

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

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**REQUEST FOR DIRECTIONS REGARDING THE RECLASSIFICATION OF CIVIL  
PARTY DOCUMENTS**

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**Before:**

**Supreme Court Chamber**

Judge KONG Srim, President

Judge Chandra Nihal JAYASINGHE

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## 1 INTRODUCTION

1. The Civil Party Lead Co-Lawyers (“Lead Co-Lawyers”) seek directions from the Supreme Court Chamber (“Chamber”) to enable a process for the reclassification of documents in the case file relating to members of the consolidated group of civil parties (“Civil Parties”). The request is filed pursuant to Internal Rules 104*bis* and 92 and at the prompting of the Trial Chamber in its Order to Reclassify Documents on the Case File as Public.<sup>1</sup>
2. Reclassification is an issue of enormous significance for the Civil Parties. It is central to the Court’s legacy. Reclassification will determine how much of the Court’s product will be publicly available, so that the ECCC has a real and lasting impact. However the issue also affects individual Civil Parties whose sensitive private information is contained in the case file and may require redaction.
3. Pursuant to Article 12.2 of the Practice Direction on Classification and Management of Case-Related Information (“Practice Direction on Classification”), the Chamber is required to review the classification of records in the Case 002. While the Chamber may prefer to finally determine the classification of specific documents after it has issued its final judgment, detailed submissions and requests regarding the status of Civil Party material in Case 002 will require time to prepare. The Lead Co-Lawyers therefore seek directions which will enable this work to be done in the intervening period. In this filing the Lead Co-Lawyers:
  - (a) Provide an overview of the procedural history and background to this request;
  - (b) Set out the relevant legal framework, to the extent that it is made clear by the ECCC’s legal texts, and identify outstanding areas of uncertainty;
  - (c) Identify categories of Civil Parties documents on the case file which raise questions of privacy and may require redaction before material on the case file is made public;
  - (d) Propose principles for use in the reclassification of Civil Party material in the Case 002 case file which would balance transparency and privacy; and
  - (e) Propose a proportionate and efficient process by which the reclassification process could take place.

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<sup>1</sup> E467/6 Order to Reclassify Documents on the Case File as Public, 27 June 2019, para. 11. See also para. 9.

4. Confidential Annex A to the filing contains tables listing examples of Civil Party documents which demonstrate the need for a careful reclassification process involving individual document review and an opportunity for affected parties to be heard. These examples are included in a separate list for convenience, but also to protect sensitive information contained in documents which are currently classified as public and which the Lead Co-Lawyers believe may require redaction. The Lead Co-Lawyers emphasise that the documents listed in Annex A are not an exhaustive list of documents requiring review and redaction. A complete review of the case file will require some time and has not yet been possible. Annex A is therefore intended to provide illustrative examples only, which it is hoped will demonstrate the need for a careful and complete review.
5. The Lead Co-Lawyers are conscious of the Chamber's heavy workload and acutely aware of the diminishing resources available to the parties. This request is made now because – as explained further below – it is anticipated that the process of reviewing case file documents with a view to their careful reclassification will require significant time. Clarifying the applicable principles and process now would allow much of this work to be undertaken in the period prior to the delivery of the Chamber's final judgment. If the process is not undertaken now there is a risk that it may substantially delay the completion of the Court's work on Case 002, particularly if the case knowledge currently held by the parties is lost through resource cuts in the intervening period, with new lawyers needing to familiarise themselves with the case.
6. Civil Parties must have a chance to be heard on the fate of their personal information. This is a question of principle: a central object of victim participation, which has often been claimed as one of the ECCC's achievements,<sup>2</sup> is to allow those most affected by a court's decisions to be heard before it.<sup>3</sup> But it is also a question of practicalities: in many cases identifying clearly which information needs to be protected will require input from the persons concerned.<sup>4</sup>

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<sup>2</sup> See for example: ECCC Press Release: [Co-Rapporteurs on Residual Functions Related to Victims Delivery Their Report](#), 2 December 2021. [Attachment 1]

<sup>3</sup> [Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power](#), UN General Assembly Resolution 40/34, 29 November 1985, para. 6(b).

<sup>4</sup> This is not only a matter of obtaining consent but also of understanding the information in the document and its level of sensitivity. For example, apparently sensitive information might already be known to the Civil Party's family and community. It is also usually not clear from the documents whether there is a risk of conflict or retaliation concerning persons named as perpetrators – this will depend on the circumstances of the individuals and their relationship, which is rarely mentioned in VIFs or supplementary information forms.

7. The Lead Co-Lawyers recognise that a proper process for reclassifying Case 002 documents, which includes hearing from the parties, will require resources. This is unavoidable. It is not a reason to avert, to delay, or to carry out in an inadequate fashion, a process which is essential to the Court's legacy. This process which will determine how *open* the Court's archive can be, but also its quality, and in particular whether the archive meets basic *ethical* standards in terms of privacy protection.
8. Indeed, the Lead Co-Lawyers are hopeful that clear and timely directions from the Chamber on this crucial issue may encourage donors to provide resources which will enable reclassification work to be undertaken appropriately and to begin as soon as possible, so as to avoid delays.

## 2 PROCEDURAL HISTORY AND CONTEXT

### 2.1 *Reclassification to date in Case 002*

9. In its judgment, the Trial Chamber stated

At the conclusion of closing submissions, 14,476 documents and other materials put before the Chamber pursuant to Internal Rule 87(3) remained “confidential”. The majority of this material retains the classification automatically assigned during the judicial investigation in Case 002, although many documents presented during public trial hearings were reclassified as public and made available on the court's website. While certain justifications for non-disclosure continue to be valid, reclassification of material generated by, and collected during, the judicial investigation in Case 002 no longer poses a generalised risk of prejudice to the rights of the Parties or the integrity of the investigation. Thus, in reaching its judgment and publicly relying upon and/or referring to classified information, beyond the confidentiality of the judicial investigation exists. The Chamber, on its own motion, determined that confidentiality is no longer justified for information publicly disclosed in this Judgement.<sup>5</sup>

10. After issuing the Case 002/02 trial judgment, the Trial Chamber invited the parties, the Pre-Trial Chamber, and the Co-Investigating Judges “to comment on the need to retain” the confidential status of some (though apparently not all<sup>6</sup>) documents which were referred to in

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<sup>5</sup> E465 Trial Judgement, 16 November 2018, para. 34. The Trial Chamber clarified at footnote 78 of the same paragraph that “[i]nsofar as the Chamber reclassified particular portions of a document in this Judgement, the Chamber clarifies that this partial disclosure does not affect the classification pertaining to those undisclosed portions of, and information in, a document or other material as a whole.”

<sup>6</sup> The Lead Co-Lawyers note that some confidential documents referred to in the trial judgment do not appear to have been included in the Annexes on which the Trial Chamber sought submissions. It is unclear on what basis it was decided to include or exclude documents from those Annexes.

the judgment.<sup>7</sup> Upon the request of the Lead Co-Lawyers that Article 7.4 of the Practice Direction on Classification be applied to redact personal contact and identification documents with respect to victim information forms and supplementary information forms,<sup>8</sup> the Trial Chamber

identified several civil party applications and supplementary information forms in Annex A which may require redactions to complainants' and civil party applicants' contact details in accordance with Article 7.4 of the Practice Direction. As mentioned above, the Trial Chamber does not have the human resources and time to assess and redact these documents. Accordingly, the Chamber has removed them from Annex A and appends them to this Order as Annex 5. *It will be the duty of the Supreme Court Chamber to review the appropriateness of the security classifications of these records, including any redactions, either on its own motion or at the conclusion of appeal proceedings – unless seised with a request by the Lead Co-Lawyers (or other party) to do so at an earlier date...*<sup>9</sup>

11. However the Trial Chamber did reclassify some other types of documents as public.<sup>10</sup>

12. The Lead Co-Lawyers note that no equivalent process was undertaken in respect of documents referred to in the Case 002/01 Trial Judgment.<sup>11</sup>

## 2.2 *Reclassification in the other cases*

13. The Lead Co-Lawyers have not had a direct role in the other cases before the ECCC and do not have access to confidential case file material other than in Case 002. Without access to confidential records it is difficult to conclude with certainty what the approach to reclassification has been in those other cases. However the following observations can be made based on material which has been classified as public.

14. In Case 001, the Chamber's Decision on Guidelines for Reclassification of Documents on the Case File was issued on 26 July 2012, well after the delivery of the Case 001 Appeal Judgment

<sup>7</sup> **E467** Trial Chamber Memorandum entitled Confidential Documents in Case 002/02 Judgment Proposed for Reclassification to Public, 9 April 2019; **E467/6** Order to Reclassify Documents on the Case File as Public, 27 June 2019, para. 1.

<sup>8</sup> **E467/2** Civil Party Lead Co-Lawyers' Comments and Objections Regarding the Trial Chamber Memorandum entitled "Confidential Documents in Case 002/02 Judgment Proposed for Reclassification to Public", 6 May 2019, para. 2.

<sup>9</sup> **E467/6** Order to Reclassify Documents on the Case File as Public, 27 June 2019, para. 11 [*emphasis added*].

<sup>10</sup> See further below in Section 4.3.

<sup>11</sup> As it did in Case 02/02, the Trial Chamber decided *proprio motu* that certain information from confidential documents could be referred to publicly in its judgment, but without altering the classification of the underlying documents: **E313** Case 002/01 Judgement, 7 August 2014, para. 39 and footnote 106.

on 3 February 2012.<sup>12</sup> That decision recognised that the parties should be heard on matters of reclassification,<sup>13</sup> but it appears that no submissions were made on behalf of civil parties, perhaps because the process occurred after the conclusion of the case.<sup>14</sup> (The Lead Co-Lawyers note that they were not involved in Case 001.) The Chamber ordered the reclassification as public of all victim information forms (“VIFs”),<sup>15</sup> whether or not they had been referred to in public decisions or filings, but without elaborating the reason for that approach in its decision.<sup>16</sup> Limited redactions were ordered regarding “[c]ontact details of victims who are not civil parties, including in cases where such information is found in victim complaints”.<sup>17</sup>

15. A review of the public Case 001 case file reveals that most of the public VIFs of civil parties or applicants for civil party status in that case<sup>18</sup> have had redactions applied to protect some victim and third party personal information, particularly contact and identity card details.<sup>19</sup> The same is generally true of supplementary information,<sup>20</sup> civil parties’ powers of attorney<sup>21</sup> and of letters acknowledging receipt of civil party applications<sup>22</sup> where these documents contained civil party personal information.
16. However a small number of VIF are classified as public in totally unredacted form.<sup>23</sup> This is despite the fact that these VIFs contain personal information of the individuals in question; and also despite the fact that some are also found in the Case 002 case file where they remain confidential.<sup>24</sup> Biographies and confessions, which are not made publicly available by the Tuol Sleng Genocide Museum because they are considered torture-tainted (see below at

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<sup>12</sup> **Case 001 – F30/2** Decision on Guidelines for Reclassification of Documents on the Case File, 26 June 2012. The Chamber also issued one subsequent decision, in 2015, in response to a specific request for the reclassification of a specific Case 001 item: **Case 001 – F31/1** [Public redacted] Decision on Reclassification of Video Recording E3/247R and on Variation of Related Protective Measures, 21 December 2015.

<sup>13</sup> *Ibid.*, paras 2-4.

<sup>14</sup> For reasons which are not clear from the decision, the Chamber invited the Victim Support Section, rather than the Civil Party Lawyers, to comment on the matter.

<sup>15</sup> These are also sometimes referred to as civil party applications.

<sup>16</sup> **Case 001 – F30/2** Decision on Guidelines for Reclassification of Documents on Case File, 26 July 2012, para. 7.

<sup>17</sup> *Ibid.*, para. 7(b)(i).

<sup>18</sup> The individuals admitted as civil parties to Case 001 are listed in **Case 001 – F28.2** Appeal Judgement, Annex – Civil Parties admitted in Trial or Appeal Judgement, 3 February 2012. The victim documents reclassified in Case 001 include documents submitted by these civil parties, as well as by others who sought, but were not granted, civil party status.

<sup>19</sup> See for example Annex A, items 1, 5, 11, 12, 14, 15.

<sup>20</sup> See for example Annex A, items 27, 28, 29.

<sup>21</sup> See for example Annex A, items 2, 3, 6, 16.

<sup>22</sup> See for example Annex A, items 4, 19.

<sup>23</sup> See for example Annex A, items 20, 21; also Annex A, item 25 French version.

<sup>24</sup> See for example Annex A, item 21.

paragraph 42) are mostly classified as public,<sup>25</sup> although a small number have been partially redacted.<sup>26</sup> The categories of information which have been redacted also differ between and even within documents,<sup>27</sup> and it is not clear how they have been determined. In some instances material redacted in one language version of a document is unredacted in other language versions of the same document.<sup>28</sup> Moreover, numerous “Victim Unit” reports on VIFs were made public without redactions, even though some include information which is redacted from the corresponding VIFs themselves.<sup>29</sup> It is unclear based on the public case file whether additional VIFs or other civil party documents have not been declassified and exist only on the confidential case file. Sensitive personal information other than contact details does not appear to have been considered for redaction: for example material about civil parties’ health conditions and/or treatment is unredacted.<sup>30</sup>

17. Some reclassification has also been undertaken by the Pre-Trial Chamber in Cases 003, 004, 004/01 and 004/02.<sup>31</sup> In Case 004/02 a number of VIFs have been reclassified as public without any redactions being applied, even to basic personal information such as addresses, phone numbers and identity card numbers.<sup>32</sup> This is also despite the fact that the individuals concerned

<sup>25</sup> See for example Annex A, items 10, 30.

<sup>26</sup> See for example Annex A, item 31.

<sup>27</sup> For example in some documents the Civil Party’s age or date of birth are redacted while in others it is not; some Civil Parties’ parents’ names are redacted while others are not; in some documents the location of its signature is redacted while in others it is not. Compare for example Annex A, items 1 and 5; or Annex A, items 14 and 17. Regarding internal inconsistencies, see for example the documents where the Civil Party’s address is redacted in one part of the document, but left unredacted on subsequent pages (Annex A, items 7, 25, 26). In some instances the case file contains differently redacted versions of exactly the same document. See for example Annex A, items 22 and 23; and Annex A, items 24 and 25.

<sup>28</sup> See for example Annex A, items 22, 23, 24. Annex A item 25 has redacted versions in Khmer and English but is totally unredacted in its French version.

<sup>29</sup> For example, see Annex A, items 9, 13 and 18, which appear to reveal some of the personal information which has been redacted from other documents concerning the same Civil Parties (Annex A, items 5, 11, 14).

<sup>30</sup> See for example Annex A, items 1, 5, 12, 13, 20, 21, 24, 25, 27.

<sup>31</sup> **Case 003 – D266/28 & D267/36** Decision on the Pre-Trial Chamber’s Reclassification of Documents in Case File 003, 8 April 2021; **Case 003 – D266/29 & D267/37** Pre-Trial Chamber Memorandum “Reclassification of Documents in Case File 003”, 9 June 2021; **Case 003 – D274** Pre-Trial Chamber Memorandum “Reclassification of Documents in Case File 003”, 28 October 2021; **Case 004/01 – D315** Pre-Trial Chamber Memorandum “Reclassification of Documents in Case File 004/01”, 5 May 2021; **Case 004/01 – D316** Pre-Trial Chamber Memorandum “Reclassification of Documents in Case File 004/01”, 17 September 2021; **Case 004/01 – D317** Pre-Trial Chamber Memorandum “Reclassification of Documents in Case File 004/01”, 28 October 2021; **Case 004/02 – D359/21 & D360/30** Pre-Trial Chamber Memorandum “Reclassification of Documents in Case Files 004, 004/01 and 004/02”, 1 November 2019; **Case 004/02 – D359/38 & D360/47** Decision on the Pre-Trial Chamber’s Reclassification of Documents in Case File 004/02, 12 June 2020; **Case 004/02 – D365** Pre-Trial Chamber Memorandum “Reclassification of Documents in Case File 004/02”, 24 September 2021; **Case 004 – D381/43 & D382/42** Pre-Trial Chamber Memorandum “Reclassification of Documents in Case File 004”, 5 May 2021; **Case 004 – D387** Pre-Trial Chamber Memorandum “Reclassification of Documents in Case File 004”, 28 October 2021.

<sup>32</sup> See Annex A, items 32-38.

are also Civil Parties in Case 002 and identical or nearly identical VIFs remain confidential on the Case 002 case file.<sup>33</sup> It appears that confidential copies of these VIFs also exist on the case files of Cases 003, 004 and 004/1.<sup>34</sup> One of the individuals was a Case 001 civil party whose Case 001 VIF had been reclassified as public with personal information redacted.<sup>35</sup> The Lead Co-Lawyers have raised this issue with the Pre-Trial Chamber. It declined to take any action.<sup>36</sup> The Lead Co-Lawyers note that the Pre-Trial Chamber has ordered several further reclassifications recently and that therefore this work appears to be ongoing. There is therefore an immediate need for coordination so that personal material which rightly continues to be protected in Case 002 is not inadvertently revealed through the reclassification of material held on the other case files.

### 2.3 *Context concerning the Court's archive and residual functions*

18. The UN and Cambodia have now agreed the Addendum to the Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea on the Transitional Arrangements and the Completion of Work of the Extraordinary Chambers. It foresees the maintenance of a public archive of documents which shall be “as broadly accessible as possible”.<sup>37</sup>
19. However no specific access rules concerning this archive (yet) exist. The Cambodian Archives Law would apply to the ECCC archive unless new law is enacted.<sup>38</sup> It provides for declassification after set time periods. But it is far from clear that the ECCC's archive will be regulated by this general framework, rather than by a specifically designed access policy of the

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<sup>33</sup> Items 32-37 in Annex A are VIFs which appear in identical form in Case 002 (confidential) and in Case 004/2 (reclassified as public, with no redactions). Item 38 in Annex A refers to VIFs submitted by a single individual, one in Case 002 (confidential) and one in Case 004/02 (reclassified as public, with no redactions). The documents are not exact copies, but were submitted by the same individual about the same events and containing much of the same personal information.

<sup>34</sup> See Annex A, items 32-38.

<sup>35</sup> See Annex A, item 38.

<sup>36</sup> Annex B: Email from Pre-Trial Chamber Greffier to International Lead Co-Lawyer, 5 November 2021 .

<sup>37</sup> Addendum to the Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea on the Transitional Arrangements and the Completion of Work of the Extraordinary Chambers, Article 3(1). [Attachment 2]

<sup>38</sup> Archives Law, 23 October 2005 (Khmer only). [Attachment 3]



kind created for other international courts.<sup>39</sup> In the absence of clarity on this it is difficult to address all considerations: for example it is not known which categories of individuals might be granted case-by-case access to confidential case file material, or whether the time periods for declassification under the Archives Law will apply. However the Lead Co-Lawyers urge that this is not a reason to delay essential work on identifying sensitive information contained in case file documents. Further submissions may be made at a later point. The Lead Co-Lawyers also call on the UN and Cambodia to ensure that Civil Parties are consulted in the development of any specific access policy or law, since they are the persons most affected by it.

### 3 APPLICABLE LEGAL PRINCIPLES

#### 3.1 *Broad principles*

20. The ECCC's texts provide that proceedings shall be public and transparent.<sup>40</sup> This is in line with international standards, which also make clear that a public hearing entails public access to written records including evidence.<sup>41</sup> Civil parties have repeatedly called for transparency and for the public recognition of the truth about the crimes which are within the Court's mandate. Both are to be facilitated by enabling public access to information held on the case file. In Case 001 this Chamber recalled that

“wide dissemination 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 minimizing denial, distortion of facts, and partial truths.”<sup>42</sup>

<sup>39</sup> See for example: RSCSL, [Records and information sensitivity, classification, changes in classification, handling and access policy](#), 1 January 2014; MICT, [Access Policy for the Records Held by the Mechanism for International Criminal Tribunals](#), 12 August 2016; See also Secretary-General's Bulletin, [International Criminal Tribunals: information sensitivity, classification, handling and access](#), ST/SGB/2012/3, 20 July 2012.

<sup>40</sup> Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (“ECCC Agreement”), article 12(2); Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (“ECCC Law”), article 34 new; Internal Rules, rule 21(1).

<sup>41</sup> Eg see HRC, [General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial](#), 23 August 2007, para. 29; [Istanbul Declaration on Transparency in the Judicial Process](#), A/73/831-E/2019/56, annex I, principle 6 and [Measures for the Effective Implementation of the Istanbul Declaration](#), A/73/831-E/2019/56, annex II, principle 6(3), endorsed by the UN Economic and Social Council in Resolution 2019/22 [Enhancing transparency in the judicial process](#), E/RES/2019/22, 1 August 2019.

<sup>42</sup> **Case 001 – F30/2** Decision on Guidelines for Reclassification of Documents on Case File, 26 July 2012, para. 5; citing **Case 001 – F28** Appeal Judgement, 3 February 2012, para. 708.

21. However at the same time, the imperative towards transparency and truth must be balanced against other interests.<sup>43</sup> In Case 001 the Chamber observed “that the classification of documents is to be determined by balancing the exigency of confidentiality with the demands of transparency”<sup>44</sup> and that “certain reasons for non-disclosure may continue to remain valid”.<sup>45</sup> International standards requiring transparency also call for exceptions to protect privacy,<sup>46</sup> which is itself a right recognised under international and regional human rights law.<sup>47</sup> For example, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power provides that judicial processes should

“[take] 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>48</sup>

### 3.2 *The Specific Legal Framework*

22. The key ECCC legal text which distils these broad principles into a specific framework is the Practice Direction on Classification. Article 12.2 provides that “[t]he last judicial office seised of a case shall undertake a review of the security classifications in the case file” and that

“a. Records that remain confidential or strictly confidential shall be reviewed and reclassified as necessary.

b. Records that have limited portions of confidential material shall be appropriately redacted to produce a public version.

<sup>43</sup> Practice Direction on Classification, article 1.2.

<sup>44</sup> **Case 001 – F30/2** Decision on Guidelines for Reclassification of Documents on Case File, 26 July 2012, para. 5.

<sup>45</sup> *Ibid.*, para. 6.

<sup>46</sup> See for example: MICT, [Access Policy for the Records Held by the Mechanism for International Criminal Tribunals](#), 12 August 2016, art. 7(2) (“In determining access, the general principles of openness and transparency shall be balanced with the obligation to maintain the confidentiality of classified records and information, in the interest of preventing harm or damage to the United Nations or harm, damage or violations of privacy to individuals.”); [Measures for the Effective Implementation of the Istanbul Declaration](#), A/73/831-E/2019/56, annex II, principle 6(3), endorsed by the UN Economic and Social Council in Resolution 2019/22 [Enhancing transparency in the judicial process](#), E/RES/2019/22, 1 August 2019; See also the authorities referred to in footnotes 95-98 below.

<sup>47</sup> Most relevantly for Cambodia: [Universal Declaration of Human Rights](#), article 12; [International Covenant on Civil and Political Rights](#), article 17; [ASEAN Human Rights Declaration](#), article 21. The Human Rights Committee has explained that the right requires that: “Effective measures have to be taken by States to ensure that information concerning a person’s private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the Covenant.” HRC, [General Comment No. 16: Article 17 \(right to Privacy\) The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation](#), 8 April 1988, para. 10.

<sup>48</sup> [Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power](#), UN General Assembly Resolution 40/34, 29 November 1985, para. 6(d).

c. The list of reclassified records shall be placed in the case file.

d. Any records sealed during any stage of the case shall be reviewed and necessary unsealing carried out.”

23. Both the Trial Chamber and this Chamber have recognised that the parties should be heard on issues of reclassification.<sup>49</sup>

24. The Practice Direction on Classification also sets out relevant principles which are applicable to establishing the appropriate classification for given material.

25. Article 4 provides for categories of material in the case file which are presumptively public. For present purposes this includes most significantly “[e]vidence, including expert reports, filed during a trial hearing” (Article 4(d)).

26. Conversely, certain categories of material are presumptively confidential or strictly confidential. These are listed in Articles 5 and 6. Confidential material includes “[v]ictims’ complaints” (Article 5.1(d)) and the “[i]dentity and contact details of victims who are not civil parties (including applications to be joined as civil parties)” (Article 5.1(e)). Strictly confidential material includes information concerning the health of a suspect, charged person or accused (Article 6(c)) and material subject to protective measures (Article 6(b)).

27. Article 7 additionally provides some guidance regarding protections relevant to witnesses and victims, including Civil Parties. Article 7.2 provides:

In accordance with Article 5(e) [*sic*<sup>50</sup>], an application to be joined as a civil party will be held in the confidential section of the case file. Where such an application is denied, and has not been made public, the application and the applicant’s identifying details will as a rule remain in the confidential section of the case file.

28. Article 7.4 provides that the “[c]ontact details of Complainants and Civil Party Applicants contained in Victim Information Forms made public under Article 4, shall be redacted from the documents appearing on the ECCC website.”

29. The Lead Co-Lawyers understand this scheme to mean that evidence which has been before the Trial Chamber in a case should be made public, unless the nature of the material is such that it is confidential or strictly confidential. Documents containing the materials listed in

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<sup>49</sup> **E467/6** Order to Reclassify Documents on the Case File as Public, 27 June 2019, para. 2; **Case 001 – F30** para. 1-2, 5; **Case 001 – F30/2** Decision on Guidelines for Reclassification of Documents on the Case File, 26 June 2012, paras 2, 8.

<sup>50</sup> It appears that the intended reference is to Article 5.1(e).

Articles 5, 6, and 7 are therefore either left with a confidential or strictly confidential status, or confidential information is redacted from the documents which are reclassified as public.

30. Concerning the question of what constitutes “evidence” within the meaning of Article 4(d) of the Practice Direction on Classification, the Lead Co-Lawyers note Internal Rule 87(3), which provides that “[t]he Chamber bases its decision on evidence from the case file provided it has been put before it by a party or if the Chamber itself has put it before the parties. Evidence from the case file is considered put before the Chamber or the parties if its content has been summarised, read out, or appropriately identified in court...” Evidence which was before the Trial Chamber in Case 002 is readily identifiable because it has been allocated an E3 number in the case file.<sup>51</sup>

### 3.3 *Areas of Uncertainty*

31. Despite this framework, areas of uncertainty remain. Of particular relevance to the present submissions:

- (a) It is unclear from the Practice Direction on Classification whether Articles 5, 6, and 7 are intended to provide an *exhaustive* list of material which should be exempted from public status, or whether the Judges and Chambers retain a discretion to treat other material as confidential. If a judicial discretion to maintain the confidentiality of other case file material does exist, it is unclear which categories of material it might be used to protect.
- (b) It is unclear what classification is given to material which falls into none of Articles 4, 5, 6 or 7.

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<sup>51</sup> “[A]llocation of an E3 number signifies that a document has been put before the Chamber or the parties without objections being made (or, where objections are made to a document, these objections are rejected by the Chamber). Pursuant to Rules 87(2) and 87(3), the Chamber may base its decision on documents that have been put before the Chamber or the parties (i.e. their ‘content has been summarised, read out, or appropriately identified in court’), ‘subjected to examination’ and not excluded on any of the five grounds specified in Rule 87(3)(a) to (e). The Chamber considers a document to have been subjected to examination if adequate opportunity has been given to the parties to object to its use, even if the parties do not in fact avail themselves of this opportunity. New documents that the Chamber deems to have met the criteria in Internal Rule 87(4) are also allocated E3 numbers. The assignment of E3 numbers is recorded by the Greffiers in the Written Record of Proceedings for each day of trial and will be soon notified to the parties through the Daily Trial Documents interface. Once assigned, an E3 number replaces any previous document number assigned to that document.” See **E178/1** Trial Chamber memorandum entitled “Requests by KHIEU Samphan Defence to Clarify the Status of Certain E3 Documents (E178) and its Motion E167, 11 April 2012, para. 2. See also **E465** Case 002/02 Judgement, 16 November 2018, para. 44; **E190** Decision Concerning New Documents and Other Related Issues, 30 April 2012, para. 18; **E305/17** Decision on Objections to Documents Proposed to Be Put before the Chamber in Case 002/02, 30 June 2015, para. 27.

32. The inconsistent classification and redaction of civil party documents in Case 001, as set out in paragraph 16 above, highlights the lack of a clear applicable framework and demonstrates how this can adversely affect the rights of civil parties, particularly if they are not given an opportunity to be heard.
33. The following section of these submissions provides an overview of the Case 002 case file material relating to Civil Parties, with a particular focus on the material which is affected by these areas of uncertainty.

#### **4 CIVIL PARTY MATERIAL ON THE CASE FILE**

##### *4.1 Overview of Civil Party material on the case file*

34. Each of the Civil Parties in the consolidated group<sup>52</sup> submitted a VIF in order to participate in Case 002. Numerous Civil Parties filed supplementary information forms in addition to their VIF(s), detailing additional factual aspects of the crimes they experienced and/or the harm they suffered.<sup>53</sup> Some Case 002 Civil Parties submitted VIFs and supplementary information forms in Cases 003 and/or 004 which, as a result of disclosures, also appear on the Case 002 case file.<sup>54</sup> Civil Parties also gave interviews to the Office of the Co-Investigating Judges (“OCIJ”), with the result that the case file includes written records of interviews (“WRIs”) from some Civil Parties. Some Civil Parties had provided accounts to DC-Cam which have also been added to the case file. The case file also contains administrative documents related to civil party participation, including Victim Support Section (“VSS”<sup>55</sup>) reports on civil party applications, powers of attorney and documents concerning civil party succession requests.<sup>56</sup> Collectively, these types of documents form the main body of Civil Party material on the case file.

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<sup>52</sup> The consolidated group currently includes 3,865 Civil Parties. Additionally, two persons who previously held civil party status withdrew, and two civil parties died with death certificates on the case file but no successor claim. The documents for these individuals remain on the case file. The case file also contains documents from individuals who applied for civil party status but were not granted it.

<sup>53</sup> Core Civil Party documents were generally assigned case file numbers in Case 002 beginning with D22 and linked to each Civil Party’s unique D22 number. The list of Civil Parties contained in Annex II to the trial judgment (**E465.3**) sets out each Civil Party’s D22 number. Where these documents were subsequently admitted into evidence they were renumbered with an E3 number. The link between the E3 number and the previous D22 number is sometimes, but not always, indicated by use of a surrogate sheet on the case file in place of the original D22 document.

<sup>54</sup> The latter documents, along with other material disclosed from the other cases, were assigned Case 002 document numbers beginning with E319 (unless and until they were admitted to evidence and given an E3 number).

<sup>55</sup> Usually titled in Zylab as “Victim Unit’s report on...” or “Report by Victim Unit on...”.

<sup>56</sup> These administrative documents were either assigned a D22 number or a number beginning with E2 (unless and until they were admitted into evidence and given an E3 number).

35. During Case 002/01 and Case 002/02, a significant number of Civil Party documents were admitted as evidence. Where that occurred, the number originally assigned to the document was replaced with an E3 number. Documents admitted to evidence and assigned an E3 number include the documents concerning the Civil Parties who testified in the two trials, but also a significant number of others which were proposed as evidence in the parties' lists or referred to in trial hearings. The Lead Co-Lawyers estimate that the evidence (E3 material) in the Case 002 case file includes approximately 3000 VIFs and approximately 1000 supplementary information forms.<sup>57</sup> The E3 material also contains some other Civil Party documents, such as DC-Cam statements, WRIs and other records produced by the OCIJ.
36. The case file contains an even larger number of documents concerning Civil Parties which were *not* put into evidence in either trial. The majority of VIFs and supplementary information forms (an estimated 14400 documents) were not put before the Trial Chamber as evidence and remain on the case file either with their original D22 numbers, or in some cases with a number starting with E319 where they were disclosed from other cases. Likewise, most of the administrative documents concerning the Civil Parties, including VSS reports, powers of attorney and successor claims were not put into evidence (although a small number of these documents were admitted to evidence and assigned an E3 number).

#### 4.2 *Private and sensitive material concerning Civil Parties*

37. Many of the documents described above include information about the Civil Parties which may not be appropriate to release into the public domain. Although Civil Party *identities* are already public,<sup>58</sup> the documents submitted by Civil Parties contain a significant amount of private information beyond this. Civil Party perspectives on how such information should be handled are not uniform: of the limited number consulted on this question so far,<sup>59</sup> some are unconcerned about the publication of particular categories of information, but others have expressed concern about one or more types of information, the publication of which could

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<sup>57</sup> The numbers given in this filing count each individual language version as a separate document: so where a VIF exists on the casefile in Khmer, English and French this is counted as 3 documents.

<sup>58</sup> E465.2 Trial Judgment Annex II is a list of the Civil Party names.

<sup>59</sup> The Lead Co-Lawyers and Civil Party Lawyers are dependent on external donor funding to support their engagements with Civil Parties, because funds for this work are not provided by the ECCC Office of Administration. The limited amount of donor funding now available therefore restricts the Lead Co-Lawyers' ability to fully seek Civil Party perspectives on these and other important questions.

potentially cause harm to Civil Parties or others. Concerns exist about the following categories of information:

38. *Contact details*: VIFs, supplementary information forms, and other Civil Party documents typically contain contact information such as Civil Parties' addresses and telephone numbers (and, in some cases, email addresses). Many include copies of personal identification documents (including photographs), or at least the identity numbers from such documents. Other personal information such as dates and places of birth, and details of family members are also often included. The importance of protecting such information is already reflected in the Practice Direction on Classification (see above in section 3.2). Some Civil Parties have expressed the concern that if such details are made public they may be exposed to unwanted approaches including by perpetrators of telephone or internet fraud.
39. *Information identifying victims of sexual violence*:<sup>60</sup> A considerable number of Civil Party documents identify the Civil Party providing the account as a victim of sexual violence or name and/or otherwise identify third persons as sexual violence victims.<sup>61</sup> This information, if made public, might result in adverse consequences for the persons in question if their husbands, children, extended families or communities are not aware of the information in question. Some Civil Parties speak of children conceived as a result of rape,<sup>62</sup> something which might not be known to those children or their families and could cause significant harm if revealed in these circumstances.

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<sup>60</sup> The Lead Co-Lawyers emphasise that this category is wider than the instances of forced sexual intercourse within forced marriage which were covered by the charges in Case 002. A significant number of Civil Party documents speak of other forms of sexual violence, occurring outside marriage.

<sup>61</sup> See for example Annex A, item 39 (which describes the systematic rape of Vietnamese girls in a named village, and gives names, current locations and names of family members for five identified rape victims); Annex A, item 40 (which names a family member who was raped and killed); Annex A, item 41 (which names a woman, and gives her village of residence, who was raped and sexually assaulted); Annex A, items 42 and 43 (which include graphic details of the Civil Party's own rape and sexual assault, as a result of which she became pregnant and had a child who is still alive); Annex A, item 44 (which refers to sexual violence suffered by the Civil Party and also identifies by name a woman from the same mobile unit as the Civil Party who was raped by a militia unit chief, became pregnant and was forced to marry the rapist, as well as naming the village where the rape victim currently lives with her child); Annex A, item 45 (which describes the rape of a family member, who is named, and how she was killed using sexual violence); Annex A, item 46 and 47 (which describe witnessing another female victim, who is named, being sexually assaulted); Annex A, item 48 (which names a third party who was subjected to rape).

<sup>62</sup> See for example Annex A, items 42 and 43 (in which the Civil Party describes being raped by militiamen and having a child as a result who is still alive); and Annex A, item 44 (in which the Civil Party names a woman who became pregnant as the result of a rape and was forced to marry the rapist, and which names the place where the rape victim and her child currently live).

40. *Personal medical information*: A number of Civil Parties provided information about their physical or mental health problems and/or treatment which has been received. This is particularly the case in VIFs, since part C of the form requested information about this type of harm suffered by the applicant. Civil parties have indicated a range of mental health conditions and symptoms from which they have suffered, including PTSD, depression, panic attacks, anxiety, insomnia, suicidal thoughts and violent behaviour.<sup>63</sup> Many also disclosed pharmaceutical or psychological treatments they have received, some naming the treating institution.<sup>64</sup> In some cases proof of psychiatric illness or treatment has been provided in the form of doctors' letters and/or detailed medical and treatment records.<sup>65</sup> Some Civil Party documents also describe mental health symptoms experienced by others close to them.<sup>66</sup> Numerous physical health problems are also described, including some which are particularly private in nature, including gynaecological problems or sexually transmitted infections.<sup>67</sup> Some of the matters disclosed in this way may potentially result in stigmatisation if revealed; but even where that is not the case, these remain personal matters which the individuals in question may not wish to have revealed to the public.
41. *Experiences of and perspectives on forced marriage*: In Case 002, 667 Civil Parties were admitted to participate based on harm suffered by the regulation of marriages during the DK. As borne out in the Case 002/02 Trial Judgment, Civil Parties and other victims had varied experiences of these marriages, with some remaining married to their DK-era spouse. Civil parties spoke candidly in their VIFs, supplementary information forms and WRIs about their feelings towards their spouses and about sex within their marriages. Many do not want their spouses, ex-spouses, children, extended families or communities to know of these very personal matters.
42. *Torture-tainted material, including confessions and biographies*: The case file contains many documents which were produced through the use of torture or ill-treatment, or the threat of it. These include security centre confessions, as well as biographies which were written under duress. Some are sourced from Civil Parties. These documents will often contain false

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<sup>63</sup> See for example Annex A, items 53, 56-64.

<sup>64</sup> See for example Annex A, items 45, 53, 56, 57, 58, 59, 62, 63, 64.

<sup>65</sup> See for example Annex A, item 56.

<sup>66</sup> See for example Annex A, items 21, 52.

<sup>67</sup> See for example Annex A, items 53, 54, 55.



information about the author or other people including family members, which might be considered harmful. The Lead Co-Lawyers note that the Tuol Sleng Genocide Museum has adopted a policy of restricting access to these documents.<sup>68</sup>

43. *Naming of alleged perpetrators*: Some Civil Parties indicated lower level cadre in their communities as being responsible for crimes. This particularly occurs in VIFs because Part B of the form specifically requested information regarding the alleged perpetrators of the crimes from which the applicant suffered. Equivalent information is also sometimes found in narrative descriptions in the VIFs or supplementary information forms, as well as in WRIs. It may be unproblematic to reveal some of these allegations (for example where they are already widely known, or where all relevant persons have died), but in at least some instances revealing a Civil Party's allegations of criminal behaviour against others may become a source of community conflict or retaliation. Civil Parties have generally indicated a desire for these details to be available to investigating authorities, but have expressed concerns about making them public.
44. Many Civil Parties have participated in this case precisely in order for their experiences to be acknowledged and publicly known. Nonetheless, motivations will have varied.<sup>69</sup> It is therefore unsurprising that Civil Parties have varied views about whether their documents, and sensitive information within them, should be made public. While many have been eager to share their experiences publicly, others requested protective measures,<sup>70</sup> declined to testify publicly, or specifically indicated a desire to have their identity or information protected from the public.<sup>71</sup> Where protective measures were refused at pre-trial this was often because they were deemed unnecessary *at that stage* given that investigative proceedings were not public;<sup>72</sup> thus

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<sup>68</sup> See [Access to Documents](#), on the Tuol Sleng Genocide Museum website.

<sup>69</sup> The forms served various purposes and were intended differently by different individuals: for some it was a way of reporting information regarding the crimes under investigation; for some it was a means to achieve recognition from the Court or from the public regarding the crimes they suffered; for others it was simply an avenue to obtaining civil party status in the proceedings and reparation for the harm suffered.

<sup>70</sup> Protective measures were sought both at the investigation stage, and then later at the trial stage in respect of Civil Parties who might be called to testify.

<sup>71</sup> See for example **E293** Trial Chamber Memorandum entitled "Disposition of all Requests for Protective Measures sought in Case 002/01 and response to Co-Prosecutor's Request for the Recall of Civil Party SAR Sarin and an Order for a Formal Assessment of the Need for Protective Measures (E286)", 28 June 2013, paras 1-2; **E307/6** Civil Party Lead Co-Lawyers' Rule 87(4) Request to Admit Into Evidence Oral Testimony and Documents and Exhibits Related to Witnesses, Experts and Civil Parties Proposed to Testify in Case 002/02, 29 July 2014, para. 22; Annex A, items 22, 23.

<sup>72</sup> See for example: **D111** [Confidential] Order on Protective Measures, 28 October 2008; **D112** [Confidential] Order on Protective Measures, 28 October 2008; **D405** [Confidential] Order Concerning Protective Measures, 6 September

highlighting the importance of revisiting this question before opening matters to the public at a later stage. The same likely applies to a large number of protective measures requests which were withdrawn at the investigation stage following discussions with the Witnesses and Experts Support Unit.<sup>73</sup> And it remains the case that when VIFs and similar documents were completed, specific informed consent for the publication of their contents (or parts thereof) was not systematically obtained. Most Civil Party documents do not give any indication of the Civil Party's intentions regarding public access. Considering that these documents were initially created with a confidential classification, it is very possible that Civil Parties (or at least some) were led to believe that this status would endure. The inclusion in some documents (especially those submitted with assistance from DC-Cam) of a standard waiver concerning protective measures and publication does not obviate these concerns. These waivers do not address the question of whether documents made public should contain selective redactions and it is not known whether this possibility was explained to victims by the organisations which assisted them. It is also not known to what degree it was explained what would happen to these documents in the proceedings or thereafter.

45. A limited exception to this position concerns Civil Parties who testified during the trials. The process of selecting these individuals to testify involved detailed discussions between the Civil Parties in question and their lawyers, and only those who gave informed consent to testifying publicly were put forward. The Lead Co-Lawyers have no objection to the reclassification as public of material which covers the subjects addressed in their public testimony (although other information about these Civil Parties, including contact details and identity document numbers, as well as sensitive matters not touched on by their testimony<sup>74</sup> should remain confidential). However this only serves to further highlight the need to protect sensitive information from those who explicitly declined to share their accounts publicly,<sup>75</sup> or from those who have not yet been given an opportunity to express their views on this question.

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2010; **D407** [Confidential] Order Concerning Protective Measures, 6 September 2010; **D413** [Confidential] Order Concerning Protective Measures, 9 September 2010; **D421** [Confidential] Order Concerning Protective Measures, 14 September 2010; **D422** [Confidential] Order Concerning Protective Measures, 14 September 2010.

<sup>73</sup> See **D389** [Confidential] Order on Civil Party Requests for protective measures, 9 August 2010.

<sup>74</sup> See for example below at paragraph 48(ii).

<sup>75</sup> See for example **E307/6** Civil Party Lead Co-Lawyers' Rule 87(4) Request to Admit Into Evidence Oral Testimony and Documents and Exhibits Related to Witnesses, Experts and Civil Parties Proposed to Testify in Case 002/02, 29 July 2014, para. 22.

46. Much of the material identified above is affected by the two areas of uncertainty identified above at paragraph 31. A number of the Civil Party documents which are in evidence on the case file – and therefore presumptively to be reclassified as public – contain information which is sensitive or private, but which does not appear to fall within one of the categories of confidential material under Articles 5, 6, or 7 of the Practice Direction on Classification. And much of the remaining Civil Party material in the case file falls within none of the specified categories of public or confidential material: that is, it is categorised neither as public nor confidential pursuant to the Practice Direction on Classification.

#### *4.3 Current classification of Civil Party material*

47. The current classification of these documents is varied.

48. All were originally added to the case file as confidential. However several hundred of the VIFs and supplementary information forms in evidence (E3 documents) now appear in the case file with their classification marked as public and without any redactions.<sup>76</sup> The Lead Co-Lawyers have not been able to identify any formal decision pursuant to which these documents were reclassified, nor any obvious rationale for such a decision. It appears that most or all of these documents were either referred to in public hearings or concern Civil Parties who testified publicly. However many other documents which were referred to or quoted in public hearings, or which were submitted by testifying Civil Parties, were admitted into evidence without being reclassified as public, and remain confidential. It also does not appear that a careful review was undertaken of the documents in order to identify material within them which is unrelated to testimony given in public hearings and which could cause harm to the Civil Party or others if revealed. Owing to resource limitations the Lead Co-Lawyers have not been able to systematically review all of these apparently declassified Civil Party documents, however partial reviews reveal that at least some of these documents (now identified as public with no redactions) include highly sensitive information for which there does not appear to be any justification for publication. For example:

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<sup>76</sup> A search in the Zylab Case 002 case file database for Classification = Public and Record Type = Victims Application returns 451 hits. It is likely that the correct figure is somewhat higher, since metadata for Record Type has not been entered consistently for all documents and most Supplementary Information Forms have been assigned as other Record Types. A Zylab search for Classification = Public and Title = \*supplementary information\* returns 108 hits, but would omit documents named in French.

- (i) In one VIF the Civil Party describes her “extreme anxiety, depression and nightmares” because of which she is being treated by a psychiatrist and is “heavily medicated”. The VIF includes a treating psychiatrist’s letter detailing the Civil Party’s PTSD which has caused her “severely compromised functionality”, as well as around 50 pages of the Civil Party’s personal psychiatric records. This VIF was referred to in a court hearing and a short section of it read out, but not in relation to the Civil Party’s psychiatric condition or treatment.<sup>77</sup>
- (ii) Another Civil Party VIF describes how cadres “used a branch of a tree to penetrate Comrade [...]’s vagina and caused it to bleed.” While this Civil Party gave evidence at trial, the incident of sexual violence in question was not mentioned in the hearing. In any event, according to the Trial Chamber’s procedures, any testimony given in open session about such an incident would not have been permitted to disclose the victim’s name (see below at paragraph 59(b)).<sup>78</sup>

49. Attempts by the Lead Co-Lawyers to understand the process or basis on which these documents were given a public classification without redactions have proved unsuccessful. Some informal discussions with persons involved at the time of trial suggest that this may have occurred inadvertently. As addressed below, it is essential that this situation is corrected.

50. Separately, as mentioned above in paragraph 10, a number of confidential documents in evidence were later proposed for reclassification to public by the Trial Chamber as a result of having been relied upon in the Case 002/02 trial judgment, including some Civil Party documents.<sup>79</sup> The Trial Chamber did not elaborate how these documents had been identified, and it appears that some confidential Civil Party documents referred to in the trial judgment were not proposed for reclassification.<sup>80</sup> Eventually the Trial Chamber decided not to reclassify WRIs, VIFs and supplementary information forms, deferring this matter for the Chamber to resolve.<sup>81</sup>

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<sup>77</sup> Annex A, item 56.

<sup>78</sup> Annex A, item 47.

<sup>79</sup> **E467/6.5** [Confidential] Annex 5: Civil Party applications and supplementary statements requiring review for redaction prior to reclassification, 27 June 2019.

<sup>80</sup> See for example **E465** Trial Judgement, 16 November 2018, fn 1083 referring to **E3/4828**, fns 8920 and 8921 referring to **E3/5863**; fns 10476 and 10484 referring to **E3/6260**; fn 10484 referring to **E3/6314**; fn 10896 referring to **E3/4800**.

<sup>81</sup> **E467/6** Order to Reclassify Documents on the Case File as Public, 27 June 2019, paras 11 and 18.

51. However the Trial Chamber *did* reclassify as public a large number of other documents, including DC-Cam statements, biographies and confessions.<sup>82</sup> The Lead Co-Lawyers have not yet been in a position to review these documents to identify whether any concern Civil Parties.
52. Most of the remaining documents on the case file which concern Civil Parties remain confidential in Case 002 and are yet to be considered for reclassification.
53. As noted above in section 2.2, some documents which concern Case 002 Civil Parties have been reclassified as public (with or without redactions) in other cases.

## **5 PROPOSAL REGARDING APPROPRIATE CLASSIFICATION OF CIVIL PARTY DOCUMENTS ON THE CASE FILE**

### *5.1 Civil Party documents in evidence*

54. As set out above, it is estimated that more than 4000 documents originating from Civil Parties were entered into evidence and assigned an E3 number in Case 002.
55. Despite disparate treatment to date, the Lead Co-Lawyers submit that all Civil Party documents in evidence should be treated consistently. Under Article 4(d) the Practice Direction on Classification, they are presumptively to be reclassified as public. However in accordance with Article 9.2, public versions of these documents should be made by redacting all confidential information from the documents. This raises the question of which material in these documents is to be treated as confidential.
56. As set out above, Article 7.4 of the Practice Direction on Classification requires the redaction of victims' contact details from VIFs which are reclassified as public. However other categories of information are not explicitly treated by the Practice Direction on Classification as confidential, or required to be redacted, although there appear to be good reasons for doing so.

#### *5.1.2 Rationales for the redaction of evidentiary material prior to reclassification as public*

57. Several of the categories of private and sensitive information which are set out above in Section 4.2 do not fall readily within a type of confidential information listed in the Practice Direction on Classification Articles 4, 5, 6 or 7. Nonetheless, good reasons exist, as elaborated below, for the Chamber to treat this information as confidential.

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<sup>82</sup> **E467/6** Order to Reclassify Documents on the Case File as Public, 27 June 2019, para 11 and **E467/6.1** Annex 1: Evidence filed during trial proceedings in Case 002/02, 27 June 2019.

*Consistency of approach regarding privacy*

58. In several decisions the Trial Chamber has ruled that material should be withheld from the public where the interests of transparency are outweighed by the privacy of individuals concerned. Likewise, the Court's legal texts protect certain categories of information apparently on the basis of privacy concerns.

59. This is reflected for example in:

- (a) recognition within the Practice Direction on Classification that information about the health of a suspect, charged person or accused is strictly confidential;<sup>83</sup> and that contact details of victims and civil parties are confidential;<sup>84</sup>
- (b) decisions of the Trial Chamber that evidence concerning sexual violence committed against third persons should be heard in closed session (pursuant to Article 316 of the Cambodian Code of Criminal Procedure), in order to avoid identifying those third parties;<sup>85</sup>
- (c) an order by the Trial Chamber for identifying personal details regarding a witness to be redacted from documents and not read in court where the witness was accused of serious crimes and might face retaliation;<sup>86</sup>
- (d) measures ordered by the Trial Chamber to protect a testifying civil party's identity where revealing it would post a risk to her emotional and psychological health.<sup>87</sup>

60. These principles should be applied consistently. Protections afforded to those who testify, or even third parties mentioned in testimony, should not be denied to civil parties and their families. Neither should privacy protections rightly granted to the accused (such as protections concerning health information) be denied to civil parties. Therefore, where documents contain private information relating to a person's contact details, identity documents, physical or mental health conditions or treatment; their experience of sexual violence or other highly personal matters relating to their matrimonial and sexual life this information should generally

<sup>83</sup> Practice Direction on Classification, article 6(c).

<sup>84</sup> Practice Direction on Classification, articles 5.1(e) and 7.4.

<sup>85</sup> **E1/255.1** [Corrected 4] T., 2 February 2015, p. 3 lines 8-18 after [09.10.10]; see also **E1/272.1** [Corrected 1] T., 5 March 2015, p. 11 line 1 – p. 12 line 11 and p. 44 lines 9-18; **E1/282.1** [Corrected 1] T., 25 March 2015, p. 28 lines 11-13 and p. 109 lines 8-17.

<sup>86</sup> **Case 001 – D288/6.135** Decision on Protective Measures for Civil Parties E2/62 and E2/89 and for Witnesses KW-10 and KW-24, 7 August 2009, paras 7-9.

<sup>87</sup> *Ibid.*, para. 4.

be confidential regardless of which party (or third party) is affected. So too should information the release of which might cause retaliation or emotional or psychological harm.

61. The Lead Co-Lawyers accept that there will be circumstances in which material relating to sensitive subjects should be made public: especially where it was disputed in the proceedings and is material to a matter dealt with in the Court's judgments. A case-by-case assessment is required on these matters.

*Redactions required in order to avoid defeating the object of other measures*

62. Additionally, certain categories of redaction are necessary because without them, documents reclassified as public in the case file will reveal information which is treated as confidential when contained in other documents.
63. For example: Article 7.4 of the Practice Direction on Classification requires that contact details of complainants and civil party applicants be redacted from VIFs when they are reclassified public. However this provision appears to overlook that the same details may also appear in other documents, including supplementary information forms, WRIs, and DC-Cam statements. The evident object of Article 7.4 is to protect private Civil Party information which there is no public interest in disclosing it. That object would be undermined if the same information was disclosed through other (non-redacted) documents on the public record of the case file.
64. Similarly, where the Trial Chamber explicitly protected certain information from disclosure during hearings, redactions will be necessary to ensure that the protected information is not disclosed through other documents. For example, the Trial Chamber required that measures be taken to protect the identity of a third party victim of sexual violence in Kraing Ta Chan Security Centre.<sup>88</sup> However the same individual is named in documents on the case file.<sup>89</sup>
65. These are two examples which were readily identifiable to the Lead Co-Lawyers. A thorough review will be necessary in order to identify others instances where this issue arises.

*5.1.3 Legal basis for redaction*

66. Although the Practice Direction on Classification establishes a strictly confidential status for documents and information which are subject to protective measures,<sup>90</sup> it does not appear

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<sup>88</sup> **E1/272.1** [Corrected 1] T., 5 March 2015, p. 44 lines 13-18; **E1/272.1** [Corrected 1] [Closed] T., 5 March 2015.

<sup>89</sup> Annex A, items 48, 49, 50, 51.

<sup>90</sup> Article 6(b) of the Practice Direction

possible to simply request protective measures at the end of the case to prevent the disclosure of this material when documents are reclassified. Ordinarily such measures may only be requested within 15 days of the indictment becoming final,<sup>91</sup> suggesting that they are intended for the purpose of proceedings themselves, rather than the redaction of material on the permanent public record of the case file.

67. However, whether or not falling within the formal concept of “protective measures”, the Lead Co-Lawyers request the Chamber to confirm that it retains a discretion to apply a classification to documents or information other than that which is presumptively established by the Practice Direction on Classification. This supported by the use of the words “Subject to a different classification in accordance with a Court decision”, which appear in Articles 4, 5 and 6 of the Practice Direction. It also follows from Internal Rule 21, which requires that the ECCC’s legal texts should be interpreted so as to “always safeguard the interests of ... Victims”, and also that victims’ rights are respected throughout ECCC proceedings.<sup>92</sup> In Case 001 the Chamber ruled that it had broad powers within the final reclassification process which go beyond those explicitly enumerated in the Practice Direction on Classification.<sup>93</sup>
68. If there is any remaining doubt, reference can be made to international standards.<sup>94</sup> These include a requirement for the protection by justice mechanisms of victims’ privacy, dignity and psychological well-being, and those of their families.<sup>95</sup> Particular categories of information which must be protected include material relating to sexual violence,<sup>96</sup> and information about

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<sup>91</sup> Internal Rules, rule 29(3).

<sup>92</sup> Internal Rules, rules 21(1) and 21(1)(c).

<sup>93</sup> **Case 001 – F31/1** [Public redacted] Decision on Reclassification of Video Recording E3/247R and on Variation of Related Protective Measures, 21 December 2015, p4.

<sup>94</sup> ECCC Agreement, article 12; ECCC Law, article 33 new.

<sup>95</sup> See for example: [Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law](#), UN General Assembly Resolution 60/147, 21 March 2006, article 10; [Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power](#), UN General Assembly Resolution 40/34, 29 November 1985, article 6(d); [Directive 2012/29/EU of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime and replacing Council Framework Decision 2001/220/JHA](#), 25 October 2012, articles 21-22; Regarding international criminal proceedings, see also ICC Statute, articles 68(1) and 68(2); *Prosecutor v Tadic*, [Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses](#), 10 August 1995, paras 31-42; [Secretary-General’s bulletin, International Criminal Tribunals: information sensitivity, classification, handling and access](#), ST/SGB/2012/3, 20 July 2012, section 4.1 (incorporating [Secretary-General’s bulletin, Information sensitivity, classification and handling](#), ST/SGB/2007/6, 12 February 2007, para. 1.2).

<sup>96</sup> See for example: *Prosecutor v Tadic*, [Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses](#), 10 August 1995, paras 45-52; [Rape as a grave, systematic and widespread human rights violation, a crime and a manifestation of gender-based violence against women and girls, and its prevention: Report](#)



mental or physical health conditions.<sup>97</sup> Where releasing personal information could cause stigmatisation or harm to honour and reputation, courts are required to put in place effective and adequate safeguards to ensure non-publication (including by providing affected persons with an opportunity to request non-disclosure).<sup>98</sup>

#### 5.1.4 *Proposed approach for Civil Party documents in evidence*

69. The Lead Co-Lawyers therefore propose that Civil Party documents with an E3 number should be reclassified according to the following principles:

- (i) As evidence, all are presumptively public, but subject to necessary redactions;
- (ii) Subject matter falling within all of the topics set out in Section 4.2 above should be presumptively treated as requiring redaction;
- (iii) However in individual cases these matters may be left unredacted: for example where the material was already made public through testimony at trial, or where the Civil Party gives informed consent.

#### 5.2 *Civil Party documents not in evidence*

70. As explained above in paragraph 36, the majority of the Civil Party documents on the case file were not put into evidence. The Lead Co-Lawyers believe that approximately 14400 VIFs and supplementary information forms are in this category. Many WRIs and DC-Cam statements (including some from Civil Parties) are also not in evidence.

71. In addition, the overwhelming majority of administrative documents relating to Civil Parties (such as powers of attorney and VSS reports) are not in evidence.

72. The Lead Co-Lawyers consider that the principles applicable to these, non-E3, documents are somewhat different to those set out above. Because the documents were not in evidence before the Trial Chamber, the public interest in accessing them may be considered somewhat less.

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of the [Special Rapporteur on violence against women, its causes and consequences, Dubravka Šimonović](#), A/HRC/47/26, 19 April 2021, para. 100(c); [A framework for legislation on rape \(model rape law\): Report of the Special Rapporteur on violence against women, its causes and consequences](#), A/HRC/47/26/Add.1, 15 June 2021, para. 30 (c); ICC Office of the Prosecutor, [Policy Paper on Sexual and Gender-Based Crimes](#), June 2014, paras 88-89; UN, [Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 \(1993\), S/25704](#), 3 May 1993, para. 108.

<sup>97</sup> ECtHR, *Z v Finland*, App. No. 22009/93, [Judgment](#), 25 February 1997, esp. at paras 95 and 113; ECtHR, *Frâncu v Romania*, App. No. 69356/13, [Judgment](#), 13 October 2020, paras 51-56 and 65-74.

<sup>98</sup> ECtHR, *Vicent del Campo v Spain*, App. No. 255527/13, [Judgment](#), 6 November 2018, paras 48-50, 53.

This is reflected in the Practice Direction on Classification, which does not create a presumption of public status for these documents.

73. Despite this, and particularly regarding the non-administrative documents, there is still an interest from many Civil Parties in having the experiences recounted in these documents made known; along with a potential public interest in having these documents contribute to the education and legacy purposes of the ECCC. However the Lead Co-Lawyers submit that these documents need not be *presumptively* made public: they could rather be made public based on principles of individual informed consent.
74. From a review of the Case 001 public case file, it appears that in that case the vast majority of civil party documents, including VIFs and administrative documents were reclassified to public, regardless of whether they were in evidence.<sup>99</sup> In most (though not all) instances, limited redactions were applied, but only to personal details such as addresses, ages and identity document numbers. The Lead Co-Lawyers consider that such wholesale reclassification would be inappropriate in Case 002.<sup>100</sup> Civil Parties in this case experienced a wide range of crimes, some of which are highly personal in nature. The issues addressed in Section 4.2 above affect a significant number of documents on the case file. Blanket reclassification of these documents would fail to protect Civil Parties' privacy, and is not justified by the same level of public interest in transparency where documents were not part of the evidence before the Trial Chamber.
75. The Lead Co-Lawyers therefore submit that Civil Party documents which are not in evidence should remain confidential unless individual requests are made by the Civil Parties concerned for reclassification, subject to any requested redactions. However the Lead Co-Lawyers emphasise that Civil Parties must be given a genuine opportunity to make such requests, so that those wishing their accounts to be made public are not prevented from achieving that.

## 6 PROPOSAL REGARDING PROCESS AND TIMING

76. Four key considerations inform the Lead Co-Lawyers' proposals regarding the most appropriate process for progressing reclassification.

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<sup>99</sup> However the Lead Co-Lawyers have been unable to locate documents related to successorships on the Case 001 public case file, which might indicate that these documents remain confidential if they exist in Case 001.

<sup>100</sup> The Lead Co-Lawyers note in particular that Civil Parties in Case 002 experienced a wider range of crimes than those in Case 001, including forced marriage and sexual violence

77. First, it is essential that the reclassification process occurs before the Court's archives are made public in a practical sense. As set out above, numerous documents containing unredacted personal information appear to have been given a public classification in error. These errors must be addressed before the records are opened to the community. Contrary to the position intimated by the Pre-Trial Chamber,<sup>101</sup> the fact that material has had a public classification for some time does not mean that this classification should be retained. Until now, even case file documents classified as 'public' have not been readily available to persons outside the Court. Most are not accessible on the ECCC website. Some are online but would be difficult to find without prior knowledge of their existence and contents. It is therefore unlikely that the protection which would be afforded by a confidential classification has lost its value for these documents. What is important is not the classification which has existed to date, but ensuring appropriate classifications prior to the creation of a truly accessible public archive.
78. Secondly, the Lead Co-Lawyers note that many documents appear in the case file of more than one case. Numerous Case 002 Civil Parties also having status in one or more of the other cases. To manage the risk that a classification granted in one case file will be undermined by an inconsistent classification in another case, a unified approach to reclassification across all ECCC cases is necessary.
79. Thirdly, the parties must have an opportunity to be heard before decisions on reclassification are taken. This reflects principles of natural justice, particularly the right to be heard (*audi alteram partem*), which requires that concerned parties should be heard before a decision affecting them is taken. The requirement that victims to be heard on matters affecting their interests within criminal proceedings is recognised in international standards,<sup>102</sup> and is the basis for victim or civil party participation in international trials. For some Civil Parties, the publication of personal information which they shared with the Court could have disastrous repercussions for family or community relationships. But a total restriction on access to that information may also undermine the outcomes which some Civil Parties most want from this Court. It is essential that Civil Parties are able to be heard on these issues before decisions are taken. Personal views and preferences will differ, so individual Civil Parties must have an

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<sup>101</sup> See Annex B: Email from Pre-Trial Chamber Greffier to International Lead Co-Lawyer, 5 November 2021 and paragraph 17 above.

<sup>102</sup> [Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power](#), UN General Assembly Resolution 40/34, 29 November 1985, para. 6(b).

opportunity, through their legal representatives, to request the redactions or publication of their personal information. In any event, the parties are the persons best placed to identify which information contained in case file documents could raise privacy concerns. Without contextual input from the persons affected, it would be impossible for the Chamber to assess this question on an individual basis.

80. Fourthly, the Lead Co-Lawyers are sensitive to the resource limitations faced by Court, and conscious that the Chamber's resources are currently focused on producing the Case 002/02 final judgment. It is therefore logical for the parties to make use of this time for undertaking review of the material for reclassification, so that submissions are ready before the Chamber once the final judgment has been issued. This is also the case because currently the parties (or some of them) continue to include some team members who have familiarity with the case and the case file material. Those persons are best placed to efficiently make submissions on the question of reclassification, and may not last in their posts much longer given recent decisions by the Office of Administration. Discussions with external partners also suggest that funding for the civil party engagement which is necessary to carry out this work may be more forthcoming if Directions on procedure are issued by the Chamber.
81. The Lead Co-Lawyers therefore propose that the Chamber provide directions immediately for a reclassification process which would allow the parties to prepare submissions on classifications and necessary redactions prior to the delivery of the final judgment. Directions to clarify the areas of ambiguity set out above in paragraph 31 are necessary, so that relevant instructions can be taken on the basis of proper advice and appropriate proposals made. In the absence of directions or clarification from the Chamber, efforts expended on seeking individual Civil Party views may be wasted if principles assumed to apply are ultimately not endorsed by the Chamber. The Lead Co-Lawyers also note that there is a realistic prospect that work needing to be undertaken on this issue will not be funded either by the Office of Administration or external donors in the absence of a clear direction from the Chamber.<sup>103</sup>

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<sup>103</sup> As indicated in the Office of Administration's last decision concerning resources for the International Lead Co-Lawyer. See **F70** Urgent Request for Orders to Protect Civil Party Rights to Effective Representation And a Fair Trial, 28 October 2021, paras 40-44 and **F70.1.7** Annex G: Confidential Memorandum from Office of Administration to International Lead Co-Lawyer, Reasons for decision on your resource request from October-December 2021, 11 October 2021, para. 15.

82. The Lead Co-Lawyers are conscious that this process may be viewed by some as an unnecessary and unforeseen expense at a time when the Court's work is expected to be winding down. But while reclassification may be less glamorous and saleable than public hearings, it is no less essential to the Court's work and its legacy. Without this process, the Court's most important records will either be inaccessible or will do harm to those in whose name the Court has purported to act.
83. It has also always been foreseeable that significant resources would be required at the end of Case 002 for reclassification. Other international courts have also had to invest significant time and resources in this process.<sup>104</sup> And the process is explicitly anticipated under the Practice Direction on Classification. Before transferring the Case 002 case file to the Chamber, the Trial Chamber noted that it had been limited in its ability to contribute to reclassification because of "downsizing", but made clear that a process would need to be undertaken by the Chamber at the end of the proceedings.<sup>105</sup> If proper resources have not yet been budgeted for this process, they must be found now: core parts of the judicial process cannot simply be dispensed with because of expense or inadequate planning.
84. For their part, the Lead Co-Lawyers propose to initiate a process which includes both (i) a desk review of Civil Party documents, and (ii) meetings with Civil Parties. The process would prioritise those Civil Parties whose documents are in evidence, in order to identify and discuss sensitive material contained in their documents which may need to be redacted. Other Civil Party documents not in evidence could then be subjected to a similar process, to identify whether the Civil Parties wish to consent to the declassification of their documents, or parts thereof.
85. The proposed process includes the following steps:
- (1) A desk review would be carried out to identify potentially sensitive material in civil party materials. The approximately 4000 Civil Party documents which are in evidence would

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<sup>104</sup> See for example the 2009 analysis regarding the requirements for residual functions of the ICTY and ICTR including archives, which noted the challenge involved in dealing with confidential material and the fact that this should be done using the "expertise and knowledge" of courts' existing personnel – that is, before downsizing would occur: UN, [Report of the Secretary-General on the administrative and budgetary aspects of the options for possible locations for the archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the seat of the residual mechanism\(s\) for the Tribunals](#), S/2009/258, 21 May 2009, esp. at para. 89.

<sup>105</sup> **E467/6** Order to Reclassify Documents on the Case File as Public, 27 June 2019, paras 7, 11.

be prioritised. Sensitive material would be identified using a pre-agreed protocol based on the Chamber's directions. For example:


- (a) It is proposed to treat contact details, details of physical and mental health conditions and torture-tainted evidence as presumptively appropriate for redaction, but subject to clear indications to the contrary (for example where the information is included in a Civil Party's public testimony or a Judgment of the Court).
  - (b) The Lead Co-Lawyers have identified 1523 Civil Parties whose documents address forced marriage and/or sexual violence. Of these 849 are known to be connected to a document with an E3 number (that is, a document in evidence). The desk review would ascertain whether this material is potentially sensitive - and in particular, whether it *identifies* the victim(s) of sexual violence or forced marriage.
  - (c) Civil Party documents which name alleged perpetrators, would be carefully assessed in order to identify instances where these appear to create a risk of retribution or conflict.
- (2) It is expected that in many cases the desk review would be sufficient to propose any redactions which are necessary. Where there is doubt, meetings would be arranged with individual Civil Parties to consult them on their preferences regarding the material in question. Where a Civil Parties is to be met, a review would first be carried out of other (non-evidentiary) material in the case file which relates to that Civil Party, so that these can be dealt with together in a single discussion.
- (3) Based on these steps, proposals for the classification and redaction of Civil Party documents in evidence would be made to the Chamber which the Chamber can then decide on in due course and taking into account any responses from the other parties. To facilitate such responses, the Lead Co-Lawyers propose to prepare an accompanying set of submissions which explain in general terms the rationale behind certain categories of proposed redactions.
- (4) Once submissions have been made on evidentiary material, which according to the Practice Direction on Classification is presumptively public, a further process would be initiated to address the remaining Civil Party material which is not in evidence, following a similar approach.

## 7 REQUEST

86. Based on the submissions above, the Lead Co-Lawyers request that the Chamber:

- (a) **AFFIRM** the principles of privacy and informed consent with respect to redaction of Civil Party documents on the case file prior to any reclassification;
- (b) **CONFIRM** that it has the power to order the redaction of documents prior to their reclassification as public under the Practice Direction, including for the purpose of protecting privacy and avoiding retaliation;
- (c) **CONFIRM** that Civil Party documents which fall outside Article 4 of the Practice Direction will not be reclassified as public without a request demonstrating the informed consent of the Civil Party in question;
- (d) **DIRECT** the parties to prepare submissions concerning reclassification, including proposals for the redaction of evidentiary material, prior to the issuance of the final verdict;
- (e) **ORDER** the immediate reclassification as confidential (until and subject to the outcome of the full reclassification process) of all Civil Party documents in all cases which have been reclassified as public in error or without appropriate redactions in violation of the Practice Direction.

Respectfully submitted,

Date	Name	Place	Signature
14 December 2021	PICH Ang National Lead Co-Lawyer	Phnom Penh	
	Megan HIRST International Lead Co-Lawyer	Phnom Penh	