C33/I/3

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

BEFORE THE PRE-TRIAL CHAMBER

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APPEAL AGAINST ORDER CONCERNING PROVISIONAL DETENTION CONDITIONS

Filed by

Co-Lawyers for NUON Chea:
SON Arun
Michiel PESTMAN
Victor KOPPE

Assisted by:
MAM Thanna
Andrew IANUZZI

Distribution

Pre-Trial Chamber:
PRAK Kimsan
HOUT Vuthy
Rowan DOWNING
NEY Thol
Katinka LAHUIS
PEN Pichsaly

Co-Prosecutors:
CHEA Leang
Robert PETIT
TAN Senarong
Anees AHMED

I. INTRODUCTION

1. Pursuant to Rules 73, 74, and 75 of the ECCC Internal Rules (the "Rules"), counsel for Charged Person NUON Chea (the "Defence") submit this appeal to the Pre-Trial Chamber (the "PTC") against the 'Order Concerning Provisional Detention Conditions' (the "Order")[1] issued by the Office of the Co-Investigating Judges (the "OCIJ").

2. The Order confirms the imposition of an open-ended regime of enforced separation (the "Regime") with respect to Mr Nuon and the four other Charged Persons housed in the ECCC detention facility on the grounds that such conditions are necessary in order to curb "the potential for prejudicial collusion".[2] The OCIJ takes the position that the Regime is sufficiently justified by reference to the jurisprudence of the European Court of Human Rights (the "ECHR") which, in certain cases, has endorsed the imposition of similar measures without requiring proof of an actual risk of collusion.[3] Applying ECHR standards, the OCIJ concludes that the Regime does not result in inhuman or degrading treatment;[4] violate Mr Nuon's rights to private and family life;[5] nor infringe upon the presumption of innocence[6] or the right to remain silent.[7]

3. The Defence submits that: (i) the appeal is admissible; (ii) the principle of *stare decisis* should apply to pre-trial proceedings at the ECCC; pursuant to this Chamber's established jurisprudence, the Regime is neither (iii) necessary nor (iv) proportional to the interests of the investigation; and (v) the ECHR case law relied upon in the Order is of little relevance to the instant case, let alone controlling.

II. RELEVANT FACTS

4. Mr Nuon was arrested and provisionally detained by the ECCC authorities on 19 September 2007.[8] While no official ECCC document prior to the impugned Order

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1 Document No. A-169/II, 21 May 2008. The Order is also listed on the case file as Document Nos. A-104/V, A-166/III, and C-33.
2 Order, para. 5.
3 Order, paras. 1–6.
4 Order, paras. 7–9.
5 Order, paras. 1–11.
6 Order, para. 12.
7 Order, para. 13.
8 Document Nos. C-7, 'Record of Brining the Suspect' and C-9, 'Provisional Detention Order'. This Chamber upheld the Provisional Detention Order on 20 March 2008. Document No. C-11/54, 'Decision on Appeal against Provisional Detention Order of Nuon Chea'.

addressed the particular conditions of Mr Nuon's provisional detention, the Regime—which limits *all* contact between Mr Nuon and the other four detainees—has been in place and enforced by the ECCC authorities for over ten months.[9]

5. The Defence filed its 'Request for Modification of Detention Conditions' on 25 March 2008.[10] While that request was pending, this Chamber issued its 'Decision on Appeal concerning Contact between the Charged Person and his Wife' (the "Ieng Decision"), which (i) established certain general principles governing conditions of detention at the ECCC and (ii) altered the Regime by allowing IENG Thirith and IENG Sary "to meet in accordance with the detention rules applicable at the ECCC Provisional Detention Facility".[11]

6. In light of the Ieng Decision, the Defence wrote to the OCIJ on 2 May 2008 requesting "assurances [...] that any OCIJ order of separation specifically related to Mr Nuon [...] has been duly rescinded as well".[12] The Defence received its answer on 21 May 2008 when the OCIJ finally provided its putative justifications for the Regime.[13]

III. APPLICABLE LAW

A. Jurisdiction of the Pre-Trial Chamber

7. Rule 73 vests this Chamber with "sole jurisdiction over [...] appeals against decisions of the Co-Investigating Judges, as provided in Rule 74". Pursuant to Rule 74(3)(f), a charged person may appeal against any order of the Co-Investigating Judges "relating to provisional detention or bail".

B. Precedential Effect of Appellate Court Decisions

8. Pursuant to the doctrine of *stare decisis*, when a court has laid down a principle of law as applying to a certain set of facts, it will adhere to that principle and apply it to all

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[9] The Defence was only made aware of the existence of the Regime on 22 January 2008 (four months after Mr Nuon's arrest) by way of the OCIJ's response to Mr Ieng's request for permission to meet with his wife. In denying that particular request, the OCIJ indicated: "we are not planning any change in the conditions that currently apply for visits". Document A-104/I, 22 January 2008. Yet the OCIJ failed to state what those conditions were; when and by whom they had been imposed; and in which official ECCC document their precise terms and justifications could be found.

[10] Document A-169 (which sought justification for the OCIJ's authority to impose conditions of detention as a general matter; production of the specific order imposing the Regime; and annulment of such order to the extent that it existed).

[11] Document A-104/II/7, 30 April 2008, p. 6.

[12] Document A-169/I.

[13] *See* Order, paras. 4–5.

future cases where the facts are substantially the same. Additionally, where the said principle is announced by an appellate court, lower courts within the same jurisdiction will follow the established precedent. "The rule of *stare decisis* is a judicial policy, based on the principle that, absent powerful countervailing considerations, like cases should be decided alike in order to maintain stability and continuity in the law. The doctrine is the means by which courts ensure that the law will not merely change erratically but will develop in a principled and intelligible fashion."[14]

9. The International Criminal Tribunal for the Former Yugoslavia (the "ICTY") has long ago determined that decisions of its Appeals Chamber are binding on ICTY trial chambers.[15] In reaching this decision, particular attention was paid to the practice in *both* common-law and civil-law jurisdictions:

> Generally, in common law jurisdictions, decisions of a higher court are binding on lower courts. In civil law jurisdictions there is no doctrine of binding precedent. However, as a matter of practice, lower courts tend to follow decisions of higher courts. As one commentator has stated: "it is hardly an exaggeration to say that the doctrine of *stare decisis* in the Common Law and the practice of Continental courts generally lead to the same results [...]. In fact, when a judge can find in one or more decisions of a supreme court a rule which seems to him relevant for the decision in the case before him, he will follow those decisions and the rules they contain *as much in Germany as in England or France*".[16]
>
> The Appeals Chamber considers that a proper construction of the Statute requires that the *ratio decidendi* of its decisions is binding on Trial Chambers for the following reasons:
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> (i) the Statute establishes a hierarchical structure in which the Appeals Chamber is given the function of settling definitively certain questions of law and fact arising from decisions of the Trial Chambers. [...] and its decisions are final;
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> (ii) the fundamental mandate of the Tribunal to prosecute persons responsible for serious violations of international humanitarian law cannot be achieved if the accused and the Prosecution do not have the assurance of certainty and predictability in the application of the applicable law; and

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[14] American Jurisprudence, 2d Ed. (2007), 20 Am Jur 2d Courts § 129.

[15] *See Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, 'Judgement', 24 March 2000 (the "Aleksovski Judgement").

[16] Aleksovski Judgement, para. 112 (quoting Zweigert and Kotz, An Introduction to Comparative Law (1998), p. 263) (emphasis added); *see ibid.*, para. 97 ("The Appeals Chamber recognises that the principles which underpin the general trend in both the common law and civil law systems, whereby the highest courts, whether as a matter of doctrine or of practice, will normally follow their previous decisions and will only depart from them in exceptional circumstances, are the need for consistency, certainty and predictability. This trend is also apparent in international tribunals. Judge Shahabuddeen observes: 'The desiderata of consistency, stability and predictability, which underlie a responsible legal system, suggest that the Court would not exercise its power to depart from a previous decision except with circumspection [...]. The Court accordingly pursues a judicial policy of not unnecessarily impairing the authority of its decisions'.") (quoting Shahabuddeen, Precedent in the World Court (1996), p. 239).

> (iii) the right of appeal is, as the Chamber has stated before, a component of the fair trial requirement, which is itself a rule of customary international law and gives rise to the right of the accused to have like cases treated alike. [...].[17]

10. On information and belief, Cambodian courts routinely apply the principle of *stare decisis* to decisions of appellate tribunals.

C. Limitation of Contact among Charged Persons

11. The Ieng Decision affirms the OCIJ's authority to impose limitations on communication and contact between and among charged persons detained at the ECCC detention facility "in the interest of the investigation".[18] In exercising such authority, the OCIJ is required to balance any putative investigative interests against the rights of the Charged Person: While "Rule 55(5) is sufficiently broad in its scope to give the [OCIJ] jurisdiction to limit contacts between the Charged Person and any other person",[19] such jurisdiction is "limited by Internal Rule 21(2)",[20] which requires that "[a]ny coercive measures to which [a Charged Person] may be subjected [...] shall be strictly limited to the needs of the proceedings, proportionate to the gravity of the offence charged and fully respect human dignity." Additionally, it was held that any limitation of contacts must be "ordered by a reasoned decision"[21] identifying "which interest is protected"[22] and explaining "how the limitation of contacts is a necessary and proportional measure to protect" that interest.[23] Such a decision must not result in "*de facto* segregation" of the

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[17] Aleksovski Judgement, para. 113.
[18] Ieng Decision, para. 14.
[19] Document No. A-104/II/7, 'Decision on Appeal Concerning Contact Between the Charged Person and His Wife', 30 April 2008 (the "Ieng Decision"), para. 14. *N.B.* Rule 55(5) provides, in pertinent part: "In the conduct of judicial investigations, the Co-Investigating Judges may take any investigative action conducive to ascertaining the truth. [...] To that end, the Co-Investigating Judges may: [...] (b) take any appropriate measures to provide for the safety and support of potential witnesses and other sources; [...]; and (d) issue such orders as may be necessary to conduct the investigation, including summonses, Arrest Warrants, Detention Orders and Arrest and Detention Orders." In this regard, the PTC acknowledged the practice at various international tribunals which vest their own judicial authorities with jurisdiction to restrict "communication and contact between a detained person and any other person to avoid any prejudice to the outcome of the proceedings". Ieng Decision, para. 16 (citing *Prosecutor v. Katanga and Chui*, Case No. ICC-01/04-01/07, 'Decision Revoking the Prohibition of Contact and Communication Between Germain Katanga and Mathieu Ngudjolo Chui', Judge Sylvia Steiner, 13 March 2008 (the "Katanga Decision"), p. 8).
[20] Ieng Decision, para. 15.
[21] Ieng Decision, para. 17.
[22] Ieng Decision, para. 17.
[23] Ieng Decision, para. 18; *see also* Katanga Decision, p. 9 (restrictions on contact are only permissible where they meet the requirements of necessity and proportionality).

detainees.[24] These principles are in accordance with the basic guarantees provided by the European Convention on Human Rights (the "European Convention").[25]

12. In the Ieng Decision, this Chamber ultimately determined that the above-mentioned requirements had not been met. In particular, it was held that the OCIJ failed to adequately explain "how limiting contact between the Charged Persons protects the interests of the investigation"[26] given that Mr and Mrs Ieng have had sufficient time to discuss matters related to the pending investigation over the last thirty years.[27] And it was further noted that "the long duration of the measures imposed since the investigation started on 19 November 2007, without any proper justification, affects the Charged Person's right to be treated with humanity and must therefore cease".[28]

13. In the Katanga Decision—cited approvingly by this Chamber—the International Criminal Court (the "ICC") held that the limitation of contacts as a "purely speculative" preventive action is unacceptable; rather, a risk of collusion and/or inappropriate interference with the outcome of the proceedings must be justified by "concrete evidence".[29] The decision was based, in part, on a survey of the relevant jurisprudence of the International Criminal Tribunals for the Former Yugoslavia (the "ICTY") and Rwanda (the "ICTR").[30] With the exception of one particular instance, "those tribunals have only restricted communications of a detainee 'with the outside world and not between co-detainees (and much less between persons jointly prosecuted)'. Even those restrictions were triggered only by 'previous *specific* violation of the detention regime'

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[24] Ieng Decision, para. 18 (citing Katanga Decision, pp. 8–9, where the court was critical of the effect of the prosecution proposals which "would amount to a *de facto* segregation of Mathieu Ngudjolo Chui from all other persons, including Germain Katanga, currently detained at the Detention Center").

[25] With respect to Article 3 of the European Convention, which imposes a strict prohibition on the torture, inhuman or degrading treatment of detainees, the European Court of Human Rights (the "ECHR") has determined that "[r]egard should be had to the particular conditions of detention: their stringency, duration, the objective pursued and its effect on the person concerned"; "[a] balance must be struck between the requirements of the measure and the effect [...] on the detained person"; and "[p]rolonged solitary confinement is especially undesirable when the person is detained on remand". Jessica Simor and Ben Emmerson QC, Human Rights Practice, (Sweet & Maxwell 2006), §§ 3.038, 3.040, 3.041. With respect to Article 8 of the European Convention—which enshrines the right to respect for private and family life—the ECHR has noted that "where conditions do not attain the level of severity necessary for a violation of Article 3, they may nevertheless constitute a violation of the right to respect for private life". *Ibid.*, § 8.019.

[26] Ieng Decision, para. 20.

[27] Ieng Decision, para. 19.

[28] Ieng Decision, para. 21 (noting that the Iengs "should be allowed to meet in accordance with the detention rules applicable at the ECCC Provisional Detention Facility").

[29] Katanga Decision, p. 10.

[30] Katanga Decision, p. 11.

by the detainee".[31] In this regard, the ICC approach goes beyond the minimum protections afforded under the European Convention.[32]

IV. ARGUMENT

A. The Appeal is Admissible

14. As the Order clearly "relat[es] to provisional detention", the instant appeal is admissible pursuant to Rule 74(3)(f).[33]

B. The Principle of *Stare Decisis* Should Apply to Pre-Trial Proceedings at the ECCC

15. For the same reasons articulated by the ICTY Appeals Chamber in the Aleksovski Judgement,[34] the principle of *stare decisis* should apply to pre-trial proceedings at the ECCC. First of all, the Rules establish a hierarchical structure in which the PTC is tasked with, among other things, definitively settling issues relating to provisional detention. Secondly, the mandate of the ECCC to bring to trial senior leaders of Democratic Kampuchea said to be most responsible for serious violations of international humanitarian law would be threatened if the parties cannot be assured of "certainty and predictability in the application of the applicable law".[35] Finally, the right of appeal (a component of the right to a fair trial) "gives rise to the right of the accused to have like cases treated alike".[36] Accordingly, the *ratio decidendi* of PTC decisions—in particular the Ieng Decision—should be binding on the OCIJ.

C. The Regime is Unnecessary

16. While the Defence accepts that the prevention of collusion is a legitimate investigative interest, the Order neglects to articulate precisely *how* the complete limitation of

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[31] Document No. A-104/II/6, 'Co-Prosecutors' Response to the Charged Person Ieng Sary's Appeal on Visitation Rights', 1 April 2008, para. 11 (emphasis added) (citing Katanga Decision, p. 11). *N.B.* The exception occurred in the case of *Prosecutor v. Delalic et al*, in which the ICTY prohibited communications between detained co-accused where they had "exchanged notes surreptitiously by hiding them in an area accessible to both in order to circumvent any monitory or scrutiny by the ICTY custody officers". Katanga Decision, p. 11.

[32] *See* paras. 23–24, *infra*.

[33] The appeal is also timely. *See* Document No. C-33/I/2, PTC, 'Decision on Defence Request for Extension of Time to File Pleadings–Appeal against Order Concerning Conditions of Detention', 17 June 2008 (granting the Defence request for an extension of time in which to file substantive submissions on appeal).

[34] *See* para. 9, *supra*.

[35] Aleksovski Judgement, para. 113.

[36] Aleksovski Judgement, para. 113.

contacts among the various Charged Persons is a necessary measure to protect that interest.[37] One particular rationale of the Ieng Decision is that because Mr and Mrs Ieng have had over thirty years "to discuss any matter related to [the ECCC] allegations", limiting further contact between them would not protect the interests of the investigation.[38] This logic applies with equal force to the other Charged Persons including Mr Nuon, all of whom have had ample opportunity over the last three decades to freely discuss the same matters as Mr and Mrs Ieng.[39]

17. Furthermore, since the Khmer Rouge was officially disbanded in 1996, each of the Charged Persons has gone "on record" with members of the press (and others) with regard to his or her various positions and activities between 1975 and 1979—in some cases, even after it became quite clear that criminal investigations were a very real possibility. The suggestion that the Charged Persons would now attempt to fabricate a mutually beneficial narrative, with the knowledge that such previous statements are part of the case file, is not credible. Indeed, there is *no evidence* that any one of them as ever attempted to do so.

18. To the extent the OCIJ is concerned that the Charged Persons, if allowed to meet, would agree to use their "respective influence networks"[40] to exert pressure on potential witnesses, such anxiety is sufficiently alleviated by the fact that the Charged Persons are detained and not permitted to communicate with the outside world. And as above, there is *no evidence* that any such network exist or that any of the Charged Persons have ever attempted to improperly influence witnesses in this case. Accordingly, the OCIJ has failed to demonstrate, as it must, that the Regime is a necessary measure.

D. The Regime is Disproportional

19. The Order similarly fails to examine *how* the Regime is proportional to the stated goal of avoiding collusion among the Charged Persons. An additional rationale of the Ieng Decision is that the "long duration" of the Regime "without proper justification, [adversely] affects the Charged Person's right to be treated with humanity and must therefore cease".[41]

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[37] *See* Ieng Decision, para. 18.
[38] Ieng Decision, paras. 19–20.
[39] The Ieng's spousal relationship, while perhaps strengthening the basic argument in respect of their particular situation, does not in any way diminish its applicability to the case of Mr Nuon and the others.
[40] Order, para. 4.
[41] Ieng Decision, para. 21.

Equally problematic, according to this Chamber, was the OCIJ's failure to consider "the implications of their decision, which leads to a *de facto* segregation".[42]

20. Again, the same logic applies with no less force to Mr Nuon and the other Charged Persons, each of whom enjoys the right to be treated with humanity and not to be subject to protracted *de facto* segregation. It is true that Mr Nuon is "allowed" to receive visits from close family members.[43] However, in reality—due to the distance and poor road conditions between Pailin and Phnom Penh as well as the associated travel costs—Mr Nuon sees his family approximately once every six weeks. And while he does in fact have regular contact with members of his legal team as well as personnel of the detention facility,[44] the presumption of innocence entitles Mr Nuon to a reasonable private life beyond routine legal visits and conversations with his jailors. Books, newspapers, and television are no substitute for regular human contact of a non-professional variety.

21. The proportionality analysis requires a delicate balancing exercise.[45] Yet the OCIJ does not appear to have considered any means by which to alleviate the adverse effects of the imposed Regime (such as occasional supervised visits among the Charged Persons) despite this Chamber's clear instruction to avoid the imposition of measures resulting in *de facto* segregation. Surely the OCIJ is capable of striking a more equitable balance between the interests of the investigation and the rights of the Charged Persons.

E. The Order Significantly Overstates the Relevance of the Cited ECHR Jurisprudence

1. The Risk of Collusion Should be Substantiated by Concrete Evidence

22. The Order emphatically states that, pursuant to certain ECHR case law: "it cannot be argued that pre-trial detention, and the allied conditions of detention, must be justified by proof of specific action; on the contrary, the only element to be taken into account is a risk assessment".[46] Yet a thorough review of the cited cases[47] reveals a far more

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[42] Ieng Decision, para. 18.
[43] Order, para. 8.
[44] Order, para. 8.
[45] *See* para 11, *supra*.
[46] Order, para. 3.
[47] The Order refers to eight ECHR cases in support of this proposition: *Gorski v. Poland*, ECHR, 'Judgment', 4 October 2005 (the "Gorski Decision"); *Celejewski v. Poland*, ECHR, 'Judgment', 4 May 2006 (the "Celejewski Decision"); *Bak v. Poland*, ECHR, 'Judgment', 16 January 2007 (the "Bak Decision"); *Laskiewicz v. Poland*, ECHR, 'Judgment', 15 January 2008 (the "Laskiewicz Decision"); *Bernard v. France*,

nuanced position than the proposition put forward by the OCIJ. Accordingly, a somewhat detailed analysis of the jurisprudence is instructive.

23. While the ECHR has not squarely addressed the precise issue raised by the instant appeal, its case law does accept that prolonged periods of *detention* (not separation as such) may be partially justified in certain complex multi-accused criminal cases by an unsubstantiated risk of collusion or inappropriate interference with the outcome of the proceedings. This singular proposition is supported by a line of cases dealing with the application of Article 258(2) of the Polish Code of Criminal Procedure which recognizes a legal "presumption to the effect that the likelihood of a severe penalty being imposed on the applicant might induce him to obstruct the proceedings".[48]

24. In the Gorski Decision, the Polish Court of Appeal found that "the risk of absconding or tampering with witnesses which existed in the present case did not have to be supported by any concrete facts, but resulted from the above presumption".[49] Although the ECHR sanctioned this finding as a general matter, it did so with a measure of circumspection:

> The Court considers that such a generally formulated risk flowing from the nature of the applicant's criminal activities may possibly be accepted as the basis for his detention at the initial stages of the proceedings. Nevertheless, in the absence of any other factor capable of showing that the risk relied on actually existed, the Court cannot accept that ground as a justification for holding the applicant in custody for the entire relevant period.[50]

Three subsequent ECHR decisions confirmed the Gorski Decision's initial endorsement in similarly cautious terms.[51] This note of caution was sounded with particular clarity in the Celejewski Decision, which stressed that "with the passage of time, the initial grounds [...] become less and less relevant and the [authorities] should rely on other 'relevant' and 'sufficient' grounds to justify the [measures]"[52] and noted that the same authorities are obliged to consider "alternative measures".[53] Notwithstanding the ECHR's tentative

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ECHR, 'Judgment', 26 September 2006 (the "Bernard Decision"); *Kemmache v. France*, ECHR, 'Judgment', 27 November 1991 (the "Kemmache Decision"); *W. v. Switzerland*, ECHR, 'Judgment', 26 January 1993, (the "W. Decision"); *Muller v. France*, ECHR, 'Judgment', 17 March 1997 (the "Muller Decision").

[48] Gorski Decision, para. 24.

[49] Gorski Decision, para. 24.

[50] Gorski Decision, para. 58.

[51] *See* Celejewski Decision, para. 37 (citing the Gorski Decision); Bak Decision, paras. 57, 62 (citing the Celejewski Decision); Laskiewicz Decision, para. 59 (citing the Gorski and Celejewski Decisions).

[52] Celejewski Decision, para. 38.

[53] Celejewski Decision, para. 39

approval of the "Polish Presumption", the risk of collusion was clearly supported by *actual evidence* in at least two of the four cases.[54] This is nowhere mentioned in the Order.

25. Equally missing from the OCIJ's analysis is the fact that another four of the eight cited ECHR cases clearly support the ICC approach requiring "concrete evidence" of a risk of collusion.[55] Indeed, the Bernard Decision (decided *after* the Gorski Decision), specifically rejected the French court's reliance on the risk of collusion on the grounds that the advanced "facts" were not sufficient to establish the risk.

26. The actual holdings of the eight cases cited in the Order to support the above-mentioned proposition are inconsistent with both the substance and tone of the OCIJ's characterization. Equally problematic is the OCIJ's assessment of the position taken by the ICC.[56] Hardly an "isolated" view, the rationale of the Katanga Decision is in fact supported by six of the eight ECHR decisions cited in the Order as well as the practice at the ICTY, ICTR, and the Special Court for Sierra Leone. Obviously each of these tribunals shares the OCIJ's concern of avoiding collusion; however, each has managed to address that concern without imposing indefinite segregation regimes. Notably, not one of these tribunals—which routinely deal with complex multi-accused cases—has deemed it appropriate to recognize a presumption of collusion among detained co-accused. The Order simply fails to make a principled case for the OCIJ's departure from the international approach.

27. Given (i) the absence of any legal presumption of collusion at the ECCC;[57] (ii) this Chamber's previously-stated approval of the Katanga Decision (albeit on a different point of

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[54] *See* Gorski Decision, para. 44 (where one of the suspects had attempted to influence the testimony of witnesses prior to his arrest) and Bak Decision, para. 19 (where one of the accused significantly changed his statements during the hearing).

[55] *See* Bernard Decision, para. 42 (the advanced "facts" were insufficient to establish a serious risk of collusion and the ground was accordingly rejected); Kemmache Decision, paras. 11, 26, 28, 54 (provisional detention until the conclusion of the judicial investigation was justified where the applicant had paid his co-accused to testify untruthfully and this provided support for fearing that further pressure might be brought to bear on the witness); W. Decision, paras. 9, 36 (the national authorities were entitled to regard the applicant's altering accounts of his companies in order to thwart possible investigation as justification for using the risk of collusion as a ground for detention); Muller Decision, paras. 24, 40 (provisional detention until the close of criminal investigation was justified where the risk of collusion between the alleged co-perpetrators was substantiated by the fact that both accused had consistently sought to exculpate their accomplices and associates charged with a criminal conspiracy).

[56] Order, para. 3 ("The isolated decision handed down by the ICC Pre-Trial Chamber in [the Katanga Decision] cannot suffice to bring the pertinence of [the ECHR] reasoning into question.")

[57] In place of any "concrete evidence" of a risk of collusion, the OCIJ has substituted a nebulous *post facto* gloss on its original Provisional Detention Order: Because that decision was justified in part by the general need to prevent Mr Nuon from exerting pressure on any witnesses or victims, "it went without saying that the detainees could not communicate amongst themselves, since collusion would clearly facilitate pressure, given the cumulative effect of the respective influence networks of each of the co-Charged Persons". Order, para. 4.

law); and (iii) the fact that a majority of the citied ECHR decisions, as well as the various international tribunals, endorse a cautious approach to the issue; the Defence submits that the OCIJ's position should be rejected in favor of the ICC rule requiring "concrete evidence" of collusion in order to justify restrictive measures such as the Regime.

2. There is No Risk of Ongoing Criminal Activity or Immediate Threat to Security

28. In support of its view that the Regime does not violate Article 3 or 8 of the European Convention, the OCIJ relies on two separate lines of ECHR jurisprudence—one relating to alleged terrorist organizations[58] and the other dealing with the Mafia.[59] However, the cited cases are factually inapposite and therefore lend no assistance to the OCIJ position. The express concern of the detaining authorities in *both* lines of cases was the immediate prevention of additional criminal activity including violent attempts to release the detained persons;[60] whereas the Khmer Rouge has been defunct for over ten years, and no one

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This risk is considerably heightened, the argument goes, now that Mr Nuon and the others have been arrested, charged, and given access to the case file, "which not only sets out the nature of the individual responsibility relating to the specific charges against each of them, but also informs [them] of the direction and content of the judicial investigation". Order, para. 5. However, this explanation—based as it is on pure speculation—is nothing more than a misplaced attempt to create a legal presumption of collusion with respect to Charged Persons at the ECCC such as the one recognized by the Polish Court of Appeal.

[58] *Ensslin et al v. German Federal Republic*, ECHR, 'Decision', 8 July 1978 (the "Ensslin Decisin"); *Ilascu et al v. Moldova and Russia*, ECHR, 'Judgment', 8 July 2004; *Ocalan v. Turkey*, ECHR, 'Judgment', 12 May 2005 (the "Ocalan Decision"); and *Ramirez-Sanchez v. France*, ECHR, 'Judgment', 4 July 2006 (the "Ramirez-Sanchez Decision").

[59] *Messina v. Italy* (No. 2), ECHR, 'Judgment', 28 September 2000 (the "Messina Decision") and its progeny (the Argenti, Cavallo, and Guidi Decisions) (collectively, the "Mafia Cases"). The Mafia Cases all deal with the application of the so-called "Special Regime"—Section 41*bis* of the Italian Prison Administration Act—which gives the Minister of Justice the power to suspend the application of the ordinary prison regime in whole or in part for reasons of public order and security in cases where the ordinary prison regime would be inadequate to meet these requirements. Such measure can be applied only to prisoners charged with or sentenced for the offences mentioned in section 4*bis* of the Act, which includes offences relating to Mafia activities. *See* Messina Decision, paras. 42–43.

[60] *See* Messina Decision, para. 66 ("[...] the regime laid down in section 41*bis* is designed to cut the links between the prisoners concerned and their original criminal environment, in order to minimise the risk that they will maintain contact with criminal organisations. [...] before the introduction of the special regime imprisoned Mafia members were able to maintain their positions within the criminal organisation, to exchange information with other prisoners and the outside world and to organise and procure the commission of serious crimes both inside and outside their prisons. [...]"). Neither the Ensslin, Ocalan, nor Ramirez-Sanchez Decisions have anything to say about collusion to obstruct the proceedings (but rather deal with prohibition of contact for "security, disciplinary, or protective reasons" in the context of alleged terrorist cases where the organizations were still active and violent criminal activity ongoing). *See* Ensslin Decision, para. 5, p. 109 (where the detained members of the Red Army Faction (the "RAF") had used firearms at the time of their arrest; the RAF had repeatedly organized armed attacks in order to bring about the applicants' release; there were indications that they had themselves contributed to those acts; indeed, Baader himself had previously escaped by use of weapons); Ocalan Decision, paras. 192, 195 (where the applicant's detention was justified on the grounds that, as the leader of the PKK, he was considered to be the most dangerous terrorist Turkey; his life was genuinely at risk and the government feared it would not be able to protect his life in an ordinary prison; and it was reasonably feared that his supporters would seek to help him escape); and Ramirez-Sanchez Decision, para. 125

could credibly claim that any attempt to release the Charged Persons by violent methods has ever been contemplated. The OCIJ's failure to recognize—let alone address—such a critical distinction is fatal to its position.[61] The Defence accepts, as general propositions, that (i) the exclusion of a detainee from the general prison community does not necessarily amount to inhuman and degrading treatment[62] and (ii) some limitations on private and family life may be required to maintain the integrity of the judicial investigation.[63] Nevertheless, the OCIJ's stance on both points is based on flawed factual assumptions[64] and should therefore be rejected by this Chamber.

3. The Application of ECHR Jurisprudence to the Instant Case is Limited

29. The ECHR is tasked with reviewing the decisions of European municipal jurisdictions with a view to establishing, among other things, *minimum* fair trial standards. Accordingly, its decisions are of a somewhat limited value where a court determines that additional due process safeguards in excess of those provided by the European Convention are suitable. For example, a Pre-Trial Chamber of the ICC has determined that it is appropriate to require some "concrete evidence" of collusion before imposing measures restricting contact among co-accused detainees.[65] The fact that the ECHR has sanctioned Article 258(2) of the Polish Code of Criminal Procedure—which, as interpreted by the Polish Court of Appeals, does not require such a showing—does not in any way undermine the ICC approach. It is a strained logic indeed which would suggest (as the Order appears to do[66]) that the ECCC is somehow barred from adopting the ICC approach because to do so would exceed the ECHR's minimum standards.

V. CONCLUSION

30. For the reasons stated above, the Defence submits that this Chamber should declare the Regime null and void and allow Mr Nuon and the other Charged Persons to engage in limited social contact with each other to the extent they so desire.

(where it was accepted that detaining "Carlos the Jackal"—at the time considered one of the world's most dangerous terrorists—posed serious problems for the French authorities).

[61] Indeed, the OCIJ neglects to draw any useful factual analogies between the cited cases and the instant one.

[62] Order, para. 7.

[63] Order, para. 10.

[64] *See* paras 16–21, *supra*.

[65] *See* Katanga Decision.

[66] Order, para. 3.

CO-LAWYERS FOR NUON CHEA

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P.P. Michiel PESTMAN and Victor KOPPE