

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

FILING DETAILS

Case No. : 002/19-09-2007-ECCC/TC
Party Filing : Civil Party Lead Co-Lawyers
Before : The Trial Chamber
Original : French
Date of document : 18 August 2011



CLASSIFICATION

Classification of document suggested by the filing party: PUBLIC

Classification by the Co-Investigating Judges or the Chamber: សាធារណៈ/Public

Classification Status:

Review of interim Classification:

Records Officer's Name:

Signature:

Submission for purpose of reconsideration and Correction of Memorandum E62/3/10/4

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Before:

The Trial Chamber

Judge NIL Nonn, President
 Judge Silvia CARTWRIGHT
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I.- FACTUAL AND PROCEDURAL BACKGROUND

1. In its memorandum E62/3/10 dated 6 July 2011,¹ the Trial Chamber (“the Chamber”) decided that the classification of the expert reports on IENG Thirith and NUON Chea, are to remain classified as “strictly confidential”, and that a full copy was to be distributed to “the Co-Prosecutors, the Defence counsel for each Accused and the Civil Party Lead Co-Lawyers” (emphasis added). The Chamber added that “[a] copy of these reports may further be provided by them to individual Civil Party lawyers where agreement has been reached pursuant to Internal Rule 12 *ter* (5) (b) and (6) that a Civil Party lawyer is to make a written or oral submissions on the application [before the Chamber].”
2. On 15 July 2011, the Civil Party Lead Co-Lawyers filed a motion requesting the Chamber to amend its memorandum E62/3/10 and to grant unrestricted access by all Civil Party lawyers to the medical reports of the Chamber-instructed expert. The motion was notified to parties on 18 July 2011.²
3. On 22 July 2011, the Ieng Thirith Defence filed its response, notified to the parties on 25 July 2011, moving that the Civil Parties Co-Lead Lawyers’ request be found inadmissible or, alternatively, be rejected in its entirety.³ On 28 July 2011, the NUON Chea Defence filed a submission, notified on 29 July 2011, in which it joined in the arguments of the IENG Thirith Defence.⁴
4. It was permissible for the Lead Co-Lawyers to respond to these filings, according to Rule 8.4 of the Practice Direction on *Filing Documents Before the ECCC (ECCC/01/2007/Rev. 6)*, as no oral argument is envisaged on the matter. The Lead Co-Lawyers were to file their response within 5 calendar days of notification, i.e. no later than Sunday 31 July, or Monday 5 August.

¹ Trial Chamber Memorandum to Counsel for the Parties regarding the classification of expert’s reports, 6 July 2011, **E62/3/10 (formerly E106)**, available in Khmer and English only.

² Urgent Request for the Trial Chamber to Amend Memorandum E62/3/10 (formerly E106), **E62/3/10/01**, 15 July 2011.

³ Ieng Thirith Defence Response to the Civil Parties Co-lead Lawyers Urgent Request for the Trial Chamber to Amend Memorandum E/62/3/10 (formerly E106), **E62/3/10/2**, 22 July 2011.

⁴ Notice of Joinder in Ieng Thirith’s Defense Response to the Civil Parties Co-lead Lawyers’ Urgent Request for the Trial Chamber to Amend Memorandum E/62/3/10 (formerly E106), **E62/3/10/3**, 28 July 2011.

5. However, on 29 July, the Chamber issued a memorandum described as “[the] official response of the majority of the Chamber regarding document E62/3/10/1, Judge Lavergne dissenting,” and entitled, “Decision on Lead Co-Lawyers’ ‘Urgent Request for the Trial Chamber to amend memorandum E62/3/10’ (E62/3/10/1)”. By its memorandum, the Chamber denied the Lead Co-Lawyers of their right of rebuttal.

II – LEGAL REPRESENTATION OF CIVIL PARTIES AT TRIAL IN CASE 002

a. Request for clarification as to whether E62/3/10/4 is a legal document

6. The Chamber elected to render its decision by way of a mere memorandum as to the fundamental legal issue of access by the Civil Party lawyers to certain material on the case file.
7. The content and subject matter of Document E62/3/10/4 clearly reveal that the Chamber intended to issue a decision.⁵ However, in accordance to the ECCC procedural rules, as before any other court, matters of law must be determined only by way of a decision or judgment, and be clearly identified as such.
8. This basic requirement is aimed at preventing arbitrariness in the ongoing proceedings. In fact, the uncertainty regarding the legal status of Document E62/3/10/4 breaches the rights of Civil Parties, as they are entitled to know with certainty the nature and effect of any decisions concerning them, in order to fully appreciate their legal force and whether or not such decisions require compliance, and, *inter alia*, to decide whether to seek recourse, with full knowledge of the facts. Furthermore, it is indeed worth noting that the term “memorandum” is not used anywhere in ECCC procedure. Yet, a fundamental issue such as access to the case file requires a decision that is clearly identified as such. If not, the document amounts to an arbitrary decision and adversely affects fairness of the proceedings.

⁵On this matter, for comparative purposes, see jurisprudence of the Pre-Trial Chamber, which considers that a letter must be understood as a decision based on its content, and not its form: D54/V/5 “Decision on Nuon Chea’s Appeal regarding appointment of an expert”, 22 October 2008, para. 9(9), A104/II/4 “Decision on the Admissibility of the appeal lodged by Ieng Sary on Visitation” Rights, 21 March 2008: “6. *Based on the submissions of both the Co-Lawyers and the Co-Prosecutors, the Pre-Trial Chamber finds that the decision contained in this letter appears to be, in its effect, a segregation order by the Co-Investigating Judges*”; A162/III/6 “Decision On Ieng Sary’s Appeal Against Letter Concerning Request For Information Concerning Legal Officer David Boyle,” 28 August 2008, para. 3.

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9. Wherefore, the Lead Co-Lawyers and Civil Party Lawyers hereby challenge the authority of memorandum E62/3/10/4 and request the Chamber to clarify its nature.

b. Request to correct the errors of law contained in document E62/3/10/4

10. The memorandum creates confusion in that it omits to cite or to quote *in extenso* the rules relating to the organisation and legal representation of Civil Parties at trial; the Civil Party lawyers and Lead Co-Lawyers hereby request that the confusion be cleared up.

(i) Seeking consensus

11. In document E62/3/10/4, the Chamber notes that the Lead Co-Lawyer's request to allow all Civil Party Lawyers to access the expert reports is based on the assertion that:

“As the Lead Co-Lawyers are otherwise unable to achieve consensus and coordination of representation of Civil Parties required of them by Rule 12ter(3) (Request, paras. 14-17).”

12. This summary erroneously cites paragraphs 14 to 17 of the Lead Co-Lawyers' request, which does state that the Lead Co-Lawyers are unable to reach a consensus, but rather, that the restriction of notification and access of the medical reports to only some Civil Party lawyers prevents them from reaching a consensus, given that a consensus can only be reached on a subject that is known and shared by everyone concerned.
13. While the Lead Co-Lawyers must seek a consensus, it is obvious that such consensus can only be achieved if the documents are made available to all concerned. The need for an expeditious trial must not take priority over respecting and balancing the rights of all the parties to the proceedings. Such balance also concerns both the Civil Parties and all the other parties. The intended role of the Lead Co-Lawyers is to represent the Civil Parties and this coordination and the support of Civil Party lawyers through drafting of submissions, pleadings or procedural actions. Providing such support entails acts that only lawyers are authorised to perform. Therefore, the status of Civil Party lawyers is not called into question in the Internal Rules. As such, they, as all the other lawyers, must have access to the documents, once access is accepted as a premise.

14. Further, the Chamber quotes from Internal Rule 12 *ter* (3), as follows :

« Il ressort du texte (« le devoir premier des Co-avocats principaux pour les parties civiles est de consulter les avocats des parties civiles et de parvenir à un consensus... ») (nous soulignons) que cette disposition ne demande pas aux Co-avocats principaux d'obtenir le consensus des avocats des parties civiles en toutes circonstances [...] »

[“It follows from its express language (“[t]he Civil Party Lead Co-Lawyers shall....seek the views of the Civil Party lawyers and endeavor to reach consensus...”) (emphasis added) that this provision does not require the Lead Co-Lawyers to obtain consensus of the Civil Party lawyers in all circumstances [...]”]

15. This quote [in the French version] is incorrect, because it omits to place the words “*s’efforcer de*” before “*parvenir*”. This gives rise to significant confusion regarding the role of the Lead Co-Lawyers, and it must therefore be corrected, especially because the Chamber seems to say the opposite thereafter.

(ii) On what is termed the “overriding” obligation

16. Moreover, the Chamber refers to what it characterises as the “overriding” obligation of the Lead Co-Lawyers as to the limits to seeking consensus.

“[...] particularly where this would conflict with the LCL’s overriding obligation (emphasis added) to “ensure the effective organization of Civil Party representation during the trial stage...whilst balancing the rights of all parties and the need for an expeditious trial within the unique ECCC context” (Rule 12ter (1))”⁶

17. By comparison, Internal Rule 12 *ter* (3) talks of “first and foremost” and Internal Rule 12 *ter* (5) talks of “core functions”. This shows that whenever the Internal Rules seek to emphasise the overriding character, they do so. It is not for the Chamber to modify, *a fortiori* by means of a memorandum, the order of priorities or to add thereto. This error modifies the role of the Lead Co-Lawyers.

iii) Ambit of Internal Rule 23(3)

18. Lastly, the Chamber indicates that:

⁶ Para. 8.

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“The Civil Party lawyers’ role is support to the Lead Co-Lawyers in discharging these responsibilities (who bear ultimate responsibility to the court for the overall advocacy, strategy and in-court presentation of the interests of the consolidated group of Civil Parties at trial (Rule 12ter(5)), and their clients no longer participate individually at trial (Rule 23.3)”

19. Here again, the Chamber’s interpretation is incorrect. While, according to Internal Rule 12 *ter* (5), the Civil Party Lead Co-Lawyer’s core functions include representing the interests of the consolidated group of Civil Parties during the trial stage and beyond, Rule 12 *ter* (3) and (6) provides that they are supported for this purpose by the Civil Party lawyers who initially represented the Civil Parties at the judicial investigation stage. The Civil Party lawyers are therefore consulted and the Lead Co-Lawyers endeavor to reach consensus with them. Such consultation and support may include – as has been the case in the past – oral and written submissions, as well as examination of their clients and witnesses at trial, according to Rule 12 *ter* (6).
20. Therefore, the Civil Party lawyers, who were given power of attorney by the Civil Parties, have assisted their clients and built trust with them, and they continue to participate at trial stage, even though representation of the consolidated group is the duty of the Lead Co-Lawyers. Civil Party lawyers continue to discharge their duties and are actually involved in the trial proceedings where they play an active and essential role; they should continue to be acknowledged as such.
21. Indeed, it seems unjustified and irrational to expect the Civil Party lawyers to continue performing their duties and fulfilling their mission as lawyers if their role is not acknowledged within the procedural framework, whereas they are clearly part and parcel of the proceedings.

III – RIGHTS OF THE PARTIES AT TRIAL

a. Access to the case file by the lawyers participating in the proceedings

22. The IENG Thirith Defence contends that in requesting the distribution of medical reports to all Civil Parties, the Lead Co-Lawyers fail to grasp the notion of a “strictly

confidential” classification. Yet, the Lead Co-Lawyers clearly articulated this notion in their original submission, to which they refer for further explanation.⁷

23. In its original memorandum, the Chamber stated that strictly confidential documents may be distributed to some lawyers, but not others. By not challenging the distribution of medical reports to the Co-Prosecutors, counsel for the Accused and the Civil Party Lead Co-Lawyers, the IENG Thirith Defence implicitly agrees with the merits of and the need to make an exception regarding limits to access to strictly confidential material. Accordingly, invoking its client’s right to privacy against the Civil Party lawyers alone is without basis.
24. The explanations of the IENG Thirith Defense, which are implicitly accepted by the Chamber, tend to make an unjustified distinction between lawyers, i.e., lawyers for the Accused, on the one hand, and Civil Party Lawyers, on the other.
25. It is worth recalling that Internal Rule 86 provides that “the Co-Prosecutors and the lawyers for the other parties shall have the right to examine and obtain copies of the case file, under supervision of the Greffier of the Chamber, during working days and subject to the requirements of the proper functioning of the ECCC.”
26. Moreover, Internal Rule 46 (1) provides: “*orders of the Co-Investigating Judges or the Chambers shall be notified to the parties or their lawyers (...)*”, and adds in its subparagraph 4: “*at the trial stage and beyond, the Civil Party Lead Co-Lawyers shall additionally be notified of orders.*” The use of the term “additionally” clearly shows that the Lead Co-Lawyers do not substitute for the Civil Party lawyers as to notification.
27. The regime introduced by the Chamber, consisting in authorising “the Lead Co-Lawyers to distribute these reports to the extent this is necessary to enable the Lead Co-Lawyers to prepare oral or written submissions on this matter, should they choose to delegate part or all of these tasks to an individual Civil Party lawyer,” is untenable. Indeed, the Lead Co-Lawyers consider that it is not for them to do so – as they are not vested with such power – to decide when to allow or deny access to

⁷ Urgent Request for the Trial Chamber to Amend Memorandum E62/3/10 (formerly E106), 15 July 2011, E62/3/10/01, 15 July 2011, paras. 7-9.

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documents, especially those classified as “strictly confidential”, much less assess whether a confidentiality rule may be relaxed.

b. Definition of “civil action” before the ECCC

28. In paragraph 9, the Chamber states that the purpose of civil action before the ECCC is to “*support the prosecution in criminal proceedings against those most responsible.*” The Chamber omits to mention that the ultimate goal of a Civil Party is to seek moral and collective reparations, pursuant to Internal Rule 23 (1), of which support to the prosecution is only one element that is crucial to achieving the second. By omitting to mention the ultimate goal, the Chamber can claim to establish a basis for its reasoning that no “breach of the principle of equality of arms is entailed” by denying notification of the reports to all Civil Party lawyers. This omission therefore results in an incorrect assessment of the Civil Parties’ rights.

c. Infringement of the Civil Parties’ rights

29. The IENG Thirith Defence claims to be surprised that the non-disclosure of the reports infringes the Civil Parties’ rights; it then goes on to contend that if the Chamber were to find the Accused unfit to stand trial on the basis of her mental state, this does not impact any right of a Civil Party.

30. According to section VII of the basic principles recalled in the UN General Assembly Resolution of 16 December 2005,⁸ victims, *a fortiori* Civil Parties, are entitled to “equal and effective access to justice,” and “access to relevant information concerning violations and reparation mechanisms.” They have a manifest interest in the presence of each Accused at trial. Moreover, Civil Parties are entitled to weigh in on any issue pertaining to such presence. The purpose of access to such information is only to allow the Civil Parties to adequately prepare their defence. Lastly, to the extent that Civil Parties’ goal is to seek reparations, this requires a finding of guilt, which is only an intermediary, but necessary, objective.⁹

31. Pursuant to Internal Rule 23 *quinquies* 3(a), the Civil Parties are also entitled to request that “the costs of the award shall be borne by the convicted person.” Here

⁸ See Resolution United Nations General Assembly Resolution A/RES/60/147 “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,” adopted on 21 March 2006.


⁹ See Internal Rule 23(1).

again, the presence of the Accused is important for the Civil Parties, and it is crucial for them to make submissions on the matter with full knowledge of the facts, especially concerning any documents upon which the Chamber could rely for its decision.

FOR THESE REASONS

The Civil Party Lead Co-Lawyers request the Trial Chamber:

- to specify the legal status of Document **E62/3/10/4**,
- to correct the errors of law contained in Document **E62/3/10/4**.
- to review its position regarding civil parties lawyers, so that they are granted the same access to medical reports and subsequent documents, as co-prosecutors, lawyers of the accused and lead co-lawyers, despite the strictly confidential classification of these documents.

Date	Name	Place	Signature
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