



**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

អង្គជំនុំជម្រះសាលាដំបូង

Trial Chamber

Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ

Case File/Dossier No. 002/19-09-2007-ECCC/TC

Before:

Judge NIL Nonn, President

Judge Silvia CARTWRIGHT

Judge YA Sokhan

Judge Jean-Marc LAVERGNE

Judge YOU Ottara

Date:

20 December 2011

Original language(s):

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**DECISION ON NUON CHEA DEFENCE REQUEST FOR INTERNAL RULE 35 INVESTIGATION
FOLLOWING UNAUTHORIZED DISCLOSURE OF CONFIDENTIAL DOCUMENTS**

Co-Prosecutors

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Andrew CAYLEY

Accused

NUON Chea
IENG Sary
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THE TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“Chamber” and “ECCC”);

BEING SEISED of Case File No. 002/19-09-2007-ECCC/TC pursuant to the Decisions on Appeal Against the Closing Order by IENG Sary, IENG Thirith, NUON Chea and KHIEU Samphan, rendered by the Pre-Trial Chamber on 13 January 2011¹;

NOTING the “Decision on NUON Chea’s Fitness to Stand Trial and Defence Motion for Additional Medical Expertise” of 16 November 2011 (E115/3) (“Fitness Decision”), which observed that Dr. Bursztajn, an external medical consultant who had provided a report to the Defence, had been provided with a number of strictly confidential or confidential documents in breach of Article 8.1 of the Practice Direction on the Classification and Management of Case-Related Information²;

FURTHER NOTING that the Fitness Decision had directed the Defense to ascertain whether classified material remained in the possession of third parties and to report to the Chamber within 15 days of this decision regarding measures to prevent further unauthorized distribution or disclosure of this material by Dr. Bursztajn or other third parties³;

CONSIDERING the “Request for Investigation Pursuant to Rule 35 Regarding Alleged Unauthorized Disclosure of Strictly Confidential Material to External Consultant by NUON Chea Defence” filed by the Defence of the Accused NUON Chea (“Defence”) on 1 December 2011 (E147) (“Request”), which noted that “the Chamber [appears to consider] there to be ‘reason to believe that [one or more members of the Defence] may have committed [one] of the acts set out in [Rule 35(1)]’” and requested the Chamber to conduct further investigations to ascertain whether sufficient grounds existed for instigating proceedings pursuant to Internal Rule 35, in particular by interviewing the Defence;

¹ Decision on Ieng Sary’s Appeal Against the Closing Order, 13 January 2011, D427/1/26; Decision on Ieng Thirith’s and Nuon Chea’s Appeals Against the Closing Order, 13 January 2011, D427/2/12; Decision on Khieu Samphan’s Appeal Against the Closing Order, 13 January 2011, D427/4/14; and Decision on Ieng Sary’s Appeal Against the Closing Order’s Extension of his Provisional Detention, 13 January 2011, D427/5/9.

² T., 31 August 2011, p. 110 (indicating that the Defence “would also like to evaluate the answers given by Professor Campbell with [their] own medical experts”). The Defense subsequently filed as an addendum to their “Request for Appointment of Additional Expert to Assess NUON Chea’s Fitness to Stand Trial” (E115) a report from Dr. Burztajn, which was addressed to two members of the NUON Chea Defense team and which listed the confidential and strictly confidential documents referenced in footnote 92 of the Fitness Decision (E115.2.1).

³ Fitness Decision, p. 17.



FURTHER CONSIDERING that, contrary to the Defense assertion, the Chamber in the Fitness Decision neither summarily imposed sanctions on the Defence under Internal Rules 35 or 38 nor instigated proceedings under these Rules, but merely warned the Defence against further unauthorized disclosure of confidential or strictly confidential information pursuant to Internal Rules 35(5) and 38;

NOTING, however, that the Defence has neither reported back to the Chamber as directed by the Fitness Decision, nor liaised with Dr. Bursztajn to safeguard these documents against further disclosure, stating instead that the Request constituted the totality of its response to the directions contained in the Fitness Decision⁴;

FURTHER NOTING that Internal Rule 35(2) grants the Trial Chamber the discretion to deal summarily with issues involving disclosure of confidential information in violation of an order of a Chamber or to refer the matter to the appropriate authorities where the Chamber has reason to believe that a person may have acted contrary to Internal Rule 35(1);

CONSIDERING that the above circumstances provide reason for the Chamber to believe that the Defense has made unauthorized disclosure of confidential or strictly confidential document to Dr. Bursztajn, and that the Defence has further failed to comply with the Chamber's directions designed to limit the impact of this unauthorized disclosure;

FOR THE FOREGOING REASONS, THE CHAMBER:

REMINDS the parties that pursuant to Rule 35(1), the ECCC may sanction or refer to the appropriate authorities any person who knowingly and willfully discloses confidential information in violation of an order of the Chamber;

DIRECTS the Office of Administration to communicate the present decision to Dr. Bursztajn and orders the latter, within one week of notification of this Decision, to inform the Chamber of how he came into possession of the confidential documents referred to in this Decision, whether classified material remains in his possession, and to further clarify whether any of these documents have since been communicated to any other individual;

⁴ Request, para. 9.



ORDERS that no translation of the Request for Investigation (E147) into the Khmer and French languages be undertaken by the Interpretation and Translation Unit;

FURTHER ORDERS the parties to refrain from responding to the Request;

REFERS this matter for review to the Defence Support Section pursuant to its power to refuse part payment for work claimed where the work carried out is not “necessary and reasonable” and which, pursuant to Rule 11(2)(h), is obliged to “monitor and assess the fulfillment of all contracts [with Defence lawyers] and authorize corresponding remuneration in accordance with Defence Support Section administrative regulations”; and

RECOMMENDS that remuneration to the Defence for costs associated with the preparation of the Request be withheld in accordance with these provisions. *me*

Phnom Penh, 20 December 2011
President of the Trial Chamber



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Nil Nonn