

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:** 14 September 2012**CLASSIFICATION****Classification of the document
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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

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All Defence Teams**All Civil Parties**

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Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby responds to the OCP’s Request to call TCW-505, TCW-754, TCW-100, TCE-33, TCW-720, TCW-781 and TCW-164.¹ This Response is made necessary because the OCP’s belated filing of its Request made it impossible for the Defence to perform its due diligence obligations and respond to the Request in a reasoned fashion at the 17 August 2012 trial management meeting.² The OCP has failed to meet its burden to demonstrate that there is “compelling justification”³ for any of the proposed new witnesses to appear before the Chamber. This is an attempt to circumvent the Severance Order and will defeat the purpose of severing the case, which was to have a streamlined, efficient trial and to reach judgment during the lifetimes of all the Accused.⁴ Adding these witnesses would unnecessarily delay proceedings that have already caused Mr. IENG Sary to be detained – despite his constitutionally enshrined right to be presumed innocent⁵ – for nearly 5 years.

I. RESPONSE

1. The OCP proposes adding several witnesses who, according to the OCP’s own witness summaries, are mainly relevant to areas outside the scope of Case 002/01. If these witnesses appear, the OCP will undeniably seek to question them on areas outside the scope of Case 002/01, claiming that such questioning is relevant for background or context, or that the witnesses may be unavailable later if they are not questioned now on the full extent of their knowledge, or that “this type of testimony is very fundamental to the JCE that the Co-Prosecutors are seeking to prove.”⁶ To suggest otherwise is poppycock. The OCP proposes that some of these witnesses be substituted for others because these individuals are better witnesses.⁷ Replacing some witnesses with others

¹ This Request was made in the Notice of Co-Prosecutors’ Position on Key Issues to be Discussed at 17 August 2012 Trial Management Meeting (with Confidential Annex A), 15 August 2012, E218/2, and during the 17 August 2012 trial management meeting.

² For more on this belated filing, which was notified to the Defence only one day prior to the Trial Management Meeting, see IENG Sary’s Motion to Strike *Notice of Co-Prosecutors’ Position on Key Issues to be Discussed at 17 August 2012 Trial Management Meeting* and its Annex or, in the Alternative, Request to Respond, 16 August 2012, E218/3.

³ See Transcript, 17 August 2012, E1/114.1, p. 18: “The Chamber considers that calling these individuals would undercut many of the above efficiency gains, and it is reluctant to do so in absence of compelling justification.”

⁴ “Separation of proceedings will enable the Chamber to issue a verdict following a shortened trial, safeguarding the fundamental interest of victims in achieving meaningful and timely justice, and the right of all Accused in Case 002 to an expeditious trial.” Severance Order Pursuant to Internal Rule 89ter, 22 September 2011, E124, para. 8.

⁵ Article 38 of the Cambodian Constitution mandates: “The accused shall be considered innocent until the court has judged finally on the case.”

⁶ Transcript, 17 August 2012, E1/114.1, p. 22.

⁷ *Id.*, p. 20-21.

should only be done if the testimony of the substituted witnesses can *add* value to Case 002/01 *without* expanding its scope. The Trial Chamber created its current witness list presumably after reviewing the entire Case File, particularly the witness summaries prepared by the OCP and the witnesses' OCIJ statements. If the original witness summaries of the proposed witnesses did not indicate that the witnesses could provide important testimony on areas relevant to Case 002/01, then it stands to reason that these new witnesses are now being proposed in an attempt to expand the scope of Case 002/01. The Defence's views on the individual witnesses proposed are set out below.

A. TCW-505

2. The OCP's summary of this witness lists "Kraing Ta Chan Security Centre," "Factual Findings of Joint Criminal Enterprise - Cooperatives and Worksites [168 to 177], Security Centres and Execution Sites [178 to 204]; Tram Kok Cooperatives – Structure and Personnel [304 to 309], Security [315 to 318]; Srae Ambel Worksite – Structure and Personnel [371 to 375]," and "Ieng Sary – Cooperatives and Worksites – Knowledge and Implementation of this Policy [1043 to 1047];" as relevant issues. None of these issues are part of Case 002/01. Discussion of any of these topics during Case 002/01 would violate the terms of the Severance Order and significantly expand the scope of the first trial. Should this witness be called to testify, he must not be permitted to discuss these topics.

3. During the 17 August 2012 Trial Management meeting, the OCP stated that TCW-505 could provide "very significant information ... related to the evacuation of Phnom Penh."⁸ This was absent from the OCP's summary of this witness⁹ and appears unnecessary, as several other witnesses and even Mr. NUON Chea have spoken and are expected to speak about the evacuation of Phnom Penh.¹⁰ Additional testimony on this subject would merely be cumulative. During the trial management meeting, the OCP also referred to the importance of Tram Kak district records and indicated that TCW-505 would be the best witness to discuss communications and the reporting structure. Were the Trial Chamber to agree to call this witness, the OCP should be required, within a short period set by the Trial Chamber, to provide a list of all documents it intends to use during

⁸ *Id.*, p. 19.

⁹ *See* Witness, Civil Party and Expert Summaries with Points of the Indictment – OCP, 23 February 2011, E9/13.1, p. 92.

¹⁰ *See, e.g.*, testimony of NUON Chea, Kaing Guek Eav alias Duch, Ny Kan, Sar Kimlomouth, and Sa Siek.

this witness's testimony. The Trial Chamber should set aside 6-8 days to hear the testimony of this witness.

B. TCW-754 and TCW-100

4. At the 17 August 2012 Trial Management meeting, the OCP stated that it has proposed these two witnesses to deal with military structure issues and that it has proposed removal of one or two other witnesses related to military structure because it believes TCW-754 and TCW-100 to be better witnesses.¹¹ The Defence's position on replacement witnesses has been set out above. The major concern is that these new witnesses may be questioned about areas listed in their witness summaries such as armed conflict, the Au Kanseng Security Center, treatment of Vietnamese and S-21 (unless the Trial Chamber decides to expand the scope of Case 002/01 to include S-21, as discussed at the 17 August 2012 Trial Management meeting).¹² At the 17 August 2012 Trial Management meeting, the OCP claimed that the testimony of TCW-100 "is very fundamental to the [Joint Criminal Enterprise ("JCE")] that the Co-Prosecutors are seeking to prove."¹³ To claim that testimony is necessary to prove the alleged JCE is meaningless, as all testimony heard at this stage of trial is to some extent relevant to proving or disproving the alleged JCE. The OCP's use of this deceptively logical reasoning is a means to open the floodgates to hear any topic on which the OCP seeks to elicit testimony and places undue pressure on the Trial Chamber to allow questioning outside the scope of Case 002/01. This sort of tactic is designed to cater to the court of public opinion as a means of placing pressure on the Trial Chamber to allow seepage of unrelated issues to Case 002/01 to be addressed.

C. TCE-33

5. The OCP has failed to demonstrate "compelling justification"¹⁴ that TCE-33 must appear before the Chamber. In fact, Deputy Co-Prosecutor Dale Lysak agreed that TCE-33 "would be a more time consuming witness, he would be a contested witness."¹⁵ The sole justifications provided at the 17 August 2012 Trial Management meeting were:

¹¹ Transcript, 17 August 2012, E1/114.1, p. 20-21.

¹² See Witness, Civil Party and Expert Summaries with Points of the Indictment – OCP, 23 February 2011, E9/13.1, p. 36-37, 97-98.

¹³ Transcript, 17 August 2012, E1/114.1, p. 22.

¹⁴ See *id.*, p. 18: "The Chamber considers that calling these individuals would undercut many of the above efficiency gains, and it is reluctant to do so in absence of compelling justification."

¹⁵ *Id.*, p. 22.

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 – that he would be that person, he would be that person. Again, he is also a person who conducted very important interviews with some of the Accused.¹⁶

The Trial Chamber does not need TCE-33 to explain communist ideology; it is not an issue in dispute or one which needs elucidation by this “expert.” Furthermore, the OCP has failed to provide any justification, compelling or otherwise, as to why TCE-33 alone is capable of discussing communist ideology. Mr. NUON Chea has discussed communist ideology, as have certain other witnesses, albeit briefly.¹⁷ Professor Chandler, as a knowledgeable historian with experience in Cambodia since the 1960s who has also supervised the PhD studies on Cambodian history by Professor Kiernan,¹⁸ could have been questioned about communist ideology had the Trial Chamber or OCP found it necessary to clarify any matters. The OCP has also failed to explain why the experts currently scheduled to be heard in October 2012 could not clarify these matters.

6. The fact that TCE-33 has conducted interviews with some of the Accused is not reason enough to call him to testify as an expert. The experts currently scheduled to testify in October have similarly conducted interviews with some of the Accused. There is no gap to fill in relation to any issue in Case 002/01 that would require TCE-33’s testimony or would justify the additional two weeks of trial time that hearing TCE-33 would require.
7. TCE-33 has, for all intents and purposes, pre-judged this case and is simply incapable of being a fair and impartial expert. Any suggestion to the contrary is irrational. In 2004, as the ECCC was being established and in anticipation of the upcoming investigations the OCP would undertake to prepare indictments (Introductory Submissions), TCE-33, along with another author, published SEVEN CANDIDATES FOR PROSECUTION: ACCOUNTABILITY FOR THE CRIMES OF THE KHMER ROUGE. This book included Mr. IENG Sary as one of the “seven candidates.”¹⁹

¹⁶ *Id.*, p. 22-23.

¹⁷ *See, e.g.*, testimony of Kaing Guek Eav alias Duch, Saloth Ban, and Ong Thong Hoeung.

¹⁸ For Professor Kiernan’s work concerning communist ideology, *see* BENEDICT KIERNAN, HOW POL POT CAME TO POWER (1985), IS4.24, especially chapter 8. *See also generally* BENEDICT KIERNAN, THE POL POT REGIME (1996), IS4.25.

¹⁹ STEPHEN HEDER & BRIAN TITTEMORE, SEVEN CANDIDATES FOR PROSECUTION: ACCOUNTABILITY FOR THE CRIMES OF THE KHMER ROUGE (2004).

8. After publishing this book, TCE-33 was provided with an opportunity to validate and buttress the claims he had set out in his book when he became employed by the OCP to investigate and prepare the Introductory Submission against Mr. IENG Sary and the other Accused. After having done this, TCE-33 was then employed by the OCIJ – the supposedly neutral investigative body established to evaluate the evidence for and against the Accused. Presumably TCE-33 would have been tasked with neutrally evaluating the very same allegations against Mr. IENG Sary and the other Accused that he himself had prepared, although that may not have been the actual expectation of the OCIJ, as reflected by its position that only the Co-Investigating Judges need to be independent and impartial.²⁰
9. According to the eyewitness account of the former Chief of the Intelligence and Analysis Unit of the OCIJ, Mr. Wayne Bastin – whose professional expertise is beyond dispute²¹ – while working for the OCIJ, TCE-33 attended a meeting in August 2009 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 as opposed to conducting an objective investigation. Judge Lemonde stated that he would prefer that the team **“find more inculpatory evidence than exculpatory evidence.”**²² TCE-33, according to Mr. Bastin’s recollection, remained silent and did not protest.²³
10. Since leaving the OCIJ due to his disappointment that it appeared that Cases 003 and 004 would not be pursued,²⁴ TCE-33 has continued to write articles attempting to influence

²⁰ According to the OCIJ: “the relevant case-law recalls that the rules governing the incompatibility of functions, aimed at guaranteeing the independence and impartiality of courts, only apply to magistrates and not to investigators. Therefore, the situation referred to in your letter dated 10 January 2008 does not raise any problem regarding the independence and impartiality of the Co-Investigating Judges, and in no way prejudices the progress of on-going judicial investigations.” Letter from OCIJ to IENG Sary Defence, “Re: Request for Information Concerning an Eventual Conflict of Interest,” 24 January 2008, A121/I, p. 2.

²¹ Mr. Bastin is currently serving 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 has previously served for 12 months with the International Criminal Tribunal for Rwanda as an Analyst/Investigator, and has 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.

²² IENG Sary’s Application to Disqualify Co-Investigating Judge Marcel Lemonde & Request for a Public Hearing, 9 October 2009, 1, Annex A, p. 1.

²³ *Id.*, p. 2.

²⁴ 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

this Court, with the two most recent articles having been published in April of this year.²⁵ As is apparent from the title, one of these recent articles, *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*, obviously touches upon issues relevant to Case 002 and appears to have been published in an attempt to influence judicial decision making in Case 002.

11. In the other recent article, *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*, TCE-33 sets out a lengthy summary of the negotiations for the establishment of the ECCC in order to reach the conclusion that “the most reasonable interpretation, legally speaking” of the ECCC’s personal jurisdiction is that it should include middle level CPK leaders.²⁶ The timing of this article, coinciding with the OCIJ’s consideration of whether the ECCC has jurisdiction to investigate the suspects in Cases 003 and 004 was being considered by the OCIJ, leads to the conclusion that TCE-33 published it with the intention of influencing judicial decision making. This seems especially likely considering that TCE-33 is now employed by Human Rights Watch, who’s Asia Director was quoted in November 2011 stating that “[i]f additional cases are not allowed to go ahead, only four people will end up going on trial for one of history’s darkest moments. This will allow many Khmer Rouge officials responsible for large-scale atrocities to continue to live freely, some in the same communities in which they carried out mass killings.”²⁷ Any testimony from TCE-33 would be result-oriented: it would be intended to promote his own academic career and advance his position that Cases 003 and 004 should be pursued.

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.”

²⁵ 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; 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.

²⁶ 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, quote p. 42.

²⁷ Brad Adams, *Khmer Rouge Trial is Failing Cambodian Victims of Pol Pot’s Regime*, GUARDIAN, 23 November 2011, available at <http://www.hrw.org/news/2011/11/23/khmer-rouge-trial-failing-cambodian-victims-pol-pots-regime>.

12. Finally, as additional evidence of TCE-33's unsuitability to testify as an expert, the Defence has evidence indicating that TCE-33 may have been employed by the United States Central Intelligence Agency ("CIA") during the period relevant to the Indictment, an allegation which TCE-33 has failed to deny, after it was first brought to the OCIJ's attention in January 2009.²⁸ Such employment would certainly affect TCE-33's ability to evaluate evidence and give opinions impartially. If it is true that TCE-33 worked for the CIA, the Defence requests to be informed of the details of this employment in advance of TCE-33's testimony in order to properly prepare for his examination.
13. The Defence notes that on 23 February 2010, the OCIJ denied the OCP's request to appoint TCE-33 as an expert. Among other reasons, the OCIJ stated that "the Co-Investigating Judges consider that, quite apart from the issue of assessing their requisite qualifications, *given that some of [the requested experts] are current or former staff members of a party to the proceedings ... or of the OCIJ ([TCE-33]), it would not be in the best interests of justice to appoint them as experts* under ECCC Internal Rule 31 in these circumstances."²⁹ The Trial Chamber should follow this approach and should declare that it will not be in the best interests of justice to call TCE-33 as an expert.
14. This approach is consistent with ICTY jurisprudence. The ICTY employs a hybrid system where the admission of evidence is very much in line with the Civil Law system;³⁰ however, trial proceedings are adversarial and party-driven, meaning that the parties may select their own witnesses (rather than merely making proposals to the Trial Chamber). Even with this party-driven system, ICTY Trial Chambers have refused to hear as experts individuals who are considered too close to one party. In the *Milutinović et al.* trial, for example, the Trial Chamber did not allow a prosecution employee to give evidence as an expert.³¹ Similarly, in *Dorđević*, the Trial Chamber stated:

²⁸ See Request for Information Concerning the Potential Existence of Conflict of Interest of OCIJ Investigator Stephen Heder, 30 January 2009, A252.

²⁹ Order on Co-Prosecutors' Request for Appointment of Experts, 23 February 2010, D281/3, para. 7 (emphasis added).

³⁰ The general rule in international tribunals is to admit evidence freely and consider its weight at the end of trial, in the context of the entire trial record. See JUDGE RICHARD MAY & MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE 93 (Transnational Publishers, Inc. 2002): "In this respect, international criminal trials resemble criminal trials held under the civil law systems, operating under a 'free evaluation of evidence.'"

³¹ See *Prosecutor v. Milutinović et al.*, IT-05-87-T, Decision on Prosecution Request for Certification of Interlocutory Appeal of Decision on Admission of Witness Philip Coo's Expert Report, 30 August 2006, para. 1. This decision explains that on 13 July 2006, the Trial Chamber issued an oral decision regarding the expert witness Philip Coo in which the Trial Chamber "rule[d] him out as an expert" and decided that his report will

While concerns relating to an expert witness' independence are usually considered as matters of weight rather than admissibility, the involvement in a particular case may be such that the reliability of the opinions of the expert must be questioned. [...] The Chamber finds that Philip Coo, although possessing the requisite qualifications of an expert witness, should not give evidence as an expert because *the extent of his involvement in the preparation of the Prosecution case is such that the Chamber is not able to be confident of the impartiality of his opinions.*³²

At the ECCC, the standard should be even higher than that employed by the ICTY since experts at the ECCC are appointed by the Trial Chamber, rather than by the parties. A danger that has been recognized in numerous studies³³ is that experts can become socialized into identifying with the party which employs (or in this case employed) them, because:

the process by which experts are selected, retained, and prepared for trial inevitably socializes them into feeling as if they are members of the adversary team. The law says be a witness, but the process by which experts become witnesses sends them the opposite message.³⁴

This is certainly the case for TCE-33. The Trial Chamber must reject the OCP's request to hear him as an expert. His testimony will not assist the Trial Chamber, but will only taint the proceedings. TCE-33 is not an independent or objective expert, but a highly subjective and biased advocate.

D. TCW-720

"not be received as an expert report." The Trial Chamber also held that "he is too close to the team, in other words to the Prosecution presenting the case, to be regarded as an expert."

³² *Prosecutor v. Đorđević*, IT-05-87/1-T, Decision on Defence Notice under Rule 94bis, 5 March 2009, paras. 19-20 (emphasis added).

³³ "For many years, however, the topic of bias has been studied in more well-controlled experimental situations by researchers in psychophysics and behavioral economics. These controlled studies show that no absolute performance is unbiased. In such studies, two major factors have been shown to bias choice. One is how often one choice rather than another is made: an imbalance might occur when one testifies regularly for only one side." Michael Lamport Commons, PhD, Patrice Marie Miller, EdD, & Thomas G. Gutheil, MD, *Expert Witness Perceptions of Bias in Experts*, 32 J. AM ACAD PSYCHIATRY L. 70, 70 (2004). "Most disturbing, however, is research demonstrating that the adversarial role affects the nature of the testimony delivered by a witness. For example, witnesses who are interviewed prior to testifying by an adversarial attorney have been shown to deliver more biased testimony than those whose prior interview is by a nonadversarial attorney, and one study found that the opinions of mental health experts differed according to which side had retained them." Nancy J. Brekke, Peter J. Enko, Gail Clavet, & Eric Seelau, *Of Juries and Court-Appointed Experts: The Impact of Nonadversarial versus Adversarial Expert Testimony*, 15(5) LAW & HUM. BEHAV. 451, 453 (1991) (internal citations omitted). See also Lawrence A. Ponemon, *The Objectivity of Accountants' Litigation Support Judgments*, 70(3) ACCOUNTING REV. 467 (1995).

³⁴ Michael J. Saks, *Expert Witnesses, Nonexpert Witnesses, and Nonwitness Experts*, 14(4) LAW & HUM. BEHAV. 291, 309 (1990).


15. The Defence does not consider that this witness would assist the Trial Chamber in ascertaining the truth as he has no relevant firsthand knowledge of the allegations set out in the Closing Order. If this witness is called to testify, the Defence requests the Trial Chamber to require him to supply well in advance of his testimony his entire video and audio archive of his interviews with Mr. NUON Chea and with any other persons relevant to the Democratic Kampuchea period. There may be exculpatory information in this archive that is not contained in his book or film about which the Defence may wish to question this witness.

E. TCW-781 and TCW-164


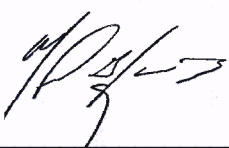
16. The Defence notes that according to the OCP's witness summaries and the OCP's statements at the 17 August 2012 Trial Management meeting, these witnesses are mainly relevant in relation to Mr. NUON Chea and Mr. KHIEU Samphan. According to the OCP's witness summaries, they may also speak about "Factual Findings of Joint Criminal Enterprise – Security Centres and Execution Sites."³⁵ As the OCP has claimed that the testimony of these witnesses will be "very short,"³⁶ the Defence leaves it to the Trial Chamber's discretion whether to call these witnesses, but notes that they must not be permitted to speak about security centers and execution sites unless the Trial Chamber decides to expand the scope of Case 002/01 to include these sites.

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Trial Chamber to REJECT the OCP's request to call TCW-505, TCW-754, TCW-100, TCE-33, TCW-720, TCW-781 and TCW-164.

Respectfully submitted,



 ANG Udom

 Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this **14th** day of **September, 2012**

³⁵ Witness, Civil Party and Expert Summaries with Points of the Indictment – OCP, 23 February 2011, E9/13.1, p. 51-52, 63.

³⁶ Transcript, 17 August 2012, E1/114.1, p. 23.