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អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

C33/I/7

អង្គបុរេជំនុំជម្រះ
PRE-TRIAL CHAMBER
CHAMBRE PRELIMINAIRE

In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea.

Criminal Case File N° 002/19-09-2007-ECCC/OCIJ (PTC09)

Before: **Judge PRAK Kimsan, President**
Judge Rowan DOWNING
Judge NEY Thol
Judge Katinka LAHUIS
Judge HUOT Vuthy

Date: **26 September 2008**

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PUBLIC

DECISION ON NUON CHEA'S APPEAL CONCERNING PROVISIONAL DETENTION CONDITIONS

ឯកសារចម្លងត្រឹមត្រូវតាមច្បាប់ដើម
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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") is seized of the "Appeal Against Order Concerning Provisional Detention Conditions" filed by the Co-Lawyers for Nuon Chea (the "Charged Person") on 14 July 2008 (the "Appeal").

I- INTRODUCTION

1. On 20 May 2008, the Co-Investigating Judges issued an "Order concerning Provisional Detention Conditions" (the "Order") where they "[c]onfirm[ed] that the detainees in the ECCC Detention Facility have not the right to communicate amongst themselves."[1] The Co-Investigating Judges acknowledge that "in practice, this separation amounts, *de facto*, to the segregation of all the detainees in the facility."[2]

2. The Co-Lawyers filed a Notice of Appeal against the Order on 30 May 2008.

3. Upon the request of the Co-Lawyers, the Pre-Trial Chamber extended the deadline to file their pleadings to 14 July 2008.

4. The Co-Lawyers filed their Appeal Brief on 14 July 2008.

5. The Co-Prosecutors filed their "Response to Nuon Chea's Appeal on Separation in Detention" (the "Co-Prosecutors' Response") on 29 July 2008 in which they stated that they "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."[3]

6. The Civil Parties did not file a response.

7. On 7 August 2008, the Pre-Trial Chamber decided that the Appeal would be determined solely on the basis of the written submissions of the Parties and allowed the Co-Lawyers for Nuon Chea to file a reply to the Co-Prosecutors' Response within five days.[4] The Defence did not file any reply.

8. The Pre-Trial Chamber received a request for leave to file an *amicus curiae* brief but denied it on the basis that the Chamber was sufficiently informed to determine the Appeal.[5]

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[1] Order concerning Provisional Detention Conditions, 20 May 2008, A169/II ("Order"), p. 5. The Order was notified to the Charged Persons on 23 May 2008.
[2] Order, para. 6.
[3] Co-Prosecutors' Response to Nuon Chea's Appeal on Separation in Detention, 29 July 2008, C33/I/4 ("Co-Prosecutors' Response"), para. 2.
[4] Decision to Determine Nuon Chea's Appeal concerning Conditions of Detention on the basis of Written Submissions Only, 7 August 2008, C33/I/5.
[5] Decision on Request for Leave to file Amicus Curiae Brief, 13 August 2008, C33/I/6.

II- ADMISSIBILITY OF THE APPEAL

9. In its "Decision on the Admissibility of the Appeal Lodged by Ieng Sary on Visitation Rights", the Pre-Trial Chamber previously found admissible an appeal lodged by the Charged Person Ieng Sary against a decision of the Co-Investigating Judges which was, in its effect, a segregation order ("Ieng Sary's appeal") on the following ground:

> "The Pre-Trial Chamber finds that the assertion made by the Co-Lawyers can be seen as a complaint against a coercive measure taken by the Co-Investigating Judges that, in its effects, may not fully respect the human dignity of the Charged Person.
>
> As a matter involving the right to respect human dignity and taking into account its duty as prescribed in Rule 21(1) of the Internal Rules, the Pre-Trial Chamber finds that this appeal falls within the scope of Rule 74(3)(f) of the Internal Rules."[6]

10. The current Appeal is lodged against what is, in its effect, a segregation order issued by the Co-Investigating Judges. The Co-Lawyers assert that such order affects the Charged Person's right to be treated with humanity[7]. The Pre-Trial Chamber finds, for the reasons expressed in its previous decision, that the Appeal falls within the scope of Internal Rule 74(3)(f).

11. Considering that the Appeal was filed within the time limit as extended by the Pre-Trial Chamber, the Pre-Trial Chamber finds it admissible.

III- CONSIDERATIONS

12. On 30 April 2008, the Pre-Trial Chamber ruled on the merit of Ieng Sary's appeal and delivered its "Decision on Appeal concerning Contact between the Charged Person and his Wife" (the "30 April Decision")[8]. In this decision, the Pre-Trial Chamber found that contact between detainees at the ECCC Detention Facility can only be limited by the Co-Investigating Judges as a "necessary and proportional measure to protect the interests of the investigation."[9] The Pre-Trial Chamber further stated that "limitation of contact has to be ordered by a reasoned decision" and that "it must be clear which interest is protected and any limitation should be based upon the protection of such interest."[10]

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[6] Decision on the admissibility of the appeal lodged by Ieng Sary on visitation rights, 21 March 2008, A104/I/4, paras 6, 9 and 10.
[7] Appeal Against Order Concerning Provisional Detention Conditions, 14 July 2008, C33/I/3 ("Appeal Brief"), para. 20.
[8] Decision on Appeal concerning Contact between the Charged Person and his Wife, 30 April 2008, A104/II/7 ("30 April Decision").
[9] 30 April Decision, para. 18.
[10] 30 April Decision, para. 17.

13. In its 30 April Decision, the Pre-Trial Chamber also found that since the alleged crimes were committed thirty years ago and the Charged Persons Ieng Sary and Ieng Thirith had had all that time to discuss any matter related to such allegations, "it [was] not clear to the Pre-Trial Chamber how limiting contact between the two Charged Persons protects the interest of the investigation."[11]

14. This decision was in accordance with the position adopted by the International Criminal Court in the case of *Prosecutor v. Katanga and Chui* (the "*Chui* Decision") where a Single Judge of the Pre-Trial Chamber found that measures "to restrict the communication and contact" between two co-accused "constitute an important restriction of the rights provided for by the detention regime set forth in the Regulations and the RoR [Regulations of the Registry], and therefore they can be imposed if the requirements of necessity and proportionality are met."[12] In this decision, which presents many similarities with the case currently before the Pre-Trial Chamber[13], the judge rejected a request from the Prosecution to impose measures to restrict the communication and contact between two co-accused, as no "concrete evidence" that the co-accused "might discuss confidential materials for the purpose of threatening or harming witnesses and victims, or for the purpose of breaching non-disclosure orders made by the Single Judge" had been brought by the Prosecution.[14]

15. The Pre-Trial Chamber further notes that the European Commission of Human Rights has found that "it is a serious measure to exclude a prisoner from all or almost all contact with normal prison society for a long period".[15] In decisions dealing with the right to be tried within a reasonable time or to be released, the European Court of Human Rights found that while a generally formulated risk that the defendant might put pressure on witnesses or obstruct the proceedings based on the fact that he had been a member of an organised group "may possibly" be accepted as the basis for detention at the initial stages of the proceeding, with the passage of time, there needs to be some "other factor capable of showing that the risk relied on actually existed."[16]

16. By their Order, the Co-Investigating Judges confirmed the imposition of a regime of "strict separation between the detainees (except as regards the spouses IENG Sary and IENG

[11] 30 April Decision, paras 19 and 20.
[12] *Situation in the Democratic Republic of Congo in the case of Prosecutor v. Katanga and Chui*, ICC-01/04-01/07, "Decision revoking the prohibition of contact and communication between Germain Katanga and Mathieu Ngudjolo Chui", Single Judge of the Pre-Trial Chamber, 13 March 2008 ("*Chui* Decision"), p. 9.
[13] Similarities with the case of Nuon Chea are shown notably in the following decision: *Prosecutor v. Katanga and Chui*, ICC-01/04-01/07, "Review of the Decision on the Conditions of the Pre-Trial Detention of Germain Katanga", 18 August 2008, Trial Chamber.
[14] *Chui* Decision, p. 10.
[15] *Reed v. United Kingdom*, Application no. 7630/76, 19 D.R. 95 at 136.
[16] *Gorski v. Poland*, Application no. 28904/02, 4 October 2005, para. 58 (emphasis added).

Thirith [...])"[17] who "have not the right to communicate amongst themselves".[18] In fact, it appears that the Charged Person Nuon Chea has been subjected to this segregation measure since his arrest on 19 September 2007.

17. The Co-Investigating Judges imposed the segregation measure on the ground that it is justified to curb the "potential for prejudicial collusion" between the Charged Persons.[19] From the reasoning exposed in the Order, the Pre-Trial Chamber understands that the Co-Investigating Judges more particularly referred to the risk that the Charged Persons may collude in order to exert pressure on witnesses and victims:

> "[I]t is clear (...) that when the Co-Investigating Judges referred to the need to '*prevent the Charged Person from exerting pressure on any witnesses or Victims*' for each Charged Person, 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."[20]

18. The Co-Investigating Judges found that in light of the jurisprudence of the European Court of Human Rights, "a pre-trial detention regime may be justified, *inter alia,* by the need to prevent any collusion between co-accused".[21] The Co-Investigating Judges further stated: "having regard to the ECHR [European Court of Human Rights] case law cited in the preceding paragraph, 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."[22]

19. The Co-Lawyers submit that "the OCIJ [Office of the Co-Investigating Judges]'s position should be rejected in favor of the ICC [International Criminal Court] rule requiring 'concrete evidence' of collusion in order to justify the restrictive measures such as the Regime."[23] They argue that "the Order neglects to articulate precisely *how* the complete limitation of contacts among the various Charged Persons is a necessary measure to protect [a legitimate investigative] interest" and that the rationale of the 30 April Decision should be applied to the present case.[24]

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[17] Order, para. 6.
[18] Order, p. 5.
[19] Order, para. 5.
[20] Order, para. 4.
[21] Order, paras 1 and 2.
[22] Order, para. 3.
[23] Appeal Brief, para. 27.
[24] Appeal Brief, para. 16.

20. Similarly, the Co-Prosecutors are of the view that since "[s]egregation 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. [...] Though similar policy concerns may be at issue, the two determinations turn upon different considerations and facts."[25] They request the Pre-Trial Chamber to determine the Appeal "in the light of its previous holding" in the 30 April Decision.[26]

21. In light of the jurisprudence from the International Criminal Court, the European Court of Human Rights and the European Commission for Human Rights, the Pre-Trial Chamber considers that limitation of contacts can only be ordered to prevent pressure on witnesses or victims when there is evidence reasonably capable of showing that there is a concrete risk that the charged person might collude with other charged persons to exert such pressure while in detention. With the passage of time, the threshold becomes higher as the investigation progresses and the risk necessarily decreases.

22. In making their Order, the Co-Investigating Judges did not identify any evidence that was relied upon and was capable of showing a concrete risk that the Charged Persons would collude to exert pressure on witnesses or victims while in detention. The mere fact that provisional detention was considered to be a necessary measure to prevent the Charged Person from exerting pressure on witnesses and victims does not lead to the conclusion that the Charged Persons might collude, while in detention, to exert such pressure. The basis of detention to prevent a charged person from exerting pressure on witnesses or victims is the fact that if not detained, this person would be in proximity to witnesses and victims or those with whom he or she could directly arrange to exert such pressure. The assumption drawn by the Co-Investigating Judges is not supported by any evidence and is therefore not sufficient to justify the segregation of the detainees.

23. The Pre-Trial Chamber further notes that in none of the five cases before the Co-Investigating Judges, where provisional detention was ordered, was detention stated to be a necessary measure to prevent collusion between the Charged Persons. While in detention, the Charged Persons have limited contact with the outside world. Not only have they been in detention, but they have also been segregated from one another upon instructions from the Co-Investigating Judges for approximately one year, during which time the Co-Investigating Judges have had the opportunity to collect a substantial amount of evidential material without any possible interference from the Charged Persons.

[25] Co-Prosecutors' Response, para. 28.
[26] Co-Prosecutors' Response, para. 30.

24. In all these circumstances, the Pre-Trial Chamber finds that there can be no reason related to investigation purposes justifying that contacts between the five Charged Persons currently detained at the ECCC Detention Facility be restricted.

25. The Pre-Trial Chamber further notes that the Co-Investigating Judges mentioned in the Order that in "the absence of any clear regulations concerning the precise conditions of detention of charged persons and, in particular, the fact that the draft ECCC Detention Regulations have not yet come into force, [...] it [is] necessary to specify the reasons for separating the detainees from each other and to set out their conditions of detention [...]".[27]

26. The Pre-Trial Chamber recalls that the ECCC Detention Facility is under the authority of the Royal Government of Cambodia and subject to Cambodian law, as already mentioned in the 30 April Decision.[28] In accordance with Cambodian law, the Chief of Detention is in charge of the daily administration and operation of the ECCC Detention Facility, including the security.[29] Within his authority and in respect of the general rules applicable in all Cambodian prisons,[30] the Chief of Detention is currently in the process of adopting rules that will specifically set out the conditions of detention at the ECCC Detention Facility, including rules related to the routine[31] and surveillance[32] of the detainees. These rules have to be approved by the Prisons Department of the Ministry of Interior.[33] The fact that these rules have not yet been officially adopted and approved by the Prisons Department does not deprive the Chief of Detention of his authority over the ECCC Detention Facility under the rules currently applied to detainees within the Cambodian prison system.

27. The Pre-Trial Chamber notes that detainees are normally not kept separately in Cambodian prisons,[34] as reflected in the draft Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Extraordinary Chambers in the Courts of Cambodia (the "Draft Detention Rules of the ECCC").[35] Contacts between detainees are only restricted by rules related to routine and surveillance. In certain circumstances, the Chief of Detention has the authority to segregate a detainee from all or some of the other detained persons for the purpose of preserving order in the prison and the security of the detainees, as mentioned in the 30 April Decision.

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[27] Order, p. 2.
[28] 30 April Decision, para. 10.
[29] Proclamation on the Administration of Prisons, Ministry of Interior, no. 217 ("Proclamation on the Administration of Prisons"), Articles 1(1)(A), 1(2)(G) and 3(2). This is also reflected in the Draft Detention Rules of the ECCC.
[30] Proclamation on the Administration of Prisons, Article 3(2).
[31] Rule 27 of the Draft Detention Rules of the ECCC.
[32] Rule 22 of the Draft Detention Rules of the ECCC.
[33] Proclamation on the Administration of Prisons, Article 3(2).
[34] This can notably be inferred from Prison Procedure No. 3 – Separation of Prisoners adopted in accordance with Article 4(3) of the Proclamation on Administration of Prisons.
[35] Rule 3 of the Draft Detention Rules of the ECCC.

28. In the 30 April Decision, the Pre-Trial Chamber found that Internal Rule 55 gives jurisdiction to the Co-Investigating Judges to limit contact between the detainees in the interest of the investigation.[36] In the absence of any other legal disposition giving them authority over the ECCC Detention Facility, the Co-Investigating Judges have no power to set out the conditions of detention at the ECCC Detention Facility, which shall remain under the authority of the Chief of Detention.

THEREFORE, THE PRE-TRIAL CHAMBER HEREBY DECIDES

(1) The appeal is allowed.

(2) The Order concerning Provisional Detention Conditions dated 20 May 2008 is set aside.

Phnom Penh, 26 September 2008

Pre-Trial Chamber **President**

Rowan DOWNING **NEY Thol** **Katinka LAHUIS** **HUOT Vuthy** **PRAK Kimsan**

[36] 30 April Decision, para. 14.