

BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

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CO-PROSECUTORS' JOINT RESPONSE TO "IENG SARY'S REQUEST FOR ACCESS TO STRICTLY CONFIDENTIAL DOCUMENTS ON THE CASE FILE" and "IENG THIRITH DEFENCE MOTION SUPPORTING IN PART 'IENG SARY'S REQUEST FOR ACCESS TO STRICTLY CONFIDENTIAL DOCUMENTS ON THE CASE FILE'"

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I. INTRODUCTION

1. On 14 September 2011, the Ieng Sary Defence filed *Ieng Sary's Request for Access to Strictly Confidential Documents on the Case File* ("Ieng Sary's Request").¹ They argue that "there are more than 5,000 strictly confidential documents" that are inaccessible to the Defence, a situation that would "violate Mr. Ieng Sary's right to a fair trial" and that "the disclosure of only generic titles of strictly confidential documents" would be "inadequate to counter the prejudice to Mr. Ieng Sary's fair trial rights".² They request the Trial Chamber to grant the Defence access to all strictly confidential documents. In the alternative, they make the more reasonable request that the Trial Chamber "conduct an *in camera* review of all the strictly confidential documents on the Case File to determine which documents, if any, should be disclosed to the Defence and refuse to admit as evidence or rely upon any strictly confidential documents which have not been disclosed to the Defence".³
2. On 22 September 2011, the Ieng Thirith Defence filed a motion ("Ieng Thirith's Motion") supporting Ieng Sary's Request in part but restricting the disclosure request to (a) the evidentiary documents in relation to victims who will take part in the trial as witnesses or civil parties; and (b) other inculpatory or exculpatory evidence on the strictly confidential section of the Case File.⁴
3. The Co-Prosecutors hereby jointly submit their response to Ieng Sary's Request and Ieng Thirith's Motion. This response falls within the time limit specified in Article 8(3) of the Practice Direction.⁵
4. In respect of Ieng Sary's Request, the Co-Prosecutors request that the Trial Chamber dismiss the request insofar as it seeks an automatic access by the Defence to *all* strictly confidential documents on the Case File. The Co-Prosecutors submit as follows: (a) the request is not substantiated by any analysis of the nature of the documents classified as strictly confidential and is therefore inaccurate or unacceptably vague; (b) at least 97% of the documents listed in annex E118.1.1 to Ieng Sary's Request are either not evidential in

¹ **E118**, Ieng Sary's Request for Access to Strictly Confidential Documents on the Case File, 14 September 2011 [referred hereunder as "Ieng Sary's Request"].

² **E118**, Ieng Sary's Request, at p. 1.

³ **E118**, Ieng Sary's Request, at pp 6-7.

⁴ **E118/1**, Ieng Thirith Defence Motion Supporting in part Ieng Sary's Request for Access to Strictly Confidential Documents on the Case File, 22 September 2011, paras. 3-5 ["Ieng Thirith's Motion"]

⁵ ECCC Practice Direction on Filing of Documents Before the ECCC, ECCC/01/2007/ Rev.7, 17 August 2011. Ieng Sary's Request (E118) was filed and notified on 14 September 2011. The 10 calendar days to file this Response started running on 15 September and ended on Saturday 26 September 2011. By its Decision **E120** dated 20 September 2011, the Trial Chamber informed the parties that it will recess during Pchum Ben and that where a time limit falls on a day during the recess, the due date for filing will become Monday 3 October 2011. Ieng Thirith's Motion (E118/1) was notified to OCP on 22 September 2011.

nature (26,7%) or are evidentiary materials in principle classified ‘strictly confidential’ within the terms of Article 6 of the Practice Direction on Classification⁶ (70,6%); (c) where evidence is subject to protective measures imposed by OCIJ, the Co-Prosecutors request that the Trial Chamber review such orders and where protective measures are denied by the Trial Chamber, the Co-Prosecutors request that the relevant documents be re-classified as confidential; where the requests are granted by the Trial Chamber, the Co-Prosecutors contend that confidential redacted versions of the strictly confidential documents should be created and disclosed to the parties; (d) there is no breach of the principle of equality of arms as the Co-Prosecutors do not have access to any strictly confidential documents except to those they filed themselves; (e) The Co-Prosecutors agree with the Defence regarding the need to amend the inventory of the strictly confidential section of the Case File in order to include the titles (redacted as necessary) of all documents.

5. As regards to Ieng Thirith’s Motion, the Co-Prosecutors observe that the motion does not envisage the fact that protective measures have effectively been requested by all victims whose documents appear on the strictly confidential section of the Case File. The Co-Prosecutors request that, prior to the release of such victims’ documents, the Trial Chamber issue orders on protective measures and take steps to redact material that could be used to identify the relevant victims or family of the victims. The Co-Prosecutors share the view of Ieng Thirith Defence that medical records and other related materials are properly classified as ‘strictly confidential’ in principle, unless the Trial Chamber decides otherwise.⁷

II. APPLICABLE LAW

6. Article 319 (Examining Case Files) of the Cambodian Code of Criminal Procedure (“CCPC”) states that “before the hearing, the lawyers can examine the case file in the court clerk’s office” (...) and “may be authorized by the court president to copy documents in the case file at their own cost, under the supervision of the court clerk”.
7. Internal Rule 86 (Access to Case Files) states:

At all times, the Co-Prosecutors and the lawyers for the other parties shall have the right to examine and obtain copies of the case file, under supervision of the Greffier of the Chamber, during working days and subject to the requirements of the proper functioning of the ECCC.

⁶ ECCC Practice Direction on Classification and Management of Case-related Information, ECCC/004/2009, 5 June 2009 (“Practice Direction on Classification”).

⁷ E118/1, Ieng Thirith’s Motion, para. 7.

8. Article 319 CCPC and Rule 86 are limited by the ECCC applicable provisions in relation to the levels of confidentiality of documents and information. The Practice Direction on Classification provides guidelines on the classification of documents as ‘strictly confidential’ by the relevant judges or Chamber. Article 2 (d) (iii) of this Practice Direction details the levels of confidentiality and defines the terms “strictly confidential” as being “open only to the Judges and such other persons, including court staff who require access in the discharge of their duties, expressly given access by the Court”. Contrary to Ieng Sary’s assertion,⁸ the term “court staff” does not include the Defence team members (or other parties), but is confined to staff from the Co-Investigating Judges or a Chamber, as defined in Article 2 (a) and (b).
9. Article 6 of the Practice Direction on Classification specifically addresses the strictly confidential section of the Case File in the following terms :
- Subject to a different classification in accordance with a Court decision the following categories of documents and information are in principle strictly confidential:
- a. Requests for protective measures and associated documents (including Witness and Expert Support Unit risk assessments);
 - b. Documents and information subject to protective measures; and
 - c. Information concerning the health of a Suspect, Charged Person or Accused.
10. Although not cited by the Defence, Article 7.3 of the Practice Direction on Classification provides that any civil party application whose author is also the subject of a request for protective measures will be treated as strictly confidential until a decision is made on the protective measures request. Article 9 of the Practice Direction on Classification confirms the principle that documents or information can only be re-classified at the trial stage pursuant to an order of the Trial Chamber. Finally, Article 10(c) states that the inventory of the strictly confidential section of the Case File will contain the titles of all documents in the case file.
11. Articles 3.12-15 of the Practice Direction on Filing Documents before the ECCC⁹ set out the procedure by which a filing party proposes a classification for its documents and the relevant Chamber determines the appropriateness of the proposed classification.
12. Protective Measures are established in Internal Rule 29 and Practice Direction on Protective Measures.¹⁰ Rule 29 (3) & (4) states:
3. The Co-Investigating Judges and the Chambers may, on their own motion or on request, and after having consulted with the Victims Support Section or the Witnesses/Experts Support Unit, order appropriate measures to protect victims and witnesses whose appearance before them is liable to place their life or health or that of their family members or close relatives in serious danger. The Co-Investigating Judges or

⁸ E118, Ieng Sary’s Request, para. 4.

⁹ ECCC Practice Direction on Filing of Documents, ECCC/01/2007/Rev.7, amended 3 August 2011.

¹⁰ ECCC Practice Direction on Protective Measures, ECCC/ 03/2007/Rev.1, adopted on 29 April 2008.

the Chambers may issue such an order on their own motion where there are indications in the case file of such risk. (...)

4. In this respect, the Co-Investigating Judges and the Chambers may make a reasoned order adopting measures to protect the identity of such persons, including:

- a) declaring their contact address to be that of their lawyers or their Victims' Association, as appropriate, or of the ECCC;
- b) using a pseudonym when referring to the protected person;
- c) authorising recording of the person's statements without his or her identity appearing in the case file;
- d) where a Charged Person or Accused requests to be confronted with such a person, technical means may be used that allow remote participation or distortion of the person's voice and or physical features;
- e) as an exception to the principle of public hearings, that the Chambers may conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means.

13. Likewise Article 2(6) of the Practice Direction on Protective Measures stipulates:

When the Co-Investigating Judges or Chambers order protective measures, any documentation relating to such order shall be recorded in a classified register separate from the case file and maintained by the greffiers of the Co-Investigating Judges or the Chambers, as appropriate. Authorization to access the register shall only be granted by decision of the Co-Investigating Judges or the Chambers.¹¹

III. ARGUMENT

A. Ieng Sary Defence Arguments are inaccurate, unacceptably vague as to the categories of strictly confidential documents it seeks to access and legally unfounded

14. The Ieng Sary Defence vaguely argues that "more than 5,000 documents" are currently classified as strictly confidential.¹² Even a cursory review of the documents listed as strictly confidential in the Case File inventory would have led the Defence to conclude that among the 5,220 entries of the inventory, there are only 4,432 different documents, the remaining 788 being translations.¹³
15. The Ieng Sary Defence seeks to access *all* strictly confidential documents on the Case File, without any distinction and irrespective of whether those documents may be introduced at trial.¹⁴ Such request lacks adequate specificity, is unreasonable and without legal foundation. All parties have access to both public and confidential documents and information on the Case File and, accordingly, have the capacity to discern, by reference to the root document from a particular document number series, the general nature of most of the documents classified as 'strictly confidential'. It is regrettable that, contrary to Article 10 (b) and (c) of the Practice Direction on Classification, the information provided on the Case File inventory does not always reveal the nature of the strictly confidential documents

¹¹ ECCC Practice Direction on Protective Measures, ECCC/ 03/2007/Rev.1, Article 2.6.

¹² **E118**, Ieng Sary's Request, introductory paragraph (p.1), repeated in paras. 1, 6, 10.

¹³ See for example **A100/1**, **A209/I/1**, **B46**, **E9/4.3.1** available in three languages.

¹⁴ **E118**, Ieng Sary's Request, introductory paragraph (p.1), repeated in paras. 4, 6, 8 and in its conclusion.

as no title is mentioned, even in a redacted or generic form (see below, paragraph 36). Nevertheless, by conducting a brief analysis of the inventory, the Defence would have been able to classify the ‘strictly confidential’ documents in two main categories: documents bearing no evidentiary relevance and those being or appearing to be evidentiary in nature.

16. By filing such a broad request without conducting any basic analysis of the nature of the strictly confidential documents, the Ieng Sary Defence places an unnecessary and unreasonable burden on both the Trial Chamber and other parties. It is worth noting in this respect that Ieng Sary failed to point to any specific piece of evidence or category of documents that should be accessible pursuant to the applicable provisions of the practice directions.

B. Access should be denied to strictly confidential documents that are non-evidential

17. The Ieng Sary Defence argues in paragraph 6 of Ieng Sary’s Request that without the ability to see the strictly confidential documents, it would not “know whether it needs to object to their admissibility, whether the documents contain exculpatory material, or whether the documents are necessary to establish context”.¹⁵ The Defence assumes that all strictly confidential documents on the Case File are evidential in nature. This is untrue. At least 1,186 documents on the Case File appear to be non-evidential. Consequently, these documents will not be introduced by any party at trial and, accordingly, there is plainly no need for the Defence to assess their contents prior to substantive hearings.
18. Among the abovementioned 4,432 documents listed in the Annex attached to the Request and referred to as E118.1.1, at least 728 different documents¹⁶ relate to the health of defendants. Those documents primarily consist of medical reports and related documents, such as memoranda, letters, rules, submissions or decisions that appear to be linked, via the root document number, to the medical reports. The Co-Prosecutors are unable to determine who the medical reports and associated documents pertain to unless the Record Type or the Filing Party fields provide an indication. It appears, however, that the vast majority of those 728 documents were filed by the ECCC Medical Unit while others were filed by the Defence teams, OCIJ, the Chambers or other authorities (the latter possibly including Calmette Hospital). Of these 728 medical documents, at least 62 documents pertain to or were filed by Ieng Sary and should be accessible to the Ieng Sary Defence. These

¹⁵ E118, Ieng Sary’s Request, para. 6.

¹⁶ 1,202 entries of which 474 are translated documents. Those documents may all be considered as non-evidentiary material except for psychological / psychiatric reports which may be evidential as regards to the Accused’s intent and eventually for determining the appropriate sentencing. Based on the inventory, it is however impossible to identify such psychological / psychiatric reports in the mass of health-related documents.

documents cannot be accessed by the Co-Prosecutors, Civil Parties lawyers and the other defence teams. Similarly, a significant number of strictly confidential documents can only be accessed by Ieng Thirith¹⁷.

19. The Ieng Sary Defence should have noted that the health-related documents were appropriately classified as strictly confidential pursuant to the presumption in Article 6(c) of the Practice Direction on Classification. Pursuant to the principles of medical confidentiality and respect for privacy, it is inappropriate for medical documents to be widely disseminated. Similarly to the Civil Party Lead Co-Lawyers and the defence teams that are not directly concerned, the Co-Prosecutors have no access to such health-related documents, except those documents they were specifically authorized to access by the Trial Chamber in preparation for the Fitness to Stand Trial Hearings such as those held in late August 2011.¹⁸ Even within the narrow confines of the August 2011 fitness hearings, the Co-Prosecutors were not granted general access. Rather, access was granted only to specific documents as required (and only to the Co-Prosecutors and their Deputies). In accordance with the Internal Rules and Practice Directions the decision concerning the grant of access is in the discretion of the Trial Chamber.¹⁹
20. From a pragmatic view, parties other than the filing or responding party have no reasonable expectation of access to an Accused's medical documents.²⁰ Therefore, Ieng Sary's Request should be dismissed insofar as it relates to medical documents related to other Accused. Further, as stated by the Ieng Thirith Defence in its motion, the non-disclosure of such medical information will not have any impact on Ieng Sary's right to a fair trial.²¹
21. Apart from the strictly confidential medical documents, a brief analysis of the 'Record Type' and 'Filing Party' fields of the inventory's strictly confidential section reveals that a number of documents are or might be of administrative or procedural nature and therefore non-evidential. The Co-Prosecutors believe that the 458 reports filed by CMS (E29 – E29/453) consist of Witnesses/Experts Support Unit (WESU) reports assessing security risks and the necessity or otherwise of protective measures requested by complainants or civil parties. Subject to confirmation by the Trial Chamber of the true nature of those CMS Reports, this category appears to be non-evidential in nature and is appropriately classified as strictly confidential pursuant to the presumption in Article 6(a) of the Practice Direction on Classification.

¹⁷ For example **A275**, **B37/7**, **B37/8** or **E52.3**.

¹⁸ **E62/3/10**, Trial Chamber Memorandum to Counsel for the Parties, 6 July 2011.

¹⁹ **E62/3/10**, Trial Chamber Memorandum to Counsel for the Parties, 6 July 2011, p.1.

²⁰ **E62/3/10**, Trial Chamber Memorandum to Counsel for the Parties, 6 July 2011, p.1.

²¹ **E118/1**, Ieng Thirith's Motion, para. 7.

22. If the Co-Prosecutors' observations are correct, the strictly confidential section of the Case File inventory comprises a minimum of 1,186 non-evidentiary documents. These documents represent more than a quarter of the 4,432 strictly confidential documents listed in Annex E118.1.1. Had the Ieng Sary Defence engaged in the basic analysis set out above, they would not have sought access to these documents.

C. Situation of the strictly confidential documents that are / might be evidentiary relevant

23. The remaining 3,246 documents classified as 'strictly confidential', may be of direct or indirect evidentiary relevance.

Victims' Requests for Protective Measures

24. About 3,132 of those documents are either related to civil party applications or to complaints. The strictly confidential inventory shows that around 1,355 civil party applications and related documents (concerning about 370 civil parties) were filed by the Victims Unit, the Civil Parties themselves or OCIJ and comprise Victims Application Forms, attached documents such as statements, memoranda and reports or OCIJ decisions regarding protective measures. Most, if not all those documents, bear a reference number starting with D22. The same strictly confidential inventory also indicates that the Co-Prosecutors, pursuant to Rule 49(4), filed with OCIJ about 1,777 complaints or related documents that were then classified 'strictly confidential'. Those documents concern about 665 different complainants. Most, if not all of those documents, bear a reference number starting with D230 and comprise Victims Application Forms, English summaries by the Victims Unit and/or other attached documents such as biographies.
25. None of those 3,132 civil party and complainant documents are accessible to the Co-Prosecutors in Zylab. However, because they filed them, the Co-Prosecutors have access to the 1,777 complaints or related documents through their own database (OCP CaseMap). An analysis of a random selection of the Victims Application Forms, filed by the Co-Prosecutors as complaints, demonstrates that the complainants whose documents are listed in the strictly confidential section of the inventory all requested protective measures at an early stage. Similarly, the civil party applications and related documents listed in E118.1.1 most likely pertain to Victims who sought protective measures when filing their application. It must be noted that only 414 complaints (as compared to the 4,228 complainants) appear on Annex 13 of the Co-Prosecutors Document List filed on 19 April 2011. Only a part of these 414 complainants requested protective measures.
26. Both Ieng Sary and the Ieng Thirith Defence cannot ignore the fact that requests for protective measures and associated documents (including the WESU risk assessments

discussed above, para. 19), as well as documents and information subject to protective measures, are presumed to be strictly confidential by virtue of Article 6(a) and (b) of the Practice Direction on Classification. It is therefore entirely appropriate that those documents were classified as ‘strictly confidential’ during the investigative and pre-trial phases. Victims and witnesses have the right to seek protective measures²² and the Court has an obligation to ensure the protection of all Victims who participate in the proceedings regardless of their status before the Court.²³ Such protective measures are appropriate to ensure the safety and confidentiality of the victim at all stages of the proceedings, although they must be balanced with the Accuseds’ right to access the criminal file. Protective measures, where necessary, are a fundamental right of a victim in a criminal or international criminal trial.

27. Internal Rule 29 balances the protection of Victims against the rights of the defendant, by allowing for appeals against protective measures imposed by a Chamber and stipulating that no conviction can be pronounced against the Accused on the sole basis of statements from witnesses under protective measures.
28. Pursuant to Article 7(3), civil party applications will be treated as strictly confidential *until a decision is made on the protective measures requests*.²⁴ In order to preserve the fairness of the proceedings and to allow the Defence and the other parties to access the evidence contained in civil party or complainant documents during the trial phase, and in particular those introduced by the parties at trial, the Co-Prosecutors request that the Trial Chamber expeditiously make orders on the protective measures requested by civil parties and complainants, notably on the basis of the WESU risk assessment reports and documents provided by VSS, whenever available. The Trial Chamber will first make a distinction between protective measures sought with regards to the public (public vs confidential) and those with regards to the parties (confidential vs strictly confidential). Only the latter are considered in this response.
29. Where applications for protective measures are denied, it is anticipated that, subject to any appeal, the Trial Chamber will remove the related documents from the strictly confidential section of the Case File and re-classify them as confidential, as was done in its Decision on Protective Measures for Civil Parties in Case 001.²⁵ Accordingly in respect of this sub-set of strictly confidential documents, Ieng Sary’s Request and Ieng Thirith’s Motion are

²² Practice Direction on Protective Measures, ECCC/ 03/2007/Rev.1, Article 2.

²³ Internal Rule 29 (1).

²⁴ Emphasis added.

²⁵ **D288/6.71**, Case 001, Trial Chamber Decision on Protective Measures for Civil Parties, 2 June 2009, p.7 (ruling section).

premature. Where, on the other hand, protective measures are granted,²⁶ the Trial Chamber will maintain the strictly confidential classification and create a confidential version of the documents accessible to all parties by systematically redacting the documents to remove material which could be used to identify the relevant persons, thereby complying with the provisions of Rule 29(4), Articles 7(1) & 9(2) of the Practice Direction on Classification and Article 3(14) of the Practice Direction on the Filing of Documents before the ECCC. By doing so, the Trial Chamber will respect the needs of victims and witnesses, the rights of the Accused and the fairness of the proceedings in accordance with Article 1(3) of the Practice Direction on Protective Measures.

30. Since the Trial Chamber will be confronted with the consideration of a significant number of applications for protective measures, the Co-Prosecutors submit that it would facilitate this issue if the parties identify and prioritize the strictly confidential complaints that are included in their Trial Document Lists or relate to proposed trial witnesses, and similarly to prioritize the Civil Party applications that relate to those Civil Parties who have been proposed by a party to testify or make a statement at trial.
31. Once again, the Co-Prosecutors submit that Ieng Sary's Request²⁷ for access to *all* strictly confidential documents should be refused. This is particularly true in respect of documents that are subject to protective measures resulting in a 'strictly confidential' designation. If, contrary to this submission, access is ultimately granted to such documents, the Co-Prosecutors request the Trial Chamber to exercise its discretion to impose restrictions in order to protect the identity of the victims and their family members.

Other Documents

32. Apart from the 3,132 documents related to civil party applications or complaints, the inventory comprises 114 other documents that may be of evidentiary relevance. Based on the available information in the inventory, it is not always possible to fully ascertain the nature of those documents. However, it appears that about 50 of them are OCIJ international rogatory letters, orders or reports which, based on their root documents,²⁸ were aimed at collecting evidence from scholars / researchers abroad or from foreign

²⁶ For example, such measures were granted for civil parties E2/62 and KW-24 in **D288/6.135**, Case 001, Trial Chamber, Decision on Protective Measures for Civil Parties, 7 August 2009. As stated by this Trial Chamber in another decision in Case File 001, "the established jurisprudence of other criminal tribunals also indicates that protective measures are granted on a case by case basis when supported by information regarding the identity of the applicant and a particularized risk or threat of harm to the applicant or their relatives. In addition, a genuine fear on the part of the applicant or their relatives is required, as well as the existence of an objective justification for this fear", **D288/6.71**, Case 001, Trial Chamber, Decision on Protective Measures for Civil Parties, 2 June 2009, para. 7 and fn 17.

²⁷ **E118**, Ieng Sary's Request, p.1, introductory paragraph, repeated in paras. 4, 6, 8 and in its conclusion.

²⁸ **D269, D291, D292, D293, D294** or **D308/2**.

countries through their diplomatic representatives. The Co-Prosecutors are unaware of the motives underpinning the ‘strictly confidential’ classification of those OCIJ documents.

33. The Co-Prosecutors submit that the Trial Chamber should consider re-classifying OCIJ Documents D359/1/Corr-1, D368/Corr-1, D369/Corr-1, D372/Corr-1, D373/Corr-1 in the confidential section of the Case File as they are accessible to the parties in their non-corrected versions in Zylab. Similarly, OCIJ document bearing the reference D389.1 is accessible on Zylab in the confidential section. OCIJ documents D389.2, D405, D407, D413, D421, D422 and D425 bear no indication whatsoever regarding their nature or content.
34. The 114 documents that are not related to civil party applications or complaints also comprise appeal documents filed by Nuon Chea in relation to requests for investigative actions.²⁹ Finally, a small number of documents filed by “Other” cannot be identified or categorized at all and, as such, the Co-Prosecutors are unable to make submissions as to how they should be classified.
35. In light of the lack of information regarding these 114 additional documents, the Co-Prosecutors request that the Trial Chamber undertake an assessment of their content and thus classification to ensure that the access of the parties is appropriate under the Practice Direction on Classification.

D. The titles of the strictly confidential documents should appear in the inventory

36. The Co-Prosecutors submit that, pursuant to Article 10 (b) & (c) of the Practice Direction on Classification, the Trial Chamber ought to amend the inventory of the strictly confidential section in order to mention the full title of all documents or whenever necessary, redacted versions of those titles, as opposed to the existing generic record types. This is necessary, in particular, for documents whose nature cannot be properly identified on the basis of the existing inventory data or by reference to the root documents in Zylab. While the Co-Prosecutors agree with Ieng Sary’s submission that the disclosure of generic record types³⁰ of strictly confidential documents is inadequate to enable the parties to understand the nature of such documents without disclosing their strictly confidential contents, they disagree with the Defence conclusion. The Defence argues that this disclosure would be “inadequate to counter the prejudice to Mr. Ieng Sary’s fair trial

²⁹ Five documents starting with **D273/3/1**.

³⁰ In **E118**, Ieng Sary’s Request, at introductory paragraph and paras. 9-11, Ieng Sary Defence mentions that generic *titles* are disclosed. This is untrue as no title is provided as such in the inventory, only the Record Type, Filing Party, Document Number, ERN and Document Language. Under the fields ‘Title EN’ and ‘Title KH’ will be found the mention “strictly confidential”, being the document classification.

rights”;³¹ however, as explained above, there is nothing to suggest that Ieng Sary’s fair trial rights have been violated by the absence of disclosure of non-evidentiary material or by the preliminary classification of evidentiary documents that are subject to protective measures as ‘strictly confidential’.

E. No breach of the equality of arms between parties

37. The Ieng Sary Defence asserts that their inability to access documents classified as ‘strictly confidential’ violates the principle of equality of arms with the Office of the Co-Prosecutors (“OCP”). The Defence provides three examples of strictly confidential documents³² that OCP relied upon in, respectively, its Rule 80 Expert, Witness and Civil Party Lists,³³ Rule 80(3) Trial Document List³⁴ and Response to the Trial Chamber’s Request for Documents Relating to the First Phase of Trial.³⁵
38. As mentioned above, the Co-Prosecutors do not have access to any of the documents classified by the Co-Investigating Judges or the Chambers as ‘strictly confidential’ in Zylab. The three documents cited by Ieng Sary’s Defence are all victim application forms filed by complainants who requested protective measures on their forms thus, in principle, belonging in the strictly confidential section of the Case File. OCP received these documents from the Victims Unit then reviewed and forwarded them to the Co-Investigating Judges pursuant to Internal Rule 49(4). The Co-Prosecutors have access to the contents of these documents not through Zylab but rather through their own database (OCP CaseMap). There is no material difference between the treatment of these documents, and documents filed by the Ieng Sary Defence that are ultimately classified as ‘strictly confidential’. Moreover, it would defeat the purpose of the protective measures regime if these documents were made available to the Defence prior to the resolution of the application for such measures.
39. As for the right of the Accused to access his/her own criminal file, the Co-Prosecutors reiterate their position described above in paragraph 29 regarding the protective measures requests filed by complainants and civil parties and their eventual limited distribution, if need be, in redacted form.

³¹ **E118**, Ieng Sary’s Request, introductory paragraph; see also paras. 9-11.

³² **D230/1.1.874a**, **D230/1.1.360a** and **D230/2/2.1.241a**. The D230 series concerns victim applications submitted by complainants.

³³ **E9/4**, Co-Prosecutors’ Rule 80 Expert, Witness and Civil Party Lists, Including Confidential Annexes 1,2,3,3A, 4 and 5, 28 January 2011.



³⁴ **E9/31**, Co-Prosecutors’ Rule 80(3) Trial Document List, 19 April 2011.

³⁵ **E109/4**, Co-Prosecutors’ Response to the Trial Chamber’s Request for Documents Relating to the First Phase of Trial, 22 July 2011.

IV. REQUEST

40. For the reasons given above, the Co-Prosecutors request that the Trial Chamber:
- (a) Dismiss Ieng Sary's Request insofar as it seeks an automatic access to all strictly confidential documents on the Case File (4,432 documents);
 - (b) Dismiss the request for disclosure of all non-evidentiary documents requested (approximately 1,186 documents);
 - (c) Dismiss Ieng Sary's Request and Ieng Thirith's Motion to access the documents subject to protective measures (approximately 3,132 documents);
 - (d) Expediently determine, in accordance with paragraph 30 above, the applications for protective measures relevant to these documents and (1) where the application is denied, reclassify civil party or complainant documents as confidential; or (2) where the application is granted, maintain the strictly confidential classification of those documents but disclose to the parties, prior to the substantive hearings, redacted confidential versions of the evidence they contain;
 - (e) Conduct an assessment of the 114 documents that do not fall within either the non-evidential documents or civil party / complainant documents considered above to review their classification and ensure that the parties' access is appropriate under the Practice Direction on Classification; and
 - (f) Amend the inventory of the strictly confidential section of the Case File in order to include the titles (redacted as necessary) of all documents.

Respectfully submitted,

Date	Name	Place	Signature
3 October 2011	CHEA Leang Co-Prosecutor	 Phnom Penh	
	Andrew CAYLEY Co-Prosecutor		