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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 AN ORDER TO CALMETTE HOSPITAL TO IMMEDIATELY DISCLOSE MEDICAL RECORDS AND A LIST OF TREATING PHYSICIANS FOR MR. IENG SARY**

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Judge NEY Thol

Judge HUOT Vuthy

Judge Katinka LAHUIS

Judge Rowan DOWNING

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Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby respectfully requests the Pre-Trial Chamber to issue an Order to Calmette Hospital: (1) to immediately disclose all medical records pertaining to Mr. IENG Sary from his repeated hospital admissions; (2) to provide a list of all physicians who have treated Mr. IENG Sary during his hospital admissions including information on the role of each physician in treating Mr. IENG Sary; and (3) to provide information of the members, structure and authority of “*The Committee*” which appears to take any substantive decisions on the treatment provided to Mr. IENG Sary.

## I. SUMMARY OF ARGUMENT

1. The Defence submits this Request for the following reasons:
  - A. Mr. IENG Sary has the absolute and unqualified right to be provided with copies of all of his medical records;
  - B. Mr. IENG Sary has the absolute and unqualified right to all relevant information as to which physicians are responsible for treating him and, especially, who is/are responsible for making decisions on his treatment; and
  - C. Mr. IENG Sary has the absolute and unqualified right to seek a judicial order from the Pre-Trial Chamber to Calmette Hospital for the purpose of obtaining his medical records as well as the names and functions of his treating physicians, which, ineluctably, is necessary data for further submissions related to the hearing on provisional detention.

## II. LAW

2. According to the OCIJ, “a detainee’s access to his medical file at the Detention Centre and at Calmette Hospital is a matter which any patient can pursue and obtain.”<sup>1</sup> Similarly, the Co-Prosecutors have previously submitted that “counsel for a defendant in pre-trial detention have a right of access at all reasonable times to the defendant and his medical record.”<sup>2</sup> Furthermore the Agreement between Calmette Hospital and the ECCC supports

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<sup>1</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Interoffice Memorandum: Medical Reports of Mr. IENG Sary, 25 February 2008.

<sup>2</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Co-Prosecutors’ Response to IENG Sary’s Counsel’s Request for Access to their Client and Medical Record While in Hospital, 18 August 2008, para. 1 (“OCP Access Response”).

the interpretation of both the OCIJ and Co-Prosecutors as it provides that “Party A [Calmette] shall provide to ECCC detainees, on their request, with access to their medical files and all pertinent medical information, whether it be maintained at the Calmette Hospital or at the ECCC Detention Facility.”<sup>3</sup>

3. There do not appear to be any provisions in the Internal Rules which are relevant to the right of a detainee’s access to information on his treating physicians. However, under Article 24 of the Establishment Law, “during the investigation, Suspects shall be unconditionally entitled to assistance of counsel of their own choosing.” For this right to have any meaning, it must be read as encapsulating the right to effective counsel.<sup>4</sup> This right may be relevant for assessing whether there appears to be a justification for being provided with certain information, particularly medical records generated by appointed treating physicians while a Charged Person is under the protection of or seized by judicial organs of the ECCC.
4. As regards jurisdiction over a detainee while at Calmette Hospital, the Co-Prosecutors have previously held that “[Calmette] Hospital is the *de facto* extension of the ECCC Detention Unit and IENG Sary remains subject to the same limitations on his liberty that govern him in the Detention Unit.”<sup>5</sup> The Pre-Trial Chamber may therefore issue orders directed to Calmette Hospital regarding treatment of Mr. IENG Sary while he has been transferred to the hospital from the ECCC Detention Centre.

### III. ARGUMENT

#### A. Mr. IENG Sary has the absolute and unqualified right to be provided with copies of all of his medical records

5. There appears to be no disagreement among the parties that a detainee has the absolute and unqualified right to be provided with copies of all of his medical notes. This right applies equally to medical records produced by hospitals when a patient is treated there, and also to daily reports maintained by the Head of the ECCC Unit.

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<sup>3</sup> Emergencies and Other Medical-Related Services Agreement between Calmette Hospital and the Extraordinary Chambers in the Courts of Cambodia (“Calmette-ECCC Agreement”) dated August 2008, at 7.6 (Emphasis added).

<sup>4</sup> See *Artico v. Italy*, ECHR, 30 April 1980, para. 33.

<sup>5</sup> OCP Access Response., para. 2.

6. Mr. IENG Sary has been provisionally detained since 14 November 2007.<sup>6</sup> Since his incarceration he has been transferred to Calmette Hospital on 10 separate occasions.<sup>7</sup> Medical reports have only been provided by Calmette Hospital for 4 out of these 10 hospital admissions.<sup>8</sup> As a consequence, neither Mr. IENG Sary, nor any of the parties to Case File 002, nor even the OCIJ or Pre-Trial Chamber, have been provided with all the necessary information on Mr. IENG Sary's health condition.
7. The ECCC Medical Doctor, Dr. NETH Phalla, maintains constant surveillance over all ECCC detainees including Mr. IENG Sary and produces daily health records detailing his state of health. These daily records have never been placed on the Case File nor have they been separately provided to the Defence despite the requirement set out in the ECCC Detention Rules<sup>9</sup> and the Defence's reasonable and specific request directed towards the ECCC Medical Unit.<sup>10</sup>

**B. Mr. IENG Sary also has the absolute and unqualified right to all relevant information as to which physicians are responsible for treating him and making decisions on his treatment**

8. The Defence originally requested the Pre-Trial Chamber, in advance of the oral hearing on the Appeal of the Extension of the Provisional Detention Order scheduled for 26 February 2009, to summon "all doctors at Calmette Hospital who have been responsible for examining and treating Mr. IENG Sary."<sup>11</sup> The Pre-Trial Chamber denied this Request but permitted the Defence to "raise new arguments during the

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<sup>6</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Provisional Detention Order, 14 November 2007.

<sup>7</sup> See Annex A detailing the hospital admissions of Mr. IENG Sary.

<sup>8</sup> It appears from the Case File that only the following four medical reports have been provided by Calmette Hospital. *Case of IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ, Calmette Hospital Medical Report, 28 January 2008; *Case of IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ, Calmette Hospital Medical Report; 9 February 2008; *Case of IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ, Calmette Hospital Medical Report 7 March 2008; *Case of IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ, Calmette Hospital Medical Report, 24 December 2008.

<sup>9</sup> Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Extraordinary Chambers in the Courts of Cambodia ("ECCC Detention Rules"), rules 5.7.1 states that "Information contained in a detainee's medical file ... shall not be disclosed to any person, except: the detainee concerned ... the assigned defence team of a detainee, with the consent of the detainee concerned", (emphasis added).

<sup>10</sup> *Case of IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ, A response to the request of lawyer Ang Udom, the Defense lawyer of Mr. IENG Sary, 20 February 2008. This information had been requested by the Defence three weeks previously. See *Case of IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ, Request for a List of Medical Records for IENG Sary, 29 January 2008.

<sup>11</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC17), IENG Sary's Request to Summon Medical Experts to Give Evidence During the Oral Hearing on Provisional Detention, 9 February 2009, p.5.

next hearing [and] renew their Application at this point, provided it is specific in nature.”<sup>12</sup> In its later decision on the various requests submitted during the oral hearing, the Pre-Trial Chamber noted that “no further application has been filed of a more specific nature as suggested by the Pre-Trial Chamber in its decision of the 23<sup>rd</sup> of February 2009.”<sup>13</sup> In order to satisfy the requirement of a more specific and detailed request to the Pre-Trial Chamber, the Defence must be provided with greater information by Calmette Hospital than that provided in the four Medical Reports disclosed thus far. Essentially, this information must be provided for the Defence to effectively represent Mr. IENG Sary, as guaranteed by Article 24 of the Establishment Law.<sup>14</sup>

9. The first step in providing more specific information is obviously to disclose the remaining medical reports of Mr. IENG Sary’s admissions to Calmette Hospital set out above. Each report lists the doctors who have been responsible for compiling it.<sup>15</sup> With this information, the Defence can verify which doctors have been more involved with treating Mr. IENG Sary during his hospital admissions.<sup>16</sup>
10. This information, in and of itself, is insufficient to allow the Defence to specify which of these doctors it wishes to be summoned to give evidence during the oral hearing scheduled for 2 April 2009. Further information on which doctor was responsible for which part of the treatment must also be provided so that the correct doctor is requested to give evidence. For example, if the Pre-Trial Chamber accepts that oral evidence on Mr. IENG Sary’s health condition is warranted, it is axiomatic that his heart specialist be called to give evidence rather than the doctor who may have been responsible for another ailment.

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<sup>12</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC17), Decision on IENG Sary’s Request to Summon Medical Experts to Give Evidence During the Oral Hearing on Provisional Detention, 23 February 2009, para. 14.

<sup>13</sup> *Case of IENG Sary*, 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. 4.

<sup>14</sup> Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).

<sup>15</sup> See *Case of IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ, Calmette Hospital Medical Report, 24 December 2008 which lists Professor NHEM Sophoeun, Dr. PRUM Visess and Dr. LIV Chinh as the physicians who compiled the report.

<sup>16</sup> *Case of IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ, Calmette Hospital Medical Report, 28 January 2008 – This report was compiled by the same team of Professor NHEM Sophoeun, Dr. PRUM Visess and Dr. LIV Chinh that compiled the medical report of 24 December 2008. See also *Case of IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ, Calmette Hospital Medical Report, 9 February 2008 & *Case of IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ, Calmette Hospital Medical Report 7 March 2008 – Both compiled in part by Professor NHEM Sophoeun.

11. Remarkably, in its recent interactions with staff of Calmette Hospital, the Defence learned<sup>17</sup> that there is *The Committee* at the hospital which appears to take the final decision on treatment, admission and discharge from hospital of Mr. IENG Sary. In this opaque institution it is far from clear who is part of *The Committee* – whether it simply comprises the team of doctors who are engaged in treating Mr. IENG Sary at any given time or additional people such as the Director of the hospital. Providing transparent information on the members, structure and authority of *The Committee* to take decisions regarding Mr. IENG Sary vis-à-vis the treating physicians mentioned in the hospital reports would greatly assist the Defence in formulating a specific and detailed request on which doctors to summon to give oral evidence.
12. Finally, it bears underscoring that this requested information will neither create an unnecessary administrative burden on the hospital nor violate any perceived right of confidentiality of the Hospital. Indeed it will do the opposite. It will reduce the number of doctors from Calmette Hospital called to give evidence and whose work at the hospital will be disrupted. This information will also only relate to the treatment of Mr. IENG Sary and so will not require the disclosure of any information to which Mr. IENG Sary is not entitled. As regards the Pre-Trial Chamber, it will ensure that the limited court time available to the Pre-Trial Chamber is not wasted by summoning doctors who have neither the knowledge nor the responsibility for the actual health conditions on which the Defence wishes to examine them.

**C. Mr. IENG Sary has the absolute and unqualified right to seek a judicial order from the Pre-Trial Chamber to Calmette Hospital for the purpose of obtaining the information sought**

13. Calmette Hospital has repeatedly and willfully obstructed the Defence team's attempts to visit Mr. IENG Sary when he has been admitted to hospital.<sup>18</sup> Doctor NETH Phalla, the ECCC Medical Doctor who is under the authority of Calmette

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<sup>17</sup> When Mr. IENG Sary was recently admitted to Calmette Hospital the Defence attempted to visit him on 25 February 2009 but were denied by guards posted outside the door of his hospital room. The Defence contacted Richard Rogers, Head of the Defence Support Section to see if he could find out more information. He informed the Defence team that "*The Committee*" was apparently in a meeting and therefore could not be contacted to see whether it would grant access to the Defence team. It is unclear who was a member of this committee.

<sup>18</sup> *Case of IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ, Letter to the OCIJ: Request by Ieng Sary's lawyers for immediate and unfettered access to IENG Sary, his medical records and treating physicians while under hospital care, 4 August 2008.

Hospital has also denied a specific and reasonable requests by the Defence for access to the daily medical records on Mr. IENG Sary<sup>19</sup> despite the OCIJ's assertion that "the detainee's access to his medical file at the Detention Centre and at Calmette Hospital is a matter which any patient can pursue and obtain."<sup>20</sup>

14. In the light of the insolent and obstructive attitude repeatedly displayed by Calmette Hospital in relation both to the Defence team and the OCIJ, only a judicial order with an attached deadline for Calmette Hospital to comply will actually result in the requested information being provided. It will also permit the Defence to file a subsequent request for examination of specific doctors based on the entirety of Mr. IENG Sary's medical file, sufficiently in advance of the hearing scheduled for 2 April 2009 for this request to be resolved in advance of the hearing.

#### IV. CONCLUSION & RELIEF SOUGHT

**WHEREFORE**, for all of the reasons stated herein, the Defence respectfully requests the Pre-Trial Chamber to issue an Order to Calmette Hospital to provide the following information by **13 March 2009**:

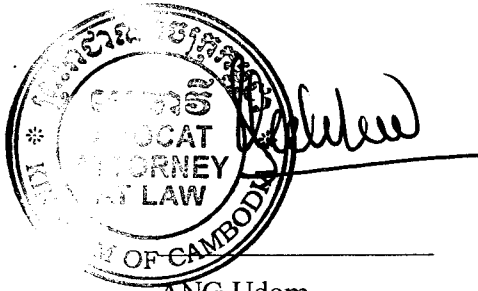
- (1) All medical records pertaining to Mr. IENG Sary from his repeated hospital admissions and from the daily reports of Mr. NETH Phalla;
- (2) A list of all physicians who have treated Mr. IENG Sary during his hospital admissions including information on the specific role of each physician in treating Mr. IENG Sary; and
- (3) Information on the members, structure and authority of *The Committee* vis-à-vis the treating physicians mentioned in the hospital reports which appears to take any substantive decisions on the treatment provided to Mr. IENG Sary.

Respectfully submitted,

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<sup>19</sup> *Case of IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ, A response to the request of lawyer Ang Udom, the Defense lawyer of Mr. IENG Sary, 20 February 2008. This information had been requested by the Defence three weeks previously. *See Case of IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ, Request for a List of Medical Records for IENG Sary, 29 January 2008.

<sup>20</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Interoffice Memorandum: Medical Reports of Mr. IENG Sary, 25 February 2008.



ANG Udom

Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 3<sup>rd</sup> day of **March, 2009**