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E301/4

ព្រះរាជាណាចក្រកម្ពុជា  
ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Kingdom of Cambodia

Nation Religion King

Royaume du Cambodge

Nation Religion Roi

សាធារណៈ / Public

### PRESIDENT OF THE TRIAL CHAMBER

TO: Director Office of Administration

FROM: NIL Nonn, President of the Trial Chamber

CC: All Trial Chamber Judges; Trial Chamber Senior Legal Officer; All Parties, Case 002

SUBJECT: President's Memorandum on the Proposal to Appoint a Second Panel of the Trial Chamber to Try the Remaining Charges in Case 002



#### Introduction

1. The Supreme Court Chamber has recommended exploration of the establishment of another panel within the Trial Chamber to support the timely adjudication of the remainder of Case 002 (E284/4/7 and E284/4/8). In particular, in its Decision on Immediate Appeals Against Trial Chamber's Second Decision on Severance of Case 002, the Supreme Court Chamber indicated that "[w]ith the Trial Chamber's express projection of a time line of at least eight months to issue its judgment in Case 002/01 and in light of the considerations expressed above, the Supreme Court Chamber considers that the establishment of a second panel has now become imperative" (E284/4/8). Therefore, it is "the responsibility of the President of the Trial Chamber to avail himself of the existing possibilities" to form a second panel to try Case 002/02 (E284/4/8).

2. With a view to implementing the recommendation of the Supreme Court Chamber, during the Trial Management Meeting ("TMM") held on 11 and 12 December 2013, the parties and the ECCC Acting Director and Deputy Director of the Office of Administration were consulted on various aspects of constituting a second panel. The submissions made at the TMM have been of assistance in reaching my conclusion, set out below.

#### Considerations

3. The ECCC legal framework provides for a specific number of judges for each Chamber. As the Trial Chamber is allocated five sitting and two reserve judges, it is

unclear whether a legal basis for the establishment of a second panel of the Trial Chamber exists. The President's competence to appoint a second panel is also unclear. Under the legal framework, I have a limited power to designate international judges already appointed to complete the composition of a bench (Article 3(8) of the ECCC Agreement and Article 11<sup>new</sup> of the ECCC Law). By its plain language, Internal Rule 79(4) gives me the power to appoint a judge where a sitting judge becomes unavailable but this does not appear to extend to the constitution of an additional and entirely new panel of the Trial Chamber.

4. During the TMM, two possible avenues for the constitution of a second panel were discussed: the reassignment of existing ECCC reserve judges to a second panel of the Trial Chamber; and the selection of new judges from outside the ECCC to form a second panel. I have reservations about the legality of both avenues. In my view, an amendment to the ECCC legal framework, which would add significantly to the time when a second panel could become operational, might be necessary before I could validly appoint a second panel. However, should I proceed in the absence of an amendment, the time it would take to resolve any consequential legal challenges might also delay significantly the commencement of evidentiary hearings in Case 002/02.

5. A first step in constituting a second panel of the Trial Chamber is to identify and appoint judges. During the TMM, your office confirmed that all of the ECCC's current reserve judges have already been allocated to the various Chambers and there exists no list of additional reserve judges. Even if it were possible to reallocate already assigned reserve judges to a second panel of the Trial Chamber, a Royal Decree would be required, adding time to this process. Further, it seems that some reserve judges may not be available or that their appointment may raise concerns under the provisions of Article 556 of the Cambodian Code of Criminal Procedure. If the other proposed avenue were taken and new judges appointed from outside the ECCC, the entire process would need to be completed. During the TMM, the Office of Administration informed the Chamber that no request had been submitted to the United Nations for the nomination of new judges. The Office of Administration also advised that it will take around one month for new judges to be appointed by the Supreme Council of Magistracy. These considerations and past experience concerning the time needed to finalise appointment by the Supreme Council of Magistracy indicate that both of the proposed avenues for the appointment of a second panel of judges would take additional time.

6. A second panel of the Trial Chamber would require a team of legal staff to support its operations (see the President's Scheduling Memorandum and Agenda for a Trial Management Meeting in Case 002/02, which notes that the current Trial Chamber panel and staff are needed to focus exclusively on the preparation of the judgement in Case 002/01 to ensure its timely issuance). In the Trial Chamber's experience, it takes at least two months to recruit new legal staff. The Office of Administration agreed during the TMM that it might take new judges even longer to make themselves available than new legal staff. Furthermore it is unknown when the ECCC budget for the biennium 2014-2015 will be approved, but its final approval including its staffing table is necessary before a recruitment process is initiated.

7. Once new judges and legal staff have arrived in Cambodia, they will need to familiarise themselves with the Closing Order, the evidence on the case file, the procedure and the proceedings thus far. This will add several more months to the prospective start date of evidentiary hearings conducted by a second panel. For instance, the International Co-Prosecutor estimates that reading the transcripts alone would take six months (at a rate of 1,000 pages per week). Even under the most optimistic estimates, it will take several months for new judges and legal staff to read the documents necessary for their participation in Case 002/02. On top of this, further time may be added for a second panel of new judges to hear certain witnesses already heard Case 002/01 and to reconsider decisions made during the Case 002/01 proceedings.

8. Conversely, the current bench of Trial Chamber judges would not be required to start from the very beginning. This bench and its legal staff are familiar with the case, the Closing Order, the evidence, the procedure and they have already commenced preparatory work for the trial in Case 002/02. Unlike a second panel, they will not face all the time-consuming issues discussed above. Moreover, since the Supreme Court Chamber's decision directing consideration of a second panel (E284/4/8), the Trial Chamber has taken significant steps to ensure a more expeditious start of Case 002/02 such as the completion of a Trial Management Meeting for Case 002/02, the present determination regarding a second panel, and the forthcoming workplan for Case 002/02.

9. The Chamber intends to commence the evidentiary proceedings in Case 002/02 as soon as possible without jeopardizing the timely delivery of the judgement in Case 002/01. I have considered the possibility of hearing evidence in Case 002/02 for several days a week and reserving the balance of time for deliberations in Case 002/01, and will continue to do so. I am aware, however, that Trial Chambers at the *ad hoc* tribunals that have adopted this practice have been forced to delay significantly the delivery of their judgements, a fact that must be considered when evaluating this option (*see e.g.*, S/2012/349, paras 12-13; S/2011/731, para. 12). In any event, it is premature to determine at this stage whether it is appropriate to start evidentiary hearings in Case 002/02 before the issuance of the judgement in Case 002/01, as the Chamber shall first deal with all the matters relevant to the preparation of the next trial which will be conducted in parallel with the drafting of the said judgment in the most expeditious manner.

### *Conclusion*

10. The legal issue of whether I have the power to appoint a second panel of the Trial Chamber would require further analysis to answer definitively. Irrespective of that determination, taking all of the above considerations into account, it is apparent that appointing a second Trial Chamber panel to hear the remaining charges in Case 002/02 is not in the interests of justice since it would be less expeditious than proceeding with the existing bench who are already familiar with the case.

11. With a view to implementing the Supreme Court Chamber's direction that the evidentiary hearings in Case 002/02 shall commence as soon as possible after closing submissions in Case 002/01, the Trial Chamber will issue a workplan as soon as possible.