

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

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Observations from the Defence on the procedure for the appeal hearing

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REQUEST TO THE SUPREME COURT CHAMBER

1. On 28 April 2021, the Supreme Court Chamber (the "Supreme Court") issued a notification of its decision to postpone the appeal hearing to an indefinite date "due to the current situation in Cambodia (in relation to COVID-19)".¹
2. On the same day, the Office of Administration (the "Administration") filed written submissions in response to the Lead Co-Lawyers' request for a postponement of the Civil Parties' hearing (the "Civil Parties"), together with a report on Covid-19's preventive measures and protocols to ensure the safe conduct of the hearing (the "Report").²
3. On 4 May 2021, the Prosecution filed observations and requests based on these submissions by the Administration and the Report.³ On 10 May 2021, the Civil Parties provided a courtesy copy of their submissions on the procedure for the hearing and their response to the Prosecution's submissions.⁴
4. In these written submissions, the Defence of KHIEU Samphân (the "Defence"), after having had the opportunity to exchange views with KHIEU Samphân, provides its observations on the procedures for the forthcoming hearing: some introductory observations on the holding of the hearing (I), observations on the preventive measures to be followed (II) and observations on the setting of the hearing date (III).

I. Introductory remarks on the holding of the hearing itself

5. First of all, the Defence wishes to emphasise that two suggestions made by the Administration do not constitute options because they have no basis in the legal framework applicable to the ECCC.

¹ *Notification with regard to appeal hearing in Case 002/02 pursuant to Internal Rule 108(3)*, 28 avril 2021, **F62**, published in English only.

² Office of Administration's Response to the request of the Civil Parties' Co-Lead Lawyers for the postponement of the appeal hearing scheduled for 17-21 May 2021, 28 April 2021, **F61/3** (the "Administration's Response"); Annex C - Covid-19 Prevention Measures and Protocols, undated, **F61/3.4** (the "Report").

³ Observations and the Co-Prosecutors' Request based on the Administration's response to the Civil Party Lead Co-Lawyers' Request for Postponement of the Appeal Hearing scheduled for 17-21 May 2021, 4 May 2021, **F61/3/1** (the "Prosecution's Observations"), served on 5 May in English and Khmer, and on 12 May in French.

⁴ Civil Party Lead Co-Lawyers' Observations on Hearing Modalities and Response to Observations from the OCP, courtesy copy delivered on 10 May 2021 awaiting translation into Khmer for filing ("Civil Party Observations"). The Defence refers to it without prejudice to the forthcoming translation into Khmer and French.

6. The possibility of a "fully remote"⁵ hearing is not provided for neither by our internal Rules of Procedure nor by the Cambodian Code of Criminal Procedure.
7. As for the "possibility of replacing oral submissions with a written procedure in order to respect the timetable and the expectations of the public",⁶ this runs counter to the provisions under which an appeal hearing is to be held on a mandatory basis.⁷
8. Moreover, it would not comply with the timetable or the expectations of the public. Not only would it deprive KHIEU Samphân of his right to speak before the judges and the public,⁸ but it would also involve considerable delays. Indeed, replacing the hearing by a written procedure would mean filing (and having translated into two languages):
 - the submissions of all parties in response to the Supreme Court's questions,
 - the Prosecution's submissions in response to the Defence's response (30 pages) to its appeal,
 - the Defence's submissions in response to the Prosecution's response (637 pages) and the Civil Parties' response (354 pages) to its appeal.⁹
9. However, the Defence, which has the heaviest workload, has very few resources. After filing its appeal brief, the Administration only allowed the two lawyers to work part-time and to be assisted by only two consultants. The lawyers were thus denied their requests for additional staff from the time of the filing of the other parties' response briefs. They were only able to go back to full time work in February this year and to be assisted by two additional people as of March, for a non-renewable period of three months (expiring at the end of May). In these circumstances, as the Prosecution has pointed out,¹⁰ it is clear that the Defence would need considerable time to prepare its submissions. In any event, these would not obviate the need for a hearing.

⁵ Administration's reply, §4.

⁶ Administration's reply, §3.

⁷ Internal Rules of Procedure, Rule 109-1 (according to which the Supreme Court may decide to deliberate on the basis of the written submissions of the parties only in the case of immediate appeals, and thus not in the case of appeals from judgments); Cambodian Criminal Procedure Code, Articles 388 to 395 in appeal and Articles 433 and 434 in cassation (Article 434, paragraph 5: "In no case shall the Supreme Court deliberate on a case until the hearing has taken place. ").

⁸ Internal Rules of Procedure, Rules 109-1 ("Proceedings shall be held in open court") and 109-5 ("In all cases, the accused shall have the last word. The lawyers of the accused shall be allowed to make brief supplementary observations. "). See also the Observations of the Civil Parties, §61.

⁹ Number of pages in French.

¹⁰ Prosecution's submission, §13(4).

II. OBSERVATIONS ON PREVENTIVE MEASURES FOR THE HEARING

10. The authors of the Report provided by the Administration recommend practical arrangements for the courtroom as well as a certain number of preventive measures. The Defence has no training in medicine or epidemiology and does not claim to be able to comment on all of these recommendations, which it believes to be sensible. However, it must point out certain legal considerations to be taken into account regarding the presence of participants (1), and proposes additional preventive measures that it considers to be of sound practical sense (2).

1. Observations on limiting the number of people in the courtroom and on the presence of KHIEU Samphân

11. One of the main measures advocated in the Report is the limitation of the number of people present in the courtroom, which should remain the same throughout the hearing "in order to create a bubble". It is recommended that 4 people per party should be present in the room, and that the Accused should only stay for a maximum of 15 minutes to appear before the Judges.¹¹

12. The Prosecution "disagrees" with the limitation of its office in the courtroom to the same 4 people,¹² which would be "inconsistent" with the way it determined that it could "best prepare and present [its] oral submissions".¹³ By virtue of the magnitude and complexity of the case, the Prosecution had scheduled 7 or even 8 speakers on their behalf, each of whom having worked on particular issues.¹⁴ The Prosecution requested that 6 people be present in the room at the same time and that they be able to rotate between sessions and hearing days, knowing that they would be interacting with other staff in their office and that they would be travelling at least every day of the hearing between their homes and the court.¹⁵

13. The Civil Parties request that the Supreme Court order more comprehensive expertise, in particular to allow the presence of civil parties in the courtroom.¹⁶ They agree with the

¹¹ Report, p. 1 and 3, ERN 01669234 and 01669236.

¹² Prosecution's observations, §4 to 7.

¹³ Prosecution's observations, §2.

¹⁴ Prosecution's observations, §5.

¹⁵ Prosecution's observations, §6, 7 and 13.

¹⁶ Civil Parties' Observations, §16 to 18, 41 and 67.

Prosecution that the members of their legal team should be able to rotate for each session.¹⁷ They point out that the presence of KHIEU Samphân in the courtroom and his safety are of great importance to the Civil Parties.¹⁸

14. The Defence does not concur with the difficulties expressed by the Prosecution and the Civil Parties regarding the limitation of the number of persons in the courtroom as recommended in the Report. Indeed, unless the Administration decides otherwise, from 1 June 2021,¹⁹ the number of people in the courtroom will again be reduced to a strict minimum: the two lawyers and two legal consultants. The Defence will not need to conduct rotations or interact with anyone other than KHIEU Samphân and will therefore already be in a - small - "bubble".
15. While the Defence fully understands the motives of the Prosecution and the Civil Parties to contest the Report's recommendations on their presence in the courtroom, it must insist that the satisfaction of their requests must in no way be to the detriment of KHIEU Samphân and his presence in the courtroom.
16. It should be recalled that this is the trial of KHIEU Samphân and no one else. It is his appeal against his numerous convictions and his life sentence. The stakes are extremely high for him and are incomparable to those of the other parties. He has the absolute right to participate in his trial and to be heard. He has participated in the hearings since 2011, and has only made use of the possibility to attend from the provisional remand cell below the courtroom in very rare cases, for health reasons. He therefore obviously wishes to be present in the courtroom with his defence team for this final and very important hearing.
17. The Prosecution's desire to be able to "best prepare and present [its] oral submissions" cannot take precedence over the presence of KHIEU Samphân at his appeal hearing. Furthermore, the Defence recalls that it has always had to work with fewer staff than the Prosecution, despite the size and complexity of the case, and that it has been obliged to adapt, even if it would have liked to be able to work "at its best". Moreover, the prosecution is one and indivisible: each member represents the whole and its members are therefore interchangeable.

¹⁷ Civil Parties' Observations, §44 to 46.

¹⁸ Civil Parties' Observations, §36.

¹⁹ See *supra*, §9.

18. Similarly, while it is undeniable that the Civil Parties have the right to participate in the trial, as the Supreme Court has stated, their rights to participate "must be subject" to the rights of the Accused and the proper conduct of the trial.²⁰
19. Therefore, if measures other than those recommended in the Report are to be taken, they must be taken in such a way as to first allow KHIEU Samphân to be able to attend his hearing in the courtroom, and possibly then (or at the same time) to allow the Prosecution and the Civil Parties to have their requests satisfied.
20. It is in this sense that the Defence proposes the implementation of additional preventive measures. It being understood that if, despite the above, the doctors treating KHIEU Samphân (who were apparently not consulted for the drawing up of the Report) are of the opinion that he should not be present in the courtroom for more than 15 minutes, he would abide by their recommendations and follow the hearing from the remand cell. In this scenario, KHIEU Samphân would like these 15 minutes of his presence in the courtroom be devoted to his final statement rather than merely to his appearance before the Judges.

2. Proposed additional preventive measures

21. The Prosecution and the Civil Parties emphasise that the majority of the participants in the hearing will have been vaccinated before the hearing. While this reduces the risk of infection and transmission of the virus, it does not eliminate it.
22. The Defence is of the opinion that the best way to ensure that the hearing takes place with a minimum of risk would be to carry out **rapid antigenic tests** (the results of which are known within 10 to 15 minutes) on the people who are to enter the courtroom in the morning before the start of each court day.
23. If this is not possible, rapid tests should be carried out at least 1) as soon as a person enters the courtroom for the first time and 2) a second time on the persons who would be present in the

²⁰ Instructions for the conduct of the hearing concerning SCW-3, SCW-4 and SCW-5, 17 June 2015, F26, p. 3: "WHEREAS the participation rights of the Civil Parties must be contingent upon the proper conduct of the trial, the rights of the Accused and any protective measures afforded to witnesses and therefore the participation of the Civil Parties in the Hearing is dependent upon the number of seats available in the courtroom and may be precluded when any witness called is afforded protective measures.

courtroom on the day of KHIEU Samphân's final statement in the event that he could only be present in the courtroom at the time of the statement declaration.

24. In addition, it would be appropriate for all persons present in the courtroom to be able to wear not only surgical masks, but **N95 masks** which offer the best level of protection. If this is not possible, this type of mask should be provided at least to those most at risk, including KHIEU Samphân. In any case, the masks should be changed every 4 hours.
25. Furthermore, in order to maintain the "bubble" recommended in the Report beyond the courtroom, the court services could arrange a **transport "bubble"** to the court for those who need to go to the courtroom by section (Supreme Court and its interpreter, Prosecution, Civil Parties, Defence, guards, medical staff). If this is not possible, the Defence, which will be in daily contact with KHIEU Samphân, will try to organise such a transport "bubble" by its own means, unless the Supreme Court considers it preferable that it be organised by the court. The Defence will of course also limit its personal contacts throughout the hearing and trusts that all those attending will also demonstrate a high degree of individual responsibility.
26. In addition to the above proposals for additional preventive measures, the Defence insists that the measures recommended in the Report for those who will have to touch KHIEU Samphân (who is no longer able to move around on his own), such as wearing gloves etc.,²¹ be strictly adhered to. On the other hand, the Defence agrees with the Prosecution²² in that the wearing of a visor by the speakers may not be necessary given the glass partitions between the persons present and those speaking. Lastly, the Defence wishes to draw the attention of the Supreme Court to the fact that the time needed to carry out necessary disinfection and ventilation during breaks must be taken into account when calculating the length of the hearing and the duration of the sessions.

III. REMARKS ON THE SCHEDULING OF THE HEARING

27. The Defence understands that the determination of the hearing date would depend, inter alia, on the development of the COVID-19 situation in Cambodia.²³ The state and local authorities are

²¹ Report, p. 3, ERN 01669236.

²² Prosecution's observations,

²³ See *supra*, §1.

likely to provide information on the projections related to such made at national and local level. This would have the merit of affording some visibility to the Supreme Court and the parties.

28. The Defence also seems to understand that a Judge will attend the hearing remotely from Europe. In addition, those members of the Prosecution and the Civil Parties who are unable to attend the courtroom will also attend remotely. The Defence agrees with the other parties that the technical tests need to be carried out well in advance of the hearing in order for it to run smoothly.
29. Furthermore, as the Defence has already indicated,²⁴ our International Lawyer travel requires a month's availability for one week of hearings due to the quarantines to be carried out on the way there and back. Due to professional commitments, the International Lawyer will not be available before 2 August and will remain unavailable until 28 August 2021 (dates of judicial holidays). The International Lawyer could therefore come for a hearing which would be scheduled for the week of 16 August. If this is not possible during that week, then, as a last resort, the International Lawyer could attend the hearing remotely during another week in August. In these circumstances, the International Lawyer would adapt to the timetable set by the Supreme Court, but the breaks would have to allow the team to consult with each other between interventions, and a possibility of confidential exchange with KHIEU Samphân would have to be set up (using the same system as the one that now exists in the in the cell below the courtroom). If a hearing were to be held at a later date, there would be significant scheduling conflicts.
30. In any event, the new hearing date must be communicated with as much notice as possible to allow for all necessary arrangements and preparation of the parties. Furthermore, it is most urgent that the Supreme Court communicate its questions to the parties, which are totally separate from these considerations but crucial for the preparation of the parties and especially the Defence, which not only has to respond to the hearing but whose numbers will also decrease on 31 May, with all the consequent readjustment that this implies in terms of the topics prepared by each party. This also has an impact on the work plan that the Defence must submit to the Administration every month, and on which its allocated working hours depend.

²⁴ Defence observations following the Civil Parties' request to postpone the appeal hearing, 22 April 2021, F61/1, §9.

31. **FOR THESE REASONS**, the Defence of KHIEU Samphân requests the Chamber of the Supreme Court:

- to ORDER all necessary measures to ensure that KHIEU Samphân is present in the courtroom throughout the hearing; failing that, TO ALLOW him to come to the courtroom at least for his final statement;
- to TAKE INTO ACCOUNT the additional preventive measures proposed by the Defence, including what relates to the availability of the International Lawyer;
- to COMMUNICATE the new hearing date (as well as the schedule of debates with topics and time for intervention) as far in advance as possible, even if informally;
- to COMMUNICATE questions to the parties as soon as possible, even if informally.

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