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E408/2

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ជាតិ សាសនា ព្រះមហាក្សត្រ

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Extraordinary Chambers in the Courts of Cambodia
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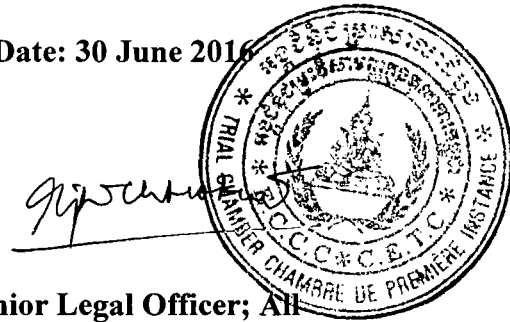
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TRIAL CHAMBER

**TO: Mr. Michael G. KARNAVAS
Mr. ANG Udom**

Date: 30 June 2016

FROM: NIL Nonn, President of the Trial Chamber



CC: All Trial Chamber Judges; Trial Chamber Senior Legal Officer; All Parties, Case 002/02

SUBJECT: Decision on Urgent request from Co-Lawyers for Mr. IENG Sary and Mr. MEAS Muth for leave to file submissions on the testimony of Expert Witness Michael Vickery (E408/1)

1. The Chamber is seised of a request filed by the Defence of MEAS Muth, Charged Person in Case 004, and former counsel for IENG Sary, Accused in Case 002, now deceased (“Interveners”). The Interveners seek to file submissions and to impose limitations on the testimony of expert Michael Vickery (2-TCE-94) who is scheduled by the Chamber to testify in Case 002/02 (E408). By email of 24 June 2016, the Chamber directed the parties not to file responses to this request.

2. The Interveners submit that it is in the interests of justice to permit it to make submissions in Case 002/02 on the parameters of Mr. Vickery’s testimony because there is a real risk that Mr. Vickery’s testimony may violate the confidentiality of MEAS Muth and IENG Sary’s respective cases (E408/1, paras 9-10). They inform the Chamber that Mr. Vickery is a former member of both the MEAS Muth and IENG Sary Defence teams. The Interveners submit that the applicable rules and codes of ethics impose a duty of confidentiality on all members of the defence, including Mr. Vickery, and they seek to intervene to ensure this confidentiality is respected (E408/1, paras 12-13). The Interveners contend that the Chamber must ensure that Mr. Vickery’s testimony does not breach the confidentiality of IENG Sary or MEAS Muth’s cases (E408/1, para. 16). They accordingly request that Mr. Vickery not be permitted to testify about any information he

has learned in the course of his work for them and also that they be permitted to be present during Mr. Vickery's testimony to object to questions that may lead Mr. Vickery to violate his duty of confidentiality to MEAS Muth or IENG Sary (E408/1, paras 16-21). It is submitted that the acceptance of these submissions will not prejudice the parties to the case or cause delays in Case 002/02 (E408/1, paras 22-23).

3. The Chamber notes that there are no specific provisions in the applicable law of the ECCC concerning interveners in proceedings (F20/1, para. 10). Procedural rules developed at the international level provide that the primary consideration in allowing an intervention is "whether it is in the legitimate interests of the requesting entity, and denial thereof could cause them prejudice" (E350/7, para. 4; F20/1, para. 11). Applications to participate in proceedings as interveners "are to be granted, if at all, on a case-by-case basis where the interests of justice so dictate" (E350/7, para. 4; F20/1, para. 12).

4. As a preliminary matter, the Chamber notes that the death of IENG Sary had the effect of terminating all criminal and civil actions against him (E270/1). Therefore, the filing of a submission in the interest of his "Defence" in the current proceedings would at least require authorisation or endorsement by his heirs.

5. This issue aside, the Trial Chamber considers that the parties may propose that particular experts testify, but it is for the Chamber to decide whether to appoint or hear such persons. Those appointed are experts of the Court and not of the parties. If any previous contractual engagement with a third party creates an obstacle to the provision of independent testimony, it is primarily the duty of the expert to inform the Chamber whether he or she can testify in accordance with his or her oath which require that an expert assist the Chamber honestly, confidentially and to the best of his or her ability (Internal Rule 31(2)). The Chamber has appointed Mr. Vickery as an expert to testify in Case 002/02 and considers that the intervention of third parties during his testimony would be inappropriate to the ECCC legal framework and contrary to the interests of justice. If Mr. Vickery owes a duty of confidentiality to a Charged Person or Accused in another case, it is not an issue to be regulated by the Trial Chamber during the expert's testimony.

6. However, in order to determine whether the Chamber will retain the scheduled testimony of the expert, the Chamber orders the Witness and Expert Support Unit to inform Mr. Vickery of the confidentiality concerns raised by the Interveners. This is to provide the expert an opportunity to inform the Chamber whether he considers that this situation prevents him from being completely forthcoming about his expert opinion in his Case 002 testimony.

7. In light of the foregoing, the request to file submissions and to intervene in this case is denied.