

**BEFORE THE SUPREME COURT CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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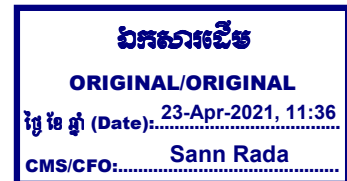
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**CIVIL PARTY LEAD CO-LAWYERS' REQUEST TO POSTPONE THE APPEAL
HEARING PLANNED FOR 17-21 MAY 2021**

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Before:

Supreme Court Chamber

Judge KONG Srim, President
Judge Chandra Nihal JAYASINGHE
Judge SOM Sereyvuth
Judge Florence Ndepele MWACHANDE-MUMBA
Judge MONG Monichariya
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1 INTRODUCTION

1.1 Legal basis

1. The Civil Party Lead Co-Lawyers (“Lead Co-Lawyers”) file these submissions pursuant to Internal Rule 108(6) to address concerns about the upcoming appeal hearing in light of the current situation in Cambodia and email exchanges concerning the modalities for the hearing.
2. The Supreme Court Chamber (“Chamber”) has acknowledged “the full range of participation rights available to civil parties under the 2007 [Cambodian] Code of Criminal Procedure and the Internal Rule Rules in the pre-trial, trial, and appeal phases of a case.”¹ This includes the right to be heard on matters affecting their rights and interests.² 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.

1.2 Procedural history

3. On 4 December 2020 the Parties were informed by email that the Chamber was intending to hold the appeal hearing week of 17 May 2021.³ On 22 January 2021, a memorandum was distributed informing the Parties “that the Supreme Court Chamber has decided to hold the appeal hearing in the appeals against the Trial Judgment in Case 002/02 from 17 May to 21 May 2021,”⁴ and that the Chamber would invite “observations on the tentative timetable for the hearings” in due course, with a scheduling order to follow.⁵
4. Beginning on 20 February 2021, Cambodia experienced a community outbreak of COVID-19, with Phnom Penh being especially affected. The Royal Government of Cambodia (“RGC”) has responded with a series of measures including restrictions on movements and gathering,⁶

¹ **F10/2** Decision on Civil Party Lead Co-Lawyers’ Request Relating to the Appeals in Case 002/01, 26 December 2014, para. 11.

² See for example **E301/9/1/1/3** Decision on KHIEU Samphân’s Immediate Appeal against the Trial Chamber’s Decision on Additional Severance of Case 002 and Scope of Case 002, 29 July 2014, para. 5.

³ Email from Senior Legal Officer of the Supreme Court Chamber entitled “Re: Appeal hearing in Case 002/02 – changed dates”, 4 December 2020 at 12:22pm. *Attachment 1*

⁴ **F58** Memorandum entitled Notification of appeal hearing dates in Case 002/02 pursuant to Internal Rule 108(3), 22 January 2021.

⁵ *Ibid.*

⁶ At the time of this writing, lockdown measures were imposed in Phnom Penh. See Khmer Times, [Phnom Penh and Takmao under lockdown from midnight – full details announced](#), 14 April 2021. *Attachment 2*

as well as initiating a mass vaccination campaign in which over one million people have already been vaccinated.⁷

5. On 26 February 2021, the Chamber issued its Invitation for Parties to File Observations on Timetable for Appeal Hearing in Case 002/02.⁸ The Chamber confirmed the 17-21 May 2021 hearing dates and informed the Parties that it would issue a scheduling order after the Parties file their observations on the timetable, which would include “specific questions on which the parties’ oral submissions will be expected to focus.”⁹ The Parties filed their submissions on 12 March 2021.¹⁰ The Lead Co-Lawyers responded to submissions from KHIEU Samphân on 18 March 2021.¹¹
6. On 22 March 2021, owing to the COVID-19 situation in Phnom Penh, the Parties were informed by email that “the Supreme Court Chamber is considering conducting the appeal hearing remotely, in part or fully” and that the Court Management Section was “exploring and preparing for different options to ensure that the hearing can go ahead as planned.”¹²
7. On 25 March 2021, the Lead Co-Lawyers responded by return email, stating

While CMS is considering options, it would be helpful for us if any assessment of risk and/or proposal on modalities for the hearing could include the possibility of civil party attendance (eg even if in limited numbers and only in the public gallery). Ordinarily both Civil Party Lawyers and some civil parties would be present. We have been fundraising in order to enable civil parties to attend if the covid situation permits, but of course with the knowledge that it may prove impossible. Guidance would be very much appreciated on what, if anything, could be done safely, as well as on what alternatives to physical attendance the Court could offer so that the hearing is accessible to civil parties.¹³

⁷ Khmer Times, [Cambodia successfully vaccinates one million people nationwide](#), 12 April 2021. *Attachment 3*

⁸ **F60** Invitation for Parties to File Observations on Timetable for Appeal Hearing in Case 002/02, 26 February 2021.

⁹ **F60** Invitation for Parties to File Observations on Timetable for Appeal Hearing in Case 002/02, 26 February 2021, p. 2.

¹⁰ **F60/1** *Observations de la Défense sur le calendrier des débats l’audience d’appel (002/02)*, 12 March 2021; **F60/2** Co-Prosecutors’ Observations on the Timetable for the Appeal Hearing in Case 002/02, 12 March 2021; **F60/3** Civil Party Lead Co-Lawyers’ Observations on the Proposed Timetable for the Case 002/02 Appeal Hearing, filed on 12 March 2021 and notified on 15 March 2021.

¹¹ **F60/1/1** Civil Party Lead Co-Lawyers’ Response to Khieu Samphân’s Observations on the Proposed Appeal Hearing Timetable, 18 March 2021.

¹² Email from the Senior Legal Officer of the Supreme Court Chamber to the Parties entitled “Appeal hearing in Case 002/02 – modalities”, 22 March 2021 at 9:54pm. *Attachment 4*

¹³ Email from the International Lead Co-Lawyer to the Senior Legal Officer regarding “Appeal hearing in Case 002/02 - modalities”, 25 March 2021 at 12:42pm. *Attachment 5*. Emails from one of the Lead Co-Lawyers are sent with the agreement with the other Lead Co-Lawyer, as required by Internal Rule 12 *ter* “4” which provides that “[a]ll actions

8. On 28 March 2021, the Senior Legal Officer indicated that he had shared the Parties' responses with the Chamber, and that further information would be conveyed, hopefully within 10 days.¹⁴
9. On 5 April 2021, the Senior Legal Officer emailed the Parties informing them that "due to the exceptional circumstances in Cambodia, the Supreme Court Chamber has decided to cancel the appeal hearing scheduled for 17-21 May. Further information will follow as soon as possible."¹⁵ The International Co-Prosecutor and the International Defence Counsel replied, particularly on the question of whether an appeal hearing is mandatory or not. The International Lead Co-Lawyer responded,

...As you can imagine, the questions being discussed are of great interest to the civil parties. We are therefore seeking views on these issues through the Civil Party Lawyers.

If the Supreme Court Chamber is considering whether or not to hold appeal hearings at all, we suggest that it may be of value to allow the parties an opportunity to submit written observations.¹⁶

10. On 12 April 2021, the Senior Legal Officer informed the Parties that "while the live appeal hearing has been cancelled due to the Covid 19 situation, the appeal hearing will be held remotely over the same time period commencing 17 May as originally planned." The email requested the parties to identify any anticipated difficulties or make special requests by 18 April 2021 and indicated that a scheduling order would be issued as soon as possible.¹⁷
11. A flurry of emails followed this email pertaining to some aspects of the possible modalities of a remote hearing, with questions asked by the International Co-Prosecutor and International Defence Counsel, some of which were responded to by the Senior Legal Officer or the Office of Administration ("OoA"). Later the same day, the Senior Legal Officer clarified that the Chamber was aiming to hold a "hybrid" hearing, in which some participants would attend in-

shall be taken jointly, except where power has been delegated to one of them, by a joint written decision, to accomplish such action individually."

¹⁴ Email from the Senior Legal Officer of the Supreme Court Chamber to the Parties regarding "Appeal hearing in Case 002/02 - modalities", 28 March 2021 at 7:00pm. *Attachment 6*

¹⁵ Email from the Senior Legal Officer of the Supreme Court Chamber to the Parties entitled "Appeal hearing in May CANCELLED", 5 April 2021 at 9:47pm. *Attachment 7*

¹⁶ Email from the International Lead Co-Lawyer to the Senior Legal Officer regarding "Appeal hearing in May CANCELLED", 8 April 2021 at 5:33pm. *Attachment 8*. Internal Rule 12 *ter* 3 provides that "[t]he Civil Party Lead Co-Lawyers shall first and foremost seek the views of the Civil Party lawyers and endeavour to reach consensus in order to coordinate representation of Civil Parties at trial."

¹⁷ Email from Senior Legal Officer of the Supreme Court Chamber to the Parties entitled "Appeal hearing – (re)scheduled for 17-21 May 2021", 12 April 2021 at 11:47am. *Attachment 9*

person, and others would attend remotely. The email indicated that the OoA was seeking outside expertise to guide the issue.¹⁸

12. Another exchange of emails followed, concerning issues including equipment, logistics, the speakers at the hearing, and support of the Court Management Section.
13. On 16 April 2021, the Lead Co-Lawyers sent their concerns and questions to the Chamber in an email which requested, *inter alia*, that the Chamber include proposed modalities for the hearing in its scheduling order, and that the hearing be postponed by two months, to July 2021, and requested leave to file the present submissions in one language, with a translation to follow. That email is attached as Annex A to the present filing.
14. Also on 16 April 2021, the Senior Legal Officer replied directing the Lead Co-Lawyers to file in two languages. He also indicated that the Chamber is not yet in a position to propose concrete modalities for the hearing because it is still waiting for an external assessment commissioned by the OoA.¹⁹
15. A courtesy copy of this filing was circulated to the Parties and the Chamber on 19 April 2021 in English only.

2 APPLICABLE LAW

16. Internal Rule 21 provides, in relevant part:

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...

¹⁸ Email from Senior Legal Officer of the Supreme Court Chamber to the Parties regarding “Appeal hearing – (re)scheduled for 17-21 May 2021”, 12 April 2021 at 10:15pm. *Attachment 10*

¹⁹ Email from Senior Legal Officer of the Supreme Court Chamber to the Parties regarding “Appeal hearing – (re)scheduled for 17-21 May 2021”, 16 April 2021 at 9:10pm. *Attachment 11*

[...]

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

17. Internal Rule 12 *bis* (h) provides that the Victims Support Section shall “[a]ssist and support Civil Party and complainants’ attendance in court proceedings.”

18. Internal Rule 79(6) provides that “[h]earings of the Chamber shall be conducted in public” and provides only one limitation on the participation of the parties:

Where the purpose of *in camera* proceedings could be defeated by the attendance of the parties, the Chamber may, by reasoned decision having consulted the parties, limit the participation of the parties to those essential to the proceedings and their necessary representatives.

19. The drafters of the Rules incorporated video-link participation into only two rules: in the context of live testimony, if it “would not be seriously prejudicial to, or inconsistent with defence rights”;²⁰ and in the context of trial management meetings, which “may be conducted with the participation of counsel via tele-conference or video-conference.”²¹ Internal Rule 81(5) provides for audio-visual participation of the Accused only for specified reasons and where “the interests of justice so require.”

20. Internal Rule 104 *bis* provides that absent “any specific provision, the rules that apply to the Trial Chamber shall, *mutatis mutandis*, also apply to the Supreme Court Chamber.”

21. Internal Rule 108(3) provides that “[t]he date of the appeal hearing shall be determined by the President of the Chamber, after having verified that the case file is complete. The Greffier of the Chamber shall notify all parties of the hearing date...”

3 SUBMISSIONS

22. By these submissions, the Lead Co-Lawyers request that it would be in the interests of justice to postpone the appeal hearing currently planned for 17-21 May 2021, by a period of at least two months, to July 2021. This is the course of action which would be most likely to enable (1) the presence of civil parties at the appeal hearing; (2) a safe and responsible in-person

²⁰ Internal Rule 26(1).

²¹ Internal Rule 79(8).

presence of hearing participants in the courtroom; and (3) full preparation of all requirements for remote participation in the hearing, in the event that it remains necessary for the hearing to be conducted in a “hybrid” form or entirely online. The Lead Co-Lawyers also make related requests concerning preparation for and conduct of the hearing.

3.1 The object and value of the appeal hearing

23. The Lead Co-Lawyers submit that there are three strong rationales for the holding of an appeal hearing in proceedings of this kind: (1) the hearing provides an opportunity for clarification of the contested issues; (2) it enhances the transparency, legitimacy and impact of the Court’s work; and (3) it enables engagement by the people who are parties to the proceedings.

(1) Clarification of the contested issues

24. The arguments on appeal have already been subject to extensive written briefs over a period of nearly one year. The Chamber therefore has considerable material before it. However, an oral hearing provides an opportunity for the parties to engage more directly and immediately with each other and with the Chamber.²² Areas of confusion are able to be clarified, and debate on specific issues can be carried out such that the position of the parties is clear, and any remaining questions from the judges can be addressed by all present.

25. Of course, the assumption that an oral hearing contributes value in this way is premised on the understanding that good and clear communication will be possible at that hearing.

(2) Public accessibility: transparency, legitimacy and impact

26. Holding an oral hearing, as opposed to using solely written materials, is also a means by which to make the hearing accessible to the general public. In this way it furthers the broader goals of public proceedings, namely furthering the transparency and accountability of the process.²³

²² **F30/4** Order Setting the Final Timetable for the Appeal Hearing and Informing the Parties of Issues to be Addressed, 5 November 2015, p. 3 (“the purpose of the appeal hearing is... primarily to present the parties with an opportunity to reply to the responses of the other parties and to answer questions of the Supreme Court Chamber”); **C11/54** Decision on Appeal against Provisional Detention Order of NUON Chea, 20 March 2008, para. 17 (“An adversarial hearing gives the Charged Person the opportunity to respond to the request of, and the arguments made by, the Co-Prosecutors.”).

²³ **A190/I/8** Decision on KHIEU Samphan’s Request for a Public Hearing, 4 November 2008, para. 8 (“... one of the primary bases for holding a public hearing is to allow public scrutiny of the fairness of the proceedings.”); ICTY *Prosecutor v Delalić et al.*, [Decision on the Motions by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed “B” through to “M”](#), 28 April 1997, para. 34 (quoting the European Court of Human Rights

It also furthers public information and outreach goals by ensuring that interested communities have a sense of the Court's work. The Lead Co-Lawyers consider that a smoothly-run public hearing contributes to the legitimacy of the Court by reassuring communities of the professionalism and fairness of proceedings.

27. However again, this value relies on certain assumptions. The hearing must be accessible to communities in a real sense. It must not only be available to them, but take a form which they are likely to be willing to watch. It must also take place smoothly and without significant mishap, otherwise legitimacy may be undermined, rather than strengthened.

(3) Engagement by the parties themselves

28. International criminal proceedings – particularly at the appeal stage – frequently involve a considerable amount of abstract argument about legal principles. It is important that the proceedings nonetheless reflect the human aspect of their subject. The proceedings concern specific human beings: most obviously the person accused of crimes; but also those affected by them. Hearings provide an opportunity for these persons to engage with the Court, with each other, and with the general public in a tangible way. The person accused is able to present his account; civil parties are able to see him before the court and to hear his account; and civil parties are able to view the proceedings and are seen by both the accused person and the public to be present.
29. The presence of parties in court proceedings is not a minor or dispensable matter. Courts (including this one) have ruled that the person accused (or convicted) may only be absent from a public hearing with due justification. The presence and visibility of the accused is not merely a right for him or her: it is also an obligation²⁴ that benefits the public and the victims²⁴, including civil parties.

in *Pretty & Ors v Italy* “[p]ublicity is seen as one guarantee of fairness of trial; it offers protection against arbitrary decisions and builds confidence by allowing the public to see justice administered”); ECHR *Werner v Austria*, [Judgment](#), 24 November 1997, para. 45 (“The Court reiterates that the holding of court hearings in public constitutes a fundamental principle enshrined in paragraph 1 of Article 6. This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention”). *Attachment 12*

²⁴ Internal Rule 81. See also **F1/4.1** Transcript (Appeal Hearing) 17 November 2015 p. 22 line 16 – p. 27 line 5 after 09.55.07 (and esp. before 10.02.14 and after 10.04.30).

30. In proceedings where victims are parties their presence at a hearing can also serve important purposes. It provides those present with acknowledgment and recognition. More broadly it reminds those following the hearing that victims are parties to the proceedings, and that the Court is also bound to consider their interests.²⁵ The practice of the ECCC demonstrates the importance of civil party presence. Approximately 10 civil parties attended each court hearing – with an estimated total of 1,635 civil parties having attended.²⁶ A total of around 65 civil parties sat in the courtroom on at least one day during the Case 002/01 appeal proceedings, and their names were read aloud in court during the announcement of the parties.²⁷ Indeed, while the texts do not explicitly create a right for civil parties attend, they imply that it is usual, with VSS mandated to secure the attendance of civil parties to court proceedings.²⁸

3.2 The relative benefits of in-person, remote and hybrid hearing models

31. The Lead Co-Lawyers submit that all three of the objectives of a hearing are likely to be best achieved where a hearing involves some in-person element.
32. A presence in the courtroom provides for better advocacy, with counsel able to read reactions from judges, and spontaneous two-way interaction between judges and counsel being possible. It also allows for team members to privately confer when necessary.

²⁵ Internal Rule 21(1).

²⁶ This number was provided by the VSS during the writing of the Closing Brief. Some civil parties may have attended proceedings more than once. The Lead Co-Lawyers further note that approximately 400 civil parties were not able to attend proceedings or forums owing to their age or health at that time, and that this number is now significantly higher.

²⁷ **F1/1.1** Transcript (Appeal Hearing) 2 July 2015, p. 1 lines 19-25 after 09.01.50 (“Mr. President, for today's proceedings, all Parties to this case are present. Both Accused: Nuon Chea and Khieu Samphan are present as well. We have participation of 10 civil parties, namely, Madam Yim Sovann, Madam Mom Sam Ourn, Mr. Meas Saran, Madam Or Ry, Madam Toeng Sokha, Mr. Aun Phally, Madam Sang Rath, Madam Chan Socheat, Mr. Yin Roum Doul and Madam Po Dina. Thank you, Mr. President.”). The Greffier continued to announce the names of civil parties in the courtroom with the other parties during the appeal proceedings. See **F1/2.1** Transcript (Appeal Hearing) 3 July 2015, p. 1 lines 10-15 before 08.59.06; **F1/3.1** Transcript (Appeal Hearing) 6 July 2015, p. 1 lines 13-20 after 09.15.12; **F1/5.1** Transcript (Appeal Hearing) 16 February 2016, p. 1 line 17 – p. 2 line 4 after 09.11.58; **F1/6.1** Transcript (Appeal Hearing) 17 February 2016, p. 2 lines 2-7 before 09.05.56; **F1/7.1** Transcript (Appeal Hearing) 18 February 2016, p. 1 line 22 – p. 2 line 1 after 09.07.01; **F1/8.1** Transcript (Appeal Judgment) 23 November 2016, p. 1 lines 12-23 before 09.10.53 (“THE GREFFIER: Mr. President, for today's proceedings on the final judgment delivery in Case 002, all parties are present and the two Accused are also present. We have the Co-Prosecutors and the Lead Co-Lawyers and all the Defence Counsel. We also have more than 100 civil parties who are attending the pronouncement. However, due to the limited seats available in the courtroom, we only have 10 civil parties who are selected to be present in the courtroom. They are Sut Ny, Sou Sotheavy, Chau Ny, Kim Hounn, Sophan Sovany, Yim Sovann, Neang Sakhan, Toeng Sokha, Seng Sivutha, and Yim Roudoul.”).

²⁸ Internal Rule 12 *bis* (h).

33. In-person hearings are also more accessible for public viewing by live-stream as they are more dynamic and easier to follow. Judges and the Parties are recognisable from their sections of the courtroom. Viewers have more to watch than simply faces on a videocall, and are able to attribute the symbolism of a courtroom in the process.
34. Significantly, an in-person hearing permits not only the presence, but also the *visibility* of KHIEU Samphân as well as that of civil parties.
35. While remote hearings have – through necessity – become common in some jurisdictions particularly affected by the COVID-19 pandemic, they are not without their drawbacks. The use of videoconferencing does not fully replicate the experience of interacting and communicating in person, owing to technical interruptions, lags, limited camera angles, diminished eye contact and poor access to of non-verbal cues.²⁹ It is also less likely to achieve goals concerned with public information and the reinforcing of the Court’s legitimacy, since it is more difficult through a remote hearing to convey the authority of the judges and to engage the interest of the public.³⁰
36. The Lead Co-Lawyers therefore submit that from every perspective it is preferable to hold a hearing which involves an in-person component. Despite this, they recognise the significant challenges which currently affect such a hearing and accept that it may be necessary for a hearing to be held which is either fully or partially remote. However, if that is the case, all steps must be taken to ensure that remote participation occurs smoothly, and that the hearing objectives identified above are nonetheless maximised to the extent possible.

3.3 The need for a postponement

37. Current circumstances mean that proceeding with the hearing as planned in mid-May would likely fail to ensure *any* of the three objectives of an appeal hearing as identified above. In the currently planned timeframe, in-person components are likely to be limited, unsafe and risk harmful public perceptions. Meanwhile, remote components are not yet well prepared,

²⁹ Anne Bowen Poulin, *Criminal Justice and Video Conferencing Technology: The Remote Defendant*, 78. *Tul. L. Rev.* 1089 (2003-2004), pp. 1106-1111; Joe Tomlinson, Jo Hynes, Emma Marshall and Jack Maxwell, [Judicial Review in the Administrative Court during the COVID-19 Pandemic](#), April 15, 2020, pp. 11-12. See also Fair Trials, [Safeguarding the right to a fair trial during the coronavirus pandemic: remote criminal justice proceedings](#), pp. 4, 6. *Attachments 13, 14, 15*

³⁰ See for example Emma Rowden and Anne Wallace, *Remote judging: the impact of video-links on the image and the role of the judge*, *International Journal of Law Context* (2018), pp. 514-520. *Attachment 16*

meaning that they are likely to pose risks to both the quality of communication and the reputation of the Court. The submissions below explain why this is, and why postponing the hearing for a short period would significantly increase the prospects of achieving the objectives identified above.

3.3.2 The current situation in Cambodia

38. In the first month of the 20 February 2021 outbreak, COVID-19 cases appeared to increase consistently but not exponentially. However, this changed in early April when cases were reported in garment factories and markets. On 9 April, 576 new COVID-19 cases were reported in Cambodia, with 544 of these in Phnom Penh.³¹ Between 9 April and 18 April, 3361 new COVID-19 cases were reported, 2828 of these in Phnom Penh.³² While these figures may appear low by international standards, the outbreak has drastically changed the situation in Cambodia, which before 20 February 2021 had experienced a total of 484 cases during the entire pandemic. Measures currently in place include a lockdown throughout Phnom Penh with roadblocks limiting movement. Prior to the lockdown a range of other measures had already been implemented, including a prohibition on gatherings of more than 20 people, school closures, a prohibition on travelling between provinces, and a curfew.³³ Local lockdowns of buildings with identified COVID-19 cases has been occurring for some time, as has mandatory isolation for contacts with positive cases. Stringent enforcement is occurring, with some highly publicised prosecutions of violators.³⁴ On 19 April “red zones” were announced: entry into these areas is highly restricted and within them residents may not leave their homes except for health reasons.³⁵

39. On 10 April 2021, the World Health Organisation representative to Cambodia stated,

We stand on the brink of a national tragedy because of COVID-19. Despite our best efforts, we are struggling to control the virus. New cases occur every day

³¹ Khmer Times, [Black Friday: Cambodia detects 576 new COVID-19 cases in one day](#), 9 April 2021. *Attachment 17*

³² These numbers are derived from the Ministry of Health’s daily press releases reported in various media outlets.

³³ See for example Sopheang Cheang, Associated Press, [Cambodia orders strict 2-week lockdown of Phnom Penh](#), 15 April 2021; Tith Kongnov, Khmer Times, [14-day curfew imposed across Phnom Penh: Strict action against curfew violators](#), 2 April 2021; Tith Kongnov, Khmer Times, [PM orders temporary ban on all gatherings, especially weddings](#), 16 March 2021; Taing Vida, Khmer Times, [Siem Reap and Phnom Penh schools face temporary closure amid COVID-19 pandemic](#), 14 March 2021; Khmer Times, [Gov’t imposes inter-provincial travel ban to stem the spread of COVID-19](#), 6 April 2021. *Attachments 18, 19, 20, 21, 22*

³⁴ Sen David, Khmer Times, [Courts prepared to try violators of measures to curb C-19](#), 17 April 2021. *Attachment 23*

³⁵ Khmer Times, [Phnom Penh Capital Hall declares “Red Zone” in three districts in Phnom Penh](#), 20 April 2021. *Attachment 23bis*

and we are racing against the virus. Unless we can stop the outbreak, Cambodia's health system is at high risk of being overwhelmed, which would have disastrous consequences.³⁶

40. In the short time since the Chamber's email of 12 April regarding a "hybrid" hearing, the situation in Cambodia – Phnom Penh especially – has changed dramatically. Severe lockdown measures in Phnom Penh and its surrounding areas were imposed on 15 April 2021, allowing residents to leave their homes only when necessary, such as for medical treatment or three times per week for food.³⁷ Prime Minister HUN Sen has been quoted as saying, "[w]e are facing an impending disaster and we will die unless we act responsibly and be united".³⁸ He has called for strict enforcement of the measures, with special courts already established to prosecute suspected violators.³⁹
41. The health care system is overwhelmed.⁴⁰
42. On 16 April 2021, the Governor of Phnom Penh City Hall announced that if the situation does not improve, lockdown measures (initially imposed until 28 April) would be extended.⁴¹

3.3.3 Risks involved with in-person attendance

43. The Lead Co-Lawyers understand that the OoA is commissioning an expert assessment which will address the question of risks involved in the appeal hearing and approaches to mitigating them. They also understand that this assessment is yet to be received. Despite this, the situation in Cambodia has become so stark in the past few days that some matters appear to be clear, even without expert assistance.

³⁶ News Release, World Health Organization (WHO) in Cambodia, [WHO warns of impending disaster, unless people act responsibly this Khmer New Year and beyond](#), 10 April 2021. *Attachment 24*

³⁷ Sopheang Cheang, Associated Press, [Cambodia orders strict 2-week lockdown of Phnom Penh](#), 15 April 2021. Travel for limited other purposes is permitted with proper documentation. Khmer Times, [English translation of Phnom Penh and Takhmao Lockdown order](#), 15 April 2021. *Attachments 18, 25*

³⁸ Sopheang Cheang, Associated Press, [Cambodia orders strict 2-week lockdown of Phnom Penh](#), 15 April 2021. *Attachment 18*

³⁹ Khmer Times, [Violators of measures to curb and prevent the spread of COVID-19 must be prosecuted without mercy, says PM](#), 16 April 2021. *Attachment 26*

⁴⁰ The Prime Minister is quoted as stating "[m]ore than 300 new cases have been detected as I talk, it is a horrible figure and that is making it impossible to find room for new arrivals of patients". See Khmer Times, [PM Hun Sen: "Lockdowns are for Saving Lives, not death"](#), 15 April 2021. COVID-19 treatment facilities were at capacity on 23 February 2021. See also, Mom Kunthear, Phnom Penh Post, [Covid-19 cases now beyond hospital capacity](#), 10 April 2021; Sun Narin, VOA Khmer, [COVID-19 Patients Left Without Hospital Beds as Officials Scramble to Set up Field Hospitals](#), 15 April 2021. *Attachments 27, 28, 29*

⁴¹ Khmer Times, [Phnom Penh residents face possibility of extension if lockdown measures of COVID-19 not reigned in](#), 16 April 2021. *Attachment 30*

44. There seems to be little doubt that risks to the health of participants would arise if a hearing with any in-person component was to be held now in Phnom Penh, given the state of the current outbreak. It is also likely that current regulations would prevent or limit such in-person participation unless special exemptions were issued. It also seems highly unlikely that by 17 May these circumstances will have materially changed. It is likely to take two to four weeks to assess whether the measures are working,⁴² and international experience demonstrates that a longer period of lockdown might be needed to bring an outbreak under control. Unless a dramatic change occurs in the next four weeks, there are several reasons why it seems inevitable that an in-person hearing in mid-May would be unsafe and ill-advised:
45. First, it is far from clear that an in-person hearing can be held without creating considerable risks of COVID-19 transmission. A full hearing would involve having considerably more than 20 persons in the courtroom, a confined space, for a considerable length of time.
46. Levels of risk might be reduced by limiting the number of persons present in the courtroom while others attend remotely. However, a hearing where speakers were present but not able to be supported by colleagues in the courtroom would create significant challenges for communication within legal teams. This approach would also bring into play the numerous concerns relating to preparedness for remote participation, which are detailed below.
47. Most importantly, if numbers in the courtroom must be limited it remains unclear to the Lead Co-Lawyers whether civil parties will be able to attend. No information has been provided yet to the Lead Co-Lawyers regarding this possibility, or the attendant risks and possible measures for mitigation. The Lead Co-Lawyers have worked together with the Victims Support Section to secure funding for civil party attendance, and are prepared to identify civil parties within Phnom Penh (to account for travel bans), including by reference to vaccination status. However, the Lead Co-Lawyer recognise that civil party attendance at the present time, at the peak of the outbreak and before second vaccinations have been given, would necessarily involve some risks. Nonetheless, they also consider that it would send a highly regrettable message to the public and to the civil parties themselves about their role in ECCC proceedings and their status as parties if every effort was not taken to secure their safe presence.

⁴² Given the incubation period of the virus and time required for testing.

48. Secondly, the Lead Co-Lawyers have serious concerns about public perceptions which would follow were the Court to proceed with an appeal hearing involving an in-person component at the height of the present outbreak. Postponing a hearing that could be conducted with greater safety in the near future demonstrates respect for the public health measures in place, and sets an example for the public. While court functions are essential services, in this instance they do not carry a similar level of urgency or necessity as those providing medical services or distributing food. To move forward in this context risks suggesting a degree of exceptionalism – that the rules do not apply. This is in marked contrast to the purpose of the Court, which is to establish and maintain a rules-based system. The Lead Co-Lawyers fear that proceeding with the hearing under the current circumstances sets a poor example and potentially undermines the very objectives of the Court.
49. Thirdly, applicable regulations and their enforcement through roadblocks are likely to hinder travel to and from the Court and present other logistical challenges. It is currently unclear to what extent exemptions may be obtained for Court personnel (not all of whom are UN officials), and equally unclear what obstacles may arise in practice, given roadblocks and the lack of usual transportation.⁴³ It is unclear whether any such exemptions would cover civil parties. Even if permissions are obtained to travel for the purpose of the hearing, this would not resolve the problem of individuals unexpectedly caught in “red zones”, local lockdowns or becoming required to isolate due to contact with a COVID-19 case or hot spot. Such cases have become significantly more common in recent weeks. In light of this fluid situation and unpredictable practical challenges, special arrangements would likely need to be made. The Lead Co-Lawyers are concerned that such special treatment may be seen negatively by the public, considering more pressing priorities currently facing the RGC.
50. Despite these anticipated obstacles to holding an in-person hearing in May, the Lead Co-Lawyers maintain the view that (for the reasons set out above in Section 3.1) the hearing would be far more valuable and effective if an in-person component is possible. The Lead Co-Lawyers respectfully submit that there are several reasons to believe that a delay of at least

⁴³ Buses which usually run between central Phnom Penh and the ECCC have been cancelled from 19 April 2021 onwards to prevent the spread of COVID-19.

two months would significantly increase the possibilities for safe and appropriate in-person attendance.

51. This is in part because a short postponement may reasonably mean that the peak of the current outbreak will have passed by the time the hearing is held, addressing concerns both about optics and risk levels.⁴⁴
52. However, and in any event, by July a considerable number of those who would be involved in an in-person hearing could be fully vaccinated. Vaccination of UNAKRT and ECCC personnel began in late March, and second vaccinations are currently projected to begin in late May.⁴⁵ By July it seems likely that most Court personnel involved in the hearing will have had the opportunity to be fully vaccinated and for those vaccinations to take effect. Likewise, the Lead Co-Lawyers note that Cambodians over 60 (a category including most of the civil parties, as well as KHIEU Samphân) were prioritised during the vaccination roll out on 23 March 2021.⁴⁶ By July it should therefore be possible to identify civil parties who are fully vaccinated. Finally, in addition to vaccination, other measures may be available to minimise the risks of transmission through an in-person hearing. At other international courts, such measures have included, for example: reduced session lengths and increased breaks; use of perspex barriers; use of masks; and testing of participants. Some of these measures could be implemented immediately. However, decisions on them should be taken through a considered process, transparently, and with input from the Parties where appropriate. That process will require time and is unlikely to be manageable on the current timeline of four weeks, particularly given that the OoA's external assessment has yet to be received. However it should be feasible by July. Moreover, by that time the cumulative value of these measures, vaccinations, *and* a reduced level of community transmission may provide far more reassurance regarding the safety of participants than is likely to be possible in May.

⁴⁴ The Lead Co-Lawyers note that the time required for a lockdown to bring an outbreak under control is variable internationally. Experience over the past year suggests that the virus may have a lower "R0" in Cambodia than in Europe or the Americas, possibly meaning that a shorter lockdown may be required than has been necessary in those locations. More importantly, significant progress is being made with respect to vaccinations, especially in Phnom Penh, which gives reason for optimism that the outbreak may be controlled by June.

⁴⁵ UNAKRT-Broadcast entitled COVID-19 – Update on Vaccine Safety and Home Care, 13 April 2021 at 6:42pm.

⁴⁶ Rhea Mae Soco, Khmer Times, [Health Ministry called for people 60 and over to get vaccinated](#), 5 March 2021; Khmer Times, [Elderly to receive AstraZeneca vaccinations in Phnom Penh tomorrow](#), 22 March 2021; Sen David, Khmer Times, [PM allocates additional 10,000 AstraZeneca doses for elderly in Phnom Penh](#), 28 March 2021. *Attachments 31, 32, 33*

53. The Lead Co-Lawyers therefore submit that postponing the hearing to at least July would serve several benefits in terms of maximising the possibility of in-person hearing attendance, by the judges and advocates, as well as by the civil parties.

3.3.4 Levels of preparedness for remote attendance

54. Although the Lead Co-Lawyers maintain that the objectives of an appeal hearing would best be served by a hearing with an in-person component, they nonetheless consider it essential that the Court is sufficiently prepared for remote attendance. Even if some in-person attendance is possible at a postponed hearing, it seems almost certain that a component of remote participation would be advisable in order to limit numbers in the courtroom. Moreover, some participants may be unable to attend in person, owing to travel or movement restrictions or the need to self-isolate. And ultimately, it remains possible that the current outbreak will continue to intensify such that in-person attendance remains impossible, even after a postponement.

55. It is therefore essential that the Court and participants are fully prepared for remote hearing attendance, and that if a hearing is undertaken in a fully remote manner, that steps are in place to maximise the value of the hearing in line with the three objectives identified above in Section 3.1. The Lead Co-Lawyers respectfully submit that the Court appears highly unlikely to have achieved that level of preparedness by mid-May.

56. As a preliminary issue, there may be a legal question about whether remote hearings are permitted under the Internal Rules. Internal Rule 79(8) permits counsel to appear by “tele-conference or video-conference” only for the purpose of trial management meetings; possibly implying that this is impermissible for other hearings. The Lead Co-Lawyers currently take no position on this question, but make the following submissions regarding the *practical* issues which would arise in respect of a remote hearing if no legal impediment exists.

57. The Lead Co-Lawyers note that, to date, the Parties have not received a proposal for the modalities of the hearing. Instead, they have been told in general terms of the intention for the hearing to be “hybrid”, and answers to a narrow set of specific questions have been provided (such as the name of the software platform which it is proposed to use). A large number of specifics therefore remain unknown. Some of these are set out in the email sent by the Lead Co-Lawyers to the Chamber on 16 April 2021, which is Annex A to these submissions.

58. Unresolved questions include: 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;⁴⁷ and the issuance of rules and guidelines for the conduct hearing. The Lead Co-Lawyers therefore have serious concerns about the numerous issues which remain uncertain, and on which the Parties have not had a meaningful opportunity to be heard, even though the hearing is planned to begin in only 4 weeks.
59. A failure to address all of these issues sufficiently has the potential to defeat key objectives of the hearing. Basic technological problems such as poor connectivity can obviously result in a lack of communication between hearing participants. However poor communication can also occur for less obvious reasons, such as a platform set up in such a way that speakers cannot read non-verbal cues from each other, or problems in interpretation which go unidentified because of the lack of live transcript. In a hearing where speakers will use three different languages, addressing all these issues is particularly important.
60. Inadequate readiness for remote hearings may not only of inhibit communication, but could also render the hearing less accessible and meaningful to the public. Consideration must be given to how the hearing can be made understandable to viewers if it appears simply as faces on a screen. Planning must also take account of the need to avoid technological mishaps that could cause embarrassment or be delegitimizing to the institution.⁴⁸
61. Experience from other jurisdictions indicates that remote hearings can be held with some level of success, but that time and the preparation of clear protocols is required. The Lead Co-Lawyers are aware of three appeal hearings in international criminal jurisdictions which have

⁴⁷ The Lead Co-Lawyers note that as Cambodia has had a different experience with the pandemic over the course of the past year as compared with Europe or the Americas, there has not already been a widespread transition to virtual or remote hearings. Some training will be required for all users to become comfortable with its use.

⁴⁸ Numerous such problems have occurred in remote court hearings during the pandemic. Some have resulted simply from an inability for parties to maintain sufficient internet connection: see for example, [R v Macdonald, Obeid and Obeid](#) [2020] NSWSC 382. Others have involved parties or judges being inadvertently overheard in sensitive private conversation: see for example [C \(A Child\)](#) [2020] EWCA Civ 987 (24 July 2020), paras 7-9; Joe Tomlinson, Jo Hynes, Emma Marshall and Jack Maxwell, [Judicial Review in the Administrative Court during the COVID-19 Pandemic](#), April 15, 2020, p. 12. Others have been less substantive but nonetheless potentially embarrassing: BBC World News, [US Supreme Court hears toilet flush during oral arguments - a first](#), 7 May 2020 *Attachments* 34, 35, 14, 36

taken place during the pandemic – two at the International Criminal Court (ICC) and one at the Residual Mechanism for International Tribunals (MICT). The ICC experience is particularly instructive.⁴⁹ In both the *Gbagbo and Blé Goudé* and *Ntaganda* cases, hearings had to be postponed because initial efforts to prepare for remote participation were more complex than anticipated.⁵⁰ In both instances more time had been allowed than what remains before the proposed hearing dates in the present case; nonetheless it proved inadequate.

62. The Lead Co-Lawyers also note that ICC experience also demonstrates that best practice requires the development of clear pre-determined modalities for remote hearings. In both cases at the ICC the Appeals Chamber required this to be done through a process of input from the parties, requiring that the Registry develop options to put to the parties for their views.⁵¹ The Lead Co-Lawyers consider that a similar process should be adopted here, enabling the Parties

⁴⁹ Delays in the appeal proceedings in the *Mladic* case at the MICT were compounded by health concerns unrelated to the pandemic. See MICT *Mladic v. Prosecutor*, [Decision on Defence Submissions](#), 14 August 2020.

⁵⁰ See, for example, ICC *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Decision vacating the hearing before the Appeals Chamber](#), ICC-02/11-01/15-1352, 22 May 2020, para. 11 (“As to the timing of this hearing, for the following reasons, the Appeals Chamber has decided to postpone the hearing; such postponement already having been communicated informally to the parties. In the Appeals Chamber’s Decision of 30 April 2020, when it scheduled this hearing, the Appeals Chamber ordered the Registrar ‘to liaise with the parties and the victims as to any technical parameters with respect to the form of the hearing.’ The Registry has made great strides in exploring the possibilities for this hearing, liaising with the Appeals Chamber, the parties and the OPCV, as well as internally with the various relevant sections of the Registry. It has become clear, however, that further time would allow for outstanding technical preparations for this hearing to be finalised. In addition, on 15 May 2020, the Court decided to partially open the headquarters premises as of 1 June 2020. Taking into account all of these circumstances, the Appeals Chamber considers it reasonable to postpone the Appeals Chamber’s hearing in this appeal and is exploring with the Registry the possibility of holding the hearing on 10-12 June 2020, dates which will be confirmed in due course. The parties and the OPCV are requested to cooperate to the extent possible with the Registry to ensure that preparations for the hearing can be completed.”). The hearing had to be rescheduled again. See ICC *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Decision rescheduling the hearing before the Appeals Chamber](#), ICC-02/11-01/15-1359, 17 June 2020, paras 1, 2, 9, 10, 17-19, 21 (“In light of the above, and after having been informed by the Registry as to the current state of technical preparation for the hearing, the Appeals Chamber considers that holding a partially virtual hearing on 22-24 June 2020, with the arrangements put in place by the Registry, will not affect the rights of Mr Gbagbo or the fairness of the proceedings, as argued by counsel for Mr Gbagbo in his request. It therefore rejects Mr Gbagbo’s Request for Postponement and confirms that the hearing will take place from 22-24 June 2020, by way of a partially virtual hearing. However, the Registrar is ordered to continue to liaise with the parties and the OPCV with a view to addressing any outstanding questions, and identifying and finalising any technical parameters to facilitate the hearing.”), 23 (“The Registry is ordered to draw up, in consultation with the Appeals Chamber, a protocol for the conduct of the partially virtual hearing in this case, which will be disseminated to the parties and the OPCV prior to the hearing.”). In the case of *The Prosecutor v. Bosco Ntaganda*, see also: [Scheduling order for a hearing before the Appeals Chamber](#), ICC-01/04-02/06-2486, 9 March 2020; [Order regarding the hearing scheduled for 29 June – 1 July 2020](#), ICC-01/04-02/06-2542, 5 June 2020; [Second order scheduling a hearing](#), ICC-01/04-02/06- 2568, 20 August 2020; [Directions on the conduct of the hearing](#), ICC-01/04-02/06-2542, 14 September 2020.

⁵¹ See ICC *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Decision vacating the hearing before the Appeals Chamber](#), ICC-02/11-01/15-1352, 22 May 2020, para. 11 and [Decision rescheduling the hearing before the Appeals Chamber](#), ICC-02/11-01/15-1359, 17 June 2020, paras 21, 23.

to be meaningfully heard on proposals for the conduct of remote hearings. A concrete proposal should be made by the OoA, in response to which submissions can be made which are not based on mere speculation.

63. It is also imperative that guidelines be issued by the Chamber well in advance of the hearing so that all participants can familiarise themselves with the procedures adopted and sufficient testing and rehearsal can be carried out.
64. The Lead Co-Lawyers consider it to be almost inconceivable that this process can be carried out in the time remaining before 17 May. However, an additional period of at least two months should allow all necessary steps to be taken.

4 RELIEF SOUGHT

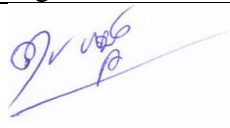
65. In light of all the considerations above, the Lead Co-Lawyers request the Chamber to postpone the planned appeal hearing, so that it takes place in July 2021 or soon thereafter, and to make associated orders for preparation of the hearing before that time.
66. This is the last substantive hearing in a case which is of national and international importance and great personal significance to civil parties. It is in the interest of the Civil Parties and the Cambodian public that the appeal hearings are properly planned and well-executed, and that all possible steps are taken to achieve the ultimate objectives of the hearing.
67. The Lead Co-Lawyers note the importance of expedition. They have themselves frequently insisted upon the need to avoid unnecessary delays in this case. Nonetheless the Court is now faced with a situation unprecedented during its mandate. Continuing with the hearing in May would require the Court to choose between significantly diminishing the value of the appeal hearing by holding it largely remotely; or continuing with an in-person event which would risk the health and safety of the participants, while simultaneously undermining the RGC's wider public health messages. Given this choice, the Lead Co-Lawyers see it as inevitable that the appeal hearing will be conducted largely by remote means, and without adequate preparation – potentially causing last minute delays and postponements, miscommunications, or embarrassing technological mishaps. The hearing will likely lose much of its intended value to the Chamber, parties, the public and the civil parties.

68. Conversely, by postponing for at least two months, there is a reasonable likelihood that in-person participation could safely occur. However, adequate time would also have been taken to properly establish modalities for any remote component which is necessary.
69. Case 002 was initiated on 18 July 2007,⁵² almost 14 years ago. There are many (civil parties among them) who consider that it has already taken too long. However, within the context of the full duration of the case, an additional period of around two months is not a significant delay in light of the current circumstances. The proportionality of a delay must be assessed in the light of what it would achieve: in this case enabling the Court to hold a meaningful appeal hearing which would otherwise be precluded by risks to life and health.
70. If the hearing is postponed, time must nonetheless be used efficiently to ensure full preparedness. A process for developing guidelines for the hearing must be begun immediately, based on a concrete proposal on which the parties can give input. This should be undertaken in a way which balances the need for expedition with that of transparency and the rights and interests of all the parties. If it is deemed appropriate to solicit input by email, those exchanges should later be made publicly available in two languages. Any external expert input obtained by the OoA should be shared with the Parties so as to better inform the exchange.
71. Finally, the Lead Co-Lawyers request the Chamber to direct the OoA to take all steps necessary to facilitate the presence at the appeal hearing of civil parties, in recognition of their status as parties to these proceedings.
72. The Lead Co-Lawyers therefore request that the Chamber:
- (i) postpone the appeal hearing to at least July 2021;
 - (ii) endeavour to hold the hearing in-person to the extent possible, with the option to transition to a partial or fully remote hearing if necessary;
 - (iii) direct the OoA to share any expert assessment it obtains with the Parties;
 - (iv) direct the OoA to take all steps possible to enable the presence of civil parties at the hearing, and to keep the Lead Co-Lawyers informed on these matters; and

⁵² **E465** Case 002/02 Judgement, 16 November 2018 (reasons notified on 28 March 2019), para. 2.

- (v) direct the OoA to distribute a proposal regarding the modalities and minimum logistical requirements for remote hearing participation and solicit observations from the parties before issuing a decision on modalities.

Respectfully submitted,

Date	Name	Place	Signature
23 April 2021	PICH ANG National Lead Co-Lawyer	Phnom Penh	
	Megan HIRST International Lead Co-Lawyer	Phnom Penh	