E62/3/10/4.1

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

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ
Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

TRIAL CHAMBER

TO: **Civil Party Lead Co-Lawyers;** **Date: 23 August 2011**

All Parties, Case 002

FROM: **Judge Jean-Marc Lavergne, Judge of the Trial Chamber**

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

SUBJECT: **Dissenting Opinion of Judge Jean-Marc Lavergne Concerning the Trial Chamber Decision in Memorandum E62/3/10/4**[1]

1. In order to understand the procedural background to the decision to which I feel compelled to dissent, it should be recalled that:

   - In response to requests by the Defence of three of the Accused alleging health problems which could affect the latter's participation in the trial, the Trial Chamber commissioned an expert geriatrician to examine those Accused and assess their condition, on the premise that any particularly important difficulties seriously affecting an Accused's fitness to exercise his/her rights could ultimately result in a temporary or permanent stay of the proceedings against him/her.

   - The expert submitted his reports prior to the initial hearing; the reports were then classified "Strictly Confidential"[2] and disclosed to the Defence of the

[1] Decision on Lead Co-Lawyers Urgent Request for the Trial Chamber to amend Memorandum E62/3/10, E62/3/10 /1 and E62/3/10/4 [corrected 1].

Accused concerned. However, at the initial hearing, the Trial Chamber announced that at the expiration of the time granted to the Defence to file submissions regarding the expert reports, the reports along with any related comments or objections would be placed on the case file as "Confidential".[3]

- In determining the motions raised by two of the Accused objecting to the classification of these documents as "Confidential",[4] the Trial Chamber – having regard to the need to ensure the expeditiousness of the trial and, in particular, the deadline by which the parties had to respond to the Defence briefs – decided to rule urgently on the matter of classification, solely on the basis of Accused's objections.[5] There is no doubt that such a decision may be considered provisional; this is particularly true given that the third Accused subsequently requested that the expert medical report pertaining to him be classified as "Public". To date, there has been no response to his request. Nonetheless, the report concerning him was classified as "Confidential" and is therefore accessible to all counsel for the parties, including Civil Party lawyers.[6]

2. First and foremost, my dissent concerns the classification principle applied or, more precisely, the restrictions imposed upon Civil Party lawyers limiting their access to the expert medical reports; secondly, it concerns the analysis of the responsibilities of Civil Party lawyers as well as the mechanics of the civil party representation system as inferred from Memorandum E62/3/10/4.

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[2] According to the Practice Direction on the Classification and Management of Case-related Information, "Public" means open to the public and not subject to any restrictions on public distribution; "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; "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 by the Court".

[3] T., 27 June 2011, pp. 31-32.

[4] See E62/3/7 (concerning Accused Ieng Thirith) and E62/3/8 (concerning Accused Nuon Chea).

[5] In particular, the Civil Party Lead Co-Lawyers were not afforded the opportunity to make any submissions on the matter, since they did not even have access to the expert medical reports, unlike the Co-Prosecutors.

[6] E62/3/5.

1°) Restricting access to the expert medical reports by Civil Party lawyers is not justified, because the reports constitute evidence which must be subjected to examination in a manner that is at once adversarial between all parties without exception, and as transparent as possible

3. First of all, it should be recalled that, both at the judicial investigation stage in this case and in Case 001, expert medical reports on the fitness of the Accused to stand trial or concerning their character – in particular, their psychological condition – were placed on the case file. To date, those reports have all been systematically classified as "Confidential".[7] In fact, the psychological and psychiatric assessment report concerning KAING Guek Eav was discussed in open court without the Chamber raising any concerns at the very broad disclosure of personal medical information.

4. The practice of granting all counsel, including Civil Party lawyers, access to medical expert reports placed on the case file has been called into question by the Chamber, based mainly on the need to balance the Accused's privacy rights to medical information and the public's right to know the grounds on which an accused challenges his or her fitness to stand trial. I do not consider the new explanation to be an adequate legal basis for excluding, as a matter of principle, Civil Party lawyers from the list of persons granted access to the expert medical reports.

5. The medical information contained in the expert medical reports is compiled by a medical expert designated, not by the parties, but by the Court with a view to undertaking a specific mission namely, in this instance, assessing the validity of an application by one Accused challenging his fitness to stand trial. Any information that is not relevant to answering this question ought not to be included in the report, as its inclusion could even be considered a potential breach of medical confidentiality. Moreover, it is the duty of the expert to inform the Accused of the exact nature of his mission in order to ensure that his examination

[7] Psychologic Expertise by Professors Philip Brinded and Ka Sunbaunat, B36/5, B35/7, B38/4 and B37/9/8; Psychological Assessment Report by Françoise Sironi-Guilbaud and KA Sunbaunat, Case No. 001/18-07-2007/ECCC/TC E3/509.

is not conflated with that of an attending physician. He must therefore clearly place the expert-accused relationship within the framework of his court-granted mandate, which, needless to say, differs from the normal doctor-patient relationship.

6. In undertaking their mission, it is absolutely crucial for the experts to obtain relevant medical information in order to assess the scope of the claims made by the Accused themselves concerning their state of health. Thus, it is both the information so gathered and its analysis by the experts which must be subjected to adversarial examination by all parties without exception. It is therefore abundantly clear that since the mission assigned to the expert is undertaken in the execution of a court-granted mandate given exclusively by the Chamber, any medical privilege that could attach to the relevant information may not be set up against the Court or interested parties; otherwise, the very notion of adversarial proceedings would be rendered meaningless.

7. This specificity explains why in civil law systems, such as the French and Cambodian legal systems, there is no provision for the classification of expert medical reports placed on the case that would deny access thereto to Civil Party lawyers. As a matter of fact, Internal Rule 22(3) enshrines the principle of the right of access by lawyers to all documents on the case file. Nonetheless, this right does not preclude classifying such reports as "confidential" provided counsel have access to them, as their clients need not be acquainted with the minutiae of the reports for their rights to be adequately upheld.

8. In this case, none of the Accused has contended that the reports may contain information that is extraneous to the expert's mandate. As such, it is wholly irrelevant to raise privacy rights against disclosing medical information collected at the behest of the Accused themselves, where such disclosure is crucial to a genuine adversarial discussion that goes to the very existence of the trial itself.

9. This is particularly true in the case of those persons who were granted civil party status (declared admissible to join the proceedings as civil parties) by virtue of

their being direct victims of the offences for which the Accused are answerable. Whether those civil parties exercise their rights individually or as part of a consolidated group, it is in their interest that the trial will actually held, and are entitled to make submissions either to object to the termination of the proceedings or to debate the evidence that the Defence intends to rely upon in such a debate.

10. In the specific context of cases before the Chamber, it is obvious that for the thousands of persons granted civil party status, these rights take on a special significance, bearing in mind not only the seriousness of the charges against the Accused, but also the Civil Parties' very long wait for justice, a wait which makes these trials historic. The long wait also concerns members of the general public who follow the ECCC's proceedings and would like the trials to be held and that any discussion pertaining to the termination of the proceedings be conducted in public and transparently. This is no doubt an issue that the Chamber will have to address should it be requested to hold the hearings on this matter in closed session, as this will involve deciding what is in the interests of justice.

2°) The measure, reflecting mistrust, that aimed at excluding Civil Party lawyers from the list of persons granted access to the expert medical reports was not warranted by a change in those lawyers' status or by the new "structure" introduced by the ECCC for the defence of the interests of the consolidated group of civil parties at trial. It is prejudicial to the adequate representation of their interests.

11. Restricting, as a matter of principle, access to Professor Campbell's expert medical report by the Civil Party lawyers alone is logically indefensible on the sole ground that the case is at the trial stage. These are indeed the same lawyers who were involved at the judicial investigation stage where their right to access this type of material was not all at issue. The mere fact that the Trial Chamber has now been seised of the case file does not alter their ethical obligation to safeguard the confidentiality of any material to which they have access nor, for that matter, their responsibility vis-à-vis their clients, even though those clients now exercise their rights as a consolidated group under the coordination and ultimate responsibility of the Civil Party Lead Co-Lawyers. Moreover, it has not in any

way been established that any personal medical information pertaining to the Accused has been improperly disclosed or even that the Civil Party lawyers could have been behind such disclosure.

12. Moreover, in my view, the high number of lawyers cannot warrant such an abrupt and discriminatory measure which reflects mistrust in them. First and foremost, this is a matter of principle which is inherently unrelated to the number, large or small, of lawyers concerned. The high number of Civil Party lawyers only goes to show the importance of defending the Civil Parties' interests. Again, as a matter of principle and assuming that this category of officers of the court may be excluded – which in itself is debatable – I fail to understand why they should be treated differently from Defence lawyers, given that the latter have access to the medical records of their clients' co-accused. Likewise, I fail to see the relevance of a principle which denies Civil Party lawyers the opportunity to consult with the Lead Co-Lawyers in order to express their views, in particular, as to whether to challenge earlier assessments or as to the impact of the evolution of the Accused's state of health on their fitness to stand trial.

13. Finally, I am of the view that the Chamber's interpretation of the nexus between the responsibilities of the Lead Co-Lawyers and those of the Civil Party lawyers is erroneous. The structure designed by the Plenary which is encapsulated in Rules 12 *ter* and 23 mainly calls for shared responsibility between the Lead Co-Lawyers and the Civil Party lawyers in the representation of the interests of the consolidated group of civil parties.

14. While these Rules confer on the Lead Co-Lawyers ultimate responsibility before the court for the overall advocacy, strategy and in-court presentation of the interests of the consolidated group of Civil Parties, there is indeed a requisite preliminary responsibility deriving from their "first and foremost" duty "to seek the views of the Civil Party lawyers and endeavour to reach a consensus in order to coordinate representation of Civil Parties". This implies that the Lead Co-Lawyers' "ultimate" responsibility only kicks in where they have been unable

to reach a consensus. The initial consultative stage is not optional, and less so in this instance, as it could entail discussing issues relating to whether or not a trial will take place.

15. It is obvious in this circumstance that denying access to the reports, as a matter of principle, to Civil Party lawyers makes it impossible for the Lead Co-Lawyers to consult them effectively on the strategy to be adopted in view of the potential consequences of Professor Campbell's reports. This is therefore undeniably prejudicial to the adequate representation of the Civil Parties' interests, which the Chamber is in fact required to ensure.

16. Further, Civil Party lawyers have a duty to endeavour to support the Lead Co-Lawyers, such support to be mutually agreed between the Civil Party Lead Co-Lawyers and the "concerned Civil Party lawyer". The consolidated group of civil parties is an abstract notion; however, the trial highlights instances where individual civil parties are acutely concerned by the proceedings, for example, where a civil party is called to testify in court. Thus, where the civil party participates as an individual, the "support" expected from the concerned Civil Party lawyer is vital. However, there are also instances where the civil parties as a whole are "concerned". An accused's fitness to stand trial is clearly one of those. The Trial Chamber's decision in this case makes it not only impossible for the Lead Co-Lawyers to consult effectively with the Civil Party lawyers, but also puts them in a delicate, if not impossible, position with respect to seeking the support of the Civil Party lawyers pursuant to a mutual agreement with any of them or even with an international lawyer and a Cambodian lawyer. Here again, this is prejudicial to the proper representation of the interests of the Civil Parties.