



**ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ**

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

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

អង្គជំនុំជម្រះសាលាដំបូង

Trial Chamber
Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ

Case File/Dossier No. 002/19-09-2007/ECCC/TC

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Before: Judge NIL Nonn, President
Judge Silvia CARTWRIGHT
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge YOU Ottara

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DECISION ON DESIGNATION OF TCE-33

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1. INTRODUCTION

1. On 26 November 2012, the Chamber indicated that it would summon 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.”¹ TCE-33 is scheduled to give evidence shortly. The Co-Prosecutors propose that TCE-33 be called as an expert witness.² In multiple filings, the Defence teams oppose the designation of TCE-33 as an expert, on grounds that TCE-33 is neither independent nor impartial as he has worked for the Office of the Co-Prosecutors (“OCP”) and the Office of Co-Investigating Judges (“OCIJ”).³ By this decision, the Chamber sets out the basis on which it will hear TCE-33’s evidence.

2. SUBMISSIONS

2. The Co-Prosecutors say that TCE-33 is:

widely considered one of the world’s foremost authorities on the history, politics, evolution and authority structure of the CPK, the DK regime, and events which took place in Cambodia during the DK period. He holds BA, MA (Cornell) and PhD (London) degrees and is currently a lecturer on South East Asian Politics at the School of Oriental and African Studies at the University of London. He is a member of the Board of the Documentation Centre of Cambodia, and is fluent in Khmer.⁴

3. The Co-Prosecutors indicate that TCE-33 is the author of numerous books, academic articles and working papers on the Khmer Rouge, Communist Party of Kampuchea (“CPK”)

¹ Announcement of Upcoming Witnesses, E236/2, 26 November 2012, p. 1.

² Co-Prosecutors’ Rule 80 Expert, Witness and Civil Party Lists, Including Confidential Annexes 1, 2, 3, 3A, 4 and 5, E9/4, 28 January 2011, para. 8; Annex 1: Proposed Order of Witness Appearances at Trial, E9/4.1 (identifying P-037, later re-designated as TCE-33, as an expert); Annex 2: OCP Expert List, E9/4.1, p. 2 (identifying P-037 as an expert); Co-Prosecutors’ rule 80 witness, Civil Party and expert summaries, E9/13.1, 23 February 2011, p. 18 (summary of TCE-33’s proposed evidence); Co-Prosecutors’ Response to Trial Chamber Directive in Advance of Initial Hearing Concerning Proposed Witnesses, E93/3, 21 June 2011; 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), E93/7, 5 July 2011 (“Co-Prosecutors’ Request for Additional Witnesses”), para. 3; Notice of Co-Prosecutors’ Position on Key Issues to be Discussed at 17 August 2012 Trial Management Meeting (with Confidential Annex A), E218/2, 15 August 2012.

³ KHIEU Samphan’s Objection to Calling Certain Experts, E9/4/10, 28 February 2011, para. 11; NUON Chea’s Initial Observations Regarding the Witnesses Proposed by the Parties, E9/4/12, 28 February 2011, para. 7. As a consequence of the termination of all proceedings against IENG Sary following his death (Termination of Proceedings Against the Accused IENG Sary, E270/1, 14 March 2013, para. 3), the following IENG Sary Defence motions pending, in whole or in part at the time of his death are moot: IENG Sary’s Request for Information Concerning TCE-33, E236/2/2, 11 December 2012; IENG Sary’s Initial Objection to the OCP Proposed Experts & Request for Leave to File Supplementary Submissions within 30 days, E9/4/9, 24 February 2011, para. 27 and 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, E93/12, 15 July 2011, para. 3.

⁴ Co-Prosecutors’ rule 80 witness, Civil Party and expert summaries, E9/13.1, 23 February 2011, p. 18.

and Democratic Kampuchea (“DK”). Over a period of more than 30 years, TCE-33 has conducted extensive examinations of CPK and DK related documents, collaborated with other Cambodia experts and interviewed numerous CPK cadres and Cambodians affected by the events during the DK regime. TCE-33 has also interviewed senior leaders of CPK/DK, including IENG Sary and KHIEU Samphan. The Co-Prosecutors submit that TCE-33’s evidence is essential in order to assist the Chamber in ascertaining the truth in relation to the matters alleged in the Closing Order.⁵

4. The Co-Prosecutors submit that TCE-33 is one of the world’s foremost authorities on the history, policies, evolution and authority structure of the CPK/DK regime. He is also a leading authority on the Khmer language and CPK terminology and will assist the Chamber in clarifying the meaning of key terms used in Khmer Rouge documents.⁶ They request that TCE-33 be examined before the Chamber on:

the history of the CPK; CPK, DK and RAK functioning and authority structures; origin and evolution of CPK policies regarding class, forced collectivisation and labour, and identification and repression of enemies, which drove the criminal policies described in the Indictment; the CPK / DK security apparatus, and the Party Centre’s oversight of it; the evolving purges within and outside the regime; legal and factual authority of the Accused; Khmer Rouge’s use of a unique vocabulary; and CPK policies regarding Buddhists, the Vietnamese and the Cham, [in addition to] the interviews he conducted with the Accused and other members of the CPK, and asked to authenticate the records of those interviews.⁷

5. The Trial Chamber has previously expressed its reluctance to call TCE-33 on the grounds that his testimony is likely to be contested and to substantially prolong proceedings.⁸ The Co-Prosecutors nevertheless argue that:

of all the people in the world, if there was one person that we would turn to explain Communist ideology as it existed in the Democratic Kampuchea regime [...] he would be that person. [H]e is also a person who conducted very important interviews of some of the Accused.⁹

6. The KHIEU Samphan Defence object to TCE-33 appearing as an expert witness on grounds of his prior affiliations, and argue that summoning TCE-33 would “create the

⁵ Co-Prosecutors’ Request for Additional Witnesses.

⁶ Co-Prosecutors’ Request for Additional Witnesses, para. 13; *see also* Annex 1 to Prosecutors’ Response to Trial Chamber Directive in Advance of Initial Hearing Concerning Proposed Witnesses, E93/3.1, 21 June 2011, p. 4 (identifying TCE-33’s evidence as relevant to each of the first four trial segments of Case 002/01 as identified by the Chamber during its first Trial Management Meeting).

⁷ Co-Prosecutors’ rule 80 witness, Civil Party and expert summaries, E9/13.1, 23 February 2011, p. 19.

⁸ T. 17 August 2012, pp. 18-19.

⁹ T. 17 August 2012, pp. 22-23.

impression that the Trial Chamber is partial and biased”.¹⁰ The NUON Chea Defence also concur that TCE-33 may not qualify as an expert given his “current and previous associations with organs of the tribunal, in particular the [OCP] and the [OCIJ].”¹¹ However, they agree that TCE-33 is a “very important witness for the reasons identified by the Prosecution”.¹²

7. While acknowledging that TCE-33 was previously employed by the OCP as an analyst and investigator and by the OCIJ in a consultative capacity, the Co-Prosecutors contend that:

regardless of any previous or current professional affiliations with organs of the Court, expert witnesses are required and expected to testify with the utmost neutrality and to make statements and draw conclusions [that are] independent and impartial.¹³

8. They aver that although TCE-33 was previously a member of the prosecution staff, he has been primarily involved in investigations by the OCIJ – an independent office within the ECCC. Nor should TCE-33’s involvement in the interview of some witnesses preclude his designation as an expert. In any event, the Co-Prosecutors submit that TCE-33’s impartiality can be explored, if required, during his examination by the parties in court.¹⁴

9. Regarding the OCIJ’s decision not to hear TCE-33, the Co-Prosecutors submit that the OCIJ simply deferred expert testimony to the trial stage. The OCIJ placed publications of various proposed experts on the Case File in the event the Trial Chamber considered it useful to hear their evidence.¹⁵ Therefore, the Trial Chamber should not reject TCE-33 on the basis that he was not interviewed during the investigation phase.

10. Further, and at a minimum, none of the above considerations preclude TCE-33 from testifying as a witness of fact.¹⁶ The Co-Prosecutors note that TCE-33 conducted extensive interviews with IENG Sary and KHIEU Samphan and “is in the unique position to verify his notes from these interviews and offer additional recollections.”¹⁷

¹⁰ KHIEU Samphan’s Objection to Calling Certain Experts, E9/4/10, 28 February 2011, para. 11.

¹¹ Initial Observations Regarding the Witnesses Proposed by the Parties, E9/4/12, 28 February 2011, para. 7.

¹² T. 17 August 2012, p. 28.

¹³ Co-Prosecutors’ Request for Additional Witnesses, para. 7.

¹⁴ Co-Prosecutors’ Request for Additional Witnesses, paras 8-10.

¹⁵ Co-Prosecutors’ Response to Trial Chamber Directive in Advance of Initial Hearing Concerning Proposed Witnesses, E93/3, 21 June 2011, para. 14, citing Order on Co-Prosecutors’ Request for Appointment of Experts, D281/3, 23 February 2010, paras 5, 8.

¹⁶ Co-Prosecutors’ Request for Additional Witnesses, para. 8.

¹⁷ Co-Prosecutors’ Request for Additional Witnesses, para. 13; *see also* Annex 1 to Prosecutors’ Response to Trial Chamber Directive in Advance of Initial Hearing Concerning Proposed Witnesses, E93/3.1, 21 June 2011, p. 4 (noting that TCE-33 has interviewed numerous other CPK cadres).

11. The NUON Chea Defence also identifies TCE-33 as a leading expert on Cambodia but categorises his evidence as relevant to the OCIJ investigation rather than the facts at issue in the trial. They submit that TCE-33 is more appropriately classified as a witness of fact in light of his knowledge of the Case 002 investigation, but acknowledge that he should be questioned on “all topics which are relevant to this trial.”¹⁸ The NUON Chea Defence revised witness list describes TCE-33 as an individual “indispensable” to their case.¹⁹

3. FINDINGS

12. On 23 February 2010, the OCIJ decided not to hear TCE-33 as an expert on grounds this evidence duplicated material already on the Case File and would result in undue delay.²⁰ It noted that as TCE-33 had been an OCIJ staff member, it would therefore not “be in the best interests of justice to appoint [TCE-33] as [an expert] under ECCC Internal Rule 31 in these circumstances.”²¹ They noted, however, that TCE-33 may still give evidence, at the request of the parties, should the Trial Chamber consider this useful.²² The Pre-Trial Chamber also confirmed the OCIJ’s rejection of the IENG Sary Defence’s request to annul all investigative acts performed by TCE-33 or with his assistance, finding that

the fact that a person is an expert 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 a biased or partial employee of the [OCIJ].²³

13. Although the OCIJ had denied the request to appoint TCE-33 as an expert because, among other things, he was an OCIJ staff member, the Chamber notes that challenges to the independence or impartiality of expert witnesses have before other international tribunals generally been considered as relevant to the weight to be given to expert evidence rather than

¹⁸ Initial Observations Regarding the Witnesses Proposed by the Parties, E9/4/12, 28 February 2011, para. 7; T. 17 August 2012, p. 28.

¹⁹ NUON Chea’s Updated Summaries of Proposed Witnesses, Experts, and Civil Parties, E93/4.3, 21 June 2011, pp. 40-41 (indicating that TCE-33 could offer “insight into the course and caliber of the OCIJ Case 002 Investigation”); *see also* NUON Chea Request for Additional Witnesses & Continuation of Initial Hearing, E93/9, 5 July 2011 and Annex E93/9.1, pp. 11-12.

²⁰ Order on Co-Prosecutors’ Request for Appointment of Experts, D281/3, 23 February 2010 (“OCIJ Order”), para. 6.

²¹ OCIJ Order, para. 7.

²² OCIJ Order, para. 8.

²³ Pre-Trial Chamber Decision on IENG Sary’s Appeal Against the OCIJ’s Order Rejecting IENG Sary’s Application to Seize the Pre-Trial Chamber with a Request for Annulment of all Investigative Acts Performed by or with the Assistance of [TCE-33] & David Boyle and IENG Sary’s Application to Seize the Pre-Trial Chamber with a Request for Annulment of All Evidence Collected from the Documentation Center of Cambodia & Expedited Appeal Against the OCIJ Rejection of a Stay of the Proceedings, D402/1/4, 30 November 2010 (“Pre-Trial Chamber Decision”), para. 33.

its admissibility.²⁴ In *Popović et al*, where the Defence challenged the admissibility of expert evidence from a former United States army intelligence analyst employed by the Office of the Prosecutor, the Trial Chamber ruled that “concerns relating to the Witness’ independence and impartiality [...] are matters of weight, not admissibility.”²⁵ The Appeals Chamber held that the party alleging bias may demonstrate it through cross-examination, by calling its own expert witness or by means of an expert opinion in reply.²⁶ In dismissing the Defence’s appeal, the Appeals Chamber noted that the extent of the proposed expert’s involvement with the investigation and preparation of the prosecution’s case could be explored during cross-examination, thus giving the Appellants full opportunity to challenge the admissibility of his reports.²⁷

14. In *Milutinović et al*, an ICTY Trial Chamber declined to hear an expert proposed by the prosecution because his involvement in the investigation and preparation of the case was such that it could not regard his opinion as having the appearance of impartiality on which findings crucial to the determination of guilt or innocence might confidently be made. The Trial Chamber found the proposed expert to be “far closer to the case than would be appropriate for an expert who can express opinions on which the Chamber might rely.”²⁸ It was, however, willing to hear the witness “testify about facts, but not his opinions.”²⁹ In *Dorđević*, an ICTY Trial Chamber reached the same conclusion about the same individual.³⁰ However, the individual excluded from giving expert evidence in *Milutinović et al* and

²⁴ *Prosecutor v. Popović et al*, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, ICTY Appeals Chamber (IT-05-88-AR73.2), 30 January 2008 (“*Popović Decision*”); *Prosecutor v. Nahimana et al*, Judgement, ICTR Appeals Chamber (ICTR-99-52-A), 28 November 2007, para. 282 and *Prosecutor v. Taylor*, Decision on Defence Application to Exclude the Evidence of Proposed Prosecution Witness Corinne Dufka or, in the alternative, to limit its scope and on urgent Prosecution request for decision, SC-SL Trial Chamber (SCSL-03-01-T), 19 June 2008, para. 17; see also Internal Rule 87(1) and (3) (indicating that a Chamber may reject evidence on grounds of irrelevance, impossibility of obtaining evidence within a reasonable time, unsuitability to prove the facts alleged, or due to the existence of breaches of fundamental legal standards concerning the rules of evidence, but that all evidence is otherwise admissible).

²⁵ Decision on Defence Rule 94bis Notice Regarding Prosecution Expert Witness Richard Butler, 19 September 2007.

²⁶ *Popović Decision*, para. 21.

²⁷ *Popović Decision*, para. 31 (acknowledging, however, that in a limited number of instances, Trial Chambers have not admitted a proposed expert on grounds that he or she lacked impartiality, independence or due to an appearance of bias).

²⁸ *Prosecutor v. Milutinović et al*, Trial Transcript, ICTY Trial Chamber (No.IT-05-87-T), 13 July 2006, pp. 840-844 and *Prosecutor v. Milutinović et al*, Decision on Prosecution Request for Certification of Interlocutory Appeal of Decision on Admission of Witness Phillip Coo’s Expert Report , ICTY Appeals Chamber (No.IT-05-87-T), 30 August 2006 (“*Milutinović Decision*”), para. 10.

²⁹ *Milutinović Decision*, para. 11.

³⁰ *Prosecutor v. Dorđević* Decision on Defence Notice Under Rule 94bis, ICTY Trial Chamber (IT-05-87/1-T) 5 March 2009, para. 19.

Dorđević was allowed to give expert evidence in both *Milošević* and *Limaj*.³¹ In addition, the ICTR Trial Chamber in *Akayesu* precluded an accused from one case giving expert evidence in another because his impartiality could not be sufficiently assured.³² The above cases illustrate that assessments of a proposed expert's qualifications and potential bias are made on a case-by-case basis in the light of all circumstances.³³

15. The Trial Chamber adopts the reasoning of the ICTY Appeals Chamber and will hear TCE-33's evidence as an expert. It will assess the weight to be attributed to it in the light of the submissions made to date regarding the impartiality or otherwise of TCE-33 in consequence of his past employment and his in-court examination by the Chamber and all parties. However, in circumstances where the TCE-33 has yet to testify regarding the nature of his prior roles before the Co-Investigating Judges and Co-Prosecutors, the Chamber considers it premature to reject TCE-33's evidence on this basis.

16. As to submissions that factual evidence should be heard from TCE-33, the Chamber notes that there are a significant number of documents on the Case File of which TCE-33 has first-hand knowledge, including interviews that he conducted with certain Accused. The Chamber will therefore also hear relevant factual evidence from TCE-33.

17. Regarding the NUON Chea Defence request that TCE-33 provide evidence as to the "course and caliber" of the judicial investigation in Case 002, the Chamber reminds all parties of its prior decisions outlining the recourse available to them under the ECCC legal framework to subject information gathered during the lengthy judicial investigation to scrutiny, and thus the limited permissible scope of examination before the Trial Chamber of these issues.³⁴ The parties are directed to confine their questioning to areas relevant to the trial in Case 002 and are reminded of the time allocated to each party for questioning of TCE-33, in the interests of a fair and expeditious trial.

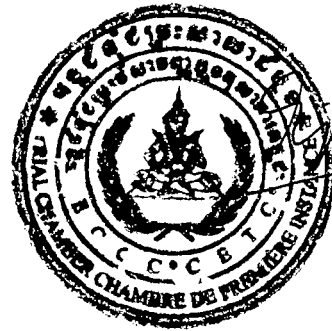
18. Finally, the Chamber directs the Co-Prosecutors to commence the in-court examination of TCE-33 pursuant to Internal Rule 91 and 91*bis*.

³¹ *Prosecutor v. Milošević*, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for *Voir Dire* Proceedings, ICTY Trial Chamber (IT-02-54-T), 20 June 2005, para. 2; *Prosecutor v. Limaj et al*, Trial Transcript, ICTY Trial Chamber, IT-03-66, 12 April 2005, p. 5693; Decision on Assignment of Experts, E215, 5 July 2012.

³² *Prosecutor v Akayesu*, Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness, ICTR Trial Chamber (No. ICTR-96-4-T), 9 March 1998; *see also Popović* Decision, para.22.

³³ *Popović* Decision, para.31.

³⁴ Decision on Defence Requests Concerning Irregularities Alleged to Have Occurred During the Judicial Investigation (E221, E223, E224, E224/2, E234, E234/2, E241 and E241/1), E251, 7 December 2012, paras 20-22.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:**AFFIRMS** that it will hear the evidence of TCE-33 as an expert; and**DIRECTS** the Co-Prosecutors to lead the in-court questioning of TCE-33 pursuant to Internal Rules 91 and 91bis. *RAA*.**Phnom Penh, 26 April 2013**
President of the Trial Chamber**Nil Nonn**