



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

អង្គជំនុំជម្រះតុលាការកំពូល

Supreme Court Chamber
Chambre de la Cour suprême



សំណុំរឿងលេខ: ០០២/១៩-កញ្ញា-២០០៧-អ.វ.ត.ក-អ.ជ.ស.ដ/អ.ជ.ត.ក(២០)
Case File/Dossier N°. 002/19-09-2007-ECCC-TC/SC(20)

Before:
Judge KONG Srim, President
Judge Chandra Nihal JAYASINGHE
Judge Agnieszka KLONOWIECKA-MILART
Judge MONG Monichariya
Judge Florence Ndepele Mwachande MUMBA
Judge SOM Sereyvuth
Judge YA Narin

Date: 21 February 2013
Language(s): Khmer/English
Classification: PUBLIC

**ORDER TO FILE A PUBLIC REDACTED VERSION OF NUON CHEA’S APPEAL
(E189/3/1/1)**

Co-Prosecutors
CHEA Leang
Andrew CAYLEY

Accused
NUON Chea

Civil Party Lead Co-Lawyers
PICH Ang
Elisabeth SIMONNEAU-FORT

Co-Lawyers for NUON Chea
SON Arun
Victor KOPPE

1. **THE SUPREME COURT CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea between 17 April 1975 and 6 January 1979 (“Supreme Court Chamber” and “ECCC”, respectively) is seized of the “Immediate Appeal against Trial Chamber Decision on Application for Immediate Action Pursuant to Rule 35” filed by the Defence for NUON Chea (“Defence”) on 24 December 2012 (“Appeal”).¹ The Co-Prosecutors responded to the Appeal, arguing *inter alia* that the Defence violated their ethical and professional obligations to the ECCC in disclosing confidential information.² The Defence contests the Co-Prosecutors’ allegations in this respect, arguing *inter alia* that the confidential information was already in the public domain.³

2. When filing the Appeal, the Defence suggested that it be classified as public,⁴ a classification that the Trial Chamber confirmed.⁵ However, the Supreme Court Chamber notes that the Appeal quotes extensively from what the Defence purports to be the Introductory Submission in Case 003 (“ISC3”) and discloses confidential information contained therein, such as the names of the suspects in Case 003.⁶ The Supreme Court Chamber also notes the Defence’s statement that “while the [ISC3] is a confidential document, it is widely available in the public domain. The Defence has accessed the document at the website [...], most recently on 22 December 2012 [...]. The Defence is referencing the document in this Appeal, considering that it is in the direct interest of N[UON] Chea to use the information contained therein” (“Statement”).⁷

3. In addition to the Appeal, the Defence filed a table of authorities along with four attachments,⁸ and suggested that they also be classified as public,⁹ a classification that the Trial

¹ E189/3/1/1, confidential.

² Co-Prosecutors’ Response to NUON Chea’s “Immediate Appeal against Trial Chamber Decision on Application for Immediate Action pursuant to Rule 35”, E189/3/1/2, 14 January 2013, paras. 45-50.

³ Reply to Co-Prosecutors’ Response to Rule 35 Appeal, E189/3/1/3, 21 January 2013.

⁴ Appeal, first page.

⁵ Rule 106(2) of the Internal Rules of the ECCC, Revision 8, 3 August 2011 (“Internal Rules”) provides that notices of appeal and immediate appeals shall be filed with the Greffier of the Trial Chamber.

⁶ Appeal, paras. 38-43.

⁷ Appeal, fn. 82 (emphasis in original).

⁸ Immediate Appeal against Trial Chamber Decision on Application for Immediate Action Pursuant to Rule 35, Table of Authorities, E189/3/1/1.1, confidential, 24 December 2012 (“Table of Authorities”), first page; Immediate Appeal against Trial Chamber Decision on Application for Immediate Action Pursuant to Rule 35, Attachment 1, E189/3/1/1.1.1, 24 December 2012 (“Attachment 1”); Immediate Appeal against Trial Chamber Decision on Application for Immediate Action Pursuant to Rule 35, Attachment 2, E189/3/1/1.1.2, strictly confidential, 24 December 2012 (“Attachment 2”); Immediate Appeal against Trial Chamber Decision on Application for Immediate Action Pursuant to Rule 35, Attachment 3, E189/3/1/1.1.3, 24 December 2012 (“Attachment 3”); Immediate Appeal against Trial Chamber Decision on Application for Immediate Action Pursuant to Rule 35, Attachment 4, E189/3/1/1.1.4, 24 December 2012, (“Attachment 4”).

⁹ Table of Authorities, first page.

Chamber also confirmed. However, the Supreme Court Chamber notes that the Table of Authorities reveals the website address where the Defence purports the ISC3 may be found.¹⁰ The Supreme Court Chamber also notes that, at the time of filing, Attachment 2 was labelled “Julia Wallace: ‘From Phnom Penh With Love’, *International Justice Tribune*, No. 148, 28 March 2012”,¹¹ although its actual content is what appears to be a copy of the ISC3.

4. The Supreme Court Chamber recalls that any document submitted for filing must bear the proposed classification in accordance with the Practice Direction on Classification, and filing parties must ensure that filings for which they propose to classify as public do not contain any confidential or strictly confidential information.¹² The fact that a document classified as confidential by the ECCC may have been “leaked” or otherwise illegitimately placed in the public domain does not entitle the Defence to disclose it or the information contained therein, or to further perpetuate its disclosure and dissemination, in a way that offends its judicially determined status.¹³

5. The Supreme Court Chamber recalls that unauthorised disclosure of classified documents, if established beyond reasonable doubt, is an offence under Rule 35(1)(a) of the Internal Rules, possibly leading to sanctions in accordance with Cambodian law as well as a finding of misconduct against a lawyer.¹⁴ The Supreme Court Chamber is therefore alarmed by the Defence’s blatant support for the violation of an order of the ECCC, particularly in light of repeated prior warnings against similar misconduct.¹⁵ In the present case, although the Defence may consider it to be in NUON Chea’s “direct interest”¹⁶ to use the information contained in what it believes to be the ISC3 in support of the Appeal, the Supreme Court Chamber can decipher no legitimate interest that NUON Chea might have in perpetuating its improper disclosure. The proper course of action would have been for the Defence to file the Appeal, Table of Authorities, and Attachment 2 confidentially, along with a public redacted version thereof,

¹⁰ Table of Authorities, para. 30.

¹¹ See Table of Authorities, para. 33.

¹² Article 3.13 of the Practice Direction on the Filing of Documents before the ECCC, Revision 8, 7 March 2012 (“Practice Direction on Filing Documents”), referring to Practice Direction on the Classification and Management of Case-Related Information, Revision 1, 7 March 2012 (“Practice Direction on Classification”).

¹³ Cf. Appeal, paras. 38-42, quoting from Introductory Submission to Case 003, confidential.

¹⁴ See Decision on Immediate Appeal by NUON Chea against the Trial Chamber’s Decision on Fairness of Judicial Investigation, E116/1/7, 27 April 2012 (“Decision on Fairness of Judicial Investigation”), para. 36, citing Rules 35(2), 35(4), 35(5) and 38 of the Internal Rules.

¹⁵ See, e.g., Decision on Fairness of Judicial Investigation, para. 37; Decision on NUON Chea’s Fitness to Stand Trial and Defence Motion for Additional Medical Expertise, E115/3, 15 November 2011, para. 39; Warning for Unauthorised Disclosure of Confidential Information, D314/1/11, 9 June 2010.

¹⁶ Statement.

where appropriate.¹⁷ Such conduct would have protected NUON Chea's interest in using the information, without violating the various other interests involved in the decision to classify it as confidential.

6. Pursuant to Article 3.14 of the Practice Direction on Classification, the Supreme Court Chamber has re-classified the Appeal and Table of Authorities as confidential, and Attachment 2 as strictly confidential.¹⁸ The Supreme Court Chamber recalls that where it re-classifies a document from public to confidential or strictly confidential, it should instruct the affected party to file a public redacted version, as appropriate, in keeping with the general need to ensure transparency of proceedings.¹⁹

7. For the foregoing reasons, the Supreme Court Chamber, acting pursuant to Rules 35(2)(a) in conjunction with 35(1)(a) of the Internal Rules and Article 9.2 of the Practice Direction on Classification,

INSTRUCTS the Defence to file a public redacted version of the Appeal and Table of Authorities no later than 26 February 2013;

INSTRUCTS the Defence to ensure that any changes to the confidential versions of the Appeal and of the Table of Authorities be limited to necessary redactions of confidential information, such as any excerpts and/or descriptive content of the alleged copy of the ISC3, as well as the purported names of the suspects in Case 003, contained in paragraphs 38 through 43 of the Appeal, and the website address contained in paragraph 30 of the Table of Authorities, and not consist of any additions, deletions, or other amendments;

INSTRUCTS the Defence to clearly mark the redactions in the text of the public versions of the Appeal and Table of Authorities or to file confidential annexes thereto identifying all redactions;

REMINDS the Defence to exercise greater diligence to propose appropriate classifications in accordance with the Practice Direction on Classification, and to ensure that filings which it proposes to classify as public do not contain any confidential or strictly confidential information; and,

¹⁷ A similar course of action has already been suggested in similar circumstances to the Defence. *See* Decision on Fairness of Judicial Investigation, para. 36.

¹⁸ Although the ISC3 has been classified by the Office of the Co-Investigating Judges as confidential, the Supreme Court Chamber considers it most appropriate in the present case to re-classify Attachment 2 as strictly confidential given that it is not seized of Case 003, which remains at the judicial investigative stage.

¹⁹ Order to File a Public Redacted Version of IENG Sary's Appeal (E238/9/2/1), E238/9/2/3, 24 January 2013, para. 5, *referring to* Rules 29(4)(e), 54, 56(2)(a), 66(1), 78, 79(6), 102(1), 109(1), *and* 113(4) of the Internal Rules; Articles 1.2, 3.13, 3.14, 4-6, 9.2 *and* 9.3 of the Practice Direction on Classification.

INSTRUCTS the Trial Chamber to classify all future notices of appeal and immediate appeals as “interim confidential”, so as to permit the Supreme Court Chamber to determine and confirm their appropriate classifications.

Phnom Penh, 21 February 2013

President of the Supreme Court Chamber



KONG Srim