C 22/5/27

BEFORE THE PRE-TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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CO-PROSECUTORS' RESPONSE TO IENG SARY'S APPLICATION SEEKING AN ORDER TO THE CALMETTE HOSPITAL FOR THE DISCLOSURE OF IENG SARY'S MEDICAL RECORD AND OTHER INFORMATION

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Pre-Trial Chamber:
Judge PRAK Kimsan, Presiding
Judge Rowan DOWNING
Judge NEY Thol
Judge Katinka LAHUIS
Judge HUOT Vuthy

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IENG Sary:
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I. INTRODUCTION

1. In an omnibus application ("Application"), the Appellant requests the Pre-Trial Chamber to order the Calmette Hospital, Phnom Penh ("Hospital") to furnish (1) all the medical record pertaining to him maintained at the Hospital and that maintained in-house by the ECCC's Resident Doctor NETH Phalla, (2) a list of all the physicians who have treated him at the Hospital and their respective roles, and (3) information about a so-called "Committee" at the Hospital that, according to the Appellant, "appears to take substantive decisions on [his] treatment".[1]

2. The Co-Prosecutors request that the Pre-Trial Chamber reject this Application as, amongst other reasons. (1) the Application does not disclose the provision of law under which it is filed, (2) the Application is omnibus in nature, lacks precision and is factually unsubstantiated, (3) the Application seeks documents and relief beyond the scope of this Appeal,[2] (4) the Application does not indicate why the Appellant has not exhausted the alternative remedy of approaching the Co-Investigating Judges and why an appellate body—like this Pre-Trial Chamber—should issue the sought directions, especially in an Appeal where the issue of the Appellant's health was not substantively raised before the Co-Investigating Judges when they passed their impugned Detention Extension Order.

II. PRELIMINARY OBSERVATIONS

Provisionally Detained Detainees have a Right to Their Own Medical Record

3. Defendants-in-detention, and their counsel, have a right of access to the defendant's medical record. This is an international standard embodied, *inter alia*, in the United Nations Basic Principles on the Role of Lawyers that support access to medical information, stating that "[i]t is the duty of competent authorities to ensure lawyers access to appropriate information,

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1 *Case of IENG Sary*, Ieng Sary's Expedited Request for an Order to the Calmette Hospital to Immediately Disclose Medical Records and a List of Treating Physicians for Mr. Ieng Sary, 3 March 2009, C22/5//25, ERN 00285108-002785115, p. 6 [*hereinafter* Application].

2 *Case of IENG Sary*, Ieng Sary's Appeal Against the OCIJ Order on Extension of Provisional Detention, 10 December 2008, C22/5//1, ERN 00250393-00250412[*hereinafter* Appeal].

files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients."[3]

4. This international standard is entrenched in the ECCC Detention Rules. Detention Rule 5.7.1 notes that the information in a detainee's medical file is confidential and should only be disclosed to the detainee and his defence team.

III. ARGUMENT

Application does not Disclose the Provision of Law under Which it is Filed

5. The Application does not disclose the provision of law under which it has been filed. It also does not cite the provision of law or jurisprudence under which it is seeking binding directions from the Pre-Trial Chamber to the Hospital for the production of the medical record. It does not identify the sources, if any, and the extent of such powers of the Pre-Trial Chamber.

6. In the absence of any clarity, the Co-Prosecutors can only speculate about the legal basis of the Appellant's Application. If the Application is assumed to be filed for the issuance of a *request for assistance* ("RFA"), pursuant to Article 25 of the United Nations–Cambodia Agreement ("UN-Cambodia Agreement"), then it should be rejected as the Appellant has not fulfilled the requisite conditions before an RFA can be issued.[4] It is settled international jurisprudence that a party seeking the production of a document or information from a State must:

   i. Identify, as far as possible, the document or information to which the application relates;

   ii. Indicate how it is relevant to any matter in issue before the chamber and is necessary for the determination of that matter; and

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[3] United Nations Basic Principles on the Role of Lawyers, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August - 7 September 1990, para. 21, available at: http://www.unhchr.ch/html/menu3/b/h_comp44.htm.

[4] Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, 6 June 2003[*hereinafter* UN-Cambodia Agreement].

iii. Explain the steps that have been taken by the applicant to secure the State's assistance.[5] The applicant has an obligation to demonstrate that, prior to seeking relief from the chamber, s/he made a reasonable effort to persuade the State to provide the requested information voluntarily.[6] Only after the State declines to lend the requested support, should a party request a chamber for mandatory action.[7] A party must demonstrate to the satisfaction of the chamber that it has requested assistance from the State through the appropriate State organ. It is not sufficient to direct the request only to the authority holding the documents. The statutes of international tribunals impose obligations on States, and not on their individual authorities, to ensure that their obligations towards the tribunals are met.[8] A chamber's decision on an application, however, is discretionary.[9]

7. While the provisions in the statues of international tribunals refer to "orders" that may be issued by their judicial bodies to the States concerned, the UN-Cambodia Agreement authorises the Pre-Trial Chamber to make an RFA to the Government of Cambodia.[10] If the Appellant is assumed to be seeking an RFA from the Pre-Trial Chamber, then he has not demonstrated how his Application satisfies the three above conditions. He has (1) not identified clearly and "specifically"[11] the documents that he wishes to obtain, (2) not indicated how they are relevant to the current Appeal, and (3) has not explained the steps that he has taken to secure the State's assistance before moving this Application. This Application should, therefore, be dismissed.

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5 *Prosecutor v. Milutinovic et al*, Decision on Sreten Lukic's Amended Rule 54*bis* Application, Case No. IT-05-87-T, 29 September 2006, para. 6.

6 *Prosecutor v. Milutinovic et al*, Decision on Second Application of Dragoljub Ojdanic for Binding Orders Pursuant to Rule 54*bis*, Case No. IT-05-87-T, 17 November 2005, para. 7.

7 *Prosecutor v. Milutinovic et al*, Decision on the Request of the United States of America for Review, Case No. IT-05-87-AR108bis.2, 12 May 2006, para. 32.

8 *Prosecutor v. Halilovic*, Decision on Defence Motion for Access, Case No. IT-01-48-PT, 4 December 2003, p. 2.

9 *Prosecutor v. Milutinovic et al*, Decision on Sreten Lukic's Amended Rule 54*bis* Application, Case No. IT-05-87-T, 29 September 2006, para. 7.

10 Compare, for example, Article 25 of the UN-Cambodia Agreement with Article 29 of the ICTY Statue and Rule 54*bis* of the ICTY Rules of Procedure and Evidence.

11 *Case of IENG Sary*, Decision on Ieng Sary's Request to Summon Medical Experts to Give Evidence During the Oral Hearing on Provisional Detention, 23 February 2009, C22/5//18, ERN 00282884-00282888, para. 14 [*hereinafter* Omnibus Request Dismissal Order].

Application is Omnibus in Nature, Lacks Precision and is Factually Unsubstantiated

8. The Application is both imprecise and over-broad. It seeks to summon "all the medical records pertaining to [the Appellant] from his repeated hospital admissions and from the daily reports of [the ECCC Resident Doctor]".[12] These documents pertain to more than fifteen months of the Appellant's detention at the ECCC Detention Unit. The Appellant has not identified specific periods or specific reports, or specific parts thereof, that he wishes to summon. When he identifies documents, he does so in a sweeping fashion. For example, the Appellant wishes to summon all the daily reports of the ECCC Resident Doctor for the entire period of the last fifteen months. The Appellant's request for the names and roles of all the doctors who have examined him and the details of a so-called "Committee" is equally over-broad.

9. The Co-Prosecutors, therefore, request that the Pre-Trial Chamber dismiss the Application for being imprecise and over-broad.

Application seeks Documents and Relief beyond the Scope of Appeal

10. The Application seeks to summon documentation generated in the past fifteen months. Only a very small part of this period is within the scope of these proceedings. This Appeal concerns the extension of detention granted by the Co-Investigating Judges as of 10 November 2008. Therefore, the issue before this Chamber in these proceedings is whether the extension was appropriate and whether the conditions of detention under Rule 63(3) were satisfied on 10 November 2008 and remain satisfied. On 17 October 2008, the Pre-Trial Chamber has already ruled on an appeal upholding the Appellant's original detention by the Co-Investigating Judges since 14 November 2007.[13] In that decision, the Pre-Trial Chamber analysed all the available material on the Case File (including the medical reports from the Hospital and those submitted by Dr. NETH Phalla) and ruled that "there [was] no evidence of an immediate need for a long term hospitalisation and the ECCC Detention Facility [was] properly equipped to provide medical assistance, as required."[14] In a separate decision of 21

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[12] Application, p. 6.

[13] *Case of IENG Sary*, Decision on Appeal Against Provisional Detention Order of Ieng Sary, 17 October 2008, C22/1//73, ERN 00232830-00232861[*hereafter* Decision of 17 October 2008].

[14] Decision of 17 October 2008, para. 123.

October 2008, once again analysing all available medical records on the Case File, this Chamber noted that:

> "[...] none of the medical or expert reports indicates that the ailments from which the Charged Person is suffering might have an effect on his mental capacity. There is no mention either of side effects caused by any medication. On the contrary, the cardiologists Antoine Lafont and Chour Sok, appointed as experts, concluded in their report dated 5 March 2008 that the ailments that they have identified do not require particular measures with regard to the Charged Person's participation in investigation."[15]

11. The current Appeal is not an ordinary detention appeal. It is an appeal against extension of detention which shall analyze material before the Co-Investigating Judges on 10 November 2008 and whether they exercised their discretion reasonably. Any change in circumstance, thereafter, should be a subject of a fresh provisional release application so as to afford all parties the opportunity to brief the Co-Investigating Judges fully and for a meaningful appellate process thereafter. To bring fresh untested evidence before an appellate body—like this Pre-Trial Chamber—defeats the intended purpose of an appellate review.

12. The Appellant has not demonstrated what material circumstances have changed in his medical condition to necessitate reconsideration by the Pre-Trial Chamber of its findings and to "order" the disclosure of documents from the Hospital over and above the material that this Chamber has already considered and ruled upon. He has also not shown how his medical conditions have changed since the filing of this Appeal to require the disclosure of documents that he has not sought before the Co-Investigating Judges. The Pre-Trial Chamber has already noted that in the Appeal Brief, the Appellant did not raise any issues concerning his health conditions except for a short sentence in paragraph 53 that made a general reference to his "age and ill health".[16] The Appeal principally concerned with the issues of due diligence in the investigation and the perceived non-consideration of the alternative

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[15] *Case of IENG Sary*, Decision on Ieng Sary's Appeal Regarding the Appointment of a Psychiatric Expert, 21 October 2008, A189/1/8, ERN 00233433-00233443, para. 43.

[16] Omnibus Request Dismissal Order, para. 8.

modes of detention (like house arrest) by the Co-Investigating Judges.[17] The issue of the Appellant's health was also not raised substantively in the Appellant's objections to the extension of detention before the Co-Investigating Judges.[18] Consequently, the impugned Detention Extension Order did not consider health issues while deciding on extension of provisional detention.[19]

13. The Pre-Trial Chamber has noted that the Appellant has not identified any new circumstances to conclude that his health conditions are "contrary to the existing conclusion of the experts".[20] In addition, in the Co-Prosecutors' submission, the Appellant has raised no new arguments that are "specific in nature" to be permitted to renew his application for examination of experts and, by extension, disclosure of further documents at this stage of these Appeal proceedings.[21]

14. The medical record placed on the Case File pertaining to the period since the filing of this Appeal (i.e. after 10 December 2008) indicates that there has been no change in the Appellant's medical conditions and the diagnoses. For example, his latest hospitalisation during 23 – 25 February 2009 was caused by the presence of blood in urine, a condition that has been part of his medical history since even prior to his arrest. Medical experts appointed by the Co-Investigating Judges have noted that "from a urological standpoint, [the Appellant's] symptoms are directly related to the benign prostatic hyperplasia, which was treated by endoscopy in 2003 and is currently being treated [...]".[22] Those experts have opined that the "anti-blocker" urological treatment for this condition can be administered "away from home, including [at] a penitentiary. As for arrangements regarding his conditions of detention, it is necessary to provide for a toilet in close proximity or a plastic urinal."[23]

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[17] Appeal, para. 1.

[18] *Case of IENG Sary*, Ieng Sary's Motion Against Extension of Provisional Detention, 28 October 2008, C22/3, ERN 00235370-00235379. The issue of health was principally relegated to a sentence in paragraph 16 that mentioned that "Mr Ieng Sary is 80 years old and has been repeatedly rushed to the hospital".

[19] *Case of IENG Sary*, Order on Extension of Provisional Detention, 10 November 2008, C22/4, ERN 00238566-00239537.

[20] Omnibus Request Dismissal Order, para. 14.

[21] Omnibus Request Dismissal Order, para. 14.

[22] *Case of IENG Sary*, Doctor's Report on Ieng Sary's Health Condition on the Morning of 26 February 2009, 26 February 2009, ERN 00284552-00284552. See also, *Case of IENG Sary*, Rapport D'expertise by Drs. MANGIN and KOUTCH Hach, 14 May 2008, ERN 00189153-00189160, p. 5 [*hereinafter* MANGIN Report].

[23] MANGIN Report, p. 8.

15. On 15 December 2008, the Co-Investigating Judges conducted a statutory interview with the Appellant regarding the conditions of his detention. During this interview, attended by his counsel, he did not complain about any substantive element of his detention at the ECCC Detention Unit. His only request was about certain dietary modifications.[24] The Appellant's response was similar during an earlier interview with the Co-Investigating Judges on 2 May 2008.[25]

16. The Co-Prosecutors, therefore, request that the Pre-Trial Chamber dismiss the request for disclosure of documents on grounds of it being unsubstantiated and being outside the scope of this Appeal.

Appellant has not Exhausted Alternative Remedies before Approaching the PTC

17. The Appellant has stated that in January and February 2008, he sought certain documents from the Hospital which were denied.[26] He has also asserted that in February 2008, the Co-Investigating Judges recognised a detainee's right to access to his medical files maintained at the ECCC Detention Unit and at the Hospital.[27] The Appellant, however, has failed to establish what steps he took since that time to request the Hospital and the Government of Cambodia for the disclosure of the documents that he now seeks through the Pre-Trial Chamber. He has also not demonstrated that he exhausted his remedies before the Co-Investigating Judges by seeking their intervention in obtaining these documents. He has also not established why he did not move the Pre-Trial Chamber earlier in the event of an unwillingness or inability of the Co-Investigating Judges to summon these documents.

18. Having not exhausted his remedies with the Government of Cambodia (that administers the Hospital) and with the Co-Investigating Judges for the past fifteen months, the Appellant cannot be allowed to seek an order from the Pre-Trial Chamber for the production of his entire medical record, especially, when the limited issue in this Appeal concerns the extension of detention as of 10 November 2008. The Co-Prosecutors, therefore, request the

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[24] *Case of IENG Sary*, Written Record of Interview on Conditions of Detention, Case No. 002/19-09-2007-ECCC/OCIJ, 12 December 2008, C44, ERN 00250650–00250652.
[25] *Case of IENG Sary*, Written Record of Interview on Conditions of Detention, Case No. 002/19-09-2007-ECCC/OCIJ, 2 May 2008, C32, ERN 00185518–00185521 (complaining, on page 3, about indigestible diet and noise in detention).
[26] Application, para. 13
[27] Application, para. 13

Pre-Trial Chamber to dismiss the Application on ground of non-exhaustion of alternative remedies before the State and/or the Co-Investigating Judges.

IV. CONCLUSION

19. The Co-Prosecutors request that the Pre-Trial Chamber dismiss the Application.

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Co-Prosecutor

Robert PETIT
Co-Prosecutor

Signed in Phnom Penh on this tenth day of March 2009.