

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

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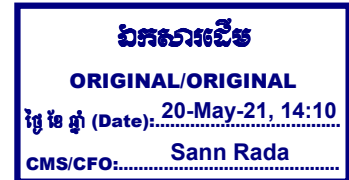
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**CIVIL PARTY LEAD CO-LAWYERS' OBSERVATIONS ON HEARING MODALITIES
AND RESPONSE TO OBSERVATIONS FROM THE OCP**

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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 and overview

1. The Civil Party Lead Co-Lawyers (“Lead Co-Lawyers”) file these submissions pursuant to an email request received from the Supreme Court Chamber (“Chamber”) on 2 May 2021.¹
2. The Lead Co-Lawyers submit that the material filed to date by the Office of Administration (“OA”) does not provide a sufficiently reliable or detailed basis for determining modalities such as to enable meaningful observations from the Parties or a decision from the Chamber. The Chamber must first be properly equipped with expert guidance and an OA proposal on remote modalities. Three potential hearing modalities are dealt with in these submissions: (i) in-person participation; (ii) remote hearing participation; and (iii) written submissions instead of a hearing.
3. Regarding options for safe **in-court proceedings**, a properly conducted expert opinion should be sought, including specific independent recommendations including in respect of (i) measures to minimize the risk of airborne transmission; (ii) the impact of participant vaccination status; (iii) possibilities for the use of rapid testing; and (iv) options for safe civil party attendance or remote viewing.
4. Regarding **remote hearing participation**, specific modalities should be proposed by the OA which address the numerous questions already posed to date by the Lead Co-Lawyers which remain unanswered.² Opportunities for observations from the Parties should be provided once these appropriate proposals have been presented.
5. Finally, regarding the use of **written submissions**, the Lead Co-Lawyers agree with the observations of the OCP³ but make limited additional observations concerning the possibility of written submissions as a partial replacement for oral submissions.

¹ Email from Senior Legal Officer of the Supreme Court Chamber to the Parties entitled “Prosecution observations to be formally filed”, 2 May 2021 at 9:43am. *Attachment 1*

² See **F61.2** Civil Party Lead Co-Lawyers Request for Postponement, Annex A.

³ **F61/3/1** 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, dated 4 May 2021 and notified 5 May 2021, para. 13.

1.2 Procedural history

6. On 23 April 2021, the Lead Co-Lawyers filed their Civil Party Lead Co-Lawyers' Request to Postpone the Appeal Hearing Planned for 17-21 May 2021 ("Postponement Request"). That document contained a detailed procedural history which is adopted here.⁴ The Postponement Request sought orders from the Chamber to:
- (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 [OA] to share any expert assessment it obtains with the Parties;
 - (iv) direct the [OA] 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
 - (v) direct the [OA] 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.⁵
7. Pursuant to requests from the Chamber for responses (even informally) within shortened timeframes,⁶ responses from the Defence and OCP were provided informally on 22 and 24 April respectively, and notified formally on 25 and 27 April.⁷
8. On 28 April 2021, the Chamber issued a memo postponing the appeal hearing and indicating that new dates would be set in due course.⁸

⁴ **F61** Civil Party Lead Co-Lawyers' Request to Postpone the Appeal Hearing Planned for 17-21 May 2021, 23 April 2021, paras 3-15.

⁵ **F61** Civil Party Lead Co-Lawyers' Request to Postpone the Appeal Hearing Planned for 17-21 May 2021, 23 April 2021, para. 72.

⁶ Email from the Senior Legal Officer of the Supreme Court Chamber to the Parties regarding "List of speakers (appeal hearing)", 19 April 2021 at 5:42pm; Email from the Senior Legal Officer of the Supreme Court Chamber to the Parties regarding "List of speakers (appeal hearing)", 23 April 2021 at 10:08am; Email from the Senior Legal Officer of the Supreme Court Chamber to the Parties regarding "List of speakers (appeal hearing)", 23 April 2021 at 3:54pm. *Attachments 2, 3, 4*

⁷ **F61/1** *Observations de la Défense suite à la demande des Parties Civiles de reporter l'audience d'appel*, filed on Friday, 23 April 2021 and notified on Sunday, 25 April 2021 (courtesy copies were distributed by email to the Parties and the Chamber on 22 and 23 April 2021, in French and Khmer respectively); **F61/2** 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 (a courtesy copy was distributed by email to the Parties and the Chamber on Saturday, 24 April 2021).

⁸ **F62** Interoffice Memorandum from Senior Legal Officer and Greffier of the Supreme Court Chamber to the Parties to the Appeals in Case 002/02 entitled "Notification with regard to appeal hearing in Case 002/02 pursuant to Internal Rule 108(3)", 28 April 2021.

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9. Also on 28 April, the OA filed its response to the Postponement Request (“OA Response”),⁹ which annexed, *inter alia*, a document from the International Organization for Migration (“IOM”) titled “Covid-19 preventive measures and protocols” (“IOM Document”).¹⁰
10. On 1 May 2021, the OCP informed the Chamber and Parties that it would be filing observations on the OA Response.¹¹ On 2 May, by reply email, the Chamber requested that the Defence and Lead Co-Lawyers also file observations.¹² The OCP Observations were filed on 4 May and notified to the Parties on 5 May 2021.
11. A decision on the remaining relief sought in the Postponement Request has not yet been issued.
12. A courtesy copy of this filing was circulated to the Parties and the Chamber on 10 May 2021 in English only, pending translation to Khmer for filing.
13. On 17 May, the Parties and Chamber were notified of a memo from the OA’s Court Management Section (“CMS”), dated 14 May 2021, with the subject “CMS’s notice of readiness for appeal hearings in case 002/02”.¹³ It was accompanied by photographs and a diagram of courtroom modifications, as well as videos of a hearing simulation conducted by CMS.

2 OBSERVATIONS

14. The Lead Co-Lawyers will make submissions in turn the on modalities relating to (i) in-court participation; (ii) remote participation; and (iii) written submissions.

⁹ **F61/3** Office of Administration’s Response to the Civil Party Lead Co-Lawyers’ Request to Postpone the Appeal Hearing Planned for 17-21 May 2021, 28 April 2021. A general description of the OA’s position was communicated to the Chamber and the Parties by email on Thursday, 22 April 2021 at 10:42am and Friday, 23 April 2021 at 3:13pm. *Attachment 5*

¹⁰ **F61/3.4** Office of Administration’s Response to the Civil Party Lead Co-Lawyers’ Request to Postpone the Appeal Hearing Planned for 17-21 May 2021, Annex C: Covid-19 preventive measures and protocols.

¹¹ Email from the International Co-Prosecutor to the Senior Legal Officer and the Parties entitled “Prosecution observations to be formally filed”, 1 May 2021 at 9:08am. *Attachment 6*

¹² **F61/3/1** 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.

¹³ **F64.1** Interoffice Memorandum from Chief of CMS to the Chamber entitled “CMS’s notice of readiness for appeal hearings in case 002/02”, 14 May 2021.

2.2 Observations regarding in-person participation

15. The Lead Co-Lawyers reiterate their strong preference for in-person hearing participation if this can be done safely.¹⁴ However they remain gravely concerned about the risks involved in undertaking in-person hearings without risk-mitigation measures in place which are based on proper expert advice. The death of an accused person soon after recent MICT hearings in Arusha¹⁵ highlights the gravity of the matters under discussion. It also suggests that the measures adopted by other international tribunals cannot be assumed to represent good practice. The Lead Co-Lawyers emphasise their belief that it should be possible to hold the hearing with some level of in person-attendance, however this must be based on proper advice.
16. The Lead Co-Lawyers therefore implore the Chamber to oversee the establishment of protocols for an in-person hearing which are based on genuine scientific expertise and best practice. For the reasons elaborated below, the Lead Co-Lawyers submit that the Chamber does not currently have the benefit of advice of this nature. An expert report should be sought from a qualified source which addresses all relevant issues and explains its reasoning.

2.2.2 *The total absence of recommendations regarding civil party attendance*

17. As the Lead Co-Lawyers have previously stated,¹⁶ civil party attendance at hearings is an important recognition and implementation of their status as parties. It has been the consistent practice throughout this Court's work for civil parties to be present in the courtroom.¹⁷ While

¹⁴ **F61** Civil Party Lead Co-Lawyers' Request to Postpone the Appeal Hearing Planned for 17-21 May 2021, 23 April 2021, paras 31-36 and paras 23-30.

¹⁵ See Confidential Annex A; MICT *Prosecutor v Maximilien Turinabo et al.*, MICT-18-116-T, Decision Terminating Proceedings against Maximilien Turinabo, 19 April 2021, p. 2 (“R[ecalling] that Mr. Turinabo fell seriously ill during the course of the Defence case and was medically evacuated by the Mechanism to Nairobi, Republic of Kenya, on 24 March 2021 where he was hospitalized”), p. 3 (“N[oting] that Counsel for Mr. Turinabo and the Registrar, based on reports received from the Medical Officer at the Arusha Branch of the Mechanism, informed me on Sunday, 18 April 2021 that Mr. Turinabo passed away that morning”). See also *Prosecutor v Maximilien Turinabo et al.*, MICT-18-116-T, Transcript, 30 March 2021 p. 1 line 4 – p. 2 line 4; Transcript, 1 April 2021, p. 2 line 25 – p. 9 line 10; Transcript 7 April 2021, p. 1 line 4 – p. 2 line 9 (“JUDGE JOENSEN: Good morning. Today we will have the presentation of Mr. Munyeshuli's Defence and testimony from him. Before we begin, I was informed by the Registrar last night that the Registry will be covering Mr. Turinabo's reasonable medical expenses while he remains hospitalised in Nairobi, Kenya. I am grateful for this decision. It also gives recognition, in my view, to the Mechanism's responsibilities to Mr. Turinabo, who is an indigent defendant and not a voluntary participant in this trial, and that he fell seriously ill while in Arusha exercising his fundamental right to be tried in his presence.”). The Lead Co-Lawyers note that a photo of these proceedings is contained in **F61/3/1.1.1** Annex A: Photos from the International Criminal Court (ICC), International Court of Justice (ICJ), and UN International Residual Mechanism for Criminal Tribunals, 4 May 2021, p. 5. *Attachments 7, 8, 9, 10*

¹⁶ **F61** Civil Party Lead Co-Lawyers' Request to Postpone the Appeal Hearing Planned for 17-21 May 2021, 23 April 2021, paras 28-30, 34.

¹⁷ *Ibid.*, para. 30.

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current circumstances may be extreme enough to justify modifications to this practice, this should not be done without proper consideration, based on relevant information.

18. Accordingly, the Lead Co-Lawyers have requested this issue to be taken into account in planning for the hearing. The question of civil party attendance has been discussed in informal meetings with the OA and in the quarterly resource requests which are required by UNAKRT from the International Lead Co-Lawyer. On 25 March, the need for this matter to be taken into account when assessing the risks and modalities of the appeal hearing was expressly raised in an email from the Lead Co-Lawyers to the Chamber.¹⁸
19. Regrettably, the IOM Document gives no consideration to civil party attendance. As far as the Lead Co-Lawyers are aware, no other guidance has been sought to address the numerous questions relevant to civil party attendance, such as: how many civil parties could safely attend the hearing, in which location, how they should be identified (for example from Phnom Penh only, or fully vaccinated persons only), or how they can safely be transported to the hearing. CMS's memo indicating readiness for the hearing to proceed makes no mention of facilities for civil parties.¹⁹ The accompanying photographs of courtroom modifications, shared on 17 May 2021, show that seats usually reserved for civil parties have been removed. The Lead Co-Lawyers have received no information from any other part of the OA on this subject.

2.2.3 Insufficiency of the IOM Document

20. Even leaving aside the fact that it does not address civil party attendance, the Lead Co-Lawyers consider that the IOM Document falls far short of providing a sufficient basis for decisions on the modalities of in-person hearing attendance.²⁰ It does not constitute an expert assessment and exhibits several critical flaws.

¹⁸ 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 11*

¹⁹ **F64.1** Interoffice Memorandum from Chief of CMS to the Chamber entitled "CMS's notice of readiness for appeal hearings in case 002/02", 14 May 2021.

²⁰ The Lead Co-Lawyers note that the courtroom adaptations which CMS informed the Chamber and Parties of on 17 May 2021 are based on the IOM Document. See **F64.1** Interoffice Memorandum from Chief of CMS to the Chamber entitled "CMS's notice of readiness for appeal hearings in case 002/02", 14 May 2021, paras 2, 4.

2.2.3.2 Expertise

21. As the OA itself rightly intimates,²¹ matters relating to COVID-19 may require expert advice. The Lead Co-Lawyers respectfully submit that such expertise is required on questions relating to COVID-19 risk-mitigation measures in the courtroom. Recommending such measures requires an understanding of how COVID-19 is transmitted, and therefore how transmission can be minimised in a given environment. These are matters which are the subject of intense research and therefore evolving understandings in the scientific community, as the submissions below demonstrate.
22. However, the IOM Document is in no sense an expert report. It does not demonstrate any of the hallmarks of an “expert” report, which are also the features which make an expert report useful and reliable, and are the basis on which it is able to be assessed by judges. Most significantly:
- (i) The IOM Document does not indicate that its signatories have expertise in Infection Prevention and Control (“IPC”) or a related field (such as epidemiology, virology or infectious disease control). No information is provided about their IPC qualifications and experience. The only experience mentioned relates to tele-monitoring of UN personnel in quarantine or hospital, and consultations regarding vaccinations, rather than IPC work.
 - (ii) The IOM Document provides no information about the instructions given to its signatories by the OA. The reader cannot ascertain what the task was. It is not clear whether the IOM were asked to advise on risk at all. At one point, the IOM Document states that its additional recommendations are intended “in order to proceed with the court hearing process smoothly”.²² Moreover it is also unknown which material information was provided for the purpose of the assessment. For example, the report makes no mention of any information used regarding the dimensions of the courtroom, the ventilation system in use, or the vaccination status of participants (other than that of KHIEU Samphân).

²¹ **F61/3** Office of Administration’s Response to the Civil Party Lead Co-Lawyers’ Request to Postpone the Appeal Hearing Planned for 17-21 May 2021, 28 April 2021, para. 3.

²² **F61/3.4** Annex C: Covid-19 preventive measures and protocols, ERN (En) 01668662.

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- (iii) The IOM Document makes no mention of which assumptions, sources, tools and guidelines were used for its recommendations. These factors are particularly important in the COVID-19 context because scientific knowledge and official guidance are evolving rapidly, creating a risk of reliance on outdated sources. No underlying principles are referred to, or reasoning given for the recommendations which are made. For example, it is recommended that numbers in the courtroom and gallery are limited to 30 and 50 persons respectively, but no explanation is given as to how those numbers were derived, or how risk levels would change if those numbers were adjusted.
23. Without these key components a reader cannot assess the usefulness of the recommendations contained in the report. That is particularly the case given that some of those recommendations appear – even to a lay person – to be problematic (as discussed below). Such recommendations from an expert should be explained and justified by reference to reasoning and sources.
24. The Lead Co-Lawyers recognise that the IOM Document does not purport to be a formal “expert report”.²³ Although the Lead Co-Lawyers expected that the OA was commissioning an assessment from experts (an expectation which appears to have been shared by the Chamber²⁴) the OA Response does not use the term “expert” in connection with the IOM Document, or the IOM representatives who produced it. There is certainly no suggestion that the IOM Document purports to comply with the standards usually expected from an expert report submitted under Internal Rule 31.
25. Nonetheless, the features which are routinely contained in an expert report exist for a reason. They are the factors which permit the decision-maker to assess the reasoning and conclusions or recommendations made in the report.²⁵ They are the features which give the conclusions of

²³ **F61/3.4** Annex C: Covid-19 preventive measures and protocols, ERN (En) 01668662 (IOM representatives visited the “ECCC premises to review and provide recommendation and feedback regarding infection prevention and control measures”).

²⁴ Email from Senior Legal Officer regarding “Appeal hearing - (re)scheduled for 17-21 May 2021”, 12 April 2021 at 10:15pm. *Attachment 12*

²⁵ **E215** Decision on Assignment of Experts, 5 July 2012, para. 15 (Experts are “individuals possessing relevant skills or specialized knowledge acquired through education, experience or training in the proposed field of expertise. ... In determining whether an individual possesses sufficient credentials to be called an expert, a Chamber may have recourse to the individual’s *curriculum vitae*, articles, publications or other information relating to him or her relevant to the subject on which expertise is required, including the proposed expert’s former and present positions”); ICTY *Prosecutor v Strugar*, IT-01-42-A, [Judgement](#), 17 July 2008, para. 58 (“When assessing an expert report, a Trial

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an “expert” more value than the views of a lay person. The omissions identified in paragraph 22 above make it unclear why the IOM Document should be valued in such a way.

26. In the present matter the Chamber is required to make a decision involving huge responsibility for the health and safety of hearing attendees. It should not be expected to do so without sufficiently justified, reasoned and detailed guidance.

2.2.3.3 Contents of the IOM Document that give rise to concerns

27. The OA Response describes the IOM Document as providing “recommendations in line with Covid-19 health standards”.²⁶ It is unclear which standards the OA has in mind, however the Lead Co-Lawyers have concerns about several areas in which the IOM Document’s recommendations appear to diverge from current scientific opinion on IPC best practice for COVID-19, or to be without possible scientific justification. No explanation is given in the IOM Document itself for why these approaches have been recommended.

Airborne transmission

28. The issue of greatest concern to the Lead Co-Lawyers is that the IOM Document appears to be premised on the now-outdated idea of COVID-19²⁷ as transmitted primarily through large respiratory droplets. A recent article in *The Lancet* explained the serious consequences for IPC of such an approach:

If an infectious virus spreads predominantly through large respiratory droplets that fall quickly, the key control measures are *reducing direct contact, cleaning surfaces, physical barriers, physical distancing, use of masks within droplet distance, respiratory hygiene*, and wearing highgrade protection only for so-called aerosol-generating health-care procedures. Such policies need not distinguish between indoors and outdoors, since a gravity-driven mechanism for transmission would be similar for both settings. But if an infectious virus is mainly airborne, an individual could potentially be infected when they inhale

Chamber generally evaluates whether it contains sufficient information as to the sources used in support of its conclusions and whether those conclusions were drawn independently and impartially.”); *Prosecutor v Popović*, IT-05-88-AR73.2, [Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness](#), 30 January 2008, para. 29 (“the Appeals Chamber underlines the Trial Chamber’s ruling that before admitting Butler’s evidence, it will have to determine, *inter alia*, “whether there is transparency in the methods and sources used by the expert witness, including the established or assumed facts on which the expert witness relied”).

²⁶ **F61/3** Office of Administration’s Response to the Civil Party Lead Co-Lawyers’ Request to Postpone the Appeal Hearing Planned for 17-21 May 2021, 28 April 2021, para. 7.

²⁷ The Lead Co-Lawyers recognise that COVID-19 is the disease which results from the transmission of the SARS-CoV-2 virus, and that therefore it is more correct to speak of SARS-CoV-2 transmission. However, in the interests of maximising accessibility to lay readers the Lead Co-Lawyers will in this filing follow the common usage of referring to COVID-19 transmission.

aerosols produced when an infected person exhales, speaks, shouts, sings, sneezes, or coughs. Reducing airborne transmission of virus requires measures to avoid inhalation of infectious aerosols, including *ventilation, air filtration, reducing crowding and time spent indoors, use of masks whenever indoors, attention to mask quality and fit*, and higher-grade protection for health-care staff and front-line workers.²⁸ [Emphasis added]

29. Initially it was believed that COVID-19 was transmitted mainly or exclusively through large droplets and contact transmission. However, over time this has changed. Contact transmission is now thought to be relatively rare.²⁹ Meanwhile, the focus on airborne transmission has increased. A significant number of scientists have now taken the position that the virus is “transmitted *primarily* by the airborne route.”³⁰ [Emphasis added] Hundreds have lobbied international and national health agencies to recognise this,³¹ eventually resulting in modified

²⁸ Greenhalgh T, Jiminez JL et al., The Lancet, [“Ten scientific reasons in support of airborne transmission of SARS-CoV-2”](#), Volume 397, Issue 10285, 15 April 2021. Attachment 13

²⁹ See for example: USCDC, [Science Brief: SARS-CoV-2 and Surface \(Fomite\) Transmission for Indoor Community Environments](#), updated 5 April 2021; ECDC, [Transmission of COVID-19. Attachments 14, 15](#)

³⁰ Greenhalgh T, Jiminez JL et al., The Lancet, [“Ten scientific reasons in support of airborne transmission of SARS-CoV-2”](#), Volume 397, Issue 10285, 15 April 2021. See also: Martin Z. Bazant and John W. M. Bush, Proceedings of the National Academy of Sciences (PNAS), [“A guideline to limit indoor airborne transmission of COVID-19”](#), 118 (17) e2018995118, 27 April 2021; Martin Z. Bazant, Ousmane Kodio et al., [“Monitoring carbon dioxide to quantify the risk of indoor airborne transmission of COVID-19”](#), April 2021 (in pre-print); Parham Azimi, Zahra Keshavarz et al., Proceedings of the National Academy of Sciences (PNAS), [“Mechanistic transmission modeling of COVID-19 on the Diamond Princess cruise ship demonstrates the importance of aerosol transmission”](#), 118 (8) e2015482118, 23 February 2021; *Nature* (editorial), [“Coronavirus is in the air – there’s too much focus on surfaces”](#), 2 February 2021; Lindsey Marr, Shelly Miller et al., [“FAQs on Protecting Yourself from COVID-19 Aerosol Transmission”](#), updated 9 December 2020; Kimberly A. Prather, Linsey C. Marr et al., [“Airborne transmission of SARS-CoV-2”](#), *Science*, 16 October 2020, pp. 303-304; Ma J, Qi X, Chen H et al., [“COVID-19 patients in earlier stages exhaled millions of SARS-CoV-2 per hour”](#), *Clin Infect Dis*, 28 August 2020; National Academies of Sciences, Engineering, Medicine, [“Airborne Transmission of SARS-CoV-2: Proceedings of a Workshop – in Brief”](#), October 2020; Stadnytskyi V, Bax CE, Bax A, Anfinrud P, Proceedings of the National Academy of Sciences (PNAS), [“The airborne lifetime of small speech droplets and their potential importance in SARS-CoV-2 transmission”](#), 117 (22) 11875-11877, 2 June 2020. Attachments 13, 16, 17, 18, 19, 20, 21, 22, 23, 24

³¹ In November 2020, 239 scientists from around the world signed an open letter calling on national and international bodies to recognise airborne transmission: Lidia Morawka and David K. Milton, [“It is Time to Address Airborne Transmission of Coronavirus Disease 2019 \(COVID-19\)”](#), *Clin Infect Dis*, 1 November 2020, pp. 2311-2313. In January 2021 a group of 363 Canadians, including numerous scientific experts, called for Canadian guidelines, regulations and public health messaging to reflect the airborne transmission: Open Letter, *Ricochet*, [“Time for government to take aerosol transmission of COVID-19 seriously”](#), 4 January 2021. In February 2021, thirteen US Scientists wrote to United States agencies about the need for measure to limit inhalation exposure to COVID-19: [“Re: Immediate Action is Needed to Address SARS-CoV-2 Inhalation Exposure”](#), 15 February 2021. In March 2021, more than 100 Spanish scientists and health workers wrote to Spanish authorities to request that measures address airborne transmission: *El Pais*, [“Es urgente abordar de forma coordinada la transmisión de covid por aerosoles”](#), 25 March 2021. Attachments 25, 26, 27, 28

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official guidance.³² Even where such agencies have not yet recognised it as the main means of transmission, they now accept that airborne transmission of COVID-19 does occur.³³

30. The IOM Document exemplifies the problem identified in the quote from *The Lancet* cited above. It recommends tempered glass partitions, hand-sanitizing, disinfecting surfaces, social distancing, face shields, and masks which may be removed while speaking. These measures address large droplet or contact transmission, but do not address airborne transmission.
31. The only measure contained in the IOM Document which is clearly and usefully addressed to airborne transmission is that doors should be kept open. A recommendation for the daily changing of air-conditioning filters is not explained by reference to any science or to information about the specifications of the courtroom air-conditioning systems and their filtration levels.³⁴ And beyond this, there is no analysis of key factors relevant to airborne transmission risks. There is no discussion about the dimensions of the courtroom or the gallery, or to the nature of ventilation and airflows in either space.³⁵ No consideration is given to the use of fans,³⁶ or of CO₂ monitors to assess airflow.³⁷ No analysis is made of whether masks could or should remain on during presentations.³⁸
32. The Lead Co-Lawyers note with particular concern that no analysis is made as to whether shorter hearings sessions and longer breaks should be used, despite the fact that the duration

³² UN News, [“WHO to issue new brief on airborne transmission, following ‘active engagement’ with scientists”](#), 7 July 2020; Roni Caryn Rabin and Emily Anthes, New York Times, [“The virus is an airborne threat, the C.D.C. acknowledges”](#), 7 May 2021. *Attachments 29, 30*

³³ For example see: USCDC, [Science Brief: SARS-CoV-2 and Potential Airborne Transmission](#), updated 7 October 2020; WHO, [Transmission of SARS-CoV-2: implications for infection prevention precautions](#), 9 July 2020. *Attachments 31, 32*

³⁴ The relationship between air-conditioning systems and COVID-19 transmission is not straightforward – strength and direction of airflow, and air humidity are thought to be factors in transmission; recirculation of indoor air is likely to increase transmission. Air filtration might have some impact in reducing transmission, but it is thought that filtration only of MERV 13 or higher (including HEPA filters) would be capable of having any impact on SARS-CoV-2 particles. See ECDC, [Heating, ventilation and air-conditioning systems in the context of COVID-19: first update](#), 10 November 2020; USCDC, [Ventilation in Buildings](#), updated 23 March 2021; Public Health Ontario, [Heating, Ventilation and Air Conditioning \(HVAC\) Systems in Buildings and COVID-19](#), March 2021. *Attachments 33, 34, 35*

³⁵ On the relevance of such issues, see WHO, [Roadmap to improve and ensure good indoor ventilation in the context of COVID-19](#), 2021. *Attachment 36*

³⁶ On the use of fans, see *ibid.*

³⁷ See for example Martin Z. Bazant, Ousmane Kodio et al., [“Monitoring carbon dioxide to quantify the risk of indoor airborne transmission of COVID-19”](#), April 2021 (in pre-print). *Attachment 17*

³⁸ See e.g., Martin Z. Bazant and John W. M. Bush, Proceedings of the National Academy of Sciences (PNAS), [“A guideline to limit indoor airborne transmission of COVID-19”](#), 118 (17) e2018995118, 27 April 2021; and Jose L. Jimenez and Zhe Peng, [“COVID Aerosol Transmission Estimator”](#), updated 3 May 2021. *Attachments 16, 37*

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of time spent in a confined indoor space appears to be one of the most important factors in determining airborne transmission risk.³⁹

33. Crucially, concerns about indoor airborne transmission *do not* imply that groups cannot gather safely indoors. Rather, current thinking suggests that there is a limit to the *time* which should be spent together indoors, depending on a number of variables. Thus, for example, a recent peer-reviewed paper by researchers from MIT presents an equation for calculating safe exposure time in indoor spaces based on factors including the dimensions of the space; ventilation, filtration, recirculation and humidity; respiratory activity; use and type of face masks; and levels of immunity.⁴⁰ Other tools for calculating the risk of airborne transmission have also been developed.⁴¹
34. It therefore *might* be the case that the 30- and 50-person limits proposed by the IOM Document – or even perhaps larger numbers – could sufficiently minimise risks of airborne transmission (particularly if combined with other measures such as fans and reduced session lengths). The Lead Co-Lawyers do not have the expertise to assess that question. Their concern is that the IOM Document does not appear to have taken any account of the risk of airborne transmission. Risk levels from the modalities proposed are therefore entirely unknown.

Reference to a “bubble”

35. The IOM Document recommends that the same people participate in the hearing each day “in order to create the bubble within the same 30 essential staff”.⁴² The Lead Co-Lawyers agree with the OCP that this proposal is without apparent value. There is no suggestion of hearing participants isolating from their own households, colleagues outside the courtroom, or other persons prior to or during the days of the hearing.
36. The IOM Document does not explain why switching participants between one hearing session and another would increase the risk of COVID-19 transmission. Tellingly, no equivalent

³⁹ *Ibid.*

⁴⁰ Martin Z. Bazant and John W. M. Bush, Proceedings of the National Academy of Sciences (PNAS), “[A guideline to limit indoor airborne transmission of COVID-19](#)”, 118 (17) e2018995118, 27 April 2021. An accompanying online tool can be used to apply the calculation: <https://indoor-covid-safety.herokuapp.com/> *Attachments 16, 38*

⁴¹ Jose L. Jimenez and Zhe Peng, “[COVID Aerosol Transmission Estimator](#)”, updated 3 May 2021. *Attachment 37*

⁴² **F61/3.4** Annex C: Covid-19 preventive measures and protocols, ERN (En) 01668662.

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recommendation is made in respect of the 50 persons who are to be permitted in the public gallery.

Key omissions

37. The IOM Document makes no mention of some obvious potential measures, without giving any explanation as to why they are not considered useful:

- (i) *Rapid testing:* Rapid testing for COVID-19 is now being used in Cambodia.⁴³ Official guidance is unclear on the reliability of such tests in identifying asymptomatic cases⁴⁴ (which cause the majority of COVID-19 transmissions⁴⁵), however some studies suggest that it may be useful depending on the prevalence of COVID-19 infections in the tested population.⁴⁶ Expert advice would be useful on whether rapid testing could be usefully employed during the appeal hearing to screen participants and attendees. The IOM Document contains no discussion of this.
- (ii) *Vaccination status:* The IOM Document does not indicate what impact vaccination status of participants would have on transmission risks in the hearing. It does not assess how many attendees have been vaccinated, referring solely the vaccination status of KHIEU Samphân.⁴⁷ It does not consider whether vaccinations could be obtained for those who have not yet have been offered them. Regarding KHIEU Samphân's vaccination status, the Lead Co-Lawyers leave this matter to the Defence, save to reiterate that KHIEU Samphân's presence at the hearing and his safety are both matters of great importance to the civil parties.⁴⁸

Lack of clarity

38. On some potentially important issues the IOM Document's recommendations are unclear.

⁴³ Khmer Times, ["New rapid test kits implemented in the Kingdom."](#) 18 April 2021. *Attachment 39*

⁴⁴ WHO, ["Antigen-detection in the diagnosis of SARS-CoV-2 infection using rapid immunoassays"](#), 11 September 2020. *Attachment 40*

⁴⁵ Michael A. Johansson, Talia M. Quandelacy, Sarah Kada et al., ["SARS-CoV-2 Transmission From People Without COVID-19 Symptoms"](#), 7 January 2021. *Attachment 41*

⁴⁶ Marta García-Fiñana, Iain E. Buchan, ["Rapid antigen testing in COVID-19 responses"](#), *Science*, 7 May 2021. *Attachment 42*

⁴⁷ **F61/3.4** Annex C: Covid-19 preventive measures and protocols, ERN (En) 01668664.

⁴⁸ **F61** Civil Party Lead Co-Lawyers' Request to Postpone the Appeal Hearing Planned for 17-21 May 2021, 23 April 2021, paras 28-29, 34.

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- (i) *Screening questionnaire*: The IOM Document refers to a “[s]creening questionnaire as checklist for everyone. If any YES, needs to be verified for further information.”⁴⁹ It is unclear what is intended to be covered by the questionnaire: Is it to identify persons who might have had contact with a COVID-19 case? Is it to identify individuals at high-risk of serious illness if infected with COVID-19? It is also unclear what the consequences would be for a person identified as falling into either of these categories. Is it recommended to exclude persons from the hearing on the basis of the questionnaire? It is also unclear when and how often the questionnaire screening would be undertaken, and which categories of persons it will be used for (for example: hearing participants, gallery attendees, others in contact with them such as security and other Court staff not attending the hearing).
- (ii) *Masks*: The IOM Report appears to recommend that face masks be removed while speaking but face shields should be worn. Masks should be to “WHO standards”; “surgical masks or N95”.⁵⁰ Since N95 masks are considerably more effective than surgical masks⁵¹ it would be useful to have a precise recommendation on which should be worn. Likewise, it is unclear when it would be permitted to remove a mask – this is said to be permitted when someone is speaking for a “long time”.⁵² It is unclear what constitutes a long time.

2.2.3.4 Conclusions regarding the IOM Document and proposed action

39. The Lead Co-Lawyers do not purport to be experts. However, even without expertise it is possible to identify omissions and ways in which the IOM Document appears to diverge from current scientific thinking regarding COVID-19. What is particularly concerning is the lack of any explanation about these omissions or departures from prevailing scientific opinion. This concern is compounded by the lack of information about any relevant expertise of the authors, the instructions and information they were provided, and the sources and approach they used.

⁴⁹ F61/3.4 Annex C: Covid-19 preventive measures and protocols, ERN (En) 01668662.

⁵⁰ F61/3.4 Annex C: Covid-19 preventive measures and protocols, ERN (En) 01668662.

⁵¹ See for example the summary contained in and Jose L. Jimenez and Zhe Peng, [“COVID Aerosol Transmission Estimator”](#), updated 3 May 2021. *Attachment 37*

⁵² F61/3.4 Annex C: Covid-19 preventive measures and protocols, ERN (En) 01668662, 01668663.

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Taken together these factors cast significant doubt on the value of the IOM Document's recommendations.

40. The Lead Co-Lawyers therefore submit that the IOM Document is not a sufficient or reliable basis for decisions about IPC measures for in-person hearing attendance, particularly given the seriousness of the risk. Indeed, the Lead Co-Lawyers consider it telling that the IOM Document recommends against KHIEU Samphân's presence in the courtroom.⁵³ If the courtroom is unsafe for KHIEU Samphân then it is also unsafe for others, particularly elderly participants and those with comorbidities, especially if unvaccinated.
41. The Lead Co-Lawyers are clearly not in a position to provide substitute advice. Advice is needed from a suitably qualified expert. Considering the seriousness of the issue, the expert should be an independent scientist of high professional standing with considerable experience in COVID-19 IPC. The Lead Co-Lawyers submit Chamber should appoint an expert pursuant to Internal Rule 31. The Lead Co-Lawyers believe that if all necessary information could be provided immediately by the OA, such an assessment could be undertaken (remotely if necessary) within a matter of weeks.
42. The Lead Co-Lawyers reiterate their request that the expert advice address the feasibility of measures to ensure the safe presence of civil parties. Alternatives to attendance inside the courtroom or public gallery should also be considered: for example, whether covered outdoor spaces in the ECCC compound could be used for civil parties to view the hearing on screen, or the use of other locations for similar safe remote viewing.⁵⁴ The Lead Co-Lawyers are ready to assist any expert appointed with relevant information on civil parties and logistics with assistance from the Civil Party Lawyers ("CPL") and the Victims Support Section.

⁵³ **F61/3.4** Annex C: Covid-19 preventive measures and protocols, ERN (En) 01668665. The IOM Document states: "Recommendation from IOM: If possible, to avoid completely but if accused needs to be present in person, to be assessed by the health officer for medical condition prior to arrival and a maximum of 15 min duration." The Lead Co-Lawyers note that no explanation is given as to how the period of 15 minutes was arrived at.

⁵⁴ The use of remote "attendance" from a safe location outside the courtroom would not preclude the Chamber from acknowledging civil parties in its opening remarks for the hearing, as it has done previously.

2.2.4 Observations on the proposed approach, if no further expert guidance is sought

43. In the alternative, if the Chamber declines to seek expert guidance on which to base its decision, the Lead Co-Lawyers make the following observations regarding the changes which should be made to the approach proposed in the IOM Document:

Civil Parties

44. In the absence of any assessment regarding safe civil party attendance, the Lead Co-Lawyers are unable to make submissions on safe Civil Party participation. They will be glad to provide such submissions once an expert assessment has been undertaken.

Legal teams – swapping attendance and conferring

45. The Lead Co-Lawyers agree with the OCP that teams should be able to rotate which of their members are present in the courtroom in a given session, unless expert advice explains why this would increase transmission risks.

46. Similarly, those within a team will be interacting with each other outside the hearings in any event. It is therefore not clear that allowing them to confer when necessary within the courtroom would increase transmission risks. Photographs of courtroom modifications which accompanied CMS's memo on 17 May 2021 suggest that it will be possible for those sitting in each row to confer with each other, but not with those in front or behind them. The science behind this approach is not explained. Conducting the hearing without the possibility for supporting team members to speak to counsel or to pass documents or notes to them (because of glass screens and distancing) would considerably reduce the effectiveness of the hearing.

Civil Party Lawyers

47. The Lead Co-Lawyers request that space in the Civil Party area of the courtroom be allocated to CPL, who will rotate and otherwise participate remotely.

Minimizing personnel in the courtroom

48. All efforts should be made to minimise the number of people in the courtroom whose presence is not directly contributing to the proceedings. This will allow legal teams to have as many members present as possible within the recommended ceiling.

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49. The persons specifically identified by the IOM Document as being permitted in the courtroom total fewer than 30, presumably because a number of other persons are assumed as being present without having been clearly identified in the report (passing reference is made to security, as well as to an interpreter to assist the judges and it is suggested that a “health officer” will be present, although it is not clear whether this person will be inside the courtroom). The Lead Co-Lawyers submit that these persons should be kept to a minimum to enable the limited space in the courtroom to be used for active participants. The Chamber should give clear directions for how many such persons are permitted to be present.

2.3 Observations regarding remote participation

50. As indicated above, the Lead Co-Lawyers consider it essential that preparations are made for remote participation, even though in-person participation is preferred. Plans should address the possibility that, as a last resort, the hearing may need to occur entirely online, depending on the situation in Phnom Penh at the time of the rescheduled hearing.

51. The Lead Co-Lawyers repeat the request made in their Postponement Request that the OA be directed to propose a detailed set of modalities for remote participation, so that the Parties can provide meaningful input. At present, no clear proposal has been made.

52. Under these circumstances, Lead Co-Lawyers can only submit the following:

2.3.2 Matters yet to be addressed by the OA

53. On 16 April, the Lead Co-Lawyers sent an email to the Chamber, the Parties and the OA requesting the postponement of the hearing and identifying concerns about the COVID-19 situation and readiness for remote hearings.⁵⁵ That email included a list of specific questions and requests in respect of remote hearing modalities. The email acknowledging receipt on behalf of the Chamber stated that:

You raise several issues, many of which are for the Office of the Administration ([OA]) to address. I would kindly ask [the OA Officer] to deal with those as well as to indicate to you when the [OA] cannot assist, so that the parties can decide whether they want to raise the matter with the Supreme Court Chamber.⁵⁶

⁵⁵ **F61.2** Civil Party Lead Co-Lawyers Request for Postponement, Annex A.

⁵⁶ Email from Senior Legal Officer regarding “Appeal hearing – (re)scheduled for 17-21 May 2021”, 16 April 2021 at 7:11pm. *Attachment 43*

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54. The issues of concern and related questions were raised again in the Postponement Request filed on 23 April 2021.⁵⁷ The email listing specific questions was annexed to it.⁵⁸
55. However, to date no response to these questions has been received from the OA. The Lead Co-Lawyers therefore repeat the most important of the outstanding issues:
- (i) *Equipment:* Lead Co-Lawyer team members and CPL do not have access to court-issued computer equipment at home, and equipment issued for use in ECCC offices is of highly variable speed and reliability. There is a need for alternative equipment to be provided to those who require it. The OA Response indicates that equipment will be provided, but with no detail about what will be provided, to whom, or when.
 - (ii) *Other necessary facilities:* Lead Co-Lawyer team members and CPL also have variable access to reliable internet, electricity, and private locations suitable for participation in a hearing. A proposal should be made for alternative locations (whether in the ECCC premises, other UN agencies or special-arranged office space) to be made available to those who require it for this purpose, with particular attention given to the quality of internet connectivity at the proposed location. No response has been received in respect of this request.
 - (iii) *Conferring during the hearing:* If hearing participants are all remote from each other, a means for team members to confer among themselves during the hearing should be proposed. No response has been received on this issue.
 - (iv) *Delayed and live streaming:* The OA has indicated, in a response to a request from the OCP, that it will “defer to the Chamber’s decision” on delayed online streaming of the hearing to allow redaction of confidential material.⁵⁹ The Lead Co-Lawyers support the OCP’s request in this respect. However, they note that it will also be essential to have a separate, live, stream available for the use of team members who are viewing the proceedings remotely in the event of a ‘hybrid’ hearing. This would allow, for example, that the Lead-Co Lawyers can receive live input from team

⁵⁷ **F61** Civil Party Lead Co-Lawyers’ Request to Postpone the Appeal Hearing Planned for 17-21 May 2021, 23 April 2021, paras, 57-63.

⁵⁸ **F61.2** Civil Party Lead Co-Lawyers Request for Postponement, Annex A.

⁵⁹ Email from OA regarding “Appeal hearing – (re)scheduled for 17-21 May 2021”, 13 April 2021 at 9:04am. Attachment 44

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members and CPL who are not with them in the courtroom. No response has been received on this issue.

- (v) *Live transcript:* The Lead Co-Lawyers have requested that live transcription be provided during the hearing. They note that without live transcription it would be difficult or impossible to identify interpretation errors which occur during the hearing, or for participants who lose connectivity with the hearing to know what they have missed. Without a live transcript, the Parties will need to dedicate resources to taking detailed notes during the hearing which will be difficult for the Lead Co-Lawyers who are operating with a very small team. No response has been received on this issue.⁶⁰
- (vi) *View for remote participants:* The Lead Co-Lawyer have raised the question of what will appear on the screen of speakers in the hearing who are participating remotely. At some other international court hearings during the pandemic, remote speakers have only been able to see their own face on screen while making a presentation (no doubt because this is the view considered most useful for judges, other Parties and the public). The impact is that speakers are unable to gauge reactions, or to anticipate interjections from the bench. No response has been received on this issue. Videos of a hearing simulated by five OA staff, which accompanied CMS's memo notified on 17 May 2021 ("the simulation videos"), aptly demonstrate this problem. In the English and French simulation videos, the footage shows one participant at a time, while the four others appear as thumbnails too small and indistinct to see clearly. For considerable portions of those videos, the screen shows a participant other than the person who is speaking. "Judges" can only be seen one at a time, while speaking. Conversely, the Khmer and floor simulation videos use a "gallery" view, where all five participants are visible at all times. It is unclear how useful this view would be if upwards of thirteen participants were on screen. Nor is it clear who controls the view.
- (vii) *Test-run:* The Lead Co-Lawyers have requested that a practice-run of remote participation be undertaken before the hearing, with enough time thereafter to address

⁶⁰ CMS's memorandum notified on 17 May makes reference to transcription services having been arranged, but does not address the question of whether remote hearing participants will be able to access live transcription: **F64.1** Interoffice Memorandum from Chief of CMS to the Chamber entitled "CMS's notice of readiness for appeal hearings in case 002/02", 14 May 2021, para. 1.

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any issues identified. The Lead Co-Lawyers agree with the submission now made by the OCP that this should be done at least fifteen days before the hearing.⁶¹ The OA has to date not expressly responded to this request but a test-run does not appear to have been envisaged, given the proposal to only offer training to participants in the week before the hearing.⁶² The Lead Co-Lawyers emphasize that the need for a practice run with the actual hearing is not addressed by the provision of the simulation videos. Difficulties may not become apparent until the actual hearing participants are involved, from the locations and computers they intend to use for the hearing, and in their full numbers simultaneously. It is also essential that actual hearing participants – and not only OA staff – are familiar with and comfortable with the software and have a chance to raise concerns once they have used it. The simulation videos demonstrate that practice is necessary for the participants, especially with transitions between speakers and to coordinate the video control. A practice run of hearing participants will allow the Chamber to identify whether problems apparent from the simulation videos have been addressed.

- (viii) *Rules, protocols or guidance*: The Lead Co-Lawyers have asked whether a set of rules or guidance will be issued for use in the hearing, which would identify such issues as whether participants may turn cameras off during the hearing, and what procedure would be followed where connectivity is lost. Such a protocol could also indicate how remote participants should indicate to the Chamber when they wish to intervene; how the Chamber should be informed of an interpretation issue or technical difficulty; how requests for IT assistance should be made; and what will be the subsequent status and classification of various categories of “chats” between hearing participants, some of which may be relevant to understanding the transcript and others of which may be inappropriate for public disclosure. No response has been provided on this issue.
- (ix) *Captioning or other measures for public understanding*: The Lead Co-Lawyers have asked whether remote participants will be captioned in a way which allows viewers

⁶¹ **F61/3/1** 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, dated 4 May 2021 and notified 5 May 2021, para. 11.

⁶² **F61/3** Office of Administration’s Response to the Civil Party Lead Co-Lawyers’ Request to Postpone the Appeal Hearing Planned for 17-21 May 2021, 28 April 2021, para. 9.

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to readily identify them (by name and role). This will be necessary in the absence of the physical structure of the courtroom which would usually make clear – for example – who are the judges and who are the various Parties. Any other means by which a remote hearing can be made more understandable to members of the public would also be welcomed. No response has been received on this issue. The simulation videos make the need for such measures clear. In them, speakers are unidentifiable. The videos appear to contain captions and other text, but it is illegible. They also show how a hearing's outreach value may be undermined by broadcasting something which appears more like an online meeting than a hearing. Hearing footage is usually taken from a range of angles and shows speakers within their courtroom context. The simulation videos instead show a series of isolated head-shots, even for those inside the courtroom. If this approach is used, viewers will have almost no sight of the judges, KHIEU Samphân, or civil parties (if they are able to attend). They will be unable to see how hearing participants and attendees react to submissions being made. The symbolism of the courtroom, and the Parties' respective places in it, will be lost. International trials are already challenging for viewers to engage with because of interpretation. The additional loss of meaningful visual cues may render them unwatchable to most audiences. The Lead Co-Lawyers therefore urge that efforts are made to incorporate courtroom footage into the platform view.

56. In addition to the above issues which have already been raised, the Lead Co-Lawyers make the following additional observations:

- (i) *Control of speakers:* The Chamber should retain control of remote participants' microphones during the hearing, to avoid problems arising if participants fail to mute themselves when not speaking.
- (ii) *Additional time:* When fixing the final hearing schedule, the Chamber should factor in that time is likely to be lost on technical difficulties. Additional time should be built in to ensure that the Parties' time is not reduced as a result.

2.3.3 Timeliness and adequacy of preparation

57. The Lead Co-Lawyers are concerned by the OA's apparent belief that it will be possible to make all necessary preparations for a remote hearing within a very short timeframe before the

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hearing. The OA Response, filed on 28 April, asserted that all remaining issues, including provision of equipment and training, could be dealt with before the hearing then scheduled for 17 May 2021, a period which included only nine working days.⁶³

58. The proposal to “offer software training for remote participants in the week prior to any hearing date”⁶⁴ is particularly concerning. The Lead Co-Lawyers note that hearing participants have not received access to the software, or any training in it, despite highlighting numerous potential challenges. The Lead Co-Lawyers’ own experience of meeting remotely with CPL with simultaneous interpretation in three languages has demonstrated that significant time is required for training of participants and interpreters. Additional materials and assistance may be needed to explain the software interface if its menus cannot be provided in Khmer and/or French. Some users who have less familiarity with online videoconferencing software are likely to need individualized assistance in addition to any proposed group training sessions.
59. Sufficient training must be provided well in advance of a test-run of hearing modalities so that all participants have the necessary time to familiarize themselves with the software and ask for guidance if needed. Equipment and office space for remote access must also be arranged and provided before the test-run takes place, in order for it to be effective. CMS’s memo indicating readiness for the hearing makes no mention of these issues.⁶⁵ The Lead Co-Lawyers submit that provision of equipment and training must begin at least one month before the proposed hearing dates, and preferably earlier.
60. There is a need for the OA to take seriously both the need for sufficient advance planning and preparation, and the need for input from the Parties. The Lead Co-Lawyers are not reassured by CMS’s simulated hearing, conducted without the involvement of the Parties, with videos of the process shared weeks later.⁶⁶ The possibility of unforeseen issues, including the needs of the Parties which the OA has not anticipated, must be factored in. This is demonstrated

⁶³ Taking account of the three Court holidays during this period: 30 April (Royal Ploughing Ceremony) and 14 May (King’s Birthday) on the national side; and 13 May (Eid al-Fitr) on the international side.

⁶⁴ **F61/3** Office of Administration’s Response to the Civil Party Lead Co-Lawyers’ Request to Postpone the Appeal Hearing Planned for 17-21 May 2021, 28 April 2021, para. 9.

⁶⁵ **F64.1** Interoffice Memorandum from Chief of CMS to the Chamber entitled “CMS’s notice of readiness for appeal hearings in case 002/02”, 14 May 2021.

⁶⁶ Videos accompanying CMS’s memo are dated 4 May 2021 in Zylab and were shared with the parties on 17 May 2021.

clearly by the recent difficulties encountered by the Defence in achieving communication with KHIEU Samphân.⁶⁷

2.4 Observations on the OA's proposal to use written submissions

61. While taking “no position” on the question of a postponement,⁶⁸ the OA suggests that “oral submissions could be replaced by a written process.”⁶⁹ However the OA does not address how written submissions could adequately achieve the objectives of the appeal hearing,⁷⁰ nor the legal question of whether it is even permissible under the Internal Rules to entirely dispense with a hearing on appeal against a judgment. A footnote for this proposal cites to the Postponement Request. It appears that the OA may have misunderstood an intervention from the Lead Co-Lawyers stating that the Chamber should receive written submissions from the parties before determining the legally controversial question of whether an oral hearing could be dispensed with.⁷¹ The Lead Co-Lawyers have at no point advanced the position that the Internal Rules permit an appeal to occur without an oral hearing. To the contrary, the Postponement Request sought to make clear the Lead Co-Lawyer's strong preference for an oral hearing.⁷²
62. The Lead Co-Lawyers consider that it may be workable for the Parties to provide written submissions on discrete issues (such as certain questions posed by the Chamber), to be complemented by a shorter hearing. However, some benefits of an oral hearing – including the possibility for interaction, as well as for KHIEU Samphân to be heard – cannot be achieved

⁶⁷ **F61/1** *Observations de la Défense suite à la demande des Parties Civiles de reporter l'audience d'appel*, filed on Friday, 23 April 2021 and notified on Sunday, 25 April 2021, paras 7, 8.

⁶⁸ **F61/3** Office of Administration's Response to the Civil Party Lead Co-Lawyers' Request to Postpone the Appeal Hearing Planned for 17-21 May 2021, 28 April 2021, para. 2.

⁶⁹**F61/3** Office of Administration's Response to the Civil Party Lead Co-Lawyers' Request to Postpone the Appeal Hearing Planned for 17-21 May 2021, 28 April 2021, para. 4.

⁷⁰ Set out in the Postponement Request, paras 23-30.

⁷¹ **F61/3** Office of Administration's Response to the Civil Party Lead Co-Lawyers' Request to Postpone the Appeal Hearing Planned for 17-21 May 2021, 28 April 2021, paras 4, 5. The OA cites to paragraph 9 of the Postponement Request in support of its proposition that “oral submissions may be replaced by a written process”. The Lead Co-Lawyers request at paragraph 9 does not support this proposition. The Lead Co-Lawyers quoted from a previous email in which they stated, “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 submissions.” See **F61** Civil Party Lead Co-Lawyers' Request to Postpone the Appeal Hearing Planned for 17-21 May 2021, 23 April 2021, para. 9 and **F61.1.1.8** Attachment 8: Email from the International Lead Co-Lawyer to the Senior Legal Officer regarding “Appeal hearing in May CANCELLED”, 8 April 2021 at 5:33pm. The Lead Co-Lawyers did not request or suggest that written submissions could replace the appeal hearing.

⁷² **F61** Civil Party Lead Co-Lawyers' Request to Postpone the Appeal Hearing Planned for 17-21 May 2021, 23 April 2021, paras 31-36, 72(ii).

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through written submissions. The Lead Co-Lawyers also agree with the OCP⁷³ that the OA's assumptions about time and cost-reduction through the use of written submissions appear to be incorrect.

2.5 Final observations

2.5.1 Observations regarding choice of modalities

63. The Lead Co-Lawyers maintain that there are significant advantages in having the hearing take place at least partly in-person. The concern expressed in this filing for ensuring proper IPC measures should not be read as suggesting that in-person attendance be dispensed with. Nor is it intended to suggest that in-person hearings will require significantly more onerous measures than those currently proposed. Without appropriate advice this is simply not known.
64. The Lead Co-Lawyers urge the Chamber to avoid concluding that the simple solution is to abandon the idea of in-person hearings altogether and adopt a fully remote approach. This is for two reasons. First, obtaining appropriate expert advice should not be excessively onerous or time consuming, and other preparation for the hearing can occur in parallel. Secondly a fully-remote hearing may present even more challenges than resolving the question of IPC in the courtroom, given the list of outstanding issues set out above in paragraphs 55 and 56.
65. An in-person hearing should therefore remain the objective, with the possibility of some remote participation which could be increased if necessary based on the receipt of expert advice.

2.5.2 Observations regarding timeframes and planning

66. The Lead Co-Lawyers respectfully request that a new date be fixed for the hearing as soon as possible so that preparations can be undertaken with a clear timeframe in mind. This would enable the Parties and the OA to plan their time, and would assist the OA in managing resources. Alternatively, if the Chamber is not yet in a position to fix a specific hearing date, the Lead Co-Lawyers suggest that an approximate indication or a "not-before" date be fixed.

⁷³ **F61/3/1** 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, dated 4 May 2021 and notified 5 May 2021, para. 13.

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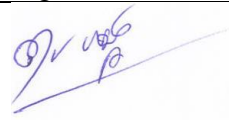

67. Finally, the Lead Co-Lawyers request that if the Chamber still intends to issue questions for the parties to address at the hearing,⁷⁴ such questions be provided as soon as possible. This could be done independently of, and prior to, decisions on modalities and hearing dates.

3 RELIEF SOUGHT

68. The Lead Co-Lawyers respectfully request that the Chamber:

- (i) Obtain appropriate expert advice on in-court modalities, including in respect of civil party attendance, by use of Internal Rule 31;
- (ii) Order the OA to produce a proposed set of modalities for remote hearing participation and to file them by a fixed deadline;
- (iii) Inform the parties of new hearing dates as soon as possible or, in the alternative, indicate an approximate hearing timeframe or a “not before” date;
- (iv) Inform the parties as soon as possible of the questions to be addressed at the appeal hearing.

Respectfully submitted,

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

⁷⁴ F60 Invitation for Parties to File Observations on Timetable for Appeal Hearing in Case 002/02, 26 February 2021, p. 2.