

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

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**CO-PROSECUTORS' RESPONSE TO NUON CHEA'S APPEAL ON
SEPARATION IN DETENTION**

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I. INTRODUCTION

1. International criminal tribunals, similar to this Court, have rarely separated detainees solely because of their status as co-defendants.¹ Any such order of separation, especially in the circumstances of this Court's Detention Unit, where all the co-detainees are also co-defendants, may amount to a *de facto* solitary confinement.
2. The Pre-Trial Chamber in its IENG Sary Visitation Rights Decision has previously annulled two similar orders.² It had reasoned that it was unclear how limiting contact between the detainees would protect the interests of investigation, especially when the alleged crimes were committed thirty years ago and the detainees had all that time to discuss any matter related to such allegations.³ The Pre-Trial Chamber's decision, being without appeal, is binding on the Co-Investigating Judges. The Co-Prosecutors, therefore, do not oppose NUON Chea's Appeal seeking a reversal of the Co-Investigating Judges' Separation Order that separated the detainees by barring communication among them.⁴ They note that while its detainees are charged with some of the most grievous violations of international humanitarian law and human rights, it is nonetheless essential that this Court respect their human rights and dignity and ensure that they receive a fair trial.

¹ *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision Revoking the Prohibition of Contact and Communication Between Germaine Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07, Single Judge of the Pre-Trial Chamber-I, 13 March 2008, p. 11 [*hereinafter* Katanga Decision].

² *Case of Nuon Chea*, Order Concerning Provisional Detention Conditions, Criminal Case File No. 002/19-09-2007-ECCC-OCIJ, 20 May 2008, ERN 00191068-00191073, C33 [*hereinafter* Separation Order].

³ *Case of Ieng Sary*, Decision on Appeal Concerning Contact Between the Charged Person and His Wife, Criminal Case File No. 002/19-09-2007-ECCC-OCIJ (PTC 05), 30 April 2008, ERN 00184951-00184956, A104/II/7 [*hereinafter* Visitation Rights Decision].

⁴ *Case of Nuon Chea*, Appeal Against Order Concerning Provisional Detention Conditions, Criminal Case File No. 002/19-09-2007-ECCC-OCIJ(PTC 09), 14 July 2008 [*hereinafter* Appeal]. The Case File Officer served the Appeal to the Co-Prosecutors by email at 1027h on 15 July 2008.

II. RELEVANT FACTUAL BACKGROUND

3. Pursuant to a single Introductory Submission, containing identical charges against them, five Charged Persons are currently under detention in separate cells at the ECCC Detention Unit containing only eight cells.
4. The Appellant has been in provisional detention at the Detention Unit since his arrest on 19 September 2007.⁵ He claims that a regime prohibiting any communication between him and his co-detainees has been in effect “for over ten months”.⁶ This deprives him of any human contact within the Detention Unit other than that with his jailors.⁷
5. While the judicial investigation commenced on 18 July 2007, the Co-Investigating Judges, on 22 January 2008, informed Co-Charged Person IENG Sary that “given the judicial investigation” they were “not planning any change” in the regime prohibiting communication amongst detainees.⁸ Aggrieved by this denial of his right to society within detention (particularly, his right to meet his co-detainee wife), IENG Sary appealed the 22 January 2008 decision to the Pre-Trial Chamber. On 21 March 2008, while admitting the appeal, the Pre-Trial Chamber noted that the decision of the Co-Investigating Judges appeared to be “in its effect, a segregation order”.⁹ The Chamber stated that such “coercive measure taken by the Co-Investigating Judges, in its effect, may not fully respect the human dignity” of the detainees.¹⁰
6. While IENG Sary’s appeal was pending, the Co-Investigating Judges, on 17 March 2008, issued another memorandum permitting a weekly contact between IENG Sary and his wife as “some investigative actions that were previously necessary had been completed.”¹¹

⁵ Appeal, para. 4.

⁶ Appeal, para. 4.

⁷ Appeal, para. 20.

⁸ Visitation Rights Decision, para. 2.

⁹ *Case of Ieng Sary*, Decision on the Admissibility of the Appeal Lodged by Ieng Sary on Visitation Rights, Criminal Case File No. 002/19-09-2007-ECCC-OCIJ (PTC 05), 21 March 2008, ERN 00172265-00172268, A104/II/4, para. 6 [*hereinafter* Admissibility Decision].

¹⁰ Admissibility Decision, para. 9.

¹¹ Admissibility Decision, para. 4.

7. On 30 April 2008, the Pre-Trial Chamber rendered its substantive Visitation Rights Decision and held that:

- i. Rules permit limitation of contact between detainees in the interest of investigation.¹² However, such measures should be strictly limited to the needs of the proceedings, proportionate to the gravity of the charges and should fully respect human dignity.¹³
- ii. Such measures can only be ordered by a reasoned decision. From this reasoning, it must be clear which interest these measures protect. Any limitation on rights should be based on the protection of such interest.¹⁴
- iii. The Co-Investigating Judges did not sufficiently reason their decisions segregating detainees and paid no attention to the “implications of their decisions, which leads to a *de facto* segregation.”¹⁵
- iv. On merits, IENG Sary and his wife were married for fifty-seven years and the alleged crimes were committed thirty years ago. “[T]he Charged Persons have had all that time to discuss any matter related to such allegations.”¹⁶ In these circumstances, it was not clear how limiting contact between the detainees protects the interest of the investigation.¹⁷
- v. The long duration of measures “imposed since the investigation started [...] without proper justification, affects the Charged Person’s right to be treated with humanity and must, therefore, cease.”

¹² Visitation Rights Decision, para. 14 (citing Rule 55(5)).

¹³ Visitation Rights Decision, para. 15 (citing Rule 21(2)).

¹⁴ Visitation Rights Decision, para. 17.

¹⁵ Visitation Rights Decision, para. 18.

¹⁶ Visitation Rights Decision, para. 19.

¹⁷ Visitation Rights Decision, para. 20.

8. The Pre-Trial Chamber, therefore, found the regime of non-communication as procedurally and substantively unsupportable and set it aside. In its disposition, the Chamber directed that:

“[the] Charged Persons should be allowed to meet in accordance with the Detention Rules applicable at the ECCC Detention Facility.”¹⁸

9. Within twenty days of the Pre-Trial Chamber’s decision prohibiting separation the Co-Investigating Judges issued the Separation Order. The Separation Order indefinitely barred any communication between the detainees except IENG Sary and his wife, who, according to it, formed a separate category, as they were married.¹⁹
10. Relying exclusively on the decisions of the European Court of Human Rights (“ECHR”) and considering as “isolated” the distilled jurisprudence of international criminal tribunals similar to this Court, the Separation Order argued that separation of detainees may be justified to curb the “potential for prejudicial collusion” between them.²⁰ It found that separation in detention does not need to be “justified by proof of specific action”; rather, “the only element to be taken into account is a risk assessment”.²¹ It recognized that although separation amounts to *de facto* segregation of the detainees, it does not result in a breach of their fundamental rights and is, therefore, allowable.
11. Aggrieved by the Separation Order, segregated Charged Person NUON Chea has preferred this Appeal.²² The Appeal argues that the doctrine of precedent must apply to proceedings before this Court and submits that, pursuant to this Chamber’s Visitation Rights Decision, the regime of separation is neither necessary nor proportional to the interests of the investigation. It contends that the ECHR case law

¹⁸ Visitation Rights Decision, para. 21.

¹⁹ Separation Order, para. 11.

²⁰ Separation Order, para. 5.

²¹ Separation Order, para. 3.

²² Rule 73(a) grants the Pre-Trial Chamber the “sole jurisdiction” over appeals against the decisions of the Co-Investigating Judges.

relied upon in the Separation Order is of little relevance to the instant case, let alone controlling.²³

III. RELEVANT LAW

Doctrine of Precedent

12. One of the fundamental principles underpinning proceedings before this Court is that persons who find themselves in a similar situation and are prosecuted for the same offences should be treated according to the same rules.²⁴ This principle is based on the doctrine of precedent ('to stand by things decided'). This legal precept can be divided into two components. First, a decision of a higher court binds a lower court. Second, even higher courts do not overrule their own precedents without a compelling rationale. This ensures that courts follow earlier judicial decisions when the same points arise again.²⁵
13. In *Aleksovski*, the International Criminal Tribunal for the Former Yugoslavia ("ICTY") affirmed the importance of this doctrine underscoring the need for consistency, stability and predictability in legal principles.²⁶ It reasoned that appellate decisions are binding on lower courts because: 1) the judicial hierarchy requires the Appeals Chamber to definitively settle questions of law and fact; 2) certainty and predictability are important in criminal law; and 3) like defendant have the right to be treated alike.²⁷ Similarly, in *Cossey*, the ECHR noted that although it is not bound by its previous decisions, it usually follows and applies them in the interest of certainty and the orderly development of the law.²⁸
14. Although, unlike their common law counterparts, civil law jurisdictions do not strictly adhere to the doctrine of precedent, their practices are remarkably similar.²⁹ In civil

²³ Appeal, para. 3.

²⁴ Rules, rule 21(2)(b).

²⁵ Blacks Law Dictionary, *Stare Decisis*, Eighth Edition, 2004, p. 590.

²⁶ *Prosecutor v. Aleksovski*, Appeals Chamber Judgement, Case No. IT-95-14-1-A, 24 March 2000, para. 97 [*hereinafter* *Aleksovski* Judgement].

²⁷ *Aleksovski* Judgement, para 113.

²⁸ *Cossey v. United Kingdom*, [1990] ECHR 21, 27 September 1990, para. 35.

²⁹ *Aleksovski* Judgement, para. 113.

law jurisdictions, similar to Cambodia, higher courts generally follow their own previous decisions and lower courts follow the decisions of the higher courts.³⁰ For example, in France, there is a strong tendency to follow precedents, especially those of the higher courts. Of course, the *Cour de Cassation* can always overrule itself but it does not do so without weighty reasons. The attitude of the lower courts toward decisions of the *Cour de Cassation* is, in substance, quite similar to that of lower courts in common law jurisdictions towards decisions of their judicial superiors.³¹ In Italy, even though the decisions of the Supreme Court of Cassation are not strictly binding, in practice, few lower courts adopt a different interpretation. In essence, Italian courts do not act very differently towards reported decisions than the courts do in the United States.³²

Separation of Detainees

15. The Internal Rules constitute a complete procedural code specifically promulgated to regulate proceedings before this *sui generis* Court.³³ They require that the conditions of detention of persons detained by this Court should respect the Cambodian law, the Standard Minimum Rules for Detainees and the United Nations Basic Principles of Treatment of Prisoners.³⁴ In addition, they stipulate that only competent judicial authorities of this Court can order “coercive measures” and envisage that these measures should (1) be strictly limited to the needs of the proceedings; (2) be proportionate to the gravity of the charges; and (3) fully respect human rights.³⁵
16. The draft Detention Rules of this Court exceptionally permit separation of detainees and require that the Court’s Medical Unit examine the separated detainee daily to assess whether the separation “should not continue.”³⁶ They strictly proscribe solitary

³⁰ Aleksovski Judgement, paras. 93–95.

³¹ Aleksovski Judgement, para. 93.

³² Aleksovski Judgement, para. 94.

³³ Rules, Preamble (stating “the ECCC has adopted the following Internal Rules, the purpose of which is to consolidate applicable proceedings before the ECCC”).

³⁴ Rules, rule 10(3).

³⁵ Rules, rule 21(2).

³⁶ Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Extraordinary Chambers in the Courts of Cambodia or Otherwise Detained on the Authority of the Extraordinary Chambers in the Courts of Cambodia, (DRAFT- v.10), rule 3(1.3), [*hereinafter* Detention Rules].

confinement.³⁷ They contemplate denial of visits as a disciplinary measure against the detainee but require that such a measure can only be applicable for a maximum of two weeks and the Chief of the Detention Unit can only order it based on one of the exhaustively enumerated breaches of discipline.³⁸ The Detention Rules permit the detainees to make external telephonic calls (potentially, even to un-arrested co-defendants).³⁹

17. The ICTY⁴⁰, the International Tribunal for Rwanda (“ICTR”)⁴¹ and the Special Court for Sierra Leone (“SCSL”)⁴² have adopted rules of detention that, among other things, regulate a detainee’s right of communication. The Detention Rules of the ICTY – that are mirrored on this issue by those of the ICTR and SCSL – provide that the Prosecution may request for prohibition or regulation of contact between a detainee and a third person on the grounds that it could prejudice the proceedings against the detainee or any other investigation.⁴³ Similarly, the Registrar of the ICTY, or the Commanding Officer of its Detention Unit, may refuse visitation rights upon reasonable grounds for believing that the detainee may be attempting to interfere with a witness or with the administration of justice.⁴⁴ While prohibiting segregation as a disciplinary measure, the ICTY Detention Rules permit it *only* to preserve security and good order in the Detention Unit or for the protection of the detainee.⁴⁵ Those Rules only contemplate segregation “from some [not all] of the other detainees” and provide that such measures be taken only after seeking medical advice.⁴⁶

³⁷ Detention Rules, rule 10(2)(2.5).

³⁸ Detention Rules, rules 10(5)(5.6), 10(8).

³⁹ Detention Rules, rule 30.

⁴⁰ ICTY Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal, 9. October 2005 [*hereinafter* ICTY Detention Rules]; ICTY Regulations for the Establishment of a Complaints Procedure for Detainees, April 1995.

⁴¹ ICTR Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal [*hereinafter* ICTR Detention Rules].

⁴² SCSL Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Special Court for Sierra Leone or Otherwise Detained on the Authority of the Special Court for Sierra Leone, rule 41(A) [*hereinafter* SCSL Detention Rules].

⁴³ ICTY Detention Rules, rule 64(A)(ii); ICTR Detention Rules, rule 64; SCSL Detention Rules, rule 47(A).

⁴⁴ Regulations to Govern the Supervision of Visits to and Communications with Detainees, ICTY Detention Unit, April 1995, rule 33(A).

⁴⁵ ICTY Detention Rules, rule 43.

⁴⁶ ICTY Detention Rules, rule 43.

18. Recently in *Katanga*, the International Criminal Court (“ICC”) surveyed the relevant jurisprudence and noted that, save for one instance in *Delalic*, international tribunals have only restricted communications of a detainee “with the outside world and not between co-detainees (and much less between persons jointly prosecuted).”⁴⁷ Even these restrictions were triggered only by “previous *specific* violation of the detention regime” by the detainee.⁴⁸ In *Delalic*, the ICTY exceptionally prohibited communications between detained co-defendants as they sought to “exchange notes surreptitiously” in order to circumvent scrutiny by the security officers.⁴⁹
19. Following this practice, the ICC distinguished between a restriction of communication between a detainee and any other person,⁵⁰ and the segregation of a detainee from other co-detainees.⁵¹ It noted that it could only order segregation to (1) prevent the detainees from creating potential conflict in the Detention Unit, or (2) to avoid danger to the co-detainees.⁵² In rejecting a request for segregation, it noted that the Prosecution did not base its application on any previous specific violation of the detention regime and since the requested measures constituted “important restrictions” on the rights of the detainee, it could only impose them if they met the requirements of necessity and proportionality.⁵³ It described the “preventive” restrictions sought by the Prosecution as “purely speculative”. It added that, under Article 67(1) of its Rome Statute, co-defendants had the right to properly prepare their defenses and, in the absence of concrete evidence that they were fabricating testimony or evidence, the Court did not consider that the exercise of this fundamental right can prejudice the outcome of the proceedings against them.⁵⁴
20. While this Chamber relied upon *Katanga* in its Visitation Rights Decision, the Separation Order described it as “isolated”.⁵⁵

⁴⁷ *Katanga* Decision, p. 11.

⁴⁸ *Katanga* Decision, p. 11. Emphasis added.

⁴⁹ *Katanga* Decision, p. 11.

⁵⁰ ICC Regulations of the Court, reg. 101.

⁵¹ ICC Regulations of the Registry, reg. 201.

⁵² *Katanga* Decision, p. 8.

⁵³ *Katanga* Decision, p. 9.

⁵⁴ *Katanga* Decision, pp. 10-11.

⁵⁵ Visitation Rights Decision, para. 16; Separation Order, para. 3.

IV. ARGUMENT

Precedent Must Apply

21. The Appeal submits that the *ratio* of the Pre-Trial Chamber's Visitation Rights Decision must bind the Co-Investigating Judges.⁵⁶ It contends that their Separation Order seeks to unjustifiably limit the scope of the Visitation Rights Decision only to the married detainees.⁵⁷
22. The Co-Prosecutors note that the Visitation Rights Decision did not predicate its disposition solely on the marital rights of IENG Sary and his wife but rather on the basis that the long and unjustified period of separation impinged on the detainees' right to human dignity.⁵⁸ The right to human dignity attaches to a detainee irrespective of his marital status.
23. Although the Pre-Trial Chamber issued the Visitation Rights Decision on an appeal by IENG Sary, it made a general finding that coercive measures of detention amounted to segregation and, as such, must cease. The measures were imposed on all detainees and, consequently, were set aside by the Pre-Trial Chamber for all the detainees. The general, and non-specific, nature of the Pre-Trial Chamber's finding is reflected in the disposition that reads: "The Pre-Trial Chamber decision shall have the effect that the Charged Persons shall be allowed to meet [...]."⁵⁹

Segregation Is Neither Necessary Nor Proportionate

24. The Appeal submits that segregation in detention is neither necessary nor proportionate in the Appellant's case.⁶⁰ It contends that the assertion in the Separation Order that the only element required to order separation of detainees is a "risk assessment" does not accord with the Pre-Trial Chamber's Decision that required that any separation "has to be ordered by a reasoned decision".⁶¹

⁵⁶ Appeal, para. 15.

⁵⁷ Appeal, para. 16; Separation Order, para. 10.

⁵⁸ Visitation Rights Decision, para. 21.

⁵⁹ Visitation Rights Decision, p. 6.

⁶⁰ Appeal, para. 3.

⁶¹ Appeal, para. 22; Visitation Rights Decision, para. 17.

25. The Co-Prosecutors submit that, pursuant to Rule 21(2), any coercive measure in detention should be strictly limited to the needs of the proceedings, proportionate to the gravity of the charges and should fully respect human dignity.⁶² It is unclear in the Separation Order how the objectives of “potential prejudicial collusion” amongst the detainees can only be addressed by segregation and not by other means such as witness and victim protection. Other similar tribunals have achieved the same objectives through alternative and less onerous measures such as monitored interaction between the detainees, *etc.*

International Criminal Law Should Take Precedence Over ECHR Decisions

26. The Appeal submits that the Separation Order significantly overstates the relevance of certain decisions of the ECHR and “fails to make a principled case” for not relying on the jurisprudence of international criminal tribunals and for departing from the concrete evidence test in favor of the risk assessment test.⁶³ It notes that many decisions of the ECHR cited in the Separation Order related to the Mafia or terrorist organizations where detention conditions were imposed to “minimize the risk that [the detainees] will maintain contact with criminal organizations.”⁶⁴ It claims that these cases do not apply here as the *Khmer Rouge* has been defunct for more than ten years and “no one could credibly claim that any attempt to release [the detainees] by violent methods has ever been contemplated.”⁶⁵

27. The Co-Prosecutors note that a majority of ECHR cases cited in the Separation Order, including those cited to justify segregation, relate only to provisional detention *per se*. For example, it substantially relies upon *Bak* to justify segregation. That decision holds that longer periods of detention (and not segregation) “may be essential to [prevent a detainee from] absconding, tampering with evidence and [...] influencing or threatening witnesses.”⁶⁶

⁶² Appeal, para. 11; Visitation Rights Decision, para. 15.

⁶³ Appeal, paras. 3, 22-7.

⁶⁴ Appeal, para. 28; Separation Order, fn. 9 (citing *Messina*, para. 66).

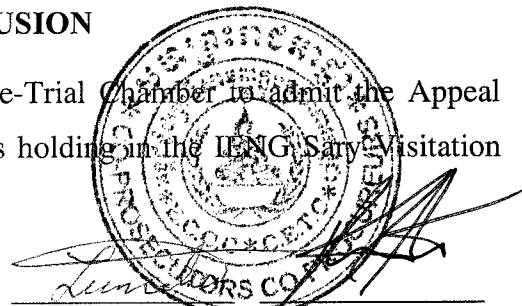
⁶⁵ Appeal, para. 28

⁶⁶ Separation Order, fn. 1 (citing *Bak*, para. 56).

28. To use decisions on provisional detention to rule on segregation conflates two distinct legal concepts. Presumably, the Separation Order combines these two concepts, as they seem to serve similar policy objectives. Even so, the critical distinction is one of degree. Segregation is an extreme measure. The ECHR jurisprudence and the ICC decision in *Katanga* demonstrate that the threshold for justifying segregation is considerably higher than that for provisional detention. Often, the justification for provisional detention exists without meeting the threshold for segregation. Though similar policy concerns may be at issue, the two determinations turn upon different considerations and facts. Accordingly, while on 13 March 2008 the ICC could rule that it would not permit the segregation of a detainee, still, on 21 April 2008, it ruled that his detention was appropriate.
29. The Co-Prosecutors note that reliance on factually distinguishable jurisprudence of the ECHR, a regional body dealing essentially with municipal crimes, while not considering jurisprudence favorable to the detainees from international tribunals like the ICC and ICTY that are similar to this Court and handle similarly serious crimes, is inapposite.

IV. CONCLUSION

30. The Co-Prosecutors, therefore, request the Pre-Trial Chamber to admit the Appeal and to determine it in the light of its previous holding in the IENG Sary Visitation Rights Decision.



CHEA Leang Robert PETIT
Co-Prosecutor Co-Prosecutor

Signed in Phnom Penh, Kingdom of Cambodia on this twenty-ninth day of July 2008.