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Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

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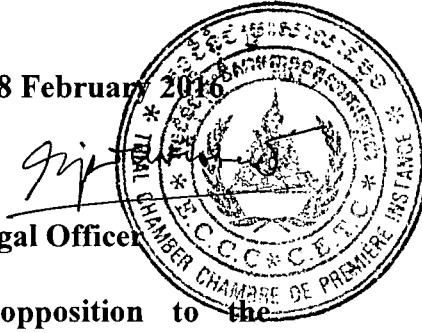
TRIAL CHAMBER

TO: All Parties, Case 002 **Date:** 18 February 2016

FROM: NIL Nonn, President of the Trial Chamber

CC: All Trial Chamber Judges; Trial Chamber Senior Legal Officer

SUBJECT: Decision on the KHIEU Samphan Defence's opposition to the appearance of 2-TCW-987 (E364)



1. The Chamber is seised of a KHIEU Samphan Defence motion in which it requests the Chamber to reverse its decision to call on its own motion Witness 2-TCW-987 (“Request”) (E364, para. 12; T. 3 September 2015, pp. 99-103, 105-106). The Co-Prosecutors oppose the Request (T. 3 September 2015, pp. 103-104). On 24 December 2015, the Chamber informed the Parties of its decision to hear this witness during the trial topic on the Treatment Cham (E364/1.1). This memo sets out the reasons for this decision.

2. The KHIEU Samphan Defence submits that the decision to call Witness 2-TCW-987 violates the principle of equality of arms and the Accused’s right to adequate time and facilities to prepare for his defence due to the late notice provided and the fact that the Defence had never heard about this individual before being notified of his selection (E364, para. 10; T. 3 September 2015, p. 100). The Defence particularly objects to the fact that Witness 2-TCW-987 was not proposed by any Party to testify in Case 002/02 or subject to an Internal Rule 87(4) request by the Co-Prosecutors, and was interviewed only in the context of the investigations in Case 004 (E364, paras 8-10; T. 3 September 2015, pp. 99-101, 103). The KHIEU Samphan Defence submits that statements from investigations in Cases 003 and 004 should not be allowed to “enrich” without limit the current trial in Case 002/02 for which investigations have been closed, as the Accused must have access to the evidence in its totality (E364, paras 8-11; T. 3 September 2015, p. 106).

3. The Co-Prosecutors respond that the two written records of interview (“WRIs”) of Witness 2-TCW-987 amount to no more than 15 pages in French, the review of which does not represent an unsurmountable task to undertake by the day of the witness’s scheduled testimony. They further submit that it is within the Trial Chamber’s discretion to decide that a witness be heard on its own motion (T. 3 September 2015, pp. 103-104).

4. The Trial Chamber recalls that it is within its discretion to decide which individuals to hear during these trial proceedings and that it may decide on its own initiative to hear any person whom it deems conducive to ascertaining the truth (*see* Internal Rule 84(2), 87(4), 91). The Chamber notes that the KHIEU Samphan Defence renews its general objection to the use in Case 002/02 of material disclosed from Cases 003 and 004 (*see* E364, paras 8-10; E363) and recalls that the Chamber has addressed and rejected such objection in E363/3. The Trial Chamber finds that the KHIEU Samphan Defence's opposition to hearing Witness 2-TCW-987 is based primarily upon the Accused's right to have sufficient time and facilities to prepare his defence and to have equal access to information (E364, para. 10). The Chamber acknowledges that the Parties were not given significant advanced notice when it originally scheduled Witness 2-TCW-987 to replace Witness 2-TCW-955. This was because the Chamber received new information regarding the latter's health only shortly before he was scheduled to testify. However, the Chamber temporarily removed Witness 2-TCW-987 from the schedule while it considered the KHIEU Samphan Defence's objections (*see* E364/1.2).

5. This Witness was heard on 11 January 2016, over four months after the Parties were first informed that he had been selected to be heard as witness in Case 002/02. Further, the Chamber notes that the WRIs from Case 004 of Witness 2-TCW-987 were disclosed to the Defence around 20 March 2015 (E319/19.3.93; E319/19.3.219). Considering the additional time that has effectively been accorded to the Defence to prepare for the appearance of this individual, the Chamber finds that the Defence have been accorded sufficient time and facilities to prepare. Accordingly, the Chamber's decision to hear Witness 2-TCW-987 on its own motion does not violate the rights of the Accused. The Request is therefore rejected.

6. Finally, the Chamber notes that this Witness's WRIs were the subject of an Internal Rule 87(4) request for admission from the International Co-Prosecutors (E319/32) made on 25 September 2015, which the Chamber granted on 18 February 2016 (E319/32/1).

7. This constitutes the Trial Chamber's official response to E364.