

BEFORE THE PRE-TRIAL CHAMBER**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 004/1/07-09-2009-ECCC/OCIJ (PTC49) **Party Filing:** The Defence for IM Chaem**Filed to:** The Pre-Trial Chamber**Original language:** English**Date of document:** 4 September 2017**CLASSIFICATION****Classification of the document suggested by the filing party:** Public**Classification by OCIJ or Chamber:** សាធារណៈ/Public**Classification Status:****Review of Interim Classification:****Records Officer Name:****Signature:**

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

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I. INTRODUCTION

1. Ms. IM Chaem, through her Co-Lawyers (“the Defence”), hereby responds to the *International Co-Prosecutor’s Appeal of Decision on Closing Order (Reasons) Redaction or, alternatively, Request for Reclassification of Closing Order (Reasons)* (“Appeal”).¹

Summary of the Appeal

2. In the Appeal, the International Co-Prosecutor requests the Pre-Trial Chamber to i) reclassify as public the Co-Investigating Judges’ *Decision on International Co-Prosecutor’s Request for Closing Order Reasons and CIJ’s Decision to be Made Public* (“Impugned Decision”),² and ii) reverse the Impugned Decision and reclassify the Closing Order (Reasons) as public, subject only to necessary redactions concerning protective measures for victims and witnesses.³
3. In support of this request, the International Co-Prosecutor contends that the Co-Investigating Judges have failed to substantiate the reasons for overriding the public interest in accessing the full reasoning on the Closing Order (Reasons) and that no plausible reasons exist to justify this decision. More specifically, the International Co-Prosecutor submits that: i) the relevant law and principles require the publication of the full Closing Order (Reasons);⁴ and ii) the Co-Investigating Judges have failed to provide meritorious reasons for their redactions.⁵

Summary of the Response

4. Pursuant to the request by the International Co-Prosecutor, the Defence does not oppose the reclassification as public of the Impugned Decision, the Appeal, and this Response, albeit with the necessary redactions.⁶

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**.

² Appeal, para. 66 a.

³ Appeal, paras. 63, 66 b.

⁴ Appeal, paras. 19-42.

⁵ Appeal, paras. 43-62.

⁶ Appeal, paras. 2, 64, 66 a.

5. However, the Defence submits that the remainder of the Appeal should be dismissed because:
- (i) The International Co-Prosecutor fails to apply the correct appellate standard of review, namely to identify the alleged errors of law and/or fact that amount to an abuse of discretion requiring the Pre-Trial Chamber's intervention;
 - (ii) The current redactions in the Closing Order (Reasons) do not infringe upon any public interest allowing access to the Co-Investigating Judges' reasoning;
 - (iii) The singular nature of a Dismissal Order requires a level of redactions commensurate with those currently in place;
 - (iv) Removal of the redactions in the Closing Order (Reasons) would violate Ms. IM Chaem's right to private life and the presumption of innocence; and
 - (v) All *ultra vires* findings in the Closing Order (Reasons) should remain redacted.
6. Finally, to ensure the consistent application of the critical considerations taken into account by the Co-Investigating Judges when applying the redactions, the Defence requests minor amendments be made to the current redactions in the Closing Order (Reasons).

II. RELEVANT BACKGROUND

7. On 22 February 2017, the Co-Investigating Judges issued the dispositive part of the Closing Order in Case 004/1 dismissing all charges against Ms. IM Chaem, with full reasons to follow.⁷ In the related press release, the Co-Investigating Judges indicated that they would publish the main legal findings.⁸
8. On 7 March 2017, the International Co-Prosecutor requested the publication of, *inter alia*, the full reasons underlying the Dismissal Order in Case 004/1, including those relevant to the substance of the charges against Ms. IM Chaem.⁹ On 20 March 2017, the Defence submitted

⁷ Closing Order (Disposition), 22 February 2017, **D308**.

⁸ 'Co-Investigating Judges Dismiss Case Against IM Chaem', 22 February 2017, available at: <https://www.eccc.gov.kh/en/articles/co-investigating-judges-dismiss-case-against-im-chaem>.

⁹ International Co-Prosecutor's Request for Closing Order Reasons and CIJ's Decision to be made Public, 7 March 2017, **D309** ("Request for Publication"), paras. 1-8, 10.

that, prior to the issuance of the full reasons for the Dismissal Order, the Request for Publication, was premature and should be denied at this stage.¹⁰

9. On 10 July 2017, the Co-Investigating Judges issued the full reasons of the Closing Order in Case 004/1 and dismissed all charges against Ms. IM Chaem.¹¹
10. On the same day, a public redacted version of the Closing Order (Reasons) was filed in “the interests of completeness of information on the public record in relation to the dismissal of charges against [Ms. IM] Chaem”¹² and the International Co-Prosecutor’s Request for Publication was subsequently found moot.¹³
11. On 13 July 2017, the International Co-Prosecutor filed a Notice of Appeal against the Decision on International Co-Prosecutor’s Request for Closing Order Reasons and CIJ’s Decision to Be Made Public.¹⁴ On 9 August 2017, the Appeal was filed in English.¹⁵ On 24 August 2017, the parties were notified of the filing of the Appeal in Khmer.

III. APPLICABLE LAW

A. ON THE CONFIDENTIALITY OF THE JUDICIAL INVESTIGATION

12. Internal Rule 56(1) provides that the judicial investigation shall not be conducted in public, and all persons participating in the judicial investigation shall maintain confidentiality. However, pursuant to Internal Rule 56(2), the Co-Investigating Judges may issue information regarding a case under judicial investigation as they determine essential to keep the public informed, or limited access to judicial information to the media and other non-parties to the proceedings.

¹⁰ IM Chaem’s Response to the International Co-Prosecutor’s Request for Closing Order Reasons and CIJ’s Decision to be made Public (D309), 20 March 2017, **D309/1**.

¹¹ Closing Order (Reasons), 10 July 2017, **D308/3** (“Closing Order (Reasons)”).

¹² Order on the Issuance of a Public Redacted Version of the Closing Order (Disposition), 10 July 2017, **D312**, para. 3.

¹³ 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”), para. 20.

¹⁴ Appeal Register of the International Co-Prosecutor’s notice of Appeal against decision on request for closing order reasons to be public, 13 August 2017, **D309/2/1**.

¹⁵ Appeal.

B. ON THE RIGHT TO PRIVATE LIFE

13. Under Article 38 of the Cambodian Constitution, “[t]he law shall protect life, honor, and dignity of the citizens.”¹⁶
14. Internal Rule 21 safeguards the interests of a charged person when interpreting provisions applicable at the ECCC.¹⁷
15. Article 17 of the International Covenant on Civil and Political Rights (“ICCPR”),¹⁸ applicable before the ECCC,¹⁹ provides:
1. No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.
 2. Everyone has the right to the protection of the law against such interference or attacks.

C. ON THE PUBLICATION OF CONFIDENTIAL FILINGS

16. Article 9.1 of the Practice Direction on the Classification and Management of Case-Related Information provides the following rule regarding reclassification:
- 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.
17. Article 1.2 of the Practice Direction on Classification and Management of Case-Related Information before the ECCC provides:
- 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.

¹⁶ The Constitution of the Kingdom of Cambodia (adopted 21 September 1993), Art. 38.

¹⁷ Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (Rev. 9), 12 June 2007 (as amended on 16 January 2015) (“Internal Rules”), Rule 21(1).

¹⁸ International Covenant on Civil and Political Rights, adopted on 16 December 1966, entered into force on 23 March 1976, 999 UNTS 171, Art. 17.

¹⁹ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, 27 October 2004, Art. 33 new; Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, 6 June 2003, Art. 12(2).

18. Article 3.14 of the Practice Direction on Filing Documents before the ECCC states:

Where required in the interests of justice, Co-Investigating Judges or a Chamber seised of a case may re-classify any document on the case file. Affected parties will be given an opportunity to be heard either prior to such a decision being made, or during any period of a temporary re-classification that is necessary to protect information that may be confidential or strictly confidential. In any event, parties to the case will be notified of any temporary re-classifications and of any decisions on re-classification.

D. ON THE REDACTION OF SUBMISSIONS

19. Article 9 of the Practice Direction on the Classification and Management of Case-Related Information provides the following rules regarding the redaction of reclassified submissions:

9.2. A public version of a confidential or strictly confidential document may be created for the purposes of placement in the public section of the case file, on instruction of the Co-Investigating Judges or a Chamber, as appropriate. The public version will be produced by:

- a. creating a copy of the original document
- b. redacting from the copy all confidential and strictly confidential information, as applicable, and
- c. submitting the redacted version to the Co-Investigating Judges or the Chamber for review and approval, prior to its placement in the public section of the case file.

A confidential version of a strictly confidential document may be created in a similar manner.

9.3. If a public version of a confidential or strictly confidential document is to be prepared at the request of a party, any redactions shall be undertaken by the requesting party and submitted for approval in accordance with Article 9.2.(c).

20. Article 3(1)(d) of the Practice Directions on Protective Measures requires all other information that could potentially identify the protected person or other information which would permit his or her identification or location to be redacted from the record.

IV. RESPONSE

21. The Defence agrees that there is a degree of public interest in Case 004/1.²⁰ However, contrary to the underlying premise of the Appeal, this may only be served through a careful and calibrated approach to transparency that also respects the compelling need to maintain

²⁰ Appeal, para. 14.

confidentiality of the investigation, the presumption of innocence and Ms. IM Chaem's right to privacy and reputation. In the Appeal, the International Co-Prosecutor appears to disregard these essential considerations, ignoring the need to ensure a balanced approach to these interests, as well as the threshold for review of the Impugned Decision. In sum, the Defence submits that the Appeal should be dismissed because:

- (i) The International Co-Prosecutor fails to apply the appellate standard of review; to identify how the alleged errors of law and/or fact amount to an abuse of discretion requiring the Pre-Trial Chamber's intervention;
- (ii) The current redactions in the Closing Order (Reasons) do not infringe upon any public interest allowing access to the Co-Investigating Judges' reasoning;
- (iii) The singular nature of a Dismissal Order requires a level of redactions commensurate with those ordered;
- (iv) A lesser degree of redactions would infringe Ms. IM Chaem's right to private life and the presumption of innocence; and
- (v) All findings not essential to determination of personal jurisdiction are *ultra vires* and should remain redacted.

A. THE INTERNATIONAL CO-PROSECUTOR FAILS TO APPLY THE CORRECT STANDARD OF REVIEW

22. In the Appeal, the International Co-Prosecutor fails to identify *any* ground of appeal and *any* error of law and/or fact. The Appeal lacks the specificity required to sufficiently identify the issues in dispute by reference to specific findings. It deprives the Defence of a reasonable opportunity to respond with specificity.²¹ It should therefore be dismissed.

²¹ See, Case of *KAING Guek Eav alias Duch*, 001/18-07-2007-ECCC/SC, Judgement, 3 February 2012, **F28**, para. 41 [“These provisions require the parties to an appeal to plead their case with adequate specificity to enable the Supreme Court Chamber to identify the issues in dispute by reference to specific findings of the Trial Chamber. They are aimed not only at ensuring procedural efficiency, but also that each party knows the arguments it may respond to. As the ICTY has observed in relation to comparable provisions in its rules of procedure, an appellate court ‘cannot be expected to consider a party’s submissions in detail if they are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies.’ As a general rule, an appellant is required to identify the portions of the transcript under challenge, to identify with a reasonable degree of precision the

23. It appears from a purposive reading of the collection of concerns outlined in the Appeal that, rather than seeking a reversal of the Impugned Decision, the International Co-Prosecutor seeks reconsideration of the Impugned Decision and of the redactions applied to the Closing Order (Reasons).²² This is not permissible. An appeal may not be used as a Trojan horse to request reconsideration of an unfavorable or unwanted decision. Instead, it must rest solely upon the correct appellate standard with a precise enunciation of the alleged errors of law and/or fact and how they amount to an abuse of discretion requiring the Pre-Trial Chamber's intervention.
24. The Impugned Decision and the redactions are decisions of a discretionary nature. The proper standard of review to be applied in this case rests upon a showing of an abuse of discretion. Internal Rule 56(2) permits the Co-Investigating Judges to publically issue information about a case.²³ However, they exercise discretion in doing so. In this respect, the Pre-Trial Chamber has stated on many occasions:

[T]he ECCC legal framework, particularly under Internal Rule 56, gives a broad

submissions addressed to the Trial Chamber on the point, and to set out clearly and transparently the grounds of appeal against the decision and the principal arguments in support. Where a party's pleadings are incoherent, or fail to set out the substance of any ground of appeal with sufficient particularity to enable the Supreme Court Chamber to identify the issues in dispute, they may be declared inadmissible as being procedurally defective." (references omitted)].

²² See, *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC03), Decision on Application for Reconsideration of Civil party's Right to Address Pre-Trial Chamber in Person, 28 August 2008, **C22/I/68**, para. 25 ["The Application for Reconsideration may only succeed if there is a legitimate basis for the Pre-Trial Chamber to reconsider its previous decisions. The Appeals Chamber of the ICTY has held that a Chamber may 'always reconsider a decision it has previously made, not only because of a change of circumstances but also where it is realised that the previous decision was erroneous or that it has caused an injustice.' This has been described as an inherent power and is particularly important for a judicial body of last resort like the Pre-Trial Chamber. A change of circumstances may include new facts or arguments. The standard for reconsideration has also been described as follows: 'a Chamber has inherent discretionary power to reconsider a previous interlocutory decision in exceptional cases 'if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice.'"] (references omitted)], available at: https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/C22_I_68_EN_0.pdf.

²³ Internal Rules, Rule 56(2) ["However, the Co-Investigating Judges, may: a) jointly through the Public Affairs Section, issue such information regarding a case under judicial investigation as they deem essential to keep the public informed of the proceedings, or to rectify any false or misleading information; and b) jointly grant limited access to the judicial investigation to the media or other non-parties in exceptional circumstances, under their strict control and after seeking observations from the parties to the proceedings. The non-respect of any conditions that the Co-Investigating Judges may impose shall be dealt with in accordance with Rules 35 to 38."].

discretion to the Co-Investigating Judges in handling confidentiality issues and granting limited access to the judicial investigations.²⁴

25. The Co-Investigating Judges have further emphasised that “[t]he disclosure of confidential portions of the investigations to subjects who are not parties to Case 004 falls within the purview of the Co-Investigating Judges’ discretion.”²⁵ There can be no doubt that the Co-Investigating Judges enjoy the broadest discretion in granting access to judicial investigations, deciding whether a public version of a closing order should be issued, and what redactions to apply.
26. The Pre-Trial Chamber has stated that not every error of law or fact will lead the Pre-Trial Chamber to set aside a discretionary decision of the Co-Investigating Judges.²⁶ To warrant appellate intervention, an error must have been *fundamentally determinative* of the exercise of the Co-Investigating Judges’ discretion.²⁷ Moreover, the onus is on the Appellant to demonstrate that: i) the error of law invalidates the decision; ii) the error of fact occasions a miscarriage of justice; or iii) that the decision or order is so unreasonable as to force the conclusion that the Co-Investigating Judges failed to exercise discretion judiciously.²⁸
27. Therefore, without a showing of an abuse of discretion, the Impugned Decision must stand. The International Co-Prosecutor’s failure to argue an abuse of discretion is fatal and should lead to a dismissal of the Appeal.

²⁴ See, e.g., *Case of AO An*, 004/2/07-09-2009-ECCC/OCIJ (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; *Case of YIM Tith*, 004/07-09-2009-ECCC/OCIJ (PTC26), Decision on International Co-Prosecutor’s Appeal Concerning Testimony At Trial in Closed Sessions, 20 July 2016, **D309/6**, para. 20.

²⁵ *Case of YIM Tith*, 004/07-09-2009-ECCC/OCIJ, Decision on the International Co-Prosecutor’s Request to Disclose Case 004 Interviews relevant to Case 002/02, 8 May 2014, **D193/1**, para. 10.

²⁶ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC62), Decision on the Ieng Thirith Defence Appeals against ‘Order on Requests for Investigative Action by the Defence for Ieng Thirith’ of 15 March 2010, 14 June 2010, **D353/2/3**, para. 8; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC64), Decision on IENG Sary’s Appeal against Co-Investigating Judges’ Order Denying Request to Allow Audio/Video Recording of Meetings with IENG Sary at the Detention Facility, 11 June 2010, **A371/2/12**, para. 22.

²⁷ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC62), Decision on the Ieng Thirith Defence Appeals against ‘Order on Requests for Investigative Action by the Defence for Ieng Thirith’ of 15 March 2010, 14 June 2010, **D353/2/3**, para. 8.

²⁸ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC64), Decision on IENG Sary’s Appeal against Co-Investigating Judges’ Order Denying Request to Allow Audio/Video Recording of Meetings with IENG Sary at the Detention Facility, 11 June 2010, **A371/2/12**, para. 22.

28. Moreover, as argued below, the Impugned Decision and redactions of the Closing Order (Reasons) were based on a correct interpretation of the law and a reasonable application of the facts or was otherwise well within the margins of discretion. Whether seen alongside Ms. IM Chaem's right to be presumed innocent and privacy or alone, the redactions ordered are proportionate and sufficient to meet the demands of a public trial and commensurate with the importance of the various rights at stake.

B. THE PUBLIC REDACTED VERSION OF THE CLOSING ORDER (REASONS) DOES NOT INFRINGE UPON ANY PUBLIC INTEREST ALLOWING ACCESS TO THE CO-INVESTIGATING JUDGES' REASONING

29. The International Co-Prosecutor observes that "the public version of the document is heavily redacted so as to remove all discussion regarding the crimes that were committed and [Ms. IM] Chaem's responsibility".²⁹ Further, the International Co-Prosecutor contends that the law applicable at the ECCC supports public access to the *full* Closing Order (Reasons).³⁰ The Defence submits that this uncompromising assertion disregards the importance of maintaining the correct balance between the right of the public to be informed, the confidentiality of the investigation and the rights of the suspect. As described below at paragraphs 30 to 39, bearing in mind these competing interests, the Co-Investigating Judges' redactions were reasonable and proportionate. The International Co-Prosecutor has not argued or shown any abuse of discretion.

i. The public's demands for transparency do not equate to a general overriding claim to be informed

30. The International Co-Prosecutor argues that the redactions in the public version of the Closing Order (Reasons) infringe the right of victims to be informed³¹ and fail to comply with the demands for transparency.³² The International Co-Prosecutor further asserts that the requirement of transparency of the proceedings is the overriding principle restricted only by

²⁹ Appeal, para. 15. *See also*, Appeal, para. 14.

³⁰ Appeal, paras. 20-42.

³¹ Appeal, para. 15.

³² Appeal, paras. 23-42.

“a limited and reasonable exception” pursuant to Internal Rule 56 “mandating that during the period that investigations are being conducted, the norm is confidentiality.”³³

31. The Defence submits that the International Co-Prosecutor’s assertion is not supported by a reasonable view of the rules applicable at the ECCC or its prevailing jurisprudence. Indeed, the contrary is correct: the confidentiality of investigations is and remains the norm and public disclosure is the exception. Whilst the confidentiality of the judicial investigation is the primary principle at the pre-trial stage,³⁴ this must be balanced against the interests of justice³⁵ and the need to keep the public informed and educated about the proceedings.³⁶ In regard to the demands of transparency, the Supreme Court Chamber held:

[C]lassification of documents is to be determined by balancing the exigency of confidentiality with the demands of transparency deriving from the fundamental principles that govern the procedure before the ECCC, in light of this Court’s goals of education and legacy.³⁷

32. However, when striking a balance with the right of the public to be informed, the Co-Investigating Judges clearly stated that there was no generic claim for the media and the public to be informed:

Outside this framework [of scrutiny through appellate courts, disciplinary procedures, and a properly informed media], civil society, *the media and the public have no generic overriding claim to be informed beyond what the competent judges have decided is to be revealed.*³⁸

33. The same lack of generic claim applies to the victims. In the case of *Welke and Bialek v. Poland*, the European Court of Human Rights (“ECtHR”) confirms that judgements may be redacted in conformity with human rights standards.³⁹ The ECtHR noted that there is a

³³ Appeal, para. 20 (emphasis omitted).

³⁴ See, Internal Rule 56(1).

³⁵ See, Practice Direction on the Filing of Documents, Article 3.14.

³⁶ See, Practice Direction on the Classification and Management of Case-Related Information, Article 1.2.

³⁷ *Case of KAING Guek Eav alias Duch*, 001/18-07-2007-ECCC/SC, Decision on Guidelines for Reclassification of Documents on Case File, 26 July 2012, **F30/2**, para. 5.

³⁸ *Case of YIM Tith*, 004/07-09-2009/ECCC/OCIJ, Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004, and 004/2 and Related Submissions by the Defence for YIM Tith, 11 August 2017, **D355/9**, para. 13 (emphasis added).

³⁹ *Welke and Bialek v. Poland* (Application no. 15924/05), ECtHR, 1 March 2011, paras. 83-84 [attached as **Authority 1**].

“degree of flexibility” concerning the requirement that judgements must be pronounced publically: “the form of publicity ... must be assessed in light of the special features of the proceedings in question”.⁴⁰ The Court held that a public pronouncement that included the “operative parts” of a judgement was sufficient in the circumstances.⁴¹

34. Further, contrary to the International Co-Prosecutor’s underlying suggestion,⁴² the overarching goal of the ECCC does not encompass a ‘duty of history’ or a ‘duty of remembrance’ but only to prosecute those found to be “senior leaders” or “most responsible” for crimes falling within the jurisdiction of the ECCC. To support his allegation, the International Co-Prosecutor purports to refer to the International Co-Investigating Judge’s own writings to the effect that part of the mission of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) was to establish an “historical record of what occurred during the conflict there by preventing historical revisionism”.⁴³ First, these words are not those of the International Co-Investigating Judge but rather those of a lawyer, Michael Karnavas.⁴⁴ Second, the very next sentence proffers a contrary view:

Others, such as American Judge Patricia M. Wald, express a different viewpoint, and one that is more in line with the original intent of the founders of the ad hoc international tribunals. Having sat on the bench at the ICTY, Judge Wald noted:

‘Initially the Tribunal was urged to make detailed findings about the social and political etiology of events leading up to the atrocities on trial. ... However, commentators, citizens, and officers of the implicated countries increasingly suggested that the adversarial trial process and the findings of judges may not produce the best approximation of history. Moreover, the ‘adjudication’ by the ICTY of who started, prolonged, or ended the war and why in the context of

⁴⁰ *Welke and Bialek v. Poland* (Application no. 15924/05), ECtHR, 1 March 2011, para. 83.

⁴¹ *Welke and Bialek v. Poland* (Application no. 15924/05), ECtHR, 1 March 2011, paras. 84-85.

⁴² Appeal, para. 42.

⁴³ Appeal, para. 42.

⁴⁴ M. Karnavas, *International Criminal Justice: A Critical Analysis of Institutions and Procedures*, Chapter 8: Gathering evidence in International Criminal Trials – The View of the Defence lawyer, edited by Michael Bohlander, Cameron May, 2007, p. 77 available at: https://books.google.fr/books?id=6K9MHONs9KcC&printsec=frontcover&hl=fr&source=gbs_atb#v=onepage&q&f=false.

criminal proceedings without the state themselves having input is basically unfair, or at least does not contribute to future reconciliation.⁴⁵

ii. Domestic legislation supports redactions when reclassifying confidential documents as public

35. The International Co-Prosecutor submits that the provisions cited by the Co-Investigating Judges – domestic civil law, i.e., Cambodian, French, Swiss and German criminal law, relating to the violation of the confidentiality of investigations – provide no support for either the Prosecution⁴⁶ or the Defence position. However, this assertion fails to appreciate the Co-Investigating Judge’s principal point, namely that these are illustrations that demonstrate the unremarkable nature of the Impugned Decision: “[s]imilar provisions regarding pre-trial publicity [as enacted in this case] also exist in other civil law jurisdictions, for example Germany, Switzerland, and France.”⁴⁷
36. Moreover, although not cited by the Co-Investigating Judges, Articles 177-1 and 212-2 of the French Code of Criminal Procedure are equally relevant. They permit the investigating judge to order the *partial* or full publication of a judicial decision or the insertion of a communiqué informing the public of the grounds and terms of the order or judgement.⁴⁸ This may be done

⁴⁵ M. Karnavas, *International Criminal Justice: A Critical Analysis of Institutions and Procedures*, Chapter 8: Gathering evidence in International Criminal Trials – The View of the Defence lawyer, edited by Michael Bohlander, Cameron May, 2007, pp. 77-78 available at: https://books.google.fr/books?id=6K9MHONs9KcC&printsec=frontcover&hl=fr&source=gbs_atb#v=onepage&q&f=false.

⁴⁶ Appeal, paras. 47-51.

⁴⁷ Impugned Decision, para. 16, fn. 20.

⁴⁸ French Code of Criminal Procedure, Article 177-1 [“Le juge d’instruction peut ordonner, sur la demande de la personne concernée ou, avec l’accord de cette personne, d’office ou à la demande du ministère public, soit la publication intégrale ou partielle de sa décision de non-lieu, soit l’insertion d’un communiqué informant le public des motifs et du dispositif de celle-ci, dans un ou plusieurs journaux, écrits périodiques ou services de communication au public par voie électronique qu’il désigne.” Unofficial translation: “At the request of the person concerned or with his agreement, or on his own motion, or at the request of the public prosecutor, the investigating judge may order either the partial or full publication of his discharge order, or the insertion of a communiqué informing the public of the grounds and enacting terms of the order in one or more newspapers, periodicals or electronic public communication services he chooses. Where appropriate, he determines which extracts from the decision will be published or fixes the wording of the communiqué to be inserted. If the judge does not grant the request of the person concerned he must provide a reasoned decision, which may be subject to appeal before the investigating chamber.”], Article 212-1 [“La chambre de l’instruction peut ordonner, sur la demande de la personne concernée, ou, avec l’accord de cette personne, d’office ou à la demande du ministère public soit la publication intégrale ou partielle de l’arrêt de non-lieu, soit l’insertion d’un communiqué informant

proprio motu or at the request of either the person concerned or the prosecution.⁴⁹ Similarly, the only two specific provisions under German law that oblige the full publication of the decision concern the issuance of a conviction, not a dismissal.⁵⁰ In the same vein, Swiss law also distinguishes the publication required in relation to dismissal orders:

Decisions to take no proceedings and summary penalty orders are deemed to be served without publication being required.⁵¹

37. In sum, contrary to the International Co-Prosecutor's assertion, examples from comparable or similar Civil Law systems support a cautious and carefully calibrated approach to confidential decisions or judgements, particularly those that concern dismissal orders.

iii. The confidentiality of the investigation does not cease to apply with the conclusion of the investigation

le public des motifs et du dispositif de celui-ci, dans un ou plusieurs journaux, écrits périodiques ou services de communication au public par voie électronique désignés par cette chambre.” Unofficial translation: “The investigating chamber may order, at the person concerned's request or with his assent, of its own motion or at the public prosecutor's request, either the partial or full publication of the discharge judgment, or the insertion of a communiqué informing the public of the grounds and terms of the judgment, in one or more newspapers, periodicals or electronic public communication services chosen by the chamber. As appropriate, it determines the extracts of the decision to be published or chooses the wording of the communiqué to be inserted. If the investigating chamber does not grant the person concerned's request, it must render a reasoned judgment.”] [attached as **Authority 2**].

⁴⁹ French Code of Criminal Procedure, Articles 177-1, 212-1.

⁵⁰ German Criminal Code, Section 165(1) [“Ist die Tat nach § 164 öffentlich oder durch Verbreiten von Schriften (§ 11 Abs. 3) begangen und wird ihretwegen auf Strafe erkannt, so ist auf Antrag des Verletzten anzuordnen, daß die Verurteilung wegen falscher Verdächtigung auf Verlangen öffentlich bekanntgemacht wird.” Unofficial translation: “If the offence under section 164 was committed publicly or through dissemination of written materials (section 11(3)) and if a sentence was imposed the court shall order, upon application of the victim, that the conviction for false accusation be publicly announced upon request.”], Section 200(1) [“Ist die Beleidigung öffentlich oder durch Verbreiten von Schriften (§ 11 Abs. 3) begangen und wird ihretwegen auf Strafe erkannt, so ist auf Antrag des Verletzten oder eines sonst zum Strafantrag Berechtigten anzuordnen, daß die Verurteilung wegen der Beleidigung auf Verlangen öffentlich bekanntgemacht wird.” Unofficial translation: “If the insult was committed publicly or through dissemination of written materials (section 11(3)) and if a penalty is imposed the court shall, upon application of the victim or a person otherwise entitled to file a request, order that the conviction be publicly announced upon request.”] [attached as **Authority 3**].

⁵¹ Swiss Code of Criminal Procedure, Article 88(4) [“Les ordonnances de classement et les ordonnances pénales sont réputées notifiées même en l'absence d'une publication.”] *See also*, Swiss Code of Criminal Procedure, Article 88(3) [“Seul le dispositif des prononcés de clôture est publié.” Unofficial translation: “In the case of final judgments, only the conclusions of the judgment shall be published.”] [attached as **Authority 4**].

38. The International Co-Prosecutor also alleges that Rule 56 of the Internal Rules was no longer applicable due to the completion of the investigation.⁵² To support this contention, the International Co-Prosecutor avers that all decisions from the Pre-Trial Chamber, the Trial Chamber and the Supreme Court Chamber and all trial proceedings are public and at the conclusion of the case any remaining confidential documents are reviewed for reclassification purposes.⁵³
39. However, 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.”⁵⁴ Moreover, the International Co-Prosecutor’s reliance on the fact that confidential documents are reviewed at the end of a case for reclassification purposes is puzzling.⁵⁵ The Co-Investigating Judges *have* reviewed the Closing Order (Reasons) and ruled on this issue. Seen in this light, the Appeal is nothing short of an attempt to ‘forum shop’ through a request to the Pre-Trial Chamber to revisit this issue and impose its own view over that of the Co-Investigating Judges.

C. THE SINGULAR NATURE OF A DISMISSAL ORDER WARRANTS THE CURRENT REDACTIONS

40. Contrary to the International Co-Prosecutor’s assertion,⁵⁶ the Co-Investigating Judges reasonably concluded that the singular nature of the Dismissal Order warranted a more restrictive approach to publication than the issuance of an indictment.
41. In a press release following the issuance of the Closing Order (Disposition), the Co-Investigating Judges stated:

Due to the nature of the closing order as a di[s]missal, the reasons for this decision, as far as they relate to the substance of the charges themselves, and the decision on the civil party applications shall remain confidential unless the

⁵² Appeal, paras. 21-24.

⁵³ Appeal, para. 22.

⁵⁴ Impugned Decision, para. 13.

⁵⁵ Appeal, para. 31.

⁵⁶ Appeal, paras. 44-45.

dismissal is overturned on appeal and a trial ordered by the Pre-Trial Chamber.⁵⁷

42. Later, following the issuance of the Closing Order (Reasons), the Co-Investigating Judges stated:

Due to the dismissal for lack of jurisdiction, IM Chaem continues to benefit from the presumption of innocence and the right to privacy, which restrict the contents that may be made public, *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.⁵⁸

43. The International Co-Prosecutor's submissions do not establish that this approach is flawed, let alone that it led to an abuse of discretion. The reliance on the jurisprudence of other international tribunals⁵⁹ ignores the discretionary nature of the Impugned Decision, the fundamental differences that exist between the approaches to the pre-trial stage at the international tribunals and at the ECCC, as well as the singular nature of a dismissal order.
44. If the jurisprudence from other international tribunals had to be relied upon, it was only to underline the case specificity of such decision.⁶⁰ There is nothing in the jurisprudence that detracts from the self-evident proposition that the presumption of innocence and the right to privacy may be more keenly engaged in the circumstances of a dismissal of a case; or the essential balancing exercise that any Chamber must conduct: namely to reasonably weigh all of the prevailing circumstances to safeguard important rights.⁶¹ As the Appeals Chamber of the International Criminal Court has acknowledged, decisions concerning redactions must be

⁵⁷ 'Co-Investigating Judges Dismiss Case Against IM Chaem', 22 February 2017, available at: <https://www.eccc.gov.kh/en/articles/co-investigating-judges-dismiss-case-against-im-chaem> (emphasis added).

⁵⁸ 'Co-Investigating Judges issue Reasons for Dismissal of Case 004/1', 10 July 2017, available at: <https://www.eccc.gov.kh/en/articles/co-investigating-judges-issue-reasons-dismissal-case-0041>.

⁵⁹ Appeal, paras. 35-39.

⁶⁰ Impugned Decision, para. 15 ["There may be a difference between the relatively lax common law approach to privacy rights of suspects ... and the more restrictive one in civil law jurisdictions. Cambodia belongs to the latter." In this regard, the Defence notes that the ICTY and ICTR are both courts of common law procedure. Further, contrary to the International Co-Prosecutor's assertion that the Special Tribunal for Lebanon is "based on a civil law model" (Appeal, para. 34), in fact "its procedural and evidentiary rules incorporate common law and civil law traditions". (Special Tribunal for Lebanon, 'Seventh Annual Report' (2015-2016), p. 6) [attached as **Authority 5**]].

⁶¹ Appeal, paras. 35-39.

made on “a case-by-case evaluation of the merits” in the particular circumstances.⁶² There is no ‘one size fits all’ approach to redactions and none that suggests that they may not be reasonable and proportionate steps to protect the interests of justice.

45. As such, the International Co-Prosecutor’s claim that “[e]ven if harm to reputation were a valid concern, however, in order to evaluate any harm ... one must necessarily consider the status of the individual’s reputation before the release”,⁶³ is wrong in principle and dangerous.
46. On the contrary, as a consequence of the singular nature of *this* Closing Order, rights to both privacy and reputation remain extant and at risk and in need of enhanced protection at this stage of the proceedings. Had the Closing Order led to an indictment, a public trial would have followed. Similarly, if the Pre-Trial Chamber reverses the Closing Order (Reasons) and Ms. IM Chaem is indicted and sent to trial, the Closing Order (Reasons) may be reclassified as public, albeit with some redactions.⁶⁴ Those issues currently redacted would be material issues for balanced scrutiny, argument and evidence. However, in circumstances where this scrutiny occurs outside the context of an adversarial trial, the resulting publicity is at large without any prospect of situating it in a fair and reasonable and ongoing context. Crucially, Ms. IM Chaem would be denied any meaningful opportunity to seek appropriate orders to ensure the protection of her rights to privacy, reputation and the presumption of innocence.⁶⁵
47. Accordingly, the reasoning of the Impugned Decision on the need for prior and proactive safeguarding of those rights is correct and consistent with both the singular nature of a dismissal order and the particularities of this case.⁶⁶ The particularities of this case will be further discussed below at paragraphs 48 to 67.

⁶² *The Prosecutor v. Thomas Lubanga Dyilo* (ICC-01/04-01/06-568), AC, Judgment on the Prosecutor’s appeal the decision of Pre-Trial Chamber I entitled “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence”, 13 October 2006, paras. 36, 39 [attached as **Authority 6**].

⁶³ Appeal, para. 55.

⁶⁴ ‘Co-Investigating Judges Dismiss Case Against IM Chaem’, 22 February 2017, available at: <https://www.eccc.gov.kh/en/articles/co-investigating-judges-dismiss-case-against-im-chaem> (emphasis added).

⁶⁵ See below at paragraphs 48 to 61.

⁶⁶ Appeal, para. 46.

D. LESS REDACTIONS IN THE CLOSING ORDER (REASONS) WOULD INFRINGE MS. IM CHAEM'S RIGHT TO PRIVATE LIFE AND PRESUMPTION OF INNOCENCE

48. In the press release following the issuance of the Closing Order (Reasons), the Co-Investigating Judges stated:

Due to the dismissal for lack of jurisdiction, *IM Chaem continues to benefit from the presumption of innocence and the right to privacy, which restrict the contents that may be made public*, 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.⁶⁷

49. Nonetheless, the International Co-Prosecutor contends that in order to evaluate the harm caused to Ms. IM Chaem's reputation, one must necessarily consider the status of the individual's reputation before the release,⁶⁸ i.e. the media attention this person has attracted. The International Co-Prosecutor further avers that granting public access to the reasoning of the substantive charges in the Closing Order (Reasons) will not compromise Ms. IM Chaem's right to a presumption of innocence because the presumption of innocence does not require that all evidence regarding a defendant's alleged crimes be kept from the public.⁶⁹

50. The International Co-Prosecutor's submissions fail to appreciate the extent of the human rights considerations that arose for protection and were carefully balanced by the Co-Investigating Judges.

51. Article 17 of the ICCPR protects against arbitrary interference with a person's right to privacy and family life.⁷⁰ As acknowledged by the International Co-Prosecutor,⁷¹ and as held by both the Pre-Trial Chamber and Human Rights Committee, the scope of protection

⁶⁷ 'Co-Investigating Judges issue Reasons for Dismissal of Case 004/1', 10 July 2017, available at: <https://www.eccc.gov.kh/en/articles/co-investigating-judges-issue-reasons-dismissal-case-0041> (emphasis added).

⁶⁸ Appeal, paras. 55-62.

⁶⁹ Appeal, paras. 52-58.

⁷⁰ ICCPR, Article 17.

⁷¹ Appeal, para. 60.

afforded by the prohibition on “arbitrary ... interference” will always depend on what is *reasonable* in the circumstances.⁷²

52. The Co-Investigating Judges were *obliged* to decide the extent to which disclosure and/or redaction of information was necessary and proportionate to protect this right and decided discretionarily to restrict the publication to the main legal findings.⁷³
53. The risks of a trial by media are significantly elevated at this stage of the case. Despite the fact that all charges have been dismissed, the Closing Order (Reasons) concludes that Ms. IM Chaem “could be criminally responsible” for serious crimes.⁷⁴ As provided by Article 14 of the ICCPR, the right to a fair trial, requires “[t]he media [to] avoid news coverage undermining the presumption of innocence.”⁷⁵ Although this requirement is primarily focused upon the conduct of the media, and not the decisions of courts, publication of a Judgement may lead to a violation of this right. In the circumstances prevailing at the ECCC, it was well within the reasonable exercise of the Co-International Judges’ discretion to conclude that the full publication of the Closing Order (Reasons) created an unacceptable risk that the media coverage of the Co-Investigating Judges drawing tentative conclusions implicating Ms. IM Chaem with potential responsibility for serious crime would undermine her right to be presumed innocent.
54. Indeed, media outlets painted a lurid narrative of Ms. IM Chaem’s involvement in criminal activity on the basis of a Closing Order (Disposition) that – unlike the Closing Order (Reasons) – did not contain conclusions concerning Ms. IM Chaem’s links to alleged crime.⁷⁶

⁷² *Case of MEAS Muth*, 003/07-09-2009-ECCC/OCIJ (PTC31), Decision on [Redacted] Appeal Against International Co-Investigating Judge’s Consolidated Decision on the International Co-Prosecutor’s Requests to Disclose Case 003 Documents into Case 002 (D100/25 and D100/29), 15 February 2007, **D100/32/1/7**, para. 19; General Comment 16 on Article 17 of the ICCPR, HRC, HRI/GEN/1/Rev.9 (Vol. I) (1988), para. 4 [attached as **Authority 7**].

⁷³ ‘Co-Investigating Judges Dismiss Case Against IM Chaem’, 22 February 2017, available at: <https://www.eccc.gov.kh/en/articles/co-investigating-judges-dismiss-case-against-im-chaem>.

⁷⁴ Closing Order (Reasons), para. 307.

⁷⁵ General Comment 32 on Article 14 of the ICCPR, HRC, CCPR/C/GC/32 (2007), para. 30 [attached as **Authority 8**].

⁷⁶ *See for example*, G Wright, *Khmer Rouge Official Suspected Of Mass Killings Off The Hook*, Cambodia Daily, 23 February 2017 [“Cambodian Investigating Judge You Bunleng and his international counterpart, Michael Bohlander, decided that Im Chaem’s alleged crimes - including overseeing mass killings of suspected traitors -

55. By their nature, these tentative findings that may be easily misunderstood or likely, misused. Not only are they likely to attract unwarranted and unjustified critique of the ECCC as a judicial body for ‘failing’ to pursue accountability for serious crimes, they provide a further basis for the mischievous or malicious to further vilify Ms. IM Chaem; and in circumstances where the underlying factual findings will likely not be tested in a public trial. It was not within the reasonable exercise of the Co-Investigating Judges’ discretion to disregard these manifest risks to Ms. IM Chaem’s right to be presumed innocent.
56. Moreover, as discussed above at paragraphs 40 to 47, the risks to the right to be presumed innocence are enhanced in circumstances where the Closing Order dismisses the case for want of personal jurisdiction. Prior to the filing of the Defence’s Response to the International Co-Prosecutor’s Final Submission, the Co-Investigating Judges provided notice that the “main legal issue” to be addressed in the Closing Order would be personal jurisdiction.⁷⁷ The suspect relied upon this notice, limiting her Response to this issue.
57. Notwithstanding, as outlined above, the Closing Order (Reasons) appears to have arrived at *tentative* conclusions concerning Ms. IM Chaem’s criminal culpability.⁷⁸ Putting aside that these are *ultra vires* the stated object and purpose of the Closing Order (as discussed at paragraphs 62 to 67 below), the Defence has therefore been deprived of a meaningful opportunity to respond to substantive allegations concerning Ms. IM Chaem’s alleged criminal responsibility and these tentative conclusions. As discussed above at paragraphs 40 to 47, should the International Co-Prosecutor’s Appeal be granted, Ms. IM Chaem will be deprived of any meaningful opportunity to respond to or properly confront the evidence underlying these findings even whilst the disputed conclusions become a matter of public record and media speculation.

were not deemed serious enough to be sent to trial ‘Im Chaem allegedly presided over a wave of killings of people suspected of harbouring anti-regime sentiments’ ... the [Human Rights Watch] report says. ... In 2015, Sen Sophorn, testifying as a civil party in the [Case 002] trial, said that Im Chaem ... proved to be even more brutal than her predecessors once she began overseeing the Trapeang Thma Dam worksite.”] [attached as **Authority 9**].

⁷⁷ Notice to Defence on Deadline to Respond to the Co-Prosecutors’ Rule 66(5) Submissions, 1 November 2016, **D304/4**, para. 6.

⁷⁸ Closing Order (Reasons), paras. 306-11.

58. In these circumstances, any violation of the presumption of innocence will be serious and irrevocable. Ms. IM Chaem will not have a meaningful opportunity to refute the judicial findings implicating her in criminal activity or have the evidence supporting such findings properly tested or disclosed to the public leaving a dark cloud of prejudice and insinuation. This is not only inconsistent with Ms. IM Chaem's right to be presumed innocent but also her fair trial rights, particularly the right to examine the evidence against her and the right to a review of adverse judgments.⁷⁹
59. Further, such likely effects will impact upon Ms. IM Chaem's right to a private life. In *Sayadi and Vinck v. Belgium*, the Human Rights Committee held that Article 17 of the ICCPR encompasses a protection from "negative association" which may follow from the publication of information linking a person to a dismissed criminal case.⁸⁰ Although the publication of information in that case emanated from the State, as opposed to a court, the Human Rights Committee considered that the "negative association" that could be drawn from the published information (suggesting the authors' association with criminal activity), combined with the acknowledgement that this had led to the publishing of "many press articles that cast doubt on the authors' reputation", meant that the right to privacy had been violated.⁸¹
60. Further, the publication of a dismissal order is aimed at lessening media attention in investigations through the provision of *necessary* information explaining why a case has led to a dismissal.⁸² The redacted information concerning these aspects of the case is not essential for a full understanding of the disposition of the case nor is any other legitimate

⁷⁹ ICCPR, Articles 14(3)(e), 14(5).

⁸⁰ *Sayadi and Vinck v. Belgium*, HRC, CCPR/C/94/D/1472/2006 (2008), paras. 10.12-13 [attached as **Authority 10**].

⁸¹ *Sayadi and Vinck v. Belgium*, HRC, CCPR/C/94/D/1472/2006 (2008), paras. 10.12-13.

⁸² See J-Y Lassalle, 'Affichage ou diffusion de la décision', *Répertoire de droit pénal et de procédure pénale*, March 2016, para. 43 [« L'objectif [des dispositions des articles 177-1 et 212-1 du Code de Procédure Pénale] vise à atténuer les impacts médiatiques que peuvent avoir les enquêtes et les instructions relatées dans la presse écrite ou audiovisuelle, en informant les lecteurs, auditeurs ou spectateurs que telle affaire, portée précédemment à leur connaissance, a finalement abouti à un non-lieu. » Unofficial translation: "The goal [of Articles 177-1 and 212-1 of the Code of Criminal Procedure] aims at lessening the media attention which judicial investigations recounted in the newspaper can have in the media by informing the readers, the listeners and the audience that this case, which they are aware of, has led to a dismissal of the charges."] [attached as **Authority 11**].

interest of justice served by their disclosure. Instead, as discussed further at paragraphs 62 to 67 below, given the disposition of the Closing Order rested entirely upon jurisdiction and competence to even consider, let alone reach, these substantive conclusions, there exists no countervailing human rights considerations warranting publication. On the contrary, the publication of the aforementioned *ultra vires* or extraneous findings of criminal conduct do not provide any illumination of the disposition but will encourage critical media reports attributing negative associations that may not be adequately defended or explained.

61. Therefore, the Co-Investigating Judges reasonably concluded that redactions were required to protect the interests of justice, including these essential and critical rights.⁸³ In these circumstances, the current redactions strike a fair balance between the right of the public and the media to be informed and Ms. IM Chaem's right to privacy and to be presumed innocent.

E. ALL *ULTRA VIRES* FINDINGS IN THE CLOSING ORDER (REASONS) SHOULD REMAIN REDACTED

62. The International Co-Prosecutor argues that the Defence's statement following the dismissal of the charges against Ms. IM Chaem misleads the public by stating the Closing Order (Reasons) demonstrated her "innocence" when in fact the Co-Investigating Judges found that Ms. IM Chaem had contributed in various ways to very serious crimes.⁸⁴

63. The Defence submits 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 are therefore *ultra vires*.

64. The Defence avers that the first obligation of a court is to ascertain its own competence.⁸⁵ A

⁸³ 'Co-Investigating Judges issue Reasons for Dismissal of Case 004/1', 10 July 2017, available at: <https://www.eccc.gov.kh/en/articles/co-investigating-judges-issue-reasons-dismissal-case-0041>.

⁸⁴ Appeal, para. 17.

⁸⁵ See, *Judgements of the Administrative Tribunal of the International Labour Organisation upon complaints made against the United Nations Educational Social and Cultural Organisation*, (I.C.J. Reports 1956), Advisory Opinion, 23 October 1956, Dissenting Opinion of Judge Cordova, p. 163 [attached as **Authority 12**], cited in *The Prosecutor v. Dusko Tadić* (IT-94-1), AC, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 18 [attached as **Authority 13**]. See also, *The Prosecutor v. Milan Milutinović et al.* (IT-05-87-PT), TC, Decision on Ojdanic's Motion Challenging Jurisdiction: Indirect Co-Perpetration, 22 March 2006, paras. 25, 40 [para. 40: "[T]he Trial Chamber holds that the form of responsibility

court's possession of jurisdiction predetermines the right of a judicial authority to make any legal findings on the criminal responsibility of an individual. Axiomatically, a finding of a lack of jurisdiction equates to a lack of legitimate power to make any judicial decision on the merits of the case. In this respect, any finding of a court on the substance of the crimes – or alleged criminal responsibility of a suspect – without jurisdiction constitutes *coram non judice*.⁸⁶

65. In Case 001, the Supreme Court Chamber, held:

34. ... If, at any stage of the proceedings, the Trial Chamber becomes aware that it may be acting in excess of its jurisdiction, then it must examine the issue and satisfy itself that it has jurisdiction to proceed. A competent court is a prerequisite to a fair trial. To proceed without jurisdiction would strike at the root of the ECCC's mandate, and would deprive the Trial Chamber of its legal authority to try an accused person. ...

35. ... Even if no party raises an objection to the jurisdiction of the Trial Chamber, the Trial Chamber must still satisfy itself that it possesses jurisdiction over the case before it in order to enter a judgement on the merits.⁸⁷

66. The fact that jurisdiction constitutes a necessary prerequisite to findings on the merits stems from the conceptual nature of jurisdiction. Without jurisdiction in a particular case, a court “can make no finding, nor any observation whatever” on the substance of that case.⁸⁸

set forth in paragraph 22 of the Proposed Amended Joinder Indictment did not exist in customary international law at the time of the events alleged in the Indictment. The Chamber recalls its observation in paragraph 25 above that, if either of the two prerequisites derived from the Appeals Chamber's May 2003 *Ojdanic* decision is not fulfilled in respect of a purported form of responsibility, the Tribunal has no jurisdiction to determine an accused's guilt pursuant to that form. Accordingly, the Chamber will not engage in an examination of whether the Statute would be broad enough to encompass ‘indirect co-perpetration’ if such a form of responsibility did exist in custom.” (reference omitted) [attached as **Authority 14**].

⁸⁶ “Before one who is not a Judge”, “without jurisdiction”. See also, E. Widder, *A Fair Trial at the International Criminal Court? Human Rights Standards and Legitimacy* (Peter Lang, 2016), p. 217 [“The search for truth must always be supported by the legitimate power to render a decision”].

⁸⁷ Case 001 Appeal Judgment, **F28**, paras. 34-35.

⁸⁸ *Case Concerning Legality of Use of Force (Serbia and Montenegro v. Belgium)*, (I.C.J. Reports 2004), Judgment on Preliminary Objections, 15 December 2004, para. 128 [“When, however, as in the present case, the Court comes to the conclusion that it is without jurisdiction to entertain the claims made in the Application, it can make no finding, nor any observation whatever, on the question whether any such violation has been committed or any international responsibility incurred.”] [attached as **Authority 15**]; *Case Concerning East Timor (Portugal v. Australia)*, (I.C.J. Reports 1995), Judgment, 30 June 1995, paras. 35-36 [para. 36: “Having dismissed the first of the two objections of Australia which it has examined, but upheld its second [objection to jurisdiction], the Court finds that ... it cannot rule on Portugal's claims on the merits, whatever the importance

Therefore, the establishment of jurisdiction constitutes an indispensable prerequisite to a court making any decision on the substance of the case in question. In other words, a finding that the ECCC lacks jurisdiction over Ms. IM Chaem because she is neither a senior leader nor most responsible⁸⁹ precluded the CIJs from making any finding as to the likelihood of her criminal responsibility.⁹⁰

67. In light of these strictures and the presumption of innocence, Ms. IM Chaem is entitled to rely upon her innocence and neither the International Co-Prosecutor nor any other organ of the ECCC may violate that presumption. In these circumstances, all *ultra vires* findings relating to Ms. IM Chaem's *tentative* culpability should remain confidential. In any event, for the reasons outlined above at paragraphs 22 to 28, the Co-Investigating Judges were well within their discretion to decline to disclose these highly prejudicial conclusions to the public.

V. REQUEST FOR AMENDMENTS TO THE REDACTIONS

68. The Defence does not oppose the Impugned Decision and does not seek its reversal. However, in the interests of Ms. IM Chaem pursuant to Rule 21 of the Internal Rules, the Defence wishes to raise concerns regarding the redactions adopted in the public redacted version of the Closing Order (Reasons). The Co-Investigating Judges approach to the redactions was based on i) a balance between the confidentiality of the ongoing investigations and the right of the public to be informed; ii) the public disclosure of the legal findings of the Closing Order (Reasons); and iii) the respect of Ms. IM Chaem's right to

of the questions raised by those claims and of the rules of international law which they bring into play.”] [attached as **Authority 16**]; *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, (I.C.J. Reports 2006), Judgment on Jurisdiction of the Court and Admissibility of the Application, 3 February 2006, para. 127 [“[T]he Court has come to the conclusion that it cannot accept any grounds put forward by the DRC to establish its jurisdiction in the present case, and cannot therefore entertain the latter’s Application”] [attached as **Authority 17**]. *See also, Case of the Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, (I.C.J. Reports 1954), Judgment on Preliminary Question, 15 June 1954, pp. 32-33 [attached as **Authority 18**]; *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, (I.C.J. Reports 1966), Second Phase Judgment, 18 July 1966, para. 59 [attached as **Authority 19**].

⁸⁹ *See*, Closing Order (Reasons), para. 325.

⁹⁰ *See, e.g.*, Closing Order (Reasons), paras. 281-312 [In particular para. 307: “The evidence on [Ms.] IM Chaem’s authority, responsibilities, and conduct strongly indicates that she could be criminally responsible for these crimes through the modes of liability listed in the Notification of Charges.”].

private life and to be presumed innocent. As outlined below, the Defence seeks full implementation of this Decision.

69. In particular, the Defence respectfully requests: i) a more consistent approach to the redaction of witness names and factual findings; ii) the lifting of the redactions on the section on the scope of the Closing Order (Reasons); and iii) the redaction of the references to Ms. IM Chaem's statements in the factual analysis and findings. The minor amendments are not premised on any error of law or fact or abuse of discretion but are by way of typographical amendments to ensure the accurate and consistent implementation of the Impugned Decision.

A. A MORE CONSISTENT APPROACH IN REDACTING WITNESS NAMES AND FACTUAL FINDINGS

70. The Defence seeks a consistent approach to the following: First, the names of TUM Soeun⁹¹ and PECH Chim⁹² should be consistently redacted. Second, according to the approach adopted by the Co-Investigating Judges, the redactions of paragraph 176 of the Closing Order (Reasons) should be removed albeit the redaction of the names mentioned. Third, the entirety of Section 4.4 pertains to confidential evidence, not to the "main legal findings", and should therefore be redacted.

B. THE LIFTING OF THE REDACTIONS ON THE SECTION ON THE SCOPE OF THE CLOSING ORDER (REASONS)

71. In a press release following the issuance of the Closing Order (Disposition), the Co-Investigating Judges expressed:

The Co-Investigating Judges will, however, produce and disseminate a public version of *their main legal findings* surrounding the issue of personal jurisdiction upon filing of the full reasons.⁹³

72. Section 5.1. addressing preliminary considerations of section 5 on evidence of crimes alleged by the International Co-Prosecutor but not charged entails critical legal findings that should

⁹¹ See, Closing Order (Reasons), paras. 119, 165(f).

⁹² See, Closing Order (Reasons), paras. 146, 148, 157.

⁹³ 'Co-Investigating Judges Dismiss Case Against IM Chaem', 22 February 2017, available at: <https://www.eccc.gov.kh/en/articles/co-investigating-judges-dismiss-case-against-im-chaem> (emphasis added).

be made accessible to the public. Therefore, the redaction of the entire section should be removed. This is all the more important because the International Co-Prosecutor based most of his Final Submission on evidence of crimes not charged and the Defence responded in depth on this issue. This would assist in explaining the conclusions of the Closing Order (Reasons) more fully without prejudice to the interests of any party thereby ensuring a more precise legal legacy for the benefit of the Cambodian courts as a whole.

C. THE REDACTION OF THE REFERENCES TO MS. IM CHAEM’S STATEMENTS IN THE FACTUAL ANALYSIS AND FINDINGS

73. Consistent with Article 14(3)(g) of the ICCPR that requires that, as a minimum guarantee in the determination of any criminal charge, every person is entitled “not to be compelled to testify against himself or to confess guilt”, the Co-Investigating Judges correctly found that Ms. IM Chaem’s statements had to be given less probative weight than interviews conducted by the Office of the Co-Investigating Judges.⁹⁴ However, for the reasons outlined below, the current redactions have an effect that may inhibit this safeguard.
74. In the public redacted version of the Closing Order (Reasons), the entire section on factual analysis and findings is redacted apart from Ms. IM Chaem’s interviews and a few other obvious exceptions.⁹⁵ From footnote 256 to footnote 735, the Co-Investigating Judges relied 16 times on Ms. IM Chaem’s interviews. Apart from one statement from 2012,⁹⁶ the other statements referred to are not available publicly.
75. This has the effect of creating the erroneous impression that Ms. IM Chaem’s statements were found to constitute the main support of the factual analysis and findings contained

⁹⁴ Closing Order (Reasons), para. 139.

⁹⁵ Closing Order (Reasons), fns. 321, 327 (*referring to* Transcript of hearing on the substance in Case 002/02, 17 August 2015, **D219/494.1.8**, ERN 01132282-83, 01132311), 325 (*referring to* Suspect Statement of Ieng Sary *alias* Van, 17 December 1996, **D1.3.29.1**, ERN 00417600; Transcription of Interview of Ouk Bunchhoeun conducted by Steve Heder, **D6.1.529**, ERN 00350208), 331 (*referring to* Annex 9: DC-Cam Document “Interview with Chhit Yoek”, 19 June 2011, **D67.9**, ERN 00731142), 347, 348, 353, 355, 356, 357 (*referring to* CPK Legal Document entitled ‘Communist Party of Kampuchea Statute’, January 1976, **D1.3.20.1**), 358, 359 (*referring to* CPK Magazine entitled ‘Revolutionary Flag, Special Issue’, October - November 1977, **D6.1.740**).

⁹⁶ DC-Cam Interview with IM Chaem, 6 April 2012, **E305/13.23.330**, available at: https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2015-06-11%2013:07/E305_13.23.330_EN.PDF

within the Closing Order (Reasons) including the *ultra vires* findings. It is submitted that these statements should therefore also be redacted. This will ensure against any unfairness and prejudice that may accrue as a result of this misleading impression.

VI. RELIEF REQUESTED

For the reasons above, the Defence respectfully requests the Pre-Trial Chamber to:

- i) Dismiss the Appeal, but grant the request for reclassification of the Impugned Decision as well as the Appeal and the Response; and
- ii) Grant the Defence's request for amendments to the public redacted version of the Closing Order (Reasons).

Respectfully submitted,



BIT Seanglim



Wayne JORDASH, QC

Co-Lawyers for Ms. IM Chaem

Signed on this 4th day of September, 2017