

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

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**CO-PROSECUTORS' RESPONSE TO NUON CHEA'S "REQUEST TO TRIAL
CHAMBER TO ORDER RESUMPTION OF DETENTION INTERVIEWS"**

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I. INTRODUCTION

1. On 17 March 2011 Nuon Chea through his Defence (the 'Defence') filed his "Request to Trial Chamber to Order Resumption of Detention Interviews" (the 'Request').¹ The Defence requests that Nuon Chea resume detention interviews ('Detention Interviews') at least every 4 months during the trial phase of the proceedings similar to those conducted in the judicial investigation phase pursuant to ECCC Internal Rule 63 (8) (the 'Rule/s'). They argue the Trial Chamber has a 'legal obligation'² to do so and that "such failure to grant the requested relief could amount to a violation of Nuon Chea's right to be detained under humane and dignified conditions."³
2. The Co-Prosecutors submit that this Request should be dismissed for three reasons. First, there is no legal obligation for the Trial Chamber to resume Detention Interviews. Second, Nuon Chea has not demonstrated that by failing to resume Detention Interviews it could lead to a violation of his rights and third, in light of other ECCC mechanisms available to Nuon Chea to protect his right to be detained in humane and dignified conditions, the Defence has failed to show that the resumption of Detention Interviews is a necessary condition to protect this right

II. ARGUMENT

A. There is No Legal Obligation for the Trial Chamber to Resume Detention Interviews

3. First, as acknowledged by Nuon Chea the Rules nor the Cambodian Code of Criminal Procedure (the 'CCCP') specifically require periodic Detention Interviews during the trial phase of proceedings.⁴ The Co-Prosecutors agree with Nuon Chea that the Trial Chamber has inherent powers "to ensure the fundamental fairness of their proceedings and to avoid any abuses of process and / or rights."⁵ However, the Defence argument takes an unsupported leap by concluding that the Trial Chamber has a "legal obligation" to resume Detention Interviews. They imply that this obligation is derived from the Trial Chamber's power to ensure that the proceedings are fundamentally fair and that abuses of process and / or rights are avoided.

¹ Document No. E66, "Nuon Chea's Request to Trial Chamber to Order Resumption of Detention Interviews", 17 March 2011, ERN 00654969-00654975 ["Request"].

² Request at para. 1.

³ Request at para. 1.

⁴ Request at para. 8.

⁵ Request at para. 9.

4. Such a derived legal obligation from a general legal principle is unfounded. As the Rules nor the CCCP require Detention Interviews it is the prerogative of the Trial Chamber to determine how they ensure that detention conditions at the ECCC are humane and dignified. The Defence has not demonstrated how this principle can be upheld *only* by the ordering of Detention Interviews therefore the implementation of these interviews cannot be considered a legal obligation of the Trial Chamber.

B. The Defence Have Failed to Demonstrate that a Failure to Resume Detention Interviews may Lead to a Violation of Nuon Chea's Right to be Detained in Humane and Dignified Conditions.

5. Second, the Defence argument that a failure to resume Detention Interviews during the trial phase may lead to a violation of Nuon Chea's right to be detained in humane and dignified conditions is similarly unfounded.⁶ This argument is based on the premise that - assuming detention conditions were inhumane or lacked dignity - the only way this could be communicated to the Trial Chamber for rectification would be through a Detention Interview. This argument, however, fails to acknowledge the interactive nature of the trial process and consequently the ability of the Trial Chamber to hear any requests or complaints from Nuon Chea or his Counsel on detention conditions.
6. Unlike the judicial investigation phase, during the trial phase there are full and frequent opportunities for Nuon Chea and his Counsel to communicate to the Trial Judges any complaints concerning detention conditions on a daily basis. This could be done in open or closed session at any convenient point while the Trial Chamber is already sitting. Counsel for Nuon Chea have the ability, opportunity and obligation to raise such matters as Nuon Chea's legal representatives to protect his interests before the ECCC.

C. The Defence Have Failed to Show that Resuming Detention Interviews is Necessary to Protect Nuon Chea's Right to be Detained in Humane and Dignified Conditions.

7. Third, the Defence fails to recognize the already existing substantial opportunities for requests and complaints to be made by Nuon Chea, with or without Counsel's advice, to the Head of the Detention Unit to ensure his right to humane and dignified detention conditions is respected. The "ECCC Rules Governing Persons Awaiting Trial or Appeal before the Extraordinary Chambers in the Courts of Cambodia" (the "Detention Facility Rules") apart from providing a comprehensive set of rules to ensure that detention conditions meet international standards also recognize the right for a detainee to make

⁶ Request at para. 1.

002/19-09-2007-ECCC/TC

- requests or complaints regarding his or her detention conditions.⁷ Rule 13 (1) states “All detainees have the right to make requests or complaints to the Chief of Detention in regards to their treatment, well-being and matters of a personal nature.”
8. In addition, the Detention Facility Rules provide a detailed procedure to ensure that such a request or complaint is heard. Rule 13 (4) requires the Chief of Detention to ensure that the detainees have the opportunity to make these requests or complaints each weekday. Rule 13 (5) requires the Chief of Detention to promptly deal with and respond to these requests or complaints. Rule 13 (6) requires all such complaints and requests to be recorded as well as the recording of the action taken. Rule 13 (7) guarantees the right of detainees to make requests or complaints, “without censorship as to substance” to the Co-Investigating Judges or the Chambers, as appropriate, with a copy to the General Department of Prisons, and the Director and Deputy Director of the Office of Administration. Finally, Rule 13 (8) requires the Chief of Detention to forward the request or complaint to the appropriate authority.
9. Similarly, the Defence fails to recognize the role of the Head of the Defence Support Section amongst others to assist the Director and Deputy Director of Administration..... “to adopt mechanisms that will ensure that the Office of Administration be properly informed about the conditions of detention, which, in accordance with the Agreement, should respect Cambodian Law, the Standard Minimum Rules for the Treatment of Detainees and the Basic Principles for the Treatment of Prisoners of the United Nations.”⁸
10. While it is accepted that the Trial Chamber has a judicial oversight role in relation to detention matters - inevitably - to execute this role the Chamber relies on a system of mechanisms that provide checks and balances to ensure an Accused is detained in conditions that respect his humanity and dignity. Where such a system fails it is the obligation on all of those individuals who have a responsibility or an opportunity to do so to report on this failure to the Trial Chamber. Consequently aside from the opportunity of the Accused to currently report on issues concerning detention, Counsel for the Defence, the Head of Defence Support Section, the Co-Prosecutors, the Head of the Detention Unit, the Director and Deputy Director of Administration amongst other individuals have an obligation to report any issue that would indicate that detention conditions were not in

⁷ ECCC Rules Governing Persons Awaiting Trial or Appeal before the Extraordinary Chambers in the Courts of Cambodia,” 17 December 2008 (the “Detention Facility Rules”).

⁸ Rule 10 (3).


002/19-09-2007-ECCC/TC

accordance with international standards. However, bearing in mind the unique access and relationship Defence Counsel have to and with Nuon Chea it is expected that they are best placed to report on any detention conditions that they believe do not conform to international standards at the earliest opportunity.

III. RELIEF REQUESTED

11. For the above reasons, it is submitted that the implementation of Detention Interviews at least every four months during the trial phase would be an unnecessary and substantially redundant additional routine to a system already in place at the ECCC which allows the Accused, his Counsel and the Trial Chamber to ensure that Nuon Chea's right to detention conditions consistent with international standards are continued to be met. For these reasons, the Request should be dismissed.

Respectfully submitted,

Date	Name	Place	Signature
28 March 2011	YET Chakriya Deputy Co-Prosecutor	Phnom Penh	
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