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

C26/5/22

អង្គបុរេជំនុំជម្រះ
PRE-TRIAL CHAMBER
CHAMBRE PRELIMINAIRE

Criminal Case File N° **002/19-09-2007-ECCC/OCIJ (PTC 14 and 15)**

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

Date: **19 May 2009**

PUBLIC
WARNING TO INTERNATIONAL CO-LAWYER

Co-Prosecutors

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Charged Person

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Co-Lawyers for the Charged Person

SA Sovan
Jacques VERGÈS

1. **THE PRE-TRIAL CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia ("ECCC"), having been seized by the Co-Lawyers for the Charged Person of an Appeal against Order Refusing Request for Release dated 27 November 2008 (PTC 14) and an Appeal against Order on Extension of Provisional Detention dated 4 December 2008 (PTC 15) ("Appeals"), held a hearing on 3 April 2009.

I- BACKGROUND

2. The Co-Prosecutors requested the Pre-Trial Chamber to determine the Appeals on the basis of written submissions alone in their responses to the Appeals[1].

3. Following an invitation by the Pre-Trial Chamber, the Co-Lawyers for the Charged Person filed a response in which they "strongly opposed" the request and asked the Pre-Trial Chamber to schedule a public hearing to hear the Appeals together. They argued that both Appeals concerned the illegality of the Charged Person's provisional detention and his urgent need for release. The Co-Lawyers alleged that these Appeals raised novel legal issues and concerned the Charged Person's fundamental right to liberty. They requested that a hearing be scheduled as soon as possible[2].

4. Recognising the importance of the two Appeals, which both relate to the liberty of the Charged Person, and considering the Defence's request to be heard orally as well as the general right of the Charged Person to be heard, the Pre-Trial Chamber scheduled a hearing of the Appeals on 27 February 2009, at 9:00 am[3].

5. On 26 February 2009, the Pre-Trial Chamber received a request from the National Co-Lawyer to delay the commencement of the hearing on 27 February 2009 by one hour. It was submitted that due to exceptional circumstances, Mr. Jacques Vergès, the International Co-Lawyer, had to delay his flight and would not arrive in Phnom Penh until 9:00 am on 27 February 2009[4]. This request was granted and the hearing rescheduled to commence at 10:00 am[5].

6. On 27 February 2009, at the opening of the hearing, the Charged Person and his National Co-Lawyer requested to adjourn the hearing to 3 April 2009, for the reason that Mr. Vergès could

[1] Co-Prosecutors' Response to Khieu Samphan's Appeal Brief against the Order Refusing Request for Release dated 28 October 2008, 22 January 2009, C40/5/2, para. 6, and Co-Prosecutors' Response to Khieu Samphan's Appeal against the Order on Extention of Provisional Detention dated 18 November 2008, 9 January 2009, C26/5/10, para. 4.
[2] *Réponse de la défense à la requête formulée par les co-procureurs visant à ce que l'appel soit tranché sur la seule base des conclusions écrites* [Defence Response to the Co-Prosecutors' Request to Determine the Appeal on the Basis of Written Submissions Only], 30 January 2009, C26/5/12, paras 2, 22 and 23, and p. 8.
[3] Decision on Co-Prosecutors' Request to Determine the Appeal on the Basis of Written Submissions and Scheduling Order, 6 February 2009, C26/5/13.
[4] *Demande de report de l'horaire d'ouverture de l'audience du 27 février 2009* [Request to Delay the Commencement of the Hearing of 27 February 2009], 26 February 2009, C26/5/17.
[5] Decision on Defence's Request to Delay the Commencement of the Hearing and Revised Scheduling Order, 26 February 2009, C26/5/18.

not be present. To support his request for adjournment, the National Co-Lawyer notably argued that he was "defending for one appeal while Mr. Jacques Vergès [was] defending the other case concerning provisional detention"[6]. It was unclear why Mr. Vergès was not able to arrive the morning of 27 February as indicated the day before, or why the Pre-Trial Chamber was not informed of his nonattendance at an earlier stage. No information was provided directly by the International Co-Lawyer at the time or subsequently.

7. By a decision delivered orally during the hearing on 27 February 2009, the Pre-Trial Chamber adjourned the hearing to 3 April 2009 on the basis that although it was in the interest of the Charged Person to proceed as soon as possible due to the fact that his Appeals concerned his liberty, the Charged Person himself and his National Co-Lawyer requested the Pre-Trial Chamber not to proceed in the absence of the International Co-Lawyer. This decision was delivered in writing on the same day[7].

8. On 3 April 2009, the Pre-Trial Chamber held the hearing, commencing with the Appeal against the Order Refusing Request for Release.

9. After the National Co-Lawyer presented his oral submissions in relation to this Appeal, Mr. Jacques Vergès declared:

> "MR. VERGÈS [INTERPRETATION FROM FRENCH]:
>
> My friend Mr. Sovan has spoken on behalf of the defence. The defence has a joint position. So Mr. Sovan has said what I think and I do not feel that there is any need to repeat what he has already said."[8]

10. The Co-Prosecutors then presented their oral submissions in relation to this Appeal, discussing the fulfilment of the conditions for ordering provisional detention set out in Internal Rule 63.

11. Being given the opportunity to reply to the Co-Prosecutors' oral submissions, Mr. Vergès stated:

> "MR. VERGÈS [INTERPRETATION FROM FRENCH]:
>
> We have asked the Co-Investigating Judges to give us information regarding the proceedings that are underway in the field of corruption, and on this subject perhaps I

[6] Transcripts, 27 February 2009, p. 3.
[7] Written Version of the Oral Decision on Defence's Request to Adjourn the Hearing, 27 February 2009, C26/5/19, para. 4.
[8] Transcripts, 3 April 2009, p. 24.

could provide some explanations."[9]

12. Mr. Vergès was interrupted by Judge Downing who stated that the Co-Lawyer was raising new issues, and that this was not permitted. He underlined that the Defence was instead restricted only to reply to the Co-Prosecutors' submissions.

13. Mr. Vergès responded as follows:

> "MR. VERGÈS [TRANSLATION FROM THE FRENCH TRANSCRIPTS]:
>
> *[beginning inaudible]*...first of all, I will not raise any new matters, I shall abide by your decision, but allow me to explain why – I shall not dwell on it, as you allowed the civil party to do this morning. I'll be brief. Firstly, I shall be silent because it is not for me to be more concerned about your honour than you yourselves are. If you consider that corruption should not be discussed, I am not going to force the discussion on you. I shall be silent because I understand your caution in this regard and I think that the presumption of innocence that you sometimes deny the accused may be of some benefit to you. And I shall be silent because the Head of the State which hosts you has stated publicly that he wishes you to leave, making of you, in a moral sense, squatters. I shall be silent also because a member of the Government of the country that hosts you stated that you were obsessed only by money, thus confirming the charge - be it grounded or not - of corruption, which blights the tribunal.
>
> Lastly – you see, I'll be brief – because it is not seemly to fire on ambulances and victims and the wounded; nor is it seemly to fire on hearses and those who are about to die."[10]

14. In the afternoon of the same day, the Pre-Trial Chamber commenced the hearing on the Appeal against the Order on Extension of Provisional Detention. Again, the National Co-Lawyer presented his oral observations and, when given the opportunity to speak, Mr. Vergès declared: "Mr. Sa Sovan has said what I thought."[11]

15. In his response, the International Co-Prosecutor raised concerns about the fact that the Defence was using a strategy to disrupt the proceedings. He referred to the statement made by Mr. Vergès, quoted in paragraph 13 above, stating that:

> "MR. DE WILDE D'ESTMAEL [INTERPRETATION FROM FRENCH]:
>
> This is a strategy of disruption on the part of the defence, which for one year has only

[9] Transcripts, 3 April 2009, p. 46.
[10] English translation from the French Transcripts, 3 April 2009, p. 52 and 53.
[11] Transcripts, 3 April 2009, p. 58.

> submitted one argument, that is the argument on translation, and which has refused to cooperate with the ECCC, in particular with the administrative organs or services of the Court. This strategy on which this international lawyer has based all his career consists in wilfully disrupting and delaying proceedings so that no trial worthy of the name can be concluded within a reasonable timeframe."[12]

He then asked: "Can this Chamber afford to continue to tolerate such a strategy before the ECCC?"[13]

Pointing out "the absence of co-operation on the part of the defence, and the systematic challenge of the authority of this Chamber and the ECCC in general"[14], the International Co-Prosecutor questioned the availability and commitment of the Co-Lawyers to this file. He concluded: "The underlying question is linked to what the Chamber raised during the hearing on the 23rd of April 2008, which is, in the main, finding out whether defence lawyers are now ready, effectively, to defend the rights of the client and to do so diligently."[15] The International Co-Prosecutor requested the Pre-Trial Chamber to draw all the necessary conclusions in order to preserve the fundamental rights of the Charged Person.

16. Being given the opportunity to reply, Mr. Vergès stated:

> "The deputy prosecutor has most elegantly challenged me, and I shall respond with a Latin motto: *de minimis non curat praetor*. I hope he understands Latin."[16]

II- CONSIDERATIONS

17. The Pre-Trial Chamber notes Rule 38 of the Internal Rules, which provides:

> **"Rule 38. Misconduct of a Lawyer**
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> 1. The Co-Investigating Judges or the Chambers may, after a warning, impose sanctions against or refuse audience to a lawyer if, in their opinion, his or her conduct is considered offensive or abusive, obstructs the proceedings, amounts to abuse of process, or is otherwise contrary to Article 21(3) of the Agreement.
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> 2. The Co-Investigating Judges or the Chambers may also refer such misconduct to the appropriate professional body.

[12] Transcripts, 3 April 2009, p. 64.
[13] Transcripts, 3 April 2009, p. 64.
[14] Transcripts, 3 April 2009, p. 65.
[15] Transcripts, 3 April 2009, p. 66.
[16] Transcripts, 3 April 2009, p. 73.

3. Any foreign lawyer practising before the ECCC who is subject to disciplinary action by the BAKC [Bar Association of the Kingdom of Cambodia] may appeal to the Pre-Trial Chamber within 15 (fifteen) days of receiving notification of the decision of the BAKC. Such appeal shall suspend enforcement of the decision unless the Pre-Trial Chamber decides otherwise. The decision of the Pre-Trial Chamber shall not be subject to appeal."

4. Where, as a result of any such disciplinary action, a person is struck off the list of lawyers approved to appear before the ECCC, the lawyer shall transmit all related material to the appropriate unit within the Office of Administration, so that it may ensure continuity of representation.

18. Article 21(3) of the Agreement further provides:

> "Any counsel, whether of Cambodian or non-Cambodian nationality, engaged by or assigned to a suspect or an accused shall, in the defence of his or her client, act in accordance with the present Agreement, the Cambodian Law on the Statutes of the Bar and recognized standards and ethics of the legal profession."

19. The Pre-Trial Chamber further notes articles 6(1) and 24(2) and (3) of the Code of Ethics for Lawyers Licensed with the Bar Association of the Kingdom of Cambodia, which provide:

> **"Article 6:fundamental principles**
>
> In all circumstances, the lawyer must respect the obligations of his or her oath and the principles of conscience, humanity, and tact."
>
> **"Article 24: relations with judges**
>
> [...]
>
> The lawyer preserves for the judges, in independence and dignity, the respect due to their position.
>
> The lawyer observes the procedural rules and practices of the jurisdiction. He or she is strictly prohibited from engaging in disloyal and disruptive conduct, especially with regard to objections. The lawyer has the right to express all that which he or she deems useful to the interests of his or her client."

20. The Pre-Trial Chamber notes that the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY), when dealing with a provision largely similar to Internal Rule 38, found that this rule "is meant to deal with questions of courtroom decorum or other

behaviour in the course of the proceedings, that makes it necessary to ensure that counsel has no platform in the hearings to continue his disruptive conduct"[17].

21. Further, in its "Decision on Assignment of Counsel" for Vojislav Seselj, the Trial Chamber of the ICTY mentioned:

> "24. [...] [T]he European Court of Human Rights held that, while the composition and the functioning of a tribunal may be criticized, verbal attacks of a personal nature made against the judges, creating an atmosphere detrimental to the orderly administration of justice, may be subject to sanctions. The Court stated:
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> > 'La Cour rappelle que l'action des tribunaux, qui sont garants de la justice et dont la mission est fondamentale dans un État de droit, a besoin de la confiance du public et que les magistrates doivent, pour s'acquitter de leurs fonctions, bénéficier de cette confiance sans être perturbés. Il peut donc s'avérer nécessaire de les protéger contre des attaques verbales offensantes lorsqu'ils sont en service.'[18]
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> 25. In its consideration of the restrictions that my be placed on the right of the Accused to represent himself, including, if necessary, his removal from the courtroom, the Chamber cannot but endorse the assessment of Justice Douglas in *Allen*, that '[a] courtroom is a hallowed place where trials must proceed with dignity and not become occasions for entertainment by the participants'."[19]

22. Dealing with an application containing "several phrases or statements that [were] abusive and insulting" by an unrepresented accused, the Bureau of the ICTY stated:

> "Parties appearing before the Tribunal have great latitude in phrasing their pleadings. But that latitude is not boundless. Insults are not arguments [...] Motions containing abusive and insulting language of the sort included in the present Application are indeed 'frivolous or an abuse of process' [...]".[20]

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[17] *Prosecutor v. Kunarac et al.*, IT-96-23&23/1, "Decision on the Request of the Accused Radomir Kovac to Allow Mr. Milan Vujin to Appear as Co-Counsel Acting Pro Bono", 14 March 2000, para. 8 referring to Article 46 of the Rules of Procedure and Evidence of the ICTY.

[18] English translation:

> "The Court recalls that, the courts, being the guarantors of justice and essential to the rule of law, must enjoy public confidence, and that the judges must enjoy such confidence in conditions free of any perturbation if they are to be successful in performing their tasks. It may therefore prove necessary to protect them from offensive verbal attacks when on duty."

[19] *Prosecutor v. Seselj*, IT-03-67-PT, "Decision on Assignment of Counsel", Trial Chamber I, 21 August 2006, paras 24-25. See also *Prosecutor v. Blagojevic*, IT-02-60-T, "Decision on Motion to Seek Leave to Respond to the Prosecution's Final Brief", Trial Chamber I, 28 September 2004, where Counsel for Vidoje Blagojevic was "admonished" for having made unsupported allegations regarding the professionalism and ethics of the members of the Prosecution team.

[20] *Prosecutor v. Seselj*, IT-03-67-PT, "Decision on Motion for Disqualification", Bureau, 10 June 2003, para. 5.

23. The ICTY Trial Chamber also recalled that "the Tribunal has a legitimate interest in ensuring that the trial proceeds in a timely manner without interruptions, adjournments or disruptions"[21]. "Disruption of a trial, whatever the circumstances, may give rise to the risk of a miscarriage of justice because the whole proceedings have not been conducted and concluded fairly."[22] This is particularly the case where the accused is kept in detention:

> "Where an accused has been deprived of his liberty and is in the custody of the International Tribunal, it is reasonable for a Trial Chamber to expect a higher level of urgency and expediency in the handling of cases. An accused who is being held in detention is entitled to have his case dealt with as a priority: he remains an innocent man, accused of serious crimes, unless a finding of guilt is made. Being seised of the matter, the Trial Chamber's role is, *inter alia*, to ensure that the Prosecution handles its case in a manner which is both fair and expeditious and does not prejudice the rights of the accused under Article 21 of the Statute or the provisions in the Rules."[23]

24. Similarly, the Trial Chamber of the Special Court for Sierra Leone stated:

> "[W]e would like to affirm here that The Trial Chamber cannot allow the integrity of its proceedings to be tarnished or to be conducted in a manner that is not in conformity with the aspirations, of the norms of the judicial process. As a matter of law, it is our duty as a Chamber at all times, to protect the integrity of the proceedings before us and to ensure that the administration of justice is not brought into disrepute."[24]

25. In light of the jurisprudence of the international tribunals, the Pre-Trial Chamber considers that Internal Rule 38 is meant to ensure that proceedings are not disrupted by offensive and/or obstructive behaviour, or by any conduct which amounts to an abuse of process as it may endanger the administration of justice. The Chamber endorses the finding of the European Court of Human Rights, repeated by the Trial Chamber of the ICTY, to the effect that "while the composition and the functioning of a tribunal may be criticized, verbal attacks of a personal nature made against the judges, creating an atmosphere detrimental to the orderly administration of justice, may be subject to sanctions"[25], which is reflected in Internal Rule 38. The Pre-Trial Chamber further considers that abusive and insulting language as well as strategies used to delay the proceedings can amount to an abuse of process and affect the fairness of the

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[21] *Prosecutor v. Seselj*, IT-03-67-PT, "Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Seselj with his Defence", Trial Chamber II, 9 May 2003, para. 21.
[22] *Prosecutor v. Milosevic*, IT-02-54-T, "Reasons for Decision on Assignment of Defence Counsel", Trial Chamber, 22 September 2004, para. 33.
[23] *Prosecutor v. Furundzija*, IT-95-17/1-PT, "The Trial Chamber's Formal Complaint to the Prosecutor concerning the Conduct of the Prosecution", Trial Chamber, 5 June 1998, para. 5.
[24] *Prosecutor v. Norman et al.*, SCSL-04-14-T, "Decision on the Application of Samuel Hinga Norman for Self Representation under Article 17(4)(d) of the Statute of the Special Court", Trial Chamber, 8 June 2004, para. 28.
[25] *Prosecutor v. Seselj*, IT-03-67-PT, "Decision on Assignment of Counsel", Trial Chamber I, 21 August 2006, para. 24, quoted at para. 21 of the current Warning.

proceedings. The Pre-Trial Chamber has, in such circumstances, a duty to protect the integrity of the proceedings.

26. The Pre-Trial Chamber recalls that the hearing of the first appeal lodged by the Charged Person against provisional detention had to be adjourned due to the fact that Mr. Jacques Vergès had declined to continue to act on his behalf for the reason that all the documents in the Case File were not available in French. In its "Decision on Application to Adjourn Hearing on Provisional Detention Appeal", the Pre-Trial Chamber noted:

> "The conditions leading to the withdrawal of the International Co-Lawyer have existed from when he first started to act. No application for an adjournment or complaint related to the linguistic problems was made to the Pre-Trial Chamber. His refusal to continue to act in this appeal was first announced on the day of the hearing and has resulted in his client not being able to have his appeal heard promptly. This violated the Charged Person's fundamental right to a timely hearing and the representation of a lawyer of his choice, which are internationally recognized rights applicable before the ECCC."[26]

27. The Pre-Trial Chamber issued a warning to the International Co-Lawyer, holding that:

> "As a consequence of the behaviour of the International Co-Lawyer advising with effectively no notice that he will not continue to act in this appeal within the circumstances mentioned above, a warning is given to him pursuant to Internal Rule 38(1) as he has abused the processes of the Pre-Trial Chamber and the rights of the Charged Person."[27]

28. The Pre-Trial Chamber notes that despite the fact that the hearing of 27 February 2009 was postponed in order to allow him to participate, Mr. Vergès did not present any oral submission in relation to the Appeals or meaningfully contribute to the debates before the Pre-Trial Chamber during the hearing continued on 3 April 2009.

29. The participation of Mr. Vergès in the hearing was limited to a statement which was clearly outside the scope of the Appeals as well as the parameters of the right to reply. The interventions of Mr. Vergès were aimed at challenging the integrity and legitimacy of the Court in general and the Pre-Trial Chamber's judges in particular.

30. The unsubstantiated allegations made by Mr. Vergès and the language he employed were abusive and insulting towards the Pre-Trial Chamber's judges. These allegations, made outside the context of the Appeals and the scope of a permissible reply, amount to an offensive and

[26] Decision on Application to Adjourn Hearing on Provisional Detention Appeal, 23 April 2008, C26/1/25, para. 11.
[27] Decision on Application to Adjourn Hearing on Provisional Detention Appeal, para. 15.

obstructive conduct within the meaning of Internal Rule 38. They cannot be tolerated by the Pre-Trial Chamber, which has a duty to ensure that decorum and dignity necessary for court proceedings are preserved.

31. Furthermore, from the first time that Mr. Vergès appeared before the Pre-Trial Chamber on 23 April 2008, he has refused to participate meaningfully in the hearings and, on one occasion, failed to bring any contribution to the debates despite the fact that the hearing was specifically requested by the Defence and postponed to allow Mr. Vergès being present. This behaviour had the result of delaying proceedings and misusing the Court's resources. Together with his statement discussed above, the behaviour of Mr. Vergès more generally amounts to an obstructive conduct and an abuse of process within the meaning of Internal Rule 38.

THEREFORE, THE PRE-TRIAL CHAMBER HEREBY

WARNS Mr. Jacques Vergès that was his conduct to remain offensive or otherwise abusive, or was he to obstruct proceedings or adopt a conduct that amounts to an abuse of process, the Chamber would impose sanctions pursuant to Internal Rule 38.

ORDERS that a copy of this warning be forwarded by the Greffiers of the Pre-Trial Chamber to the Bar Association of the Kingdom of Cambodia, the Paris Bar Association and the Defence Support Section.

Phnom Penh, 19 May 2009
President of the Pre-Trial Chamber

PRAK KIMSAN