

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

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URGENT

**IENG THIRITH DEFENCE RESPONSE TO THE CIVIL PARTIES CO-LEAD LAWYERS'
'URGENT REQUEST FOR THE TRIAL CHAMBER TO AMEND MEMORANDUM E62/3/10
(FORMERLY E106)'**

Defence for Ieng Thirith:

PHAT Pouv Seang
Diana ELLIS, QC

Trial Chamber Judges:

NIL Nonn, President
Silvia CARTWRIGHT
THOU Mony
Jean-Marc LAVERGNE
Ya SOKHAN

Civil Party Co-Lead Lawyers:

PICH Ang
Elisabeth SIMONNEAU FORT

Co-Prosecutors:

CHEA Leang
Andrew CAYLEY

I INTRODUCTION

1. On 27 June 2011, on the first day of the Initial Hearing, the President of the Trial Chamber announced that the medical report by Professor Campbell (**The Report**) would be placed on the 'confidential' part of the case file on 25 July 2011.
2. On 29 June 2011, the defence for Madame Ieng Thirith (**Accused**) filed its 'Defence Objection to Trial Chamber's Announcement to Put the Medical Report by Dr Campbell on the "Confidential" Part of the Case File' (**Defence Request**).¹ In it the defence requested that the Report should remain 'strictly confidential'.² The defence also requested that the Report should not be disclosed to the Co-Prosecutors until the final version was confirmed. Further, the Trial Chamber was asked to reject the disclosure of the Report to any other parties or persons.³ The Civil Parties Co-Lawyers lodged no response to the defence submissions.
3. On 6 July 2011, the Trial Chamber notified the parties of its 'Memorandum to Counsel for the Parties',⁴ in which the Trial Chamber stated that 'it will not re-classify the expert reports on IENG Thirith [...] as confidential but will instead limit their distribution to counsel for the parties, giving them an opportunity to review the full reports and to indicate whether they oppose or support the applications of IENG Thirith [...]'.⁵ The Trial Chamber further decided to provide the Civil Party Co-Lawyers, and not individual Civil Party Lawyers, with a full copy of the expert Report on the Accused, unless an agreement is reached pursuant to Internal Rule 12ter (5)(b) and (6) between the Civil Party Co-Lawyers and the individual Civil Party lawyer.⁶

¹ Ieng Thirith 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, Document No. E62/3/7.

² Defence Request, paras. 4-6.

³ Defence Request, para. 16.

⁴ TC, Memorandum to Counsel for the Parties, 6 July 2011, Document No. E62/3/10.

⁵ TC, Memorandum to Counsel for the Parties, 6 July 2011, Document No. E62/3/10, p. 1-2.

⁶ TC, Memorandum to Counsel for the Parties, 6 July 2011, Document No. E62/3/10, p. 2.

4. On 15 July 2011, the Civil Parties Co-Lead Lawyers filed their 'Urgent Request for the Trial Chamber to Amend Memorandum E62/3/10 (formerly E106)' (**Request**).⁷ The defence was notified of this Request on 18 July 2011 and hereby files its response.

II INADMISSIBILITY OF THE REQUEST

5. The defence submits that the Civil Parties Co-Lead Lawyers Request is inadmissible. The Civil Parties Co-Lead Lawyers request the Trial Chamber to review a decision adopted by the Trial Chamber in its Memorandum dated 6 July 2011, while submitting that the said decision violates Internal Rule 21(1)(a),⁸ as well as the rights of the Civil Parties lawyers reflected in Internal Rules 23^{ter} (2), 12^{ter} (3) and (6).⁹ The Civil Parties Co-Lead Lawyers request that the Trial Chamber recognizes that the Civil Parties lawyers are deprived of their rights enshrined in the Internal Rules¹⁰ and seek to 'amend' the Trial Chamber Memorandum in a way that will allow them to have a full copy of the Report of the Accused.¹¹
6. The request of the Civil Parties Co-Lead Lawyers amounts to an appeal against the Trial Chamber's decision and falls under Internal Rule 104. The Supreme Court Chamber was established under the Internal Rules for the purpose of reviewing Trial Chamber decisions to determine whether an error on a question of law invalidating the decision, or an error of facts, has led to a miscarriage of justice. It is not possible for the parties to seek a review before the Trial Chamber of a former decision of the Trial Chamber itself, on the basis that its decision violates a party's right.

⁷ Civil Parties Co-Lead Lawyers, Urgent Request for the Trial Chamber to Amend Memorandum E62/3/10 (formerly E106), 15 July 2011, Document No. E62/3/10/1.

⁸ Civil Parties Co-Lead Lawyers Request, para. 19.

⁹ Civil Parties Co-Lead Lawyers Request, para. 23.

¹⁰ Civil Parties Co-Lead Lawyers Request, para. 24.

¹¹ Civil Parties Co-Lead Lawyers Request, para. 25.

7. The defence further notes that the Civil Parties Co-Lead Lawyers did not respond to the Defence Request, asking the Trial Chamber not to disclose the Report to all parties to the proceedings. The Civil Parties Co-Lead Lawyers failed to raise the issue at the correct time. This failure should lead to the rejection of their Request.

III SUBMISSIONS

8. For the reasons set out, the defence submits that the Civil Parties Co-Lead Lawyers Request is inadmissible and should be rejected for lack of legal basis. The defence now turns to the substance of the argument in response to paragraphs 7-26 of the Civil Parties Co-Lead Lawyers Request.

3.1 Failure to differentiate between Information on the Case File and Strictly Confidential Information

9. In their Request, the Civil Parties Co-Lead Lawyers argue that all the lawyers of all civil parties are entitled to have a full copy of the Report of the Accused, as the Report concerns fundamental interests of all the parties to the proceedings.¹² They contend that the individual Civil Parties lawyers must have access to ‘the entirety of the relevant information’¹³ on the Case File in order to represent the interests of the Civil Parties, at all stages of the proceedings.¹⁴ They further argue that restricting the notification of the Report to the Civil Parties lawyers constitutes a violation of the Civil Parties’ lawyers fundamental principle to access the Case File. The Civil Parties Co-Lawyers submit that such a violation has no basis at law and that it is not justified.¹⁵
10. In justifying their request, the Civil Parties Co-Lead Lawyers refer to the importance of the respect of equality of arms and the guarantees of the victims’

¹² Civil Parties Co-Lead Lawyers Request, para. 8.

¹³ Civil Parties Co-Lead Lawyers Request, para. 14.

¹⁴ Civil Parties Co-Lead Lawyers Request, para. 14.

¹⁵ Civil Parties Co-Lead Lawyers Request, para. 10.

rights in the proceedings.¹⁶ At no point do the Civil Parties Co-Lead Lawyers mention the Accused's fundamental right to privacy.

11. The defence submits that the Civil Parties Co-Lead Lawyers in their Request failed to differentiate between public/confidential information and 'strictly confidential' information available on the Case File. In doing so, they have ignore the nature of the document that they seek to have disclosed to all individual Civil Parties lawyers, namely a Medical Report of the Accused.
12. The defence respectfully submits that it is vitally important to preserve the confidentiality of medical information provided by the doctors as a result of private consultations with an accused. The justification for not providing Civil Parties individual lawyers with the Medical Report is that the Accused has a right to privacy concerning medical information. It is fundamental in all societies that the information provided by a patient in the course of a medical consultation is private and will not be disclosed to the public. There is a public and a private interest in maintaining this privacy. A patient is less likely to disclose information if it is then made public. The defence hereby refers to its previous submissions on the matter.¹⁷ Accordingly, by balancing the fundamental rights of the Accused to privacy and the public's right to know the basis on which an application on fitness to stand trial will be determined, the Trial Chamber decided that only Civil Parties Co-Lead Lawyers be provided with the Report.¹⁸ The Civil Parties Co-Lead Lawyers wrongly assert that non-disclosure of the Report to all individual Civil Parties lawyers is not justified.¹⁹
13. The Accused's right to privacy is a fundamental right that is enshrined in Article 8 of the European Convention on Human Rights and Article 17 of the International Covenant on Civil and Political Rights. The Accused should not be deprived of this fundamental right on the basis that Civil Parties lawyers have the right to

¹⁶ Civil Parties Co-Lead Lawyers Request, paras. 19, 21-22.

¹⁷ Defence Request, paras. 7-9.

¹⁸ TC, Memorandum to Counsel for the Parties, 6 July 2011, Document No. E62/3/10, p. 2.

¹⁹ Civil Parties Co-Lead Lawyers Request, para. 10.

access to information on the Case File. Medical information of an accused is by nature strictly confidential and should not be widely dispersed. Allowing all Civil Parties lawyers to have access to the Accused's Medical Report would breach the Accused fundamental right to privacy. The Trial Chamber recognized this when deciding in its Memorandum that only Civil Parties Co-Lead Lawyers have access to the said Report, unless agreement is reached pursuant to Internal Rule 12^{ter} (5)(b) and (6) between the Civil Party Co-Lawyers and the individual Civil Party Lawyer.

3.2 Failure to Demonstrate the Relevancy of Disclosure to Civil Parties Lawyers

14. The Civil Parties Co-Lead Lawyers have failed to demonstrate how it will be in the interests of all the Civil Parties for their lawyers to have access to the Medical Report of the Accused. If, in due course, the Trial Chamber decides that the Accused is unfit to stand trial on the basis of her mental state, this does not impact of any right of a civil party. The Civil Parties Co-Lead Lawyers merely referred to the Civil Parties lawyers' role to consult with their clients, find a consensus and coordinate their representation.²⁰ The Civil Parties Co-Lead Lawyers fail to distinguish between the content of documents placed on the case file which go to prove the charges against an Accused, and which is properly disclosable to them, and confidential information on the personal medical condition of an Accused which is essentially private in nature and does not touch upon the evidence in the case. It will be for the Trial Chamber to determine whether the Accused is fit to stand trial on the basis of the information which the Trial Chamber has itself sought. The decision will be made with the assistance of expert opinion.
15. The defence recalls that the medical Report of the Accused has been produced by a doctor instructed by the Trial Chamber. There can be no suggestion that it therefore has been biased in favour of the defence. Professor Campbell, who was appointed by the Trial Chamber, is an entirely independent expert.

²⁰ Civil Parties Co-Lead Lawyers Request, paras. 14-16.

16. The defence notes that the Civil Parties lawyers will not succeed in any request, should they make one, for a doctor of their choice to examine the Accused as this request has been denied to the defence.
17. The defence submits that no good or proper reason has been advanced to widely disseminate the Report. In the absence of a compelling reason, which the Civil Parties Co-Lead Lawyers have failed to identify in their Request, there should be full regard for the Accused's right to privacy, as outlined in the International Covenant on Civil and Political Rights, the European Convention on Human Rights and in the European Court of Human Rights' jurisprudence.²¹ The Civil Parties Co-Lawyers have failed to demonstrate any prejudice that would be suffered by the current limits placed on disclosure by the Trial Chambers, or any sufficient reason to displace the self-evident interest in ensuring privacy and confidentiality of medical reports as a matter of public interest. It is important that the Accused, presumed innocent unless and until proved otherwise, should not lose all her fundamental rights.

3.3 The Co-Lead Lawyers' Alternative Request Breaches the Right of Privacy of the Accused

18. The Civil Parties Co-Lead Lawyers request the Trial Chamber to find that its Memorandum breaches the rights of the Civil Parties lawyers and, accordingly, to modify its Memorandum to permit the Civil Parties lawyers be provided with the Report. In the alternative, they request that all Civil Parties lawyers receive a full copy of the Report of the Accused pursuant to Internal Rule 12ter (5) and (6).²²
19. The defence submits that this alternative request breaches the right of privacy of the Accused, as the Civil Parties Co-Lead Lawyers request the disclosure of the Report to all Civil Parties lawyers.

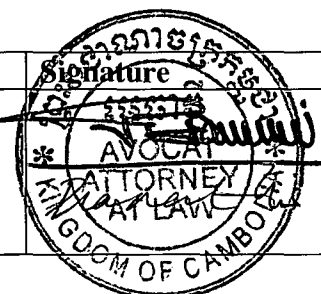
²¹ See *Z v. Finland*, European Court of Human Rights, Appl. No. 22009/93, 25 February 1997, para. 95; *M.S. v. Sweden*, European Court of Human Rights, Appl. No. 74/1996/693/885, 27 August 1997, para. 41.

²² Civil Parties Co-Lead Lawyers Request, para. 26.

20. The rationale behind the Trial Chamber's decision not to provide Civil Parties lawyers with a full copy of the Report was the need to protect the Accused's right to privacy. Despite this, the Civil Parties Co-Lead Lawyers now seek the disclosure of the Report to all Civil Parties lawyers, justifying such disclosure on the hypothetical possibility that each one of them would like to comment on it.²³
21. The defence recalls that the basis of the decision adopted in the Trial Chamber Memorandum was to 'limit [the Report's] distribution to counsel for the parties'.²⁴ By requesting that all Civil Parties lawyers be provided with the Report, the Civil Parties Co-Lead Lawyers' alternative request renders the Trial Chamber Memorandum void. As a result, the Civil Parties Co-Lead Lawyers alternative request should be rejected.

IV CONCLUSION

22. For the reasons stated above, the defence respectfully requests the Trial Chamber:
- (i) to find the Civil Parties Co-Lead Lawyers' Request inadmissible;
 - (ii) or, alternatively, to reject the Civil Parties Co-Lead Lawyers' Request in its entirety.

Party	Date	Name Lawyers	Place	Signature
Co-Lawyers for Ieng Thirith	22 July 2011	PHAT Pouy Seang Diana ELLIS, QC	Phnom Penh	

²³ Civil Parties Co-Lead Lawyers Request, para. 26.

²⁴ TC, Memorandum to Counsel for the Parties, 6 July 2011, Document No. E62/3/10, p. 1.