

BEFORE THE PRE-TRIAL CHAMBER**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 004/1/07-09-2009-ECCC/OCIJ (PTC) **Party Filing:** The Defence for IM Chaem**Filed to:** The Pre-Trial Chamber**Original language:** English**Date of document:** 12 March 2018**CLASSIFICATION****Classification of the document
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**IM CHAEM'S REQUEST FOR RECLASSIFICATION OF HER RESPONSE TO THE
INTERNATIONAL CO-PROSECUTOR'S FINAL SUBMISSION**

Filed by:**Distribution to:****The Co-Lawyers:**

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Pre-Trial Chamber Judges:

Judge PRAK Kimsan

Judge BAIK Kang Jin

Judge NEY Thol

Judge Olivier BEAUVALLET

Judge HUOT Vuthy

The Co-Prosecutors:

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Case 004/1**

I. INTRODUCTION

1. Ms. IM Chaem, through her Co-Lawyers (“the Defence”), hereby submits this request for reclassification (“Reclassification Request”) pursuant to Article 9.1 of the Practice Direction on the Classification and Management of Case-Related Information and Articles 3.12 and 3.14 of the Practice Direction on the Filing of Documents before the ECCC. The Defence respectfully requests the Pre-Trial Chamber to reclassify as public the *IM Chaem’s Response to the International Co-Prosecutor’s Rule 66 Final Submission against Her*¹ with the redactions suggested in Annex A.² The Reclassification Request will ensure that the Defence’s arguments concerning Case 004/1 are accessible to the public and the overall issues are available in a balanced way to ensure the transparent administration of justice and the integrity of the legacy of the ECCC. The Defence further seeks that the Reclassification Request be filed as public after appropriate redactions have been applied.
2. The filing of this Request is appropriate and timely at this stage of the proceedings. Should the International Co-Prosecutor’s Appeal of the Closing Order (Reasons)³ be denied and all proceedings in Case 004/1 terminated, Ms. IM Chaem will then be unable to avail herself of the right to be heard on this matter.

II. BACKGROUND

3. On 27 October 2016, the National Co-Prosecutor and the International Co-Prosecutor filed two separate final submissions in Case 004/1.⁴ The National Co-Prosecutor requested that all allegations against Ms. IM Chaem be dismissed.⁵ The International Co-Prosecutor requested her indictment, arrest, and detention.⁶

¹ IM Chaem’s Response to the International Co-Prosecutor’s Rule 66 Final Submission against Her, 28 November 2016, **D304/6** (“Response to the Final Submission, **D304/6**”).

² Reclassification Request, Annex A: “Public Redacted Version of the IM Chaem’s Response to the International Co-Prosecutor’s Rule 66 Final Submission against Her” (“Annex A”).

³ International Co-Prosecutor’s Appeal of Closing Order (Reasons), 9 August 2017, **D308/3/1/1**.

⁴ Final Submission concerning IM Chaem pursuant to Internal Rule 66, 27 October 2016, **D304/1**; International Co-Prosecutor’s Rule 66 Final Submission Against IM Chaem, 27 October 2016, **D304/2** (“Final Submission”).

⁵ Final Submission concerning IM Chaem pursuant to Internal Rule 66, 27 October 2016, **D304/1**, para. 38.

⁶ Final Submission, paras. 539-41.

4. On 28 November 2016, the Defence filed the Response to the International Co-Prosecutor's Final Submission and requested that the case against Ms. IM Chaem be dismissed on the basis of lack of personal jurisdiction.⁷
5. On 6 December 2016, the Office of the Co-Prosecutors issued a public summary of their two separate final submissions in Case 004/1 pursuant to Internal Rule 54; arguing that "transparency contributes to public confidence in judicial institutions".⁸ In the Public Summary, the International Co-Prosecutor expressed his intention "to ask the Co-Investigating Judges to make his Final Submission and the defence response to his Final Submission public after appropriate redactions are made to protect the security and privacy of witnesses and victims."⁹
6. On 10 July 2017, the Co-Investigating Judges issued a public redacted version of the Closing Order in Case 004/1 and dismissed all charges against Ms. IM Chaem.¹⁰

III. APPLICABLE LAW

On the reclassification of submissions

7. Pursuant to Article 9.1 of the Practice Direction on the Classification and Management of Case-Related Information and Article 3.12 of the Practice Direction on the Filing of Documents before the ECCC, documents and information can be reclassified only pursuant to an order of the Co-Investigating Judges or a Chamber, as appropriate. Pursuant to Article 3.14 of the Practice Direction on the Filing of Documents before the ECCC, the Co-Investigating Judges or relevant Chamber may give the parties the opportunity to be heard prior to making a decision on reclassification.

⁷ Response to the Final Submission, **D304/6**.

⁸ Statement by the Office of the Co-Prosecutors on Case 004/1: Rule 54 Summary of the Co-Prosecutor's (sic) Final Submissions regarding Im Chaem, 6 December 2016, available at: <https://www.eccc.gov.kh/en/articles/statement-office-co-prosecutors-case-00401> ("Statement by the Office of the Co-Prosecutors' on Case 004/1" or "Public Summary"), p. 1.

⁹ Statement by the Office of the Co-Prosecutors on Case 004/1, p. 5.

¹⁰ Closing Order (Reasons), 10 July 2017, **D308/3**, paras. 312-13, 325.

On the right to a public trial and transparency of the proceedings

8. Pursuant to Article 31 of the Cambodian Constitution,¹¹ Article 13(1) of the ECCC Agreement,¹² Article 33 new of the Establishment Law,¹³ Internal Rule 21,¹⁴ and Article 14(1) of the ICCPR,¹⁵ Ms. IM Chaem has the fundamental right to a transparent, fair, and public judicial process. Internal Rule 21(1) sets forth the fundamental principles of the procedure at the ECCC and guarantees legal certainty and transparency in the conduct of proceedings.
9. Pursuant to Article 1.2 of the Practice Direction on the Classification and Management of Case-Related Information, the classification of documents and information must strike a balance between the confidentiality of judicial investigations and 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.

On the redaction of submissions

10. 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

¹¹ The Constitution of the Kingdom of Cambodia (adopted 21 September 1993) (“Cambodian Constitution”).

¹² 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 (“ECCC Agreement”).

¹³ 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 (“Establishment Law”).

¹⁴ Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (Rev. 9), adopted on 12 June 2007 (as revised on 16 January 2015) (“Internal Rules”).

¹⁵ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS 171 (“ICCPR”).

- 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).

11. 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. ARGUMENT

12. For the reasons set out below, the Defence submits that the reclassification of the Response to the Final Submission does not impair the interest protected by the confidential nature of the investigation (A) and will enhance the interests of justice (B).

A. The reclassification of the Response to the Final Submission does not impair the confidential nature of the investigation

13. When assessing the optimal balance between the confidentiality of judicial investigations and the interests of transparency in the proceedings, if the reasons for classifying a document as confidential no longer exist, the Co-Investigating Judges, or any appropriate Chamber, may consider its reclassification as public.¹⁶ Yet, the confidential nature of the investigation may still require sensitive information to be safeguarded.
14. As the Defence has already submitted in its Response to the International Co-Prosecutor's Appeal of Decision on Closing Order (Reasons) Redaction or, Alternatively, Request for Reclassification of Closing Order (Reasons), the confidentiality of the investigation does not cease to apply with the conclusion of the investigation.¹⁷ Further, whether or not the

¹⁶ See, *Case of MEAS Muth*, 003/07-09-2009-ECCC/OCIJ, Decision on MEAS Muth's Request to Reclassify as Public with Public Annexes A and B and Confidential Annex C, 16 June 2015, **D129/1**, para. 11.

¹⁷ 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**, paras. 38-39.

proceedings in Case 004/1 are terminated – as was the case in Case 001 – the classification of documents must still be determined through an assessment of various considerations relevant to ensuring protection of sensitive information, including any on-going proceedings at the ECCC, the risks of prejudice to any charged person or existing investigations and any other issue contingent upon confidentiality.¹⁸

15. For the reasons outlined below, the Defence submits that the redactions set out in Annex A attached to this Motion strike a fair and necessary balance between these various considerations, the interests protected by the confidential nature of the investigation, and those served by a public process and disposition.
16. In this case, the International Co-Prosecutor has already expressed his support for the reclassification of the Defence's arguments in the Response to the Final Submission.¹⁹ Further, pursuant to the formal conclusion of the investigation phase, there is no remaining reason for maintaining a confidential classification of the Response to the Final Submission. Indeed, the judicial investigation against Ms. IM Chaem has been concluded²⁰ and any bearing upon the facts investigated in Case 004 and Case 004/2 and any confidential evidentiary material related to Case 004/1 may easily be redacted as proposed in Annex A. In sum, as appears to be agreed between the parties, granting the Reclassification Request will not compromise any interests previously protected by the confidential nature of the judicial investigation.

¹⁸ *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. 6 [“As the proceedings in Case 001 have effectively terminated, the declassification of documents pertaining to the judicial investigation no longer poses a generalised risk of prejudice to the rights of the accused or the integrity of the investigation. Therefore, the Supreme Court Chamber holds that, in principle, all such documents shall be declassified as public, thereby allowing full access to the public at large and maximising transparency. At the same time, considering that proceedings before the ECCC are still in progress and that, even after their conclusion, certain reasons for non-disclosure may continue to remain valid, limited safeguards need to be retained, as set out in the guidelines below.”].

¹⁹ International Co-Prosecutor's Response to IM Chaem's Letter to the Co-Investigating Judges on the filing of a Public Redacted Version of the Co-Prosecutor's Final Submission, 8 November 2016, **D304/3/1**, para. 12 [“The ICP would fully support a Defence request to file an appropriately redacted public version of their response to the Final Submission, thereby allowing them to publicly challenge its contents, whilst protecting the interests of witnesses and victims, and respecting the public's interest in the transparent administration of justice.”].

²⁰ Notice of Conclusion of Judicial Investigation Against IM Chaem, 18 December 2015, **D285**.

17. In light of the above, the Defence has suggested in Annex A redactions using the “strikethrough” command. Specifically:

- The Defence suggests redacting any information potentially identifying witnesses and civil party applicants in compliance with Case 001 Decision on Guidelines for Reclassification of Documents on Case File.²¹ For example, both the name of witness HEM Mean and his position as the former messenger for Sector 3 Secretary *Ta Chay* were redacted in Annex A.²² However, references to witnesses whose testimony in Cases 001 and/or 002 is public have been left unredacted. For example, references to KHOEM Boeun’s Case 002 testimony were not redacted,²³ whereas references to her Case 004 written records of interviews were redacted.²⁴
- Contrary to the Pre-Trial Chamber’s practice when issuing public redacted versions of decisions and considerations,²⁵ the Defence suggests leaving Ms. IM Chaem’s name unredacted. This is consistent with the Public Summary – in which Ms. IM Chaem is named as the charged person in Case 004/1 and for whom the International Co-Prosecutor requests indictment – and with the public redacted version of the Closing Order (Reasons).
- The Defence suggests leaving the names of deceased Khmer Rouge officials unredacted unless they have been redacted in the Redacted Closing Order. For example, *Ta Mok*, *Ta Rin*, *Ta Hing*, *Ta Saom*, *Ta Chay*, and *Ta Val* were left unredacted in the Redacted Closing Order²⁶ whereas *Ta Poal* was not.²⁷ In addition, the Defence has adopted a cautious approach concerning deceased Khmer Rouge officials whose names did not

²¹ *Case of KAINING 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. 7.

²² *See*, Annex A, para. 70.

²³ *See*, Annex A, para. 78.

²⁴ *See*, Annex A, para. 90.

²⁵ *See, e.g.*, Considerations on [Redacted] Application for Annulment of Transcripts and Written Records of Witnesses’ Interviews, 27 October 2016, **D298/2/1/3**.

²⁶ *See, e.g.*, [Redacted] Closing Order (Reasons), 10 July 2017, **D308/3** (“Redacted Closing Order, **D308/3**”), paras. 141, 147, 155, 162.

²⁷ *See, e.g.*, Redacted Closing Order, para. 229.

appear in the Closing Order (Reasons) and suggests redacting their names in Annex A. Such is the case for *Ta Lai*,²⁸ *Phon*,²⁹ *Thuok*,³⁰ and *Huor*.³¹

- In regard to the International Co-Prosecutor's Final Submission, the Defence suggests leaving all references to it unredacted. This is consistent with the Public Summary, in which the International Co-Prosecutor made his position concerning Case 004/1 public. In addition, this will allow the public to peruse, in their proper context, the specific arguments to which the Defence responded in the Response to the Final Submission.
- Lastly, the Defence suggests leaving references to Case 004/1 filings, such as the Notice of Intent to Dismiss the Charges against Ms. IM Chaem unredacted.³² Indeed, the Defence will seek in the near future the reclassification of these filings for the same reasons outlined in the Reclassification Request, i.e. to allow the Defence's narrative to be made public and to foster the interests of justice and the transparency of the proceedings.

B. The reclassification of the Response to the Final Submission is warranted by the interests of justice

18. Whilst confidentiality of the judicial investigation is the prevailing principle at the pre-trial stage,³³ it must finally be balanced against the interests of justice³⁴ and the need to keep the public informed and educated about the proceedings.³⁵ Reclassifying the Response to the Final Submission will ensure both the transparency of the proceedings and the dissemination of important, accurate and balanced information to provide adequate public awareness about the proceedings. In regard to the demands of transparency, the Supreme Court Chamber held:

²⁸ *See, e.g.*, Annex A, para. 101.

²⁹ *See, e.g.*, Annex A, para. 102.

³⁰ *See*, Annex A, para. 136.

³¹ *See*, Annex A, para. 136.

³² *See, e.g.*, Annex A, paras. 2, 10, 16.

³³ *See*, Internal Rules, Rule 56(1).

³⁴ *See*, Practice Direction on the Filing of Documents before the ECCC (Revision 8), ECCC/01/2007/Rev.8, 10 May 2012, Art. 3.14.

³⁵ *See*, Practice Direction on the Classification and Management of Case-Related Information (Revision 2), ECCC/004/2008/Rev.2, 5 June 2014, Art. 1.2.

[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.³⁶

19. Reclassifying the Response to the Final Submission will contribute to public awareness and to transparency by introducing the Defence's arguments into the public sphere. In this respect, the current public narrative based on what is available online tends to provide an inaccurate and misleading public record.³⁷
20. There is very limited public reference made to the Defence's arguments concerning the various legal and factual issues contained in the Final Submission. The public remains unaware of the Defence's arguments that explain the final disposition, including *inter alia* arguments that show: i) that the International Co-Prosecutor's adopted an excessively broad approach to the allegations and thus included irrelevant facts that exceeded the permissible scope of the Final Submission;³⁸ ii) that the International Co-Prosecutor's attribution of roles and responsibilities to Ms. IM Chaem could not be sustained on the evidence due in part to numerous errors in the approach to the evidence,³⁹ iii) that the International Co-Prosecutor's application of the "most responsible" test, including the failure to take into account relevant

³⁶ *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.

³⁷ *See*, Statement by the Office of the Co-Prosecutors' on Case 004/1; Statement of the International Co-Investigating Judge regarding Case 004, 3 March 2015, available at: <https://www.eccc.gov.kh/en/articles/international-co-investigating-judge-charges-im-chaem-absentia-case-004>. *See also*, G. Wright, *Tribunal Judge Defends Laying Absentia Charges*, The Cambodia Daily, 1 July 2015, available at: <https://www.cambodiadaily.com/archives/tribunal%E2%80%88judge-defends-laying-absentia-charges-86991/>; E. Handley, *Im Chaem filing short on reasoning*, The Phnom Penh Post, 11 July 2017, available at: <http://www.phnompenhpost.com/national/im-chaem-filing-short-reasoning>; AFP, *Off the hook for mass murder, Khmer Rouge cadre turns to God*, Daily Nation, 4 March 2018, available at: <https://www.nation.co.ke/news/world/Khmer-Rouge-leader-turns-to-God/1068-4327728-5tjvt7/index.html> ["A prosecution document said some 40,000 people died from executions, starvation and overwork at the largest prison, Phnom Trayoung, between 1977 and 1979."].

³⁸ *See*, Response to the Final Submission, **D304/6**, paras. 20-29. The Defence notes that, whilst the Co-Investigating Judges ruled in favour of the Defence's arguments on this matter in the Closing Order, this portion of the Closing Order was redacted in the publicly available decision. *See*, Redacted Closing Order, **D308/3**, paras. 244-45.

³⁹ *See*, Response to the Final Submission, **D304/6**, paras. 29-36.

evidence, was one that no reasonable trier of fact could adopt;⁴⁰ and iv) that Ms. IM Chaem neither played a role in crimes allegedly committed at Phnom Trayoung Security Centre nor at Spean Sreng Worksite.⁴¹

21. The transparency of proceedings is an issue that has been, and continues to be, of significant public interest and concern.⁴² Reclassifying the Response to the Final Submission will inform the general public of the Defence's arguments enabling the public to have a more accurate and balanced understanding of the judicial proceedings against Ms. IM Chaem, to peruse the parties' submissions and Co-Investigating Judges' Closing Order (Reasons) in their context, and to prevent the ongoing dissemination of misinformation. Reclassifying the Response to the Final Submission is a proportionate measure that will assist the public in understanding the proceedings and help to dispel any misapprehension concerning the disposition of the case, the integrity of the proceedings and the legacy of the ECCC.
22. In light of the above and in accordance with Article 9.3 of the Practice Direction on the Classification and Management of Case-Related Information, the Defence submits a redacted version of the Response to the Final Submission in Annex A, for the Pre-Trial Chamber's review and approval.

⁴⁰ See, Response to the Final Submission, **D304/6**, paras. 30-36, 54-60. See also, Response to the Final Submission, **D304/6**, paras. 20-29.

⁴¹ See, Response to the Final Submission, **D304/6**, paras. 144-226.

⁴² See, e.g., *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, IENG Sary's Request to Reclassify as Public *IENG Sary's Motion for a Hearing on the Conduct of the Judicial Investigation*, 5 May 2011, **E71/1/2**, para. 12; Fédération Internationale des Droits de l'Homme, 'ECCC: Call for transparency and independence of proceedings in Cases 003 and 004, and for an effective implementation of victims' rights to participate', 4 August 2011, available at: <https://www.fidh.org/en/region/asia/cambodia/eccc/ECCC-Call-for-transparency-and>; K. Nelson, 'The Presumption of Confidentiality at the ECCC: The Need for Standards to Protect Private Investigations, Provide Consistent Public Access, and Increase Transparency' in *Searching for the Truth* (Documentation Center of Cambodia, September 2010), available at http://www.genocidewatch.org/images/Cambodia_10_09_xx_The_Presumption_of_Confidentiality_at_the_ECCC_The_need_for_standards_to_protect_private_investigations_Provide_consistent_public_access_And_increase_transparency.doc.

V. RELIEF REQUESTED

For the reasons above, the Defence respectfully requests the Pre-Trial Chamber to i) instruct the Greffier of the Pre-Trial Chamber to file the Response to the Final Submission in a public redacted form with the redactions proposed in Annex A; and ii) reclassify this Request as public.

Respectfully submitted,



BIT Seanglim



Wayne JORDASH, QC

Co-Lawyers for Ms. IM Chaem
Signed on this 12th day of March, 2018