

BEFORE THE TRIAL CHAMBER**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 002/19-09-2007-ECCC/TC**Party Filing:** The Defence for IENG Sary**Filed to:** The Trial Chamber**Original language:** ENGLISH**Date of document:** 7 December 2012**CLASSIFICATION****Classification of the document
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IENG SARY'S REQUEST FOR INFORMATION CONCERNING TCE-33

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All Defence Teams**All Civil Parties**

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby 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. This request is made necessary by the Trial Chamber’s recent decision to call TCE-33 as a witness in Case 002/01,¹ despite the improbability that TCE-33 can be an independent and impartial witness. 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. The Trial Chamber must obtain from TCE-33 more information about his background and professional activities prior to his testimony.

I. BACKGROUND

1. On 26 November 2012, the Trial Chamber issued a memorandum indicating that TCE-33 will be summoned to testify “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.”² The Trial Chamber did not indicate whether TCE-33 will be testifying as an expert witness.³
2. In 2004, during the ECCC’s establishment and in anticipation of the OCP’s preliminary investigations, TCE-33 co-authored SEVEN CANDIDATES FOR PROSECUTION: ACCOUNTABILITY FOR THE CRIMES OF THE KHMER ROUGE. One of the “seven candidates for prosecution” named by TCE-33 was Mr. IENG Sary.⁴

¹ Trial Chamber Memorandum titled Announcement of Upcoming Witnesses, 26 November, E236/2, p. 1.

² *Id.*, p. 1.

³ The Defence has repeatedly objected to TCE-33 being designated as an expert witness. *See, e.g.*, IENG Sary’s Response to the Co-Prosecutors’ Motion Which Accompanied Their Rule 80 Expert, Witness and Civil Party Lists, 8 February 2011, E9/4/1; IENG Sary’s Initial Objection to the OCP Proposed Experts & Request for Leave to File Supplementary Submission Within 30 Days, 24 February 2011, E9/4/9; 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, E93/12; IENG Sary’s Rule 87(4) Response to the OCP’s Request to Call TCW-505, TCW-754, TCW-100, TCE-33, TCW-720, TCW-781 and TCW-164, 14 September 2012, E218/3/1. The Trial Chamber did not include TCE-33 in its decision assigning expert witness status to several proposed experts. *See* Decision on Experts, 5 July 2012, E215.

⁴ STEPHEN HEDER & BRIAN TITTEMORE, SEVEN CANDIDATES FOR PROSECUTION: ACCOUNTABILITY FOR THE CRIMES OF THE KHMER ROUGE 75-92 (March 2004), E3/48. The report was originally published in June 2001 through the War Crimes Research Office, Washington College of Law, American University. The 2004 version of the report was published in cooperation with DC-Cam.

3. From July 2006 to December 2006, prior to the filing of the Introductory Submission,⁵ TCE-33 worked as an analyst for the OCP,⁶ which was investigating at least three of the seven “candidates for prosecution” that TCE-33 had identified just two years earlier.
4. In December 2006, TCE-33 transferred to the Office of Co-Investigating Judges (“OCIJ”) to work as an investigator,⁷ assisting with the investigation and preparation of the Closing Order (Indictment). The OCIJ is tasked with investigating the facts set out in the OCP’s Introductory Submission.⁸ TCE-33 remained with the OCIJ until at least 23 February 2010.⁹
5. According to the eyewitness account of Mr. Wayne Bastin, the former Chief of the Intelligence and Analysis Unit of the OCIJ,¹⁰ while working for the OCIJ TCE-33 attended a meeting between Judge Lemonde and several international members of the OCIJ at Judge Lemonde’s residence in Phnom Penh. At this meeting, Judge Lemonde instructed TCE-33 and the others present to search primarily for inculpatory evidence rather than conduct an objective investigation. Judge Lemonde stated that he would prefer that the team “find more inculpatory evidence than exculpatory evidence.”¹¹ TCE-33, according to Mr. Bastin’s recollection, remained silent and did not protest.¹²
6. On 10 January 2008, the Defence filed a request with the OCIJ seeking information about TCE-33’s previous employment with the OCP, including the dates and nature of his employment, which was unknown to the Defence at the time.¹³ The OCIJ responded only that TCE-33 was employed by the OCP from July to December 2006, but provided no

⁵ Introductory Submission, 20 July 2007, D3.

⁶ Co-Prosecutors’ Request to Hear a Further 2 Experts and 13 Witnesses in the First Phase of the Trial and Notice of Intention to Put 7 Video-Clips Relating to Nuon Chea Before the Trial Chamber Pursuant to Rule 87(4), 5 July 2011, E93/7, para. 9; Request for Information Concerning Potential Conflict of Interest, 10 January 2008, A121; OCIJ Letter to the Defence titled Request for Information Regarding an Eventual Conflict of Interest, 24 January 2008 (“OCIJ 2008 Letter to the Defence”), A121/I, p. 1.

⁷ OCIJ 2008 Letter to the Defence, p. 1.

⁸ Rule 55(2).

⁹ See Order on Co-Prosecutors’ Request for Appointment of Experts, 23 February 2010, D281/3, para. 7.

¹⁰ Mr. Bastin’s professional expertise is beyond dispute. He currently serves as a Police Officer in Australia. He has 31 years of service, mostly in the areas of Organized Crime and Homicide, where his major role is that of an Intelligence Manager. He previously served for 12 months with the International Criminal Tribunal for Rwanda as an Analyst/Investigator, and spent 12 months with the Special Court for Sierra Leone where he was Chief of the Intelligence Unit. He was also a senior Investigator with the U.N. Independent Special Commission of Inquiry for Timor Leste in 2006, and was responsible for establishing the Intel Unit at the ECCC in 2007. He returned to the ECCC in 2008 and served as Chief of the Intelligence and Analysis Unit.

¹¹ IENG Sary’s Application to Disqualify Co-Investigating Judge Marcel Lemonde & Request for a Public Hearing, 9 October 2009, 1, Annex A, p. 1.

¹² *Id.*, p. 2.

¹³ Request for Information Concerning Potential Conflict of Interest, 10 January 2008, A121.

information about the extent of TCE-33's duties at the OCP.¹⁴ TCE-33 failed to provide any information in response to the Defence's inquiries.

7. On 30 January 2009, the Defence again filed a request with the OCIJ seeking information about TCE-33. The Defence was in receipt of information that TCE-33 had referred to himself in a book proposal as having researched the Communist Party of Kampuchea for 30 years as "a journalist, *intelligence officer*, human rights advocate, historian, UN official, legal scholar and political scientist" prior to working as an investigator for the OCIJ.¹⁵ The Defence requested information as to TCE-33's precise role and activities performed while an intelligence officer, presumably with the United States Central Intelligence Agency ("CIA"). Four months later, the OCIJ stated that it had no knowledge of any information or documents that might support the allegation.¹⁶ TCE-33 again failed to provide any information in response to the Defence's inquiries.
8. Since leaving the OCIJ,¹⁷ TCE-33 has written articles that directly relate to factual issues that the Trial Chamber will be deciding in Case 002/01¹⁸ and concern the ECCC's ability to investigate and prosecute Cases 003 and 004.¹⁹
9. In *The Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia as Regards Khmer Rouge "Senior Leaders" and Others "Most Responsible" for Khmer*

¹⁴ OCIJ 2008 Letter to the Defence.

¹⁵ Request for Information Concerning the Potential Existence of Conflict of Interest of OCIJ Investigator Stephen Heder, 30 January 2009, A252, para. 1 (emphasis added). The Defence notes that Ben Kiernan also refers to TCE-33 as a "former intelligence officer" in *GENOCIDE AND RESISTANCE IN SOUTHEAST ASIA: JUSTICE IN CAMBODIA & EAST TIMOR* 225 (Transaction Publishers 2008).

¹⁶ OCIJ Letter to the Defence titled Your Request for Information concerning Mr. Stephen Heder, 29 May 2009, A252/2, p. 2.

¹⁷ It appears that TCE-33 left the OCIJ due to disappointment that Cases 003 and 004 would not be pursued. See *Safeguarding Judicial Independence in Mixed Tribunals: Lessons from the ECCC and Best Practices for the Future*, International Bar Association Report, September 2011, quoting TCE-33's resignation letter to the OCIJ: "In view of the judges' decision to close the investigation into Case File 003 effectively without investigating it, which I, like others, believe was unreasonable; in view of the UN staff's evidently growing lack of confidence in your leadership, which I share; and in view of the toxic atmosphere of mutual mistrust generated by your management of what is now a professionally dysfunctional office, I have concluded that no good use can or will be made of my consultancy services."

¹⁸ Stephen Heder, *Communist Party of Kampuchea Policies on Class and on Dealing with Enemies Among the People and Within the Revolutionary Ranks, 1960-1979: Centre, Districts and Grassroots*, 26 April 2012, available at <http://www.cambodiatribunal.org/sites/default/files/reports/Heder,%20CPK%20Policy%20on%20Class%20and%20Enemies,%20120426.pdf>.

¹⁹ Stephen Heder, *The Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia as Regards Khmer Rouge "Senior Leaders" and Others "Most Responsible" for Khmer Rouge Crimes: A History and Recent Developments*, 26 April 2012, available at <http://www.cambodiatribunal.org/sites/default/files/reports/Final%20Revised%20Heder%20Personal%20Jurisdiction%20Review.120426.pdf>.

Rouge Crimes: A History and Recent Developments, TCE-33 summarized at length the negotiations for the establishment of the ECCC and concluded that “the most reasonable interpretation, legally speaking” of the ECCC’s personal jurisdiction is that it should include mid-level CPK leaders.²⁰ The timing of this article coincided with the OCIJ’s consideration of whether the ECCC has jurisdiction to investigate the suspects in Cases 003 and 004, and the resignation of Reserve International Co-Investigating Judge Laurent Kasper-Ansermet due to his purported inability to carry out his duties.²¹

10. TCE-33 is currently an advisor to DC-Cam,²² an organization that has a strong and pre-determined interest in seeing convictions in Case 002.²³ TCE-33 is also reportedly working for Human Rights Watch (“HRW”) in a research capacity.

II. INFORMATION REQUESTED

11. The Defence respectfully requests that the Trial Chamber seek information as to:

TCE-33’s work with the OCP

- a. Whether TCE-33’s prior work with the CIA or any other intelligence-gathering agency was disclosed to the OCP prior to the commencement of his employment;
- b. The exact nature of TCE-33’s work with the OCP, including whether:
 - i. TCE-33 was involved, in any capacity, in the investigative or drafting process of the Introductory Submission, such as:
 1. Reviewing and analyzing documents;
 2. Interviewing witnesses; or

²⁰ *Id.*, p. 42.

²¹ See Press Release of the Reserve International Co-Investigating Judge, 4 May 2012; Press Release by the International Reserve Co-Investigating Judge, 28 March 2012; Press Release by the International Reserve Co-Investigating Judge, 19 March 2012, tendering his resignation effective 4 May 2012.

²² See DC-Cam Organizational Chart, listing TCE-33 as an advisor, available at http://d.dccam.org/Abouts/Staff/pdf/DC-Cam_CHART_2012.pdf.

²³ See 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, E93/12, para. 9.

3. Participating in brainstorming sessions with members of the OCP;
- c. The names of all OCP staff, such as Mr. Craig Etcheson, with whom TCE-33 has had contact since his departure from the ECCC and the dates and nature of that contact.

TCE-33's work with the OCIJ

- d. Whether TCE-33's prior work with the CIA or any other intelligence-gathering agency was disclosed to the OCIJ prior to the commencement of his employment;
- e. The exact nature of TCE-33's work with the OCIJ, including whether:
 - i. TCE-33 was involved, in any capacity, in the investigative or drafting process of the Closing Order, such as:
 1. Reviewing and analyzing documents;
 2. Interviewing witnesses; or
 3. Participating in brainstorming sessions with members of the OCIJ;
- f. The dates on which TCE-33 ceased working as an investigator, consultant, or in any other capacity, for the OCIJ;
- g. The names of all OCIJ staff, such as Mr. David Boyle, with whom TCE-33 has had contact since his departure from the ECCC and the dates and nature of that contact.

TCE-33's work with other ECCC entities

- h. Whether TCE-33 has worked as a consultant, or in any other capacity, for any other entity of the ECCC;
- i. If so, whether TCE-33's prior work with the CIA or any other intelligence-gathering agency was disclosed to that entity prior to the commencement of his employment;

- j. The exact nature of TCE-33's work with that entity, including whether TCE-33 is involved in:
 - i. Reviewing and analyzing documents;
 - ii. Interviewing witnesses; or
 - iii. Participating in brainstorming sessions;
- k. The dates of TCE-33's employment.

TCE-33's post-February 2010 publications

- l. The titles, dates and publications of any books, articles or other materials related to the ECCC and / or Case 002 that TCE-33 has published since leaving employment at the ECCC;
- m. Whether TCE-33 discussed his articles published on 26 April 2012²⁴ with any members of the OCIJ (including Judges) or OCP prior to or while writing the article or after its publication and, if so;
 - i. The dates, frequency and content of those contacts;
 - ii. Whether TCE-33 incorporated any of the content of those contacts in his article and, if so, in what context; and
 - iii. Whether TCE-33 provided any members of the OCIJ (including Judges) or OCP with copies of the article;
- n. Whether TCE-33 conducted any interviews with ECCC staff or others while writing the articles published on 26 April 2012 and, if so;
 - i. The names of the staff or other individuals interviewed;
 - ii. The dates of the interviews; and
 - iii. The content of these interviews;

²⁴ *The Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia as Regards Khmer Rouge "Senior Leaders" and Others "Most Responsible" for Khmer Rouge Crimes: A History and Recent Developments and Communist Party of Kampuchea Policies on Class and on Dealing with Enemies Among the People and Within the Revolutionary Ranks, 1960-1979: Centre, Districts and Grassroots. See supra n. 18-19.*

- o. Whether TCE-33 has discussed any other books, articles or other materials with any members of the OCIJ (including Judges) or OCP and, if so, the dates, frequency and content of those discussions.

TCE-33's primary source documents

- p. Whether TCE-33 is in possession of any primary source documents that are not already on the Case File and, if so;
 - i. The types of documents in his possession;
 - ii. The titles, dates and publication information relating to those documents; and
 - iii. The content of those documents.

TCE-33's contacts with other witnesses or Civil Parties

- q. Whether TCE-33 has had any contact with any witnesses (expert or otherwise) or Civil Parties who have testified, or who are scheduled to testify, in Case 002/01 and, if so, the dates, frequency and content of those contacts.

TCE-33's work with DC-Cam

- r. TCE-33's functions and duties while associated with DC-Cam;
- s. The extent to which TCE-33 has been associated with DC-Cam in the past, including:
 - i. The dates on which TCE-33 worked with or for DC-Cam;
 - ii. The capacity in which TCE-33 worked with or for DC-Cam; and
 - iii. The materials produced as a result of that work.

TCE-33's work with HRW

- t. TCE-33's functions and duties while employed by or associated with HRW;
- u. The extent to which TCE-33 has been associated with HRW in the past, including:

- i. The dates on which TCE-33 worked with or for HRW;
 - ii. The capacity in which TCE-33 worked with or for HRW; and
 - iii. The materials produced as a result of that work.
- v. Whether TCE-33 disclosed any information to HRW or other organizations pertaining to Case 003 and / or Case 004 prior to leaving the ECCC, or subsequent to his departure (it has been reported that information was leaked to the media to which only ECCC insiders, such as TCE-33, would be privy);

TCE-33's work with the CIA or any other U.S. intelligence-gathering agency

- w. TCE-33's prior employment as an intelligence officer, or in any other capacity, with the CIA, or any U.S. intelligence-gathering agency, including:
- i. The exact dates of his employment;
 - ii. His precise role within the agency;
 - iii. The activities TCE-33 performed while in this position; and
 - iv. Anything else that might be relevant to the issue of TCE-33's ability to be an independent and impartial witness.

III. ARGUMENT

12. 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. After first writing a report in which he investigated Mr. IENG Sary and the other Accused and identified them as "candidates for prosecution,"²⁵ TCE-33 went to work as an analyst for the OCP, the entity that investigated those same individuals and drafted criminal charges against them. TCE-33 then moved to the OCIJ, which was tasked with gathering exculpatory and inculpatory evidence in a supposedly impartial manner,²⁶ to act as an investigator, thereby enabling TCE-33 to further validate his prior conclusions regarding

²⁵ See STEPHEN HEDER & BRIAN TITTEMORE, SEVEN CANDIDATES FOR PROSECUTION: ACCOUNTABILITY FOR THE CRIMES OF THE KHMER ROUGE 59-100, E3/48, wherein TCE-33 essentially makes the OCP's case for prosecuting Mr. IENG Sary, Mr. NUON Chea and Mr. KHIEU Samphan, including providing "Legal Analysis and Conclusions" regarding each of the Accused's proposed prosecutions.

²⁶ Rule 55(2), 55(5).

the Accused's guilt. Given his prior prosecution-oriented activities, TCE-33's work for the OCIJ constituted an inherent conflict of interest.

13. The Trial Chamber has an obligation to ensure fair and transparent proceedings and to safeguard Mr. IENG Sary's interests.²⁷ TCE-33's employment history with the ECCC, his alleged work as a CIA intelligence officer at a time relevant to the Closing Order and his other professional activities are relevant to determining whether TCE-33 can testify in an independent and impartial manner.
14. The Defence has limited information regarding the nature of TCE-33's background and professional activities. 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. 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.

WHEREFORE, the Defence respectfully requests that the Trial Chamber exercise its inherent authority and order TCE-33 to provide the above-requested information as expeditiously as possible, but prior to the commencement of his testimony.

Respectfully submitted,



ANG Udom

Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 7th day of **December, 2012**

²⁷ Rules 21(1), 21(1)(a).