

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

FILING DETAILS

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**DEFENCE OBJECTION TO TRIAL CHAMBER'S ANNOUNCEMENT TO PUT THE MEDICAL
REPORT BY DR CAMPBELL ON THE 'CONFIDENTIAL' PART OF THE CASE FILE**

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Silvia CARTWRIGHT
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I INTRODUCTION AND PETITION

1. On 27 June 2011, the President of the Trial Chamber announced at the first day of the Initial Hearing that the medical report by Dr Campbell (**Report**) would be made part of the 'confidential' part of the case file on 25 July 2011. In advance of this action the President has allowed the parties an opportunity to file submissions with regard to the Report. Currently, the Report is placed on the 'strictly confidential' part of the case file.
2. On that same day, Legal Consultant for Madame Ieng Thirith (**Accused**) indicated to the Chamber that the defence would object to such placement on the confidential part of the case file, and asked the Chamber to indicate the most appropriate time to raise such objection. The Trial Chamber's Legal Officer subsequently advised the Legal Consultant by e-mail to file a written motion in this regard. The defence herewith files its 'Defence Objection to Trial Chamber's Announcement to Put the Medical Report by Dr Campbell on the 'Confidential' Part of the Case File', and sets out its objections to the Trial Chamber's proposed transfer of the Report from the 'strictly confidential' part of the case file to the 'confidential' part thereof.

II LEGAL PROVISIONS

3. The following provisions are relevant to this issue:
 - i) the Practice Direction on Classification and Management of Case-Related Information¹ (**Practice Direction**);
 - ii) the Internal Rules;
 - iii) international instruments.

¹ Amended on 5 June 2009.

Article 2(d)(ii)

“Confidential” means open only to the Judges, the Co-Prosecutors, lawyers for the civil parties, defence counsel, authorised court staff and any other person expressly given access by the Court.

Article 2(d)(iii)

“Strictly confidential” means open only to the Judges and such other persons, including court staff who require access in the discharge of their duties, expressly given access by the Court.

Article 6: Strictly confidential section of the case file

Subject to a different classification in accordance with a Court decision, the following categories of documents and information are in principle strictly confidential:

[...]

c. Information concerning the health of a Suspect, Charged Person or Accused.

Article 8 European Convention on Human Rights

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 17 of the International Covenant on Civil and Political Rights

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Internal Rule 23. General Principles of Victims Participation as Civil Parties

1. The purpose of Civil Party action before the ECCC is to:

- a) Participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution; and
- b) Seek collective and moral reparations, as provided in Rule 23quinquies.

[...].

III SUBMISSIONS

4. Article 6 of the Practice Direction states that as a general principle information concerning the health of an accused forms part of the strictly confidential part of the case file. As such, the Report should remain on the strictly confidential part of

the case file, unless specific reasons indicate otherwise. The assumption is that the Report stays on the strictly confidential part of the case file.

5. The strictly confidential part of the case file exists to ensure that specific sensitive information is confined within a particular group of persons within the Court who absolutely need access to such information.
6. In the case of information relating to the health of the accused, there are three specific rationales for ensuring that information of a confidential material is limited to as small group of persons as possible.

3.1 The Patient's Right to Non-Disclosure

7. The first rationale is the Accused's right to privacy, as enshrined in Article 8 of the European Convention on Human Rights and Article 17 of the International Covenant on Civil and Political Rights. The Report concerns confidential medical information of the Accused. All medical information is confidential as a matter of principle, and to protect the specific relationship between a doctor and his patient, it must be guaranteed that such information will not be disclosed to persons other than those who absolutely need access to it. The Accused has spoken to Dr Campbell in confidence, and this confidentiality should be respected as much as possible.
8. In the case of *Z v Finland*, the European Court of Human Rights dealt with a case that has some similarities to the case at hand. The applicant had filed a complaint with the European Court because her medical data—including her name and the fact that she was suffering from HIV—had been released to the public in criminal proceedings against her husband. Though the complaint in *Z v Finland* relates to disclosure to the public, and not disclosure to specific other parties in a case, the defence submits the underlying rationale is still relevant. The European Court put great emphasis on the requirement that disclosure of such information pursued a



legitimate aim for the purpose of Article 8(2) of the European Convention.² The Court held that, in determining whether the impugned measures (disclosure of the medical data) were 'necessary in a democratic society', and 'the Court will consider whether, in the light of the case as a whole, the reasons adduced to justify them were relevant and sufficient and whether the measures were proportionate to the legitimate aims pursued'.³ The European Court further held:⁴

In this connection, the Court will take into account that the protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention (art. 8). Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general.

Without such protection, those in need of medical assistance may be deterred from revealing such information of a personal and intimate nature as may be necessary in order to receive appropriate treatment and, even, from seeking such assistance, thereby endangering their own health and, in the case of transmissible diseases, that of the community [...].

9. The Court also stressed that such interests of a patient may be outweighed 'by the interest in investigation and prosecution of crime and in the publicity of court proceedings [...], where such interests are shown to be of even greater importance'.⁵ The defence submits that no such overriding interests exist to disclose the Report to a larger group of persons than the defence for the Accused and the Co-Prosecutors.

3.2 Concern for Undue Pressure on Trial Chamber and Relevant Parties

10. Further, the defence is extremely concerned that the information contained in the Report were the said Report to be placed on the confidential part of the case file, may become more widely dispersed to the press and others. This is not a concern without foundation. Over the years many documents of a confidential nature have

² *Z v Finland*, European Court of Human Rights, Appl. No. 22009/93, 25 February 1997, para. 74.

³ *Ibid.*, para. 94.

⁴ *Ibid.*, para. 95.

⁵ *Ibid.*, para. 97.

found their way into the hands of the press and the public. Whilst the Practice Direction also provides, in Article 8 thereof, that parties who receive such information have a duty to protect such (strictly) confidential information and not leak it to the press or other interested persons, it has occurred on several occasions in the past that confidential information from this Court has been leaked to the outside world.

11. The defence contends that if the Report were to be placed on the confidential part of the case file, where some 3,800 Civil Parties would have access to the Report. In addition to other parties, realistically it would be impossible to keep for confidentiality to be retained. There would be a breach of the Accused's right to have her medical record kept confidential.

3.3 Civil Parties and Other Accused Have No Legitimate Interest

12. The defence concedes that the Co-Prosecutors have a legitimate interest in the contents of the Report, so as to permit them to participate in the consideration of any issues which may arise in the future. They have an obvious interest as the 'prosecutors'. However, the defence objects to the disclosure of the Report to the co-accused, the Civil Party Co-Lead Lawyers, the Civil Party Lawyers and the Civil Parties.
13. The defence submits that none of the parties save the Co-Prosecutors, have a legitimate interest in disclosure of the Report. It follows that they should not be permitted to participate in any hearing which may in the future be required to determine the issue of the Accused's fitness to stand trial.
14. Internal Rule 23 limits the role of the Civil Parties to supporting the Co-Prosecutors and to seek collective and moral reparations. The defence submits this does not include participation in fitness to stand trial proceedings. Similarly, the

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other accused do not have a legitimate interest in participating in these proceedings.

3.4 Disclosure Not at This Stage

15. In any case, the defence submits that disclosure to any other party is premature at this stage, given that Dr Campbell's advice is not yet final.

IV CONCLUSION

16. The defence is very concerned about the announced transfer of the Report from the strictly confidential part of the case file to the confidential part. For the reasons stated above, the defence respectfully requests the Trial Chamber to:

- a. Allow disclosure of the Report to the Co-Prosecutors when the Report becomes final;
- b. Reject the disclosure of the Report to any other parties or persons.

Party	Date	Name Lawyers	Place	Signature
Co-Lawyers for Ieng Thirith	29 June 2011	PHAT Pou Seang Diana ELLIS, QC	Phnom Penh	