

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

**FILING DETAIL**



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**REQUEST TO TRIAL CHAMBER TO ORDER  
RESUMPTION OF DETENTION INTERVIEWS**

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**Filed by**

**Nuon Chea Defence Team:**  
SON Arun  
Michiel PESTMAN  
Victor KOPPE  
Andrew IANUZZI  
Jasper PAUW  
PRUM Phalla  
Göran SLUITER  
Annebrecht VOSENBERG  
Alejandra CHAPA (Legal Intern)

**Distribution**

**Co-Prosecutors:**  
CHEA Leang  
Andrew CAYLEY  
  
**All Defence Teams**

## I. INTRODUCTION

1. Pursuant to Rule 21 of the ECCC Internal Rules (the ‘Rules’), counsel for the Accused Nuon Chea (the ‘Defence’) submit this request to the Trial Chamber to facilitate the resumption of the periodic detention-condition interviews (the ‘Detention Interviews’) previously conducted by the Office of the Co-Investigating Judges (the ‘OCIJ’) pursuant to Rule 63(8). For the reasons contained herein, the Defence submits that: (i) by failing to conduct Detention Interviews throughout the pre-trial period, the OCIJ failed to discharge its statutory duty; (ii) it is in the interests of justice to facilitate regular Detention Interviews until the conclusion of Nuon Chea’s trial, and this Chamber has the legal obligation and the inherent jurisdiction to do so; and (iii) there is no practical impediment to the resumption of the Detention Interviews. Failure to grant the requested relief could amount to a violation of Nuon Chea’s right to be detained under humane and dignified conditions.

## II. RELEVANT FACTS & PROCEDURAL HISTORY

2. Nuon Chea has been provisionally detained at the ECCC detention facility since 19 September 2007.<sup>1</sup> Of age and in poor health, his many ailments include: deteriorating vision; heart problems; high blood pressure; limited memory, attention span, and ability to concentrate; inability to sit for extended periods of time; and incapacitation by fatigue, sleeplessness, and headaches. In addition to the routine medical checkups conducted by the staff physicians assigned to the detention facility,<sup>2</sup> the Detention Interviews have provided a unique opportunity for creating a formal record of the degree to which Nuon Chea’s physical condition impacts the due course of the proceedings, including his ability to effectively participate in the preparation of his defence.<sup>3</sup>

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<sup>1</sup> See Document No **C-9**, OCIJ ‘Provisional Detention Order’, 19 September 2007, ERN 00148701–00148705.

<sup>2</sup> *N.B.* These are held pursuant to Rule 32 (‘Medical Examination of the Charged Person or Accused’).

<sup>3</sup> See Document No **C-34**, OCIJ ‘Written Record of Nuon Chea’s Interview on Conditions of Detention’, 11 June 2008, ERN 00195993–00195995 at 00195994; Document No **C-45**, OCIJ ‘Written Record of Nuon Chea’s Interview on Conditions of Detention’, 4 February 2009, ERN 00279057–00279058 at 00279058; Document No **C-49**, OCIJ ‘Written Record of Nuon Chea’s Interview on Conditions of Detention’, 3 June 2009, ERN 00337313–00337315 at 00337314; Document No **C-53**, OCIJ ‘Written Record of Nuon Chea’s Interview on Conditions of Detention’, 1 October 2009, ERN 00385026–00385028 at 00385027; Document No **C-57**, OCIJ ‘Written Record of Nuon Chea’s Interview on Conditions of Detention’, 28 January 2010, ERN 00449859–00449860 at 00449859; Document No **C-61**, OCIJ ‘Written Record of Nuon Chea’s Interview on Conditions of Detention’, 28 May 2010, ERN 00523613–00523615 at 00523614.

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3. Between the date of the last Detention Interview (28 May 2010) and the four-month deadline for conducting a subsequent one (28 September 2010) as required by Rule 63(8), the OCIJ issued its Closing Order.<sup>4</sup> Although the Accused remained in provisional detention pending the outcome of his appeal against the Closing Order,<sup>5</sup> the Co-Investigating Judges (the ‘CIJs’) failed to schedule any additional Detention Interviews prior to the decision by the Pre-Trial Chamber (the ‘PTC’) confirming the indictment and continuing Nuon Chea’s provisional detention.<sup>6</sup> Since ordering the further continuation of the provisional-detention period for the duration of the trial,<sup>7</sup> this Chamber has not inquired into the detention conditions of the Accused. Therefore, Nuon Chea has had no formal opportunity to report on the conditions of his continued provisional detention for over nine months.<sup>8</sup>
4. The Defence initially raised these concerns with the PTC on 6 January 2011.<sup>9</sup> That Chamber, having failed to pass on the merits of the Original Request prior to the forwarding of the case file, forwarded the application to the Trial Chamber.<sup>10</sup> In an unreasoned decision dated 2 March 2011, this Chamber rejected the Original Request, noting that it lacked jurisdiction to address the issues raised therein.<sup>11</sup>

<sup>4</sup> See Document No **D-427**, OCIJ ‘Closing Order’, 15 September 2010, ERN 00604508–00605246. The last Detention Interview took place on 28 May 2010. See Document No **C-61**, n 3 *supra*.

<sup>5</sup> Document No **D-427/3/1**, ‘Nuon Chea Defence Appeal Against the Closing Order’, 18 October 2010, ERN 00614048–00614065.

<sup>6</sup> See Document No **D-427/2/13**, Public ‘Decision on Ieng Thirith’s and Nuon Chea’s Appeals Against the Closing Order: Reasons for Continuation of Provisional Detention’, 21 January 2011, ERN 00637083–00637087, para 4(16) (‘The provisional detention of the Accused Persons is ordered to continue until they are brought before the Trial Chamber.’)

<sup>7</sup> See Document No **E-50**, Public ‘Decision on the Urgent Applications for Immediate Release of Nuon Chea, Khieu Samphan, and Ieng Thirith’, 16 February 2011, ERN 00644864–00644878, disposition, p 15 (‘[...] the Trial Chamber: [...] Notes that Nuon Chea, Khieu Samphan, and Ieng Thirith have been brought before the Chamber under Rule 82(1) and that they shall remain in detention until the Chamber’s judgement is handed down, subject to fresh applications for release pursuant to Rule 82.’)

<sup>8</sup> *N.B.* The next opportunity for Nuon Chea to formally raise concerns related to his detention conditions would be at the upcoming trial management meeting which is scheduled to begin on 5 April 2011.

<sup>9</sup> See Case File No 002/06-11-2011-ECCC/PTC(17), Document No 1, Public ‘Urgent Request to Order Resumption of Detention Interviews’, 6 January 2011, ERN 00634317–00634325 (the ‘Original Request’).

<sup>10</sup> See Case File No 002/06-11-2011-ECCC/PTC(17), Document No 2, Public ‘Decision on Urgent Request to Order Resumption of Detention Interviews’, 19 January 2011, ERN 00634946–00634950 (the ‘PTC Decision’).

<sup>11</sup> See Document No **E-60**, Memorandum Decision on ‘Request dated 6 January 2011 to the Pre-trial Chamber by the co-lawyers for Nuon Chea seeking a resumption of periodic detention interviews, pursuant to Internal Rule 63(8)’, 2 March 2011, ERN 00649034 (the ‘TC Decision’) (‘The Trial Chamber notes that it has no jurisdiction to determine this request and according[ly] rejects it.’)

### III. RELEVANT LAW

#### A. Provisional Detention

5. According to the Rules, the term *provisional detention* ‘refers to the detention of the Charged Person ordered by the [CIJs] or the [PTC], or the detention of the Accused ordered by the Chambers, pending final judgment’.<sup>12</sup> Rule 21(2) mandates that such coercive measures ‘shall be taken by or under the effective control of *the competent ECCC judicial authorities* [...] [and] shall [...] fully respect human dignity’.<sup>13</sup>

#### B. Detention Interviews

6. During the investigative stage of proceedings at the ECCC, Detention Interviews must be held pursuant to Rule 63(8), which provides as follows:

In all cases, a Charged Person in Provisional Detention shall be personally brought before the [CIJs] at least every 4 (four) months. The [CIJs] shall offer the Suspect an opportunity to discuss his or her treatment and conditions during Provisional Detention. Where any action is required, the [CIJs] may issue appropriate orders. A written record of the interview shall be placed on the case file.

While Rule 63(8) does not relate specifically to health matters, Detention Interviews have been utilized, in practice, over the course of the judicial investigation to address the Charged Persons’ general state of wellbeing.<sup>14</sup>

7. The rationale of this Rule is clear: detained individuals are to be afforded a formal judicial audience in order to create periodic written accounts of their detention conditions.<sup>15</sup> By logical extension, this rationale continues to hold once a Charged Person is formally accused and sent to trial. This much has been acknowledged by the PTC:

Recognizing the importance of the interviews provided for in Internal Rule 63(8) to exercise an oversight over provisional detention in order to ensure respect of the detainee’s rights to be detained under humane and dignified conditions, the Pre-Trial Chamber acknowledge[s] that the Accused, akin to Charged Person, shall be interviewed periodically on their conditions of

<sup>12</sup> Internal Rules | Rev.7 (23 February 2011), Glossary, p 81-82.

<sup>13</sup> Emphasis added.

<sup>14</sup> See para 2, *supra*.

<sup>15</sup> This rationale finds support in the relevant human rights jurisprudence. See, e.g., ECtHR 71572/01 *Bazjaks v Latvia*, ‘Judgment’, 19 October 2010, para 106 (where the court affirmed that ‘the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured’.)

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detention. This is particularly necessary in the light of the Accused's age and the ailments he alleges to suffer of.<sup>16</sup>

8. Yet, as additionally acknowledged by the PTC, there exists 'a lacuna in the [...] Rules as to who should conduct the interviews on the conditions of detention' following the transfer of the case file to the Trial Chamber.<sup>17</sup> No guidance on this particular issue is found in existing Cambodian law or 'procedural rules established at the international level'.<sup>18</sup>

### C. Inherent Powers

9. Although the jurisdiction of the Trial Chamber is formally limited to those matters stipulated in ECCC Agreement and Law, *all courts* possess the inherent powers to ensure the fundamental fairness of their proceedings and to avoid any abuses of process and/or rights.<sup>19</sup> This notion was consistently recognized throughout the judicial investigation by the PTC, which often relied on its inherent powers to prevent or remedy 'injustice'<sup>20</sup> and routinely invoked the spirit of Rule 21<sup>21</sup> 'in order to ensure that the interests of the Charged Person for legal certainty, transparency, and fairness of proceedings [were] safeguarded'.<sup>22</sup> There is no principled reason for this Chamber to adopt a different approach.

<sup>16</sup> PTC Decision, para 6 (citing Original Request, para 2).

<sup>17</sup> PTC Decision, para 7.

<sup>18</sup> *Ibid.*, para 8.

<sup>19</sup> See Document No **D-158/5/1/1**, 'Appeal Against Order on Eleventh Request for Investigative Action', 4 May 2009, ERN 00323238-00323255, paras 10 *et seq.*

<sup>20</sup> See Document No **C-22/1/68**, PTC 'Public Decision on Application for Reconsideration of Civil Party's Right to Address Pre-Trial Chamber in Person', 28 August 2008, ERN 00221475-00221484, para 25 (recognizing the PTC's 'inherent power' to reconsider its decisions); *confirmed in* Document No **D-55/1/13**, PTC 'Public Decision on Civil Party Co-Lawyers' Joint Request for Reconsideration', 25 February 2009, ERN 00284198-00284201, para 9; Document No **D-164/4/9**, PTC 'Decision on the Request to Reconsider the Decision on Request for an Oral Hearing on the Appeals PTC 24 and PTC 25', 20 October 2009, ERN 00388749-00388756, para 12 (reconfirming C-22/1/68); Document No **D-130/9/20**, PTC 'Decision on Request to Reconsider the Decisions on Requests for Leave to File Amicus Curiae Briefs', 23 November 2009, ERN 00404012-00404018, para 12.

<sup>21</sup> Rule 21(1) provides as follows: 'The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement. In this respect: (a) ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties.'

<sup>22</sup> Document No **A-190/II/9**, PTC 'Decision on Ieng Sary's Appeal Against the Order on Translation Rights and Obligations of the Parties', 20 February 2009, ERN 00283298-00283310, para 31 and Document No **A-190/1/20**, PTC 'Decision on Khieu Samphan's Appeal Against the Order on Translation Rights and Obligations of the Parties', 20 February 2009, ERN 00283249-00283262, para 36. Both decisions concerned the question of whether the entire case file including all supporting documents from the Introductory Submission needed to be translated into a language the international co-lawyers could understand in order to provide the charged person with an effective defence in conformity with his fair trial rights. See also Document No **D-158/5/1/15**, PTC 'Decision on Appeal Against the CIJ's Closing Order on the Charged Person's 11th Request for Investigative Action', 18 August 2009, ERN 00364033-00364046, para 33 and

#### IV. ARGUMENT

##### **A. By Failing to Conduct Detention Interviews Throughout the Pre-Trial Period, the OCIJ Failed to Discharge its Duty Under Rule 63(8)**

10. Based on the CIJs' failure to conduct Detention Interviews subsequent to 28 May 2010, it may reasonably be assumed that the OCIJ considered that its responsibility under Rule 63(8) ended following the issuance of the Closing Order or, in its own words (on a slightly different but related issue), 'only cover[ed] the period between opening and closure of the judicial investigation'.<sup>23</sup> However, the Defence takes the position that the CIJs' responsibility pursuant to the clear terms of Rule 63(8) was never fully discharged. In short, the OCIJ should have continued to conduct Detention Interviews until responsibility for the conditions of Nuon Chea's provisional detention was transferred to the Trial Chamber.

##### **B. It Is in the Interests of Justice to Facilitate Regular Detention Interviews Until the Conclusion of Nuon Chea's Trial and This Chamber Has the Duty and the Inherent Jurisdiction To Do So**

11. Detaining authorities have a positive obligation to ensure the humane and dignified treatment of persons considered particularly vulnerable by virtue of the deprivation of their liberty.<sup>24</sup> Rule 63(8) is an unambiguous expression of this universal principle: it gives those individuals detained at the ECCC a regular opportunity to compile an official, judicial record of their conditions. The need for such a mechanism is all the more clear in the case of Nuon Chea—an elderly person in poor health subjected to protracted provisional detention.

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Document No **D-158/5/4/14**, PTC 'Decision on Appeal of the Charged Person Against the CIJ Order on Nuon Chea's 11th Request for Investigative Action', 25 August 2009, ERN 00366715–00366728, para 36. This case dealt with the question of whether or not the PTC had the authority to investigate and sanction persons involved with the interference of justice. *See also* Document No **C-11/53**, PTC 'Decision on Civil Party Participation in Provisional Detention Appeals', 20 March 2008, ERN 00172886–00172906, in which the PTC specifically discusses participation by civil parties in the appeals process against the provisional detention orders in light of Rule 21(1): 'the Pre-Trial Chamber is additionally guided by the provisions of Internal Rule 21(1)(a)'. *Ibid*, paras 41–43. At issue in this case was the question whether participation by civil parties in criminal proceedings by supporting the prosecution (Rule 23(1)) included the possibility of Civil Parties to participate in an appeal against the Provisional Detention Order in the case of the Charged Person. *See ibid*, para 35.

<sup>23</sup> *Cf.* Closing Order, para 1619. *N.B.* The precise meaning of 'closure of the judicial investigation' is not further discussed by the OCIJ.

<sup>24</sup> *See, e.g.*, CCPR General Comment No 21 concerning the humane treatment of persons in detention, 7 April 1992, UN Doc CCPR/C/21/Rev.1/Add.3 (regarding Article 10 ICCPR), paras 3–4; *see also Bazjaks v Latvia*, n 15 *supra*.

12. As noted, the Accused has been detained for nearly three-and-a-half years and is likely to remain in provisional custody until a judgment is rendered by the Trial Chamber and any appeals against it are heard. It is beyond question that such enduring deprivation has physical and mental repercussions which require regular judicial oversight. Throughout the investigation, Nuon Chea took full advantage of the Detention Interviews to inform the CIJs of his state of wellbeing and grew accustomed to the practice. It has been both unfair and unreasonable to deprive him of this formal channel of communication since May 2010.
13. As trial proceedings are well underway, it is only fair and reasonable that Nuon Chea be provided with a regular opportunity to formally express any concerns regarding his general wellbeing and the manner in which such concerns may affect his defense. Considering the rationale of Rule 63(8) and the requirement of judicial oversight imposed by Rule 21(2), this Chamber should—pursuant to its inherent jurisdiction—facilitate the resumption of the Detention Interviews as soon as possible.

**C. There is no Practical Impediment to  
the Resumption of the Detention Interviews**

14. The Trial Chamber itself is undoubtedly in possession of the material resources necessary to provide the relief sought herein. And the Defence is not particularly concerned with the modalities employed to accomplish the requested task. For example, this Chamber could appoint a pair of judges—one Cambodian and one international—from its full bench; utilize the services of the reserve judges; or seek the assistance of the OCIJ, an office with ample experience and, it would seem at present, time to spare.<sup>25</sup> At this stage, public sessions in the main courtroom and with the attendance of all parties and support personnel are not envisaged. Rather, the modest proceedings previously undertaken by the OCIJ would more than suffice. Once the trial begins in earnest, the Chamber could incorporate the Detention Interviews into the established routine. In any event, any potential strain on the Trial Chamber's current workload is far outweighed by the need for judicial oversight of the Accused's right to be detained in a humane and dignified

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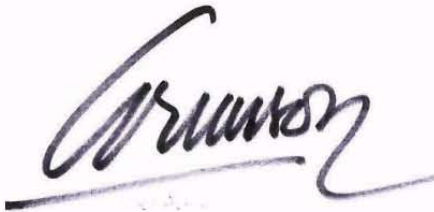
<sup>25</sup> See 'Statement of the Co-Investigating Judges', 2 February 2011 ('The work [of the recently established OCIJ joint-working groups] at present is focused on examining and analyzing the documents available on the Case Files (...) Therefore, at this stage, no field investigation is being conducted'), available via [http://www.eccc.gov.kh/english/cabinet/press/187/ECCC\\_OCIJ\\_2\\_Feb\\_2011\(Eng\).pdf](http://www.eccc.gov.kh/english/cabinet/press/187/ECCC_OCIJ_2_Feb_2011(Eng).pdf).

manner.<sup>26</sup> The current situation—in which Nuon Chea is unable to establish a formal judicial record of his detention conditions on a regular basis—must be remedied.<sup>27</sup>

## V. CONCLUSION

15. For the reasons set out above, the Defence urgently requests the Trial Chamber to facilitate the resumption of Detention Interviews in a manner consistent with Nuon Chea's rights and this tribunal's responsibilities.

CO-LAWYERS FOR NUON CHEA



SON Arun



Michiel PESTMAN & Victor KOPPE

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<sup>26</sup> *Cf. e.g.*, CPPR General Comment No 21 at para 4, n 24, *supra*, in which the Human Rights Committee found that 'treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party.'

<sup>27</sup> *N.B.* While, as a practical matter, recourse may be had by the Accused to the detention facility liaison officer (directly or through counsel), this does not sufficiently address the requirement of judicial oversight or the necessity of formal record keeping.