



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

C22/5/34

អង្គបុរេជំនុំជម្រះ

PRE-TRIAL CHAMBER
CHAMBRE PRELIMINAIRE
Criminal Case File N°

002/19-09-2007-ECCC/OCIJ (PTC17)

Before: Judge PRAK Kimsan, President
Judge Rowan DOWNING
Judge NEY Thol
Judge Katinka LAHUIS
Judge HUOT Vuthy

Date: 30 March 2009

ឯកសារដើម
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C.A. 2uy

PUBLIC

DECISION ON IENG SARY'S EXPEDITED REQUEST FOR DR. PAULUS FALKE TO GIVE EXPERT EVIDENCE DURING THE ORAL HEARING ON PROVISIONAL DETENTION ON 2 APRIL 2009

Co-Prosecutors

CHEA Leang
Robert PETIT
YET Chakriya
William SMITH
TAN Senarong
Anees AHMED

ឯកសារចម្លងត្រឹមត្រូវតាមច្បាប់
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មន្ត្រីបទបញ្ជាឯកសារ (Case File Officer / L'agent chargé du dossier):
C.A. Falke

Charged Person

IENG Sary

Lawyers for the Civil Parties

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Co-Lawyers for the Defence

Mr. ANG Udom
Mr. Michael G. KARNAVAS



1. **THE PRE-TRIAL CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) notes “IENG Sary’s Expedited Request for Dr Paulus Falke to give expert evidence during the oral hearing on provisional detention on 2 April 2009”, filed on 12 March 2009.

I. PROCEDURAL BACKGROUND

2. By their Request, the Co-Lawyers ask the Pre-Trial Chamber to:
 - (a) “[Appoint] Dr. Paulus Falke [...] as medical expert;
 - (b) “PERMIT Doctor Falke to give evidence as an expert during the oral hearing on 2 April 2009; and
 - (c) 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.”¹
3. In the Request, the Co-Lawyers submit that the fact that the Pre-Trial Chamber permitted extensive discussion of Mr. Ieng Sary’s medical reports during the oral hearing on provisional detention held on 30 June 2008 establishes that “expert medical opinion is clearly necessary and directly relevant to the oral hearing on the appeal against the extension of the provisional detention order”.² The Co-Lawyers argue that Dr. Falke “is uniquely qualified to assist the Pre-Trial Chamber to understand the various medical reports on [Ieng Sary, ...] and the effect of prolonged detention on a detained person’s health.”³ The Co-Lawyers explain that while “[t]here is no requirement for experts to provide direct evidence”, the purpose of Dr. Falke’s evidence is to explain “the procedures that have been followed by the ECCC Doctor” and to assess “whether they measured up to international standards”.⁴

¹ IENG Sary’s Expedited Request for Dr Paulus Falke to give expert evidence during the oral hearing on provisional detention on 2 April 2009, 12 March 2009, C22/5/28 (“Request”), p. 1 and 3.

² The Request, p. 2.

³ The Request, para. 7 and 8.

⁴ The Request, para. 9.



4. In Directions issued on 13 March 2009, the Pre-Trial Chamber invited the Parties involved in the case to file their responses to the Request by 17 March 2009.⁵
5. On 16 March 2009, the Co-Prosecutors filed their “Response to IENG Sary’s Application to Examine a Doctor During the Oral Hearing of His Detention Extension Appeal”, in which they ask the Pre-Trial Chamber to “dismiss the Second Application”. They submit that: “1) the Appellant has not filed any new document or disclosed any material change in circumstances for the Pre-Trial Chamber to reconsider its First Dismissal Order; 2) even if the Pre-Trial Chamber were to entertain the Second Application, then the Second Application does not satisfy the requirements of the statutory provision under which it is purported to be filed; 3) Dr. Falke is not suitable to be an expert in the present proceedings [and] even if [he] is deemed as an expert, his Summary does not qualify as an expert report; and 4) the Second Application is wasteful of this Tribunal’s time and resources and shall undermine judicial economy”.⁶
6. The Civil Parties or their Lawyers did not submit a response to the Pre-Trial Chamber’s Directions concerning the Request.

II. CONSIDERATIONS

7. In its Decision, dated 23 February 2009, on IENG Sary’s Request to Summon Medical Experts to Give Evidence during the Oral Hearing on Provisional Detention, the Pre-Trial Chamber found the following:

“In their Appeal Brief on the Order on Extension of Provisional Detention, the Co-Lawyers of the Charged Person did not raise any issues considering the health conditions of the Charged Person except for a short reference made in paragraph 53 of the brief. This reference reads:

“The case for house arrest is made more compelling by the age and ill health of Mr. IENG Sary, which demonstrates grounds for the Chamber to exercise its discretion permitted by Rule 63(3), and order Mr. IENG Sary be released under less restrictive conditions of house arrest.”⁷

⁵ Directions to the Parties concerning IENG Sary’s Expedited Request for for Dr Paulus Falke to give expert evidence during the oral hearing on provisional detention on 2 April 2009, C22/5/29.

⁶ Co-Prosecutors Response to IENG Sary’s Application to Examine a Doctor During the Oral Hearing of His Detention Extension Appeal, C22/5/30, p. 2.

⁷ IENG Sary’s Appeal against the OCIJ Order On Extension of Provisional Detention, 10 December 2008, C/22/5/1, para. 53.



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In the Request to summon witnesses, the Co-Lawyers did not submit any reasoning for hearing the witnesses before the Pre-Trial Chamber which would lead to the conclusion that hearing these witnesses would support the arguments raised in the Appeal Brief.

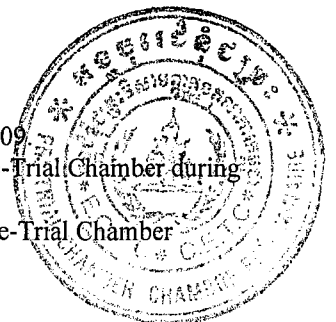
The Pre-Trial Chamber observes that the Co-Lawyers did not mention in the Request whether there are new circumstances raised after filing their Appeal Brief which could justify the necessity to hear the witnesses in the Appeal”.⁸

8. Further, on 27 February 2009, in the “Written Version of [its] Oral Decision of 26 February 2009 on the Requests Presented before the Pre-Trial Chamber During the Hearing Held on the Same Day” the Pre-Trial Chamber denied the Co-Lawyer’s Request to hear Dr. Falke as a witness because “the Request is to hear Dr. Falke as a witness and not to appoint him as an expert. The evidence he can provide is indirect”.⁹
9. In the Request filed on 12 March 2009 the Co-Lawyers request firstly the appointment of Dr. Falke as a medical expert and secondly to summon him to the oral hearing of 2 April 2009. Therefore, the Pre-Trial Chamber finds, contrarily to the submissions of the Co-Prosecutors, that this Request does not represent a request for reconsideration of their previous request to only summon Dr. Falke to the oral hearing of 26 February 2009, which was denied.¹⁰
10. The Co-Lawyers submit that they would like to have Dr. Falke “assist the Pre-Trial Chamber to “understand the various medical reports” and the “effect of prolonged detention on a detained person’s health”.
11. The Pre-Trial Chamber notes that this Appeal procedure concerns the detention of a specific Charged Person. There may be a great deal of studies or a number of experts that can give common expert advice on what are the general effects of prolonged detention on detained persons’ health. If the Pre-Trial Chamber were to consider the effect of prolonged detention on Ieng Sary’s health, it should only rely on medical reports of those experts that have had the opportunity to directly examine him rather than on reports explaining such effects in theory or on basis of other experiences. The matter with which the Pre-Trial Chamber is seized in this Appeal is related to a specific person and has to be treated as such. The Pre-

⁸ PTC’s Decision on Ieng Sary’s Request to summon Medical Experts, C22/5/18, 23 February 2009.

⁹ Written Version of Oral Decision of 26 February 2009 on the Requests presented before the Pre-Trial Chamber during the hearing held on 26 February 2009, C22/5/24, 27 February 2009.

¹⁰ Written Version of Oral Decision of 26 February 2009 on the Requests presented before the Pre-Trial Chamber during the hearing held on 26 February 2009, C22/5/24, 27 February 2009.



Trial Chamber notices that experts have already been assigned to provide direct medical reports on the health condition of Mr. Sary.

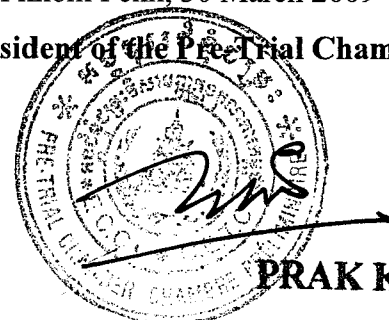
12. The current Request is filed on the assumption of the Co-Lawyers that the health issue of the Charged Person is to a large extent part of the Appeal and consequently assert it necessary to appoint an expert to assist the Pre-Trial Chamber to understand the various medical reports on the Charged Person.
13. To date the medical reports referred to are not part of the Appeal nor has it been requested by the Co-Lawyers that the health condition of the Charged Person become a substantial part of the Appeal at this late stage of the proceedings. Therefore, there is no need for the Pre-Trial Chamber to seek assistance to explain medical terms. Besides this, the Pre-Trial Chamber notes that if any assistance is needed to explain the reports, the Pre-Trial Chamber should seek this assistance from the existing experts themselves, as they have to explain their reports.
14. If any request would be made to include the health condition in the current Appeal and, within such a request, the issue of health has to be dealt with such that the Pre-Trial Chamber has to draw conclusions from the medical reports, the Pre-Trial Chamber can do so at a later stage when it has determined the scope of the appeal. The experts can be heard if the Pre-Trial Chamber finds this necessary for the decision on the Appeal.
15. If any additional experts are appointed by the Pre-Trial Chamber these appointments shall be made in accordance with the Internal Rules which require that they undertake “a medical, psychiatric or psychological examination” of the Charged Person.¹¹

THEREFORE, THE PRE-TRIAL CHAMBER HEREBY:

REJECTS IENG Sary’s Expedited Request for Dr Paulus Falke to give expert evidence during the oral hearing on provisional detention on 2 April 2009.

Phnom Penh, 30 March 2009

President of the Pre-Trial Chamber



PRAK KIMSAN

¹¹ See ECCC Internal Rule 32.