

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

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Urgent Request for the Trial Chamber to Amend Memorandum E62/3/10 (formerly E106)

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I. FACTUAL AND PROCEDURAL BACKGROUND

- 1- Pursuant to Rule 86 of the Internal Rules, “at all times, the Co-Prosecutors and the lawyers for the other parties have the right to examine and obtain copies of the case file, under the supervision of the Greffier of the Chamber, during working days and subject to the requirements of the proper functioning of the ECCC.”
- 2- On 21 February 2011, the Lawyers for Ieng Thirith filed their “Request for Appointment of a Neuropsychiatrist to Assess Madame Ieng Thirith’s Fitness to Stand Trial” (E52).
- 3- At the first day of the Initial Hearing, on 27 June 2011, the President of the Trial Chamber announced that the medical reports by Dr Campbell on three of the Accused would be made part of the “confidential” part of the case file on 25 July 2011. In response to this, the lawyers for IENG Thirith filed an objection in which they asserted that the Co-Prosecutors only should have access to the expert medical report, emphasising that the Civil Parties have no legitimate interest in discovering the contents of the Report.¹ The NUON Chea Defence joined Ieng Thirith’s objection.²
- 4- In its “Memorandum to Counsel for the Parties” (“Memorandum E62/3/10”), dated 6 July 2011³, the Trial Chamber (“the Chamber”) decided that the expert medical reports on IENG Thirith and NUON Chea were to remain classified as strictly confidential pending further order. The Chamber indicated nonetheless in the Memorandum that “it is essential that all parties have an opportunity to support or oppose the expert medical findings.”⁴
- 5- The Chamber decided to limit distribution of the reports to counsel for the parties, “giving them the opportunity to review the full reports and to indicate whether they oppose or support the applications of IENG Thirith and NUON Chea.”⁵ The Chamber directed that “the Co-Prosecutors, the Defence counsel for each Accused, and the Civil Party Lead Co-Lawyers are to receive a full copy of the expert reports on IENG Thirith and Nuon Chea.”
- 6- The Chamber added that the Civil Party Lead Co-Lawyers may provide a copy of these reports to an individual Civil Party lawyer only if agreement has been reached pursuant to Internal Rules 12 *ter* (5) (b) and (6), relative to support provided by Civil Party lawyers’ to Civil Party Co-Lead Lawyers through oral and written submissions before the Chamber.

¹ Defence Objection to Trial Chamber’s announcement to put the Medical Report by Dr. Campbell on the ‘Confidential’ Part of the Case File, 29 June 2011, E62/3/7, para. 12.

² See Memorandum to Counsel for the Parties, 6 July 2011, E106 (the Trial Chamber changed the document number of Memorandum E106, to E62/3/10)

³ *Ibid.*

⁴ *Ibid.*, para. 4.

⁵ *Ibid.*, para. 5.

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II. ARGUMENT

Strictly Confidential Nature of Documents

- 7- The Chamber considers that the expert medical reports are to be classified as strictly confidential given their substantive merit in the present proceedings. According to the Practice Direction on “Classification and Management of Case-Related Information,”⁶ ‘strictly confidential’ means that access is “open only to the Judges, the Co-Prosecutors, lawyers for the Civil Parties, defence counsel, authorised court staff who require access in the discharge of their duties, expressly given access by the court.” Accordingly, at the ECCC, the “strictly confidential” classification refers only to those documents which are open to the court judges concerned, with the parties being given access expressly by the Chamber.
- 8- In Memorandum E62/3/10, the Chamber decided that given the substantive merit of the documents in question, they are to be distributed to the Co-Prosecutors and counsel only, and not to individual Accused or Civil Parties. These reports go to the fundamental interests of all the parties to the proceedings. This is because they can potentially lead to the withdrawal of one or several Accused from the trial, and thereby affect the rights of the other parties, Accused persons or Civil Parties. It is therefore crucial that counsel for all the parties, without any distinction among them, be allowed to consult them in order to discharge their duties.
- 9- However, in reliance on the “strictly confidential” classification of documents, the Chamber does make a distinction between the Civil Party Lead Co-Lawyers and Civil Party Lawyers. The consequence is that strictly confidential documents can be distributed to all lawyers, except Civil Party lawyers.

Notification of Case File Materials to All Parties

- 10- The Chamber’s decision to limit notification to the Civil Party Lead Co-Lawyers amounts to a serious violation of the fundamental principles regarding access to the case file by counsel participating in the proceedings. The restriction is not justified and has no basis at law.
- 11- The Civil Party Lead Co-Lawyers and Civil Party Lawyers hereby submit that the regime imposed in the Trial Chamber’s Memorandum E62/3/10 is discriminatory, contrary to and derogates from the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (“the ECCC”), as well as internationally recognised standards of equality of arms.⁷
- 12- The Civil Party Lead Co-Lawyers and Civil Party Lawyers therefore respectfully request the Chamber to honour Civil Party Lawyers’ right to be notified of all materials on the case file, as is the case for all the lawyers for the other parties.

Legal Representation of Civil Parties at Trial

⁶ Classification and Management of Case-Related Information, *Practice Direction 004/2009*, 5 June 2009, Article 2(d)(iii).

⁷ See *Prosecutor v. Duško Tadić*, Judgment, 15 July 1999, ICTY Appeals Chamber, IT-94-I-Q, para. 48. Original FRENCH: 00715738-00715746

- 13- In accordance with Internal Rule 23*ter* (2), “when the Civil Party is represented by a lawyer, his or her rights are exercised through the lawyer [...]”
- 14- While Internal Rule 12 *ter* (5) provides that the Civil Party Lead Co-Lawyers are to ensure effective organization of Civil Party representation during the trial stage and beyond, even with the introduction of Civil Party Lead Co-Lawyers in ECCC proceedings, Civil Party lawyers still play a crucial role through their participation and representation of Civil Party interests at all stages of the proceedings. Accordingly, Civil Party Lawyers ought to have access to the entirety of the relevant information at all stages of the proceedings in order to effectively uphold the interests of their clients. The Civil Party Lead Co-Lawyers cannot discharge their primary duty of consultation and seeking a consensus in order to coordinate representation, as stipulated in Rule 12 *ter* (3), if the Civil Party lawyers do not have access to procedural materials. The Civil Party Lead Co-Lawyers are of the view that Memorandum E62/3/10 seriously affects the Civil Party Lawyers’ prerogatives in that it denies them the right to access materials to which the lawyers for the defence and the Co-Prosecutors have unrestricted access.
- 15- Internal Rule 12 *ter* (3) provides: “The Civil Party Lead Co-Lawyers shall first and foremost seek the views of the Civil Party lawyers and endeavour to reach consensus in order to coordinate representation of Civil Parties at trial.” For their part, Civil Party lawyers are given powers of attorney by the Civil Parties, and communicate with them.
- 16- Concerning the role of Lead Civil Party Co-Lawyers, while Internal Rule 12 *ter* (5) provides that their core functions are to represent the interests of the consolidated group of Civil Parties and to assume “ultimate responsibility to the court for the overall advocacy, strategy and in-court presentation of the interests of the consolidated group of Civil Parties during the trial stage and beyond,” sub-paragraph 6 of the same Rule highlights the need for the Civil Party lawyers to provide support by way of oral and written submissions, which is part and parcel of a lawyer’s duties.
- 17- In issuing directions, the Chamber must always take into account the complex operating procedures within the consolidated group of Civil Parties. Rule 12 *ter* (6) states that “the Civil Party Lawyers shall endeavour to support the Civil Party Lead Co-Lawyers in the representation of the interests of the consolidated group.” This implies that the drafting of submissions and the choice of strategy are decided upon *collectively and jointly* within the group: it is therefore crucial for all the Civil Party lawyers to obtain any and all documents disclosed to the other parties, to the extent that they and the Civil Party Lead Co-Lawyers are the civil party to case.
- 18- The Civil Party Lead Co-Lawyers and the Civil Party Lawyers are acutely aware that respecting confidentiality is of paramount importance, and do not in any way question the Chamber’s efforts in this regard. It is nonetheless surprising to note that the Chamber has imposed a restriction on the Civil Party lawyers’ access to the expert medical reports whereas dozens of lawyers from the various defence teams have unrestricted access thereto.
- 19- The Civil Party lawyers, just like the lawyers for the Accused, must receive equal treatment in order to perform their duties. They must not be singled out and suspected or discriminated against in regard to respect for confidentiality. Having determined that “it is essential that all parties have an opportunity to support or oppose the expert medical findings,” the Memorandum curtails the rights of the Civil Party

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lawyers by denying them access to material underpinning the request regarding which they are to make submissions. The Chamber therefore is discriminating between the various parties in violation of Rule 21(1)(a) of the Internal Rules. This Rule is crystal clear concerning respect for Civil Parties' rights: "The ECCC shall ensure that victims are kept informed and that their rights are respected throughout the proceedings."

- 20- Without access to these materials, the Civil Party lawyers cannot discharge their duty of defending the interests of their clients in conformity with Internal Rule 23 *ter* (2) and acting on behalf of the consolidated group; they are thus unable to seek a consensus.
- 21- The Civil Party Lawyers cannot make an informed decision in the absence of respect for the principles set forth in Internal Rule 21 (1) (a) and (c), namely that, "ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties," and that "[t]he ECCC shall ensure that victims are kept informed and that their rights are respected throughout the proceedings."
- 22- The fact that Civil Party Lawyers do not have equal access as other parties to the Report is a violation of the principle of equality of arms between representatives of the various parties to the proceedings. Guidance must be sought in international jurisprudence in determining the ambit of this principle. In *Delcourt v. Belgium*, the European Court of Human Rights found that the principle of equality of arms affords all parties the right to fair treatment as to avoid "put[ting] the accused unfairly at a disadvantage"⁸ This principle was enshrined in international jurisprudence in *Prosecutor v. Duško Tadić*, where the ICTY Appeals Chamber held that "equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case."⁹
- 23- The directives in Memorandum E62/3/10 regarding the disclosure of documents divert from procedural rules in that they are contrary to the rights of Civil Party lawyers, as set out in Internal Rule 23 *ter* (2), 12 *ter* (3) and (6).
- 24- In order to comply with the principle of procedural fairness before the ECCC and with the internal rules governing Civil Parties representation as a consolidated group, the Civil Party Lead-Co-Lawyers request the Trial Chamber to note that the Civil Party lawyers have been denied their rights under the Internal Rules, and that they are unable to discharge their representation duties. As for the Civil Party Lead Co-Lawyers, they are unable to discharge their core obligation of seeking a consensus and representing the interests of the consolidated group of Civil Parties.
- 25- Wherefore, the Civil Parties respectfully request the Trial Chamber to amend Memorandum E62/3/10, in that the distribution regime it introduces is contrary to the Internal Rules. Accordingly, the Chamber is requested to rule that the expert medical reports on IENG Thirith and NUON Chea shall be disclosed to the Co-Prosecutors, the lawyers of each Accused, the Lead Co-Lawyers and all the Civil Party lawyers, without any restrictions.

⁸ *Delcourt v. Belgium*, European Court of Human Rights, Judgment, 17 January 1970, Series A, No. 11, para 34.

⁹ *Prosecutor v. Duško Tadić*, Judgment, 15 July 1999, ICTY Appeals Chamber, IT-94-1-Q, para. 48. The Appeals Chamber further added in paragraph 52 that "the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts. This principle means that the Prosecution and the Defence must be equal before the Trial Chamber."

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26- In the alternative, it is requested that the Lead Co-Lawyers be permitted to disclose the documents to the Civil Party lawyers, who, in application of Rules 12 *ter* (5) and (6) and in strict compliance with the rules of confidentiality applicable to all judicial matters may, by *a priori* hypothesis, wish to participate in the drafting and review of submissions concerning the expert medical reports.

Phnom Penh, 15 July 2011.

Date	Name	Place	Signature
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