

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

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**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**

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I. INTRODUCTION

1. On 28 April 2021, the Office of Administration (“OA”) issued its Response to the Civil Party Lead Co-Lawyers’ Request to Postpone the Appeal Hearing Planned for 17-21 May 2021 (“OA Response”) with annexes.¹ On the same day, the Supreme Court Chamber (“SCC”) notified its decision to postpone the oral hearing in the appeals² against the Trial Judgment in Case 002/02.³
2. The Co-Prosecutors submit their observations regarding the planned hearing modalities and courtroom adjustments described in the OA’s Response and Annexes. The Co-Prosecutors request that this Chamber make modifications to those proposed by the OA, as outlined below. This request is made because some of the proposed modalities and adjustments are inconsistent with the manner the Co-Prosecutors have determined they can best prepare and present oral submissions and others do not appear to be necessary or reflective of the realities facing this Court.

II. OBSERVATIONS

Preventive Measures and Adjustments to the Courtroom

3. Due to the COVID-19 pandemic, the OA proposes physical adjustments to the ECCC courtroom and preventive measures in compliance with the report attached as Annex C of its Response.⁴ The Co-Prosecutors fully agree and support the majority of the adjustments and measures proposed to mitigate the COVID-19 transmission risks in the courtroom, including the installation of reinforced glass screens and partitions, mandatory hand sanitation upon entry, compulsory wearing of masks for everyone in the courtroom when not speaking, and social distancing.⁵
4. However, the Co-Prosecutors disagree with other recommendations contained in Annex C, namely (1) the number of staff from the Office of the Co-Prosecutors (“OCP”) permitted to

¹ **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 (“OA Response”).

² **F62** SCC Interoffice Memorandum from Jonas Nilsson, Senior Legal Officer and Greffier of the Supreme Court Chamber, 28 April 2021.

³ **E465** Case 002/02 Judgement, 16 November 2018.

⁴ **F61/3.4** Annex C, Report on Covid-19 preventive measures and protocols, International Organization for Migration (IOM), undated (“Annex C”).

⁵ **F61/3.4** Annex C, EN 01668662-63.

physically attend the hearing (four only: two co-prosecutors making oral submissions and two “legal assistants”);⁶ (2) the supposed creation of a “bubble” by requiring that only the same four staff members be present in the courtroom for the duration of the hearing;⁷ and (3) the wearing of a face shield for presenters who will be speaking for an undefined lengthy period of time.⁸

5. First, limiting the number of OCP attendees to the same four staff members throughout the hearing and allowing only two of those attendees to make submissions is not workable for the Co-Prosecutors. Due to the size and complexity of the case, the Co-Prosecutors have planned since October 2020 that there will be seven presenters, possibly eight, on behalf of the Prosecution. They have determined that it will best assist the Chamber if they and the other prosecutors in their office, who all have the right of audience before this Chamber, are present in the courtroom when each presents his or her assigned section(s) of the oral arguments and respond to questions on the issues on which they have engaged in comprehensive preparation. Consequently, the Co-Prosecutors require the ability to rotate OCP presenters between hearing sessions and days.
6. In addition, the Co-Prosecutors do not agree with the OA’s recommendation that limiting the courtroom presence to the same four OCP attendees throughout the hearing is necessary to create a protective “bubble”. No protective “bubble” would be created as those present in the courtroom will not be exclusively confined to that location for the duration of the hearing. Rather, OCP attendees will be interacting with other OCP staff outside the courtroom and will be travelling at least between their homes and the court each day of the hearing. Therefore, rotating OCP attendees would not affect any supposed benefits of a “bubble”.
7. Consequently, to best facilitate the smooth functioning of the hearing, the Co-Prosecutors request that six OCP prosecutors be allowed in the courtroom at any one time, rotating them as required for the issues being argued at each session and each day. The protection of the six prosecutors could be safely ensured by installing three-sided high glass screens

⁶ **F61/3.4** Annex C, EN 01668663-64 (“Parties: three parties will be participating (two co-lawyers per party) [...] Legal assistants: are seated at the benches behind the party representatives (limited to two per party)”).

⁷ **F61/3.4** Annex C, EN 01668662 (“Recommended to have the same staff for next 5 days in order to create the bubble within the same 30 essential staff.”).

⁸ **F61/3.4** Annex C, EN 01668663 (“If mask [is] off for speaking for longer duration face shield is recommended”).

separating each of the two prosecutors in each of the three rows allocated to the Co-Prosecutors. In terms of reducing the risk of spreading and catching COVID-19, the Co-Prosecutors confirm that all OCP prosecutors who will be present in the courtroom have received at least their first vaccination and, based on information provided by OA, will have received the second vaccination at or around the end of May.

8. Second, the recommendation that face shields be worn by those making oral submissions for an undefined “lengthy” period of time is unnecessary to ensure their safety.⁹ The Co-Prosecutors suggest that the recommended precautions of (1) social distancing, (2) wearing prescribed masks when not speaking, (3) glass screens between those present, (4) sanitising hands and (5) disinfecting the courtroom during breaks are more than sufficient safety precautions.
9. To do more risks undermining the integrity of the proceedings. As those speaking will need to be heard by interpreters who will be listening via headsets, the use of face shields risks muffling the speaker’s words and thus affecting the interpreters’ ability to hear the speaker clearly and accurately. This could lead to inaccurate interpretations, impairing the quality of the communication between the Parties and the judges.
10. Finally, a requirement to use face shields when speaking for prolonged periods of time in the courtroom does not appear to be an international standard at other courts conducting similar hearings in countries also impacted by the pandemic in 2021, such as the International Criminal Court, the International Court of Justice, and the UN International Residual Mechanism for Criminal Tribunals.¹⁰

⁹ The COVID-19 risk mitigation measures implemented by the Sihanoukville provincial Court of First Instance as shown in F61/3.3 Annex B are excessive and not practical (wearing masks, face shields and hazmat suits at the same time in addition to glass screens).

¹⁰ See **Annex A (Authority 1)**: Photos of (1) International Criminal Court (“ICC”), *Dominic Ongwen* Trial Judgment Hearing on 4 February 2021, accessed at <https://www.youtube.com/watch?v=3WiRobdXzP0>; (2) International Court of Justice (“ICJ”), March and April 2021 hearings, accessed at <https://www.icj-cij.org/en/multimedia-cases>; (3) United Nations International Residual Mechanism for Criminal Tribunals (“MICT”), *Stanišić and Simatović* trial closing arguments, April 2021, accessed at <https://www.youtube.com/playlist?list=PLXAYOHc1xrLYyE9ciKY-K4dS8BBaHbyjn>; (4) MICT, *Turinabo et al* contempt trial, March 2021, accessed at https://www.linkedin.com/posts/david-young-7b48091b_irmct-international-law-turinabocase-activity-6780498771919937536-dcLJ.

Testing Prior to the SCC Hearing and Necessary Authorisations

11. Testing the equipment and modalities set up in and outside the courtroom will be critical to the success of the hearing. The Co-Prosecutors submit that to ensure time to take any necessary corrective action, it would be appropriate for the testing to be done at least 15 days before the scheduled hearing dates, with all modalities in place at that time. They also submit the testing would best be done with speakers both inside and outside the courtroom, and with interpreters relaying what is said to all participants.
12. The Co-Prosecutors also submit that permission from the Royal Government of Cambodia for required physical presence in the courtroom for the preparation for and conduct of the hearing, travel and access to the courtroom should also be obtained well in advance of the hearing date, to ensure there is adequate time to make any necessary adjustments.

Case Projections and Public Expectations

13. The OA Response concludes that “oral submissions may be replaced by a written process to maintain the current case projections and public expectations”¹¹ and that any postponement would require “additional financial resources”.¹² However, the Co-Prosecutors’ assessment of the impact of postponement or cancellation of the oral hearing differs. In our view, postponing the hearing will not:
 - (1) result in an increase in expenditure, as identical financial resources for the hearing are required whether it is conducted now or later;
 - (2) alter case projections of the completion plan, as work on the SCC appeal judgment can continue in the meantime;
 - (3) impact public expectations of the ECCC, given the length of time which has already passed since the Trial Judgment and the public awareness of the specific challenges posed by the pandemic; and
 - (4) create more work or delay than cancelling the hearing altogether. Appellant’s Defence team would likely need considerable time and additional staff resources to prepare a

¹¹ F61/3 OA Response, para. 4.

¹² F61/3 OA Response, fn. 3.

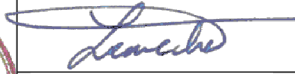
written reply to the Co-Prosecutors' 495-page response which will require translation thereafter.

III. RELIEF REQUESTED

14. Therefore, for the reasons above, the Co-Prosecutors request:

- (1) To rotate OCP prosecutors between hearing sessions and hearing days when necessary;
- (2) to have six OCP prosecutors in the courtroom at any one time during the oral hearing, using the three rows adapted as specified above;
- (3) that presenters not be required to wear face shields;
- (4) that testing of all modalities and equipment with representatives of all participants take place at least 15 days prior to the scheduled hearing; and
- (5) that necessary RGC authorisations be in place sufficiently in advance of the hearing to ensure no undue delay.

Respectfully submitted,

Date	Name	Place	Signature
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