

**BEFORE THE SUPREME COURT CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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URGENT REQUEST TO REINSTATE NUON CHEA DEFENCE TEAM

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PART 1. INTRODUCTION

1. Pursuant to Internal Rules 85 and 104 *bis*, the Co-Lawyers for Nuon Chea (the “Defence”) submit this request for an urgent order to immediately reinstate the Nuon Chea Defence Team - all members of which the ECCC Administration terminated on 9 August 2019 - until the Supreme Court Chamber (the “Chamber”) determines otherwise (the “Request”).

PART 2. BACKGROUND

I. NUON CHEA’S APPEAL

2. Following the issuance of the fully-reasoned Case 002/02 trial judgement on 29 March 2019,¹ on 1 July 2019, Nuon Chea filed his notice of appeal against that judgement. The notice sets out 351 overall appeal grounds containing 543 individual grounds, among them errors that are alleged to invalidate the trial judgement in full.² Immediately thereafter, the Defence began working on Nuon Chea’s substantive appeal brief.

II. NUON CHEA’S HEALTH AND DEATH

3. On 2 July 2019, Nuon Chea was admitted to the Khmer-Soviet Friendship Hospital.³
4. On 12 July 2019, as a matter of prudence and preparation for any eventuality, Nuon Chea issued a letter of authorisation to the Defence and selected members of his family to continue to act on his behalf after his death.⁴
5. On 4 August 2019, Nuon Chea died.⁵

III. DEFENCE REQUEST ON IMPACT OF NUON CHEA’S DEATH

6. On 6 August 2019, the Defence filed a 25-page request to the Chamber seeking clarification on the impact on the Case 002/02 appeal proceedings of Nuon Chea’s death

¹ E465, ‘Case 002/02 Trial Judgement’, 16 Nov 2018 [*sic* - 29 Mar 2019].

² E465/3/1, ‘Nuon Chea’s Notice of Appeal against the Trial Judgement in Case 002/02’, 1 Jul 2019.

³ F46/1.1, ‘Nuon Chea’s Death Certificate’, 4 Aug 2019 (“Death Certificate”), ERN 01623650 (KH), 01623651 (EN).

⁴ F46/2.1.1, ‘Letter From Nuon Chea, Designated Persons to Act on His Behalf in the Event of His Untimely Death Prior to the Completion of the Appeal Proceedings’, 12 Jul 2019 [Public (Redacted) version]; *see also* F46, ‘Nuon Chea’s Letter Authorising Designated Persons to Act on His Behalf in the Event of His Untimely Death Prior to the Completion of the Appeal Proceedings’, 18 Jul 2019.

⁵ F46/1.1, Death Certificate.

prior to the appeal judgement (the “Defence’s Urgent Request on the Impact of Nuon Chea’s Death”).⁶ In it, the Defence requested that the Chamber:

- (a) terminate the appeal proceedings in Case 002/02 and vacate the Case 002/02 trial judgement in relation to Nuon Chea because Nuon Chea continued to enjoy a presumption of innocence on appeal; or, alternatively,
- (b) allow the appeal proceedings to continue in the interests of justice despite Nuon Chea’s death, while ensuring Nuon Chea’s continued representation after this by his counsel of choice.⁷

IV. CURRENT STATUS OF ECCC PROCEEDINGS CONCERNING NUON CHEA

7. The Chamber has yet to rule on the Defence’s Urgent Request on the Impact of Nuon Chea’s Death. Likewise, the Chamber has not yet issued a determination that it is terminating the proceedings concerning Nuon Chea.
8. Nevertheless, the ECCC’s spokesperson and chief of the ECCC Public Affairs Section, presumably speaking for the ECCC Administration, has repeatedly declared that the proceedings concerning Nuon Chea are now terminated in accordance with Cambodian law.⁸

V. TERMINATION OF THE NUON CHEA DEFENCE TEAM

9. On 9 August 2019, while en route to Nuon Chea’s funeral, the entire Nuon Chea Defence Team received notices from representatives of the ECCC’s Administration that their contracts were being terminated. The three co-lawyers received a letter from the chief of the Defence Support Section (“DSS”) stating, *inter alia*, that:

A person who is deceased is not entitled to representation under the Legal Services Contract. Accordingly, the purpose of the Legal Services Contract lapsed with the death of Mr. NUON Chea. [...] Considering that you will need to complete administrative procedures such as the check-out from the ECCC, DSS will continue to retain your

⁶ E46/2, ‘Urgent Request Concerning the Impact on Appeal Proceedings of Nuon Chea’s Death Prior to the Appeal Judgement’, 6 Aug 2019 (“Defence Urgent Request on the Impact of Nuon Chea’s Death”).

⁷ E46/2, Defence Urgent Request on the Impact of Nuon Chea’s Death,

⁸ See, e.g., Radio Free Asia, ‘Nuon Chea Dies at 93, Ending Hope of Closure for Cambodia’s Victims of Khmer Rouge’, 5 Aug 2019 (**Attachment 1**), quoting the spokesperson as stating that “Nuon Chea has died, so his case has been terminated”; Cheang Sopheng, ‘Khmer Rouge ideologue cremated, appeal may be stopped’, Washington Post, 9 Aug 2019 (**Attachment 2**), describing the spokesperson as having said that: “under Cambodian law, judicial action is terminated on the death of the accused, and the tribunal’s Supreme Court chamber would rule on its application”.

Legal Services Contract until 31 August 2019. After 31 August 2019, DSS shall have no further obligation to compensate your work on behalf of Mr. [Nuon Chea].⁹

10. Likewise, all six consultants on the team received e-mails on that same day from the chief of the Human Resources (“HR”) department advising, *inter alia*, that:

You are hereby notified that your contract is foreshortened and will be terminated as of 23 August 2019 as per the advice of the Chief of Defense Support Section (DSS). We are giving advance [notice] in line with the above general conditions of service for consultants in order to [enable] you to complete the work at hand and finalize all [separation] formalities.¹⁰

11. The six consultants were in effect, given 10 working days’ notice of their termination. However, all of them have accrued significant leave entitlements during their service since they have been consistently foregoing leave in light of the onerous appellate workload and Nuon Chea’s delicate health. Most have more leave accrued than the 10 working days left in their contracts. Notwithstanding this, HR, via the DSS, has informed the Defence that the consultants will not be paid out for any leave not able to be taken by the time their contracts end, and that the consultants should either take all of their leave immediately in order to enjoy what entitlements they can, or choose to forego their leave altogether.
12. The Defence has advised its consultants to take all leave owing to them since the Administration’s position is such that they otherwise stand to lose them. In practice, therefore, this means that most of the Defence’s consultants have been terminated with immediate effect.

PART 3. APPLICABLE LAW

13. Internal Rule 104 *bis* provides that “[i]n the absence of any specific provision, the rules that apply to the Trial Chamber shall, *mutatis mutandis*, also apply to the Supreme Court Chamber.”
14. Under Internal Rule 85, it is for the President of the Trial Chamber, in consultation with the other judges, to “preside over the proceedings” and “maintain good order during the trial”. Internal Rule 85(1) specifies, in particular, that the President “shall guarantee the

⁹ ‘Letter from Mario Hemmerling, Chief of Defence Support Section, to Son Arun, Liv Sovanna and Doreen Chen, Co-Lawyers for Nuon Chea’, 9 Aug 2019 (**Attachment 3**).

¹⁰ *See, e.g.*, ‘E-mail from Lim Sothea, Chief of Human Resources, to Xiaoyang Nie, Senior Legal Consultant, Nuon Chea Defence Team’, 9 Aug 2019 (**Attachment 4**).

free exercise of defence rights”. There is no specific provision on such matters in respect of proceedings before the Supreme Court Chamber.

PART 4. ARGUMENTS

15. The Defence needs to continue to interact with the Chamber at least until a substantive decision is issued in connection with Urgent Request on the Impact of Nuon Chea’s Death. However, the decision to terminate the entire Nuon Chea Defence Team effectively prevents the Defence from doing so: since the ECCC Administration’s decision deprives the Defence of human resources and remuneration, it impedes the Defence’s ability to engage in the case efficiently (and after 31 August 2019, at all).
16. One obvious potential ramification of this is whether the Defence will continue to be able to interact with the Chamber at all following the team’s termination but prior to the Chamber’s decisions on the Defence’s various requests. Thus, if the Chamber has questions about any of the requests, for example, the Defence may not be available to respond to them. Further, once the Defence completes the mandatory administrative check-out processes, it will lose access to the case file. As a result, when decisions are rendered in relation to questions the Defence has put before the Chamber, the Defence will only be notified on a delay when decisions are released on the public website, and then only if decisions are classified as public.
17. Another key challenge will be that the Defence will lose its consultants as they will inevitably need to seek out alternative employment. However, in the event that the Chamber ultimately permits the Defence to continue with Nuon Chea’s appeal, the most efficient course of action will have been to allow the consultants to remain part of the team in light of their understanding of the case and existing workloads. Firing and rehiring or recruiting new team members will inevitably necessitate time-consuming administrative processes, loss of additional time due to the need to reorient new team members, and greater overall delays and consequent costs incurred across multiple sections of the tribunal, since this may force the Defence to request additional extensions of time to complete Nuon Chea’s substantive appeal brief.
18. Ultimately, termination or otherwise of the proceedings concerning Nuon Chea is a legal matter solely for the Chamber to determine. Unless and until the Chamber does so, the Defence is not only entitled to remain engaged in proceedings in Case 002/02 as Nuon

Chea's counsel of choice but is obliged to do so. In turn, the Defence is entitled to engage their legal consultants of choice to enable them to properly perform their role. Furthermore, the entire Nuon Chea Defence Team is entitled to remain remunerated for such work until the Chamber determines that the case is terminated.

19. Whether or not the representation of Nuon Chea's interests can continue after death is a complex question of law. It is fundamentally intertwined in the questions that the Defence has put to the Chamber in its Defence's Urgent Request on the Impact of Nuon Chea's Death. These questions are matters of significance that could have repercussions not only for Nuon Chea or the victims, but for the broader Cambodian legal system as well as for the system of international justice generally, which has thus far given only limited consideration to the impact of the death of appellants in cases of similar magnitude to Case 002/02.
20. Moreover, the fact that the ECCC's Administration appears to have unilaterally decided to terminate the entire Nuon Chea Defence Team despite the fact that the Chamber has not yet issued a decision to terminate the proceedings amounts to an interference by the ECCC's Administration in the Chamber's judicial powers. This is a clear violation of the constitutional separation of powers¹¹ and of the fundamental right of Nuon Chea to legal representation until the Chamber deems that his case has concluded.
21. Finally, the Defence wishes to highlight that the ECCC Administration's act of putting its consultants in a position where they feel coerced into waiving fundamental labour rights such as leave entitlements is not merely abusive but a cynical and blatant violation of the very principles that the United Nations itself purports to champion.¹²

PART 5. RELIEF

22. For the above reasons, the Defence requests that the Chamber issue an urgent order to the ECCC Administration to reinstate all members of the Nuon Chea Defence Team immediately until the Supreme Court Chamber determines otherwise.

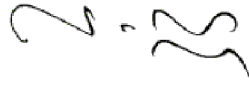
¹¹ Constitution of the Kingdom of Cambodia, Art. 51 *new*: "The powers shall be separated between the legislative power, the executive power and the judicial power."

¹² *See, e.g.*, Universal Declaration of Human Rights (at Arts 23 and 24) and the International Covenant on Economic Social and Cultural Rights ("ICESCR") (at Arts 6 and 7), among a vast array of other relevant and applicable international instruments. The ICESCR is specifically incorporated into Cambodian law via Article 31 of the Constitution of the Kingdom of Cambodia.

CO-LAWYERS FOR NUON CHEA



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