



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

**អង្គជំនុំជម្រះសាលាដំបូង**

Trial Chamber  
Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ

Case File/Dossier No. 002/19-09-2007/ECCC/TC

Before: Judge NIL Nonn, President  
Judge Claudia FENZ  
Judge YA Sokhan  
Judge Martin KAROPKIN  
Judge YOU Ottara

**ឯកសារដើម**  
ORIGINAL/ORIGINAL  
ថ្ងៃ ខែ ឆ្នាំ (Date): 27-Jun-2019, 10:48  
CMS/CFO: Sann Rada

Date: 27 June 2019  
Original languages: Khmer/English  
Classification: PUBLIC

**ORDER TO RECLASSIFY DOCUMENTS ON THE CASE FILE AS PUBLIC**

Co-Prosecutors  
CHEA Leang  
Nicholas KOUMJIAN

Accused  
NUON Chea  
KHIEU Samphan

Civil Party Lead Co-Lawyer  
PICH Ang

Lawyers for the Defence  
SON Arun  
LIV Sovanna  
Doreen CHEN  
KONG Sam Onn  
Anta GUISSÉ

## 1. INTRODUCTION

1. On 9 April 2019, the President of the Trial Chamber issued a memorandum (“Memorandum”) informing the parties that the Chamber had identified 1,439 documents filed as confidential which were referred to or extracted in the Case 002/02 Trial Judgment. The President of the Chamber informed the parties that the Chamber no longer considered the confidential classification of these documents to be appropriate at this stage of proceedings and invited them, along with the Co-Investigating Judges and Pre-Trial Chamber Judges, to comment on the need to retain their confidential status.<sup>1</sup>

## 2. APPLICABLE LAW

2. Pursuant to Article 3.14 of the Practice Direction on Filing Documents Before the ECCC and Article 9.1 of the Practice Direction on Classification and Management of Case-Related Information, a chamber which is seised of a case may, by order, reclassify any document on the case file. Affected parties will be given an opportunity to be heard before such a decision is made.

3. According to Article 4 of the Practice Direction on Classification and Management of Case-Related Information, the following categories of documents and information are (among others) in principle *public*, subject to a different classification in accordance with a Court decision and redactions as necessary:

- (c) Written records, transcripts, and audio/visual recordings of public hearings;
- (d) Evidence, including expert reports, filed during a trial hearing; and
- (e) Chambers’ decisions and judgements.

4. Pursuant to Article 5.1 of the Practice Direction on Classification and Management of Case-Related Information, and subject to the same conditions, the following categories of documents are (among others) in principle *confidential*:

- (b) Subject to Article 4, filings received and materials generated during a judicial investigation;

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<sup>1</sup> Trial Chamber Memorandum entitled Confidential Documents in Case 002/02 Judgment Proposed for Reclassification to Public, E467, 9 April 2019.

- (c) Written records, transcripts, and audio/visual recordings of interviews and other investigative acts carried out by the Co-Investigating Judges or those acting under their delegated authority;
- (d) Victims' complaints;
- (e) Identity and contact details of victims who are not civil parties (including applications to be joined as civil parties);
- (f) Decisions, orders and other findings of the Co-Investigating Judges;
- (g) Written records, transcripts and audio/visual recordings of hearings held *in camera*.

### 3. DISCUSSION

5. The Memorandum afforded the parties the opportunity to respond to the Chamber's proposed reclassification of the tabled documents. The Co-Prosecutors, NUON Chea Defence and Co-Investigating Judges did not forward any comments on the proposed reclassifications. The Chamber accordingly considers that no objections are raised by them.<sup>2</sup> None of the parties who responded to the Memorandum (see below) raised any objections to Annexes C and D. The Chamber accordingly appends these annexes hereto as **Annexes 3 and 4** and orders the reclassification of the documents listed therein.

#### **3.1. KHIEU Samphan Defence's Response to the Memorandum**

6. On 30 April 2019, the KHIEU Samphan Defence filed its comments to the Memorandum, indicating that it had "no objection to the proposed reclassification". In addition, the Defence identified twelve of its previous filings which were classified as confidential and requested that the Trial Chamber consider reclassifying them to public.<sup>3</sup>

7. In the Memorandum, the President of the Trial Chamber indicated that no documents other than those referred to in the Case 002/02 Trial Judgement were being considered for reclassification at this time. This decision was reached as a result of the Chamber's downsizing following its issuance of the Judgement and the limited time it will be seized with the case file before notices of appeal are filed by the parties and the case file is forwarded to the Supreme Court Chamber in accordance with Internal Rule 108(1).<sup>4</sup>

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<sup>2</sup> See Memorandum, para. 6.

<sup>3</sup> KHIEU Samphan Defence Memorandum entitled Comments on Proposal to Reclassify Confidential Documents, E467/1, 29 April 2019.

<sup>4</sup> The NUON Chea and KHIEU Samphan Defence teams have both indicated their intention to appeal the Case 002/02 Trial Judgment. See NUON Chea's Urgent First Request for an Extension of Time and Page Limits for Filing his Notice of Appeal against the Trial Judgement in Case 002/02, F40/1.1, 3 April 2019; NUON

8. It is noteworthy that all twelve documents sought for reclassification by the Defence form part of a broader series of filings, many of which are also classified as confidential. The Chamber is of the opinion that without a comprehensive review of all confidential filings on the case file, piecemeal reclassification of a single party's filings will not serve to provide the transparency sought by the KHIEU Samphan Defence.

9. It will be incumbent upon the Supreme Court Chamber, as the last judicial office seized of Case 002/02, to undertake a comprehensive review of the classification of all records on the case file following conclusion of appeal proceedings.<sup>5</sup> Should an aggrieved party deem it necessary to motion the Supreme Court Chamber with a reclassification request at an earlier point in time, however, they will have an opportunity to do so once the case file has been received by the greffier of the Supreme Court Chamber.

### **3.2. Civil Party Lead Co-Lawyers' Response to the Memorandum**

10. On 6 May 2019, the Civil Party Lead Co-Lawyers responded to the Memorandum, indicating that they did not object to the declassification of the civil party applications and supplementary information forms in Annex A, provided they were appropriately redacted in accordance with Article 7.4 of the Practice Direction on the Classification and Management of Case-Related Information.<sup>6</sup>

11. The Chamber has identified several civil party applications and supplementary information forms in Annex A which may require redactions to complainants' and civil party applicants' contact details in accordance with Article 7.4 of the Practice Direction. As mentioned above, the Trial Chamber does not have the human resources and time to assess and redact these documents. Accordingly, the Chamber has removed the relevant documents from Annex A and appends them to this Order as **Annex 5**. It will be the duty of the Supreme Court Chamber to review the appropriateness of the security classifications of these records,

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Chea's Letter Authorising his Lawyers to File an Appeal against the Case 002/02 Judgement, E465/1, 9 April 2019; KHIEU Samphan Defence Request for Extension of Time and Number of Pages to File Notice of Appeal, F39/1.1, 3 April 2019; KHIEU Samphan's Application for Review of Decision on Requests for Extensions of Time and Page Limits on Notices of Appeal, F44, 3 May 2019. The Supreme Court Chamber ordered the filing of Notices of Appeal by 1 July 2019. *See* Decision on Khieu Samphan's Application for Review of Decision on Requests for Extensions of Time and Page Limits on Notices of Appeal, F44/1, 7 June 2019.

<sup>5</sup> Practice Direction on the Classification and Management of Case-Related Information, Article 12.2.

<sup>6</sup> Civil Party Lead Co-Lawyers' Memorandum entitled Civil Party Lead Co Lawyers' Comments and Objections Regarding the Trial Chamber Memorandum entitled "Confidential Documents in Case 002/02 Judgment Proposed for Reclassification to Public", E467/2, 6 May 2019, para. 2 ("Civil Party Lead Co-Lawyers' Memorandum").

including any redactions, either on its own motion or at the conclusion of appeal proceedings – unless seised with a request by the Lead Co-Lawyers (or other party) to do so at an earlier date. The Trial Chamber orders the reclassification of the remaining documents in Annex A to the Memorandum, appended hereto as **Annex 1**.

12. The Lead Co-Lawyers object to the reclassification of the annexes to their Final Claim for Reparations (E457/6/2) and Supplemental Submission on Funding Issues Related to Reparation Projects in Case 002/02 and Request for Guidance (E457/6/2/4) as listed in Annex B of the Memorandum.<sup>7</sup> The Chamber observes that the filing of such annexes with a confidential status follows the practice in Case 002/01.<sup>8</sup> It also observes that the documents referred to by the Lead Co-Lawyers contain information about financial arrangements of external organisations and third-party contracts, and agrees with the Lead Co-Lawyers that it would be inappropriate to declassify them at this stage. The Chamber has accordingly removed 16 documents from Annex B to the Memorandum, and appends the remainder hereto as **Annex 2** and orders their reclassification.

13. Lastly, the Lead Co-Lawyers object to the reclassification of E344.1 as it contains the contact details of a civil party.<sup>9</sup> This document was not included in any of the annexes attached to the Memorandum and is not proposed for reclassification at this stage.

### **3.3. Pre-Trial Chamber's Response to the Memorandum**

14. On 21 May 2019, the Judges of the Pre-Trial Chamber forwarded their response to the Memorandum.<sup>10</sup> The Judges indicated that they did not object to the reclassification of confidential documents, “with the exception that the names and personal information of witnesses under protective measures, or whose requests for protective measures are pending, should remain confidential”. In addition, the Pre-Trial Chamber Judges request the reclassification as public “of any other Pre-Trial Chamber decisions on Case File 002 that are

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<sup>7</sup> Civil Party Lead Co-Lawyers' Memorandum, para. 3.

<sup>8</sup> See Annexes 1-13, E218/7/6.1.1- E218/7/6.1.10.

<sup>9</sup> Civil Party Lead Co-Lawyers' Memorandum, para. 4.

<sup>10</sup> Pre-Trial Chamber Memorandum entitled Response to Trial Chamber Memo entitled “Confidential Documents in Case 002/02 Judgment Proposed for Reclassification to Public”, E467/5, 21 May 2019 (“Pre-Trial Chamber's Memorandum”). The Pre-Trial Chamber requested and received an extension to file their responses on 8 May 2019 (see E467/3). The Trial Chamber's greffier rejected the Pre-Trial Chamber's first filing as it was not stamped or signed, and contained inconsistencies regarding the original language (E467/4).

currently confidential”, subject to the same conditions. The Pre-Trial Chamber Judges append two annexes containing 106 documents, which they propose for reclassification.<sup>11</sup>

15. The Chamber notes that none of the documents proposed for reclassification in its Memorandum concerned protected witnesses in Cases 001 or 002. Furthermore, the Chamber is only seised with Case 002/02 and does not have access to protective measures authorised by or pending before other judicial offices in Cases 003 and 004.

16. Concerning witnesses who may be protected in Cases 003 and 004, the Chamber refers to the International Co-Investigating Judge’s (“ICIJ”) instructions about public reference (during closing statements) to written records of interview (“WRI”) from Cases 003 and 004 which were disclosed to the Case 002 case file.<sup>12</sup> The ICIJ stipulated that:

At no time [in the ICIJ’s previous memoranda] was there any discussion about a publication of the full content of the relevant materials, but only of relevant portions as used by the parties and the Chamber in the trial and for the purposes of drafting the closing briefs – and ultimately, of course, the [Case 002/02] judgement. This stands to reason because the very same WRIs are still confidential in their case files of origin in Cases 003, 004 and 004/2. [...] Reclassifying the materials as public in Case 002/2 would [...] in effect make a number of documents on Case Files 003, 004 and 004/2 public, without a compelling need for doing so.<sup>13</sup>

17. The ICIJ accordingly objected to the reclassification in Case 002/02 to public of written records produced in Cases 003 and 004.<sup>14</sup> The Chamber considers that the ICIJ’s objections still stand with regard to Case 004, which is still in the investigative phase and therefore remains within the jurisdiction of the Co-Investigating Judges.<sup>15</sup>

<sup>11</sup> Pre-Trial Chamber’s Memorandum, paras 2-3.

<sup>12</sup> See e.g., International Co-Investigating Judge’s Memorandum entitled Memo of 30 march 2017, E319/35/11, Notified to OCIJ on 21 April 2017, E319/35/14/2, 12 May 2019; International Co-Investigating Judge’s Memorandum entitled Review of Confidentiality Restrictions of Case 003 and 004 Materials Pursuant to OCP Request E319/35/10, E319/35/14/3, 22 May 2017; International Co-Investigating Judge’s Memorandum entitled Trial Chamber Memorandum entitled “Memorandum Seeking Clarification on the International Co-Investigating Judge’s Memorandum E319/35/14/3”, E319/35/15/2, 16 January 2018.

<sup>13</sup> International Co-Investigating Judge’s Memorandum entitled Trial Chamber Memorandum entitled “Memorandum Seeking Clarification on the International Co-Investigating Judge’s Memorandum E319/35/14/3”, E319/35/15/2, 16 January 2018, paras 5, 8.

<sup>14</sup> International Co-Investigating Judge’s Memorandum entitled Trial Chamber Memorandum entitled “Memorandum Seeking Clarification on the International Co-Investigating Judge’s Memorandum E319/35/14/3”, E319/35/15/2, 16 January 2018, para. 11.

<sup>15</sup> Internal Rule 67(1) (“The Co-Investigating Judges shall conclude the investigation by issuing a Closing Order”). A closing order is anticipated in the second quarter of 2019. See Completion Plan Revision 20, 31 March 2019, available at < <https://eccc.gov.kh/en/completion-plan-revision-20>>.

18. The Pre-Trial Chamber is currently seised with appeals against closing orders in Cases 003 and 004/02, and is accordingly the custodian of the respective case files.<sup>16</sup> The Pre-Trial Chamber is the appropriate chamber to advise what effect, if any, protective measures in Cases 003 and 004/02 might have on the WRIs disclosed in Case 002/02 and now proposed for reclassification. The Trial Chamber has removed all WRIs from Annex A and includes them as a new annex, **Annex 6**, appended hereto. The Trial Chamber urges the Pre-Trial Chamber review the WRIs listed in Annex 6, as well as the decisions appended to their memorandum requested for reclassification,<sup>17</sup> and to advise the Supreme Court Chamber in due course of the appropriateness of their reclassification to public, subject to the necessary redactions.

### **FOR THE FOREGOING REASONS, THE TRIAL CHAMBER**

**DIRECTS** the Records and Archives Unit to reclassify as public the documents listed in Annexes 1, 2, 3 and 4.

**DEFERS** a decision on the reclassification of the documents listed in Annex 5 and the twelve filings requested by the KHIEU Samphan Defence.

**REQUESTS** the Pre-Trial Chamber to review the WRIs listed in Annex 6 and decisions appended to their memorandum, and, in light of the protective measures adopted in Cases 003 and 004, advise the Supreme Court Chamber in due course of the need for redactions and the continued need to retain their confidential classification.

**Phnom Penh, 27 June 2019**  
**President of the Trial Chamber**



**NiL Nonn**

<sup>16</sup> The Pre-Trial Chamber has declared that the Co-Investigating Judges are *functus officio* after signing the disposition of a closing order. See Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons) (Case 004/01), D308/3/1/20, 28 June 2018, para. 33.

<sup>17</sup> See above, para. 14.