ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King

Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des tribunaux cambodgiens

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Preliminaire

~~D304/6/4~~

In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea

Case File N° 004/1/07-09-2009-ECCC/OCIJ (PTC54)

THE PRE-TRIAL CHAMBER

Before: **Judge PRAK Kimsan, President**
Judge Olivier BEAUVALLET
Judge NEY Thol
Judge Kang Jin BAIK
Judge HUOT Vuthy

Date: **8 June 2018**

PUBLIC

DECISION ON IM CHAEM'S REQUEST FOR RECLASSIFICATION OF HER RESPONSE TO THE INTERNATIONAL CO-PROSECUTOR'S FINAL SUBMISSION

Co-Prosecutors

CHEA Leang
Nicholas KOUMJIAN

Co-Lawyers for IM Chaem

BIT Seanglim
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B. Discussion

11. The Pre-Trial Chamber will first address (1) the Request for Reclassification of the Defence Response to the Final Submission, and then consider (2) the International Co-Prosecutor's cross-request for further reclassifications.

1. Request for Reclassification of the Defence Response to the Final Submission

12. Article 9.1 of the Practice Direction on Classification reads: "Documents or information can be re-classified (and placed in a section of the case file with a different level of confidentiality) only pursuant to an order of the Co-Investigating Judges or a Chamber, as appropriate."[31]

13. Furthermore, Article 3.12 of the Practice Direction on Filing provides: "Until the issuance of a Closing Order and the determination of any appeal against the Closing Order, the Co-Investigating Judges and the Pre-Trial Chamber, as appropriate, shall consider whether the proposed classification is appropriate and, if not, determine what is the appropriate classification."[32]

a. Decision on the Reclassification of IM Chaem's Response to the Final Submission

14. In the case at hand, the Pre-Trial Chamber notes the agreement between IM Chaem's Co-Lawyers and the International Co-Prosecutor to reclassify the Defence Response to the Final Submission as public.[33]

15. The Pre-Trial Chamber recalls that, pursuant to Article 5.1.h of the Practice Direction on Classification, filings to the Pre-Trial Chamber are in principle confidential until the Chamber has decided on the matter.[34] However, the Pre-Trial Chamber may reclassify those

[31] Practice Direction on Classification, Article 9.1.
[32] Practice Direction on Filing, Article 3.12.
[33] IM Chaem's Reclassification Request, para. 16; International Co-Prosecutor's Response to the Reclassification Request, para. 1; IM Chaem's Reply to the International Co-Prosecutor's Response to the Reclassification Request, para. 1.
[34] Practice Direction on Classification, Article 5.1.h.

documents as public, with redactions, if necessary, pursuant to Articles 4.f, 9.2 and 9.3 of the same Practice Direction.[35]

16. The Pre-Trial Chamber finds it appropriate, in light of the current state of the proceedings in Case 004/1, to order the reclassification of the Defence Response to the Final Submission[36] from confidential to public. This reclassification is also appropriate for the present request, [37] the International Co-Prosecutor's Response to the Reclassification Request[38] and IM Chaem's Reply to the International Co-Prosecutor's Response to the Reclassification Request.[39]

b. Scope of the Redaction of the Defence Response to the Final Submission

17. While the parties agree on the reclassification of the Defence Response to the Final Submission, they disagree on the scope of the redaction. The Defence suggests some redactions in Annex A to the Request.[40] The International Co-Prosecutor has also proposed his own view on the redactions.[41]

18. The Practice Direction on Classification provides in its Article 1.2: "The principle underlying this Practice Direction is the need to balance the confidentiality of judicial investigations and of other parts of judicial proceedings which are not open to the public with the need to ensure transparency of public proceedings and to meet the purposes of education and legacy."[42]

19. After having considered Annex A and the arguments of the parties, the Pre-Trial Chamber will now turn to address each of the four categories of redaction suggested by the Defence.

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[35] Practice Direction on Classification, Articles 4.f, 9.2 and 9.3.
[36] Response to the Final Submission.
[37] IM Chaem's Reclassification Request.
[38] International Co-Prosecutor's Response to the Reclassification Request.
[39] IM Chaem's Reply to the International Co-Prosecutor's Response to the Reclassification Request.
[40] IM Chaem's Reclassification Request, para. 17.
[41] International Co-Prosecutor's Response to the Reclassification Request, para. 23.
[42] *See also* Case 002/19-09-2007-ECCC/OCIJ, Decision on Appeal of Co-Lawyers for Civil Parties Against Order on Civil Parties' Request for Investigative Actions Concerning all Properties Owned by the Charged Persons, 4 August 2010, D193/5/5, para. 1.

20. The Pre-Trial Chamber finds it appropriate to leave IM Chaem's name unredacted in the Defence Response to the Final Submission.

21. The Pre-Trial Chamber also finds it appropriate to leave unredacted every reference to or quote from any of IM Chaem's statements filed in Case 004/1, as they are already in the public domain.

22. In addition, the Pre-Trial Chamber finds it unnecessary to redact the names of deceased Khmer Rouge officials mentioned in the Defence Response to the Final Submission.

23. Coming to the redaction of all evidence gathered from witnesses or civil party applicants, the Pre-Trial Chamber finds that it is of utmost importance to ensure the security of the victims and witnesses. With regard to the above-mentioned communications from the Witnesses/Experts Support Unit and the Office of the Co-Investigating Judges, the Pre-Trial Chamber considers it appropriate to only redact the names and addresses of the people who are under protective measures pursuant to Internal Rule 29(3), or whose requests for such measures are still pending.

2. International Co-Prosecutor's Cross-Request for Further Reclassifications

24. In his response to the above-reviewed Reclassification Request, the International Co-Prosecutor counterdemands the reclassification of the transcripts of the appeal hearings held on 11 and 12 December 2017 before the Pre-Trial Chamber, related filings and the full Closing Order (Reasons).[43]

25. The Practice Direction on Filing provides in Article 3.12 that, "[d]uring the judicial investigation, a filing party may propose that a document be classified as 'Public', 'Confidential', or 'Strictly Confidential', in accordance with the provisions of the Practice Direction on the Classification".[44] First, the Pre-Trial Chamber finds that a document can be reclassified pursuant to a Chamber's decision. Such a proceeding can be initiated by a filing party, but this is not required. In other words, the Court, in the meaning of the Practice

[43] International Co-Prosecutor's Response to the Reclassification Request, paras 2, 23.
[44] Practice Direction on Filing, Article 3.12.

Direction on Classification, can act *proprio motu* and enjoys significant discretion on that matter.

26. Therefore, the Pre-Trial Chamber will consider whether it is appropriate, according to the Practice Direction on Classification, to also reconsider the current status of a few related documents produced at the time of the appeal proceedings against the Case 004/1 Closing Order.

a. Transcripts of the Hearings Held on 11 and 12 December 2017 and Related Documents

27. The fact that this prosecutorial request was formulated as a counterdemand does not prevent the Pre-Trial Chamber from exercising its discretion as to the classification of records it has generated and classified on its own. The Pre-Trial Chamber consequently grants the request with regard to reclassification of records produced by Pre-Trial Chamber. This relates to the Scheduling Order[45] and the prior suggestions of the parties.[46]

28. With regard to the reclassification of the hearings held *in camera*, the Pre-Trial Chamber finds that the fact that the hearings took place in closed session does not automatically result in the transcripts remaining off the public record. Court management and document classification are governed by different legal instruments and have different purposes. Classification is governed by the relevant Practice Direction,[47] while hearings are governed by the Internal Rules.[48]

29. Hearings before the Pre-Trial Chamber are held *in camera* pursuant to Internal Rule 77(5). The Pre-Trial Chamber stresses that: "[w]ritten records, transcripts, and audio /

[45] Case 004/1, Scheduling Order for the Pre-Trial Chamber's Hearing on Appeal Against Closing Order, 14 November 2017, D308/3/1/19.
[46] Case 004/1, Letter from IM Chaem's Co-Lawyers entitled "Proposed details of oral hearings in Case 004/1", 31 October 2017, D308/3/1/14; Case 004/1, International Co-Prosecutor's Submission on the Pre-Trial Chamber Hearing regarding the Appeal of Closing Order (Reasons), 31 October 2017, D308/3/1/15; Case 004/1, Letter from IM Chaem's Co-Lawyers entitled "Response to the International Co-Prosecutor's Submission on the Pre-Trial Chamber Hearing regarding the Appeal of Closing Order (Reasons) (D308/3/1/15)", 6 November 2017, D308/3/1/16; Case 004/1, Communication from Case 004/1 Civil Party Lawyers entitled "Pre-Trial Hearing Regarding the Appeal of Closing Order (Reasons)", 6 November 2017, D308/3/1/17.
[47] Practice Direction on Classification.
[48] Internal Rule 77(5)-(6).

visual recordings of hearings held *in camera*" are "in principle confidential" unless a different classification is ordered by a Court decision.[49] Therefore, no decision on the classification of written transcripts of hearings held *in camera* is final since such classification may be modified by a court decision. This reasoning also applies to the classification of the audio/video records of those hearings.[50]

b. Filings from the Co-Lawyers for the Former Civil Party Applicants

30. The reclassification also concerns an application initially brought by the National Co-Lawyer for the Former Civil Party Applicants who had no standing in the proceedings.[51] This was briefed by the parties. The Pre-Trial Chamber denied the request but invited the Co-Lawyers for the Former Civil Party Applicants to file a limited submission, which they did,[52] and to which IM Chaem's Co-Lawyers responded.[53] Those documents are also to be reclassified.

c. Scope of Redactions

31. For the same reasons as set out above,[54] the Pre-Trial Chamber considers it appropriate to redact from those reclassified documents the names and addresses of every person who was granted or requested protective measures pursuant to Internal Rule 29(3).

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[49] Practice Direction on Classification, Article 5.1.
[50] Case 004/1, Audio and video recordings of the hearings held by the Pre-Trial Chamber on 11 and 12 December 2017, D308/3/1/19/1.1R and D308/3/1/19/2.1R.
[51] Case 004/1, National Civil Party Co-Lawyer's Request for an Extension of Time and for Leave to File a Response to the International Co-Prosecutor's Appeal of Closing Order (Reason) in English with Khmer to Follow, 18 August 2017, D308/3/1/4.
[52] Case 004/1, IM Chaem's Response to National Civil Party Co-Lawyer's Request for an Extension of Time and for Leave to File a Response to the International Co-Prosecutor's Appeal of Closing Order (Reason) in English with Khmer to Follow, 21 August 2017, D308/3/1/5; Case 004/1, National Civil Party Co-Lawyer's Reply to IM Chaem's Response (D308/3/1/5) to the Request for an Extension of Time and for Leave to File a Response to the International Co-Prosecutor's Appeal of Closing Order (Reason) in English with Khmer to Follow, 23 August 2017, D308/3/1/6; Case 004/1, International Co-Prosecutor's Reply to IM Chaem's Response to Civil Party Co-Lawyer's Request, 23 August 2017, D308/3/1/7; Case 004/1, Decision on the National Civil Party Co-Lawyer's Request regarding the Filing of Response to the Appeal Against the Closing Order and Invitation to File Submissions, 29 August 2017, D308/3/1/8; Case 004/1, Civil Party Co-Lawyers' Submission on ECCC Position within Cambodian Legal System, 8 September 2017, D308/3/1/9.
[53] Case 004/1, IM Chaem's Response to the CPCLS' Submission on the Position of the ECCC within the Cambodian Legal System (D308/3/1/9), 8 September 2017, D308/3/1/18.
[54] *See supra* para. 23.

d. Other Related Filings

32. With regard to the reclassification of the "related filings",[55] the Pre-Trial Chamber first notes that the International Co-Prosecutor has not yet requested the reclassification of his own Final Submission, despite announcing he would do so in his Response to the Reclassification Request, filed on 23 March 2018.[56] At this stage of the proceedings, considering the International Co-Prosecutor's intention and in the interest of the good administration of justice, the Pre-Trial Chamber finds it appropriate to order the reclassification of the International Co-Prosecutor's Final Submission,[57] as part of the overall review of classification triggered by the present request.

33. Coming to "other related filings," the Pre-Trial Chamber considers that, beyond what has been reviewed in the paragraphs above, it is not sufficiently clear what the International Co-Prosecutor considers as "related filings". This request is consequently denied.

e. Closing Order (Reasons)

34. With regard to the redacted version of the Closing Order (Reasons), the Pre-Trial Chamber is already seised through the "International Co-Prosecutor's Appeal of Decision on Closing Order (Reasons) Redaction or, Alternatively, Request for Reclassification of Closing Order (Reasons)".[58] As this request is already being addressed in different proceedings, the reiterated request is consequently moot.

FOR THESE REASONS, THE PRE-TRIAL CHAMBER UNANIMOUSLY HEREBY:

- **ORDERS** the Defence to submit within seven days a public version of the following filings:
    - The Defence Response to the Final Submission;[59]

[55] International Co-Prosecutor's Response to the Reclassification Request, para. 23.
[56] International Co-Prosecutor's Response to the Reclassification Request, para. 2.
[57] Final Submission.
[58] Case 004/1, International Co-Prosecutor's Appeal of Decision on Closing Order (Reasons) Redaction or, Alternatively, Request for Reclassification of Closing Order (Reasons), 9 August 2017, D309/2/1/2.
[59] Response to the Final Submission.

- IM Chaem's Request for Reclassification of her Response to the International Co-Prosecutor's Final Submission;[60]
- IM Chaem's Reply to the International Co-Prosecutor's Response to her Reclassification Request;[61]
- IM Chaem's Response to National Civil Party Co-Lawyer's Request for an Extension of Time and for Leave to File a Response to the International Co-Prosecutor's Appeal;[62]
- IM Chaem's Response to the CPCLs' Submission on the Position of the ECCC Within the Cambodian Legal System;[63]
- IM Chaem's Proposed Details of oral Hearings in Case 004/1;[64]
- Response to the International Co-Prosecutor's Submission on the Pre-Trial Chamber Hearing Regarding the Appeal of Closing Order (Reasons);[65]

- **INSTRUCTS** the Defence to redact in these submissions only the names and addresses of every person under protective measures pursuant to Internal Rule 29(3), or whose request for such measures is still pending;

- **ORDERS** the International Co-Prosecutor to submit within seven days a public version of the following filings:

  - The International Co-Prosecutor's Rule 66 Final Submission Against IM Chaem;[66]
  - The International Co-Prosecutor's Response to IM Chaem's Reclassification Request;[67]

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[60] IM Chaem's Reclassification Request.
[61] IM Chaem's Reply to the International Co-Prosecutor's Response to the Reclassification Request.
[62] Case 004/1, IM Chaem's Response to National Civil Party Co-Lawyer's Request for an Extension of Time and for Leave to File a Response to the International Co-Prosecutor's Appeal of Closing Order (Reason) in English with Khmer to Follow, 21 August 2017, D308/3/1/5.
[63] Case 004/1, IM Chaem's Response to the CPCLS' Submission on the Position of the ECCC within the Cambodian Legal System (D308/3/1/9), 10 November 2017, D308/3/1/18.
[64] Case 004/1, Letter from IM Chaem's Co-Lawyers entitled "Proposed details of oral hearings in Case 004/1", 31 October 2017, D308/3/1/14.
[65] Case 004/1, Response to the International Co-Prosecutor's Submission on the Pre-Trial Chamber Hearing regarding the Appeal of Closing Order (Reasons) (D308/3/1/15), 5 November 2017, D308/3/1/16.
[66] Final Submission.

- The International Co-Prosecutor's Reply to IM Chaem's Response to Civil Party Co-Lawyer's Request;[68]
- The International Co-Prosecutor's Submission on the Pre-Trial Chamber Hearing Regarding the Appeal of Closing Order (Reasons);[69]

- **INSTRUCTS** the International Co-Prosecutor to redact in these submissions only the names and addresses of every person under protective measures pursuant to Internal Rule 29(3), or whose request for such measures is still pending;

- **DECIDES** to reclassify as public, subject to redactions:
  - The Scheduling Order;[70]
  - Written Transcripts of the Hearings held on 11 and 12 December 2017;[71]
  - Audio/Video Record of the Hearings held on 11 and 12 December 2017;[72]
  - The National Civil Party Co-Lawyer's Request for an Extension of Time and for Leave to File a Response to the International Co-Prosecutor's Appeal of Closing Order (Reasons);[73]
  - The National Civil Party Co-Lawyer's Reply to IM Chaem's Response;[74]
  - The Decision on the National Civil Party Co-Lawyer's Request regarding the Filing of Response to the Appeal Against the Closing Order and Invitation to File Submissions;[75]

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[67] International Co-Prosecutor's Response to the Reclassification Request.
[68] Case 004/1, International Co-Prosecutor's Reply to IM Chaem's Response to Civil Party Co-Lawyer's Request, 23 August 2017, D308/3/1/7.
[69] Case 004/1, International Co-Prosecutor's Submission on the Pre-Trial Chamber Hearing Regarding the Appeal of Closing Order (Reasons), 31 October 2017, D308/3/1/15.
[70] Case 004/1, Scheduling Order for the Pre-Trial Chamber's Hearing on Appeal Against Closing Order, 14 November 2017, D308/3/1/19.
[71] Case 004/1, Trancript of Appeal Hearings (closed session), 11 December 2017, D308/3/1/19/1.2; Case 004/1, Trancript of Appeal Hearings (closed session), 12 December 2017, D308/3/1/19/2.1.
[72] Case 004/1, Audio and video recordings of the hearings held by the Pre-Trial Chamber on 11 and 12 December 2017, D308/3/1/19/1.1R and D308/3/1/19/2.1R.
[73] Case 004/1, National Civil Party Co-Lawyer's Request for an Extension of Time and for Leave to File a Response to the International Co-Prosecutor's Appeal of Closing Order (Reasons) in English with Khmer to Follow, 15 August 2017, D308/3/1/4.
[74] Case 004/1, National Civil Party Co-Lawyer's Reply to IM Chaem's Response (D308/3/1/5) to the Request for an Extension of Time and for Leave to File a Response to the International Co-Prosecutor's Appeal of Closing Order (Reasons) in English with Khmer to Follow, 23 August 2017, D308/3/1/6.
[75] Case 004/1, Decision on the National Civil Party Co-Lawyer's Request regarding the Filing of Response to

- The Civil Party Co-Lawyers' Submission on the Position of the ECCC Within the Cambodian Legal System;[76]
- The Communication from Case 004/1 Civil Party Lawyers;[77]

- **DECLARES** moot the request to order the issuance of an unredacted version of the Closing Order (Reasons) in Case 004/1;

- **DENIES** the remainder of the request.

In accordance with Internal Rule 77(13), the present decision is not subject to appeal.

Phnom Penh, 8 June 2018

President **Pre-Trial Chamber**

PRAK Kimsan **Olivier BEAUVALLET** **NEY Thol** **Kang Jin BAIK** **HUOT Vuthy**

the Appeal Against the Closing Order and Invitation to File Submissions, 29 August 2017, D308/3/1/8.
[76] Case 004/1, Civil Party Co-Lawyers' Submission on the Position of the ECCC within the Cambodian Legal System, 8 September 2017, D308/3/1/9.
[77] Case 004/1, Communication from Case 004/1 Civil Party Lawyers entitled "Pre-Trial Hearing Regarding the Appeal of Closing Order (Reasons)", 6 November 2017, D308/3/1/17.