

**BEFORE THE SUPREME COURT CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

**FILING DETAILS**

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**CO-PROSECUTORS' RESPONSE TO THE SUPREME COURT CHAMBER'S  
REQUEST FOR SUBMISSIONS REGARDING RECLASSIFICATION**

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## I. INTRODUCTION

1. The Co-Prosecutors hereby respond to the Supreme Court Chamber's ("SCC") request for submissions regarding its upcoming review of confidential and strictly confidential documents on Case File 002 ("Request for Submissions")<sup>1</sup> pursuant to its obligations under article 12 of the Practice Direction on Classification and Management of Case-Related Information (Rev. 2) ("Classification Practice Direction")<sup>2</sup> as the last judicial office seized of Case File 002.
2. As the United Nations ("UN") Secretary General noted, "[t]hrough their work, the Chambers are establishing a judicial record on the Khmer Rouge period for the Cambodian people and the international community."<sup>3</sup> The Addendum to the ECCC Agreement<sup>4</sup> makes clear that the UN and Royal Government of Cambodia ("RGC") agree it is vital to ensure that the ECCC archives are not only preserved in accordance with international standards but are also "as broadly accessible as possible".<sup>5</sup> To that end, the Addendum requires the ECCC to maintain, preserve and manage its archives, including the *declassification* of documents and materials, respond to requests for access to documents, and disseminate information to the public regarding the ECCC.<sup>6</sup> It also *requires* the ECCC to "provide electronic access to, and printed copies of, the public archives to the public".<sup>7</sup>
3. The right of access to information falls within the general framework of freedom of expression. As submitted further below, enabling public access to legal proceedings to the maximum extent possible promotes trust in the legal process. However, while the right of access to information and transparency are important objectives, they must be balanced against other rights and interests.<sup>8</sup> Chief amongst those is safeguarding the rights of the accused, witnesses, and

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<sup>1</sup> F71/1/1 Interoffice Memorandum entitled "Review of Confidential and Strictly Confidential Documents on Case File 002", 2 Aug 2022 ("Request for Submissions").

<sup>2</sup> Practice Direction on the Classification and Management of Case-Related Information, ECCC/004/2009/Rev.2, amended on 7 Mar 2012 and 24 Apr 2014 ("Classification Practice Direction"). Whilst the Request for Submissions relies on Revision 1 of the Practice Direction, the Co-Prosecutors refer throughout this Response to Revision 2, it being their understanding that this is the Practice Direction currently governing ECCC proceedings.

<sup>3</sup> Report of the Secretary-General on the Extraordinary Chambers in the Courts of Cambodia- Residual Functions, UN Doc. A/75/809, 19 Mar 2021, para. 16.

<sup>4</sup> Addendum to the Agreement between the [RGC] and the [UN] concerning the Prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea on the Transitional Arrangements and the Completion of the Work of the Extraordinary Chambers, 11 Aug 2021 and 26 Aug 2021 ("Addendum").

<sup>5</sup> Addendum, art. 3(1).

<sup>6</sup> Addendum, art. 2(1).

<sup>7</sup> Addendum, art. 3(2).

<sup>8</sup> See e.g. Agreement between the [UN] and the [RGC] concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea, 6 June 2003 ("ECCC Agreement"), arts 12(2), 23; Law

victims,<sup>9</sup> as foreseen by the Addendum itself.<sup>10</sup> This includes protecting confidential personal material such as sensitive or private information regarding mental and physical health issues, statements that name or identify victims of sexual violence, and identifying or other sensitive information contained in statements produced through the use or threat of torture.<sup>11</sup>

4. It is with this delicate balancing exercise in mind that the Co-Prosecutors respond to the SCC's Request for Submissions. In their submission, the presumption of confidentiality that applies to the judicial investigation ceases when proceedings have ended, as there is no longer a generalised risk of prejudice to the rights of the accused or the integrity of the investigation. The presumption of publicity now applies to all material held by the ECCC. This is the guiding principle to be applied to all materials on Case File 002 unless the protection of other interests requires that their confidential or strictly confidential status be retained. The Co-Prosecutors therefore favour the redaction of confidential information within documents rather than classification of entire documents as confidential and submit it is in the interests of a strong ECCC legacy that human and financial resources be dedicated to the process of review and redaction.
5. Finally, in addition to reclassification, the Co-Prosecutors urge the SCC to formulate a policy that would govern access to the ECCC's records.<sup>12</sup> By establishing guidelines detailing what

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on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, as promulgated on 27 Oct 2004, arts 33 new, 34 new; Internal Rules of the Extraordinary Chambers in the Courts of Cambodia, Rev. 9, 16 January 2015 ("Internal Rule(s)", or "IR(s)"), IR 21(1); Classification Practice Direction, art. 1.2; Case 001-F30/2 Decision on Guidelines for Reclassification of Documents on Case File, 26 July 2012 ("Case 001 Reclassification Guidelines"), paras 5-6.

<sup>9</sup> See e.g. Case 004/1-D304/6/4 Decision on Im Chaem's Request for Reclassification of her Response to the International Co-Prosecutor's Final Submission, PTC, 8 June 2018 ("PTC Decision on Im Chaem Reclassification Request"), para. 23; E118/4 Trial Chamber Memorandum entitled "Response to Ieng Sary Defence Request for Access to Strictly Confidential Documents on the Case File (E118)", 28 Nov 2011; *Yekatom and Ngaissona*, Trial Chamber, Decision on Reclassification of Documents, 28 Jan 2021, para. 8 (in assessing what documents could be made publicly available, the Single Judge balanced the different interests at stake, including, *inter alia*, the principle of publicity; the safety, physical and psychological well-being, dignity and privacy of victims and witnesses; and the accused's right to privacy).

<sup>10</sup> Addendum, art. 2(1) (listing as a residual function to "provide for the protection of victims and witnesses").

<sup>11</sup> Making these materials public could result in a variety of harms, including stigmatisation or conflict within the community (particularly if the document makes allegations against others of criminal behaviour); adverse consequences on family members who were unaware of such harms (including children who were a product of forced consummations within forced marriages); and a chilling effect on the willingness of witnesses and victims (even at other tribunals) to speak candidly about similarly private matters despite assurances of confidentiality.

<sup>12</sup> The Co-Prosecutors refer the SCC to the access policies in force at the International Residual Mechanism for Criminal Tribunals (IRMCT), the Residual Special Court for Sierra Leone ("RSCSL"), and the Unified Court Records database (ICTR, ICTY, and IRMCT) User Guide for more details.

justifications would warrant access and for what limited purposes documents classified as confidential or strictly confidential may be used when access is granted, the SCC will ensure consistency and fairness in administration of the policy. In keeping with the ECCC's mandate and goals, the overall approach should balance the principles of openness and transparency with the obligation to safeguard the security and privacy interests of individuals named in ECCC records.

## II. PROCEDURAL HISTORY

6. The Co-Prosecutors set out the relevant Case 002 procedural history. Where reclassification decisions in other ECCC Cases inform this current process, they are referred to in the submissions below.
7. On 14 January 2010, the Co-Investigating Judges ("CIJs") informed the parties that they considered that the judicial investigation had been concluded, with all IR 66(1) requests for investigative action, CIJ decisions and Pre-Trial Chamber ("PTC") appeal decisions having been disposed of by 15 July 2010.<sup>13</sup> On 15 September 2010, the Case 002 Closing Order was issued;<sup>14</sup> the CIJs redacted from the public version the names of witnesses, but left intact all the evidence, names of victims (both alive and deceased) who had not testified and all factual and legal findings. On 13 January 2011, the PTC confirmed the Closing Order, with some amendments, in its decisions on appeals against the Closing Orders.<sup>15</sup>
8. In its Case 002/01 Trial Judgment, the Trial Chamber ("TC") referenced the fact that 5,102 documents and other materials put before it pursuant to IR 87(3) retained the 'confidential' classification automatically assigned during the judicial investigation but determined that that confidentiality was no longer justified for the information publicly disclosed in the judgment.<sup>16</sup> However, the TC did not declassify the underlying documents it relied on.<sup>17</sup>
9. During the course of the Case 002/02 trial, documents presented during public trial hearings were declassified and published on the court's website.<sup>18</sup> Others were not. For example, the

<sup>13</sup> See **D427** Closing Order, 15 Sept 2010 ("Closing Order"), para. 13.

<sup>14</sup> **D427** Closing Order.

<sup>15</sup> **D427/2/12** Decision on Ieng Thirith's and Nuon Chea's Appeals against the Closing Order, 13 Jan 2011; **D427/4/14** Decision on Khieu Samphan's Appeal Against the Closing Order, 13 Jan 2011; **D427/1/26** Decision on Ieng Sary's Appeal Against the Closing Order, 13 Jan 2011.

<sup>16</sup> **E313** Case 002/01 Judgement, 7 Aug 2014 ("Case 002/01 Trial Judgment"), para. 39.

<sup>17</sup> **E313** Case 002/01 Trial Judgment, fn. 106.

<sup>18</sup> **E465** Case 002/02 Judgement, 16 Nov 2018 ("Case 002/02 Trial Judgment"), para. 34.

International Co-Prosecutor (“ICP”) disclosed a number of written records of interview (“WRIs”), civil party applications (“CPAs”) and other documents generated during the Case 003, 004/1, 004/2 and 004 investigations. The International Co-Investigating Judge (“ICIJ”) objected to the reclassification as public of some of these WRIs and CPAs since they were confidential in the case files of those ongoing investigations.<sup>19</sup> In the Case 002/02 Trial Judgment, the TC noted that 14,476 documents and other materials put before it remained ‘confidential’, again as a result of the automatic assignment during the investigation. Again, it determined that confidentiality was no longer justified for information publicly disclosed in the Judgment.<sup>20</sup>

10. After issuing the Case 002/02 Trial Judgment, the TC invited the Case 002 Parties, the PTC and the CIJs to comment on the proposed reclassification to public of documents referred to in the Judgment.<sup>21</sup> In response, Khieu Samphan committed to the “open court principle”; he did not oppose any of the proposed reclassifications and requested declassification of 12 of his own filings.<sup>22</sup> The Civil Party Lead Co-Lawyers (“CPLCLs”) did not object to the declassification of the listed CPAs and supplementary information forms (“SIFs”) subject to application of article 7.4 of the Classification Practice Direction requiring the redaction of Civil Parties’ contact details.<sup>23</sup> The CPLCLs also objected to the declassification of certain documents containing third party financial and other information relating to reparations. The PTC Judges took no issue with the reclassification with one exception: the names and personal information of witnesses under protective measures, or whose requests for protective measures were pending, should remain confidential. The PTC also asked the TC to reclassify any other confidential or public redacted PTC decisions on Case File 002 as public, and appended an

<sup>19</sup> **E319/35/15/2** Interoffice Memorandum from the ICIJ to the TC entitled “Trial Chamber Memorandum entitled ‘Memorandum Seeking Clarification on the International Co-Investigating Judge’s Memorandum E319/35/14/3 – E319/35/15/1’”, 16 Jan 2018 (“ICIJ Reclassification Memo”), paras 8-10.

<sup>20</sup> **E465** Case 002/02 Trial Judgment, para. 34.

<sup>21</sup> **E467** TC Memorandum entitled “Confidential documents in Case 002/02 judgment proposed for reclassification to public”, 9 Apr 2019, attaching 4 annexes: **E467.1** Annex A: Evidence filed during trial proceedings in Case 002/02; **E467.2** Annex B: Trial Chamber decisions and related Case 002 filings; **E467.3** Annex C: Documents filed by or before the OCIJ during the judicial investigation in Case 002; **E467.4** Annex D: Documents relating to victims who are no longer civil parties in Case 002.

<sup>22</sup> **E467/1** Letter from Kong Sam Onn and Anta Guissé entitled “Comments on proposal to reclassify confidential documents”, 29 Apr 2019.

<sup>23</sup> **E467/2** Civil Party Lead Co Lawyers’ comments and objections regarding the Trial Chamber Memorandum entitled “Confidential documents in Case 002/02 judgement proposed for reclassification to public”, 6 May 2019.

- annex with 106 documents they proposed for reclassification subject to protective measures.<sup>24</sup>
11. Having heard those interested parties, the TC reclassified as public<sup>25</sup> several thousand documents: i) evidence filed during the trial proceedings in Case 002/02,<sup>26</sup> ii) TC decisions and related Case 002 filings,<sup>27</sup> iii) documents filed by or before the Office of the Co-Investigating Judges (“OCIJ”) during the judicial investigation in Case 002,<sup>28</sup> and iv) documents relating to victims who are no longer civil parties in Case 002.<sup>29</sup> It deferred to the SCC a decision on the reclassification of the CPAs and SIFs requiring review for redaction<sup>30</sup> and 12 Khieu Samphan filings. The TC also requested the PTC to review several hundred WRIs<sup>31</sup> and decisions appended to their memorandum and in light of the protective measures adopted in Cases 003 and 004/2 and to advise the SCC of the need for redactions and the continuing need for their confidential classification. To the best of the Co-Prosecutors’ knowledge, this PTC review has not taken place and the documents remain confidential.
12. On 5 May 2021, the PTC Judges sent an Interoffice Memorandum to the SCC Judges recommending the reclassification of 151 confidential PTC decisions and orders, 387 confidential decisions and orders of the CIJs, 17 public redacted PTC decisions, and 8 public redacted decisions and orders of the CIJs in Case File 002. The PTC invited the SCC’s comments on the continuing need for the confidentiality of these documents at this stage of Case 002 and proposed to reclassify them as public 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.<sup>32</sup>
13. On 14 December 2021, mindful of the enormous significance of reclassification for Civil Parties and the need for the ECCC to have “real and lasting impact”, the CPLCLs filed a

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<sup>24</sup> **E467/5** Interoffice Memorandum from PTC Judges to TC Judges entitled “Response to Trial Chamber memo entitled ‘Confidential documents in Case 002/02 judgment proposed for reclassification to public’”, 21 May 2019.

<sup>25</sup> **E467/6** Order to Reclassify Documents on the Case File as Public, 27 June 2019.

<sup>26</sup> **E467/6.1** Annex 1: Evidence filed during trial proceedings in Case 002/02.

<sup>27</sup> **E467/6.2** Annex 2: Trial Chamber decisions and related Case 002 filings.

<sup>28</sup> **E467/6.3** Annex 3: Documents filed by or before the OCIJ during the judicial investigation in Case 002 (“OCIJ Filings Declassification”).

<sup>29</sup> **E467/6.4** Annex 4: Documents relating to victims who are no longer civil parties in Case 002.

<sup>30</sup> **E467/6.5** Annex 5: Civil Party applications and supplementary statements requiring review for redaction prior to reclassification.

<sup>31</sup> **E467/6.6** Annex 6: Written Records of Interview requiring review for redaction prior to reclassification.

<sup>32</sup> **F67** Interoffice Memorandum from the PTC Judges to the SCC Judges entitled “Confidential and Public Redacted Documents in Case File 002 Proposed for Reclassification to Public, 5 May 2021 (“May 2021 PTC Reclassification Memo”).

Request for Directions Regarding the Reclassification of Civil Party Documents.<sup>33</sup> Citing the importance for their clients that their sensitive private information contained in the case file not be made public, the CPLCLs made a range of recommendations for dealing with civil party materials, including Victim Information Forms (“VIFs”), SIFs, WRIs, DC-Cam statements, Victims Support Section (“VSS”) reports, powers of attorney and documents concerning civil party succession requests (together “Civil Party Materials”). They submitted that whilst the identities of Civil Parties are public and need not be redacted, the following private and/or sensitive information causes concern and may not be suitable for public disclosure:<sup>34</sup> i) Civil Parties’ contact details (e.g. telephone number, address, email address), copies of identification cards (including photographs) and/or their numbers, dates and places of birth, and details of family members;<sup>35</sup> ii) information identifying civil party and third-party victims of sexual violence;<sup>36</sup> iii) Civil Parties’ personal medical information;<sup>37</sup> iv) civil parties’ experiences of and perspectives on forced marriage;<sup>38</sup> v) torture-tainted material including confessions and biographies;<sup>39</sup> and vi) naming of alleged perpetrators.<sup>40</sup>

14. Since many Civil Party Materials were submitted to the ECCC with an expectation of confidentiality, the CPLCLs considered that the principle of informed consent should govern their publication, with the exception of material covering the subjects addressed in Civil Parties’ public testimony and/or where it was disputed in the proceedings and was material to a matter dealt with in the Court’s judgments.<sup>41</sup> The CPLCLs made the following recommendations: i) Civil Party Materials in evidence (and assigned an E3 number in Case 002) are presumptively public, subject to the redaction of contact details and sensitive information outlined above;<sup>42</sup> and ii) where Civil Party Materials are not in evidence, there is

<sup>33</sup> F71 Request for Directions Regarding the Reclassification of Civil Party Documents, 14 Dec 2021 (“CPLCL Request for Directions”), quote at para. 2.

<sup>34</sup> F71 CPLCL Request for Directions, para. 37.

<sup>35</sup> F71 CPLCL Request for Directions, paras 27-28, 38, 63, 68.

<sup>36</sup> F71 CPLCL Request for Directions, paras 39, 48, 64, 68.

<sup>37</sup> F71 CPLCL Request for Directions, paras 40, 48.

<sup>38</sup> F71 CPLCL Request for Directions, para. 41.

<sup>39</sup> F71 CPLCL Request for Directions, para. 42; *see also* para. 16.

<sup>40</sup> F71 CPLCL Request for Directions, para. 43.

<sup>41</sup> F71 CPLCL Request for Directions, paras 44-46, 61.

<sup>42</sup> F71 CPLCL Request for Directions, paras 54-61, 69, *citing* Classification Practice Direction, arts 4(d), 5.1(e), 6(c), 7.4, 9.2 together with TC jurisprudence that (a) evidence concerning sexual violence committed against third persons should be heard in closed session (fn. 85); (b) identifying personal details regarding a witness accused of serious crimes should be redacted (fn. 86); and (c) a civil party’s identity should be protected where revealing it could pose a risk to their emotional and psychological health (fn. 87).

no presumption of public status in the Classification Practice Direction and they should only be made public applying the principle of informed consent.<sup>43</sup> The ICP responded in support of the CPLCL’s request on 24 December 2021.<sup>44</sup>

15. On 2 August 2022, the SCC filed its Request for Submissions. On 11 August 2022, in response, the PTC Judges confirmed the views set out in their 5 May 2021 filing.<sup>45</sup>

### III. APPLICABLE LAW

#### CONFIDENTIALITY OF THE JUDICIAL INVESTIGATION

16. IR 21(1), “Fundamental Principles,” provides in relevant part:

The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and *transparency of proceedings*, in light of the *inherent specificity of the ECCC*, as set out in the ECCC Law and the Agreement. In this respect: [...] c) The ECCC shall ensure that victims are kept informed and that *their rights* are *respected* throughout the proceedings.”<sup>46</sup>

17. IR 54 mandates that Introductory, Supplementary and Final Submissions filed by the Co-Prosecutors are confidential documents<sup>47</sup> and IR 56(1) provides that “[i]n order to preserve the rights and interests of the parties, judicial investigations shall not be *conducted* in public. All persons *participating* in the judicial investigation shall maintain confidentiality.”<sup>48</sup>

18. Article 1.2 of the Classification Practice Direction confirms that:

The principle underlying this Practice Direction is the need to balance the confidentiality of judicial investigations and of other parts of judicial proceedings which are not open to the public with the need to ensure transparency of public proceedings and to meet the purposes of education and legacy.<sup>49</sup>

<sup>43</sup> F71 CPLCL Request for Directions, paras 70-75.

<sup>44</sup> F71/1 International Co-Prosecutor’s Response to the Civil Party Lead Co-Lawyers’ Request for Directions Regarding the Reclassification of Civil Party Documents, 24 Dec 2021.

<sup>45</sup> F71/1/1/1 Interoffice Memorandum from the PTC Judges to the SCC Judges entitled “Response to the Supreme Court Chamber’s ‘Review of Confidential and Strictly Confidential Documents on Case File 002’”, 11 Aug 2022 (“Aug 2022 PTC Reclassification Memo”).

<sup>46</sup> IR 21(1) (emphasis added).

<sup>47</sup> IR 54.

<sup>48</sup> IR 56(1) (emphasis added).

<sup>49</sup> Classification Practice Direction, art. 1.2.



19. Article 5.1 of the Classification Practice Direction states that *subject to a different classification in accordance with a Court decision*, the following documents are confidential:
- a. Introductory, Supplementary and Final submissions of the Co-Prosecutors;
  - b. Subject to Article 4, filings received and materials generated during a judicial investigation;
  - c. Written records, transcripts, and audio / visual recordings of interviews and other investigative acts carried out by the CIJs 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 CIJs;
  - g. Written records, transcripts, and audio / visual recordings of hearings held in camera; [and]
  - h. Filings to the PTC until the PTC has decided on the matter.<sup>50</sup>
20. Article 5.2 of the Classification Practice Direction clarifies that the fact that specific evidence is being considered by the CIJs as part of the investigation, irrespective of the content of such evidence, is confidential information.<sup>51</sup>
21. Under article 4 of the Classification Practice Direction, the following documents are presumptively public:
- a. During the course of a judicial investigation, documents classified as public by the CIJs;
  - b. *Amicus curiae* briefs;
  - c. Written records, transcripts, and audio / visual recordings of public hearings;
  - d. Evidence, including expert reports, filed during a trial hearing;
  - e. Chambers' decisions and judgments; [and]
  - f. Documents listed in Article 5.1(h) after a decision by the PTC that the document is public.
22. Articles 9.1 and 12.2 of the Classification Practice Direction allow for the reclassification of documents or information pursuant to an order of the CIJs or a Chamber, as appropriate. Articles 9.2 and 9.3 govern the redaction of documents.

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<sup>50</sup> Classification Practice Direction, art. 5.1 (emphasis added).

<sup>51</sup> Classification Practice Direction, art. 5.2.

**PRINCIPLES GOVERNING CLASSIFICATION AND RE-CLASSIFICATION OF JUDICIAL PROCEEDINGS**

23. The preamble to the ECCC Agreement recalls the concern of the RGC and the people of Cambodia in the pursuit of justice and national reconciliation, stability, peace and security. The ECCC Agreement then provides:

In the interest of securing a fair and public hearing and credibility of the procedure, it is understood that representatives of Member States of the United Nations, of the Secretary-General, of the media and of national and international non-governmental organizations will at all times have access to the proceedings before the Extraordinary Chambers. Any exclusion from such proceedings in accordance with the provisions of Article 14 of the [ICCPR] shall only be to the extent strictly necessary in the opinion of the Chamber concerned and where publicity would prejudice the interests of justice.<sup>52</sup>

24. The Addendum to the ECCC Agreement provides:

Whereas [...] the Extraordinary Chambers will need to carry out a number of *essential* residual functions identified in this Addendum [...] [T]he [ECCC] shall continue to carry out the following functions for an initial period of three years: [...] provide for the protection of victims and witnesses [...] maintain, preserve and manage its archives, including the declassification of documents and materials; respond to access to documents; disseminate information to the public regarding the [ECCC].<sup>53</sup>

The [UN] and the [RGC] agree that it is vital to ensure that the archives of the [ECCC] are preserved in accordance with international standards and that they are *as broadly accessible as possible*.<sup>54</sup> For the purpose of preserving and promoting the legacy of the [ECCC], as part of its residual functions, the [ECCC] shall provide electronic access to, and printed copies of, the public archives to the public.<sup>55</sup>

25. Article 3.14 of the Practice Direction on the Filing of Documents<sup>56</sup> provides that documents may be reclassified where it is “in the interests of justice” to do so. The Classification Practice Direction recognises that some information continues to require careful handling after proceedings are completed. It provides particular protection to requests for protective measures and associated documents (including Witness and Expert Support Unit (“WESU”) risk assessments), documents and information subject to protective measures, and information

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<sup>52</sup> ECCC Agreement, preamble, art. 12(2).

<sup>53</sup> Addendum, preamble, art. 2(1).

<sup>54</sup> Addendum, art. 3(1) (emphasis added).

<sup>55</sup> Addendum, art. 3(2).

<sup>56</sup> Practice Direction on the Filing of Documents, Rev. 8 (“Filing Practice Direction”), art. 3.14.

concerning the health of a Suspect, Charged Person or Accused.<sup>57</sup> It also provides that CPAs denied joinder are to remain confidential, whereas contact details of Complainants and Civil Party Applicants in VIFs must be redacted if they are made public.<sup>58</sup>

26. The need to protect victims' private and sensitive personal information has also been enshrined in the UN Secretary-General's guidelines for the classification and handling of sensitive information<sup>59</sup> and in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the UN General Assembly. The Declaration provides:

Victims should be treated with compassion and respect for their dignity. [...] The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by [...] [t]aking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation[.]<sup>60</sup>

27. The international criminal tribunals that have moved to residual functions have established formal access policies to ensure that interests are properly balanced and consistently honoured. At the Residual Special Court for Sierra Leone ("RSCSL"), the access policy provides:

The work of the RSCSL shall be open and transparent, except insofar as the nature of the records and information concerned is deemed sensitive [...]. For the purposes of this policy and consistent with the SCSL Records and Archival Policy, sensitive records and information shall include [...] [r]ecords and information related to the protection of witnesses, victims and other vulnerable individuals referred to in the evidence or otherwise related to the judicial process, including records which contain information which, if disclosed without appropriate authorisation, could reveal the identity and location of protected witnesses, victims and other vulnerable individuals[.]<sup>61</sup>

<sup>57</sup> Classification Practice Direction, art. 6 (providing that "Subject to a different classification in accordance with a Court decision, [these] categories of documents and information are in principle strictly confidential").

<sup>58</sup> Classification Practice Direction, arts 7.2, 7.4. *See also*, para. 3 *supra* and authorities therein.

<sup>59</sup> *See e.g.* Secretary-General's bulletin, "Information sensitivity, classification and handling", ST/SGB/2007/6, 12 Feb 2007, section 1.2 ("Information deemed sensitive shall include the following [...] (b) Documents whose disclosure is likely to endanger the safety or security of any individual, violate his or her rights or invade his or her privacy; [...] (g) Other kinds of information, which because of their content or the circumstances of their creation or communication must be deemed confidential."); Secretary-General's bulletin, "International Criminal Tribunals: information sensitivity, classification, handling and access", ST/SGB/2012/3, 20 July 2012 ("Secretary General's 2012 ICT Information Sensitivity Bulletin"), section 4.2 ("In addition to records and information identified as sensitive in ST/SGB/2007/6, sensitive records and information shall include the following: [...] (b) [...] records which contain information which, if disclosed without appropriate authorization, could reveal the identity and location of protected witnesses, victims and other vulnerable individuals").

<sup>60</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by UN G.A. Res. 40/34, 29 Nov 1985, paras 4, 6.

<sup>61</sup> Residual Special Court for Sierra Leone: Records and information sensitivity, classification, changes in classification, handling and access policy, RSCSL, 1 Jan 2014, sections 4.1, 4.2(b).

The Access Policy for the Records Held by the IRMCT provides that information *exempt* from disclosure to the public includes:

Records and information whose disclosure is likely to endanger the safety or security of any individual, violate his or her rights or invade his or her privacy. This shall include records and information related to the protection of witnesses, victims and other vulnerable individuals referred to in the evidence presented before the ICTR, ICTY or Mechanism or otherwise related to the judicial process, including records which contain information which, if disclosed without appropriate authorization, would reveal the identity and location of protected witnesses, victims and other vulnerable individuals. This shall also include personal information related to persons, or families of such persons, who have been or are currently detained by the ICTR, ICTY or Mechanism.<sup>62</sup>

#### **COPYRIGHTED MATERIALS**

28. The Classification Practice Direction provides that “[m]aterials classified as public may be accessed by the public. However, any such materials that are under copyright or subject to an agreement with a third party that prohibits dissemination shall not be released to the public, unless permission is granted by the third party.”<sup>63</sup>

### **IV. SUBMISSIONS**

#### **a. CONFIDENTIALITY OF THE JUDICIAL INVESTIGATION**

29. The overriding mandate of proceedings before the ECCC—evident in its Agreement, Rules, Practice Directions, and jurisprudence—particularly IR 21, is maximum transparency consistent with the proper functioning of the court. For this reason, with slim exceptions, all PTC decisions are public,<sup>64</sup> all trial proceedings take place publicly,<sup>65</sup> the trial judgments are issued publicly,<sup>66</sup> appeal proceedings take place publicly,<sup>67</sup> appeal judgments are delivered publicly,<sup>68</sup> and at the conclusion of the case any remaining confidential documents are reviewed for reclassification as public.<sup>69</sup>

30. IR 56(1) provides a limited and reasonable exception to this overriding principle by mandating

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<sup>62</sup> Access Policy for the Records Held by the International Residual Mechanism for Criminal Tribunals, IRMCT, MICT/17/Rev.1, 4 Jan 2019 (“IRMCT Access Policy”), art. 10(3)(b). *See also* art. 7(2).

<sup>63</sup> Classification Practice Direction, art. 12.3.

<sup>64</sup> IR 78.

<sup>65</sup> IRs 29(4)(e), 79(6).

<sup>66</sup> IR 79(6)(d).

<sup>67</sup> IR 109(1).

<sup>68</sup> IR 102.

<sup>69</sup> Classification Practice Direction, arts 12.1, 12.2.

that during the period that investigations are being conducted, the presumption is confidentiality. Confidentiality helps to ensure that witnesses are not influenced by the testimony of others, and serves to protect the interests of the parties and integrity of the ongoing investigations, including ensuring the security of witnesses.<sup>70</sup> The presumption of confidentiality of the judicial investigation is a basic tenet of ECCC,<sup>71</sup> Cambodian<sup>72</sup> and French<sup>73</sup> criminal procedure. The Co-Prosecutors make two main observations.

31. First, the plain wording of the ECCC Internal Rules makes clear that this presumption subsists only for the duration of the *ongoing* investigation. IR 56(1) requires only that the investigation not be “conducted” in public and that those “participating” in the investigation maintain confidentiality. This interpretation is supported by the jurisprudence of every ECCC Chamber. After Case 001 concluded, the SCC recognised that the reasons for the original classification given to a document may no longer exist<sup>74</sup> and issued guidelines for reclassifying documents, stating:

Most of the valuable material in the case file has been collected in the course of the judicial investigation. As the proceedings [...] have effectively terminated, *the declassification of documents pertaining to the judicial investigation no longer poses a generalised risk of prejudice to the rights of the accused or the integrity of the investigation.*<sup>75</sup>

The TC<sup>76</sup> and PTC<sup>77</sup> have made analogous statements; once the investigation is concluded, the

<sup>70</sup> See e.g. Case 001-F30/2 Case 001 Reclassification Guidelines, para. 6; Case 004/1-D309/2/1/7 Decision on the International Co-Prosecutor’s Appeal on Decision on Redaction or, Alternatively, Request for Reclassification of the Closing Order (Reasons), 8 June 2018 (“PTC Closing Order Redaction Decision”), para. 36 (“The [PTC] recalls that the investigation remains confidential until its conclusion in order to protect its integrity and the interests of the parties.”); Case 004-D193/1 Decision on the International Co-Prosecutor’s Request to Disclose Case 004 Interviews Relevant to Case 002/02, 8 May 2014, para. 9.

<sup>71</sup> IR 56(1).

<sup>72</sup> Cambodian Code of Criminal Procedure, art. 121.

<sup>73</sup> French Code of Criminal Procedure, art. 11 (“Sauf dans le cas où la loi en dispose autrement et sans préjudice des droits de la défense, la procédure au cours de l’enquête et de l’instruction est secrète.” Unofficial translation: “Except where the law provides otherwise and without prejudice to the rights of the defence, the procedure during the preliminary and judicial investigations is confidential.”).

<sup>74</sup> Case 001-F30/2 Case 001 Reclassification Guidelines, para. 2 (“the Chamber further invites the concerned parties and sections of the ECCC [...] to advise this Chamber if and to what extent reasons against public disclosure of certain documents or categories of documents still persist at this stage of the proceedings.”)

<sup>75</sup> Case 001-F30/2 Case 001 Reclassification Guidelines, para. 6.

<sup>76</sup> See e.g. E313 Case 002/01 Trial Judgment, para. 39; E465 Case 002/02 Trial Judgment, para. 34.

<sup>77</sup> See e.g. Case 003-D147/1 Decision on Meas Muth’s Request to Reclassify as Public Certain Defence Submissions to the Pre-Trial Chamber, 19 Feb 2016 (“PTC Decision on Reclassification of Defence Submissions”), para. 6 (“It follows from [IR 56] that proceedings *during* a judicial investigation, *i.e. until the issuance of a closing order in its final form*, are in principle confidential (emphasis added)”; Case 004/1-D309/2/1/7 PTC Closing Order Redaction Decision, para. 36; C20/I/27 Decision on Appeal Against Provisional Detention Order of Ieng Thirith,

confidentiality required by the specific terms of IR 56(1) may be lifted.<sup>78</sup>

32. Second, the confidentiality of the judicial investigation is not absolute. The ECCC’s legal framework and jurisprudence are replete with references to the necessity to balance the confidentiality of the judicial investigation against other interests, including those of the suspect, charged person or accused and of the victims, the transparency of the proceedings as enshrined in IR 21(1), the interests of justice and public order, and the purposes of education, legacy and reconciliation, as well as legal certainty. This balancing exercise applies even *during* the judicial investigation,<sup>79</sup> albeit with greater weight given to preserving its confidentiality. However, after the investigation is complete<sup>80</sup> and especially now when the ECCC is turning to its residual phase, the Co-Prosecutors submit that the interests of education, legacy and reconciliation come firmly to the fore. Indeed, at the time the Co-Rapporteurs presented their recommendations on initiatives for the residual functions of the ECCC, Judge Claudia Fenz stated that the “residual phase commends itself both to contributing to the victims’ healing process and the wider aspiration of national reconciliation”.<sup>81</sup>
33. When conducting its reclassification review in Case 001, this Chamber held that in principle all documents from the investigatory period should be made public “thereby allowing full access to the public at large and maximising transparency.”<sup>82</sup> It observed that:

classification of documents is to be determined by balancing the exigency of confidentiality with the demands of transparency deriving from the fundamental principles that govern the procedure before the ECCC, in light of this Court’s goals of education and legacy. In this regard, this Chamber recalls that ‘wide dissemination

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9 July 2008, para. 6 (“the information contained in the Case File shall remain confidential *at this stage of proceedings where the facts are still being investigated* (emphasis added)”).

<sup>78</sup> See also C. Guéry and P. Chambon, *Droit et pratique de l’instruction préparatoire*, 10<sup>th</sup> edition (2017), Dalloz Action, s. 31.44 (“C’est pendant le cours de l’enquête et de l’instruction, tant qu’elles ne sont pas terminées, que s’applique avec toute son intensité le secret édicté par l’article 11 du Code de procédure pénale. [...] Après la clôture de l’information et le renvoi de l’affaire devant la juridiction de jugement, la règle de la publicité remplace celle du secret.” Unofficial translation: “It is during the course of the preliminary investigation and the judicial investigation, as long as they are not completed, that the confidentiality enacted by article 11 of the Code of Criminal Procedure applies with all its intensity. After the closure of the judicial investigation and the referral of the case to the trial court, the rule of publicity replaces that of confidentiality.”)

<sup>79</sup> Classification Practice Direction, arts 1.2, 4(a), 4(f); IR 56(2); Filing Practice Direction, art. 3.12; PTC Doc No. 4 Directive on Classification of Pre-Trial Chamber Documents, 9 Sept 2010, paras 3, 7, 10; Case 003-D147/1 PTC Decision on Reclassification of Defence Submissions, 19 Feb 2016, paras 6-8; Case 003-D56/19/20 Decision on Request by Meas Muth’s Defence for Reclassification as Public of All Conflict of Interest Filings and All Other Defence Submissions Before the Pre-Trial Chamber, 27 Feb 2014, paras 6-9.

<sup>80</sup> The Case 002 investigation and all related appeals were completed by 2011. See *supra*, para. 7.

<sup>81</sup> ECCC Press Release, *Co-Rapporteurs on Residual Functions Related to Victims Deliver their Report*, 2 Dec 2021.

<sup>82</sup> Case 001-F30/2 Case 001 Reclassification Guidelines, para. 6.

of material concerning the proceedings before this Court [...] is consistent with the ECCC's mandate, which includes contributing to *national reconciliation* and providing documentary support to the progressive quest for *historical truth*.' Wide circulation of the substantial store of documentation in the Case 001 Case File may promote 'a public and genuine discussion on the past grounded upon a firm basis, thereby minimising denial, distortion of facts, and partial truths.'<sup>83</sup>

34. This comports with the jurisprudence of the *ad hoc* tribunals, which has also indicated a strong preference for transparency in court proceedings. As the Special Tribunal for Lebanon ("STL") Appeals Chamber has observed, "The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ("ICTY") has consistently held that all decisions and all submissions filed before that Tribunal shall be public unless there are *exceptional* reasons for keeping them confidential."<sup>84</sup> An ICTY Trial Chamber noted that public access "offers protection against arbitrary decisions and builds confidence by allowing the public to see justice administered."<sup>85</sup> A second Trial Chamber of the ICTY has noted that public access to the administration of justice is desirable because "the International Tribunal has an educational function and the publication of its activities helps to achieve this goal."<sup>86</sup>

35. Former ICTY President Judge Theodor Meron has written:

Transparency is essential to building public confidence in the fair administration of justice—and public confidence is, in turn, essential to fostering a broad understanding of and support for the Tribunals' work. Transparency in court proceedings also serves as an important safeguard against judicial arbitrariness and helps to ensure not only the fairness of the proceedings but the independence and impartiality of the bench and the predictability of judicial decisions. And transparency is, perhaps, particularly vital in criminal courts like the Tribunals, where the issues at stake—including horrific alleged crimes and determinations of the guilt or innocence of an accused—make it all the more imperative to have clear

<sup>83</sup> Case 001-F30/2 Case 001 Reclassification Guidelines, para. 5 (emphasis added), *citing* Case 001-F28 Appeal Judgement, 3 Feb 2012 ("Duch AJ"), para. 708. Offering an accurate factual basis helps authoritatively refute falsehoods and denialism, particularly in polarised societies after conflict. *See e.g.* Diane Orentlicher, *Memories of Judgment: Constructing the ICTY's Legacies*, 19(3) Wash. U. Global Stud. L. Rev. (2020), pp. 316, 318-319, 324 (Noting also that Holocaust survivor and Nobel laureate Elie Wiesel believed that there was a duty to preserve the memory of the Third Reich's horrors because it was the surest way to upend what the Nazis had sought to achieve, which was to erase memory and, with it, the culture itself).

<sup>84</sup> *Ayyash et al.*, Appeals Chamber, Decision on the Pre-Trial Judge's Request Pursuant to Rule 68(G), 29 Mar 2012 ("Ayyash Decision"), para. 13, fn. 34 (emphasis added).

<sup>85</sup> *Delalić et al.*, Trial Chamber, Decision on the Motions by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed "B" through "M", 28 Apr 1997, para. 34.

<sup>86</sup> *Tadić*, Trial Chamber, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 Aug 1995, para. 32.

and visible adherence to internationally recognized standards of due process.<sup>87</sup>

36. The statutes and rules of other international and internationalised tribunals demonstrate that the principle of transparency applies to documents generated at the pre-trial stage. The STL, which, like the ECCC, is a hybrid tribunal based on a civil law model, requires that, with limited exceptions, “pre-trial filings, proceedings and orders shall be public”.<sup>88</sup> The STL Appeals Chamber, dealing with a pre-trial matter, stated that it was “mindful of and emphasize[d] the need for transparency in the proceedings before this Tribunal” and noted: “Confidential submissions and decisions—although sometimes necessary—by their very nature conflict with this policy of openness. They should be kept to a minimum and can only be justified for *exceptional* reasons, which may include the protection of victims and witnesses and the safeguarding of a *continuing* investigation.”<sup>89</sup>

37. The International Criminal Court (“ICC”) requires that with limited exceptions “a database containing all the particulars of each case brought before the Court” be available to the public.<sup>90</sup> A commentary to the Rome Statute has noted the import of public access to “the functioning of a public and international institution.”<sup>91</sup> At the ICC, the “Document containing the charges”, which is based on the Pre-Trial Chamber’s decision on the confirmation of charges pursuant to article 61 of the Rome Statute, serves as the indictment in the same way the Closing Order does at the ECCC.<sup>92</sup> The ICC’s practice is to hear witnesses at the confirmation stage in public (unless security concerns require witness protection measures) and to issue the Confirmation of Charges decision publicly, with redactions limited to the names of protected witnesses and victims. This is equally true where charges are not confirmed.<sup>93</sup> In addressing whether to reclassify as public documents that had been produced under seal at the pre-trial stage, the ICC Appeals Chamber unanimously decided to do so where the reason for the confidentiality no longer existed.<sup>94</sup>

<sup>87</sup> Theodor Meron, *The Making of International Criminal Justice: A View from the Bench*, 2011, p. 278.

<sup>88</sup> Special Tribunal for Lebanon, Rules of Procedure and Evidence, rule 96.

<sup>89</sup> *Ayyash* Decision, para. 12 (emphasis added).

<sup>90</sup> International Criminal Court, Rules of Procedure and Evidence, rule 15(1).

<sup>91</sup> Antonio Cassese and others, ed., *The Rome Statute of the International Criminal Court: a Commentary*, Oxford University Press, 2002, p. 1281.

<sup>92</sup> Rome Statute of the International Criminal Court, art. 61.

<sup>93</sup> See e.g. *Abu Garda*, Pre-Trial Chamber, Decision on the Confirmation of Charges, Public Redacted Version, 8 Feb 2010; *Mbarushimana*, Pre-Trial Chamber, Decision on the Confirmation of Charges, Public Redacted Version, 16 Dec 2011.

<sup>94</sup> *Kony et al.*, Appeals Chamber, Decision of the Appeals Chamber on the Unsealing of Documents, 4 Feb 2008,



38. The ECCC’s archives contain the world’s most complete record of documents relating to the Democratic Kampuchea (“DK”) era, and the crimes committed during that period. There is strong interest in ensuring that the public can easily access the ECCC’s archive, thereby facilitating education and research into DK-era events. Indeed, this Chamber has emphasised that “[p]ublic awareness of, and open debate on, these tragic pages of the history of Cambodia form part of the efforts to bring closure to the Cambodian people.”<sup>95</sup> The Co-Rapporteurs also highlighted that the imperative for understanding this part of Cambodia’s history is not limited to the direct victims; those not born at the time of the Khmer Rouge regime are impacted by living with the trauma their parents, relatives and fellow citizens endured and the larger societal consequences which followed.<sup>96</sup> Indeed, impact studies have shown that the need to ascertain the truth and educate about the events of the DK regime were amongst the most important legacies of the Chambers in the eyes of the Cambodian population.<sup>97</sup> The increasing access to documents and audiovisual materials has been pointed out by educators and experts as a key legacy of the ECCC, allowing for evidence-based teaching.<sup>98</sup>
39. Making ECCC documents as publicly accessible as possible will also help to further demonstrate the credibility of the proceedings,<sup>99</sup> thereby strengthening the ECCC’s legacy. In addition, providing access in Khmer to reasoned legal opinions and judgments, pleadings with well-substantiated procedural, factual and legal arguments, and documents which contain insights into investigative practices aimed at collecting reliable evidence will help enhance the quality of justice delivered by Cambodia’s national legal system. The Co-Rapporteurs highlighted that knowledge transfer and capacity building has been an explicit aspiration of all

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para. 5.

<sup>95</sup> Case 001-F28 *Duch* AJ, para. 708.

<sup>96</sup> Co-Rapporteurs on Residual Functions related to Victims, *Advisory Report: Victim-Related Activities of the ECCC During the Residual Phase*, 1 Dec 2021 (“Co-Rapporteurs’ Report”), pp. 24-25.

<sup>97</sup> Caitlin McCaffrie, Somaly Kum, Daniel Mattes, Lina Tay, “*So We Can Know What Happened*”: *The Educational Potential of the Extraordinary Chambers in the Courts of Cambodia*, Stanford: Center for Human Right and International Justice at Stanford University, 2018 (“So We Can Know What Happened”), pp. 18-21, 32-36; Phuong Pham, Patrick Vinck, Mychelle Balthazard, Sokhom Hean, Eric Stover, *So We Will Never Forget: A Population-Based Survey on Attitudes About Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia*, Berkeley: Human Rights Center of the University of California, 2009, pp. 26-27, 40-42, 46-47; Phuong Pham, Patrick Vinck, Mychelle Balthazard, Sokhom Hean, *After the First Trial: A Population-Based Survey on Knowledge and Perception of Justice and the Extraordinary Chambers in the Courts of Cambodia*. Berkeley: Human Rights Center of the University of California, 2011, pp. 31-32.

<sup>98</sup> *So We Can Know What Happened*, pp. 20-21.

<sup>99</sup> ECCC Agreement, art. 12(2).

hybrid courts.<sup>100</sup> The Co-Rapporteurs encouraged legacy projects concerning knowledge transfer in the legal field, including the training of judges, prosecutors and lawyers.<sup>101</sup>

40. In conclusion, the Co-Prosecutors submit that attention should be focused on the nature and substance of each individual document to determine whether ongoing confidentiality or redaction is necessary, rather than the fact that it was placed on Case File 002 during the judicial investigation. Maximum transparency is required by the overwhelming public interest in enabling access to the ECCC's archives and to increase the legitimacy of its proceedings and findings. Leaving a strong jurisprudential, historical and educational legacy, thereby contributing to reconciliation, is imperative.

#### **b. OBSERVATIONS ON THE PROPOSED GUIDELINES**

41. The SCC seeks specific submissions on the Proposed Guidelines and the documents listed in the Classification Practice Direction, articles 5.1(a), (b), (c), and (f).<sup>102</sup> To avoid repetition, the Co-Prosecutors address these issues together. At this stage in the reclassification process, the Co-Prosecutors' discussions of particular categories and sub-categories of documents are intended to assist the SCC but are not exhaustive and are made without prejudice to their later submissions regarding specific documents or categories of documents.<sup>103</sup>

#### ***Article 5.1(a): Introductory, Supplementary and Final Submissions of the Co-Prosecutors***

42. The Co-Prosecutors submit that the original IR 54 classification of their Introductory, Supplementary and Final Submissions as confidential is no longer necessary, subject to limited redactions necessary for the protection of sensitive information discussed elsewhere.<sup>104</sup> Indeed, the scope of Case 002 as set out by Introductory and Supplementary Submissions has since been made public in the Closing Order,<sup>105</sup> the scope of the Case 002/01 and Case 002/02 trials and judgments themselves, and is at the core of many grounds of Khieu Samphan's Case 002/02 appeal. The equivalent documents were generally made public by the PTC in Cases 003,<sup>106</sup>

<sup>100</sup> Co-Rapporteurs' Report, p. 25.

<sup>101</sup> Co-Rapporteurs' Report, p. 28.

<sup>102</sup> F71/1/1 Request for Submissions, paras 3-5.

<sup>103</sup> As envisaged by the SCC in F71/1/1 Request for Submissions, para. 2.

<sup>104</sup> In particular, redactions may be necessary to protect, for example, sensitive information regarding mental or physical health issues as well as victims of sexual and gender-based violence where these issues were not subject of the trial proceedings as well as information that could endanger the security of a victim or witness. *See further supra*, paras 3, 13, 25-27.

<sup>105</sup> D427 Closing Order.

<sup>106</sup> Case 003-D274 Pre-Trial Chamber Interoffice Memorandum entitled "Reclassification of Documents in Case File

Case 004/1,<sup>107</sup> Case 004/2,<sup>108</sup> and 004.<sup>109</sup>

***Article 5.1(b): filings received and materials generated during a judicial investigation***

43. This is a broad category covering almost the entirety of the judicial investigation. To best assist the SCC, the Co-Prosecutors have broken this into subcategories on which they make individual observations. As there is an apparent overlap between article 5.1(b) and articles 5.1(c)-(h), the Co-Prosecutors have dealt with some of those items under separate headings below.
44. As a general observation, the Co-Prosecutors urge the SCC to delete Proposed Guideline 4(a)(vi).<sup>110</sup> They note that an identical guideline was used during the SCC's Case 001 reclassification in 2012,<sup>111</sup> but submit that the classification of a document in another ECCC Case File no longer has the importance it did in 2012, when proceedings, including confidential judicial investigations, were still in progress.<sup>112</sup> With the issuance of the Case 002/02 Appeal Judgment, all ECCC proceedings will be completed and the reasons for maintaining confidentiality will in many cases no longer be valid. Where there exist ongoing reasons for retaining a confidential classification, or creating a public redacted version, these must of course be respected. But the *mere fact* that a document is classified as confidential on another case file is not in itself a reason to maintain or impose a confidential classification. Reclassification of documents in Cases 003, 004/1, 004/2 and 004 is still outstanding, and if this criterion were to remain, the process would likely become circular.

**i. DK-era documents**

45. Irrespective of whether these documents were admitted as evidence at trial,<sup>113</sup> the Co-

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003", 28 Oct 2021 ("PTC Reclassification Memo"), para. 2; Case 003-D274.1 Annex, Entry Nos 2-6 (Introductory Submission and its Annexes), 77 (Supplementary Submission), 117 (NCP's Final Submission), 118 (ICP's Final Submission).

<sup>107</sup> Case 004/1-D317 Pre-Trial Chamber Interoffice Memorandum entitled "Reclassification of Documents in Case File 004/1", 28 Oct 2021, para. 2; Case 004/1-D317.1 Annex, Entry Nos 1-5 (Introductory Submission and its Annexes), 15, 35, 79, 84 (Supplementary Submissions), 94 (NCP's Case 004/1 Final Submission), 95 (ICP's Final Submission). *See also* Case 004/1-D304/6/4 PTC Decision on Im Chaem Reclassification Request, para. 32.

<sup>108</sup> Case 004/2-D360/47 & D359/38 Decision on the Pre-Trial Chamber's Reclassification of Documents in Case File 004/2, 12 June 2020; Case 004/2-D360/47.2 Annex, Entry Nos 1-4, 46 (Introductory Submission and its Annexes), 27, 34, 68 (Supplementary Submissions), 58, 60 (NCP's Case 004 Final Submission).

<sup>109</sup> Case 004-D387 Pre-Trial Chamber Interoffice Memorandum entitled "Reclassification of Documents in Case File 004", 28 Oct 2021, para. 2; Case 004-D387.1 Annex, Entry Nos 1-5 (Introductory Submission and its Annexes), 13, 33, 97, 102 (Supplementary Submissions), 168 (ICP's Case 004 Final Submission)

<sup>110</sup> F71/1/1 Request for Submissions, para. 4(a)(vi).

<sup>111</sup> *See* Case 001-F30/2 Case 001 Reclassification Guidelines, para. 7(b)(iii).

<sup>112</sup> Case 001-F30/2 Case 001 Reclassification Guidelines, para. 6.

<sup>113</sup> Evidence admitted at trial is presumptively public, *see* Classification Practice Direction, art. 4(d).

Prosecutors see no need for the following DK-era<sup>114</sup> documents to remain confidential:

- official public statements by, and communications with, DK leaders;
- meeting minutes including, non-exhaustively, minutes from Communist Party of Kampuchea (“CPK”) Standing Committee meetings, ministerial and topical meetings (meetings of ministers and Ministry of Commerce; meetings regarding public works, local affairs, social affairs and health), military leadership meetings, commerce/trade negotiations and UN General Assembly meetings;
- letters, orders and reports to and from CPK officials, including resolutions and guidelines of the CPK Central Committee;
- DK telegrams;
- media articles, including CPK magazines such as *Revolutionary Flag*, media articles and reports, transcripts of DK radio broadcasts, DK press communiqués and government statements, diplomatic cables, UN documents and Foreign Broadcast Information Service (FBIS) reports; and
- Maps and photographs.

46. Most of these documents were created either immediately prior to or during the DK regime. Subject to some exceptions that are noted below, the Co-Prosecutors recommend that the DK-era documents generally be made public to serve the principle of transparency. More than 40 years have passed since the majority of these documents were produced, they are of high historical value, and they generally do not contain information that would breach the privacy rights of any individuals. Ensuring this DK-era evidence is publicly accessible will allow future generations and researchers to better understand DK history and the events and charges in Case 002. As a general matter, however, where a state or international organisation has provided documents to the ECCC on the express understanding that they not be released to the public, such agreements should be respected. The SCC should not classify such documents as public unless and until the provider has given permission to make these documents public.<sup>115</sup>

47. The Co-Prosecutors submit that other DK-era materials require more careful handling, being those emanating from DK security centres, primarily S-21 and Kraing Ta Chan. Case File 002 contains hundreds of prisoner lists, biographies, confessions and notebooks from these institutions. The Co-Prosecutors make the following observations.

48. **Prisoner Lists:** These documents include lists of prisoners interrogated and/or executed at DK

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<sup>114</sup> Not limited to the 17 April 1975-6 January 1979 period, but including all pre- and post-DK documents falling into these categories, including especially those relating to the formation of the CPK and its policies.

<sup>115</sup> As foreshadowed in Proposed Guideline 4(e).

security centres, and other administrative reports regarding prisoners. Prepared in the normal course of managing the DK security apparatus, these records were not the product of torture and can safely be made public.

49. The Co-Prosecutors note that Proposed Guideline 4(a)(iv), regarding “names [...] of victims who are not Civil Parties”<sup>116</sup> has been added since the Case 001 Guidelines.<sup>117</sup> This proposed guideline is disproportionately broad. Since the term “victim” has not been defined, its meaning in this context is unclear, and has the potential to be unduly expansive.<sup>118</sup> This guideline would require *inter alia* the redaction of the name of every victim, including every victim of forced transfer (a very large proportion of the population at the time), from every document on the ECCC case file, including, for example, everyone named in the S-21 prisoner lists. This would be an unnecessary and disproportionate restriction on the public’s access to this information. There is no direct precedent for such a broad restriction; names of Holocaust victims, for example, are not systematically withheld from the public. The Co-Prosecutors suggest that only where necessary, for example, where it is required by protective measures or to protect victims of sexual and gender-based violence, should names of victims be redacted.<sup>119</sup>
50. **Confessions:** The SCC and TC have found that security centre prisoner confessions, primarily from S-21, were presumptively produced under torture or threat of torture.<sup>120</sup> These documents constitute proof of the coordinated and systematic interrogation and torture of those who were considered enemies by the DK regime. The Co-Prosecutors recall the particular importance of ensuring that evidence of the crime of torture is accessible to the public, in order to promote the study and discussion of torture and its prohibition, and its status as a peremptory norm or *jus cogens*, with the aim of deterring its repetition.<sup>121</sup>

<sup>116</sup> F71/1/1 Request for Submissions, para. 4(a)(iv).

<sup>117</sup> See Case 001-F30/2 Case 001 Reclassification Guidelines, para. 7(b)(i).

<sup>118</sup> The Internal Rules Glossary defines “victim” as “a natural person or legal entity that has suffered harm as a result of the commission of any crime within the jurisdiction of the ECCC.” The Co-Rapporteurs noted the term “victim” was similarly to be interpreted broadly and not limited to those who participated in legal proceedings before the ECCC (Co-Rapporteurs’ Report, p. 11) and that “Every member of society was quite literally impacted at the time of the conflict which is under the jurisdiction of the court” (Co-Rapporteurs’ Report, p. 24).

<sup>119</sup> See *supra*, paras 3, 13, 25-27.

<sup>120</sup> F26/12 Decision on Objections to Documents Lists: Full Reasons, 31 Dec 2015, paras 56-57 (S-21 only); E350/8 Decision on Evidence Obtained through Torture, 5 Feb 2016, para. 79 (S-21 and other security centres).

<sup>121</sup> The ICTY Trial Chamber in *Furundžija*, in a passage quoted with approval by the UK House of Lords in *Pinochet (R. v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet; R. v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*, 24 Mar 1999, Lord Browne-Wilkinson) emphasised the *jus cogens* nature of torture: “Because of the importance of the values it

51. Evidence of torture by the DK regime is therefore of high historical and educational value. However, the value in making this evidence accessible to the public must be weighed against the potential harms that could result to relatives and survivors from making public identifying and/or sensitive information.<sup>122</sup> For this reason, the Co-Prosecutors recommend that such information be redacted from security centre confessions. Where this information has previously been made public,<sup>123</sup> the SCC should consider reclassifying as confidential (by redaction) that information. Redacting confessions rather than making them entirely confidential enhances historical and educational legacy, leaving valuable information such as annotations by Duch and other DK leaders publicly accessible. Until such redaction can take place, the Co-Prosecutors recommend reclassifying these confessions as confidential.
52. In this regard, the Co-Prosecutors are cognisant of the Tuol Sleng Genocide Museum's ("TSGM") policies which balance competing interests, making many of the documents in its archives publicly accessible<sup>124</sup> but also protecting highly sensitive information, including information extracted by torture.<sup>125</sup> An online search of a detainee's name produces a list of all the archive documents relating to that detainee, but the searcher cannot view the contents of confessions or (most) biographies. The searcher is alerted to the existence of such records but has to apply for authorisation and meet the requirements set out in the Museum's access policy before being allowed to view them.<sup>126</sup>

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protects, [the prohibition of torture] has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. [...] Clearly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate" (*Furundžija*, Trial Chamber, Judgement, 10 Dec 1998, paras 143-146, 153-154; quote at paras 153-154).

<sup>122</sup> For example, confessions include the names and other identifying details of alleged traitors extracted under torture.

<sup>123</sup> The confessions from S-21 and Kraing Ta Chan security centres identified by the Co-Prosecutors as public are listed in **Annex A: Security Centre Confessions, Prisoner Biographies and Notebooks** classified as public.

<sup>124</sup> See Access to Information Policy for Tuol Sleng Genocide Museum Archives ("TSGM Access Policy"), paras 1 ("Tuol Sleng Genocide Museum archives are made accessible to: a) Provide the Cambodian public, Khmer Rouge survivors, families and victims of S-21, and national and international researchers with knowledge about the existence of an archive at Tuol Sleng Genocide Museum and about the different types of documents in the archive. b) Increase the chance that people get to know if a missing relative/friend was detained in S-21."), 4.

<sup>125</sup> TSGM states on its website that "The information contained in many of these documents was extracted under torture, or under threat of torture. In consequence, any opinions or statements expressed therein should be treated with the utmost discretion, should not be accepted as fact, and would be inadmissible as evidence in a court of law under the Convention Against Torture. [TSGM] cannot be held liable for the use of or reliance on the opinions, findings and data in these documents." See <http://archives.tuolsleng.gov.kh/documents>, disclaimer statement.

<sup>126</sup> See TSGM Access Policy, paras 4, 6, 7 ("The following categories of Tuol Sleng Genocide Museum archives information are available for public access through the museum's website: a) Basic details (metadata) of every

53. **Biographies:** The Co-Prosecutors also recommend that identifying information in biographies collected at S-21 and other security centres also retain its confidential status, and where biographies have previously been made public in full<sup>127</sup> that the SCC should consider reclassifying this information (by redaction).
54. **Notebooks:** These records include security centre interrogators' notes from ideology training, detailing the content of prisoner confessions. These records also constitute important evidence of torture as they set out the DK's training on techniques for interrogation of enemies and relate to the CPK's decision-making bodies and the leadership's policy discussions. For the reasons already outlined in respect of biographies and confessions, the Co-Prosecutors recommend continued confidentiality, or reclassification to confidential,<sup>128</sup> for identifying and/or sensitive information set out in security centre interrogators' notebooks detailing the content of prisoner confessions presumptively obtained under torture.

ii. "Filings Received"/Pleadings

55. As a general principle, and consistent with prior practice and, where applicable, article 4(f) of the Classification Practice Direction,<sup>129</sup> the Co-Prosecutors recommend that pleadings be made public whenever possible, as it allows for a more complete record of the legal and factual arguments and decisions in a case. This serves the important goals of transparency, education, legacy and capacity-building.
56. Nonetheless, security and privacy concerns may dictate that some pleadings should remain confidential and/or strictly confidential. The Co-Prosecutors agree with the SCC that the following should remain strictly confidential: i) requests for protective measures and associated documents, ii) documents and information subject to protective measures, iii) information

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document in the archive, including biographies and confessions. b) All detainee names with additional identifying information. c) All detainee photographs, with or without names (see exceptions in part III of this policy). [...] d) Document images of specific biographies of widely known detainees (e.g., Huot Bophana). [...] 6. Categories of information on which there are restrictions on access include the following: a) Document images of biographies. b) Document images of confessions [...] 7. IV Request for Information" Restricted items can be accessed by a limited number of individuals such as relatives and friends of detainees, and researchers.)

<sup>127</sup> See **Annex A: Security Centre Confessions, Prisoner Biographies and Notebooks** classified as public.

<sup>128</sup> See **Annex A: Security Centre Confessions, Prisoner Biographies and Notebooks** classified as public.

<sup>129</sup> See e.g. **Case 002: E467/6.3** OCIJ Filings Declassification; **Case 003: Case 003-D274** PTC Reclassification Memo, para. 2; **Case 003-D274.1** Annex, Table I (OCP Documents), Table II (Meas Muth Defence Documents), Table III (Civil Party (003) Documents), Table IV (Defence Support Section Documents). The Co-Prosecutors note that this PTC practice was repeated in Cases 004/1, 004/2 (including Office of Administration Documents) and 004 (see Case 004/1-D317.1; Case 004/2-D360/47.2; Case 004-D387).

concerning the health of a suspect, charged person or accused, and iv) any other document where the reasons for classification as strictly confidential persists.<sup>130</sup> Moreover, as discussed above,<sup>131</sup> and articulated further in the CPLCL's submissions,<sup>132</sup> the SCC may consider redacting sensitive information pertaining to, for example, sexual and gender-based violence, complainants', witnesses' or Civil Parties' medical information, or information which identifies alleged perpetrators named by Civil Parties where that information was not made public during the trial phase.

57. The Co-Prosecutors also submit that there is little utility in reclassifying requests for corrections to documents on the case file since the corrections have already been implemented and the old versions are generally no longer available in Zylab. The surrogate sheets<sup>133</sup> placed on the case file when document numbers were substituted at the trial stage also seem to have little value warranting reclassification. However, the SCC may decide that transparency of the process favours reclassifying such requests.

### iii. Documents relating to the Investigative Process

58. The investigative process produced the following broad categories of documents: 1) letters, memoranda and associated documents, 2) rogatory letters and reports, 3) summonses, 4) maps, and 5) photographs. These documents demonstrate the depth and breadth of the investigation. Making investigative documents public wherever possible would help promote the credibility and fairness of the proceedings. Giving insight into good investigative practices could also enhance the quality of justice delivered by Cambodia's national legal system. However, the Co-Prosecutors suggest that caution should be exercised where these documents contain confidential details relating either to investigative leads or to potential witnesses, including Civil Parties. With these principles in mind, the Co-Prosecutors make the following recommendations.

#### a. Letters, Memoranda and Associated Documents

59. These documents can be divided into three categories. First are the documents that the Co-Prosecutors submit are indisputably protected and should remain confidential, second are

<sup>130</sup> F71/1/1 Request for Submissions, para. 4(b); Classification Practice Direction, para. 6.

<sup>131</sup> *See supra*, paras 3, 13, 25-27.

<sup>132</sup> F71 CPLCL Request for Directions. *See supra*, paras 13-14.

<sup>133</sup> A Zylab search suggests there are almost 19,000 confidential surrogate sheets on Case File 002.



documents that can safely be made public, and third are documents whose classification will depend on the weight the SCC assigns to competing interests.

60. Documents falling into the first category, that in the Co-Prosecutors' view should remain confidential, include WESU reports and risk assessments (including also those generated at the trial stage and beyond),<sup>134</sup> letters of assurance, birth/death certificates, identity cards of complainants, witnesses and Civil Parties, and letters relating to the service of documents (detailing the location of the individual being served). For the second category, the Co-Prosecutors submit that documents appropriate for reclassification to public, subject to the redaction of sensitive information, include correspondence between parties and the CIJs and Chambers, as well as between the ECCC Chambers, CIJs and Office of Administration.
61. Documents in the third category are more administrative in nature. They include letters relating to the legal representation of individual Civil Parties, powers of attorney, withdrawal from proceedings, the transfer of documents between case files, OCIJ greffier letters regarding civil party status, and status change notifications (e.g. changing from a complainant to a civil party applicant). There may be some value in allowing access to such administrative documents in the interests of transparency and capacity-building. However, it is important to note that some of the documents contain contact details and personal identification cards and numbers that warrant redaction. Moreover, when the letters relate to Civil Parties, reclassification would only be appropriate if the related CPA was deemed admissible by the CIJs, and again, these documents would be subject to redactions before being made public.<sup>135</sup> The Co-Prosecutors flag all these issues for the SCC's consideration and uniform implementation and note that, in line with article 7.4 of the Classification Practice Direction, Civil Parties' contact details should be redacted from all documents, and not made public as Proposed Guideline 4(a)(iv) currently envisages.

#### **b. Rogatory Letters and Reports**

62. The rogatory letters that assign specific investigative tasks to OCIJ investigators and reports on their implementation<sup>136</sup> often contain information that needs to remain protected. Balancing the

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<sup>134</sup> Some of these are already covered by Proposed Guideline 4(b) – reflecting Classification Practice Direction, art. 6 - but some currently have a Confidential classification.

<sup>135</sup> *See supra*, paras 3, 13, 25-27.

<sup>136</sup> These often identify people who did not consent to a formal interview but spoke openly with an expectation that their role in providing investigative leads would remain confidential.

general principle of confidentiality for such investigative documents with the interest of transparency, the Co-Prosecutors recommend that these documents are reclassified to public but with very careful redaction of identifying and sensitive information.

**c. Summonses**

63. The majority of pre-trial summonses were those sent to prospective witnesses for interviews with the OCIJ (others were later sent by the TC and SCC that also remain confidential). Whilst some of these individuals later testified at trial, these documents identify individuals who had an expectation of privacy when they cooperated with the investigation. The documents also contain contact details that should remain private. The Co-Prosecutors therefore recommend that such documents remain confidential, as the individuals' right to privacy outweighs the interest in making such documents public. If the decision is taken to reclassify them, substantial redactions will be required. The Co-Prosecutors *do*, however, recommend reclassification as public of summonses of the Case 002 accused and/or their lawyers to attend initial and further appearances before the CIJs and PTC, including provisional detention hearings (as well as to attend hearings before the TC and SCC) as well as their arrest warrants.

**d. Maps**

64. These documents include crime site sketches drawn by witnesses, and regional and national maps that post-date the regime and help make sense of locations mentioned in testimonial and documentary evidence. As a general principle, the Co-Prosecutors recommend that maps be reclassified as public.

**e. Photographs**

65. Photographs on Case File 002 include crime site photos, book photos, photographs that were shown to potential witnesses who were asked by OCIJ investigators to identify the people in the picture (the photos were then attached to the statement), photos of potential civil parties, and photographs from identification documents. As a general principle, the Co-Prosecutors recommend that photographs be made public, except where privacy concerns dictate otherwise.<sup>137</sup>

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<sup>137</sup> See e.g. F71 CPLCL Request for Directions, para. 38.

iv. Research and Authorities

66. Case File 002 contains 1) academic articles, 2) books, 3) analytical reports, 4) media articles that post-date the DK era, 5) video documentaries relating to the Khmer Rouge (in some cases with their transcripts), and 6) national and international law, jurisprudence and commentaries. Primarily, they are the works of academics, journalists and filmmakers that help explain important aspects of the DK regime and its policies as well as legal authorities relied on by the parties and judges. Reclassifying these documents would advance the Court's goals of transparency, education, capacity-building and legacy. The Co-Prosecutors recommend that these records generally be made public.

***Article 5.1(c): Written records, transcripts, and AV recordings of interviews and other investigative acts carried out by the CIJs or those acting under their delegated authority***

67. In addition to those already discussed above, documents falling under article 5.1(c) (as well as 5.1(b), (d), (e) and (g)) of the Classification Practice Direction fall into two broad categories: i) statements and testimonial evidence and ii) reports, which the Co-Prosecutors address in turn.

i. Statements and Testimonial evidence

68. Case File 002 contains suspect statements, WRIs (of Civil Parties, witnesses and experts) with their associated transcripts and AV recordings, DC-Cam statements, complaints, VIFs and SIFs and their related VSS reports. These materials play a key role in helping ascertain the truth about the crimes committed during the DK regime, as they provide first-hand accounts of the events and are important for both evidentiary and historical purposes. Subject to some exceptions noted below, the Co-Prosecutors recommend that, in general, these materials be made public, but only after a careful review has been undertaken and private and sensitive information has been redacted.<sup>138</sup> Ensuring that these materials are made as public as possible will allow future generations and researchers to better understand DK history and the events and charges in these cases, while redactions will protect the rights and interests of the individuals who participated in the ECCC process.

**a. Suspect Statements**

69. This record type contains statements made by Ieng Sary, Nuon Chea, Khieu Samphan, Ieng

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<sup>138</sup> See *supra*, paras 3, 13, 25-27.

Thirith, Kaing Guek Eav *alias* Duch, as well as Meas Muth, Ao An, and Im Chaem. Some were made during the DK regime, some were made after the regime fell but before the speaker became an ECCC suspect (such as to DC-Cam), and some were made after the speaker was aware he/she was an ECCC suspect or charged person. As these statements were made by former leaders, they offer a unique and crucial perspective of the events that took place and the Co-Prosecutors recommend they be made public.

**b. Civil Party, Victim and Witness Materials including Transcripts and AV recordings**

70. In addition to statements of witnesses and Civil Parties to the OCIJ and DC-Cam, together with their transcripts and, in relation to OCIJ interviews, their AV recordings, these materials include Case 001 trial transcripts, sexual violence surveys, statements waiving the presence of civil party lawyers during OCIJ interviews, and records of the swearing in of interpreters, translators and witnesses.
71. Subject to the redaction of contact details and other sensitive information,<sup>139</sup> as well as appropriate consultation with Civil Parties, the Co-Prosecutors are of the view that, in the interests of education, legacy and capacity-building, WRIs, DC-Cam statements and interview transcripts, Case 001 trial transcripts, the other noted Civil Party materials and complaints should be made public. The Co-Prosecutors further submit that statements waiving the presence of civil party lawyers and the swearing in of various individuals are administrative in nature and do not merit declassification. Should the Chamber disagree, the Co-Prosecutors note that many of the documents contain personal contact information that should be redacted. Moreover, any materials relating to Civil Parties should only be reclassified if the related CPAs were deemed admissible in Case 002.
72. Regarding Proposed Guideline 4(a)(v),<sup>140</sup> the reclassification of documents related to hearings held *in camera*, the Co-Prosecutors support the PTC's finding that the fact that the hearings took place in closed session does not automatically result in the transcripts and AV recordings remaining off the public record.<sup>141</sup> The Co-Prosecutors submit that, subject to subsisting protective measures, these materials be made public with sensitive information redacted.<sup>142</sup>

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<sup>139</sup> See *supra*, paras 3, 13, 25-27.

<sup>140</sup> Reflecting Classification Practice Direction, art. 5.1(g).

<sup>141</sup> See Case 004/1-D304/6/4 PTC Decision on Im Chaem Reclassification Request, paras 28-29.

<sup>142</sup> See *supra*, paras 3, 13, 25-27.

## ii. Reports

73. Case File 002 includes, *inter alia*, DC-Cam regional investigative reports and OCIJ site identification reports. The Co-Prosecutors submit that DC-Cam regional investigative reports can safely be made public. To promote transparency and education, site identification reports should be reclassified to public, but only after determining whether any redactions are necessary to protect sensitive information, including the identity of sources who provided investigative leads but did not agree to provide a formal statement.

### ***Article 5.1(f): Decisions, orders and other findings of the Co-Investigating Judges***

74. As envisaged by the Proposed Guidelines,<sup>143</sup> and recommended by the PTC,<sup>144</sup> the Co-Prosecutors agree that decisions, orders, and other findings of the CIJs should be made public, subject to applicable protective measures; other sensitive information should also be redacted.<sup>145</sup> For the same reasons, and under the same conditions, PTC decisions and orders should also be declassified to public.<sup>146</sup>

### ***Copyrighted Materials***

75. With regard to Proposed Guideline 4(e), the Co-Prosecutors note that the expressions “public dissemination” and “protected by copyright applicable laws” are both unclear. As discussed above, the ECCC should generally encourage research, study and education of the Khmer Rouge period. This includes enabling, to the maximum extent possible, access to all public documents held by the ECCC. There is currently no governing international standard which clarifies whether making information accessible to the public through the website of a hybrid or international court<sup>147</sup> constitutes “public dissemination”.

76. Mindful of the requirement in the Addendum to make the ECCC archives “as broadly accessible as possible”, including by providing electronic access to public archives,<sup>148</sup> the SCC may wish to consider the balancing exercise set out by the Canadian Supreme Court in *CCH*

<sup>143</sup> F71/1/1 Request for Submissions, paras 4(b)(vi), 4(c).

<sup>144</sup> See F67 May 2021 PTC Reclassification Memo; F71/1/1 Aug 2022 PTC Reclassification Memo.

<sup>145</sup> See *supra*, paras 3, 13, 25-27.

<sup>146</sup> IR 78. See also fn. 144 *supra*.

<sup>147</sup> The Co-Prosecutors note that Proposed Guideline 4(e) - reflecting in turn Classification Practice Direction, art. 12.3 – it is not a question of classification, but rather access. It is particularly applicable to the question of whether to upload documents classified as public to the ECCC website. See further E319/35/15/2 ICIJ Reclassification Memo, para. 9.

<sup>148</sup> Addendum, arts 3(1), (2).

*Canada Ltd v. Law Society of Upper Canada* (“Law Society”).<sup>149</sup> The case concerned the photocopying service provided by the Law Society in the Great Library, which consists of an extensive collection of legal materials. The Great Library staff itself, on request from users of the Library, photocopied extracts from protected material, and the Law Society claimed that this was a fair dealing for research within the terms of the applicable legislation. The Canadian Supreme Court stated that “[i]n order to maintain the proper balance between the rights of a copyright owner and users’ interests, [the fair dealing exception] must not be interpreted restrictively”<sup>150</sup> and that “‘research’ must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained”.<sup>151</sup> As to the meaning of “fair”, the Court referred to the judgment of Lord Denning in *Hubbard v. Vosper*,<sup>152</sup> where he said:

It is impossible to define what is “fair dealing”. It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But, short extracts and long comments may be fair. Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression. As with fair comment in the law of libel, so with fair dealing in the law of copyright. The tribunal of fact must decide.<sup>153</sup>

77. The Canadian Supreme Court considered the Library’s Access Policy and the factors proposed by Linden JA in the Court of Appeal, namely: 1) the purpose of the dealing; 2) the nature of the dealing; 3) the amount of the dealing; 4) alternatives to the dealing; 5) the nature of the work in question; and 6) the effect of the dealing on the work, and determined that these factors provide a useful analytical framework to govern determinations of fairness in future cases.<sup>154</sup>
78. Given the extraordinarily high value of ECCC material, the Co-Prosecutors submit that the SCC should be careful not to unduly restrict access to members of the public who wish to make fair use, for educational and research purposes, of ECCC holdings, in a manner recognised by the copyright law of many states, while preserving the copyright holders’ rights. Applying a

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<sup>149</sup> *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 (“CCH v. Law Society”).

<sup>150</sup> CCH v. Law Society, para. 48.

<sup>151</sup> CCH v. Law Society, para. 51.

<sup>152</sup> *Hubbard v. Vosper*, [1972] 1 All E.R. 1023 (C.A.); [1972] 2 Q.B. 84.

<sup>153</sup> CCH v. Law Society, para. 52, citing *Hubbard v. Vosper*, p. 1027 ([1972] 2 Q.B. 84, at 94).

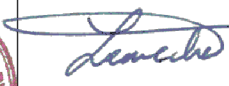

<sup>154</sup> CCH v. Law Society, para. 53.

correct balancing exercise, the SCC may wish to require users seeking to access any records held by the ECCC to accept certain conditions in an Access Policy, in a manner similar to the approach adopted by the IRMCT on its website.<sup>155</sup> The conditions could include requiring the user to accept that 1) the grant of access to a document by the ECCC shall not be construed as copyright clearance; 2) the user may make fair use of the material for the purposes of non-commercial research, study or education in accordance with the copyright law applicable in the user's jurisdiction; and 3) if the user wishes to make any other use of the material, including onward dissemination of the material, it must obtain the permission of the copyright holder.

### c. FUTURE DECLASSIFICATION

79. The Co-Prosecutors note that the balancing exercise between the public's right to access records created by the DK authorities (including confessions collected as a result of torture), and the right to privacy, changes over time. The more time passes, the more compelling the public's right to access such materials. The SCC may therefore wish to provide for greater public access in the future to records, such as confessions and biographies obtained from prisoners at DK security centres. In line with the UN Secretary-General's guidelines for the classification and handling of sensitive information at international criminal tribunals,<sup>156</sup> the SCC may consider providing that the successor authority to the ECCC should grant automatic declassification of all confidential materials 20 years after the closure of the ECCC, and should conduct a review of all "strictly confidential" material 20 years (or 50 years, where compelling reasons exist to justify continued confidentiality) after the closure of the ECCC.

Respectfully submitted,

Date	Name	Place	Signature
22 August 2022	CHEA Leang National Co-Prosecutor	Phnom Penh	
	Fergal GAYNOR International Co-Prosecutor (Reserve)	Dublin Ireland	

<sup>155</sup> IRMCT Access Policy, art. 11(8); IRMCT website, Terms and Conditions of Use, arts (c), (d), (e).

<sup>156</sup> Secretary General's 2012 ICT Information Sensitivity Bulletin, section 6.