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Chambres Extraordinaires au sein des Tribunaux Cambodgiens

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Nation Religion King
Royaume du Cambodge
Nation Religion Roi

Supreme Court Chamber
Chambre de la Cour suprême

Case File/Dossier N°. 002/19-09-2007-ECCC/SC



Before:

Judge KONG Srim, President
Judge Chandra Nihal JAYASINGHE
Judge SOM Sereyvuth
Judge Florence Ndepele Mwachande MUMBA
Judge MONG Monichariya
Judge Maureen Harding CLARK
Judge YA Narin

Date: 10 June 2021
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Classification: PUBLIC

**DECISION ON THE CIVIL PARTY LEAD CO-LAWYERS' REQUEST FOR
POSTPONEMENT OF THE APPEAL HEARING AND INSTRUCTIONS WITH
REGARD TO NEW DATES AND MODALITIES FOR THE APPEAL HEARING**

Civil Party Lead Co-Lawyers

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All Co-Lawyers for Civil Parties

Co-Prosecutors

CHEA Leang
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Accused

KHIEU Samphân

Co-Lawyers for KHIEU Samphân

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THE SUPREME COURT CHAMBER of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea between 17 April 1975 and 6 January 1979 (“Chamber”) is seised of the Civil Party Lead Co-Lawyers’ Request to Postpone the Appeal Hearing Planned for 17-21 May 2021 (“Postponement Request”).¹ This decision will set out the reasons for the Chamber’s decision to postpone the appeal hearing (“the Hearing”), set the new date of the Hearing and provide details and instructions with regard to the modalities under which it will be held.

PROCEDURAL HISTORY

1. On 16 November 2018, the Trial Chamber pronounced its verdict and sentence in Case 002/02 by providing an oral summary of its findings and the disposition of the judgment and subsequently notified the written judgment to the parties on 28 March 2019 in Khmer, French, and English (“Trial Judgment”).²
2. On 20 August 2019, the Co-Prosecutors filed their appeal against the Trial Judgment³ to which KHIEU Samphân responded on 23 September 2019.⁴ On 27 February 2020, KHIEU Samphân filed his appeal against the Trial Judgment⁵ to which the Co-Prosecutors⁶ and the Civil Party Lead Co-Lawyers (“Lead Co-Lawyers”)⁷ responded on 12 October 2020 and 4 January 2021 respectively (collectively, the “Parties”).
3. On 22 January 2021, pursuant to Internal Rule 108(3), the Greffier of the Chamber notified the Parties that it would hold the Hearing in Case 002/02 from 17 to 21 May 2021, and that a scheduling order would be issued in due course.⁸
4. On 26 February 2021, the Chamber issued an Order appointing Co-Rapporteurs for the Hearing⁹ and an Invitation for Parties to File Observations on the

¹ Civil Party Lead Co-Lawyers’ Request to Postpone the Appeal Hearing Planned for 17-21 May 2021, 23 April 2021, F61.

² Pronouncement of Judgment in Case 002/02, T. 16 November 2018, E1/529.1; Case 002/02 Trial Judgment, 16 November 2018, E465.

³ Co-Prosecutors’ Appeal Against the Case 002/02 Trial Judgment, 20 August 2019, F50.

⁴ KHIEU Samphân Response to the Co-Prosecutors’ Appeal in Case 002/02, 23 September 2019, F50/1.

⁵ KHIEU Samphân Appeal Brief (Case 002/02), 27 February 2020, F54.

⁶ Co-Prosecutors’ Response to KHIEU Samphân’s Appeal Brief, 12 October 2020, F54/1.

⁷ Civil Party Lead Co-Lawyers’ Response to KHIEU Samphân’s Appeal Brief, 4 January 2021, F54/2.

⁸ Notification of appeal hearing dates in Case 002/02 pursuant to Internal Rule 108(3), 22 January 2021, F58.

⁹ Order appointing Co-Rapporteurs, 26 February 2021, F59.

Timetable for the Hearing.¹⁰ On 12 March 2021, the Parties submitted their observations on the tentative timetable for the Hearing.¹¹ On 18 March 2021, the Lead Co-Lawyers responded to KHIEU Samphân's observations.¹²

5. On 23 April 2021, the Lead Co-Lawyers filed the Postponement Request.¹³

6. On the same day the Defence filed its response to the Postponement Request ("Defence's Observations").¹⁴ On 27 April 2021, the Co-Prosecutors filed their response to the Postponement Request ("Co-Prosecutors' Response").¹⁵

7. On 28 April 2021, the Chamber formally notified the Parties that the Hearing was postponed due to the Covid-19 situation in Cambodia.¹⁶

8. On the same day, the Office of Administration ("Administration") filed its response, to which it annexed a document from the International Organization for Migration titled "Covid-19 preventive measures and protocols" as Annex C ("Administration's Response" and "External Assessment").¹⁷

9. On 3 May 2021, the Chamber issued an order to allow the Court's Information and Communication Technology ("ICT") personnel into KHIEU Samphân's detention facility to install equipment enabling him to communicate with his Co-Lawyers.¹⁸

10. On 4 May 2021, the Co-Prosecutors filed their observations and requests based on the Administration's Response ("Co-Prosecutors' Observations").¹⁹

¹⁰ Invitation for Parties to File Observations on Timetable for Appeal Hearing in Case 002/02, 26 February 2021, F60.

¹¹ Defence's Submissions Regarding the Timetable for the Hearing (Case 002/02), 12 March 2021, F60/1; Co-Prosecutors' Observations on the Timetable for the Appeal Hearing in Case 002/02, 12 March 2021, F60/2; Civil Party Lead Co-Lawyers' Observations on the Proposed Timetable for the Case 002/02 Appeal Hearing, 12 March 2021, F60/3.

¹² Civil Party Lead Co-Lawyers' Response to KHIEU Samphân's Observations on the Proposed Appeal Hearing Timetable, 18 March 2021, F60/1/1.

¹³ Postponement Request.

¹⁴ *Observations de la Défense suite à la demande des Parties Civiles de reporter l'audience d'appel*, 22 April 2021, F61/1 (Only available in French and Khmer at the time of filing).

¹⁵ Co-Prosecutors' Response to the Civil Party Lead Co-Lawyers' Request to Postpone the Appeal Hearing Planned for 17-21 May 2021, 27 April 2021, F61/2.

¹⁶ Notification with regard to appeal hearing in Case 002/02 pursuant to Internal Rule 108(3), 28 April 2021, F62.

¹⁷ Office of Administration Response to the Civil Party Lead Co-Lawyers' Request to Postpone the Appeal Hearing Planned for 17-21 May 2021, 28 April 2021, F61/3; Administration's Response, Annex C: Covid-19 preventive measures and protocols, F61/3.4.

¹⁸ Order to Allow UNARKT/ECCC ICT Personnel into the Detention Facility to Install Equipment, 3 May 2021, F63.

11. On 17 May 2021, the Court Management Section (“CMS”) informed the Chamber of its readiness to facilitate Covid-19 compliant hearings, explaining that it had: (i) acquired the Covid-19 protections recommended in the External Assessment (sanitizer, masks, disinfectant, gloves, thermometers...) and fully briefed security officers on Covid-19 risk minimization protocols; (ii) completed the recommended physical adjustments to the courtroom; (iii) successfully tested the digital conference suite from the courtroom “under simulated ‘hearing’ conditions, which included in-house and remote Khmer, English and French-speaking participants and interpreters” (“CMS’s Notice of Readiness”).²⁰

12. On 17 and 20 May 2021, the Defence and the Lead Co-Lawyers respectively filed their observations on the Hearing modalities (“Defence’s Observations on the Modalities” and “Lead Co-Lawyers’ Observations on the Modalities”).²¹

13. On 31 May 2021, six of the seven judges of the Chamber and some of its legal staff visited the courtroom with the Deputy Director of the Administration and Coordinator for United Nations Assistance to the Khmer Rouge Trials to visualise the measures implemented.

SUBMISSIONS

Submissions on the Postponement of the Hearing

(i) The Lead Co-Lawyers

14. The Lead Co-Lawyers request that it would be in the interests of justice to postpone the Hearing planned for 17-21 May 2021 by a period of at least two months to July 2021.²² They submit that a postponement would enable – or maximise the chances of – the presence of civil parties at the Hearing; a safe and responsible in-person presence of participants in the courtroom; adequate preparation for the Hearing

¹⁹ Co-Prosecutors’ Observations and Request Based on the Office of Administration’s Response to the Civil Party Lead Co-Lawyers’ Request to Postpone the Appeal Hearing Planned for 17-21 May 2021, 4 May 2021, F61/3/1.

²⁰ CMS’s notice of readiness for appeal hearings in case 002/02, 14 May 2021 (filed on 17 May 2021), F64.1, paras 2-4.

²¹ Observation from the Defence on the Procedure for the Appeal Hearing, 17 May 2021, F64/1, filed in English on 27 May 2021; Civil Party Lead Co-Lawyers’ Observations on Hearing Modalities and Response to Observations from the OCP, 20 May 2021, F64/2.

²² Postponement Request, paras 13, 22, 37, 53, 61, 72 (i).

to be conducted in a hybrid form or entirely online in case that would be necessary.²³ They submit that civil parties have an interest that the appeal proceedings in this case are fair, expeditious and transparent – and, as parties to these proceedings, they have an interest in being able to attend the final arguments in this case, should there be any safe means of doing so.²⁴ Postponing was necessitated by several factors including: (i) that hearings involving some in-person element best achieve the objectives of a hearing;²⁵ (ii) the current Covid-19 situation in Cambodia;²⁶ (iii) the multi-faceted risks involved with in-person attendance, (including with regard to the lockdowns, “red zones” and travel restrictions);²⁷ and (iv) the levels of preparedness for the “almost certain” component of remote attendance.²⁸

(ii) *The Defence*

15. The Defence requests that the Chamber promptly decides, even informally, upon the Postponement Request by 28 April to save unnecessary travel costs being incurred by the International Co-Lawyer for KHIEU Samphân who was scheduled to travel to Phnom Penh on 29 April 2021.²⁹ The Defence explains that it has not been able to travel to the detention facility to consult with KHIEU Samphân due to the Covid-19 governmental movement restrictions in Phnom Penh, and that its urgent request seeking the installation of equipment to communicate with KHIEU Samphân was still pending.³⁰ While it was unable to respond to the Postponement Request for this reason, the Defence nevertheless recognises the importance of the questions raised by the Lead Co-Lawyers.³¹

16. The Defence further indicates that the International Co-Lawyer for KHIEU Samphân would not be in a position to travel to Phnom Penh in the event of a postponement to June or July 2021, subsequently noting her availability for August.³² Travelling to Phnom Penh for a date in August would involve two weeks of quarantine before she could address the Court and two weeks quarantine after her

²³ Postponement Request, para. 22.

²⁴ Postponement Request, paras 22, 29-30, 66, 70, 72 (iv).

²⁵ Postponement Request, paras 23-36, 68.

²⁶ Postponement Request, paras 38-42.

²⁷ Postponement Request, paras 43-53.

²⁸ Postponement Request, paras 54-65, 67.

²⁹ Defence’s Observations, para. 6.

³⁰ Defence’s Observations, para. 7.

³¹ Defence’s Observations, para. 8.

³² Defence’s Observations, para. 9; Defence’s Observations on the Modalities, para. 29.

arrival in Europe. The Defence also requested the Chamber to communicate the revised timetable and the judges' questions to the Parties as soon as possible.³³

(iii) The Co-Prosecutors

17. The Co-Prosecutors respond that the scheduling of the Hearing is within the Chamber's discretion.³⁴ They request the Chamber to decide expeditiously on the Postponement Request and to inform the Parties, whether formally or informally.³⁵

Submissions on the Modalities of the Hearing

(i) The Lead Co-Lawyers

18. The Lead Co-Lawyers request the Administration take all steps necessary to facilitate the presence of the civil parties at the Hearing in recognition of their status as parties to the proceedings.³⁶ With regard to the preparation and conduct of the Hearing, they request: (i) the issuance of guidelines to enable the participants to familiarise themselves with the procedures adopted as well as testing and rehearsal;³⁷ (ii) the Administration to develop a concrete proposal on which the Parties should give their input – noting that numerous specifics remain unknown such as:

[...] access by remote participants to required equipment as well as adequate power and internet; the availability of live transcripts; means for communication among team members; the availability of IT support to *all* parties; the ability for judges and advocates to see each other during exchanges; the visibility of KHIEU Samphân; the need for a delayed stream for the public as well as a live stream for remote participants; plans for training, testing and rehearsal using new software; and the issuance of rules and guidelines for the conduct hearing [...]³⁸

19. The Lead Co-Lawyers submit that the External Assessment is insufficient “to enable meaningful observations from the Parties or a decision from the Chamber”.³⁹ In their view, the External Assessment falls “short of providing a sufficient basis for a decision on the modalities of in-person hearing attendance”, as it lacks adequate expertise, scientific reasoning, justifications, and clarity with regard to some

³³ Defence's Observations, paras 10-11.

³⁴ Co-Prosecutors' Response, para. 3.

³⁵ Co-Prosecutors' Response, para. 4.

³⁶ Postponement Request, paras 28-30, 34, 71, 72 (iv).

³⁷ Postponement Request, para. 63.

³⁸ Postponement Request, paras 57-58, 62, 70, 72(v).

³⁹ Lead Co-Lawyers' Observations on the Modalities, para. 2.

recommendations.⁴⁰ They are particularly concerned that: (i) the External Assessment does not appear to account for airborne transmission risk;⁴¹ (ii) the “bubble” proposal is “without apparent value”;⁴² and (iii) obvious potential measures such as rapid testing and the vaccination status of the participants were omitted.⁴³

20. The Lead Co-Lawyers submit that the Chamber should appoint an expert qualified in infection prevention and control pursuant to Internal Rule 31 to provide reasoned recommendations on: (i) measures to minimize the risk of airborne transmission; (ii) the impact of participant vaccination status; (iii) the use of rapid testing; and (iv) options for safe civil party attendance or remote viewing.⁴⁴ They highlight the absence of recommendations regarding civil party attendance – whether in the External Assessment or in CMS’s Notice of Readiness (although photographs of the courtroom adjustments show that seats usually reserved for civil parties were removed).⁴⁵ They insist for an expert opinion to “address the feasibility of measures to ensure the safe presence of civil parties”, including alternatives such as covered outdoor spaces.⁴⁶

21. Should no further expert guidance be sought, the Lead Co-Lawyers submit that they are unable to make submissions on safe civil party participation.⁴⁷ Further, they agree with the Co-Prosecutors that teams should be able to rotate their members present in the courtroom and argue that team members will be interacting with each other outside the hearing in any event.⁴⁸ The Lead Co-Lawyers also observe that space should be allocated to civil party lawyers in the civil party area and that all persons whose presence is not directly contributing to the proceedings should be minimised to allow legal teams to have as many members present as possible within the recommended ceiling and the Chamber should give clear directions for how many of the non-active participants (such as security and health officers) are permitted to be present.⁴⁹

22. Despite their strong preference for in-person hearing participation, the Lead Co-Lawyers consider essential that full adequate preparation should be considered to

⁴⁰ Lead Co-Lawyers’ Observations on the Modalities, paras 20-25, 27, 39-40.

⁴¹ Lead Co-Lawyers’ Observations on the Modalities, paras 28-33.

⁴² Lead Co-Lawyers’ Observations on the Modalities, paras 35-36.

⁴³ Lead Co-Lawyers’ Observations on the Modalities, para. 37.

⁴⁴ Lead Co-Lawyers’ Observations on the Modalities, paras 2-3, 26, 41, 68 (i).

⁴⁵ Lead Co-Lawyers’ Observations on the Modalities, para. 19.

⁴⁶ Lead Co-Lawyers’ Observations on the Modalities, para. 42.

⁴⁷ Lead Co-Lawyers’ Observations on the Modalities, para. 44.

⁴⁸ Lead Co-Lawyers’ Observations on the Modalities, paras 45-46.

⁴⁹ Lead Co-Lawyers’ Observations on the Modalities, paras 47-49.

enable remote participation.⁵⁰ They reiterate that the Chamber should direct the Administration to propose, within a fixed deadline, specific modalities for remote hearing participation – addressing the numerous questions unanswered and providing the Parties with the opportunity to meaningfully respond to the proposal.⁵¹ They highlight that the following issues remain unaddressed: (i) provision of equipment of the Lead Co-Lawyers’ team members and the civil party lawyers; (ii) access to reliable internet, electricity and private locations for Hearing participation; (iii) means for team members to confer among themselves during the Hearing; (iv) separate delayed and live streaming for remote team members; (v) live transcription; (vi) precisions on the view for remote participants, (vii) realisation of a test-run of remote participation at least fifteen days before the Hearing, noting that this is not addressed by the provision by the Administration of “simulation videos”; (viii) issuance of guidance or protocol for the Hearing; and (ix) captioning or other measures for public understanding.⁵² They add that the Chamber shall retain control of remote participants’ microphones during the hearing and factor additional time for possible technical difficulties.⁵³

23. The Lead Co-Lawyers express concerns about the Administration’s “apparent belief” of timeliness and adequacy of preparation.⁵⁴ They emphasise that adequate and sufficient software training must be provided once the necessary equipment and office spaces have been provided and well in advance of a test-run.⁵⁵ They raise concerns regarding the conduct by CMS of simulated hearing without the involvement of the Parties and with videos of the process being shared weeks later.⁵⁶

24. Concurring with the other Parties that the Hearing date should be fixed as soon as possible, the Lead Co-Lawyers suggest in the alternative that the Chamber provide “an approximate indication or a ‘not before’ date”.⁵⁷ They also request that the Chamber’s questions, if any, be provided as soon as possible.⁵⁸

25. To the Administration’s suggestion to replace the oral hearing with written submissions, the Lead Co-Lawyers submit that the Administration appears to be

⁵⁰ Lead Co-Lawyers’ Observations on the Modalities, paras 3, 26, 50. See also, paras 63-65.

⁵¹ Lead Co-Lawyers’ Observations on the Modalities, paras 2, 4, 15, 26, 68 (ii).

⁵² Lead Co-Lawyers’ Observations on the Modalities, para. 55 (i)-(ix).

⁵³ Lead Co-Lawyers’ Observations on the Modalities, para. 56.

⁵⁴ Lead Co-Lawyers’ Observations on the Modalities, para. 57.

⁵⁵ Lead Co-Lawyers’ Observations on the Modalities, paras 58-59.

⁵⁶ Lead Co-Lawyers’ Observations on the Modalities, para. 60.

⁵⁷ Lead Co-Lawyers’ Observations on the Modalities, paras 66, 68 (iii).

⁵⁸ Lead Co-Lawyers’ Observations on the Modalities, paras 67-68 (iv).

incorrect in assuming that it would enable time and cost-reduction.⁵⁹ They add that written submissions on “discrete issues” could possibly complement a shorter Hearing.⁶⁰

(ii) The Administration

26. The Administration observes that, should the Chamber consider the Hearing not viable in May, written submissions could replace oral ones “to maintain the current case projections and public expectations”.⁶¹

27. The Administration retraces the successive steps it took to date. It informed the Chamber that it would prepare for any Hearing modality.⁶² On 19 March 2021, it acquired a digital infrastructure to accommodate remote participation at a hearing on which staff from ICT and CMS are being trained.⁶³ It engaged external contractors to implement Covid-19 risk-mitigating measures in the courtroom.⁶⁴ It invited the United Nations Covid-19 Medical Liaison Officer to visit the courtroom, which resulted in the External Assessment listing Covid-19 recommendations to implement in the courtroom and the ECCC premises entrances.⁶⁵ The Administration asserts that it will (i) implement the recommended physical adjustments to the Courtroom; (ii) integrate the IT infrastructure “in advance of the currently scheduled hearing dates”,⁶⁶ (iii) allocate IT resources and “extend the necessary technical assistance” to remote participants, and (iv) offer software training “in the week prior to any hearing date”.⁶⁷ The Administration concludes that it shared the External Assessment with the Parties and that “the presence of all Parties (including civil parties) [...] may be accommodated subject to the Chamber’s decision on the conduct of the hearing”.⁶⁸

(iii) The Co-Prosecutors

28. The Co-Prosecutors note that the issues raised in the Postponement Request must be resolved before the Hearing.⁶⁹ They concur with the Lead Co-Lawyers on the

⁵⁹ Lead Co-Lawyers’ Observations on the Modalities, paras 5, 62.

⁶⁰ Lead Co-Lawyers’ Observations on the Modalities, paras 5, 62.

⁶¹ Administration’s Response, para. 4.

⁶² Administration’s Response, para. 5.

⁶³ Administration’s Response, para. 7.

⁶⁴ Administration’s Response, para. 7.

⁶⁵ Administration’s Response, para. 7, referring to External Assessment.

⁶⁶ Administration’s Response, paras 8-9.

⁶⁷ Administration’s Response, para. 9.

⁶⁸ Administration’s Response, para. 10.

⁶⁹ Co-Prosecutors’ Response, para. 3.

importance of some form of in-person participation by all Parties, both for “the public perception of the Court and for engagement in the proceedings”.⁷⁰

29. In response to the Administration, the Co-Prosecutors observe that some of the External Assessment’s recommendations are “inconsistent with the manner the[y] have determined they can best prepare and present oral submissions”.⁷¹ First, regarding the limitations of in-court Prosecution staff to four and of their speakers to two throughout the Hearing, they request that six prosecutors be allowed in the courtroom at any one time.⁷² Secondly, with respect to the “bubble” requirement that the same four staff members be present in the courtroom for the duration of the Hearing, they request the possibility to rotate its six in-court prosecutors between sessions; noting that anyhow no “bubble” would be created given that those present in the courtroom will, *inter alia*, travel daily between their homes and the Court for the Hearing.⁷³ They submit that the installation of three-sided high glass screens separating each of the six prosecutors provide sufficient protection and confirm that all of them have received their first Covid-19 vaccination and should receive the second one around the end of May.⁷⁴ Thirdly, they request that speakers not be required to wear a face shield which, they submit, are unnecessary in light of the sufficiency of the other precautions, risk affecting interpreters’ ability to hear speakers and impairing the quality of the communication between the Parties and the judges, and are not an international standard at other similar courts sitting in 2021 in countries also impacted by the pandemic.⁷⁵

30. The Co-Prosecutors request that a full test round of the equipment and modalities be done at least 15 days before the Hearing and that the necessary Royal Government of Cambodia authorisations to travel for physically preparing and attending the Hearing be obtained well in advance.⁷⁶

31. The Co-Prosecutors refute the Administration’s conclusion that “oral submissions may be replaced by a written process to maintain the current case projections and public expectations” and that postponement would require “additional financial resources”.⁷⁷ In their view, postponing the Hearing would neither represent additional costs, as the Hearing requires identical resources regardless of when it is

⁷⁰ Co-Prosecutors’ Response, para. 3.

⁷¹ Co-Prosecutors’ Observations, paras 2, 4.

⁷² Co-Prosecutors’ Observations, paras 4-5.

⁷³ Co-Prosecutors’ Observations, paras 4, 6-7, 14(1)(2).

⁷⁴ Co-Prosecutors’ Observations, para. 7.

⁷⁵ Co-Prosecutors’ Observations, paras 4, 8-10, 14(3).

⁷⁶ Co-Prosecutors’ Observations, paras 11-12, 14(4)(5).

⁷⁷ Co-Prosecutors’ Observations, para. 13, referring to Administration’s Response, para. 4 and fn. 3.

conducted nor alter case projections as work on the appeal judgment can continue.⁷⁸ They add that a postponement would not impact public expectations, in light of the general length of the proceedings and the public awareness of the challenges posed by the pandemic.⁷⁹ Further, it would not create more work or delay than replacing it by written submissions, noting that the latter would require significant additional Defence staff resources and translation.⁸⁰

(iv) *The Defence*

32. The Defence submits that neither the Internal Rules, nor the Cambodian Criminal Code of Procedure provide for the possibility of a fully remote hearing.⁸¹ It also submits that the Co-Prosecutors and Lead Co-Lawyers' requests to increase the number of their participants present in the Courtroom and the possibility to rotate them should *not* be detrimental to KHIEU Samphân or jeopardise his presence in the Courtroom. The Defence suggests that if measures other than the ones provided for in the External Assessment were to be implemented, then they should primarily aim to enable KHIEU Samphân to be present in the courtroom for his Hearing.⁸² Emphasising KHIEU Samphân's right and desire to be present in the courtroom throughout the Hearing, the Defence requests that the Chamber order all necessary measures to enable his presence in the courtroom for the duration of the Hearing, or at the very least for his final declaration.⁸³ In the event where KHIEU Samphân's doctors (who the Defence notes were apparently not consulted for the establishment of the External Assessment) would recommend his presence in the courtroom for no more than 15 minutes, KHIEU Samphân will follow the Hearing from his pre-detention cell and will request his presence time in the courtroom to be dedicated to his final declaration.⁸⁴

33. With regard to the External Assessment's preventive measures, the Defence stresses the importance to scrupulously respect them, particularly by those who will be in physical contact with KHIEU Samphân.⁸⁵ The Defence however concurs with the Co-Prosecutors that the glass screen protections might render the wearing of face

⁷⁸ Co-Prosecutors' Observations, para. 13.

⁷⁹ Co-Prosecutors' Observations, para. 13.

⁸⁰ Co-Prosecutors' Observations, para. 13.

⁸¹ Defence's Observations on the Modalities, para. 6.

⁸² Defence's Observations on the Modalities, paras 11-19.

⁸³ Defence's Observations on the Modalities, paras 16, 31.

⁸⁴ Defence's Observations on the Modalities, para. 20.

⁸⁵ Defence's Observations on the Modalities, para. 26.

shield for speakers unnecessary.⁸⁶ It notes that the Hearing schedule shall take into account the time needed for adequate disinfection and ventilation of the courtroom.⁸⁷

34. The Defence suggests three additional measures. First, a daily rapid antigen test prior to entering the courtroom or at the very least when a person first enters the courtroom and another test for anyone present in the courtroom on the day of KHIEU Samphân's final declaration in the event where he could only be present in the courtroom during such declaration.⁸⁸ Secondly, that all present in the courtroom (or at the very least the most vulnerable persons, including KHIEU Samphân) wear a N95 mask, to be changed every 4 hours.⁸⁹ Third, that a transportation bubble to the Court per section be arranged by the Administration for all people who need to go to the courtroom.⁹⁰

35. The Defence agrees with the other Parties that a test-run including all remote participants should take place earlier than a week prior to the Hearing.⁹¹ With respect to the Hearing date, the Defence indicates that the International Co-Lawyer could be present in the courtroom if the Hearing is scheduled on the week of 16 August 2021, and could participate remotely if the Hearing takes place any other week in August, but anticipates "important calendar conflicts" after August.⁹² In any event, the Defence reiterates that Hearing dates and the Chamber's questions should be communicated to the Parties as early as possible.⁹³

36. Finally, the Defence opposes the Administration's suggestion to replace the hearing by written submissions.⁹⁴ In the Defence's view, it would: (i) contravene the compulsory nature of the Hearing;⁹⁵ (ii) violate KHIEU Samphân's right to speak before the judges and the public;⁹⁶ and (iii) require considerable additional time in light of the minimal resources afforded to the Defence, thereby hindering the prospect of meeting the timeline and the public's expectations.⁹⁷

⁸⁶ Defence's Observations on the Modalities, para. 26.

⁸⁷ Defence's Observations on the Modalities, para. 26.

⁸⁸ Defence's Observations on the Modalities, paras 22-23.

⁸⁹ Defence's Observations on the Modalities, para. 24.

⁹⁰ Defence's Observations on the Modalities, para. 25.

⁹¹ Defence's Observations on the Modalities, para. 28.

⁹² Defence's Observations on the Modalities, para. 29.

⁹³ Defence's Observations on the Modalities, para. 30.

⁹⁴ Defence's Observations on the Modalities, paras 6-9.

⁹⁵ Defence's Observations on the Modalities, para. 6, referring to Internal Rules, Rule 109-1 and CCCP, Articles 388-395, 433-434.

⁹⁶ Defence's Observations on the Modalities, para. 8.

⁹⁷ Defence's Observations on the Modalities, paras 8-9.

APPLICABLE LAW

37. The ECCC Law provides that the Court “shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims [...]”⁹⁸ It further provides that an accused shall have the following minimum guarantees:

- b. to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing;
- c. to be tried without delay,
- d. to be tried in their own presence and to defend himself in person or with the assistance of a counsel of their own choosing [...]⁹⁹

38. Rule 109 of the Internal Rules provides for the conduct of appeal hearings stating, *inter alia*, that:

- 1. Hearings of the Chamber shall be conducted in public. [...]
- 2. The Office of Administration shall ensure a public broadcast of the appeal hearings [...]
- 4. The co-rapporteurs shall read their report to the Chamber. The President shall then inform the Accused of his or her rights under Rule 21(1)(d) and conduct the hearing. The appellant may make a brief statement of the grounds of appeal. The other parties may make a brief reply. All the judges may ask any questions which they consider to be conducive to the determination of the appeal.
- 5. In all cases the Accused speaks last. The lawyers for the Accused shall be allowed to make a brief rebuttal presentation.

39. Rule 21 provides in relevant parts that:

- 1. The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement. In this respect:
 - a) ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties. [...]
 - c) The ECCC shall ensure that victims are kept informed and that their rights are respected throughout the proceedings; and

⁹⁸ ECCC Law, Article 33 new.

⁹⁹ ECCC Law, Article 35 new.

d) Every person suspected or prosecuted shall be [...] defended by a lawyer of his/her choice [...]

4. Proceedings before the ECCC shall be brought to a conclusion within a reasonable time.

40. Rule 23 states the purpose of Civil Party action before the ECCC is notably to “[p]articipate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution”.¹⁰⁰

41. Rule 12 *bis* provides, *inter alia*, that the Victims Support Section shall “assist and support Civil Party and complainants’ attendance in court proceedings”.¹⁰¹

42. Pursuant to Rule 9, the Administration shall be responsible for:

1. [...] support[ing] the Chambers, the Office of the Co-Prosecutors [...] in the performance of their functions and shall be responsible for their administration and servicing. [...]

2. [...] the security of the ECCC [...].

3. [...] provision of the equipment, facilities management, information technology, supplies, vehicles, transportation, and other physical and administrative requirements of the ECCC [...]

7. The Office of Administration shall be responsible for coordinating the training of ECCC personnel and supporting training of the ECCC judicial bodies, as needed.

43. Rule 12 provides, in relevant part, that the Administration shall provide “necessary administrative support to the [Lead Co-Lawyers] section and all Civil Party Lawyers”.

44. Rule 12 *ter* (1) provides that the “Lead Co-Lawyers shall ensure the effective organization of Civil Party representation during the trial stage and beyond, whilst balancing the rights of all parties and the need for an expeditious trial within the unique ECCC context”.

45. Finally, the Internal Rules provide that hearings shall be conducted in public and that the “Office of Administration shall ensure a public broadcast of the trial hearings, subject to any protective measures adopted [...]”.¹⁰²

DISCUSSION

¹⁰⁰ Internal Rules, Rule 23(1)(a).

¹⁰¹ Internal Rules, Rule 12 *bis* (1)(h).

¹⁰² Internal Rules, Rules 79(6) and 104 *bis*.

Reasons for the Decision on the Postponement Request

46. All Parties agreed on the importance and relevance of the questions raised in the Postponement Request and in particular that an in-person hearing is preferable to a remotely conducted process.¹⁰³ They also unanimously requested to be expeditiously informed, even informally, of the Chamber's decision on the Postponement Request, as well as to be provided with the Chamber's questions as soon as possible.¹⁰⁴ By 26 April 2021, the Chamber had received the Postponement Request, the Defence's Observations, a courtesy copy of the Co-Prosecutors' Response, and the position of the Administration that it is ready to support the timing and modality of the Hearing as set by the Chamber.

47. Cognisant that the Parties' preparatory plans for the then scheduled Hearing included imminent international travel as raised by the Defence, the Chamber informally informed the Parties that it had decided to cancel the Hearing scheduled for 17-21 May 2021, before formally notifying them that the Hearing was postponed due to the Covid-19 situation in Cambodia and that dates for the new hearing would follow in due course.¹⁰⁵ The Chamber hereby provides its fully written reasoned decision.

48. The original hearing dates scheduled for 17-21 May were set in January 2021, at a time when the Covid-19 pandemic situation was under control in Cambodia.¹⁰⁶ Over the next four months the situation in the country drastically deteriorated following a community outbreak on 20 February 2021.¹⁰⁷

49. In response, the Royal Government of Cambodia implemented several protective measures, including a rapid vaccine roll out, 14-day quarantine requirement upon arrival in Cambodia and the designation of "red zones" in Covid-19 hotspots

¹⁰³ Postponement Request, paras 22, 31-36, 50; Co-Prosecutors' Response, para. 3; Lead Co-Lawyers' Observations on the Modalities, paras 15-16, 50, 63-65; Co-Prosecutors' Observations on the Modalities, paras 3, 5, 14(2); Defence's Observations on the Modalities, paras 30-31.

¹⁰⁴ Co-Prosecutors' Response, para. 4; Lead Co-Lawyers' Observations on the Modalities, para. 68 (iii) and (iv); Defence's Observations, para. 11; Defence's Observations on the Modalities, paras 16, 19-20, 31.

¹⁰⁵ Notification with regard to appeal hearing in Case 002/02 pursuant to Internal Rule 108(3), 28 April 2021, F62.

¹⁰⁶ Notification of appeal hearing dates in Case 002/02 pursuant to Internal Rule 108(3), 22 January 2021, F58

¹⁰⁷ See e.g. The Diplomat, *Cambodia sees Covid 19 spike after Chinese nationals break quarantine*, 26 February 2021; Khmer Times, *Cambodia February 20 Community Incident Involving Covid-19 hotspots*, 21 February 2021; Al Jazeera, *UK Covid variant pushes Cambodia to brink of national tragedy*, 15 April 2021.

throughout Phnom Penh which were sealed off with barricades where residents were to remain in their homes and receive food aid packages distributed by the army. These preventive measures presented significant logistical challenges to organising the May Hearing, especially if the Parties' preferences for an in-person hearing were to be accommodated. The position of the red zones on the route from the city to the Court would have presented difficulty to personnel required for the installation and testing of IT systems for remote-participation to facilitate the presence of civil parties and for the Defence and KHIEU Samphân to communicate. In addition, remote working arrangements have been in place at the Court from 27 March 2020 to this date.¹⁰⁸

50. In reaching its decision to postpone the Hearing, the Chamber took into consideration the interests of justice, the integrity, fairness, and expeditiousness of the proceedings, and the Accused and the Parties' views on the issues and their possible effect on the right to expeditious proceedings.¹⁰⁹ It also considered the prevailing circumstances in Phnom Penh, notably public health concerns, safety and welfare of those facilitating and participating in the proceedings amidst the worsening Covid-19 pandemic situation in Cambodia, as well as the specific difficulties raised by the Parties which may adversely impact the presentation of their respective cases and interests. Among these, two were of particular concern for the Chamber.

51. First, the uncertainty surrounding the precise measures to ensure and accommodate the presence of civil parties at the Hearing. As provided by the Internal Rules, civil parties are integral to the proceedings and the Court shall ensure that their rights are respected.¹¹⁰ Pursuant to Rules 12 *bis* and *ter*, which entrust the Lead Co-Lawyers with organising the representation of civil parties at the proceedings, and in accordance with civil parties' procedural status as parties to the ECCC proceedings and their corresponding right to participate in such, it is the Chamber's duty to ensure that their rights are upheld to safeguard the overall integrity of the proceedings. To do so, while being fully cognisant that group gatherings are currently strictly limited by law and being mindful of the general public and the Hearing's participants safety, the Chamber considers it important that a certain number of civil parties be present at the Hearing to the extent possible. It also considers paramount that additional means such

¹⁰⁸ UNAKRT Broadcast, entitled "Alternate working arrangements in the context of Covid-19", 27 March 2020. See also UNAKRT Broadcast, entitled "Extension of Alternate Work Arrangements until and inclusive Sunday 14 March 2021" 8 April 2021; UNAKRT Broadcast, entitled "COVID-19 - Extension of Alternate Work Arrangements, until and inclusive Sunday 9 May 2021", 8 April 2021; UNAKRT Broadcast, entitled "COVID-19 - Extension of Alternate Work Arrangements, until and inclusive Sunday 6 June 2021", 7 May 2021; UNAKRT Broadcast, entitled "COVID-19 - Extension of Alternate Work Arrangements", 4 June 2021.

¹⁰⁹ ECCC Law, article 35 new (c); Internal Rules, Rules 12 *ter* (1), 21 (4).

¹¹⁰ Internal Rules, Rule 21(1)(c). See also Internal Rules, Rule 12 *bis*.

as video-link and/or outreach be facilitated by the Administration to enable maximum accessibility and participation to the civil parties.

52. Secondly, the Chamber considered the communication difficulties for KHIEU Samphân and his Co-Lawyers following the implementation of Covid-19 restrictions, which prevented counsel from travelling to the detention facility. In this regard, alerted by the Defence of the absence of telecommunication equipment in the detention facility, the Chamber ordered the installation of equipment enabling such communication on 3 May 2021.¹¹¹ While the Administration reported on the satisfactory installation and testing of the equipment on 5 May 2021,¹¹² it appears that KHIEU Samphân's Co-Lawyers effectively managed to communicate with KHIEU Samphân only days before the originally scheduled hearing. In effect, KHIEU Samphân and his Co-Lawyers were unable to communicate for several weeks preceding the scheduled Hearing. These communication difficulties rendered *de facto* untenable the prospect of maintaining the Hearing as scheduled.

53. Both of these issues, which are essential to the fairness and integrity of the proceedings, combined with the unprecedented Covid-19 pandemic situation in Cambodia and its consequences on the Parties, warranted the postponement of the Hearing. For the foregoing reasons, the Chamber granted the Postponement Request.

Considerations on the Modalities of the Hearing

54. Citing concerns regarding maintaining “the current case projections and public expectations”, the Administration proposed the filing of written submissions *in lieu* of oral arguments in circumstances where the Chamber considered that the Hearing schedule for May was not viable.¹¹³ All parties opposed such a proposal.¹¹⁴

55. The Chamber observes that the Internal Rules unequivocally foresee the holding of an appeal hearing in relation to appeals against the Trial Chamber's Judgment.¹¹⁵ It is only in the case of immediate appeals that the Internal Rules allow for their determination on the basis of written submissions.¹¹⁶ Aside from these

¹¹¹ Order to Allow UNARKT/ECCC ICT Personnel into the Detention Facility to Install Equipment, 3 May 2021, F63.

¹¹² Filed with the Chamber; Report Pursuant to F63 on the Installation of Equipment in the ECCC Detention Facility, 11 May 2021, F64.

¹¹³ Administration's Response, para. 4.

¹¹⁴ Co-Prosecutors' Observations on the Modalities, para. 13; Defence's Observations on the Modalities, paras 7-9; Lead Co-Lawyers' Observations on the Modalities, paras 61-62.

¹¹⁵ Internal Rules, Rule 109.

¹¹⁶ Internal Rules, Rule 109(1).

mandatory provisions, the Chamber is unconvinced that written submissions *in lieu* of oral submissions would advance the purpose of the Hearing; especially when considering the voluminous appeal briefs already filed to the Chamber totalling over 1,400 pages. The Chamber further considers that a postponement would not adversely affect the planned projections to complete the case. Either way, such a consideration is irrelevant when ensuring respect of Parties' rights and the integrity of the proceedings. The Chamber therefore rejects the Administration's proposal to replace the oral hearing by written submissions.

56. The Chamber notes that all Parties agree that in-person participation at the Hearing is highly desirable and preferable. However, the Chamber understands that there is great concern in the Administration that a full in-person Hearing cannot be safely conducted. The Supreme Court judges, when inspecting the Courtroom, noted the absence of windows on three sides of the room. The lack of cross ventilation due to the configuration of the courtroom is therefore a major issue. The fear is that the current air conditioning system may not be adequate to purify the air to the optimum extent, thereby insufficiently preventing the risk of aerosol spread of Covid-19.

57. Therefore, despite the implementation of the recommended risk-mitigating measures and adjustments to the courtroom, which would permit some in-person components, the Supreme Court Chamber considers that the presence in the courtroom should be limited to the Chamber. The Hearing should be conducted in the following hybrid manner in order to minimise the risk of Covid-19 infection: only the judges, greffiers, Chamber legal staff and essential staff as authorised by the President will be present in the courtroom for the Hearing and all Parties will engage with the Chamber through a remote platform.

58. To date, the Administration has been actively assisting in that, *inter alia*, it has acquired a digital infrastructure permitting remote participation to the Hearing; shared the External Assessment with the Parties and the Chamber; indicated that interpretation and transcription services will be ready for deployment subject to a 6-week notice; implemented the courtroom physical adjustments recommended in the External Assessment; integrated in the courtroom the digital infrastructure and "successfully tested [it] under simulated 'hearing' conditions" as well as offering "software training for remote participants in the week prior to any hearing date".¹¹⁷

¹¹⁷ Administration's Response, paras 7-9; CMS's Notice of Readiness.

59. However, as pointed out by the Lead Co-Lawyers, several specifics raised in the Postponement Request remain unresolved or have been insufficiently addressed in the Administration's Response, the External Assessment, or CMS's Notice of Readiness.¹¹⁸ These concerns as well as observations from the Defence and the Co-Prosecutors need to be addressed by the Administration.¹¹⁹

60. In addition, the Administration must organise the provision of training to the Parties and the Chamber on the digital software, following which a test-run shall be conducted with all participants at least 21 days prior to the commencement of the Hearing. The Chamber considers that these steps are paramount to ensure that the Hearing can take place meaningfully in the optimal conditions possible.

DISPOSITION

61. For the foregoing reasons, the Chamber:

GRANTS the Postponement Request;

ORDERS that the Hearing shall be held on 16 through 27 August 2021 in the following hybrid modalities:

- (i) the Hearing shall be fully conducted at the ECCC premises;
- (ii) only the Judges, Greffiers, Chamber's staff, and essential staff as authorised by the President, will be present in the courtroom;
- (iii) all the Parties shall participate remotely from their respective conference rooms at the ECCC premises;
- (iv) in the event travel to Cambodia is not possible, remote participation shall be made available;
- (v) the Accused shall participate remotely from the detention facility or the holding cell at the ECCC premises and communicate with his Counsel and/or the court; or, subject to the recommendation of the medical team, the Accused may sit with Counsel at their allocated ECCC conference room;

DIRECTS the Administration to:

- (i) facilitate the Hearing proceedings under these modalities in accordance with the COVID-19 protocol;

¹¹⁸ Lead Co-Lawyers' Observations on the Modalities, para. 55 (i)-(ix).

¹¹⁹ See Defence's Observations on the Modalities, paras 11, 15-16, 19-26, 31; Co-Prosecutors' Observations on the Modalities, paras 4-10, 12, 14.

- (ii) accommodate the presence of civil parties at the Hearing, in consultation with the Civil Party Lead Co-Lawyers;
- (iii) organise adequate training of all Hearing participants with the digital suite, and thereafter organise a satisfactory test-run with all the Parties, the Chamber, interpretation, IT and security staff, at least 21 days prior to the Hearing; and
- (iv) provide all necessary assistance to the Parties with preparation of the Hearing.

Phnom Penh, 10 June 2021

President of the Supreme Court Chamber



KONG Srim