



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

ព្រះរាជាណាចក្រកម្ពុជា  
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia  
Nation Religion King  
Royaume du Cambodge  
Nation Religion Roi

អង្គមុនជំនុំជម្រះ  
Pre-Trial Chamber  
Chambre Preliminaire

D309/2/1/7

*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 (PTC49)

**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

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**PUBLIC**

**DECISION ON THE INTERNATIONAL CO-PROSECUTOR'S APPEAL ON DECISION ON REDACTION OR, ALTERNATIVELY, REQUEST FOR RECLASSIFICATION OF THE CLOSING ORDER (REASONS)**

**Co-Prosecutors**

CHEA Leang  
Nicholas KOUMJIAN

**Co-Lawyers for IM Chaem**

BIT Seanglim  
Wayne JORDASH



**THE PRE-TRIAL CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) is seised of the “International Co-Prosecutor’s Appeal of Decision on *Closing Order (Reasons)* Redaction or, Alternatively, Request for Reclassification of *Closing Order (Reasons)*”, filed by the International Co-Prosecutor on 9 August 2017 (“Appeal”).<sup>1</sup>

## I. INTRODUCTION

1. The International Co-Prosecutor requests the Pre-Trial Chamber to reverse, pursuant to Internal Rules 73 and 74, the Co-Investigating Judges’ decision to redact the public version of the Closing Order (Reasons) (“Impugned Decision”)<sup>2</sup> or, alternatively, to reclassify as public, pursuant to practice directions applicable to the classification and filing of documents, the confidential version of the Closing Order (Reasons), as well as the Impugned Decision, the Appeal and any response,<sup>3</sup> subject to necessary redactions under Internal Rule 29(3) (“Request for Reclassification”).

## II. PROCEDURAL HISTORY

2. On 7 March 2017, the International Co-Prosecutor filed a request for, *inter alia*, the full reasons of the Closing Order to be made public,<sup>4</sup> to which the Co-Lawyers for IM Chaem (“Co-Lawyers”) responded on 20 March 2017.<sup>5</sup>

3. On 10 July 2017, the Co-Investigating Judges delivered a confidential version and a public redacted version of the Closing Order (Reasons), maintaining the confidentiality of the substance of the charges.<sup>6</sup>

4. On 10 July 2017, the Co-Investigating Judges issued the Impugned Decision, declaring,

<sup>1</sup> Case No. 004/1/07-09-2009-ECCC-OCIJ (“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 (“Appeal”).

<sup>2</sup> Case 004/1, Decision on International Co-Prosecutor’s Request for Closing Order Reasons and CIJ’s Decision to Be Made Public, 10 July 2017, D309/2 (“Impugned Decision”).

<sup>3</sup> Appeal, paras 2, 64, 66.

<sup>4</sup> Case 004/1, International Co-Prosecutor’s Request for Closing Order Reasons and CIJ’s Decision to Be Made Public, 7 March 2017, D309.

<sup>5</sup> Case 004/1, IM Chaem’s Response to the International Co-Prosecutor’s Request for Closing Order Reasons and CIJ’s Decision to Be Made Public, 20 March 2017, D309/1.

<sup>6</sup> Case 004/1, Closing Order (Reasons), 10 July 2017, D308/3 (“Closing Order (Reasons)”).



*inter alia*, the request to issue a public redacted version of the Closing Order (Reasons) moot.

5. On 13 July 2017, the International Co-Prosecutor filed a notice of appeal against the Impugned Decision<sup>7</sup> and, on 9 August 2017, his submissions on appeal.<sup>8</sup>

6. On 4 September 2017, the Co-Lawyers filed a response to the Appeal (“Response”),<sup>9</sup> and the International Co-Prosecutor replied on 11 September 2017 (“Reply”).<sup>10</sup>

7. On 17 May 2018, pursuant to the Pre-Trial Chamber’s instructions,<sup>11</sup> the Witness Expert Support Unit provided information related to victims who requested protective measures in Case 004/1.<sup>12</sup> On 22 May 2018, pursuant to a second order from the Pre-Trial Chamber,<sup>13</sup> the Co-Investigating Judges provided information related to persons under protective measures in Case 004/1.<sup>14</sup>

### III. ADMISSIBILITY

8. The Appeal is filed by the International Co-Prosecutor pursuant to Internal Rules 73 and 74,<sup>15</sup> in accordance with the time limits set forth in Internal Rule 75(1) and (3). The Pre-Trial Chamber thus finds the Appeal admissible.

9. The Request for Reclassification is filed pursuant to Article 9 of the Practice Direction on Classification and Management of Case-Related Information (“Practice Direction on Classification”) and to Articles 3.12 and 3.14 of the Practice Direction on Filing of

<sup>7</sup> Case 004/1, International Co-Prosecutor’s Notice of Appeal Against Decision on Request for Closing Order Reasons to Be Public, 13 July 2017, D309/2/1.

<sup>8</sup> See *supra* footnote 1.

<sup>9</sup> Case 004/1, 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, D309/2/1/3 (“Response”).

<sup>10</sup> Case 004/1, International Co-Prosecutor’s Reply Regarding Appeal of Decision on *Closing Order (Reasons)* Redaction, 11 September 2017, D309/2/1/4 (“Reply”).

<sup>11</sup> Case 004/1, Order Related to the Appeal of Decision on Redaction of the Closing Order in Case 004/1, 11 May 2018, D309/2/1/5.

<sup>12</sup> Case 004/1, Witness Expert Support Unit, Memorandum on Risk Assessment, 17 May 2018, D309/2/1/5/1 (“WESU Memorandum”), with Annexes D309/2/1/5/1.1 and D309/2/1/5/1.2.

<sup>13</sup> Case 004/1, Second Order Related to the Appeal of Decision on Redaction of the Closing Order in Case 004/1, 21 May 2018, D309/2/1/6.

<sup>14</sup> Case 004/1, Response to PTC Order of 21 May 2018, 22 May 2018, D309/2/1/6/1 (“OCIJ Memorandum”), with Annexes D309/2/1/6/1.1 and D309/2/1/6/1.2.

<sup>15</sup> Appeal, para. 1.



Documents before the ECCC (“Practice Direction on Filing”).<sup>16</sup>

10. The Pre-Trial Chamber notes that, pursuant to Article 9.1 of the Practice Direction on Classification, documents can be reclassified only pursuant to an order of the Co-Investigating Judges or a Chamber, as appropriate. Pursuant to Article 3.12 of the Practice Direction on Filing, “[u]ntil 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.” Article 3.14 of the Practice Direction on Filing further provides that a Chamber seized of a case may reclassify documents “[w]hen required in the interests of justice”. The Pre-Trial Chamber thereby considers that it has primary jurisdiction<sup>17</sup> to decide on the Request for Reclassification and finds it admissible.

#### IV. MERITS

##### A. Submissions

11. The International Co-Prosecutor contends that the total redaction of the reasoning of the substance of the charges against IM Chaem is inadequate to overcome the normative imperative of full public access.<sup>18</sup> Considering the strong public and international interest in the “multi-year” investigation, the extensive redactions may lead to public misunderstanding of the findings and conclusions in the Closing Order (Reasons).<sup>19</sup> He therefore requests the Impugned Decision be reclassified as public, as well as his Appeal and any response, with any appropriate witness redactions.<sup>20</sup>

12. First, the International Co-Prosecutor submits that the overriding principle before the ECCC is maximum transparency, with the limited exception of Internal Rule 56 while the investigations are being conducted.<sup>21</sup> As the Internal Rules do not explicitly prescribe or

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<sup>16</sup> Appeal, para. 2.

<sup>17</sup> Case No. 003/07-09-2009-ECCC/OCIJ (“Case 003”) (PTC24), Decision on MEAS Muth’s Request to Reclassify as Public Certain Defense Submissions to the Pre-Trial Chamber, 19 February 2016, D147/1, para. 5.

<sup>18</sup> Appeal, para. 16.

<sup>19</sup> Appeal, paras 14-17.

<sup>20</sup> Appeal, para. 64.

<sup>21</sup> Appeal, paras 20-21.



prohibit the publicity of closing orders,<sup>22</sup> consideration has to be given to the strong general preference for transparency expressed in Article 12(2) of the Agreement, as well as in Internal Rules 21(1) and 21(1)(c), 29(4)(e), 79(6), 109(1), 79(6)(d) and 102,<sup>23</sup> the jurisprudence of the Pre-Trial Chamber<sup>24</sup> and that of the Supreme Court Chamber.<sup>25</sup> In addition, the cited Articles 83(4) and 121(5) of the Cambodian Code of Criminal Procedure, as well as references to the cited sections of the German (Section 353d), Swiss (Article 293) and French (Article 226-13) Criminal Codes concern breaches of confidentiality orders during the investigation and not the public release of closing orders once the investigations have concluded.<sup>26</sup> The International Co-Prosecutor further refers to international law, including Article 14 of the International Covenant on Civil and Political Rights (“International Covenant”), Article 6(1) of the European Convention on Human Rights, as well as the statutes, rules and case law of other international and internationalised tribunals, before which transparency is “vital” to building public confidence and establishing a historical record.<sup>27</sup>

13. Secondly, the International Co-Prosecutor contends that the Co-Investigating Judges failed to provide meritorious reasons for their redactions,<sup>28</sup> limiting their sole explanation to two press releases explaining the redactions by the peculiar nature of the Closing Order as a dismissal and by IM Chaem’s presumption of innocence and right to privacy.<sup>29</sup>

14. The International Co-Prosecutor finally submits that the Internal Rules and the presumption of innocence neither require that all evidence regarding alleged crimes be kept

<sup>22</sup> Appeal, para. 24.

<sup>23</sup> Appeal, paras 24-30.

<sup>24</sup> Appeal, para. 28 referring to Case No. 004/07-09-2009-ECCC/OCIJ (“Case 004”), Considerations on IM Chaem’s Appeal Against the International Co-Investigating Judge’s Decision to Charge Her *In Absentia*, Opinion of Judges BEAUVALLET and BWANA, 1 March 2016, D239/1/8, paras 2-4.

<sup>25</sup> Appeal, paras 31-32 referring to Case No. 001/18-07-2007-ECCC/SC (“Case 001”), Decision on Guidelines for Reclassification of Documents on Case File, 26 July 2012, F30/2, paras 5-6; Case 001, Appeal Judgement, 3 February 2012, F28, para. 708.

<sup>26</sup> Appeal, para. 47 referring to Closing Order (Reasons), para. 16; Appeal, paras 48-51 referring to Closing Order (Reasons), para. 16 and footnote 20.

<sup>27</sup> Appeal, paras 33-42.

<sup>28</sup> Appeal, paras 43-46.

<sup>29</sup> Appeal, paras 44-45 referring to ECCC Press Release, “Co-Investigating Judges Dismiss Case Against IM Chaem”, 22 February 2017; ECCC Press Release, “Co-Investigating Judges Issue Reasons for Dismissal of Case 004/01”, 10 July 2017.



from the public throughout the trial,<sup>30</sup> nor provide for an inherent right to withhold information from the public in order to protect the reputation of a suspect.<sup>31</sup> In addition, IM Chaem is already known by the public as a person charged with crimes against humanity before the ECCC,<sup>32</sup> including *via* her own Co-Lawyers' statements.<sup>33</sup>

15. The Co-Lawyers respond that the International Co-Prosecutor failed to apply the correct standard of appellate review and to identify any ground of appeal or error of law and/or fact, instead seeking reconsideration of the Impugned Decision.<sup>34</sup> The Co-Lawyers contend that the confidentiality of investigations is the norm.<sup>35</sup> Domestic civil law systems also support a cautious approach to the confidentiality of investigations, which continues to apply with the conclusion of an investigation, formally ending after the Pre-Trial Chamber has ruled on any appeal.<sup>36</sup> During an investigation, the public does not have a right to be informed of the outcome of a case, and the ECCC has no role in the establishment of a historical record.<sup>37</sup>

16. The Co-Lawyers consider that, in the absence of any opportunity to challenge the allegations in the Closing Order (Reasons) due to its particular nature,<sup>38</sup> IM Chaem's privacy and reputation should be given enhanced protection due to the media scrutiny she is likely to face.<sup>39</sup> Finally, considering the Co-Investigating Judges' lack of jurisdiction, the Co-Lawyers contend that all findings related to the allegations were taken *ultra vires*, thus requiring their redaction,<sup>40</sup> and request amendments to the public version of the Closing Order (Reasons).<sup>41</sup> The Co-Lawyers thus ask the Pre-Trial Chamber to dismiss the Appeal but to grant the Request for Reclassification of the Impugned Decision, of the Appeal and of their Response, and to grant their request for amendments to the public redacted version of the Closing Order

<sup>30</sup> Appeal, paras 52-62.

<sup>31</sup> Appeal, para. 54.

<sup>32</sup> Appeal, paras 55-59.

<sup>33</sup> Appeal, para. 17 *referring to* Phnom Penh Post, "IM Chaem Defence Lauds Decision", 13 July 2017.

<sup>34</sup> Response, paras 22-24.

<sup>35</sup> Response, paras 31-32.

<sup>36</sup> Response, paras 35, 38-39.

<sup>37</sup> Response, paras 31-34.

<sup>38</sup> Response, paras 46.

<sup>39</sup> Response, paras 53-58.

<sup>40</sup> Response, paras 63-66.

<sup>41</sup> Response, paras 68-69.



(Reasons).<sup>42</sup>

17. The International Co-Prosecutor reiterates in his Reply that confidentiality is necessary only during the investigation and is no longer applicable at the time of the Closing Order.<sup>43</sup> He also submits that IM Chaem's presumption of innocence would not be infringed by the disclosure of the full Closing Order (Reasons)<sup>44</sup> and that her fear of a trial by media and the criticism likely to be directed towards ECCC officials are speculation. In any case, information should not be withheld from the public for fear of criticism.<sup>45</sup> Finally, the International Co-Prosecutor argues that the Co-Lawyers' request to amend the redactions constitutes an untimely attempt to appeal the Co-Investigating Judges' determination as to redactions.<sup>46</sup>

## B. Discussion

18. The Pre-Trial Chamber is seised of the Appeal against the Impugned Decision, which found moot the International Co-Prosecutor's request to make public the full reasoning of the Closing Order (Reasons), and, alternatively, of the Request for Reclassification as public of the redacted part of the Closing Order (Reasons), the Impugned Decision, the Appeal and the Response.

### 1. Reclassification of the Closing Order (Reasons) or of Its Redacted Parts

19. The Pre-Trial Chamber notes that the Request for Reclassification of the Closing Order (Reasons) is the main relief requested by the International Co-Prosecutor<sup>47</sup> and will address it first. The full reclassification is not at stake since the Closing Order (Reasons) is already classified as public. Instead, the Request for Reclassification is seeking the reclassification of the redacted parts of the Closing Order (Reasons).

#### a. Publicity and Extent of the Redactions of the Closing Order (Reasons)

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<sup>42</sup> Response, p. 26.

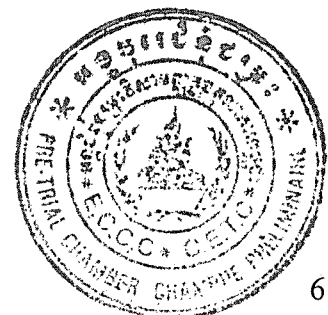
<sup>43</sup> Reply, paras 3-4, 9.

<sup>44</sup> Reply, para. 12.

<sup>45</sup> Reply, paras 13-14.

<sup>46</sup> Reply, paras 18-21.

<sup>47</sup> Appeal, para. 66.



20. The International Co-Prosecutor challenges the extent of the redactions in the Closing Order (Reasons), claiming that almost half of it is redacted in the public version, including all of the assessment of the substantive crimes and citations to written records of interviews, including those given by Civil Parties.<sup>48</sup>

21. The Pre-Trial Chamber recalls that Internal Rule 21(1) provides for an interpretation of the ECCC rules and regulations in favour of the interests of the charged persons and the victims, as well as the transparency of proceedings. Article 12.2 of the Agreement further emphasises the importance of publicity by granting access to the proceedings “at all times” to “the media” and “national and international non-governmental organizations”. Any exception to the publicity of proceedings must be in accordance with Article 14 of the International Covenant, “to the extent strictly necessary in the opinion of the Chamber concerned and where publicity would prejudice the interests of justice”.<sup>49</sup> Neither the exceptions to the principle of public trials set forth in Article 14 of the International Covenant,<sup>50</sup> nor the reasons put forth by the Co-Investigating Judges, provide for limitations to the publicity of a closing order.

22. The Pre-Trial Chamber further recalls that decisions, orders and other findings of the Co-Investigating Judges are confidential.<sup>51</sup> The Pre-Trial Chamber may reclassify those documents as public, if necessary with redactions.<sup>52</sup> Article 3.12 of the Practice Direction on Filing provides that, “[u]ntil 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.”

23. This being said, neither the Internal Rules nor other ECCC regulations provide

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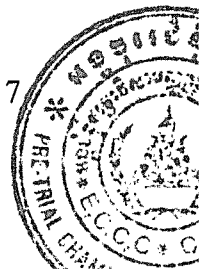
<sup>48</sup> Appeal, para. 7.

<sup>49</sup> Agreement Between the United Nations and the Royal Government of Cambodia, art. 12.2.

<sup>50</sup> International Covenant on Civil and Political Rights, 16 December 1996, art. 14.

<sup>51</sup> Practice Direction on the Classification and Management of Case-Related Information, ECCC/004/2009/Rev.2 (“Practice Direction on Classification”), art. 5.1.f.

<sup>52</sup> Practice Direction on Classification, art. 4.f, 9.2 and 9.3.





specific guidance as to the classification of a closing order<sup>53</sup> or the extent of any redaction.

24. The Pre-Trial Chamber thus finds it useful to refer to the scope of the redactions in previous closing orders. The Closing Order in Case 001 included 171 paragraphs, distributed within 45 pages. The redacted parts of the public version were limited to the footnotes and the witnesses' and victims' names in the body of the text. Those were respectively replaced by the words "Witness" or "Person" followed by identification letters.<sup>54</sup> The Closing Order in Case 002 was 739 pages and 1,624 paragraphs long. Out of these 1,624 paragraphs, 164 were sparsely redacted in the public version. More precisely, 402 redactions were made, with over 71 percent of the redacted paragraphs comprising only one to two redactions, each corresponding to a maximum of one or two words. A review of the footnotes shows that the Co-Investigating Judges seem to have chosen to redact the identity of witnesses. A typical reference would thus comprise the document number and a generic presentation of the nature of the evidence, such as "Written Record of Interview of Witness".<sup>55</sup>

25. Two remarks can be made regarding the scope of the redactions in the previous closing orders. First, the redactions in the public versions were limited to the names of individuals interviewed as witnesses, both in the text and footnotes. Second, factual or legal findings were systematically excluded from the scope of the redactions and made public, even though the Closing Orders in Cases 001 and 002 were both subjected to an appeal.

26. The Pre-Trial Chamber observes, in comparison, that the Closing Order (Reasons) in Case 004/1 was widely redacted. The public version amounts to 82 pages, while the confidential version is 132 pages long. Redactions cover not only 17 pages of the body of the public version, but also almost two full pages of titles,<sup>56</sup> many names and a considerable amount of references. More significantly, the chapter related to the ECCC's jurisdiction over IM Chaem is fully blacked out.<sup>57</sup> In other words, the reasons why the Co-Investigating Judges found they had no personal jurisdiction over IM Chaem are not public.

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<sup>53</sup> By contrast, *see* article 5 of the Practice Direction on Classification.

<sup>54</sup> Case 001, Closing Order Indicting Kaing Guek Eav alias Duch, 8 August 2008, D99 (public redacted version).

<sup>55</sup> Case No. 002/19-09-2007-ECCC/OCIJ ("Case 002"), Closing Order, 15 September 2010, D427 (public redacted version).

<sup>56</sup> Closing Order (Reasons), pp. 3-5.

<sup>57</sup> Closing Order (Reasons), paras 313-324.



b. Reclassification of the Closing Order (Reasons)

27. Article 1.2 of the Practice Direction on Classification provides that the principle underlying classification “is the need to balance the confidentiality of judicial investigations and of other parts of judicial proceedings which are not open to the public with the need to ensure transparency of public proceedings and to meet the purposes of education and legacy.”<sup>58</sup>

28. The Pre-Trial Chamber is aware of the necessity to balance the various interests at stake, including those of the charged person and of the victims, the transparency of the proceedings as enshrined in Internal Rule 21(1), and the interests of justice.

*i. Interests of the Charged Person*

29. Considering the specific nature of a dismissal order, the Co-Lawyers contend that the issuance of a public version of the Closing Order (Reasons) would infringe IM Chaem’s rights to the protection of her privacy and reputation, and her presumption of innocence, relying on, *inter alia*, Article 17 of the International Covenant.<sup>59</sup>

30. The Pre-Trial Chamber notes that neither the Agreement nor the Internal Rules refers to Article 17 of the International Covenant, which guarantees the protection of privacy, honour and reputation.<sup>60</sup> The Pre-Trial Chamber has already found that a charged person does not have “an ‘inherent right’ to integrity in the conduct of the investigations, to confidential investigation or to the protection of [his or her] reputation.”<sup>61</sup>

31. With regard to the protection of the presumption of innocence, the Pre-Trial Chamber recalls that a prior dismissal order was issued with the passing of a person not even charged,

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<sup>58</sup> Practice Direction on Classification, art. 1.2. *See also* Case 002 (PTC57), 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.

<sup>59</sup> Response, paras 46, 51, 59.

<sup>60</sup> International Covenant on Civil and Political Rights, 16 December 1996, art. 17 (“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”).

<sup>61</sup> Case 004 (PTC25), Decision on Appeal Against Order on AO An’s Responses D193/47, D193/49, D193/51, D193/53, D193/56 and D193/60, 31 March 2016, D284/1/4, para. 23.



but only suspected, and did not include any redaction of the substance but only of a few confidential footnotes.<sup>62</sup>

32. Incidentally, the Pre-Trial Chamber notes that the Co-Lawyers took the liberty to comment on the Closing Order (Reasons) to the press after its issuance.<sup>63</sup> More importantly, IM Chaem herself issued a number of public statements in interviews she gave to the press.<sup>64</sup>

33. In light of the foregoing, the Pre-Trial Chamber considers that the damage caused by a dismissal order to IM Chaem's right to be presumed innocent and to her reputation remains uncertain and hypothetical.

#### *ii. Interests of the Victims*

34. Pursuant to Internal Rule 21(1)(c), “[t]he ECCC shall ensure that victims are kept informed and that their rights are respected throughout the proceedings.” Internal Rule 29(1) further provides that “[t]he ECCC shall ensure the protection of Victims who participate in the proceedings, whether as complainants, or Civil Parties, and witnesses”, for which purpose protective measures are set out in Internal Rule 29(4).<sup>65</sup>

35. The Pre-Trial Chamber previously stressed the importance of informing the victims and considered that “due diligence displayed in the Co-Investigating Judge’s [*sic*] conduct is a relevant factor when considering victims’ rights in the proceedings.” It further held that, even though the “Co-Investigating Judges were bound by specific provisions of the Internal Rules on confidentiality of investigations and therefore were restricted in respect of information they could make public, [...] such specific provisions should, at all times, be read

<sup>62</sup> Case 003, Dismissal of Allegations Against SOU Met, 2 June 2015, D86/3.

<sup>63</sup> See Appeal, para. 17 referring to Phnom Penh Post, “IM Chaem Defence Lauds Decision”, 13 July 2017.

<sup>64</sup> See Appeal, para. 58 referring to New York Times, J. WALLACE, “The Bucolic Life of a Cambodian Grandmother Accused of Mass Killings”, 24 February 2017.

<sup>65</sup> Internal Rule 29(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; 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.”).



in conjunction with the provisions on the fundamental principles of procedure before the ECCC which require that ‘victims are kept informed and that their rights are respected throughout the proceedings.’”<sup>66</sup>

*iii. Transparency of Proceedings and the Interests of Justice*

36. The Pre-Trial Chamber recalls that the investigation remains confidential until its conclusion in order to protect its integrity and the interests of the parties.<sup>67</sup> These interests should be balanced with the necessity to “ensure legal certainty and transparency of proceedings”.<sup>68</sup>

37. As held above, the Internal Rules and Article 14 of the International Covenant do not provide for limitations on the publicity of a closing order.<sup>69</sup> In their press release, the Co-Investigating Judges stated that the publicity and transparency of the proceedings are more important in the case of a confirmation of charges or indictment than in the case of a dismissal of charges.<sup>70</sup> The Pre-Trial Chamber rejects that contention. Assuming *arguendo* that the nature of the decision can be considered in the determination of the document’s classification, the content of the decision and its impact on the interests at stake are nevertheless more relevant factors in this assessment. The transparency of the proceedings cannot be guaranteed without making public, when the investigation is closed, the main contents and the key reasoning of the final decision. It would be inconsistent with the mandate of the ECCC and generally with the interests of justice.

*iv. Necessary Redactions Pursuant to Internal Rule 29(3)*

38. In the present case, the names of individuals covered by protective measures pursuant to Internal Rule 29(3) must remain protected and out of the public domain. The

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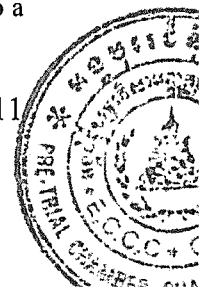
<sup>66</sup> Case 002 (PTC73-PTC171), Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, D404/2/4, paras 51-52 (footnotes and emphasis omitted).

<sup>67</sup> Internal Rule 56. *See supra* para. 22.

<sup>68</sup> Internal Rule 21(1).

<sup>69</sup> *See supra* para. 21.

<sup>70</sup> ECCC Press Release, “Co-Investigating Judges Issue Reasons for Dismissal of Case 004/01”, 10 July 2017 (“[...] even more than in the case of an indictment, when these rights also apply but may have to give way to a greater extent to the need to keep the public adequately informed of procedural developments.”).



Witnesses/Experts Support Unit informed the Pre-Trial Chamber that 14 victims' requests for protective measures are pending in Case 004/1,<sup>71</sup> which must be taken into consideration until the matter is resolved. The Co-Investigating Judges further provided lists of individuals covered by protective measures in Case 004/1.<sup>72</sup>

*v. Conclusion*

39. The Pre-Trial Chamber finds that a public closing order is the appropriate way to contribute to the transparency of justice, the legacy of the ECCC and to the fundamental objectives of education and the pursuit of justice.<sup>73</sup> In line with the Co-Investigating Judges' practice, the Pre-Trial Chamber considers it necessary to limit the redactions in the Closing Order (Reasons) to the names and addresses of individuals under protective measures pursuant to Internal Rule 29(3), or whose request for such measures is still pending.

40. The Pre-Trial Chamber thus grants the Request for Reclassification of the Closing Order (Reasons) and declares the Appeal moot.

**2. Reclassification of the Impugned Order and Related Submissions**

41. The Pre-Trial Chamber notes that both the International Co-Prosecutor and the Co-Lawyers agree with the Request for Reclassification as public of the Impugned Decision and submissions related to the Appeal.<sup>74</sup> For the same reasons as above, the Pre-Trial Chamber considers it appropriate to reclassify as public the Impugned Order, the Appeal, the Response and the Reply, subject to limited redactions of the names and addresses of individuals under protective measures pursuant to Internal Rule 29(3), or whose request for such measures is still pending.

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

- **GRANTS** the Request for Reclassification;

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<sup>71</sup> See WESU Memorandum and Annex D309/2/1/5/1.2.

<sup>72</sup> See OCIJ Memorandum and Annex D309/2/1/6/1.2.

<sup>73</sup> Agreement between the United Nations and the Royal Government of Cambodia, para. 2.

<sup>74</sup> Appeal, paras 2, 64, 66; Response, para. 4 and p. 26.



- **DECLARES** the Appeal moot;
- **ORDERS** the Office of the Co-Investigating Judges to issue, within seven days from the notification of the present decision, a public version of the Closing Order (Reasons) (D308/3);
- **ORDERS** the Office of the Co-Investigating Judges to issue, within seven days from the notification of the present decision, a public version of the Impugned Decision (D309/2);
- **INSTRUCTS** the Office of the Co-Investigating Judges to redact the names and addresses of individuals covered by protective measures pursuant to Internal Rule 29(3), or whose request for such measures is still pending;
- **ORDERS** the International Co-Prosecutor to file, within seven days from the notification of the present decision, a public version of his Appeal (D309/2/1/2) and Reply (D309/2/1/4);
- **ORDERS** the Co-Lawyers to file, within seven days from the notification of the present decision, a public version of their Response (D309/2/1/3);
- **INSTRUCTS** the International Co-Prosecutor and the Co-Lawyers to redact the names and addresses of individuals covered by protective measures pursuant to Internal Rule 29(3), or whose request for such measures is still pending.

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