



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: 23 February 2009

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PUBLIC

DECISION ON IENG SARY'S REQUEST TO SUMMON MEDICAL EXPERTS TO GIVE EVIDENCE DURING THE ORAL HEARING ON PROVISIONAL DETENTION

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1. **THE PRE-TRIAL CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) notes “IENG Sary’s Request to Summon Medical Experts to Give Evidence during the Oral Hearing on Provisional Detention” (“Request”), filed on 9 February 2009.

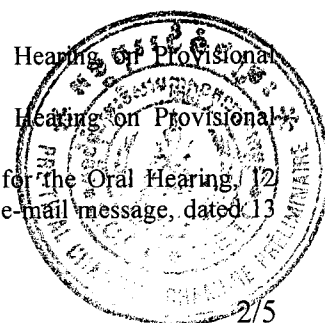
I. PROCEDURAL BACKGROUND

2. By their Request, the Co-Lawyers request the Pre-Trial Chamber “to summon the following doctors for examination at the oral hearing on 26 February 2009:
 - a. Doctor Antoine LAFONT and Doctor LIV CHHIN on [the] contents of their expert reports and their examinations of Mr. IENG Sary;
 - b. Doctor NETH Phalla on his continual examination of Mr. IENG Sary as Head of the ECCC Medical Unit and on the contents of his daily medical reports on Mr. IENG Sary which must be disclosed to the Defence prior to the oral hearing; and,
 - c. All doctors at Calmette Hospital who have been responsible for examining and treating Mr. IENG Sary on the medical reports they have prepared when Mr. IENG Sary has been admitted to [the] hospital.”¹
3. In the Request, the Co-Lawyers submit that “[i]t is necessary for all the doctors who have examined Mr. IENG Sary since his detention to the ECCC to be summoned for examination during the oral hearing on provisional detention scheduled for 26 February 2009” because “[t]he deteriorating health of Mr. IENG Sary has a clear impact on his continued detention” and “[o]nly by summoning the medical experts and thoroughly questioning them on the medical reports they have produced regarding Mr. IENG Sary will it be possible for the Pre-Trial Chamber to understand fully Mr. IENG Sary’s health situation and its impact on his detention.”²
4. In Directions issued on 12 February 2009, the Pre-Trial Chamber invited the Parties involved in the case to file their responses to the Request by 13 February 2009.³

¹ IENG Sary’s Request to Summon Medical Experts to Give Evidence during the Oral Hearing on Provisional Detention, 9 February 2009, C22/5/11 (“Request”), p.5.

² IENG Sary’s Request to Summon Medical Experts to Give Evidence during the Oral Hearing on Provisional Detention Request, para. 2.

³ Directions to the Parties concerning IENG Sary’s Request to Summon Medical Experts for the Oral Hearing, 12 February 2009, C22/5/12 (Extended by the President of the Pre-Trial Chamber by means of e-mail message, dated 13 February 2009, to 16 February 2009).



5. On the request of the national Co-Prosecutor, the President of the Pre-Trial Chamber granted an extension of the time limit for filing the Co-Prosecutors' response to the Request to 16 February 2009.
6. On 16 February 2009, the Co-Prosecutors filed their "Response to IENG Sary's Application to Examine Medical Experts during the Oral Hearing of his Detention Extension Appeal", in which they ask the Pre-Trial Chamber to reject the Request. They submit that the Request is belated and that reasons cited in the Request are insufficient and therefore do not justify oral examination. They argue that the Request is omnibus in nature, lacks precision and is factually unsubstantiated because it does not name all the doctors that it seeks to be summoned and it does not identify specific reports, or parts thereof, on which further clarification is needed. The Co-Prosecutors further submit that the Request seeks examination on issues beyond the scope of the Appeal because it seeks to bring fresh, untested evidence before an appellate chamber (like the Pre-Trial Chamber), thus defeating the salutary objectives of an appellate review.⁴
7. To date, the Civil Parties or their Lawyers have not submitted a response to the Pre-Trial Chamber's Directions concerning the Request.

II. CONSIDERATIONS

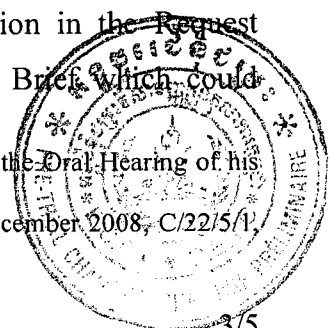
8. In their Appeal Brief on the Order on Extension of Provisional Detention, the Co-Lawyers of the Charged Person did not raise any issues considering the health conditions of the Charged Person except for a short reference made in paragraph 53 of the brief. This reference reads:

"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."⁵

9. 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.
10. 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

⁴ Co-Prosecutors' Response to IENG Sary's Application to Examine Medical Experts during the Oral Hearing of his Detention Extension Appeal, 16 February 2009, C/22/5/15, paras 3 to 14.

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



justify the necessity to hear the witnesses in the Appeal. The Request of the Charged Person notes that he has been in the hospital several times during the time that he has been in provisional detention. This reference reads:

“The health of Mr. IENG Sary has been steadily deteriorating since his incarceration at the Detention Unit of the ECCC on 12 November 2007. Since being detained Mr. IENG Sary has been transferred to Calmette Hospital 8 times which has led to him being admitted to hospital for a total of 46 days. Each time that Mr. IENG Sary has been admitted to Calmette Hospital a medical report has been produced detailing his health condition and prescribed treatment.”⁶

11. The Pre-Trial Chamber notes that the Co-Lawyers have not submitted that the Charged Person has been to the hospital after the filing of the Appeal Brief. The Pre-Trial Chamber further notes that the Case File does not contain any information that the Charged Person has been in the hospital after the filing of the Appeal Brief. The Pre-Trial Chamber notes that the Application filed on 20 February 2009 by the Co-Lawyers contains such information without specifications. It is further noted that this Application contains information that is contradictory to the Request.⁷

12. In the Case File there is a record of an interview of the Charged Person on the conditions of detention which was held on 12 December 2008. During this interview, the international Co-Lawyer provides a statement on behalf of the Charged Person to the following effect:

“I had a meeting with my client yesterday and he told me that he was feeling well enough to attend the interview in these premises. I have also talked to the detention center doctor, who confirmed that the state of health of the Charged Person has stabilized and that the Charged Person was being monitored on a regular basis. Thus, the health care given to my client is adequate.

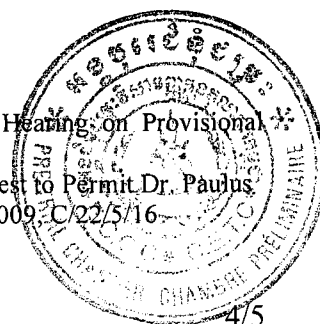
Concerning the detention conditions, my client already made remarks on the food given to him which is not always suitable to his needs. In particular, he mentioned that he does not eat pork because it is either [too] fatty or not well cooked. Other than with regard to the food, we have no other comment to submit in relation to the detention conditions.”⁸

13. During this interview, no requests by the Co-Lawyers were made to hear experts nor were there any complaints made about the conditions of detention in relation to the health conditions of the Charged Person.

⁶ IENG Sary’s Request to Summon Medical Experts to Give Evidence during the Oral Hearing on Provisional Detention, 9 February 2009, C/22/5/11, para. 3.

⁷ 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, C/22/5/16.

⁸ Written Record of Interview on Conditions of Detention, 12 December 2008, C44, p. 2.

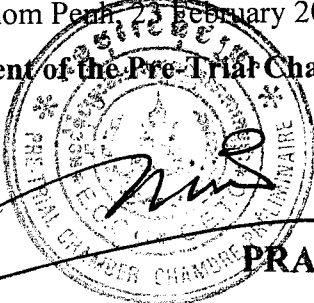


14. The Pre-Trial Chamber finds that no new circumstances have been raised after filing the Appeal which demonstrate urgency or necessity to hear the experts as requested. As the Co-Lawyers have not further identified any circumstances considering the health conditions of the Charged Person which are contrary to the existing conclusions of the experts, there is no justification disclosed to the Pre-Trial Chamber to hear the experts in relation to the Appeal. The Pre-Trial Chamber will permit the Co-Lawyers to raise new arguments during the next hearing and they can renew their Application at this point, provided it is specific in nature.
15. The Pre-Trial Chamber notes that the Co-Lawyers assert that they have an unlimited right to cross-examine the experts. A reference is made to jurisprudence of other tribunals and relevant provisions of those tribunals. These rules and jurisprudence refer to cross-examination of experts from the opposing parties and not to court-appointed experts.
16. The Pre-Trial Chamber considers it appropriate to reject the Request.

THEREFORE, THE PRE-TRIAL CHAMBER HEREBY:

REJECTS the Request to Summon Medical Experts to Give Evidence during the Oral Hearing on Provisional Detention. nt

Phnom Penh, 23 February 2009
President of the Pre-Trial Chamber


PRAK KIMSAN