BEFORE THE PRE-TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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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. Pursuant to Internal Rules 73 and 74, the International Co-Prosecutor (ICP) appeals the decision of the Co-Investigating Judges (CIJs) to redact from the public version of the Case 004/1 *Closing Order (Reasons)* the reasoning and findings of the CIJs regarding facts about the substantive crimes in the *Closing Order (Reasons)*[1], including evidence in support thereof. The ICP submits that the CIJs have failed to adequately substantiate in the "*Decision on International Co-Prosecutor's Request for Closing Order Reasons and CIJ's Decision to be Made Public*"[2] ("Impugned Decision"), or elsewhere, why the strong public interest in access to the full reasoning of the *Closing Order (Reasons)* should be overridden in this instance, and no plausible reasons exist.
2. In the alternative, pursuant to the Practice Direction on the Classification and Management of Case-Related Information Article 9, and Practice Direction on Filing of Documents Before the ECCC Articles 3.12 and 3.14, the ICP requests that the Pre-Trial Chamber (PTC) exercise its authority as the Chamber seised with the Case 004/1 Case File to reclassify the currently confidential version of the *Closing Order (Reasons)* as public in the interests of justice, with the exception of any redactions necessary pursuant to Rule 29 concerning protective measures for victims and witnesses. The ICP also requests the reclassification as public of the Impugned Decision.

II. PROCEDURAL HISTORY

3. The Initial Submission for Case 004, naming Im Chaem as one of four suspects, was filed by the Acting International Co-Prosecutor on 7 September 2009. Over eight years later, on 22 February 2017, the CIJs issued the Case 004/01 *Closing Order (Disposition)*, holding that Im Chaem was not within the personal jurisdiction of the ECCC and dismissing the charges against her.[3] They stated that the "full reasons for this conclusion" would be provided in a separate filing.[4]
4. On the same day, the CIJs issued a press release announcing the dismissal, which stated in part: "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

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1 **D308/3** Closing Order (Reasons)—Public (Redacted), 10 July 2017.
2 **D309/2** Decision on International Co-Prosecutor's Request for Closing Order Reasons and CIJ's Decision to be Made Public, 10 July 2017 (hereinafter, "Impugned Decision").
3 **D308** Closing Order (Disposition), 22 February 2017.
4 **D308** Closing Order (Disposition), 22 February 2017, para. 12.

party applications shall remain confidential unless the dismissal is overturned on appeal and a trial ordered by the Pre-Trial Chamber."[5]

5. On 7 March 2017, the ICP filed a request for the *Closing Order (Reasons)* to be made public when issued, noting the press release's assertion that the reasoning of the decision regarding the substance of the charges would remain confidential.[6] The ICP observed that there was no Rule suggesting that Closing Orders, whether indicting or dismissing, should be kept confidential.[7] He also noted that international jurisprudence favoured transparency in judicial proceedings.[8]
6. On 20 March 2017, Im Chaem responded, arguing that the ICP's request regarding the *Closing Order (Reasons)* was premature.[9]
7. On 10 July 2017, the CIJs issued the *Closing Order (Reasons)* in both confidential and public forms.[10] The public version redacted almost half of the *Closing Order (Reasons)*, including all of the assessment of the substantive crimes. The public version also redacted citations to all Written Records of Interview (WRIs), including WRIs given by Civil Parties.[11]
8. On the same day, the CIJs issued the Impugned Decision denying the request to make the full *Closing Order (Reasons)* public,[12] holding that the decision was within their discretion and that they had previously stated that the reasoning regarding the substance of the charges would remain confidential, and therefore they would adhere to that prior decision.[13]
9. Also on 10 July 2017, the CIJs issued a Press Release, in which they 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.[14]

10. On 13 July 2017, the ICP submitted a notice of appeal.[15]

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5 Press Release by the Office of the Co-Investigating Judges, Co-Investigating Judges Dismiss Case Against Im Chaem, 22 February 2017.
6 **D309** International Co-Prosecutor's Request for Closing Order Reasons and CIJ's Decision to be Made Public, 7 March 2017.
7 **D309** International Co-Prosecutor's Request for Closing Order Reasons and CIJ's Decision to be Made Public, 7 March 2017, para. 3.
8 **D309** International Co-Prosecutor's Request for Closing Order Reasons and CIJ's Decision to be Made Public, 7 March 2017, paras. 7, 8.
9 **D309/1** 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.
10 **D308/3** Closing Order (Reasons), 10 July 2017.
11 *See, e.g.* **D308/3** Closing Order (Reasons), 10 July 2017, fns. 33, 334, 342.
12 **D309/2** Impugned Decision.
13 **D309/2** Impugned Decision, para. 14.
14 Press Release, Co-Investigating Judges Issue Reasons for Dismissal of Case 004/1, 10 July 2017.
15 **D309/2/1** International Co-Prosecutor's Notice of Appeal Against Decision on Request for Closing Order Reasons to be Public, 13 July 2017.

11. On 3 August 2017, the ICP filed a request to submit his appeal in English only, with Khmer to follow as soon as possible, due to translation constraints.[16]

III. APPLICABLE LAW

12. Internal Rule 21, "Fundamental Principles," provides in relevant part:

> 1. The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and **so as to ensure** legal certainty and **transparency of proceedings**, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement. In this respect:
> ....
> c) The ECCC shall ensure that **victims are kept informed** and that their rights are respected throughout the proceedings.[17] (Emphasis added)

13. Internal Rule 56, entitled "Public Information by the Co-Investigating Judge", provides in relevant part:

> 1. In order to preserve the rights and interests of the parties, judicial investigations shall not be **conducted** in public..."[18] (Emphasis added)

IV. ARGUMENT

14. There is strong public interest in accessing the Case 004/1 *Closing Order (Reasons)*. The document concerns allegations of horrendous crimes that affected at least tens of thousands of individuals. In the sections not now accessible to the public, the *Closing Order (Reasons)* describes the evidence uncovered in a multi-year, complex, and thorough investigation; it explains how the CIJs considered that evidence impacted their decision that Im Chaem was not amongst those most responsible for crimes by discussing the gravity of the crimes and whether the evidence shows any linkage that could support an indictment charging Im Chaem as criminally responsible for the crimes.

15. Because the public version of the document is heavily redacted so as to remove all discussion regarding the crimes that were committed and Im Chaem's responsibility, victims and their surviving family members who are not Civil Parties in Case 004/1 have no access to these factual and legal findings by the CIJs, despite the fact that Article 21 mandates that victims be kept informed. In addition, the general public in Cambodia, the media, and stakeholders in the national and the international community are also completely left in the dark as to the CIJs' findings on these issues.

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16 **D309/2/1/1** International Co-Prosecutor's Request to File Appeal of Decision to Redact *Closing Order (Reasons)* in English with Khmer to Follow, 3 August 2017.
17 Internal Rule 21 (emphasis added).
18 Internal Rule 56 (emphasis added).

16. Not only those who were directly touched by the crimes of the Khmer Rouge, but also the international community as a whole, has an interest in knowing the full reasoning of the *Closing Order (Reasons)*. As this Chamber is well aware, the ECCC itself is a joint endeavour between the international community (through the United Nations) and the Royal Government of Cambodia. The United Nations General Assembly has noted that "the serious violations of Cambodian and international law during the period of Democratic Kampuchea from 1975 to 1979 continue to be matters of vitally important concern to the international community as a whole."[19] The import of transparency for courts generally, and international/internationalised criminal tribunals, including the ECCC, particularly, creates a normative imperative of full public access. The CIJs' justification for their total redaction of the reasoning of the substance of the charges against Im Chaem is inadequate to overcome this imperative.

17. The extensive redaction from the public version will almost certainly lead to public misunderstanding of the CIJs' findings and conclusions. For example, while the CIJs found substantial evidence of Im Chaem's responsibility for many serious crimes, Im Chaem's lawyers issued a press statement averring that "today's decision is a significant step towards demonstrating her [Im Chaem's] innocence and clearing her name."[20] While the ICP agrees it is always important to remind the public that Im Chaem, like all suspects or accused persons, is entitled to a presumption of innocence unless and until her guilt is proven beyond a reasonable doubt at trial, it misleads the public to state that the CIJs' *Closing Order (Reasons)* demonstrates her "innocence" when in fact the CIJs found that Im Chaem had contributed in various ways to very serious crimes.

18. Court observers and monitors have been critical of the extensive redactions contained in the *Closing Order (Reasons)*, stating "This 'public' decision demonstrates a failure of the spirit of transparency essential to a publicly credible process,"[21] and "Sadly, the key reasons for the [investigating judges'] decision seem to lurk behind the large swathes redacted, which will only fuel conjecture and doubt about why the case was dismissed."[22]

a. Relevant Law and Principles Require that the Full *Closing Order (Reasons)* be Public

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19 Resolution adopted by the General Assembly, 57/228 Khmer Rouge trials, 27 February 2003, p. 1.

20 *Im Chaem defence lauds decision,* Phnom Penh Post, 13 July 2017.

21 *Tribunal's edited decision on Im Chaem draws ire,* Phnom Penh Post, 12 July 2017 (quoting Heather Ryan, Open Society Justice Initiative).

22 *Tribunal's edited decision on Im Chaem draws ire,* Phnom Penh Post, 12 July 2017 (quoting John Ciorciari, University of Michigan).

19. In the Impugned Decision, the CIJs "remind the Parties that the necessary degree of transparency has been regulated in the ECCC Law, the Internal Rules, the subsidiary Cambodian law and any rules of applicable international law."[23] The ICP completely agrees that these sources do regulate the necessary transparency to ensure public confidence in the judicial process. However, for the reasons explained below, he submits that these sources support public access to the full *Closing Order (Reasons).*

i. *ECCC Law, Rules, and Jurisprudence Favour Transparency*

20. The overriding mandate of proceedings before the ECCC—evident in its Agreement, Rules, Practice Directions, and jurisprudence—particularly Rule 21, is maximum transparency consistent with the proper functioning of the court. Rule 56 provides a limited and reasonable exception to this overriding principle by mandating that during the period that investigations are **being conducted**, the norm is confidentiality. Confidentiality helps to ensure that witnesses are not influenced by the testimony of others, and serves to "protect the integrity of the ongoing investigations and to ensure the security of the witnesses."[24] Nevertheless, even during the confidential investigation process, the mandate for public access maintains a foothold. The Rules specifically allow the CIJs and the PTC to reclassify documents. Further, the Rules provide opportunity for the Co-Prosecutors and CIJs to keep the public informed during the course of the investigation through public statements.

21. However, once the investigation is concluded, the confidentiality required by the specific terms of Rule 56 while the investigation is being conducted no longer applies. Rule 66 enumerates the various procedural steps that take place after the close of the investigation. By the terms of Rule 66(5), it is clear that the final submission of the Co-Prosecutors is submitted only when "the Co-Prosecutors consider, like the Co-Investigating Judges, that the investigation has been concluded."[25] Thus it is clear from the Internal Rules that the final submissions of the Co-Prosecutors, any response from the defence, and the Closing Order of the CIJs can be filed only after the period when the investigation is being "conducted." Therefore, the requirement of Rule 55 that investigations not be conducted in public is inapplicable to these documents.

22. The ECCC is structured so that as soon as the necessity of the confidential investigations is concluded, the court proceedings return to the *status quo* of maximum public access. For this reason, the Agreement, Rules, and Practice Directions explicitly state that with slim

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23 **D309/2** Impugned Decision, para. 15.
24 **D193/1** Decision on the International Co-Prosecutor's Request to Disclose Case 004 Interviews Relevant to Case 002/02, 8 May 2014, para. 9.
25 Internal Rule 66 (5).

exceptions, all PTC decisions are public, that all trial proceedings take place publicly, that the trial judgment be issued publicly, that appeal proceedings take place publicly, that appeal judgements be delivered publicly, and that at the conclusion of the case any remaining confidential documents be reviewed for re-classification as public.

23. Transparency of proceedings is in no way incompatible with the presumption of innocence. Trials are conducted in public even though the Accused are presumed innocent throughout the conduct of the trial. The Internal Rules are clear and are in accord with international practice in providing that all judgments must be public—even those acquitting an Accused of all charges or otherwise dismissing the case. In such situations, the public is still entitled to know the basis for the acquittal and the findings of fact, including those that are unfavourable to the Accused ultimately acquitted. Indeed, whether speaking of convictions or acquittals, public confidence in the integrity of the judicial process depends on transparency in such decisions. The investigation in Case 004/1 having concluded, all further actions—including issuance of the *Closing Order (Reasons)*—by the CIJs, should have taken place under the norms of the *status quo*: maximum public access not incompatible with the proper functioning of the court.

24. The directive of maximum feasible transparency at the ECCC can be seen in Article 12(2) of the Agreement, which incorporates Article 14 of the ICCPR, and highlights the need and desire for public access to "proceedings before the Extraordinary Chambers", with limited exceptions. While the ECCC Internal Rules do not explicitly state whether Closing Orders should be issued publicly,[26] neither do they prohibit it. And the Rules as a whole indicate a strong preference for transparency, particularly once an investigation has concluded.

25. Rule 21 states as part of the "Fundamental Principles" that "[t]he applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted ... so as to ensure legal certainty and **transparency of proceedings**...."[27] Rule 21 also states as a fundamental principle that amongst those whose interests must guide the interpretation of the Rules is victims, and states that: "The ECCC shall ensure that victims are **kept informed** and that their rights are respected throughout the proceedings."[28] The rule applies to "victims" and not just Civil Parties who are a small subset of those who are victims.[29] However, because the unredacted *Closing Order (Reasons)* is still classified as confidential, only victims who are

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26 Internal Rule 67 governing "Closing Orders by the Co-Investigating Judges" is silent on the matter.
27 Internal Rule 21 (emphasis added).
28 Internal Rule 21 (emphasis added).
29 Victims are not co-extensive with civil parties. *See* Internal Rule 23 (Victims may apply to be Civil Parties). The rules are clear that a victim is anyone who has "suffered harm as a result of the commission of any crime within the jurisdiction of the ECCC." Internal Rules, p. 85. A Civil Party is "a victim whose application to become a Civil Party has been declared admissible by the Co-Investigating Judges or the Pre-Trial Chamber in accordance with these [Internal Rules]." Internal Rules, p. 83.

Civil Parties have access. Therefore the vast majority of victims are not being kept informed as required by Rule 21.

26. Other sections of the Internal Rules demonstrate the intent to keep the public informed about the factual allegations and evidence, to the extent this can be done without compromising the integrity of the investigation or endangering witnesses. Rule 54 provides that even during the conduct of the investigation, "mindful of the need to ensure that the public is duly informed of ongoing ECCC proceedings,"[30] the Co-Prosecutors are entitled to provide the public with summaries of their Introductory, Supplementary, and Final Submissions. Rule 56 provides that the CIJs are permitted to "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." It would be incongruous if the Rules allowed the Co-Prosecutors to inform the public about the factual allegations against a suspect with which they have seised the CIJs, but intend that the CIJs not inform the public of the resolution of their investigation into those facts after the investigation is concluded.

27. Further evidence of the intent of the drafters of the Internal Rules to ensure transparency in matters of the investigation and charging decisions except when confidentiality is necessary to ensure the integrity of the conduct of investigations, can be found in the Rule concerning decisions of the PTC. Rule 78 states:

> All decisions and default decisions of the Chamber, including any dissenting opinions, shall be published in full, except where the Chamber decides that it would be contrary to the integrity of the Preliminary Investigation or to the Judicial Investigation.[31]

28. Addressing Rule 78, judges of the PTC articulated the following standard:

> Internal Rule 78 provides that all decisions and default decisions of the Chamber, including any dissenting opinions, shall be published in full, except where the Chamber decides that it would be contrary to the integrity of the Preliminary Investigation or to the Judicial Investigation.
> As such, in principle, the publicity of Chamber's decisions is required by Internal Rule 78 and Article 4(e) of the Practice Direction on Classification and Management of Case File Information. Therefore, the content of decisions or opinions which does not jeopardize the integrity of investigations should not be redacted.[32]

29. Rule 77 concerns the procedure for pre-trial appeals and applications. Paragraph 6 of the Rule reflects the intent of the Plenary to ensure public transparency for exactly the type of ruling concerned in this closing order—where a case is brought to an end based on an interpretation of the ECCC's jurisdiction:

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30 Internal Rule 54.
31 Internal Rule 78.
32 **D239/1/8** Considerations on Im Chaem's Appeal Against the International Co-Investigating Judge's Decision to Charge her *In Absentia,* Opinion of International Judges, 1 March 2016, paras. 2-4.

> The Chamber may, at the request of any judge or party, decide that all or part of a hearing be held in public, **in particular where the case may be brought to an end by its decision**, including appeals or applications **concerning jurisdiction or bars to jurisdiction**, if the Chamber considers that it is in the interests of justice and it does not affect public order or any protective measures authorized by the court.[33]

30. The import of public access is also reflected in the "principle of public hearings"[34] at the trial stage,[35] and the appeals stage,[36] and the requirement that the Trial Chamber and Supreme Court Chamber announce their judgements at a public hearing.[37]

31. The ECCC Practice Direction on Classification and Management of Case-Related Information also indicate the import of transparency at the ECCC, noting the "need to ensure transparency of public proceedings and to meet the purposes of education and legacy."[38] The preference for public access is also indicated by the requirement in the Practice Direction that the last Chamber seized with a case file must review all documents still classified as confidential or strictly confidential for reclassification.[39] When conducting this review in Case 001, the SCC held that in principle all documents from the investigatory period should be made public "thereby allowing full access to the public at large and maximizing transparency."[40]

32. The SCC has also noted 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,"[41] and it has emphasised that in regards to transparency:

> wide dissemination of material concerning the proceedings before this Court and its factual and legal findings is consistent with the ECCC's mandate, which includes contributing to national reconciliation and providing documentary support to the progressive quest for historical truth. Public awareness of, and open debate of, these tragic pages of the history of Cambodia form part of the efforts to bring closure to the Cambodian people. The Supreme Court Chamber considers that the wide circulation of the court's findings may contribute to the goals of national healing and reconciliation by promoting a public and genuine discussion on the past grounded upon a firm basis, thereby minimising denial, distortion of facts, and partial truths.[42]

ii. International Law and Commentary Favour Transparency

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33 Rule 77 (Emphasis added).
34 Internal Rule 29(4)(e).
35 Internal Rule 79(6).
36 Internal Rule 109(1).
37 Internal Rule 79(6)(d); Internal Rule 102.
38 Practice Direction on Classification and Management of Case-Related Information, Rev. 2, Art. 1.2.
39 Practice Direction on Classification and Management of Case Related Information, Rev. 2, Art. 12.2.
40 Case 001-**F30/2** Decision on Guidelines for Reclassification of Documents on Case File, 26 July 2012, para. 6.
41 Case 001-**F30/2** Decision on Guidelines for Reclassification of Documents on Case File, 26 July 2012, para. 5.
42 Case 001-**F28** Appeal Judgement, 3 February 2012, para. 708 (internal citation omitted); *see also* Case 001-F30/2 Decision on Guidelines for Reclassification of Documents on Case File, 26 July 2012, para. 5 (quoting portions of same).

33. The ICCPR's Article 14 requires that "any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."[43] This principle applies equally to acquittals as well as convictions. The official Commentary to the ICCPR clarifies that the principle of public pronouncement applies even where the proceedings leading to that point have not been held in public: "even in cases which the public is excluded from the proceedings, the judgment, including the essential findings, evidence and legal reasoning must be made public."[44]

34. The statutes and rules of other international and internationalised tribunals also indicate a policy favouring transparency, by requiring that trial proceedings be conducted in public,[45] and judgements be delivered in public.[46] The Special Tribunal for Lebanon, which, like the ECCC, is a hybrid tribunal based on a civil law model, requires that "pre-trial filings, proceedings and orders shall be public".[47] The Appeals Chamber of the STL has stated that it is "mindful of and emphasize[s] the need for transparency in the proceedings before this Tribunal"[48] and has noted: "Confidential submissions and decisions—although sometimes necessary—by their very nature conflict with this policy of openness. They should be kept to a minimum and can only be justified for exceptional reasons, which may include the protection of victims and witnesses and the safeguarding of a continuing investigation...".[49]

35. The jurisprudence of the *ad hoc* tribunals has also indicated a strong preference for transparency in court proceedings. As the STL Appeals Chamber has observed, "The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia [ICTY] has consistently held that all decisions and all submissions filed before that Tribunal shall be public unless there are exceptional reasons for keeping them confidential."[50] An ICTY Trial Chamber noted that public access "offers protection against arbitrary decisions and builds

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43 International Covenant on Civil and Political Rights, Article 14.

44 UN Human Rights Committee, General Comment No. 32, CCPR/C/GC/32, 23 August 2007, para. 29.

45 International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, Rule 78; International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, Rule 78; Special Court for Sierra Leone, Rules of Procedure and Evidence, Rule 78.

46 Statute of the International Criminal Tribunal for Rwanda, Art. 22(2); Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 23(2); Statute of the Special Court for Sierra Leone, Art. 18; Special Court for Sierra Leone, Rules of Procedure and Evidence, Rule 88(A); International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, Rule 98ter(A); International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, Rule 88(A).

47 Special Tribunal for Lebanon, Rules of Procedure and Evidence, Rule 96.

48 *Prosecutor v. Ayyash et al.,* Corrected version of Decision on the Pre-Trial Judge's Request Pursuant to Rule 68(G), 29 March 2012, para. 12.

49 *Prosecutor v. Ayyash et al.,* Corrected version of Decision on the Pre-Trial Judge's Request Pursuant to Rule 68(G), 29 March 2012, para. 12.

50 *Prosecutor v. Ayyash et al.,* Corrected version of Decision on the Pre-Trial Judge's Request Pursuant to Rule 68(G), 29 March 2012, para. 12, fn. 34 (collecting cases).

confidence by allowing the public to see justice administered."[51] A second Trial Chamber of the ICTY has noted that public access to the administration of justice is desirable because "the International Tribunal has an educational function and the publication of its activities helps to achieve this goal."[52] Echoing this sentiment, an ICTR/ICTY Appeals Chamber Judge has written that certain aspirations of international (or internationalised) tribunals, such as promoting reconciliation and the restoration and maintenance of peace, are "possible only if the proceedings are seen as transparently conforming to internationally recognised tenets of justice."[53]

36. ICTR Chambers have explicitly stated that they have a "policy of filing as many decisions as possible as public documents so as to be as transparent as possible to the general public"[54], and a judge of the Appeals Chamber has observed:

> Both Tribunals, ICTY and ICTR, find themselves in the midst of very emotive atmospheres and are charged with the duty to maintain their independence and transparency, as expected by the international community, preserving the norms of international human rights. The international community needs to be sure that justice is being served but that it is being served through the application of their Rules and Statutes, which are applied in a consistent and unbiased manner.[55]

37. Rule 11*bis* proceedings at the ICTY are utilised after an indictment is issued to refer cases to national jurisdictions where appropriate because the lesser gravity of the crimes or level of responsibility of the accused do not require proceedings before the ICTY itself. These decisions are public, with narrow redactions where there is concern for safety of witnesses or suspects.[56]

38. The ICC requires that with limited exceptions the entire case file of cases be available to the public.[57] A commentary to the Rome Statute has noted the import of public access to "the functioning of a public and international institution."[58] In addressing whether to reclassify as public documents that had been produced under seal at the pre-trial stage, the ICC Appeals Chamber unanimously decided to do so where the reason for the confidentiality no longer

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51 *Prosecutor v. Zejnil Delalic et al.*, Decision on the Motion by the Prosecution for Protective Measures for the Prosecution witnesses pseudonymed "B" through "M", Trial Chamber, 28 April 1997, para. 34.

52 *Prosecutor v. Tadic*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Trial Chamber, 10 August 1995, para. 32.

53 *Jean Bosco Barayagwiza v. The Prosecutor*, Decision on Prosecutor's Request for Review or Reconsideration, Separate Opinion of Judge Shahabuddeen, 31 March 2000, para. 71.

54 *The Prosecution v. Edouard Karemera et al.*, Decision on The Prosecutor's Motion to Admit Rwandan *Procès-Verbaux* Concerning Witness Gay, 23 August 2010, para. 1.

55 *Jean Bosco Barayagwiza v. The Prosecutor,* Decision on Prosecutor's Request for Review or Reconsideration, Declaration of Judge Rafael Nieto-Navia, 31 March 2000, para. 18.

56 *See, e.g., Prosecutor v. Mitar Rašević and Sava Todović*, Decision on Referral of Case under Rule 11 *bis* with Confidential Annexes I and II, Referral Bench, 8 July 2005, para. 23; *see also, Prosecutor v. Gojko Janković*, Decision on Referral of Case under Rule 11 *bis*, Referral Bench, 22 July 2005.

57 International Criminal Court, Rules of Procedure and Evidence, Rule 15.

58 Antonio Cassese and others, ed., *The Rome Statute of the International Criminal Court: a Commentary*, Oxford University Press, 2002, p. 1281.

existed.[59] In a separate opinion, one of the judges explained the mandatory nature of making documents public once any need for confidentiality had lapsed. He commented that the rule allowing a chamber to declassify documents "gives procedural expression to the duty of a Chamber to ensure the openness of the judicial process. The duty arises when the reasons for non-disclosure disappear."[60] He explained that the wording of the rule stating that the chamber "may" order the disclosure:

> in this context does not import discretion but gives expression to the obligation to do what is required by law. Asking the question whether in the absence of reasons justifying the continued withholding of the publication of proceedings the court has discretion to leave the seal intact, brings to the fore the mandatory nature of the power to make the proceedings public. Not to act would be a derogation from the duty to administer justice openly. The non-disclosure of oral and documentary evidence adduced before a Chamber would hide from view the judicial process in the absence of any reasons that could validate such a course. In those circumstances the departure from the norm of a public hearing can find no justification. The duty to make public what transpires in the course of the judicial process does not abate at the end of the judicial proceedings but subsists thereafter, binding the court to keep track of the scene and remove the ban on publicity whenever and wherever the reasons for non-disclosure eclipse. [...] Ensuring the publication of the judicial process is a lasting obligation that binds the court to survey the scene throughout.[61]

39. At the ICC, the Pre-Trial Chamber's Confirmation of Charges pursuant to Article 61 of the Rome Statute serves as the indictment in the same way the Closing Order does at the ECCC.[62] The ICC's practice is to hear witnesses at the confirmation stage in public (unless security concerns require witness protection measures) and to issue the Confirmation of Charges decision publicly, with redactions limited to only the names of protected witnesses and victims. This is equally true where charges are not confirmed.[63] As a judge of the ICC's Appeals Chamber has observed, "A public hearing assuring the openness of the judicial process is envisaged by the Rome Statute at every stage of the proceedings involving adjudication bearing on the confirmation of the charges, the trial of the accused and proceedings on appeal."[64]

40. Article 6(1) of the European Convention on Human Rights requires judgments to be pronounced publicly. The ECtHR has noted the importance of allowing "scrutiny of the

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59 *Prosecutor v. Joseph Kony et al.,* Decision of the Appeals Chamber on the Unsealing of Documents, 4 February 2008, para. 5.

60 *Prosecutor v. Joseph Kony et al.,* Decision of the Appeals Chamber on the Unsealing of Documents, Separate Opinion of Judge Georchios M. Pikis, 4 February 2008, para. 4.

61 *Prosecutor v. Joseph Kony et al.,* Decision of the Appeals Chamber on the Unsealing of Documents, Separate Opinion of Judge Georchios M. Pikis, 4 February 2008, para. 4 (internal citation omitted).

62 Rome Statute of the International Criminal Court, Article 61.

63 *See, eg., Prosecutor v. Bahar Idriss Abu Garda*, Decision on the Confirmation of Charges, Public Redacted Version, Pre-Trial Chamber, 8 February 2010; *Prosecutor v Callixte Mbarushimana*, Decision on the Confirmation of Charges, Public Redacted Version, Pre-Trial Chamber, 16 December 2011.

64 *Prosecutor v. Joseph Kony et al.,* Decision of the Appeals Chamber on the Unsealing of Documents, Separate Opinion of Judge Georchios M. Pikis, 4 February 2008, para. 2.

judiciary by the public."[65] It has also observed that public access to court proceedings is "one of the means whereby confidence in the courts can be maintained."[66] The ECtHR has also held that:

> the public, must be able to understand the verdict that has been given; this is a vital safeguard against arbitrariness. As the Court has often noted, the rule of law and the avoidance of arbitrary power are principles underlying the [European Convention on Human Rights] [...] In the judicial sphere, those principles serve to foster public confidence in an objective and transparent justice system, one of the foundations of a democratic society.[67]

41. Transparency is particularly important in international and internationalised criminal trials. It helps build confidence in these unique judicial bodies, while also serving the tribunals' transitional justice aims. In addition to justice, international criminal tribunals are meant to advance "peace-building, reconciliation, creating a historical record, and norm-expressivism."[68] Former ICTY President Judge Theodor Meron has written:

> Transparency is essential to building public confidence in the fair administration of justice—and public confidence is, in turn, essential to fostering a broad understanding of and support for the Tribunals' work. Transparency in court proceedings also serves as an important safeguard against judicial arbitrariness and helps to ensure not only the fairness of the proceedings but the independence and impartiality of the bench and the predictability of judicial decisions. And transparency is, perhaps, particularly vital in criminal courts like the Tribunals, where the issues at stake—including horrific alleged crimes and determinations of the guilt or innocence of an accused—make it all the more imperative to have clear and visible adherence to internationally recognized standards of due process.[69]

42. The ICIJ has noted in his own writings that: "Former ICTY President Antonio Cassese observed in his address to the General Assembly of the United Nations in 1997, that part of the tribunal's mission was to establish 'an historical record of what occurred during the conflict there by preventing historical revisionism.'"[70] These various goals can only be achieved if decisions, particularly decisions as consequential as Closing Orders, are available to the public.

b. The CIJs Have Failed to Provide Meritorious Reasons for their Redactions

43. In the Impugned Decision, the CIJs hold that "nothing *requires* us to produce even a redacted public version of any document"[71] (emphasis in original). They note the "broad discretion in

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65 *Case of Ryakib Biryukov v. Russia*, Judgment, 7 July 2008, para. 45.
66 *Case of Werner v. Austria*, Judgment, 24 November 1997, para. 45.
67 *Case of Taxquet v. Belgium*, Judgment, 16 November 2010, para. 90.
68 Sergey Vasiliev, *International Criminal Trials, A Normative Theory*, 2014, p. 366.
69 Theodor Meron, *The Making of International Criminal Justice: A View from the Bench,* 2011, p. 278.
70 Michael Bohlander, *International Criminal Justice, A Critical Analysis of Institutions and Procedures*, 2007, p. 77.
71 **D309/2** Impugned Decision, para. 13.

handling confidentiality issues during judicial investigations"[72] that they possess, and argue that that discretion extends to Closing Orders coming at the end of a judicial investigation because "the investigation stage formally ends only when the PTC has ruled on any appeals against the Closing Order."[73] They agree that "Rule 56 does not require that the final outcome of a judicial investigation should be confidential,"[74] but they imply that Cambodian law,[75] and the practice of some civil law jurisdictions,[76] support their decision to redact.

44. Examining the extent to which the sources cited by the CIJs support confidentiality is complicated by the fact that the CIJs have not clearly articulated the reasons why they have redacted the *Closing Order (Reasons)*. The sole explanation is found in the press release that the CIJs disseminated in February 2017 when they issued the *Closing Order (Disposition)*. The press release states that the redaction of the reasoning of the charges would be done "[d]ue to the nature of the closing order as a dismissal".[77] However, in that press release the CIJs do not refer to any applicable Rule, principle, or jurisprudence to explain why a dismissal should not be made fully public.

45. In the CIJs' press release announcing the issuance of the *Closing Order (Reasons)*, the CIJs further specified that the reason they believed redaction was merited was that due to the dismissal of the case 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."[78] The CIJs do not further explain how the presumption of innocence or the right to privacy "restrict the contents that may be made public" in this case. The presumption of innocence applies whether or not the Closing Order sends the subject to trial. The CIJs provide no explanation for their view that there is a greater need to keep the public informed in cases of indictment than in cases of dismissal.

46. It is worth noting that the CIJs' intention regarding the duration of the confidential classification of portions of the *Closing Order (Reasons)* is not entirely clear. Specifically, in their press release accompanying the *Closing Order (Disposition)*, the CIJs stated that the reasoning regarding the substance of the charges "shall remain confidential unless the

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72 **D309/2** Impugned Decision, para. 13.
73 **D309/2** Impugned Decision, para. 13.
74 **D309/2** Impugned Decision, para. 13.
75 **D309/2** Impugned Decision, para. 16.
76 **D309/2** Impugned Decision, para. 16.
77 Press Release by the Office of the Co-Investigating Judges, Co-Investigating Judges Dismiss Case Against Im Chaem, 22 February 2017.
78 Press Release, Co-Investigating Judges Issue Reasons for Dismissal of Case 004/01, 10 July 2017.

dismissal is overturned on appeal and a trial ordered by the Pre-Trial Chamber."[79] This implies that it was the CIJs' expectation that the reasoning on the charges would never be made public unless Im Chaem went to trial. However, in the Impugned Decision, the CIJs appear to argue that confidentiality is merited under Rule 56 because, in the CIJs' view, "the investigation stage formally ends only when the PTC has ruled on any appeals against the closing order."[80] This would imply that they would not be opposed to public access to the reasoning on the charges once any appeals against the Closing Order have been concluded, regardless of the outcome. In any event, it is clear that any decision regarding retaining or removing the redactions is now within the sole purview of the PTC.

i. Cited Cambodian Law Does not Support Redaction

47. In the Impugned Decision, the CIJs "refer to Articles 83(4) and 121(5) of the 2007 Cambodian Code of Criminal Procedure, which together with Article 314 of the 2009 Criminal Code make the violation of confidentiality of the investigations an offence."[81] However, the issue on this appeal is not whether it is wrong to breach a confidentiality order during an investigation—clearly it is unacceptable for anyone to do so. Rather, the issue is: given that ECCC rules and international jurisprudence favour transparency, after the conclusion of the investigation, what type of documents or information should be classified confidential and denied to the public? The cited provisions say nothing about whether Closing Orders may be released publicly once the investigations have concluded. Article 314 of the 2009 Criminal Code, cited by the CIJs, provides: "There shall be no offence if the law authorises or imposes the disclosure of the secret." In regards to the ECCC, the law clearly authorises the relevant judicial chambers to release publicly any information they deem appropriate,[82] and among the "Fundamental Principles" of the Internal Rules, Article 21 mandates all judges at the ECCC to interpret the ECCC law, Rules and practice directives "so as to ensure ... transparency of proceedings…."

ii. Cited Civil Law Codes Do Not Support Redaction

48. In the Impugned Decision, the CIJs follow their brief referral to Cambodian Law provisions that cover confidentiality during investigations with an assertion that "[s]imilar provisions regarding pre-trial publicity also exist in other civil law jurisdictions, for example Germany,

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79 Press Release by the Office of the Co-Investigating Judges, Co-Investigating Judges Dismiss Case Against Im Chaem, 22 February 2017.

80 **D309/2** Impugned Decision, para. 13.

81 **D309/2** Impugned Decision, para. 16.

82 *See* Rule 56(2); Practice Direction on Classification and Management of Case-Related Information, Rev. 2, Article 9.1; Practice Direction on Filing of Documents Before the ECCC, Rev. 8, Arts. 3.12, 3.14.

Switzerland, and France."[83] The three legal codes that the CIJs cite shed no light on the issues in this case as: 1) they address confidentiality during investigations, not once an investigation has concluded; and, 2) they pertain to **unauthorised** disclosure of material during investigations, not whether or not a judicial body should classify a decision dismissing a case as confidential, which is the sole issue on this appeal.

49. The CIJs cite a portion of Section 353d of the German Criminal Code, which states that it is an offence to publicly communicate "verbatim essential parts or all of the indictment or other official documents of a criminal proceeding, a proceeding to impose a summary fine or a disciplinary proceeding before they have been addressed in a public hearing or **before the proceeding has been concluded**."[84] Notably, this Code provision states that it is not a crime to reveal documents from a criminal proceeding once "the proceeding has been concluded," thus the provision actually supports that a Closing Order issued after the conclusion of an investigation should be public.

50. Article 226-13 of the Criminal Code of the French Republic makes it a criminal violation to disclose "secret information, by a person entrusted with such a secret, either because of his position or profession, or because of a temporary function or mission."[85] However, the next article of the French Criminal Code demonstrates the point that when a competent judicial body authorises the revelation it is *ipso facto* not a violation. Article 226-14 begins: "Article 226-13 is not applicable to the cases where the law imposes or authorises the disclosure of the secret."

51. Likewise, Article 293 of the Swiss Criminal Code, which the CIJs cite, has no relevance to the issue in this appeal as to whether findings in a closing order should be confidential or accessible to the public. The Article concerns only unauthorised disclosure of confidential material: "Any person who **without authorisation** publishes information from the files, proceedings or official investigations of a public authority which have been declared secret by that authority in accordance with its powers is liable to a fine."[86] More relevant to the issue on this appeal is a 2016 ruling[87] of the Swiss Federal Tribunal, which held that under Swiss jurisprudence the media have a legitimate interest in accessing a dismissal decision, "because

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83 **D309/2** Impugned Decision, para. 16.

84 **D309/2** Impugned Decision, fn. 20; *see also* German Criminal Code (2010 English version), Sec. 353d, (emphasis added), available at https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/criminal_code_germany_en_1.pdf.

85 French Penal Code (2005 English version), Art. 226-13, available at http://www.legislationline.org/documents/section/criminal-codes/country/30.

86 Swiss Criminal Code (2017 English version), Art. 293 (emphasis added), available at https://www.admin.ch/opc/en/classified-compilation/19370083/201707110000/311.0.pdf.

87 *A. v. Radio Television Suisse*, Arret TF 1C_13/2016 of 18 avril 2016.

of the general control function which they usually assume."[88] The decision concerned a case that had received significant public attention, the suspect had made statements to the press, and criminal charges had been dismissed—exactly the situation with Im Chaem. The Swiss Tribunal held that "[i]n these circumstances, it is obviously important for the public to know why a criminal case that has had some impact has finally ended without a trial."[89]

iii. Im Chaem's Right to a Presumption of Innocence and to Privacy Do Not Support Redaction

52. Granting public access to the reasoning of the substantive charges in the *Closing Order (Reasons)* does not compromise Im Chaem's right to a presumption of innocence. She is entitled to the presumption of innocence unless and until she is convicted, and that is true even if she were to be indicted and sent to trial.[90] Closing Orders issued by the CIJs are not determinations of guilt, a function ascribed to the Trial Chamber.[91] They are merely determinations as to what charges an individual can be sent to trial on, which utilise an evidentiary standard less than the "beyond a reasonable doubt" standard necessary for conviction.[92]

53. However, the presumption of innocence does not require that all evidence regarding a defendant's alleged crimes be kept from the public. If this were the case, a trial could not take place in public as the Accused are not yet convicted and enjoy the presumption of innocence throughout. Nor did the presumption of evidence prevent public access to the Closing Order in Case 002 prior to the commencement of trial.[93] Indeed, as the ICIJ has explained in Case 003, the presumption of innocence is not affected by a Closing Order, even one that indicts:

> The investigation as such does not pronounce on guilt or innocence and even if it were to end in an indictment, that would mean no more than an expression of the CIJ's view that the charged person has to answer a *prima facie* case, because the indictment standard is precisely *not* that of "beyond a reasonable doubt" or "*intime conviction*". Meas Muth's innocence would be presumed during the entire proceedings until the final judgement.[94] (all italics in original)

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88 *A. v. Radio Television Suisse*, Arret TF 1C_13/2016 of 18 avril 2016, para. 5.4. Unofficial translation from French. "Selon la jurisprudence, les médias disposent en principe d'un intérêt suffisant à accéder à une décision de classement, en raison de la fonction de contrôle général qu'ils assument habituellement [...]."

89 *A. v. Radio Télévision Suisse*, Arret TF 1C_13/2016 of 18 avril 2016, para. 5.4. Unofficial translation from French. "Dans ces circonstances, il importe manifestement au public de savoir pour quelles raisons une affaire pénale ayant eu un certain retentissement s'est finalement achevée sans procès."

90 *See* ECCC Law, Article 35 new ("The accused shall be presumed innocent as long as the court has not given its definitive judgment."); ICCPR, Article 14(2); *see also Prosecutor v. Rasim Delić*, Decision on the Outcome of the Proceedings, 29 June 2010, para. 14.

91 Internal Rule 98.

92 Internal Rule 67; Case 002-**D427** Closing Order, 15 September 2010, paras. 1323-1326.

93 Case 002-**D427** Closing Order, 15 September 2010.

94 Case 003-**D100/32** Consolidated Decision on the International Co-Prosecutor's Requests to Disclose Case 003 Documents into Case 002 (D100/25 and D100/29), 16 August 2016, para. 31.

54. As the ICIJ has previously noted in a decision on Case 003, the ECCC rules do not provide for an inherent right to withhold information from the public, including incriminating evidence, in order to protect a Charged Person's reputation:

> The assertion regarding the presumption of innocence is a mischaracterisation. In reality, Meas Muth complains about an impact on his reputation and his right to privacy. This complaint is without merit. The PTC recently held in Case 004 that Internal Rule 21 does not confer an inherent *right* to integrity in the conduct of an investigation, a confidential investigation, or the protection of his reputation. …
>
> … That the right to the presumption of innocence does not prohibit the disclosure of information about, including evidence from, a case, or even statements confirming the existence of reasonable suspicion of guilt, or predicting the probable outcome of a trial, has been established in international human rights jurisprudence.[95]

55. Even if harm to reputation were a valid concern, however, in order to evaluate any harm to Im Chaem's reputation that the public release of the CIJs' reasoning regarding the substantive charges could occasion, one must necessarily consider the status of the individual's reputation before the release. If the public were unaware that Im Chaem stands accused of crimes against humanity, it might be possible to argue that findings in the *Closing Order (Reasons)* indicating she **may** have committed certain crimes against humanity would be damaging to her reputation. But a review of information concerning Im Chaem already in the public domain, including on the ECCC's publicly available web site and in the media, indicates that the public is already well aware that Im Chaem has been accused of crimes against humanity.

56. The ECCC's *Court Reporter*, a monthly publication informing the public of the status of the cases before the ECCC and other items of interest, has provided judicial updates on the Case 004/1 investigation in every issue since Im Chaem was formally charged in March 2015. Im Chaem's picture is prominently displayed on the home page of the ECCC website,[96] and the web page devoted to her states:

> Im Chaem has been charged with the following alleged crimes:
> - homicide, as a violation of the 1956 Cambodian Penal Code, allegedly committed at Phnom Trayoung security centre and Spean Sreng worksite; the Crimes against Humanity of murder, extermination, enslavement, imprisonment, persecution on political grounds, and other inhumane acts at allegedly commit[t]ed at the Phnom Trayoung security centre; and
> - the Crimes against Humanity of murder, enslavement, imprisonment, and other inhumane acts allegedly commit[t]ed at the Spean Sreng worksite.[97]

57. A press release from ICIJ Harmon announcing Im Chaem's charging *in absentia* also lists these crimes against humanity.[98] Moreover, the fact that it is public information that Im

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[95] Case 003-**D100/32** Consolidated Decision on the International Co-Prosecutor's Requests to Disclose Case 003 Documents into Case 002 (D100/25 and D100/29), 16 August 2016, paras. 30, 31.
[96] https://www.eccc.gov.kh/en.
[97] https://www.eccc.gov.kh/en/charged-person/im-chaem.

Chaem has been charged with these crimes means the public is aware that the ICIJ has found clear and consistent evidence in regards to them.[99] Also on the ECCC web site is the statement of the International Co-Prosecutor summarising his final submissions in Case 004/1 as authorised by Rule 54. In their own press release accompanying the issuance of the *Closing Order (Reasons)*, the CIJs noted that "a dismissal for lack of personal jurisdiction does not equate to a statement that no crimes were committed by a charged person. It would therefore be incorrect in such a scenario to state without further qualification that a charged person was 'cleared' of the charges".[100] Indeed, arguably Im Chaem's reputation is harmed more by the redactions, because they also keep from the public the CIJs' views regarding which of the crimes alleged in the ICP's public statement regarding his Final Submission the CIJs did not feel were supported by the evidence.

58. However, it is not just the ECCC that has distributed copious information publicly about the allegations against Im Chaem. National and international media have extensively reported on the case, including information regarding charges and crime sites. A search for "Im Chaem" on Google News returns over 200 results.[101] For example, a *New York Times* profile of Im Chaem from February 2017 contains quotes from questions she answered for the reporter, includes a picture of her, and notes that she is charged with "crimes against humanity including mass murder, extermination and enslavement" while also discussing evidence related to those charges.[102]

59. This same extensive media coverage of the investigation of Im Chaem also serves to refute the CIJs' implication that Im Chaem's right to privacy would be adversely affected by the release of the full reasoning regarding the substantive charges. Simply put, coverage of Im Chaem's alleged involvement in crimes during the period of Democratic Kampuchea—often with her cooperation—has been so widespread that those matters are no longer a "private" matter, even if they ever were. Im Chaem has spoken openly with DC-Cam[103] and reporters[104] about her role during Democratic Kampuchea. In these statements she has made claims regarding her conduct during the period of Democratic Kampuchea, and as mentioned above, since the issuance of the *Closing Order (Reasons)* her lawyers have themselves publicly commented on the CIJs' *Closing Order (Reasons)* characterising the findings as exonerating.

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98 Statement of the International Co-Investigating Judge Regarding Case 004, 3 March 2014, available at: https://www.eccc.gov.kh/en/articles/international-co-investigating-judge-charges-im-chaem-absentia-case-004.

99 Internal Rule 55(4).

100 Press Release, Co-Investigating Judges Issue Reasons for Dismissal of Case 004/01, 10 July 2017.

101 This search almost certainly produces only some fraction of total coverage, as it would not capture news articles not on the web, or available only in Khmer.

102 Julia Wallace, New York Times, *The Bucolic Life of a Cambodian Grandmother Accused of Mass Killings*, 24 Feb 2017.

103 **D1.3.28.4** Im Chaem DC-Cam Statement, 4 March 2007.

104 Sok Khemara, VOA, Second Tribunal Suspect Denies Prosecution's Charges, 11 August 2011.

60. The CIJs do not define or source the right to privacy that they are referring to, but the ICP presumes they are referring to the right identified in Article 17(1) of the ICCPR, which states: "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."[105] It should be clear, however, that the public release of a judicial document, if it implicates privacy at all, does not do so in an "arbitrary or unlawful" way, and therefore does not violate that right. As a Chamber of the ICC has held, the right to privacy "cannot be viewed as an absolute right in so far as these same instruments provide indications of what may be considered as 'lawful' interference with the fundamental right to privacy."[106] Indeed, the PTC has made exactly this point when it has previously addressed Article 17's rights to reputation and privacy in the context of disclosure, and found that they were not violated:

> [T]he Pre-Trial Chamber finds…that the wording of Article 17 of the ICCPR is such that it permits interference with privacy, as long as it is not "arbitrary" or "unlawful." The term "unlawful" means that no interference can take place, except in cases envisaged by the law. The expression "arbitrary interference" can also extend to interference provided for under the law and the concept of "arbitrariness" is intended to guarantee that even interference provided for by law should be reasonable in the particular circumstances. The Pre-Trial Chamber, firstly, recalls that the applicable law does not confer upon Charged Persons an 'inherent right' to the protection of reputation … . Secondly, the Pre-Trial Chamber notes that the Impugned Order is issued by a competent judicial body, based on law, through an adversarial process, and is reasonably decided in pursuance of the legitimate aim of cooperating with the truth finding mission of [a] judicial body of the ECCC, hence not arbitrary.[107]

61. The same is true here. The *Closing Order (Reasons)* was produced by a competent judicial body, based on law, through an adversarial process, and has been decided in pursuance of the legitimate aim of the truth finding mission of the ECCC. It therefore is not unlawful or arbitrary and is not a violation of privacy.

62. Even more fundamentally, however, it is difficult to see how Im Chaem's right to privacy is implicated **at all** by the reasoning regarding the substantive charges. The Commentary regarding Article 17 indicates that the right to privacy encompasses matters such as personal communications, a person's home, and her body.[108] Neither WRIs composed of statements freely given by witnesses regarding their own experiences, regardless of whether they mention Im Chaem, nor conclusions drawn by the CIJs thereon, are within the matters protected by Im Chaem's right to privacy.

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[105] International Covenant on Civil and Political Rights, Article 17(1).

[106] *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, 29 January 2007, para. 75.

[107] Case 003-**D100/32/1/7** 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 2017, para. 19 (internal citations omitted).

[108] CCPR General Comment No. 16: Article 17 (Right to Privacy), 8 April 1988, para. 8; *see also* Rikke Frank Joergensen, *Can human rights law bend mass surveillance?*, Internet Pol'y Rev., 27 Feb 2014.

c. Reclassification Request

63. As an alternative to a decision on appeal, the ICP requests that the PTC utilise its powers as the Chamber in possession of the Case 004/1 Case File to reclassify the currently confidential version of *Closing Order (Reasons)* as public pursuant to Practice Direction on Classification and Management Article 9.1, or create a new public version pursuant to Article 9.2 with redaction limited only to witnesses who have been granted protected status,[109] if any. The Practice Direction on the Filing of Documents before the ECCC Article 3.14 also grants the PTC the power of reclassification: "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."[110] The ICP submits that for the reasons stated above, reclassification is merited in the interests of justice.

64. In addition, on the same basis, the ICP also requests that the PTC reclassify as public the Impugned Decision, and classify this appeal (as well as any response, with any appropriate witness redactions) as public. Nothing in these documents concerns witnesses or evidence from the investigation and there is no reason for the public not to have access to this legal debate about the parameters of transparency versus confidentiality at the ECCC.

V. CONCLUSION

65. Due to the strong legal and policy imperatives in favour of transparency of ECCC proceedings, and because there are no persuasive reasons to maintain the redactions, the ICP submits that the full *Closing Order (Reasons)* should be released publicly.

VI. RELIEF REQUESTED

66. Based on the foregoing, the ICP respectfully requests that this Chamber:
    a. Reclassify as public the Impugned Decision; and,
    b. Reverse the Impugned Decision and release the full *Closing Order (Reasons)* publicly, subject only to any necessary redactions for witness protection pursuant to Rule 29(3).

Respectfully submitted,

Date	Name	Place	Signature
9 August 2017	Nicholas KOUMJIAN International Co-Prosecutor	Phnom Penh	

[109] Internal Rule 29(3).
[110] Practice Direction on the Filing of Documents, Rev. 8, Article 3.14.