

C22/5/30

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

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**CO-PROSECUTORS' RESPONSE TO IENG SARY'S APPLICATION TO  
EXAMINE A DOCTOR DURING THE ORAL HEARING  
OF HIS DETENTION EXTENSION APPEAL**

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<b>ឯកសារចម្លងត្រឹមត្រូវតាមច្បាប់ដើម</b>	
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## I. INTRODUCTION

1. In his second application (“Second Application”) filed on 12 March 2009, the Appellant requests the Pre-Trial Chamber to summon for examination by video-link, as a “medical expert”, a general practitioner, Dr. Paulus Falke, on the basis of an unsolicited and cursory summary (“Summary”) prepared by that doctor of the Appellant’s previous medical reports.<sup>1</sup> This Second Application is filed within weeks of the dismissal of the Appellant’s first application (“First Application”) to summon the same Dr. Falke “as a witness” (“First Dismissal Order”).<sup>2</sup> This Second Application has also been moved just a few days after the dismissal of the Appellant’s omnibus request (“Omnibus Request”) where he had sought to summon (1) all the doctors from the Calmette Hospital who have examined him in his past fifteen months of detention, (2) the ECCC Resident Doctor, and (3) Doctors LAFONT and LIV Chhin who had examined the Appellant months ago.<sup>3</sup>
  
2. The Co-Prosecutors request that the Pre-Trial Chamber reject the Second Application as, amongst other reasons, (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, (3) even if Dr. Falke 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.

<sup>1</sup> *Case of IENG Sary*, 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, ERN 00287658-00287661 [*hereinafter* Second Application].

<sup>2</sup> *Case of IENG Sary*, 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, 20 February 2009, C22/5//16, ERN 00283206-00283208 [*hereinafter* First Application]; *Case of IENG Sary*, Written Version of Oral Decision of 26 February 2009 on the Requests Presented Before the Pre-Trial Chamber During the Hearing Held on the Same Day, 27 February 2009, C22/5//24, ERN 00285102-00285104 [*hereinafter* First Dismissal Order].

<sup>3</sup> *Case of IENG Sary*, Ieng Sary’s Request to Summon Medical Experts to Give Evidence During the Oral Hearing on Provisional Detention, 9 February 2009, C22/5//11, ERN 00279185-00279190 [*hereinafter* Omnibus Request]; *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 [*hereinafter* Omnibus Request Dismissal Order].

## II. ARGUMENT

### *Application does not Satisfy the Criteria for Reconsideration of a Decision*

3. Citing with approval the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (“ICTY”), the Pre-Trial Chamber has held that it may reconsider its previous decision where (a) there has been a change in circumstances, (b) the previous decision was erroneous, or (c) it caused injustice.<sup>4</sup> The Appellant has not shown that any of these conditions have been met in this Second Application.

#### i. There has been no material change in circumstances

4. For a successful application on the ground of change of circumstances (1) there must be a new fact, (2) this new fact must not have been known by the moving party at the time of the original proceedings, (3) the lack of discovery of the new fact must not have been through the lack of due diligence of the moving party, and (4) it must be shown that the new fact could have been a decisive factor in reaching the original decision.<sup>5</sup>
5. The First Dismissal Order rejected the Appellant’s First Application to “permit Doctor Falke to give evidence during the oral hearing”.<sup>6</sup> The Appellant has cited no material change in circumstances to necessitate a reconsideration of the First Dismissal Order. Nor has he submitted that the First Dismissal Order was either erroneous or that it caused injustice. The First Application was dismissed on the Appellant’s submission that Dr. Falke was sought to be summoned “as a witness and not [...] as an expert.”<sup>7</sup> In the Second Application, the Appellant relies on the same documentation that he filed with the First Application. The only improvement—without substantiation—is that the Second Application now seeks to summon Dr. Falke as a medical expert.<sup>8</sup>

<sup>4</sup> *Case of IENG Sary*, Decision on Application for Reconsideration of Civil Party Right to Address the Pre-Trial Chamber, 28 August 2008, C22/1//68, ERN 00221475-00221484, para. 25 [*hereinafter* SENG Theory Decision] citing *Prosecutor v. Galic*, Decision on Application by Prosecution for Leave to Appeal, Case No. IT-98-29-AR73, ICTY Appeals Chamber, 14 December 2001, para. 13.

<sup>5</sup> *Prosecutor v. Barayagwiza*, Decision on Prosecutor’s Request for Review or Reconsideration, Case No. ICTR-97-19-AR72, ICTR Appeals Chamber, 31 March 2000, para. 41.

<sup>6</sup> First Application, p. 3.

<sup>7</sup> First Dismissal Order, para. 2.

<sup>8</sup> Second Application, para. 5.

e 22/5/30

Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 17)

6. In sum, the Appellant has not alleged, much less proved, any material change in circumstances that should require a reconsideration of the Pre-Trial Chamber's First Dismissal Decision. Reconsideration on this ground, therefore, is not warranted.

ii. **The First Dismissal Order was not erroneous**

7. Judicial power to reconsider a decision is discretionary. In exceptional circumstances, a decision may be reconsidered if "a clear error of reasoning has been demonstrated".<sup>9</sup> The Appellant has not demonstrated that exceptional circumstances exist to necessitate an exercise of discretion; nor has he established a "clear error" in the Pre-Trial Chamber's reasoning in the First Dismissal Order.

iii. **The First Dismissal Order did not cause injustice**

8. The Appellant has not submitted that the First Dismissal Order caused any injustice or that, if that Decision was not reconsidered, he would suffer irreparable loss and prejudice. The Co-Prosecutors, therefore, submit that Pre-Trial Chamber's reconsideration of its First Dismissal Decision is not warranted.

***Application does not Satisfy the Requirements of the Provision under which it is Filed***

9. The Second Application has been filed in purported invocation of Rule 31 to treat Dr. Falke as an "expert". The Application, as presented, is misconceived.

10. Rule 31 provides for a set of actions to happen before a person is designated as an "expert" and his or her expertise is accepted by this Court. To wit, (a) an expert is only appointed by an order of the relevant judicial organs of this Court,<sup>10</sup> (b) he or she performs his or her functions under the supervision of those judicial organs,<sup>11</sup> (c) his or her order of appointment sets out the exact assignment and its duration,<sup>12</sup> etc. None of these requirements have been met in the case of Dr. Falke. It is also unclear from the Second Application whether the Appellant wishes to submit the Summary produced by Dr. Falke as his expert report or he

<sup>9</sup> SENG Theory Decision, para. 25.

<sup>10</sup> Internal Rules, rule 31(3) [*hereinafter* Rules].

<sup>11</sup> Rules, rule 31(4).

<sup>12</sup> Rules, rule 31(3).

022/5/30

Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 17)

(the Appellant) is seeking an expertise order from the Pre-Trial Chamber to obtain a new expert report from Dr. Falke.

11. If, for the sake of argument, the Second Application is considered to have been filed under Rule 32, then again it does not fulfil the requisite conditions of that Rule. For example, an expert for the medical examination of a defendant under Rule 32 (a) can only be appointed by a judicial organ of this Court, (b) the appointment has to be pursuant to a reasoned order, and (c) the expert has to provide a report after the defendant undergoes “a medical, psychiatric or psychological examination” by the expert. None of these requirements have been met in the case of Dr. Falke.
12. The Co-Prosecutors, therefore, request that the Pre-Trial Chamber dismiss the Second Application as legally misconceived.

***Dr. Falke is not Suitable to be an Expert in the Present Proceedings***

13. International jurisprudence requires the calling party to satisfy that the proposed expert has, at his or her disposal, “special knowledge, experience or skills needed to potentially assist the [judicial chamber] in its understanding or determination” of the issues in dispute.<sup>13</sup> An expert’s testimony is intended to enlighten a judicial chamber on specific issues of a technical nature, requiring special knowledge in a specific field.<sup>14</sup> One of the distinctions between an expert witness and a fact witness is that, due to the qualifications of an expert, he or she can give opinions and draw conclusions and present them to the chamber.<sup>15</sup>
14. Dr. Falke’s expertise, if any, is not suitable in the present proceedings for the purpose for which he is sought to be summoned. This is demonstrated, in particular, by the following facts:
  - i. Dr. Falke has neither met the Appellant nor visited the ECCC Detention Unit.

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<sup>13</sup> *Prosecutor v. Milutinovic et al*, Decision on Evidence Tendered Through Dr. Eric Baccard, Case No. IT-05-87-T, ICTY Trial Chamber, 16 March 2007, para. 13.

<sup>14</sup> *Prosecutor v. Norman et al*, Decision on Fofana Application on Leave to Call Additional Witnesses, Case No. SCSL-04-14-T, 17 July 2006, p. 4.

<sup>15</sup> *Prosecutor v. Blagojevic et al*, Decision on Prosecution Motion for Admission of Expert Statements, Case No. IT-02-60-T, ICTY Trial Chamber, 7 November 2003, para. 19.

C22/5/30

Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 17)

- ii. Dr. Falke has neither met nor spoken with the several experts who have already examined the Appellant. In particular, he has not met the ECCC Resident Doctor who has examined the Appellant almost daily since his arrest. Dr. Falke has also not seen the daily medical reports maintained by the ECCC Resident Doctor.
- iii. Dr. Falke is a general practitioner while the ailments suffered by the Appellant require special experts like cardiologists, urologists, *etc.* Many such specialists, both Cambodian and international, have already tendered detailed expert reports that are on the Case File.
- iv. Dr. Falke is not a psychologist, geriatrician or a forensic psychiatrist, to be qualified to opine on (1) the Appellant's fitness to stand trial, or (2) his participation in his own defence. These are the matters Dr. Falke has sought to opine on in his Summary.<sup>16</sup> He is not suitable to be an expert to determine these matters in terms of the law laid down in the *Strugar* decision of the ICTY and the *Nahak* decision of the Special Panels for East Timor. These cases were cited with approval by the Pre-Trial Chamber while rejecting the Appellant's appeal for appointment of a psychiatric expert to assess his fitness to stand trial.<sup>17</sup> In that decision of 21 October 2008, the Pre-Trial Chamber had analysed existing medical evidence to rule that "none of the medical or expert reports indicates that the ailments from which the [Appellant] is suffering have an effect on his mental capacity."<sup>18</sup> The Appellant has cited no material change in circumstances that should necessitate a reconsideration of that decision by this Chamber.
- v. The "unique qualification" cited in favour of Dr. Falke's expertise is that he has been a doctor at the ICTY Detention Unit.<sup>19</sup> This is neither a special qualification in the present context nor indeed does it make Dr. Falke unique. Being a general practitioner at a detention unit in a European country, dealing essentially with

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<sup>16</sup> First Application, Annex B, Report of Dr. Paulus Falke, p. 1.

<sup>17</sup> *Case of IENG Sary*, Decision on Ieng Sary's Appeal Regarding the Appointment of a Psychiatric Expert, 21 October 2008, A189/I/8, ERN 00233433-00233443, paras. 39, 40, 46 [*hereinafter* PTC Psychiatric Expert Decision].

<sup>18</sup> PTC Psychiatric Expert Decision, para. 43. Most of the expert and medical reports cited in this Decision were also used by Dr. Falke to draft his Summary.

<sup>19</sup> First Application, p. 8.

022/5/30

Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 17)

European detainees with their specific dietary habits, lifestyles, ailments, *etc.* does not specially qualify Dr. Falke to opine—remotely—on such broad questions submitted to him by the Defence. There is no suggestion that Dr. Falke has a specific expertise in tropical medicine or that he is aware of the specific dietary habits, lifestyles, ailments, *etc.* of patients in Cambodia.

- vi. The curriculum vitae of Dr. Falke is self-declaredly “short” and does not establish why he is qualified, much less “uniquely” so, to be summoned by the Pre-Trial Chamber in the present proceedings.<sup>20</sup>

15. The First Application stated that the purpose of the request to summon Dr. Falke, was to “fully explain the complex medical terms set out in [the previous] reports and to clarify any ambiguities due to their translation into different languages.”<sup>21</sup> The First Application, however, did not demonstrate how Dr. Falke was “uniquely qualified” to explain complex medical terms or to address ambiguities of translation. The First Application, therefore, was rightly rejected by the Pre-Trial Chamber on 23 February 2009.
16. The Second Application now seeks to summon Dr. Falke to assist the Pre-Trial Chamber “to understand the various medical reports of [the Appellant]; the minimum standards of medical treatment and testing which a person of [the Appellant’s] age and health can expect – and would be entitled to if detained at the [ICTY Detention Unit] – and the effect of prolonged detention on a [detainee’s] health.”<sup>22</sup> The Co-Prosecutors submit that the Appellant has provided insufficient reasons in the Second Application to summon Dr. Falke. First, none of these issues have been addressed by Dr. Falke in his Summary. Second, in the short time before the hearing of 2 April 2009 it is unlikely that he may be able to opine on these issues and prepare a report to allow all parties to prepare for his oral examination. Third, as stated above, Dr. Falke is not suitable to opine on already obtained reports of experts more qualified than him. Fourth, the issue of international standards of detention has been addressed adequately and repeatedly by this Court by allowing the International Committee of the Red Cross (“ICRC”) to visit the ECCC Detention Unit. During its visits, the ICRC interviews

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<sup>20</sup> First Application, Annex C, Curriculum Vitae of Dr. Paulus Falke.

<sup>21</sup> First Application, p. 1

<sup>22</sup> Second Application, para. 8

C22/5/30

Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 17)

detainees, detaining authorities and medical personnel and inspects the detention premises.<sup>23</sup> Fifth, as previously argued by the Co-Prosecutors, this Detention Extension Appeal has not substantively raised the issue of the Appellant's health and nor was this issue discussed by the Co-Investigating Judges in their Detention Extension Order.<sup>24</sup>

17. The Co-Prosecutors, therefore, request that the Pre-Trial Chamber dismiss the Second Application as Dr. Falke is not suitable for rendering the expertise sought therein.

***If Dr. Falke is Deemed an Expert, his Summary does not Qualify as Expert Report***

18. Assuming for the sake of argument that Dr. Falke is found suitable as an expert under Rules 31 and 32, his short Summary does not qualify as an "expert report". The Summary is not based on first hand information. It does not contain conclusions of Dr. Falke regarding the questions posed to him by the Appellant. It, for example, does not answer the following four questions posed to Dr. Falke by the Appellant:

- i. How can we establish whether Mr. Ieng Sary is fit to be detained?
- ii. Whether Mr. Ieng Sary is fit to stand trial?
- iii. Whether Mr. Ieng Sary is fit to participate in his own defence?
- iv. Are there more diagnostic tests to be performed to determine the status of Mr. Ieng Sary's physical and mental health and his abilities?"<sup>25</sup>

19. Dr. Falke's two-page Summary, in the Co-Prosecutors' submission, does not provide any expertise, nor does it assist this Court in better understanding of any issues arising in this Appeal. The Summary attempts to summarise opinions of specialists more qualified than Dr. Falke, who is only a general practitioner. In authoring his Summary, Dr. Falke is seeking to be an "expert of experts", which is not what Rule 32 envisages for the experts. Rule 32 expects experts to undertake "a medical, psychiatric or psychological examination" of the defendant and not simply to summarise or opine on reports of higher qualified experts already obtained by this Court.

<sup>23</sup> *Case of IENG Sary*, ICRC Letter to the ECCC Director of Administration, 11 January 2008, A57, ERN 00158321.

<sup>24</sup> *Case of IENG Sary*, Co-Prosecutors' Response to Ieng Sary's Application to Examine Medical Experts During the Oral Hearing of His Detention Extension Appeal, 16 February 2009, C22/5/15, ERN 00282674-00282679, paras. 12-15.

<sup>25</sup> First Application, Annex B, Report of Dr Paulus Falke, p. 1.



C22/5/30

Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 17)

20. The Summary will also be unhelpful as the issue on which it purports to opine have already been tasked by the Co-Investigating Judges to more qualified experts and their reports have been received. Further reports are expected on an ongoing basis. The terms of reference given by the Co-Investigating Judges to their experts have been comprehensive. For example, in the Expertise Order of 14 March 2008, the terms of expertise were:

- “i. Does the examination of the detainee reveal any specific pathology? If so, describe them and indicate to which medical condition they relate.
- ii State whether any such disorders require special treatment or care or whether they involve any counter indications. More precisely, does the medical condition require specific measures, both with respect to the conditions of detention of the detainee and his participation in the judicial investigation?
- iii. Is any medical examinations with other specialists needed? If so, which ones?
- iv. If appropriate, provide a prognosis on possible modification, degradation or improvement of the condition.
- v. Provide any other useful observations concerning the health of the detainee.”<sup>26</sup>

21. Dr. Falke’s Summary shall add nothing to what this Court or the currently appointed experts already know. The Summary does not provide any fresh expertise except to state Dr. Falk’s inability to reach conclusions in the absence of certain tests that—according to him—need to be performed on the Appellant. Even if these tests were performed, Dr. Falke will not be in a position to comment on them as they require evaluation by a specialist, which he is not.

22. The Co-Prosecutors, therefore, request that the Pre-Trial Chamber reject Dr. Falke’s Summary as it does not meet the requirements of an expert report envisaged under Rules 31 and 32.

### *Application Undermines Judicial Economy*

23. As stated above, the current Second Application has been filed in addition to an Omnibus Request filed and rejected very recently in the same Appeal proceedings. In the Omnibus Request, the Appellant had requested the summoning of all the numerous doctors and experts who have examined him in the past fifteen months of his detention. The Co-Prosecutors had

<sup>26</sup> *Case of IENG Sary*, Expertise Order, Case No. 002/19-09-2007-ECCC/OCIJ, 21 February 2008, ERN 00164556–00164557, D76, p. 2.

C22/5/30

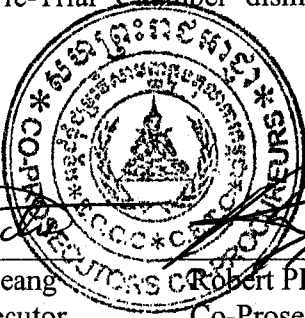
Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 17)

objected to that Omnibus Request on grounds of it being belated, imprecise, over-broad and factually and legally unsubstantiated.<sup>27</sup> Within days of dismissal of the Omnibus Request and the dismissal of his First Application to summon Dr. Falke as a “witness”, the Appellant has filed this Second Application that seeks to summon Dr. Falke—as an “expert”—to evaluate and explain the reports of experts more qualified than him and with greater knowledge of, and direct access to, the Appellant and his medical record. The Second Application will, therefore, be wasteful of this Tribunal’s time and resources and shall undermine judicial economy.

### III. CONCLUSION

24. The Co-Prosecutors, therefore, request that the Pre-Trial Chamber dismiss the Second Application.

Respectfully submitted,



CHEA Leang  
Co-Prosecutor

Robert PETIT  
Co-Prosecutor

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

<sup>27</sup> *Case of IENG Sary*, Co-Prosecutors’ Response to Ieng Sary’s Application to Examine Medical Experts During the Oral Hearing of his Detention Extension Appeal, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 17), 16 February 2009, ERN 00282674–00282667, C22/5/15.