

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

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**INTERNATIONAL CO-PROSECUTOR'S REPLY REGARDING APPEAL OF DECISION
ON *CLOSING ORDER (REASONS)* REDACTION**

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REPLY

1. The International Co-Prosecutor (“ICP”) hereby replies to Im Chaem’s response¹ (“Response”) to the ICP’s appeal² (“Appeal”) of the Co-Investigating Judges’ (“CIJs”) *Decision on International Co-Prosecutor’s Request for Closing Order Reasons and CIJ’s Decision to be Made Public*³ (“Impugned Decision”).
2. Im Chaem begins her Response by arguing that the Appeal lacks sufficient specificity for her to be able to respond,⁴ a claim belied by the remainder of her submissions identifying the arguments the ICP put forward. Even with reference to the sole standard relied on by Im Chaem,⁵ there can be no reasonable question that the Appeal “identif[ies] the issues in dispute by reference to specific findings”⁶ of the CIJs. The Appeal fully complies with the standard laid out by the Supreme Court Chamber that Im Chaem cites,⁷ as well as Rule 75(2)’s requirement that “submissions on appeal shall contain the reasons of fact and law upon which the appeal is based”.⁸
3. The Appeal lays out a clear case of error of law (as opposed to Im Chaem’s preferred standard of abuse of discretion). This is patently evident from the Appeal as a whole, which unambiguously argues that “relevant law and principles **require** that the full *Closing Order (Reasons)* be public.”⁹ The Appeal prominently relied on the mandatory language of Internal Rule 21, which provides in relevant part: “The applicable ECCC Law, Internal Rules, Practice Directions, and Administrative Regulations **shall** be interpreted so as . . . to ensure . . . transparency of proceedings,”¹⁰ and “[t]he ECCC **shall** ensure that victims are kept informed”¹¹ There is nothing discretionary about these provisions of the ECCC law as the use of the word “shall” makes it clear they are mandatory.
4. Despite the clear mandates of the ECCC law and international jurisprudence regarding transparency, Im Chaem argues that “redactions are decisions of a discretionary nature”¹² and

¹ **D309/2/1/3** Response to the International Co-Prosecutor’s Appeal of Decision on *Closing Order (Reasons)* Redaction or, Alternatively, Request for Reclassification of *Closing Order (Reasons)*, 4 September 2017 (hereinafter “Response”).

² **D309/2/1/2** International Co-Prosecutor’s Appeal of Decision on *Closing Order (Reasons)* Redaction or, Alternatively, Request for Reclassification of *Closing Order (Reasons)*, 9 August 2017 (hereinafter “Appeal”).

³ **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”).

⁴ **D309/2/1/3** Response, paras. 22-28.

⁵ **D309/2/1/3** Response, fn. 21, *quoting* Case 001-F28 Appeal Judgement, 3 February 2012, para. 41.

⁶ **D309/2/1/3** Response, fn. 21, *quoting* Case 001-F28 Appeal Judgement, 3 February 2012, para. 41.

⁷ **D309/2/1/3** Response, fn. 21, *quoting* Case 001-F28 Appeal Judgement, 3 February 2012, para. 41.

⁸ Internal Rule 75(2). The Appeal also fully complies with the Practice Direction on Filing of Documents Before the ECCC, Rev. 8, Article 4.1, by providing a “detailed legal argument”.

⁹ **D309/2/1/2** Appeal, Sec. IV(a) (emphasis added).

¹⁰ Internal Rule 21(1) (emphasis added).

¹¹ Internal Rule 21(1)(c) (emphasis added).

¹² **D309/2/1/3** Response, para. 24.

therefore that abuse of discretion is the appropriate standard of review.¹³ To support this contention, however, Im Chaem is forced to resort to inapposite jurisprudence addressing decisions regarding confidentiality **during ongoing** investigations,¹⁴ where logic dictates that the CIJs require a certain amount of discretion over confidentiality of information to ensure that the investigation is not compromised. As noted in the Appeal, however, at the time of the Closing Order, the investigatory functions justifying that discretion have ceased.

5. Im Chaem's arguments that the redactions in the *Closing Order (Reasons)* strike "the correct balance between the right of the public to be informed, the confidentiality of the investigation and the rights of the suspect"¹⁵ simply repeat the errors of the CIJs in the Impugned Decision. Indeed, in an attempt to push back on the Supreme Court Chamber's ("SCC") recognition of 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",¹⁶ Im Chaem does not point to countervailing jurisprudence of the SCC or this Chamber, but instead cites once again to the CIJs¹⁷—the very source that created the Impugned Decision—and then only to a decision concerning breaches of confidentiality of decisions addressing "procedural developments in a particular case" that "arise in a confidential part of the proceedings".¹⁸
6. Equally, if not more, unpersuasive is Im Chaem's attempt to rely on the European Court of Human Rights ("ECtHR") case of *Welke and Bialek v. Poland* in support of her argument.¹⁹ In *Welke*, the ECtHR held that it was permissible to issue only portions of a judgment publicly in the particular circumstances²⁰ where there was a "need to keep secret police methods of investigation that had been used"²¹ and extensive classified evidence had been heard by the court *in camera*.²² By contrast, there is no such justifiable reason to keep large sections of the *Closing Order (Reasons)* redacted.
7. Im Chaem asserts that the ICP, in addressing the domestic legislation cited by the CIJs and noting that the legislation does not support the CIJs' position, "fail[ed] to appreciate the Co-Investigating Judge's [*sic*] principal point, namely that these are illustrations that demonstrate

¹³ D309/2/1/3 Response, para. 24.

¹⁴ D309/2/1/3 Response para. 24 (quoting Pre-Trial Chamber decision made during ongoing Ao An investigation); *Ibid.* para. 25 (quoting International Co-Investigating Judge's decision made during ongoing Yim Tith investigation).

¹⁵ D309/2/1/3 Response, para. 29.

¹⁶ D309/2/1/3 Response, para. 31, quoting Case 001-F30/2 Decision on Guidelines for Reclassification of Documents on Case File, 26 July 2012, para. 5.

¹⁷ D309/2/1/3 Response, para. 32.

¹⁸ Case 004-D355/9 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, para. 12.

¹⁹ ECtHR *Welke and Bialek v. Poland*, Judgment, 1 March 2011.

²⁰ See ECtHR *Welke and Bialek v. Poland*, Judgment, 1 March 2011, para. 84 ("Having regard to the specific features of the criminal proceedings in question...").

²¹ ECtHR *Welke and Bialek v. Poland*, Judgment, 1 March 2011, para. 77.

²² ECtHR *Welke and Bialek v. Poland*, Judgment, 1 March 2011, para. 76.

the unremarkable nature of the Impugned Decision.”²³ It is Im Chaem, however, who apparently fails to appreciate the discussion of these provisions in the Appeal, for it shows that these provisions do not address at all the circumstances of the redaction of the *Closing Order (Reasons)*, because, as is clearly stated in the Appeal: “1) they address confidentiality during investigations, not once an investigation has concluded; and, 2) they pertain to unauthorized disclosure of material during investigations, not whether or not a judicial body should classify a decision dismissing a case as confidential”.²⁴

8. Im Chaem avers that provisions of the French Code of Criminal Procedure, the Swiss Code of Criminal Procedure, and German Criminal Code that permit partial “publication” of an order or judgment (in the case of the French code), or do not require “publication” in instances of dismissal (in the case of the German and Swiss codes), support her argument.²⁵ But this contention is based either on her misunderstanding of the term “publication”, or a false analogy between “publication” and “making publicly available”. It is clear that in context the use of the word “publication”²⁶ or “publicly announced”²⁷ in the cited legal codes refers to the physical act of announcement or distribution, not merely removing legal confidentiality. Im Chaem makes the same error of conflating “publication” with “making public” later on in her Response when she cites a commentary on the French Code of Criminal Procedure for the proposition that publication of dismissal orders are aimed at lessening media attention.²⁸
9. Im Chaem asserts that it is settled law that the investigation only formally ends when the Pre-Trial Chamber has ruled on any appeals from the Closing Order, and that therefore Rule 56’s requirement of confidentiality during the “investigation” continues to exist.²⁹ First, the ICP notes that this seems to be an acknowledgement by Im Chaem that at least by the time of the conclusion of the appeals from the *Closing Order (Reasons)*, confidentiality under Rule 56 is no longer warranted and therefore the redactions should be lifted. Second, the only source that Im Chaem cites for her conclusion that it is “settled law” that the investigation stage only ends when appeals from the Closing Order have been decided is the very Impugned Decision being challenged in this Appeal,³⁰ and the Impugned Decision itself cited no authority for this determination. Moreover, by its terms, Rule 56 applies to “judicial investigations”, not to the “investigation stage”, and when investigatory acts are no longer being carried out—as they are

²³ D309/2/1/3 Response, para. 35.

²⁴ D309/2/1/2 Appeal, para. 48 (emphasis omitted).

²⁵ D309/2/1/3 Response, paras. 35-37.

²⁶ French Code of Criminal Procedure, Articles 177-1, 212-1 (2006 English version).

²⁷ German Criminal Code, Sections 165(1), 200(1) (2010 English version).

²⁸ D309/2/1/3 Response, para. 60.

²⁹ D309/2/1/3 Response, para. 39.

³⁰ See D309/2/1/3 Response, fn. 54.

not once a Closing Order has been issued—the very reasons for the confidentiality of judicial investigations has ceased to exist.

10. Im Chaem claims that it is “puzzling” that the ICP noted that it is the norm for documents to be reviewed for maximum declassification at the conclusion of a case.³¹ She claims that since the CIJs have already made a determination regarding classification of the *Closing Order (Reasons)* no further review is necessary, and argues that the ICP is attempting to “forum shop” in asking the PTC to review this issue.³² This argument reflects a misunderstanding of the applicable procedure at the ECCC and depreciates the critical role of the Pre-Trial Chamber under ECCC law. First, bringing an appeal is not an instance of “forum shopping”, it is exercising a right under the Rules; it is the Pre-Trial Chamber that has the final say on issues brought before it and parties are under no obligation to accept erroneous rulings by the CIJs without exercising the right to bring the matter before the Pre-Trial Chamber. Second, the cited practice direction on classification explicitly designates that the “last judicial office seized of a case” shall undertake the review for reclassification.³³ It is the Pre-Trial Chamber that is currently seized of this case; under no circumstances will the OCIJ be the last judicial office seized of this case, and therefore the CIJs’ determination is not final.
11. Im Chaem quotes the Appeals Chamber of the International Criminal Court for the proposition that “decisions concerning redactions must be made on ‘a case-by-case evaluation of the merits’ in the particular circumstances”,³⁴ and argues that “[t]here is nothing in the [international] 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”.³⁵ But the very Appeals Chamber decision quoted by Im Chaem demonstrates that the extensive redactions of the *Closing Order (Reasons)* are not merited. The cited paragraphs of the Appeals Chamber decision are discussing redactions of names and other information for reasons of witness and victim protection,³⁶ and then holds that such redactions should occur “only after an evaluation of the infeasibility or insufficiency of less restrictive protective

³¹ **D309/2/1/3** Response, para. 39.

³² **D309/2/1/3** Response, para. 39.

³³ Practice Direction on Classification and Management of Case-Related Information, Practice Direction ECCC/004/2009/Rev. 2, Art. 12.2.

³⁴ **D309/2/1/3** Response, para. 44, quoting ICC, Prosecutor v. Thomas Lubanga Dyilo, Appeals Chamber, Judgment on the Prosecutor’s appeal against 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, para. 39.

³⁵ **D309/2/1/3** Response, para. 44.

³⁶ ICC, Prosecutor v. Thomas Lubanga Dyilo, Appeals Chamber, Judgment on the Prosecutor’s appeal against 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, para. 33; ICC Rules of Procedure and Evidence, Rule 81(4).

measures.”³⁷ As the ICP stated in his Appeal, redactions for valid reasons of witness protection in the *Closing Order (Reasons)* would be justified.³⁸ Moreover, as the ICP also explained in the Appeal, the ICC in practice routinely institutes only limited redactions of witness names when issuing public decisions at the confirmation of charges stage, even when those decisions dismiss charges.

12. Im Chaem parrots the Impugned Decision in arguing that due to the nature of the Closing Order as a dismissal, the redactions are appropriate to safeguard “Im Chaem’s right to private life and presumption of innocence,”³⁹ but, as with the Impugned Decision, fails to demonstrate how ICCPR Article 17’s protection from “arbitrary or unlawful interference” with privacy, nor the right to presumption of innocence, would be implicated by the public having full access to the *Closing Order (Reasons)*. As the ICP quoted in his Appeal, this Chamber has cogently explained that where an 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, [it is] hence not arbitrary.”⁴⁰ Therefore, contrary to Im Chaem’s assertion, there is no further requirement under Article 17 to determine what is “reasonable” under the circumstances.⁴¹ To be absolutely clear: the right to privacy protected by Article 17 would not be affected by full disclosure of the *Closing Order (Reasons)*.
13. In relation to the right to the presumption of innocence, Im Chaem makes speculative arguments about what the media might say if they could access the full *Closing Order (Reasons)*.⁴² Not only is such speculation not sufficient to prevent public access, but as Im Chaem is forced to admit, this principle is directed to the media, not towards the courts.⁴³ Even the sole example that Im Chaem cites of a news article purportedly “paint[ing] a lurid narrative of Ms. Im Chaem’s involvement in criminal activity”⁴⁴ repeatedly notes that the crimes are merely allegations, and restricts itself in the passages selected by Im Chaem to quoting a public Human

³⁷ ICC, Prosecutor v. Thomas Lubanga Dyilo, Appeals Chamber, Judgment on the Prosecutor’s appeal against 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, para. 37.

³⁸ **D309/2/1/2** Appeal, para. 2.

³⁹ **D309/2/1/3** Response, Title IV(D).

⁴⁰ **D309/2/1/2** Appeal, para. 60, *quoting* 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).

⁴¹ **D309/2/1/3** Response, para. 51.

⁴² **D309/2/1/3** Response, para. 53.

⁴³ **D309/2/1/3** Response, para. 53.

⁴⁴ **D309/2/1/3** Response, para. 54.

Rights Watch report, and public testimony from a Civil Party in Case 002.⁴⁵ This is therefore hardly evidence of a “trial by media.”⁴⁶

14. Nor is speculative fear that releasing the full *Closing Order (Reasons)* might “attract unwarranted and unjustified critique of the ECCC as a judicial body for ‘failing’ to pursue accountability for serious crimes”⁴⁷ a legitimate reason to keep the full *Closing Order (Reasons)* from the public. If they had access to the full *Closing Order (Reasons)*, some members of the public may be critical of it, while others may praise it. But regardless, a court keeping information from the public simply because it fears criticism is an extremely troubling proposition. Moreover, if concern of criticism is a valid motivator, then that is an even greater reason to lift the redactions: as noted in the Appeal, the public has already been critical of the lack of transparency resulting from the extensive redactions of the *Closing Order (Reasons)*.⁴⁸ Clearly, shielding ECCC officials from public scrutiny or criticism is not a legally valid reason for confidentiality.
15. Im Chaem argues that the extensive redactions are appropriate because she has been “deprived of any meaningful opportunity to respond to or properly confront the evidence underlying these findings”.⁴⁹ But this disregards that she already had such an opportunity at the investigatory stage both through the filing of investigative requests and through the filing of her response to the Co-Prosecutors’ final submissions. Im Chaem argues that she limited her response to issues concerning personal jurisdiction based on a notice from the CIJs that it would be the main legal issue addressed in the *Closing Order*,⁵⁰ but she fails to comprehend that the factual findings regarding the substantive crimes go directly to the jurisdictional question of whether Im Chaem is one of those “most responsible”. The decisions of her counsel regarding how to address that issue in their submissions is not a legitimate basis to keep the *Closing Order (Reasons)* from the public.
16. For this same reason—that the factual findings regarding crimes allegedly attributable to Im Chaem are directly connected to the jurisdictional question of whether she was one of those “most responsible”—Im Chaem’s contention that the CIJs’ findings regarding those crimes in the *Closing Order (Reasons)* are *ultra vires*⁵¹ is nonsensical. Nor is it accurate for Im Chaem to characterize the CIJs’ findings as “tentative”.⁵² While the CIJs’ findings need not reach the

⁴⁵ D309/2/1/3 Response, fn. 76.

⁴⁶ D309/2/1/3 Response, para. 53.

⁴⁷ D309/2/1/3 Response, para. 55.

⁴⁸ D309/2/1/2 Appeal, para. 18.

⁴⁹ D309/2/1/3 Response, para. 57.

⁵⁰ D309/2/1/3 Response, para. 56.

⁵¹ D309/2/1/3 Response, paras. 62-67.

⁵² D309/2/1/3 Response, paras. 53, 55.

level of proof of “beyond a reasonable doubt” required for conviction at trial, there is nothing tentative about their conclusions that Im Chaem, for example, “ordered the enslavement, imprisonment, and execution of people at the Phnom Trayoung security centre, and the enslavement of the workers at Spean Sreng Canal worksite.”⁵³

17. Im Chaem submits that the Human Rights Committee’s views in *Sayadi and Vinck v. Belgium*⁵⁴ show that ICCPR Article 17 encompasses a right of protection from “negative association”.⁵⁵ But *Sayadi* concerned the placement of individuals’ names by a State on a list associating them with terrorist acts without any due process.⁵⁶ By contrast, Im Chaem has been represented by counsel and has had extensive opportunity to submit her arguments and to request investigatory actions to the CIJs, a neutral judicial body that was the fact finder. This is an essential distinction when considering whether Article 17’s requirement of “unlawful”-ness regarding the interference with the relevant right is met, which in this instance it is not.
18. Finally, having failed to timely appeal the redactions of the *Closing Order (Reasons)* herself, Im Chaem attempts to use her Response to make her own requests to amend the applications of the redactions, and in a number of places to further redact the *Closing Order (Reasons)*.⁵⁷ She attempts to characterize these requests as “typographical amendments”, but they are nothing of the sort. Im Chaem’s arguments make clear that she disagrees substantively with the decisions the CIJs made on what to redact. This untimely attempt to lodge a surreptitious appeal should not be countenanced, but regardless, the public version of the *Closing Order (Reasons)* has been available to the public for two months. At this point, it is not possible to hide additional portions of the *Closing Order (Reasons)* from the public. It is noteworthy, however, that Im Chaem in making this request to the Pre-Trial Chamber clearly contradicts her prior legally unsupported position that the redactions are discretionary decisions for the CIJs alone.
19. Her arguments requesting further redaction, moreover, have no merit. Im Chaem argues that “the names of Tum Soeun and Pech Chim should be consistently redacted.”⁵⁸ What she presumably means, however, is that their names should be redacted everywhere they occur, as they have been redacted “consistently” according to the logic of the CIJs: they have been redacted where they are cited as the source for evidence, either in the body or in a footnote, and in the sections of the *Closing Order (Reasons)* discussing the criminal findings. But Im Chaem

⁵³ **D308/3** Closing Order (Reasons), 10 July 2017, para. 310.

⁵⁴ Human Rights Committee, Communication No. 1472/2006, Nabil Sayadi and Patricia Vinck v. Belgium, 22 October 2008.

⁵⁵ **D309/2/1/3** Response, para. 59.

⁵⁶ Human Rights Committee, Communication No. 1472/2006, Nabil Sayadi and Patricia Vinck v. Belgium, 22 October 2008, paras. 2.2, 2.3, 10.13.

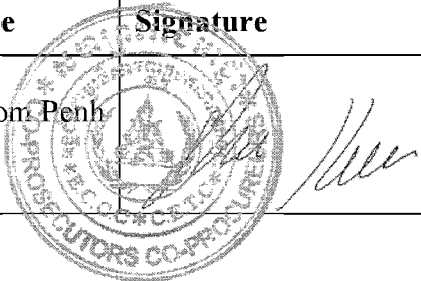
⁵⁷ **D309/2/1/3** Response, paras. 68-75.

⁵⁸ **D309/2/1/3** Response, para. 70.

provides no explanation—reasonable or otherwise—of why she believes their names should be redacted wherever they occur, and there is none.

20. Im Chaem similarly fails to provide any argument in support of her contention that Section 4.4 of the *Closing Order (Reasons)* should be redacted because it “pertains to confidential evidence, not to the ‘main legal findings’”.⁵⁹ Even according to Im Chaem, the main legal finding of the *Closing Order (Reasons)* is the issue of whether Im Chaem falls within the personal jurisdiction of the ECCC as one of those “most responsible”. As Section 4.4 addresses the “Role and Authority of Im Chaem in the Northwest Zone”, the claim that it is not related to the “main legal findings” is unsupported.
21. Im Chaem also seeks the redaction of citations to her statements made to outside organizations including DC-Cam.⁶⁰ She bases this request on her right not to be forced to testify against herself, and implies that it was concerns about this right that led the CIJs to attribute less weight to these statements than to interviews conducted by the OCIJ. But such motivation is not evidenced in the cited paragraph—or other paragraphs—of the *Closing Order (Reasons)*, which merely explains that lesser weight has been attributed to outside statements “[c]onsistent with the approach taken in Case 002 and with the general rules of evaluation of evidence explained in this section”.⁶¹ Those general rules of evaluation of evidence explain that the CIJs attributed lesser weight to statements given to outside entities not because of concerns regarding self-incrimination, but because those “statements were generated without the judicial guarantees and formality that characterise WRIs.”⁶² In addition, it should be crystal clear that Im Chaem’s **voluntary** statements made to outside entities in no way violate her right against **compelled** self-incrimination.

Respectfully submitted,

Date	Name	Place	Signature
11 September 2017	Nicholas KOUMJIAN International Co-Prosecutor	Phnom Penh	

⁵⁹ D309/2/1/3 Response, para. 70.

⁶⁰ D309/2/1/3 Response, paras. 73-75.

⁶¹ D308/3 Closing Order (Reasons), 10 July 2017, para. 139.

⁶² D308/3 Closing Order (Reasons), 10 July 2017, para. 104.