

**BEFORE THE PRE-TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

FILING DETAILS

Case No: 004/1/07-09-2009-ECCC-OCIJ (PTC)

Party Filing: International Co-Prosecutor

Filed to: Pre-Trial Chamber

Original Language: English

Date of Document: 23 March 2018



CLASSIFICATION

Classification of the document suggested by the filing party:

CONFIDENTIAL [PUBLIC]

Classification by PTC:

សាធារណៈ/Public

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:

**INTERNATIONAL CO-PROSECUTOR'S RESPONSE TO IM CHAEM'S
REQUEST FOR RECLASSIFICATION**

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I. INTRODUCTION

1. The International Co-Prosecutor (“Co-Prosecutor”) supports Im Chaem’s request for greater transparency in the proceedings.¹ However, the Co-Prosecutor opposes limiting reclassification to selected filings.² The rationale for reclassification relied on by Im Chaem applies not only to her response to the Co-Prosecutor’s Final Submission,³ but to the filings of all parties and the decisions of the Co-Investigating Judges (“CIJs”) and Pre-Trial Chamber in this case.
2. Consequently, the Co-Prosecutor reiterates his request that the appeal hearings before the Pre-Trial Chamber and associated filings be reclassified as public, and that the Closing Order (Reasons) be issued with the full reasoning and findings of the CIJs including the evidence in support thereof.⁴ The Co-Prosecutor will file a request that his Final Submission and submissions on appeal be reclassified as public in due course.
3. While the Co-Prosecutor supports Im Chaem’s reclassification request, the extent of redactions proposed are unnecessarily broad and do not have the effect of providing the public with sufficient information as to be properly informed of the proceedings.

II. IM CHAEM REQUESTS SELECTIVE TRANSPARENCY

4. The Co-Prosecutor agrees with Im Chaem that the transparency of the pre-trial proceedings “is an issue that has been, and continues to be, of significant public interest and concern.”⁵ Further, the Co-Prosecutor supports Im Chaem’s contention that reclassification of documents as public helps to “ensure the transparent administration of justice and the integrity of the legacy of the ECCC.”⁶ However, Im Chaem’s request is one-sided in the transparency it wishes to ensure – arguing, as it does, that reclassification is necessary “to allow the Defence’s narrative to be made public”.⁷ Transparency of proceedings must include the submissions of all parties, as well as the rationale and full

¹ **D304/6/1** Im Chaem’s Request for Reclassification of her Response to the International Co-Prosecutor’s Final Submission, 12 March 2018, para. 1 (“Im Chaem Request”).

² **D304/6/1** Im Chaem Request, paras 1, 19-21.

³ **D304/6** Im Chaem’s Response to the International Co-Prosecutor’s Rule 66 Final Submission Against Her, 28 November 2016 (“Final Submission Response”).

⁴ *See*, **D309/2/1/2** International Co-Prosecutor’s Appeal of Decision on Closing Order (Reasons) Redaction or, Alternatively, Request for Reclassification of Closing Order (Reasons), 9 August 2017 (“ICP Appeal of Closing Order Redactions”); **D308/3/1/19/1.2** T. Appeal Hearings, 11 December 2017, EN 01548981.

⁵ **D304/6/1** Im Chaem Request, para. 21.

⁶ **D304/6/1** Im Chaem Request, para. 1.

⁷ **D304/6/1** Im Chaem Request, para. 17. *See also*, paras 1, 19-21.

reasons of the CIJs and the Pre-Trial Chamber for their decisions in, and disposition of, this case.

5. For example, Im Chaem does not wish the CIJs' conclusion, despite dismissing the case, that "Ms. IM Chaem 'could be criminally responsible' for serious crimes", to be made public.⁸ Rather Im Chaem wants her criticism of the process and her assertions about "irrelevant facts" and "numerous errors in the approach to the evidence" to be in the public domain.⁹ As Im Chaem has previously claimed that "*all* findings relating to Ms. IM Chaem's alleged criminal responsibility for the relevant alleged crimes were matters the Co-Investigating Judges did not have the competence to address" and should therefore be redacted,¹⁰ she is seemingly advocating a skewed and one-sided form of transparency under the guise of apparently "informing" the public.
6. Im Chaem claims that she will seek "in the near future the reclassification of" filings such as the CIJs' Notice of Intent to Dismiss the Charges.¹¹ Im Chaem states that the basis for such reclassification is "the same" as the reasons supporting the current Im Chaem Request.¹² Though Im Chaem does not detail the filings that she will seek reclassification of, it appears that she is seeking to limit the proposed reclassification to filings that "introduc[e] the Defence's arguments into the public sphere".¹³ However, the rationale Im Chaem relies upon to support reclassification of her Final Submission Response is equally applicable to filings including the Co-Prosecutor's Final Submission, the transcripts of the Pre-Trial Chamber appeal hearings and a revised version of the public redacted Closing Order (Reasons).

III. THE BASIS FOR IM CHAEM'S REQUEST APPLIES TO ALL FILINGS

7. Having steadfastly opposed greater transparency in relation to the public redacted Closing Order (Reasons) and the appeal hearings before the Pre-Trial Chamber,¹⁴ Im Chaem's

⁸ **D309/2/1/3** Response to the International Co-Prosecutor's Appeal of Decision on Closing Order (Reasons) Redaction or, Alternatively, Request for Reclassification of Closing Order (Reasons), 4 September 2017, para. 53 ("Im Chaem Response to ICP Appeal of Closing Order Redactions") citing **D308/3** Closing Order (Reasons), 10 July 2017, para. 307.

⁹ **D304/6/1** Im Chaem Request, para. 20.

¹⁰ **D309/2/1/3** Im Chaem Response to ICP Appeal of Closing Order Redactions, para. 63 (emphasis added).

¹¹ **D304/6/1** Im Chaem Request, para. 17.

¹² **D304/6/1** Im Chaem Request, para. 17.

¹³ **D304/6/1** Im Chaem Request, para. 19.

¹⁴ See, **D309/2/1/3** Im Chaem Response to ICP Appeal of Closing Order Redactions; **D308/3/1/16** 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; **D308/3/1/19/2.1** T. Appeal Hearings, 12 December 2017, EN 01549680-81.

rationale for requesting reclassification of her Final Submission Response – that the confidentiality of an investigation must be balanced against the interests of justice and the need to keep the public informed¹⁵ – applies equally to all submissions in this case.

8. **Confidentiality of the investigation**: Im Chaem claimed on 4 September 2017, when opposing the Co-Prosecutor’s appeal against the level of redactions used by the CIJs in the public redacted Closing Order (Reasons): “it is settled law that, ‘the investigation stage formally ends only when the [Pre-Trial Chamber] has ruled on any appeals against the closing order’”¹⁶ and stated there was a “compelling need to maintain confidentiality of the investigation”.¹⁷ Im Chaem now argues that “pursuant to the formal conclusion of the investigation phase [on 18 December 2015], there is no remaining reason for maintaining a confidential classification of the Response to the Final Submission.”¹⁸
9. As the Co-Prosecutor has emphasised, Rule 56 of the Internal Rules provides for a limited and reasonable curtailment of the default position that proceedings be fully transparent, *during the investigation*.¹⁹ Once the investigation has concluded – which Im Chaem now accepts has occurred – the confidentiality required by Rule 56 no longer applies and proceedings revert to the *status quo* of maximum public access. Thus, all parties’ filings and the decisions of the CIJs and Pre-Trial Chamber should become public, subject to any necessary redactions for the safety of witnesses and victims.
10. **The interests of justice**: Im Chaem claims that reclassifying her Final Submission Response will “ensure the transparent administration of justice and the integrity of the legacy of the ECCC”.²⁰ Im Chaem asserts that there is currently an inaccurate and misleading public record of the case and cites, *inter alia*, the Co-Prosecutor’s publicly available Rule 54 summary.²¹ Though an erroneous characterisation of the Co-Prosecutor’s Rule 54 summary, Im Chaem’s claim that the public record of the case is false cannot be remedied by selective reclassification – but only through reclassification as public of all parties’ submissions and the decisions of the CIJs and the Pre-Trial Chamber.

¹⁵ D304/6/1 Im Chaem Request, para. 18.

¹⁶ D309/2/1/3 Im Chaem Response to ICP Appeal of Closing Order Redactions, para. 39.

¹⁷ D309/2/1/3 Im Chaem Response to ICP Appeal of Closing Order Redactions, para. 21.

¹⁸ D304/6/1 Im Chaem Request, para. 16.

¹⁹ See, D309/2/1/2 ICP Appeal of Closing Order Redactions.

²⁰ D304/6/1 Im Chaem Request, para. 1.

²¹ D304/6/1 Im Chaem Request, fn. 37.

11. Additionally, Im Chaem supports her claim of an inaccurate and misleading public record by citing a newspaper article on the difficulty of knowing what the CIJs held in the Closing Order (Reasons) due to the heavily redacted nature of the document.²² In this regard, the Co-Prosecutor reiterates that the public redacted version of the Closing Order (Reasons) does not fulfil the basic requirement of ensuring transparency of judicial proceedings because of the scale of the redactions therein.²³
12. **Keeping the public informed**: Im Chaem argues that reclassifying her Final Submission Response will enable “the public [...] to peruse the parties’ submissions and Co-Investigating Judges’ Closing Order (Reasons) in their context [and] help to dispel any misapprehension concerning the disposition of the case”.²⁴ Again, this argument rests on the false premise that issuing public redacted versions of the parties submissions while keeping the determinative findings of the CIJs’ Closing Order (Reasons) concealed will somehow assist people in understanding the resolution of this case.
13. Im Chaem previously claimed that the redacted sections of the Closing Order (Reasons) were “not essential for a full understanding of the disposition of the case nor is any other legitimate interest of justice served by their disclosure.”²⁵ And is now suggesting that the public is “unaware of the Defence’s arguments that explain the final disposition”.²⁶ However, the redacted Closing Order (Reasons) does not properly explain the disposition of the case because of the blanket redactions applied by the CIJs. Im Chaem’s suggestion that making her Final Submission Response public while keeping the Closing Order (Reasons) redacted will elucidate the public on the disposition of the case is illusory, at best.
14. Im Chaem cannot arbitrarily choose what information she favours or what she considers supports her position and disseminate that to the public. It is inconsistent to assert that the parties’ arguments be made public but not the reasoning of the CIJs for accepting or rejecting those same arguments. Im Chaem wishes to let the public know of her claims that the Co-Prosecutor’s submissions are wrong²⁷ and the bare fact that the case was

²² **D304/6/1** Im Chaem Request, fn. 37.

²³ See, **D309/2/1/2** ICP Appeal of Closing Order Redactions.

²⁴ **D304/6/1** Im Chaem Request, para. 21.

²⁵ **D309/2/1/3** Im Chaem Response to ICP Appeal of Closing Order Redactions, para. 60.

²⁶ **D304/6/1** Im Chaem Request, para. 20.

²⁷ **D304/6/1** Im Chaem Request, para. 20.

dismissed by the CIJs²⁸ – but does not support making the CIJs’ rationale and reasoning or the Co-Prosecutor’s arguments on appeal available.

15. Ironically, Im Chaem claims that the requested selective reclassification will ensure “the dissemination of important, accurate and balanced information to provide adequate public awareness about the proceedings.”²⁹

IV. THE PROPOSED REDACTIONS ARE UNNECESSARILY BROAD

16. Im Chaem claims that her proposed redactions “strike a fair and necessary balance between” the confidentiality of judicial investigations and the interests of transparency in the proceedings.³⁰ However, many of the redactions are self-serving as they do not include the evidence upon which assertions are based and therefore do not provide a full and transparent picture of the case.
17. First, Im Chaem’s proposal to redact *all* evidence of a witness or civil party applicant is unnecessary to ensure that the identity of such individuals is kept confidential and their security assured.³¹ Redacting the name of a witness or civil party and any identifying personal information is sufficient to comply with the Court’s practice on reclassification. Removing all traces of the underlying evidence leaves the public solely with the parties’ assertion, minus the context in which such submissions are made and the basis for their accuracy.
18. Second, contrary to Im Chaem’s proposal,³² there is no basis to redact the names of Khmer Rouge officials in Case 004/01 submissions. CPK officials have consistently been named in public documents issued by the Trial Chamber and Supreme Court Chamber.³³ Im Chaem’s reference to the redaction of the name of Ta Paol in the Closing Order (Reasons) merely demonstrates the unreasonably broad approach taken by the CIJs.³⁴ Ta Paol’s name appears amid an unbroken 144 consecutive paragraphs that are redacted in their entirety.³⁵ The CIJs’ rationale for redacting Ta Paol’s name, like the rationale for

²⁸ **D309/2/1/3** Im Chaem Response to ICP Appeal of Closing Order Redactions.

²⁹ **D304/6/1** Im Chaem Request, para. 18. *See also*, para. 1.

³⁰ **D304/6/1** Im Chaem Request, para. 15.

³¹ **D304/6/1** Im Chaem Request, para. 17.

³² **D304/6/1** Im Chaem Request, para. 17.

³³ *See, e.g.*, Case 001-**E188** Judgement, 26 July 2010; Case 001-**F28** Appeal Judgement, 3 February 2012; Case 002-**E313** Judgement, 7 August 2014; Case 002-**F36** Appeal Judgement, 23 November 2016.

³⁴ **D304/6/1** Im Chaem Request, para. 17.

³⁵ **D308/3** [Redacted] Closing Order (Reasons), 10 July 2017, paras 180-324.

redacting the majority of the substance of the Closing Order (Reasons), is without valid justification.³⁶

19. Third, Im Chaem improperly redacts all references to her own statements.³⁷ Im Chaem's statements were voluntarily made to DC-Cam and to other organisations and gave rise to no expectation of remaining confidential. Im Chaem was not in custody or detained at the time and the persons she spoke to were not law enforcement. Im Chaem seeks to sanitise the submissions by removing her own statements, as they would tend to contradict her current attempts to misrepresent her acts and conduct during the DK regime. Im Chaem previously argued for *increasing* the blanket redactions adopted by the CIJs in the Closing Order (Reasons) to also include redacting references to Im Chaem's statements.³⁸ Im Chaem's position, therefore, is to make information available to the public only where it pertains favourably to her arguments. But where even *her own words* are less agreeable – then the evidence should remain concealed.
20. The Co-Prosecutor agrees that Im Chaem's name should not be redacted from the submissions.³⁹ That she is the subject of Case 004/01 is publicly available information. Further, the Co-Prosecutor agrees with leaving all references to his Final Submission and documents such as the CIJs' Notice of Intention to Dismiss the Case unredacted,⁴⁰ provided these and all underlying submissions are reclassified in order to provide a transparent picture of the progress of proceedings. To selectively reclassify documents would deprive the public of knowing what specific factual and legal assertions Im Chaem is addressing in her Final Submission Response and the evidential basis underlying them. This would merely provide a one-sided narrative.

V. CONCLUSION

21. Im Chaem correctly notes that there is agreement between the parties that reclassification of her Final Submission Response “will not compromise any interests previously protected by the confidential nature of the judicial investigation.”⁴¹ Based on the same

³⁶ See, **D309/2/1/2** ICP Appeal of Closing Order Redactions.

³⁷ See, **D304/6/1.2** [Redacted] Im Chaem's Response to the International Co-Prosecutor's Rule 66 Final Submission Against Her, fns. 205-206, 219, 222-223, 226, 273, 323-324, 332, 385, 389, 406, 411, 455, 456-465, 468, 471, 476, 483, 486, 490-491, 507-508, 513, 715, 739, 755, 763.

³⁸ **D309/2/1/3** Im Chaem Response to ICP Appeal of Closing Order Redactions, para. 75.

³⁹ **D304/6/1** Im Chaem Request, para. 17.

⁴⁰ **D304/6/1** Im Chaem Request, para. 17.

⁴¹ **D304/6/1** Im Chaem Request, para. 16.

rationale as Im Chaem applies in her request, there should now also be agreement between the parties that all submissions as well as decisions of the CIJs and Pre-Trial Chamber should be reclassified as public, with redactions only as necessary to protect witnesses' and victims' identities and security.

22. Im Chaem seeks to have her assertions in the public arena but none of the evidence upon which they are based or the CIJs' rationale and reasoning in adjudicating them. However, Im Chaem cannot credibly claim that reclassifying her Final Submission Response and not reclassifying documents such as the Co-Prosecutor's Final Submission, transcripts of the appeal hearing before the Pre-Trial Chamber and associated filings, as well as releasing the full version of the Closing Order (Reasons), will aid the interests of justice or the transparency of the proceedings and legacy of the ECCC.

VI. RELIEF REQUESTED

23. For the foregoing reasons, the Co-Prosecutor supports the Im Chaem request, with modifications to the proposed redactions. The Co-Prosecutor further requests that the transcripts of the appeal hearings before the Pre-Trial Chamber, related filings, and the full Closing Order (Reasons) be released publicly, subject only to any necessary redactions for witness or victim protection.

Respectfully submitted,

Date	Name	Place	Signature
23 March 2018	Nicholas KOUMJIAN International Co-Prosecutor	Phnom Penh	

