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

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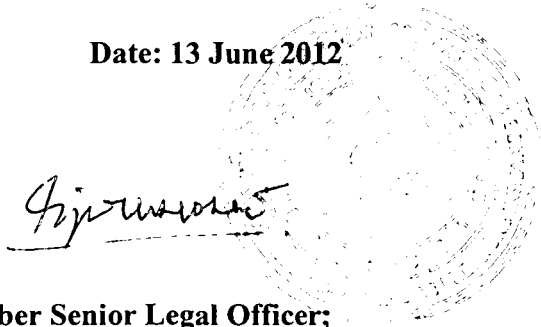
TRIAL CHAMBER

Date: 13 June 2012

TO: All parties, Case 002

FROM: NIL Nonn, President, Trial Chamber

**CC: All Trial Chamber Judges; Trial Chamber Senior Legal Officer;
Chief, Witness and Expert Support Unit (WESU);
Professor Benedict KIERNAN, Yale University.**



SUBJECT: Proposed testimony of Benedict KIERNAN before the Trial Chamber

On 25 October 2011, the Trial Chamber informed the parties of its intention to hear Professor Benedict KIERNAN during Case 002/1 (E131/1, Confidential Annex B). On 19 December 2012, the Trial Chamber informed the parties about ongoing efforts to schedule his testimony (E155). On 6 February 2012, the Trial Chamber delegated the responsibility of leading the in-court questioning of Professor KIERNAN to the Co-Prosecutors, requested them to report back to the Chamber regarding the timing and modalities of this testimony and authorized contact between the Co-Prosecutors and Professor KIERNAN for this purpose (E166). On 27 February 2012, the Co-Prosecutors informed the Trial Chamber about Professor KIERNAN's unavailability in 2012 due to other professional commitments, but that he wished to testify via video-link (E166/1). On 9 March 2012, the IENG Sary Defence opposed video-link testimony of Professor KIERNAN, as it would violate IENG Sary's right to confront the witness as no circumstances existed that would justify such an exceptional measure (E166/1/1). On 15 March 2012, the Trial Chamber heard oral submissions of the Parties on this issue (T., 15 March 2012, pp. 69-143).

The Trial Chamber could not entertain the request of Professor KIERNAN to be heard via video-link in April 2012. Testimony via video-link may only be granted in exceptional circumstances. In this instance, at least one Defence team opposed the use of video-link, in part due to the large number of documents and contested documents that would be examined during the testimony. The Trial Chamber considered additional measures to

secure Professor KIERNAN's testimony by video-link in order to accommodate Defence concerns, but concluded that such measures were impracticable and too costly. Trial efficiency therefore required his appearance in person so that his testimony could have been heard expeditiously, in particular considering the time-difference between the United States and Cambodia which would have created a risk of substantial prolongation of both this testimony and overall trial proceedings in Case 002.

Despite efforts to inform Professor KIERNAN of these realities, and its indication that it would exercise the utmost flexibility in scheduling his testimony so as to avoid disruption to his professional commitments, Professor KIERNAN did not respond to the Chamber's request that he advise WESU of particulars regarding his university teaching schedule or other constraints. While concerted efforts were made both by the Chamber and United States institutions supportive of the ECCC to obtain his testimony, in reality the ECCC has few practical means at its disposal to compel the attendance of an uncooperative expert. Having exhausted all reasonable means to obtain the testimony of Professor KIERNAN, the Chamber has decided not to hear his evidence in Case 002/1.

The Trial Chamber recognized and sought Professor KIERNAN's expertise on grounds that his expertise placed him among the foremost international authorities on the Democratic Kampuchea era and as it adjudged his expertise as likely to contribute to ascertaining the truth in Case 002. In accordance with internationally-protected fair trial guarantees, it follows from the Trial Chamber's inability to call Professor KIERNAN that his conclusions can have little if any probative value in Case 002 given that their author cannot be adversarially challenged. .