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du dossier: Ratanak

E62/3/10/4

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

TRIAL CHAMBER

Date: 29 July 2011

Civil Party Lead Co-Lawyers;
TO: All parties, Case 002

FROM: Nil Nonn, President, Trial Chamber



CC: All Judges of the Trial Chamber; Trial Chamber Senior Legal Officer

SUBJECT: Decision on Lead Co-Lawyer's "Urgent Request for the Trial Chamber to amend Memorandum E62/3/10 (formerly E106)" (E62/3/10/1)

Reference is made to the above request that the Chamber modify its memorandum previously issued to the parties on 6 July 2011 (E62/3/10/1), so as to permit unrestricted access to medical reports prepared by Trial Chamber expert Professor John Campbell to all Civil Party lawyers ("Request"). The basis of this request is the assertion that:

- Restricting distribution to the Lead Co-Lawyers alone amounts to a violation of the fundamental principles of access to the dossier by all lawyers taking part in proceedings, equality of arms, and the duty of Civil Party lawyers to represent their clients pursuant to Rule 23^{ter}(2) (Request, paras. 10-13, 19-24);
- As the Lead Co-Lawyers are otherwise unable to achieve the consensus and coordination of representation of Civil Parties required of them by Rule 12^{ter}(3) (Request, paras. 14-17).

The Chamber's earlier memorandum (E62/3/10) had already acknowledged:

- Objections by two Defence teams to the placement of these medical reports on the confidential portion of the case file, the need for the Co-Prosecutors to have full access to the expert reports in order to decide whether to challenge or support the assessments and the need to ensure the expeditiousness of proceedings;

- That the Civil Party Lead Co-Lawyers shall receive a full copy of the expert reports. 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 12ter (5) (b) and (6) that a Civil Party lawyer is to make written or oral submissions on the application on behalf of the consolidated group; and
- The need to balance the rights of the Accused to privacy concerning medical information, against the public's right to know the basis on which an application on fitness to stand trial will be determined.

The Chamber notes that under the ECCC legal framework, Civil Parties at the trial stage and beyond comprise a single, consolidated group, whose interests are represented by Civil Party Lead Co-Lawyers (Rule 23(3)). The Lead Co-Lawyers 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)). The Civil Party lawyers' role is support to the Lead Co-Lawyers in discharging these responsibilities, and their clients no longer participate individually at trial (Rule 23(3)). The consultative mechanism described in Rule 12ter (3) is specifically referenced in Rule 23(3) as a modality to give effect to such support by the Civil Party lawyers to the Lead Co-Lawyers. It follows from its express language (“[t]he Civil Party Lead Co-Lawyers shall ... seek the views of the Civil Party lawyers and endeavour to reach consensus ...”) that this provision does not require the Lead Co-Lawyers to obtain the consensus of the Civil Party lawyers in all circumstances, particularly where this would conflict with the Lead Co-Lawyers' overriding obligation to “ensure the effective organisation 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)).

The Chamber in consequence considers memorandum E62/3/10/1 neither to breach the rights of Civil Parties or their lawyers, to infringe the right of Civil Parties to be adequately represented in this context, or to be otherwise disproportionate. In view of the purpose of Civil Party action before the ECCC as “[p]articipat[ion] in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution”, nor is any breach of the principle of equality of arms entailed. The Request itself acknowledges (para. 18) the principal importance of respect for confidentiality, upon which the Trial Chamber's earlier directive was partially based, in order to ensure privacy of medical information.

The Chamber's memorandum already permits 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. The Chamber rejects the request to modify its earlier direction so as to instead permit the distribution of these reports to all Civil Party lawyers, including to those who will take no active role in relation to this issue.

This constitutes the official response of the majority of the Chamber, Judge Lavergne dissenting, to E62/3/10/1. Reasons for this dissenting opinion will be issued by Judge Lavergne in due course. *sl*