



ព្រះរាជាណាចក្រកម្ពុជា

ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

Royaume du Cambodge
Nation Religion Roi

ការិយាល័យសហចៅក្រមស៊ើបអង្កេត
Office of the Co-Investigating Judges
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**DECISION ON INTERNATIONAL CO-PROSECUTOR'S
REQUEST FOR CLOSING ORDER REASONS AND CIJ'S
DECISION TO BE MADE PUBLIC**

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I. PROCEDURAL HISTORY

1. On 20 January 2017, we issued the *Decision on Im Chaem's Requests for Retraction and Public Statement* in which we, *inter alia*, denied a request by the defence for Im Chaem ("Defence") to order the International Co-Prosecutor ("ICP") to publish a partial retraction of a public summary of his Internal Rule 66(5) final submission and instructed that public redacted versions of the underlying request and the ICP's response be filed ("Retraction Decision").¹
2. On 22 February 2017, we issued the *Closing Order (Disposition)*, dismissing the charges against Im Chaem and informing the parties that the full reasons for the dismissal would be issued separately.² In our press release of the same date, we indicated that we would file a public version of the main legal findings.³
3. On 7 March 2017, the ICP filed a request for the closing order reasons and the Retraction Decision to be made public ("Request").⁴
4. On 20 March 2017, the Defence filed their response to the Request ("Response").⁵
5. On 10 July 2017, we issued the confidential and public redacted versions of the *Closing Order (Reasons)*.⁶

II. SUBMISSIONS

A. Request

6. The ICP submits that no provisions of the Internal Rules suggest that a closing order, whether dismissing or indicting, should not be made public. The ICP submits that Internal Rule 56, providing that "*judicial investigations shall not be conducted in public*", does not imply that the final outcome of an investigation is to be confidential. Further, Internal Rule 56(2)(a) refers to the provision of information during an investigation "*to keep the public informed of the proceedings*", envisaging that information will be provided during the confidential investigation.⁷
7. The ICP submits that the rationale for releasing a public redacted version of a closing order sending a case to trial (which has previously occurred) and one dismissing charges is fundamentally the same: to provide transparency and to ensure public awareness of the ECCC's judicial processes.⁸
8. The ICP further submits that keeping the reasons confidential provides a negative example to domestic jurisdictions and fuels external criticism of the ECCC.⁹ The

¹ Case File No. 004/1-D306/2, *Decision on Im Chaem's Requests for Retraction and Public Statement*, 20 January 2017.

² Case File No. 004/1-D308, *Closing Order (Disposition)*, 22 February 2017.

³ Available at: <https://www.eccc.gov.kh/en/document/public-affair/press-release-co-investigating-judges-dismiss-case-against-im-chaem>

⁴ Case File No. 004/1-D309, *International Co-Prosecutor's Request for Closing Order Reasons and CIJ's Decision to be Made Public*, 7 March 2017.

⁵ Case File No. 004/1-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*, 20 March 2017.

⁶ Case File No. 004/1-D308/2, *Closing Order (Reasons)*, 10 July 2017.

⁷ Request, para. 3.

⁸ *Ibid.*, para. 5.

⁹ *Ibid.*, para. 6.



ICP highlights international jurisprudence emphasising the importance of transparency in terms of enhancing public confidence in the administration of justice and stating that publicity is seen as a guarantee of fairness of trial.¹⁰

9. In relation to the Retraction Decision, the ICP highlights that the Defence's underlying request and the ICP response thereto were issued in public redacted form and submits that there is no reason to keep the Retraction Decision confidential as it contains no confidential information.¹¹

B. Response

10. The Defence do not oppose the Retraction Decision being made public.¹²
11. The Defence however oppose the request to issue a public redacted version of the closing order on the grounds that the request is premature. The Defence submit that only when the reasons for classifying a document as confidential no longer exist should the CIJs consider reclassifying it as public. Further, prior to the issue of the full reasons for the dismissal, neither the ICP nor the Defence would be in a position to submit sufficiently informed arguments regarding the information that may be made public. Finally, the Defence submit that waiting until the reasons are clear and express will ensure that any public disclosure achieves the correct balance between the interests of all parties and the administration of justice.¹³

III. DISCUSSION

12. Under the ECCC legal framework, particularly Internal Rule 56, we enjoy a broad discretion in handling confidentiality issues during judicial investigations,¹⁴ including in relation to classifying and reclassifying documents¹⁵ and issuing public redacted versions of confidential or strictly confidential documents.¹⁶
13. Internal Rule 56 provides that judicial investigations shall not be conducted in public, but that the CIJs may issue such information regarding a case as they deem essential to keep the public informed or to rectify false or misleading information.¹⁷ We agree with the ICP that Internal Rule 56 does not require that the final outcome of a judicial investigation should be confidential. However, the investigation stage formally ends only when the PTC has ruled on any appeals against the closing order (although we are *functus officio* following the issuance of the closing order). The CIJs may also, at their discretion or on the request of a party, issue public redacted versions of documents, and indeed have previously done so with certain decisions issued.¹⁸ It must, however, be remembered that nothing *requires* us to produce even a redacted public version of any document. Thus, while the ICP cites the example of a public redacted version of the Case 002

¹⁰ *Ibid.*, paras 7-8.

¹¹ *Ibid.*, para. 9.

¹² Response, para. 2.

¹³ *Ibid.*, paras 2, 8-10.

¹⁴ Case File No. 004-D284/1/4, *Decision On Appeal Against Order On Ao An's Responses D193/47, D193/49, D193/51, D193/53, D193/56 and D193/60*, 31 March 2016, para. 23.

¹⁵ Practice Direction on Classification and Management of Case-Related Information, Revision 2, Article 4(a); Practice Direction on Filing Documents before the ECCC, Revision 8, Article 3.12, 3.14.

¹⁶ Practice Direction on Classification and Management of Case-Related Information, Revision 2, Article 9.2, 9.3.

¹⁷ Internal Rule 56(1), (2)(a).

¹⁸ Practice Direction on Classification and Management of Case-Related Information, Revision 2, Article 9.2, 9.3.



closing order being issued, in the same case the CIJs decided not to publicly disclose the dismissal order regarding the charges against Duch in that case.

14. We previously stated that the reasons for the decision to dismiss the charges against Im Chaem, so far as they related to the substance of the charges, would remain confidential.¹⁹ We have accordingly decided to issue a public redacted version that is in keeping with our previous stance on the confidentiality of the substance of the charges.
15. Regarding the ICP's comments on external criticism of the ECCC and setting a bad example for domestic jurisdictions, we would 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. The reference to a public trial context does not provide any helpful contribution for the confidential investigation stage. In many civil law jurisdictions, the publicity of indictments is required only when the proceedings reach the stage of a public hearing. There may be a difference between the relatively lax common law approach to privacy rights of suspects, with media reports containing names and even addresses being posted sometimes mere hours after an initial police charge (often helped by the police through so-called "police blotters"), and the more restrictive one in civil law jurisdictions. Cambodia belongs to the latter.
16. In this regard, we 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 the confidentiality of the investigations an offence. Cambodian law does not provide for any publication of closing orders at all, redacted or not. Similar provisions regarding pre-trial publicity also exist in other civil law jurisdictions, for example Germany, Switzerland, and France.²⁰
17. While the Defence seek an opportunity to make submissions on what should be made public in the *Closing Order (Reasons)*, no such entitlement exists in relation to the issue of a public redacted version of a document. The circumstances in which the parties are entitled to be heard in relation to the exercise of our discretion with respect to the confidentiality of an investigation are limited to where we propose to (a) grant access to a judicial investigation to the media or other non-parties²¹ or (b) reclassify a document.²² The preparation of a public redacted version, in accordance with Internal Rule 56 and the relevant Practice Direction,²³ is entirely within our discretion.

¹⁹ Available at:

<https://www.eccc.gov.kh/sites/default/files/media/Press%20Release%20by%20the%20Office%20of%20the%20Co-Investigating%20Judges%2022%20February%202017%20English.pdf>

²⁰ See Section 353d of the German Criminal Code, which makes it 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" (our emphasis); see also Article 226-13 of the Criminal Code of the French Republic; Article 293 of the Swiss Criminal Code. See further ECtHR, *Bédat v Switzerland*, 29 March 2016, para. 22, where it is observed that the disclosure of information covered by the secrecy of criminal investigations is penalised in thirty member states of the Council of Europe.

²¹ Internal Rule 56(2)(b).

²² Practice Direction on Filing Documents before the ECCC, Revision 8, Article 3.14.

²³ Practice Direction on Classification and Management of Case-Related Information, Revision 2.



- 18. Accordingly, we instructed the preparation of a public redacted version of the *Closing Order (Reasons)* which has been issued on today's date, rendering that part of the Request moot.
- 19. In relation to the Retraction Decision, we agree with the ICP that there is no reason for it not to be made public and, noting that the Defence do not oppose it, accordingly grant that part of the Request. We have reviewed the Retraction Decision and are satisfied that no redaction is required. Accordingly the Retraction Decision will be reclassified as public.

FOR THE FOREGOING REASONS, WE:²⁴

- 20. **DECLARE** the request to issue a public redacted version of the *Closing Order (Reasons)* moot;
- 21. **GRANT** the request to make the Retraction Decision public; and
- 22. **INSTRUCT** the OCIJ Greffier to reclassify the Retraction Decision as public.

Dated 10 July 2017, Phnom Penh

សហចៅក្រមស៊ើបអង្កេត
Co-Investigating Judges
Co-juges d'instruction



YOU Bunleng Michael BOHLANDER

²⁴ While the Co-Investigating Judges are issuing this notice jointly, the National Co-Investigating Judge notes, for the record, that documents placed on Case File 004 should be numbered sequentially from the last documents placed before the resignation of Judge Siegfried Blunk, without including in the count orders and decisions issued by Reserve Judge Laurent Kasper-Ansermet.