

MEMORANDUM

TO: Anne Heindel, Legal Advisor, Documentation Center of Cambodia
FROM: Annie Gell, Legal Associate, Documentation Center of Cambodia,
Columbia University School of Law 2009
DATE: August 5, 2008
RE: *De Facto* Segregation of Provisional Detainees at the ECCC

I. Summary of Argument

The five Charged Persons at the Extraordinary Chambers in the Courts of Cambodia (ECCC) are currently prohibited from interacting with each other with the exception of limited visits between the married couple, Ieng Sary and Ieng Thirith. The issue examined in this paper is whether these restrictions imposed on the provisional detainees by the Office of the Co-Investigating Judges (OCIJ) are consistent with ECCC guidelines, international human rights standards, and the precedent of other tribunals.

In determining the propriety of coercive measures, the ECCC Internal Rules balance the fundamental rights of the detainees with the necessity of the measure and the gravity of the charged offense.¹ The precedent of the International Criminal Court (ICC) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) similarly appear to require a showing of necessity, proportionality, and reasonableness.² Though

¹ ECCC Internal Rules, Rule 21(2).

² ICC Regulations of the Court, Regulation 101; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui: Decision Revoking the Prohibition of Contact and Communication Between Germain Katanga and Mathieu Ngudjolo Chui*, Pre-Trial Chamber I, ICC-01/04-01/07-322 (13 Mar. 2008) at 9, available at <http://www.iclklamberg.com/Caselaw/DRC/Katanga/PTC%20I/ICC-01-04-01-07-322-ENG.pdf> (restriction of communication between co-defendants “can only be imposed if the requirements of necessity and proportionality are met”) [hereinafter *Ngudjolo Chui*]; ICTY Rules of Detention, Rule 64; *Prosecutor v. Zejnir Delalic, Zdravko Mucic also known as "Pavo," Hazim Delic, Esad Landzo also known as "Zenga": Decision of the President on the Prosecutor's Motion for the Production of Notes Exchanged Between Zejnir Delalic and Zdravko Mucic*, IT-96-21-T (11 Nov. 1996), available at <http://sim.law.uu.nl/sim/caselaw/tribunalen.nsf/eea9364f4188dcc0c12571b500379d39/153ae4311c5441d0c12571fe004be323?OpenDocument> (cited by *Ngudjolo Chui* at 11 as “restricting the contact between two persons jointly prosecut[ed] in the case” because the co-accused “exchanged notes surreptitiously by hiding them in an area accessible to both in order to circumvent any monitoring or scrutiny by the ICTY custody officers”) [hereinafter *Delalic*].

these tribunals have rarely addressed the issue of provisional detainee segregation, the available case law suggests that limiting detainees' contacts with each other requires a high showing of necessity to overcome the serious infringement on the detainees' human rights. The OCIJ has failed to make such a showing, at least in its publicly available documents. Therefore the regime imposed upon the ECCC provisional detainees appears to amount to unwarranted *de facto* segregation.

II. Current *De Facto* Segregated Status of the ECCC Provisional Detainees

The five Charged Persons currently in provisional detention at the ECCC have been held under a *de facto* segregation regime since coming under the control of the Tribunal.³ The Office of the Co-Investigating Judges made the original decision to prohibit all contact between the detainees without the knowledge of the Nuon Chea Defense Team and likely without the knowledge of the overarching Defense Support Section (DSS).⁴ The segregation formally became public knowledge with the release of the Pre-Trial Chamber's (PTC) 30 April 2008 decision ordering that the married couple, Ieng Sary and Ieng Thirith, be allowed some contact.⁵

³ See Pre-Trial Chamber, *Decision on Appeal Concerning Contact Between the Charged Person and His Wife* (30 Apr. 2008), ¶ 9 [hereinafter PTC 30 Apr. 2008 Decision]; Office of the Co-Investigating Judges, *Order Concerning Provisional Detention Conditions*, (21 May 2008), ¶ 6 [hereinafter OCIJ 21 May 2008 Order].

⁴ Interview with Andrew Ianuzzi, Nuon Chea Defense Team, 13 June 2008; Emails from Andrew Ianuzzi to author (16 July 2008 & 18 July 2008) (on file with author).

⁵ PTC 30 Apr. 2008 Decision, *supra* note 3. In the decision, the Pre-Trial Chamber notes that it has not received direct knowledge of the segregation, but rather infers that the detainees are segregated from the "request made by the Charged Person and the Letter of the Co-Investigating Judges." (¶ 9) The Pre-Trial Chamber further infers that this segregation "is apparently on the basis of instructions of the Co-Investigating Judges." (¶ 9) Though the lack of transparency of the OCIJ's actions is troubling, it is not necessarily improper given the ECCC Internal Rules. The Internal Rules give the OCIJ wide latitude to conduct its investigations confidentially (Rule 56(1)) and take measures it deems necessary to preserve the integrity of the investigations. (Rule 55) The lack of transparency and dearth of facts available to the public, however, make it difficult for those outside the OCIJ to assess the facts of the Charged Persons' detention and to judge the propriety of the OCIJ's action.

Ieng Sary was the first provisional detainee to formally challenge the segregation, but only in the context of his inability to see his wife, also a Charged Person.⁶ The Co-Lawyers for Ieng Sary submitted a letter dated 20 December 2007 “requesting permission for the Charged Person to meet with his wife, detainee Ieng Thirith.”⁷ The Office of the Co-Investigating Judges rejected this request in a letter dated 22 January 2008,⁸ a letter that the Pre-Trial Chamber later characterized as “in its effect, a segregation order by the Co-Investigating Judges.”⁹ On 17 March 2008, the OCIJ sent an unprompted memorandum to the Chief of the ECCC Provisional Detention Facility “authorizing visits between Ieng Sary and Ieng Thirith once a week.”¹⁰

On April 30, 2008, the Pre-Trial Chamber held that the OCIJ memorandums rejecting Ieng Sary’s request for visits¹¹ and subsequently authorizing visits once a week¹² “are not adequately reasoned.”¹³ The Pre-Trial Chamber further held that there is a “necessary and proportional” standard for limiting the contacts of provisional detainees, and that the Co-Investigating Judges had thus far failed to address this standard and failed to address *de facto* segregation that results from prohibiting contact between the

⁶ Co-Lawyers for Ieng Sary Letter (20 Dec. 2007), *cited in* Pre-Trial Chamber, *Decision on the Admissibility of the Appeal Lodged by Ieng Sary on Visitation Rights* (21 Mar. 2008), ¶ 2 [hereinafter PTC 21 Mar. 2008 Decision]. Note, the author has been unable to obtain the original letter and is therefore relying on the Pre-Trial Chamber’s characterization of the document.

⁷ *Id.*

⁸ Office of the Co-Investigating Judges, *Letter Rejecting Ieng Sary’s Request for Visitation With His Wife* (22 Jan. 2008) [hereinafter OCIJ 22 Jan. 2008 Letter], *cited in* PTC 21 Mar. 2008 Decision, *supra* note 6, at ¶ 5. Note, the author has been unable to obtain the original OCIJ memorandums and is therefore relying on the Pre-Trial Chamber’s characterization of the OCIJ documents.

⁹ PTC 21 Mar. 2008 Decision, *supra* note 6, at ¶ 6.

¹⁰ Office of the Co-Investigating Judges, *Memorandum to Chief of ECCC Provisional Detention Facility* (17 Mar. 2008) [hereinafter OCIJ 17 Mar. 2008 Memo to Detention Chief], *cited in* PTC 30 Apr. 2008 Decision, *supra* note 3, at ¶ 4.

¹¹ OCIJ 22 Jan. 2008 Letter, *supra* note 8.

¹² OCIJ 17 Mar. 2008 Memo to Detention Chief, *supra* note 10.

¹³ PTC 30 Apr. 2008 Decision, *supra* note 3, at ¶ 18.

detainees.¹⁴ The Pre-Trial Chamber concluded, “The Charged Persons should be allowed to meet in accordance with the detention rules applicable at the ECCC Provisional Detention Facility.”¹⁵ The memorandum of the Co-Investigating Judges authorizing visits once a week is not in accordance with these rules.”¹⁶

The Pre-Trial Chamber decision has not fully dispelled the ambiguity surrounding the legality of the segregation of the ECCC provisional detainees. First, though the Pre-Trial Chamber’s 30 April 2008 decision is explicitly in response to Ieng Sary’s appeal, its holding that “[t]he Charged Persons should be allowed to meet in accordance with the detention rules applicable at the ECCC Provisional Detention Facility”¹⁷ could be read to apply to all provisional detainees, not just the married couple. If read in this way the statement suggests, if not compels, that the segregation of all the detainees should be examined for necessity and proportionality.¹⁸ Second, the Pre-Trial Chamber gives no guidance as to what constitutes meetings between the detainees “in accordance with the detention rules applicable at the ECCC Provisional Detention Facility”¹⁹ beyond identifying the applicability of a necessary and proportional standard.

These ambiguities empowered the OCIJ to only slightly modify its stance in favor of provisional detainee segregation. An OCIJ memorandum dated 8 May 2008 authorizes daily one-hour visits between Ieng Sary and Ieng Thirith, but does not alter the

¹⁴ *Id.*

¹⁵ Note that the Detention Rules of the ECCC are in draft form (Detention Rules of the ECCC, Draft Version 8 (Dec. 2007) (on file with author) [hereinafter Draft Detention Rules]).

¹⁶ PTC 30 Apr. 2008 Decision, *supra* note 3, at ¶ 21.

¹⁷ *Id.*

¹⁸ For a discussion of why the principle of *stare decisis* compels an examination of all Charged Persons’ detention conditions in light of the PTC 30 Apr. 2008 Decision, *supra* note 3, see Nuon Chea Defense Team, *Appeal Against Order Concerning Provisional Detention Conditions* (14 July 2008), ¶ 15 [hereinafter Nuon Chea Team 14 July 2008 Appeal].

¹⁹ PTC 30 Apr. 2008 Decision, *supra* note 3, at ¶ 21.

segregation scheme for the other detainees.²⁰ The OCIJ then defended its decision in its *Order Concerning Provisional Detention Conditions* on 21 May 2008, relying heavily on case law from the European Court for Human Rights (ECHR) and the right to private and family life to justify an exception to segregation for the married couple but not for the other detainees.²¹

On July 14, 2008, the Co-Lawyers for Nuon Chea submitted an appeal against the *de facto* segregation regime as it affects their client.²² The exact contours of the OCIJ's legal power to limit contact between provisional detainees therefore remains an important and ongoing question that has yet to be fully explored by the Tribunal.

III. ECCC Rules on Limiting Provisional Detainees' Communication with Outside World and Communication With Other Detainees

The Draft Detention Rules and the Internal Rules of the ECCC set forth basic guidelines for the provisional detention of the Charged Persons. The Detention Rules cover the security and functioning of the detention center, while the Internal Rules delineate the power of the OCIJ to order coercive measures involving the detainees.

A. The Draft Detention Rules of the ECCC Provide Detainees with Broad Rights to Contact the Outside World Subject Only to Reasonable Limitations by the Judicial Authorities

On their face, the Draft Detention Rules allow detainees to have ample communication with individuals other than fellow detainees, although these communications must be pre-approved in consultation “with the Co-Investigating Judges or the Chambers, as appropriate, [to determine if] there are any reasons why the proposed

²⁰ Office of the Co-Investigating Judges, *Memo Authorizing Daily Visits for Ieng Sary and Ieng Thirith* (8 May 2008), cited in OCIJ 21 May 2008 Order, *supra* note 3, at 2.

²¹ OCIJ 21 May 2008 Order, *supra* note 3.

²² Nuon Chea Team 14 July 2008 Appeal, *supra* note 18.

visitor cannot be admitted.”²³ For example, detainees have “the right to receive visits from families or friends”²⁴ and “the right to receive visits from their lawyers without delays, subject only to reasonable conditions to ensure security and good order of the ECCC Detention Facility.”²⁵ They also have the right to make phone calls, which are not to be monitored unless reasonable grounds exist to believe that a “detainee may be attempting to arrange escape, interfere with or intimidate a witness or otherwise disturb the maintenance of good order in the Detention Facility.”²⁶ In short, the Draft Detention Rules provide provisional detainees at the ECCC with broad rights to contact the outside world subject only to reasonable limitations by the OCIJ or Chambers.

B. The Authority to Limit Provisional Detainee Inter-Communication Through Segregation Is Narrow

1. The Draft Detention Rules of the ECCC Provide a Limited Authority for the Chief of Detention to Segregate Provisional Detainees

The Pre-Trial Chamber has concluded that, in light of Cambodian Law²⁷ and the practice of international tribunals,²⁸ the Draft Detention Rules of the ECCC give the Chief of Detention the sole authority to segregate detainees²⁹ and only “for the purpose of

²³ Draft Detention Rules, *supra* note 15, Rule No. 9(1).

²⁴ *Id.*

²⁵ *Id.* at Rule No. 9(14).

²⁶ *Id.* at Rule No. 30(6).

²⁷ Prison Procedure No. 3 – Separation of Prisoners, adopted in accordance with Article 4(3) of the Proclamation on the Administration of Prisons, as cited in PTC 30 Apr. 2008 Decision, *supra* note 3, at ¶ 12.

²⁸ As noted in ¶ 16 of the PTC 30 Apr. 2008 Decision, *supra* note 3, the interpretation that the Chief Detention officer’s authority to segregate detainees for security or punishment reasons is distinct from the Court’s authority to segregate in order to avoid pre-trial collusion or prejudice of outcome is in accordance with the practice of the ICC, the ICTY, and the ICTR. For the authority of the Chief of Detention to segregate on security grounds, *see* Rule 43 of the Rules of Detention of the ICTY, Rule 38 of the Rules of Detention of the ICTR, and Article 201 of the ICC Regulations of Registry. For the authority of the Court to limit detainee contact to avoid the prejudice of the case’s outcome, *see* Rule 64 of the Rules of Detention of the ICTY and ICTR and Regulation 101 of the ICC’s Regulation of the Court.

²⁹ Draft Detention Rules, *supra* note 15, Rule No. 3; PTC 30 Apr. 2008 Decision, *supra* note 3, at ¶ 12.

preserving the order in the prison and the security of the detainees.”³⁰ The Draft Detention Rules provide many safeguards for a detainee who is segregated from the detention facility population by the Chief of Detention, including daily examinations of physical and mental health³¹ and a written report detailing the reasons for segregation.³² These safeguards suggest that segregation for order and security purposes is treated as an exceptional measure and that the burden is on the Chief of Detention to justify the choice to segregate.

2. The ECCC Internal Rules Authorize the OCIJ to Impose Coercive Measures on the Provisional Detainees Subject to a Balancing Test

The Office of the Co-Investigating Judges’ decision to limit the Charged Persons’ contacts with each other is governed by the Internal Rules, which empower the OCIJ to “take any investigative action conducive to ascertaining the truth,” including “issu[ing] such orders as may be necessary to conduct the investigation, including summonses, Arrest Warrants, Detention Orders and Arrest and Detention Orders.”³³ Though the ability to limit detainees’ contacts with each other is not explicitly mentioned in the Internal Rules, it is reasonable to extrapolate that such a measure could be necessary to preserve the integrity of an investigation and could therefore fall within the power of the OCIJ. Indeed, the Pre-Trial Chamber held that “Rule 55(5) is sufficiently broad in its scope to give the Co-Investigating Judges jurisdiction to limit contacts between the Charged Person and any other person in the interest of the investigation.”³⁴

³⁰ PTC 30 Apr. 2008 Decision, *supra* note 3, at ¶ 16.

³¹ Draft Detention Rules, *supra* note 15, Rule No. 3(1)(2).

³² *Id.* at Rule No. 3(1)(1).

³³ ECCC Internal Rules, Rule 55(5).

³⁴ PTC 30 Apr. 2008 Decision, *supra* note 3, at ¶ 14.

The power of the OCIJ to impose coercive limitations on detainee communication, however, is limited by a balancing standard.³⁵ Rule 21(2) of the Internal Rules states,

Any coercive measures to which such a person may be subjected shall be taken by or under the effective control of the competent ECCC judicial authorities. *Such measures shall be strictly limited to the needs of the proceedings, proportionate to the gravity of the offence charged and fully respect human dignity.*³⁶

This standard appears to put the burden of proving necessity and proportionality on the proponent of the coercive measure.³⁷ Rule 21 is clear, however, that the power of the OCIJ to impose coercive measures exists if the measure is necessary, if the deprivation is proportionate to the gravity of the charged offense, and if it respects human dignity.

³⁵ ECCC Internal Rules, Rule 21(2). A look to international precedent reveals that restrictions of provisional detainees' rights are consistently held to a proportionality standard. On the question of restricting the defendant's right to represent himself in *Slobodan Milosevic v. Prosecutor*, the Appeals Chamber of the ICTY stated, "[w]hen reviewing restrictions on fundamental rights such as this one, many jurisdictions are guided by some variant of a basic proportionality principle: any restriction of a fundamental right must be in service of a sufficiently important objective, and must impair the right... no more than is necessary to accomplish the objective." (*Prosecutor v. Slobodan Milosevic*, IT-02-54 (1 Nov. 2004), ¶ 17.) In the case of *Prosecutor v. Fatmir Limaj* also at the ICTY, the Appeals Chamber broadly stated, "A measure in public international law is proportional only when it is (1) suitable, (2) necessary and when (3) its degree and scope remain in a reasonable relationship to the envisaged target. Procedural measures should never be capricious or excessive." (*Prosecutor v. Fatmir Limaj*, IT-03-66 (31 Oct. 2003), ¶ 13.)

³⁶ *Emphasis added.*

³⁷ See PTC 30 Apr. 2008 Decision, *supra* note 3, at ¶ 17. ("It is clear from the practice at international tribunals that limitation of contact has to be ordered by a reasoned decision. From this reasoning, it must be clear which interest is protected and any limitation should be based upon the protection of such interest.")

IV. Elements and Application of the Coercive Measures Balancing Test In Light of International Precedent³⁸

A. Defining the Elements of the Coercive Measures Balancing Test for the ECCC Provisional Detainees

1. Crimes Against Humanity and War Crimes are the Gravest of Charges

The offenses with which the ECCC provisional detainees are charged include crimes against humanity and war crimes. These are widely recognized as among the gravest charges in international criminal law. Indeed, the self-proclaimed purpose of the ECCC “is to bring to trial senior leaders of the Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia...”³⁹ Therefore, this factor does little to add to the analysis because the Charged Persons will undoubtedly all be tried for the gravest of crimes.

2. “Fully Respect[ing] Human Dignity” Requires Respecting Basic Human Rights and Disfavoring Solitary Confinement

It is uncontroversial in the context of the ECCC that respecting human dignity includes respecting fundamental customary human rights to which all nations are bound.⁴⁰ Because Cambodia has ratified the International Covenant on Civil and

³⁸ The Framework Agreement of the ECCC provides that “[w]here Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level.” (Article 12(1)). A survey of Cambodian law has revealed little on the subject of provisional detention segregation. In addition, the proportionality test of Internal Rules inherently requires a balancing of fundamental rights beyond those clarified in Cambodian law.

³⁹ Law Establishing the Extraordinary Chambers, Article 1.

⁴⁰ The OCIJ 21 May 2008 Order, *supra* note 3, specifically cites the prohibition against inhuman and degrading treatment, the right to private and family life, the right to be presumed innocent, and the right to silence as applicable to the situation of the five Charged Persons.

Political Rights (ICCPR),⁴¹ the Extraordinary Chambers are also explicitly bound by the ICCPR's provisions, including the right to private and family life,⁴² the right to be presumed innocent,⁴³ the right to not be compelled to testify against oneself or confess guilt,⁴⁴ the right to not be arbitrarily deprived of one's liberty,⁴⁵ the right to "adequate time and facilities for the preparation of [one's] defence...,"⁴⁶ and the prohibition against inhuman and degrading treatment.⁴⁷

a) The Right to Private and Family Life

The ICCPR protects individuals from "arbitrary or unlawful interference with privacy [and] family."⁴⁸ As the General Comment on this protection states, "The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances."⁴⁹ The OCIJ has declared that its prohibition of contact between the Charged Persons does not unduly infringe on the right to private and family life, particularly given the OCIJ's 8 May 2008 modification allowing contact once a day between the married couple, Ieng Sary and Ieng Thirith.⁵⁰

⁴¹ See Framework Agreement for the ECCC, Article 12(2) ("The Extraordinary Chambers shall exercise their jurisdiction in accordance with the international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 Covenant on Civil and Political Rights, to which Cambodia is a party.")

⁴² ICCPR, Article 17.

⁴³ ICCPR, Article 14(2).

⁴⁴ ICCPR, Article 14(3)(g).

⁴⁵ ICCPR, Article 9.

⁴⁶ ICCPR, Article 14(3).

⁴⁷ ICCPR, Article 7.

⁴⁸ ICCPR, Article 17.

⁴⁹ Human Rights Committee, *General Comment No. 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Art. 17)* (Thirty-second session, 1988), available at

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/23378a8724595410c12563ed004aeecd?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/23378a8724595410c12563ed004aeecd?Opendocument).

⁵⁰ OCIJ 21 May 2008 Order, *supra* note 3, at ¶¶ 10-11.

Given that Ieng Sary and Ieng Thirith are the only Charged Persons with familial ties, the argument that the right to family is only implicated in the segregation of these two detainees seems uncontroversial. However, without access to the complete underlying facts motivating the OCIJ to seek limitation of contact between Ieng Sary and Ieng Thirith in the first place, it is impossible for an outside observer to judge if the limitation of contact to one hour a day is a non-arbitrary, reasonable restriction on the married couple's right to family life. The OCIJ's order allowing daily one hour visits raises the question of what could be prevented in an hour visit that could not be prevented in a two or three hour visit between Ieng Sary and Ieng Thirith. However, the OCIJ has not addressed this issue in its public filings.⁵¹

The right to private life is implicated in the situation of the other detainees in at least two ways. First, the detention center is a small facility composed of eight cells and one common room. To keep the detainees separated, the authorities must confine them to their modest cells for long periods of time, thereby severely restricting the space in which they live their lives. Second, in depriving the detainees of interaction with each other, the OCIJ is severely curtailing their interpersonal interactions, an important component of one's private life. The OCIJ, however, has given only the most cursory consideration to these issues in its public filings.⁵²

b) The Right to be Presumed Innocent and the Right to Not Be Compelled to Testify Against Oneself or Confess Guilt

The segregation of all five Charged Persons also implicates the right to be

⁵¹ For a discussion of the need for the OCIJ to consider less restrictive alternatives to the current *de facto* segregation regime that might more fully respect the detainees' human rights, see Nuon Chea Team 14 July 2008 Appeal, *supra* note 18, at ¶ 21.

⁵² OCIJ 21 May 2008 Order, *supra* note 3, at ¶ 10.

presumed innocent⁵³ and the right to not be compelled to testify against oneself or confess guilt.⁵⁴ However, the OCIJ order dismisses the infringement of these rights of the detainees with little analysis.⁵⁵ The Co-Lawyers for Ieng Sary argue that the *de facto* segregation regime is a punitive measure at least partially intended to put pressure on the detainees to cooperate, and that it is inappropriate for provisional detainees who have not been convicted of any offense.⁵⁶ In response, the OCIJ points only to the arguments in the provisional detention orders of the five Charged Persons,⁵⁷ thereby conflating the lower burden of justifying provisional detention with the higher burden of justifying the more severe coercive measure of *de facto* segregation within provisional detention. The OCIJ goes on to state that the detainees “are segregated from each other due to the requirements of the judicial investigation,” yet gives no support for this assertion.⁵⁸ It is difficult to accurately judge the OCIJ’s position without access to the confidential facts of the investigations. Yet the cursory nature of the OCIJ’s publicly available arguments suggest that the potential infringement of the Charged Persons’ right to be presumed innocent and right to silence have not yet been adequately considered by the Tribunal.

c) The Right to Not Be Arbitrarily Deprived of One’s Liberty and the Right to Adequate Facilities to Prepare One’s Defense

The right to not be arbitrarily deprived of one’s liberty⁵⁹ and the right to adequate facilities to prepare one’s defense⁶⁰ have not been addressed in the public filings of the

⁵³ ICCPR, Article 14(2).

⁵⁴ ICCPR, Article 14(3)(g).

⁵⁵ OCIJ 21 May 2008 Order, *supra* note 3, at ¶ 12. I use the OCIJ’s reference to the right to remain silent as approximately interchangeable with the right to not be compelled to testify against oneself or confess guilt. The right to remain silent is not a right specifically included in the ICCPR.

⁵⁶ *Id.* at ¶¶ 12 & 13.

⁵⁷ *Id.* at ¶ 12.

⁵⁸ *Id.*

⁵⁹ ICCPR, Article 9.

⁶⁰ ICCPR, Article 14(3).

Tribunal thus far. There is a strong argument that the burden to justify a coercive measure is on the proponent of that coercive measure.⁶¹ Therefore, if the OCIJ is to be in accordance with the ICCPR, it must show that the prohibition against contact between the detainees is neither an arbitrary infringement on the detainees' liberty nor unduly interferes with their ability to defend themselves.⁶² The OCIJ has not done this in its filings available to the public, though it is possible that the OCIJ has addressed these issues in confidential documents. If these rights are inadequately addressed or left unaddressed, however, they could be bases for strong arguments against the *de facto* segregation of the Charged Persons.

d) The Prohibition Against Inhuman and Degrading Treatment and the Disfavoring of Solitary Confinement

Another fundamental right implicated in the *de facto* segregation regime is the prohibition against inhuman and degrading treatment as contained in Article 7 of the ICCPR. This prohibition protects individuals from more than just torture. In its General Comment on ICCPR Article 7, the Human Rights Committee stated, "The Committee notes that prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by Article 7."⁶³ The UN Basic Principles for the Treatment of Prisoners states, "Efforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use, should be undertaken and encouraged."⁶⁴ Consistent with this, the ECCC Draft Detention Rules explicitly prohibit solitary

⁶¹ See Section III.B.2. *supra* for a discussion of the burden of proving proportionality.

⁶² For a further discussion of the right to defend oneself and its impact on co-detainees, see the discussion of *Ngudjolo Chui* in Section IV.B.1 *infra*.

⁶³ Human Rights Committee, *General Comment 20: Article 7* (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994), available at <http://www.law.wits.ac.za/humanrts/gencomm/hrcom20.htm>.

⁶⁴ Basic Principles for the Treatment of Prisoners, G.A. res. 45/111, annex, 45 U.N. GAOR Supp. (No. 49A) at 200, U.N. Doc. A/45/49 (1990), available at <http://www1.umn.edu/humanrts/instreet/g2bpt.htm>.

confinement,⁶⁵ though a detainee may be confined to a cell for a maximum of three days as punishment for misbehavior.⁶⁶

Does the *de facto* segregation regime of the ECCC amount to or approach a solitary confinement scheme in violation of the prohibition against inhuman and degrading treatment? It is difficult to answer this question given the lack of transparency around the detention conditions. Though the detainees are not allowed to interact with each other, they are allowed contact with family and pre-approved visitors, as well as their lawyers.⁶⁷ However, because the families of the detainees may live far away from the detention center and there is no general prison population, detainees can go long periods without interaction with anyone other than prison guards and lawyers.⁶⁸ *De facto* segregation, therefore, could in practice approach *de facto* solitary confinement.

Such a potentially severe limitation of human contact is of particularly urgent concern in the context of elderly detainees with fragile health. As a Human Rights Watch report states, “It is well documented that restricted confinement of an individual, regardless of mental state prior to confinement, will lead to permanent psychological damage.”⁶⁹ Such damage would be not only an infringement of the detainees’ basic human rights, but also a threat to the successful conclusion of the ECCC’s work.

⁶⁵ Draft Detention Rules, *supra* note 15, Rule 10(2)(5).

⁶⁶ *Id.* at Rule 10(5)(3).

⁶⁷ See *supra* Section III.A. for a discussion of the visitation rules of the ECCC.

⁶⁸ See Nuon Chea Team 14 July 2008 Appeal, *supra* note 18, at ¶ 20.

⁶⁹ Human Rights Watch, *Locked Up Alone: Detention Conditions and Mental Health at Guantanamo*, Appendix: Email from Attorneys for Saber Lahmar to Department of Justice Officials (citing *Jones ‘El v. Berge*, 164 F. Supp. 2d 1096, 1101-02 (W.D. Wis. 2001) (finding that that even individuals who have no history of mental illness and are not subject to a psychological breakdown often develop symptoms that include paranoid delusional disorder, dissociative disorder, schizophrenia and panic disorder); *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 907 (S.D. Tex. 1999) (finding that Texas administrative segregation units were “virtual incubators of psychoses—seeding illness in otherwise healthy inmates and exacerbating illness in those already suffering from mental infirmities.”); Thomas B. Benjamin & Kenneth Lux, *Solitary Confinement as Psychological Punishment*, 13 Cal. W.L. Rev. 265, 268 (1977); Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 Crime & Delinquency 124, 132 (2003)), available at http://www.hrw.org/reports/2008/us0608/8.htm#_ftnref114.

3. What Comprises a Coercive Measure “Strictly Limited to the Needs of the Proceedings”⁷⁰ is Left Undefined by the ECCC Internal Rules and Has Not Been Adequately Explored by the Tribunal

Necessity in the context of provisional detainee segregation is perhaps the least clear of the three elements of the balancing test limiting the ECCC’s ability to impose coercive measures. The OCIJ has explicitly cited the potential for collusion between the detainees as a reason for their segregation, particularly now that the detainees have access to their case file and know the charges against them.⁷¹ The OCIJ also cites the complexity of the investigation and the length of time covered by the investigation as factors making segregation a necessity.⁷²

Internal Rule 63(3) lists reasons sufficiently compelling to support an OCIJ order of detention, including the prevention of “any collusion between the Charged Person and the accomplices of crimes falling within the jurisdiction of the ECCC,” the prevention of the harassment of witnesses or victims, the protection of “the security of the Charged Person,” and the preservation “of public order.”⁷³ However, Rule 63 addresses only the basis for allowing detention in the first place and cannot be directly used as support for the necessity of segregation while in detention without more analysis. Detention and segregation are not interchangeable, as segregation is a more extreme form of coercion subjecting a detainee to a greater deprivation and infringement on basic human rights. Therefore, a coercive measure amounting to segregation from all other detainees within detention must require a higher showing of necessity. The OCIJ, however, has not addressed these issues in any of its public filings.

⁷⁰ ECCC Internal Rules, Rule 21(2).

⁷¹ OCIJ 21 May 2008 Order, *supra* note 3, at ¶¶ 1 & 5.

⁷² *Id.* at ¶ 5.

⁷³ ECCC Internal Rules, Rule 63(3)(b).

B. The Precedent of Other International Tribunals Shows that *De Facto* Segregation of Provisional Detainees is an Exceptional Measure

1. The ICC Case Ngudjolo Chui⁷⁴ Suggests that Limitation of Contact Between Provisional Detainees is an Exceptional Measure Requiring the Existence of Concrete Evidence of Attempted Wrongdoing Within Detention

The International Criminal Court (ICC) dealt directly with the question of segregation of pre-trial detainees in *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*.⁷⁵ The ICC's Regulations set up a similar system governing detention conditions to that of the ECCC. At the ICC, segregation for security reasons can only be ordered by the Chief Custody Officer,⁷⁶ while coercive measures against detainees can be ordered by judicial authorities but are subject to a necessary and proportional standard.⁷⁷

In this case, Mr. Katanga and Mr. Ngudjolo Chui were each charged with six counts of war crimes and three counts of crimes against humanity for their activities in the Congo,⁷⁸ including an attack on civilians at the village of Bogoro.⁷⁹ The Prosecutor requested that Mr. Katanga and Mr. Ngudjolo Chui, as co-defendants, be prohibited from interacting for fear that their interactions might prejudice the outcome of the case. This is

⁷⁴ *Ngudjolo Chui*, *supra* note 2.

⁷⁵ *Id.*

⁷⁶ ICC Regulations of the Registry, Regulation 201.

⁷⁷ ICC Regulations of the Court, Regulation 101; *Ngudjolo Chui*, *supra* note 2, at 8.

⁷⁸ ICC Press Release, *Third detainee for the International Criminal Court: Mathieu Ngudjolo Chui* (07 Feb. 2008), available at <http://www.icc-cpi.int/press/pressreleases/329.html> [hereinafter ICC Ngudjolo Chui Press Release].

⁷⁹ On 24 February 2003, Germain Katanga and Ngudjolo Chui allegedly ordered their fighters to destroy the village of Bogoro. Rebels under their command are alleged to have gone on an indiscriminate killing spree in the village, killing at least 200 civilians, imprisoning survivors in a room filled with corpses, and sexually enslaving women and girls. See ICC Ngudjolo Chui Press Release, *supra* note 78; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui: Decision on the Joinder of the Cases against Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-257 (10 Mar. 2008), available at <http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-257-ENG.pdf>; *Warrant of Arrest for Mathieu Ngudjolo Chui* (6 July 2007), available at <http://www.icc-cpi.int/library/cases/ICC-01-04-02-07-1-tENG.pdf>.

notably unlike the situation at the ECCC, where the ECCC Office of the Co-Prosecutor (OCP) in fact supports greater detainee interaction.⁸⁰

The Single Judge in *Ngudjolo Chui* found that prohibiting contact between the co-accused would “amount to a *de facto* segregation of ... Ngudjolo Chui...”⁸¹ and would disproportionately infringe on the detainees’ right to properly prepare their defenses.⁸² The Judge held that, in the absence of concrete evidence showing that the co-accused had attempted to fabricate testimony or evidence, the restrictions sought by the prosecution were “purely speculative.”⁸³ The Judge further highlighted the exceptional nature of co-detainee segregation by considering precedent from the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) and noting that, “with the exception of the ICTY case *Delalic*, 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).’”⁸⁴

In the OCIJ’s 21 May 2008 filing, the OCIJ cites the *Ngudjolo Chui* decision but quickly dismisses its strong presumption against segregation within provisional detention, claiming that a later decision⁸⁵ overrules the earlier one.⁸⁶ In fact, the later decision deals only with the continued provisional detention of Germain Katanga and does not address

⁸⁰ Office of the Co-Prosecutor, *Co-Prosecutors’ Response to the Charged Person Ieng Sary’s Appeal on Visitation Rights* (01 Apr. 2008), ¶ 1 [hereinafter OCP 01 Apr. 2008 Response]; Office of the Co-Prosecutor, *Co-Prosecutors’ Response to Nuon Chea’s Appeal on Separation in Detention* (29 July 2008), ¶ 25 [hereinafter OCP 29 July 2008 Response].

⁸¹ *Ngudjolo Chui*, *supra* note 2, at 8.

⁸² *Id.* at 10.

⁸³ *Id.*

⁸⁴ OCP 01 Apr. 2008 Response, *supra* note 80, at ¶ 11, quoting *Ngudjolo Chui*, *supra* note 2, at 11.

⁸⁵ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui: Decision on the Conditions of the Pre-Trial Detention of Germain Katanga*, Pre-Trial Chamber I, ICC-01/04-01/07-426 (21 Apr. 2008), available at <http://www.iclklamberg.com/Caselaw/DRC/Katanga/PTC%20I/ICC-01-04-01-07-426-ENG.pdf> [hereinafter *Katanga*].

⁸⁶ OCIJ 21 May 2008 Order, *supra* note 3, at ¶ 3.

further coercive measures within detention.⁸⁷ Because the burden necessary to support coercive measures within pre-trial detention is logically higher than the burden necessary to support pre-trial detention only, it is misleading to claim that the later case authorizing continued provisional detention of Katanga overrules the earlier case's holding disallowing detainee segregation within provisional detention.

2. The Delalic⁸⁸ Case at the ICTY Allowed Segregation of Provisional Detainees Only Because of Concrete Evidence of Attempted Collusion

The *Delalic* case is the only case found where an international, hybrid, or ad hoc criminal tribunal sanctioned judicially ordered segregation of co-detainees. Similar to the ICC and ECCC, the ICTY Rules of Detention allow the Prosecutor to request prohibition of “contact between a detainee and any other person if the Prosecutor has reasonable grounds for believing that such contact ... could prejudice or otherwise affect the outcome of the proceedings against the detainee, or of any other investigations,” or that such contact “could be harmful to the detainee or to any other person.”⁸⁹

In *Delalic*, the Prosecutor requested segregation because of concrete evidence that two co-detainees had been attempting to communicate via notes.⁹⁰ This case is distinguishable from the publicly available facts of the ECCC situation both because there is no concrete evidence that the ECCC detainees have attempted to collude, and because the ECCC Office of the Co-Prosecutor has not requested segregation. In fact, as mentioned in the above *Ngudjolo Chui* discussion, the ECCC OCP supports greater interaction between the detainees for the benefit it might have to their health.⁹¹

⁸⁷ *Katanga*, *supra* note 85, at 3, 6 & 9.

⁸⁸ *Delalic*, *supra* note 2.

⁸⁹ ICTY Rules of Detention, Rule 64.

⁹⁰ *Delalic*, *supra* note 2, at ¶ 37.

⁹¹ OCP 01 Apr. 2008 Response, *supra* note 80, at ¶ 1; OCP 29 July 2008 Response, *supra* note 80, at ¶ 25.

3. *The European Court of Human Rights Has Not Addressed the Issue of Segregation Within a Provisional Detention Regime and Its Precedent is Less Persuasive Than That of the ICC or ICTY*

Though the OCIJ relies heavily on cases from the European Court of Human Rights to justify the *de facto* segregation regime of the ECCC,⁹² this reliance is misplaced for two reasons. First, there is a strong argument that cases from a regional human rights court are less persuasive to the ECCC than cases from an internationalized criminal court like the ICC or the ICTY.⁹³ Second, the ECHR has not directly addressed the issue of segregation for non-security reasons within provisional detention. Rather, all the ECHR case law cited by the OCIJ in its 21 May 2008 defense of the ECCC *de facto* segregation regime concerns only the propriety of ongoing provisional detention, which is a separate issue with a lower burden than segregation within detention. The OCIJ conflates segregation within provisional detention with provisional detention itself, lumping both together as “prolonged separation”⁹⁴ without clarifying whether the separation at issue is from all other detainees and the general public or just the general public.

The OCIJ order relies primarily on the case of *Bak v. Poland*⁹⁵ from the European Court.⁹⁶ Though there is some helpful dicta in the opinion that could be read to support

⁹² OCIJ 21 May 2008 Order, *supra* note 3, at ¶ 2.

⁹³ Pre-Trial Chamber, *Co-Prosecutors’ Response to Defense Appeal Against Co-Investigating Judges’ Order of the Provisional Detention of Kang Keck Iev alias Duch on 31 July 2007*, (03 Oct. 2007), ¶ 20. (“The Defence has quoted extensively from regional and supra-national courts and committees, such as the European Court of Human Rights (“ECHR”) (a regional court which deals with cases from national courts)... The Co-Prosecutors submit that although ECHR ... cases may provide some guidance on general principle, the subject-matter of their cases is completely different from those before the ECCC or before other tribunals dealing with serious violations of international criminal law such as the International Criminal Tribunals for the Former Yugoslavia The Pre-Trial Chamber is therefore invited to exercise caution in examining cases from such regional ... courts.”)

⁹⁴ OCIJ 21 May 2008 Order, *supra* note 3, at ¶ 2.

⁹⁵ *Bak v. Poland*, Application no. 7870/04, ECHR Judgment (16 Jan. 2007), available at <http://www.bailii.org/eu/cases/ECHR/2007/49.html> [hereinafter *Bak*].

⁹⁶ OCIJ 21 May 2008 Order, *supra* note 3, at ¶ 2.

the imposition of coercive measures within detention,⁹⁷ the opinion itself holds only that a longer than normal period of provisional detention is justified in a complex case involving organized crime.⁹⁸ The OCIJ also cites other ECHR cases it claims support the ECCC *de facto* segregation scheme, but which in fact only support detaining Charged Persons for long periods in cases involving particularly complex crimes or where there is evidence that the crimes are ongoing.⁹⁹ None of the cases cited concern the segregation of a detainee from other detainees.

V. Conclusion

A survey of case law from international, hybrid, and ad hoc tribunals reveals that the widely agreed upon standard for the imposition of coercive measures on provisional detainees, including segregation of detainees from each other for non-security reasons, is a test balancing the necessity of the measure, the seriousness of the crime, and the infringement on the detainee's fundamental rights. In applying the balancing test to the ECCC provisional detainees, there are many factors weighing against a *de facto*

⁹⁷ The OCIJ cites the following language from *Bak v. Poland*: "The Court observes that the present case ... was a classic example of organized crime. ... It is obvious that in cases of this kind, continuous control and limitation of the defendants' contact among themselves and with other persons may be essential to avoid their absconding, tampering with evidence and, most importantly of all, influencing, or even threatening witnesses." As the OCIJ notes, however, the quotation ends only with the conclusion, "Accordingly, longer periods of detention than in other cases may be reasonable." *Bak*, *supra* note 95, at ¶ 56, cited in OCIJ 21 May 2008 Order, *supra* note 3, at ¶ 2.

⁹⁸ *Bak*, *supra* note 95, at ¶ 56.

⁹⁹ *W. v. Switzerland*, Series A no. 254-A, ECHR Judgment (26 Jan. 1993), available at <http://www.bailii.org/eu/cases/ECHR/1993/1.html> (Court allowed prolonged pre-trial detention due to flight risk and fear of collusion. Segregation within detention was not before the Court.); *Laszkiewicz v. Poland*, no. 28481/03, ECHR Judgment (15 Jan. 2008), available at <http://www.bailii.org/eu/cases/ECHR/2008/33.html> (Drug trafficking and criminal gang case. Court allowed prolong pre-trial detention. Segregation within detention was not at issue.); *Celejewski v. Poland*, no. 17584/04, ECHR Judgment, (4 May 2006) available at <http://www.bailii.org/eu/cases/ECHR/2006/526.html> (Organized crime case. Court allowed prolong pre-trial detention. Segregation within detention was not at issue.); *Kemmache v. France*, Series A no. 218, ECHR Judgment (27 Nov. 1991), available at <http://www.bailii.org/eu/cases/ECHR/1991/51.html> (Court allowed prolong pre-trial detention in robbery case. Segregation within detention was not at issue.)

segregation regime. First, unlike the cases of *Ngudjolo Chui*¹⁰⁰ and *Delalic*,¹⁰¹ the ECCC Office of the Co-Prosecutor has not requested segregation of the detainees. Rather the OCIJ has imposed this regime on its own.

Second, although the OCIJ has expressed worry that the detainees will collude if allowed to interact, the OCIJ has not publicly identified any concrete evidence of attempted collusion as required under international precedent. The detainees were living freely for almost thirty years after their alleged crimes and had plenty of time to collude then. The OCIJ argues, however, that they did not have the same motive to collude then as they do now that the charging documents are available.¹⁰² However, *Delalic* holds that without concrete evidence of previous attempts to collude, the worry of collusion does not provide the sufficient necessity to overcome the strong presumption against infringements on provisional detainees' fundamental rights.¹⁰³

Finally, there are strong arguments that the segregation of the detainees acts as a punitive gesture and provides little benefit to the Tribunal. On the one hand, consistent, long-term segregation is likely damaging the psychological health of the detainees, thereby threatening the work of the Tribunal as a whole. On the other hand, the detainees are allowed visits from friends, family, and lawyers. Though these visits might not be frequent enough to compensate for the potential psychological harm caused by the segregation of the detainees, such visits could provide opportunities for the detainees to collude via third parties. This makes the segregation regime vulnerable to the criticism that it is a formalistic measure intended to make the provisional detainees uncomfortable

¹⁰⁰ *Ngudjolo Chui*, *supra* note 2.

¹⁰¹ *Delalic*, *supra* note 2.

¹⁰² OCIJ 21 May 2008 Order, *supra* note 3, at ¶ 5.

¹⁰³ *Delalic*, *supra* note 2.

rather than protect the proceedings from prejudice. The Tribunal must therefore promptly and carefully consider the legal bases and consequences of a provisional *de facto* segregation regime, particularly as the Tribunal strives to adhere to the highest standards of human rights and justice.