rule 84 (4) actually provides that “all decisions of the Chamber concerning the summoning of witnesses shall be open to appeal only at the same time as the Judgment of the Chamber on the merits”. The Request attempts to circumvent Rule 84 (4) and disguises yet another attempt to disqualify TCE-33 as a request for information. There is no “disqualification” procedure for lack of independence or impartiality of witnesses or expert witnesses under the ECCC Internal Rules. Rule 34 applies strictly and exclusively to specific judges, and not to investigators, other court staff members or witnesses.<sup>26</sup>
13. The Defence confusion between the role and status of an OCIJ investigator or consultant and an independent and impartial co-investigating judge is patent at paragraph 14 of the Request. The Defence alleges that TCE-33 “pre-judged this case and pre-determined Mr. IENG Sary’s guilt.”<sup>27</sup> However, TCE-33 is not a judge of the bench and the concepts of “pre-judgment” or “pre-determination” do not apply to him. TCE-33 has been employed by the ECCC / United Nations precisely for his pre-existing knowledge of and research on the Democratic Kampuchea era. As recalled by the Pre-Trial Chamber (see above, paragraph 5), an expert witness can express opinions based on his academic research and knowledge of a particular subject. In any case, the Defence is free to ask TCE-33 any question regarding his opinions on the Accused during its examination.
14. Finally, the Defence will have ample opportunity to test the credibility of expert witness TCE-33 at the hearing by directly asking him questions regarding all relevant and allowable background / professional matters, as it did for example with DC-Cam Director YOUK Chhang. The Defence will also have the opportunity to discuss the probative

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<sup>24</sup> ICTY, *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Decision on Prosecution’s Submission of Statement of Expert Witness Ewan Brown, 3 June 2003, p. 4.

<sup>25</sup> ICTR, *Prosecutor v. F. Nahimana et al.*, Case No. ICTR-99-52-A, Appeal Judgment, 28 November 2007, para. 199.

<sup>26</sup> See **PTC Doc. No 3**, PTC Decision, 22 September 2009, paras. 14, 15, 20 & 22.

<sup>27</sup> **E236/2/2**, para. 14.

value of any testimony in its final submissions after the completion of the evidence hearings. As the weight to be given to any individual's testimony will ultimately be decided by professional judges who make up the Trial Chamber, and not by a jury, in light of the totality of the evidence adduced before that Chamber, there is no prejudice that could even theoretically result from hearing TCE-33's testimony.<sup>28</sup>

*The information requested from TCE-33 is based on speculation, untimely or too vague*

15. In paragraph 11 of the Request, the Defence takes for granted purported facts that are mere speculation, based on an unspecified and unverified source. Although the Defence refers in paragraph 13 to the "*alleged* work [of TCE-33] as a CIA intelligence officer at a time relevant to the Closing Order", it describes this *alleged* fact everywhere else in the Request as if it were an established matter.<sup>29</sup> For example, in paragraph 11 (a), (d) and (i), the Defence seeks information as to whether "TCE-33's prior work with the CIA or any other intelligence-gathering agency was disclosed" to the OCP, OCIJ or any other ECCC entity prior to the commencement of his employment. In Paragraph 11 (w), the Defence similarly seeks the exact dates, precise role and activities of TCE-33 "as an intelligence officer, or in any other capacity, with the CIA, or any U.S. intelligence-gathering agency."
16. In reality, the only source supporting the Defence allegation that TCE-33 might have worked for an intelligence-gathering agency is the Defence itself, who claim to have been provided a confidential document which it has never disclosed or filed, as it appears from paragraph 1 of Document A252 dated 30 January 2009 and in particular its footnote 3.<sup>30</sup> This alleged fact has never been established and cannot be used by the Defence as a basis for its Request or to damage the reputation or credibility of TCE-33. The Co-Investigating Judges confirmed in their response that the TCE-33's alleged employment by the US Central Intelligence Agency was not established: "we have no knowledge of any

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<sup>28</sup> See ICTY, *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Decision on Prosecution's Submission of Statement of Expert Witness Ewan Brown, 3 June 2003, p. 4.

<sup>29</sup> E236/2/2, para. 7 ("The Defence requested information as to TCE-33's precise role and activities performed while an intelligence officer, presumably with the United States CIA"), para 11 (a), (d), (i) & (w).

<sup>30</sup> A252, Ieng Sary Request for Information Concerning the Potential Existence of Conflict of Interest of OCIJ Investigator [TCE-33], 30 January 2009, para. 1. Footnote 3 reads: "Through a confidential source the Defence was provided with documentation which appeared authentic..."

information or documentation that might support the allegations in your request in any way at all.”<sup>31</sup>

17. Moreover, any relevant information sought by the Defence in the Request can be elicited from TCE-33 at the time of his testimony. The only potentially relevant information mentioned by the Defence in the Request was post February 2010 publications by TCE-33 (Request, paragraph 11 (l)) and TCE-33’s possession of primary source documents (paragraph 11 (p)).
18. However, the Defence can identify TCE-33’s latest publications through the internet, rendering the request for that information unnecessary. In fact, it appears from footnotes 17 to 19 of the Request that the Defence already identified three post February 2010 publications. As for the request for any of TCE-33’s primary source documents not already on the Case File, it should be rejected as vague and overbroad. Further, TCE-33 does not currently have access to the Case File to undertake any tedious comparative study. The Defence did not attempt to define those primary source documents or to specifically identify the relevant documents or groups of documents in which the Defence is interested.

#### IV. CONCLUSION

19. For these reasons, the Co-Prosecutors respectfully request the Chamber to dismiss the Defence Request for information concerning TCE-33 in its entirety.

Date	Name	Place	Signature
8 January 2013	CHEA Leang Co-Prosecutor	Phnom Penh	
	William Smith Deputy Co-Prosecutor		

<sup>31</sup> A252/2, OCIJ Response to Ieng Sary Request for Information Regarding [TCE-33], 29 May 2009, final paragraph.