E410

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

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

សាធារណៈ / Public

TRIAL CHAMBER

TO: **All Parties, Case 002** **Date: 31 May 2016**

FROM: **NIL Nonn, President of the Trial Chamber**

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

SUBJECT: **Decision on Prior Statements of Witness 2-TCW-816**

1. The Trial Chamber is seised of an oral request by the NUON Chea Defence to admit into evidence a military court statement of witness 2-TCW-816 made on 6 March 1999 (D288/6.52/4.19). Separately, the Chamber has *proprio motu* identified for admission an autobiographical statement made by 2-TCW-816 made on 6 June 1977 (ERNs 01241619-01241627).

2. On 20 May 2016, the NUON Chea Defence e-mailed the Trial Chamber Senior Legal Officer making legal submissions on the admissibility of two documents and seeking to make oral submissions on the same topic. The Chamber granted the Defence request to make oral submissions and on 23 May 2016, heard from the NUON Chea Defence and responses of the other parties. Although in their oral submissions the NUON Chea Defence initially sought the admission of a compilation of S-21 documents in addition to the military court statement, it withdrew the former request upon the Co-Prosecutors' clarification that these S-21 documents had already been admitted (T. 23 May 2016, pp. 4, 7-8, 22 (DRAFT)). The only pending request therefore concerns the military court statement. The Co-Prosecutors, the Lead Co-Lawyers and the KHIEU Samphan Defence do not object to its admission.

3. Also on 23 May 2016, the Chamber informed the parties through an email from its Senior Legal Officer that the Chamber had obtained from DC-Cam and placed on the Shared Materials Drive "a self-critical autobiography" made by 2-TCW-816 (*See* David Chandler, Voices from S-21, E3/1684 at ERN 00192703-04). As the document was only available in Khmer, the Chamber requested translation of the document and informed the parties that it would rule on its admissibility *proprio motu.*

4. According to Internal Rule 87(4), the Trial Chamber may admit, at any stage of the trial, all evidence that it deems conducive to ascertaining the truth, where that evidence also satisfies the *prima facie* standards of relevance, reliability and authenticity required under Rule 87(3). The Chamber determines the merit of a request to admit new evidence in accordance with the criteria in Rule 87(3). Rule 87(4) also requires that any party seeking the admission of new evidence shall do so by a reasoned submission. The requesting party must satisfy the Trial Chamber that the proposed evidence was either unavailable prior to the opening of the trial or could not have been discovered with the exercise of reasonable diligence. However, in certain cases, the Chamber has admitted evidence which does not strictly speaking satisfy this criterion, including in instances where evidence relates closely to the material already before the Chamber and where the interests of justice require the sources to be evaluated together, and where the proposed documents are exculpatory and require evaluation to avoid a miscarriage of justice (E276/2, para. 2 referring to E190 and E172/24/5/1; E260, para.5)

5. As to the military court statement, the Chamber has not considered the legal argument contained in the NUON Chea Defence's email of 20 May 2016. Submitting Rule 87(4) requests by email does not comport with the Practice Direction on the Filing of Documents, and leave was not sought to deviate from established practice. It has therefore only considered the Defence's oral submissions regarding this document. As to the timing of the request, the Chamber notes that the military court statement has been on the Case File since 19 May 2009 and the parties were informed by e-mail of 7 March 2016 that that 2-TCW-816 was selected to testify on the S-21 Topic. The NUON Chea Defence fails to put forward any reason for the submission of its request on the eve of the witness's testimony. The Chamber therefore considers the request to be untimely. Nonetheless, the Chamber has as a practice admitted into evidence all prior statements of witnesses who testify before it (E319/36/2, para. 15). The statement bears the markings of an official military court document and the thumbprint of the witness. It is therefore *prima facie* relevant and reliable (including authentic). The Chamber considers it to be in the interests of justice to admit the present document so that all of the evidence of this witness may be evaluated holistically.

6. As to the autobiography of the witness, the Chamber notes that the document appears to be hand-written and signed by 2-TCW-816. It was provided to the Chamber by DC-Cam. The Chamber therefore considers it to be *prima facie* relevant and reliable (including authentic). A translation has been requested and will be provided to the parties as soon as possible.

7. The Chamber therefore admits into evidence the military court statement of 2-TCW-816 and the autobiography of 2-TCW-816, according them document numbers E3/10568 and E3/10570, respectively.