

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

FILING DETAIL

Case no: 002/19-09-2007-ECCC-TC
Filing party: Nuon Chea Defence Team
Filed to: Trial Chamber
Original language: English
Date of document: 1 December 2011



CLASSIFICATION

Classification suggested by the filing party: PUBLIC
Classification of the Trial Chamber: សាធារណៈ/Public
Classification status:
Review of interim classification:
Records officer name:
Signature:

**REQUEST FOR INVESTIGATION PURSUANT TO RULE 35 REGARDING
ALLEGED UNAUTHORIZED DISCLOSURE OF STRICTLY CONFIDENTIAL
MATERIAL TO EXTERNAL CONSULTANT BY NUON CHEA DEFENCE**

Filed by

Nuon Chea Defence Team:
SON Arun
Michiel PESTMAN
Victor KOPPE
Andrew IANUZZI
Jasper PAUW
PRUM Phalla
Zara LOCKSHIN
Mojan SAMADI

Distribution

Co-Accused

Co-Prosecutors:
CHEA Leang
Andrew CAYLEY

Co-Lawyers for Civil Parties:
PICH Ang
Elisabeth SIMONNEAU-FORT

I. INTRODCUTION

1. Counsel for the Accused Nuon Chea (the ‘Defence’) hereby submits this request in response to the Trial Chamber’s ‘Decision on Nuon Chea’s Fitness to Stand Trial and Defence Motion for Additional Medical Expert’ (the ‘Fitness Decision’).¹ As a preliminary matter, the Defence takes the position that the instant submission should be classified as public. In any event, the Defence will treat it as such.

II. PROCEDURAL HISTORY

2. In dismissing a Defence request for the appointment of additional fitness experts,² the Chamber issued the following warning:

[T]he Chamber notes that [an] external medical consultant [engaged by the Defence for the purpose of assessing the report prepared by the Trial Chamber’s expert] was 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 Information. Pursuant to Internal Rules 35(5) and 38, the Chamber warns the Nuon Chea Defence against further unauthorized disclosure of confidential or strictly confidential information.³

The Chamber then ‘[d]irect[ed] the [...] Defence to ascertain whether classified material remains in the possession of third parties and to report to the Chamber within fifteen (15) days of th[e] [Fitness] Decision regarding measures taken by the Defence to prevent further unauthorized distribution or disclosure of this material’.⁴

III. RELEVANT LAW

3. According to Rule 35(1)(a), ‘[t]he ECCC may sanction or refer to the appropriate authorities, any person who knowingly and wilfully interferes with the administration of justice, including any person who: (a) discloses confidential information in violation of an order of [...] the Chambers; [...]’. Should the Chamber ‘have reason to believe that a person may have committed [such act], [it] may’, among other things: [...] (b) conduct further investigations to ascertain whether there are sufficient grounds for instigating proceedings; [...]’.⁵

¹ Document No E-115/3, 15 November 2011, ERN 00750957–00750973.

² See Document No E-115, ‘Request for Appointment of Additional Experts to Assess Nuon Chea’s Fitness to Stand Trial’, 7 September 2011, ERN 00740580–00740589.

³ Fitness Decision, para 39.

⁴ Fitness Decision, p 17 (ultimate dispositive paragraph).

⁵ Rule 35(2).

4. Where a lawyer admitted to practice before the ECCC 'is found to have committed any act set out in [Rule 35(1)], [...] the Chamber making such finding may also determine that such conduct amounts to misconduct of a lawyer pursuant to Rule 38'.⁶ Rule 38(1) provides as follows: 'the Chambers may, after a warning, impose sanctions against or refuse audience to a lawyer if, in their opinion, his or her conduct is considered offensive or abusive, obstructs the proceedings, amounts to abuse of process, or is otherwise contrary to Article 21(3) of the [ECCC] Agreement.' That Article requires defence counsel at the ECCC to 'act in accordance with the [ECCC] Agreement, the Cambodian Law on the Statutes of the Bar, and recognized standards and ethics of the legal profession'.
5. Lawyers 'subject to proceedings under [Rule 35] shall be entitled to legal assistance as provided in Rule 11 and the Defence Support Section administrative regulations'.⁷

IV. ARGUMENT

6. It appears that the Chamber considers 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)]'.⁸ However, without inquiry, the Chamber has summarily imposed sanctions on the Defence in the form of: (i) a warning 'against further unauthorized disclosure of confidential or strictly confidential information'⁹ and (ii) an order for the Defence to take certain remedial action.¹⁰
7. Before resorting to further punitive measures (in the absence of due process), the Chamber should 'conduct further investigations to ascertain whether there are sufficient grounds for instigating proceedings'.¹¹ In particular and among other things, the Defence hereby requests the Chamber to interview any member of the Defence—which would welcome, and cooperate fully in, any such investigation.

⁶ Rule 35(5).

⁷ Rule 35(3).

⁸ Rule 35(2).

⁹ Fitness Decision, para 39.

¹⁰ Fitness Decision, ultimate dispositive paragraph, p 17.

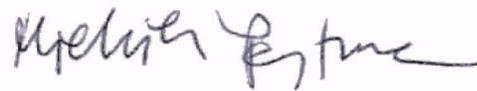
¹¹ Rule 35(2)(b).

8. Given the seriousness of the apparent accusation made against the Defence and the potential sanctions involved,¹² the Chamber may wish to consider the appointment of special counsel to advise the targets of any investigation initiated by the Chamber.¹³ However, should the need arise, individual members of the Defence are quite willing to represent themselves.
9. The instant submission constitutes the Defence's official and complete response to the Fitness Decision, which amounts to an inappropriate attempt to: (i) prevent the Defence from effectively challenging evidence; (ii) preclude the Defence from presenting its case in full; and (iii) shield the Chamber and its decisions from scrutiny by the parties and the public.

CO-LAWYERS FOR NUON CHEA



SON Arun



Michiel PESTMAN & Victor KOPPE

¹² See para 4, *supra*.

¹³ See para 5, *supra*.