

C22/5/28

BEFORE THE PRE-TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

Criminal Case File No: 002/19-09-2007-ECCC-OCIJ (PTC17)
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**IENG SARY'S EXPEDITED REQUEST FOR DR. PAULUS FALKE TO GIVE
EXPERT EVIDENCE DURING THE ORAL HEARING ON PROVISIONAL
DETENTION ON 2 APRIL 2009
&
REQUEST FOR EXPEDITED FILING SCHEDULE**

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Distributed to:

The Pre-Trial Chamber Judges:

Judge PRAK Kimsan

Judge NEY Thol

Judge HUOT Vuthy

Judge Katinka LAHUIS

Judge Rowan DOWNING

Co-Prosecutors:

CHEA Leang

Robert PETIT

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), pursuant to Internal Rules 31(1) and 31(10), respectfully requests that Dr. Paulus Falke be appointed as medical expert and to be summoned to give evidence during the oral hearing on 2 April 2009.

I. INTRODUCTION

1. The Defence requested Dr. Falke, United Nations Medical Officer at the Detention Unit of the International Criminal Tribunal for the former Yugoslavia (“ICTY UNDU”) to review the medical reports of Mr. IENG Sary.¹
2. Dr. Falke reviewed these medical reports and prepared a short report which was added to the case file² pursuant to a Defence Request in which the Defence also requested that Dr. Falke give evidence during the oral hearing on 26 February 2009.³
3. Dr. Falke expressed to the Defence his willingness and availability to give oral evidence via videolink on the contents of his report if provided adequate notice by the Pre-Trial Chamber to organise his busy schedule.⁴
4. The Pre-Trial Chamber denied the Defence’s Request for Dr. Falke to give evidence, finding that the request was “to hear Dr. Falke as a witness and not to appoint him as an expert. The evidence he can provide is indirect.”⁵

¹ *Case of IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ, Expert Medical Report, 5 March 2008; *Case of IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ, Expert Medical Report, 9 October 2008; *Case of IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ, Medical Examination Report, 14 May 2008; *Case of IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ, Calmette Hospital Medical Report, 28 January 2008; Calmette Hospital Medical Report; 9 February 2008; Calmette Hospital Medical Report 7 March 2008; Calmette Hospital Medical Report, 24 December 2008; *Case of IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ ECCC Medical Report by Doctor NETH Phalla, 11 December 2008.

² *Case of IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC17), Directions to the Parties Concerning IENG Sary’s Request to Add the Medical Report of Dr. Paulus Falke to the Case File and Request to Permit Dr. Paulus Falke to Give Evidence Via Video Link During the Hearing on 26 February 2009, 23 February 2009, para. 2.

³ *Case of IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC17), Ieng Sary’s Request to Add the Medical Report of Dr. Paulus Falke to the Case File and Request to Permit Dr. Paulus Falke to Give Evidence Via Videolink During the Hearing on 26 February 2009, 20 February 2009 (“First Falke Request”).

⁴ The Defence has also consulted with the Court Management Section and has been informed that if an expert is called to give evidence via videolink the security and technical arrangements can take several days to organize and test.

⁵ *Case of IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC17), Written Version of the Oral Decision of 26 February 2009 on the Requests Presented Before the Pre-Trial Chamber During the Oral Hearing Held on the Same Day, 27 February 2009, para. 2.

5. The Defence now requests that Dr. Falke be appointed as a medical expert, and as such, be summoned to give evidence as an expert witness during the oral hearing on Mr. IENG Sary's appeal against provisional detention, scheduled 2 April 2009.

II. APPLICABLE LAW

6. Under Internal Rule 31(1) the Pre-Trial Chamber can seek "[e]xpert opinion [...] on any subject deemed necessary to [...] proceedings before the ECCC." A party may request the Pre-Trial Chamber "to appoint additional experts to conduct new examinations or to re-examine a matter already the subject of an expert report. The request must be in writing and give reasons."⁶

III. ARGUMENT

7. The Pre-Trial Chamber has accepted the necessity of summoning medical experts for oral examination during hearings on appeals against Provisional Detention Orders.⁷ It has also permitted extensive discussion of Mr. IENG Sary's medical reports during the oral hearing on provisional detention held on 30 June 2008.⁸ Therefore, expert medical opinion is clearly necessary and directly relevant to the oral hearing on the appeal against the extension of the provisional detention order.
8. It is vitally important that Dr. Falke be called by the Pre-Trial Chamber to give evidence during the oral hearing on 2 April 2009. Dr. Falke has been the Medical Officer responsible for the medical care and health situation of the detained persons in the United Nations Detention Unit ("UNDU") at the International Criminal Tribunal for the former Yugoslavia over the last ten years⁹ and has also taken over responsibility for detainees from the International Criminal Court since the establishment of that institution in 2002. He is uniquely qualified to assist the Pre-Trial Chamber to understand the various medical

⁶ Internal Rule 31(10) (emphasis added).

⁷ In the oral hearing on IENG Sary's first appeal against the Provisional Detention Order in July 2008, the Pre-Trial Chamber orally summoned the Head of the ECCC Medical Unit, Dr. NETH Phalla, to be examined by the Defence regarding the health of Mr. IENG Sary. *See Case of IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03), Written Record of Hearing, 30 June 2008, pp. 8-10.

⁸ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC03), Written Record of Hearing, 30 June 2008, pp. 3-5.

⁹ *See attached CV of Dr. Falke at Annex A.*

reports on Mr. IENG Sary; the minimum standards of medical treatment and testing that a person of Mr. IENG Sary's age and health can expect – and would be entitled to if detained at the UNDU in The Hague – and the effect of prolonged detention on a detained person's health.

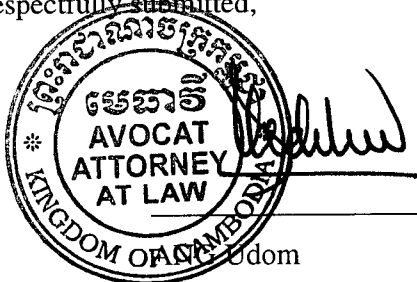
9. The fact that Dr. Falke has not examined Mr. IENG Sary directly but simply reviewed and analysed the medical reports drawn up by other doctors who examined or treated Mr. IENG Sary does not detract from the worth of his evidence. There is no requirement for experts to provide direct evidence as opposed to fact witnesses. Dr. Falke would in effect be giving evidence to the Pre-Trial Chamber on the procedures that have been followed by the ECCC Doctor and experts ordered by the OCIJ and whether they measured up to international standards rather than whether the results of their examinations or tests were correct.

IV. RELIEF SOUGHT

WHEREFORE, for all of the reasons stated herein, the Defence respectfully requests the Pre-Trial Chamber to:

- a. PERMIT Doctor Falke to give evidence as an EXPERT during the oral hearing on 2 April 2009; and
- b. DIRECT the parties in Case File 002 to respond to this Request by 17 March 2009 to enable the Pre-Trial Chamber to adjudicate on this Request in time for the Defence and Court Management Section to make the necessary arrangements for Dr. Falke to give evidence via video link.

Respectfully submitted,



Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 12th day of **March, 2009**