BEFORE THE PRE-TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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IM CHAEM'S REPLY TO THE INTERNATIONAL CO-PROSECUTOR'S RESPONSE TO HER REQUEST TO RECLASSFIFY HER RESPONSE TO THE FINAL SUBMISSION

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I. INTRODUCTION

1. Ms. IM Chaem, through her Co-Lawyers (the "Defence"), hereby submits this Reply to the *International Co-Prosecutor's Response to IM Chaem's Request for Reclassification*.[1] In the Response to the Reclassification Request, the International Co-Prosecutor ("ICP") indicates support for the Defence's Request to reclassify as public the Response to the Final Submission,[2] but claims that the Defence's approach in requesting the reclassification of certain filings is selective[3] and considers the extent of the redactions suggested by the Defence to be unnecessarily wide.[4]

2. In this Reply, the Defence submits that i) arguments made by the ICP that are irrelevant to the Reclassification Request should not be entertained by the Pre-Trial Chamber and ii) the ICP's objections to the Defence's suggested redactions are without merit and offer no reasonable alternative approach. Consequently, the Defence respectfully requests the Pre-Trial Chamber to: a) instruct the Greffier of the Pre-Trial Chamber to file the Response to the Final Submission in a public redacted form with the redactions suggested in Annex A; and b) reclassify all written submissions relevant to the Reclassification Request as public,[5] after the appropriate redactions, as deemed necessary by the Pre-Trial Chamber, have been applied.

[1] International Co-Prosecutor's Response to IM Chaem's Request for Reclassification, 23 March 2018, **D304/6/2** ("Response to the Reclassification Request, **D304/6/2**"). Pursuant to Article 8.4 of the Practice Direction on the Filing of Documents before the ECCC, when there is no oral argument on the request, a reply to a response "shall be filed within 5 calendar days of notification of the response to which the participant is replying." *See*, Practice Direction on the Filing of Documents before the ECCC (Revision 8), ECCC/01/2007/Rev.8, 10 May 2012. The Defence notes that the Response to the Reclassification Request was filed on 23 March 2018 but notified to the parties on 27 March 2018, therefore setting the deadline for the Defence's Reply to 2 April 2018. *See*, Case File Officer Notification entitled "[Filed by OCP] NEW DOCUMENT(S): CASE FILE No. 004/1 - … (International Co-Prosecutor's Response to IM Chaem's Request for Reclassification)", 27 March 2018 (**Authority 1**).

[2] Response to the Reclassification Request, **D304/6/2**, paras. 3, 23.

[3] Response to the Reclassification Request, **D304/6/2**, paras. 4-15.

[4] Response to the Reclassification Request, **D304/6/2**, paras. 16-20.

[5] IM Chaem's Request for Reclassification of her Response to the International Co-Prosecutor's Final Submission, 12 March 2018, **D304/6/1** ("Reclassification Request, **D304/6/1**"); Response to the Reclassification Request, **D304/6/2**; this Reply; and the Pre-Trial Chamber's decision on these proceedings.

II. REPLY

A. ARGUMENTS IRRELEVANT TO THE RECLASSIFICATION REQUEST SHOULD NOT BE ENTERTAINED BY THE PRE-TRIAL CHAMBER

3. The Defence submits that the Response to the Reclassification Request is replete with arguments that should not be entertained by the Pre-Trial Chamber, as they are irrelevant to the Reclassification Request.

4. As is plain, the sole subject of the Reclassification Request is the filing of the Response to the Final Submission with the redactions suggested in Annex A.[6] The ICP's Response should have been limited to the issue addressed in the Reclassification Request. Yet, the ICP appears to have regarded arguments relevant to the Reclassification Request as a marginal issue only. Only four paragraphs of the Response to the Reclassification Request – paragraphs 16 to 20 – in which the ICP opposes the extent of the redactions suggested by the Defence[7] – pertain to the issues raised in Reclassification Request. These arguments will be addressed at paragraphs 9 to 13 of this Reply.

5. The remainder of the Response – in particular, paragraphs 4 to 15 – is dedicated to arguing matters that lie beyond any reasonable interpretation of the content of the Defence's Reclassification Request.

6. First, despite indicating his support for the reclassification of the Response to the Final Submission, the ICP criticises the Defence, at paragraphs 4 to 6 of the Response to the Reclassification Request, for allegedly advocating a "one-sided" form of transparency.[8] As is plain, should the ICP have concerns about the public being provided with an unbalanced view of Case 004/1, the ECCC legal framework provides the ICP with the authority to act upon them. Indeed, the ECCC Practice Directions draw no distinction between the roles of

[6] Reclassification Request, **D304/6/1**, para. 1; Annex A: [Public Redacted] IM Chaem's Response to the International Co-Prosecutor's Rule 66 Final Submission Against Her, 28 November 2016, **D304/6/1.2**.
[7] Response to the Reclassification Request, **D304/6/2**, paras. 16-20.
[8] Response to the Reclassification Request, **D304/6/2**, para. 4.

the parties in relation to requests for reclassification of documents.[9] Plainly, the ICP is at liberty to request the reclassification of any and all documents that he deems appropriate or necessary. If the ICP's concerns expressed in the Response are sincerely held, one might have expected him to pursue this procedural avenue rather than merely propounding rhetorical objections. The ICP must exercise due diligence and use those legal avenues available to advance his interests.

7. Second, the ICP claims, at paragraphs 7 to 15 of the Response to the Reclassification Request, that the basis for reclassifying the Response to the Final Submission equally applies to all filings in Case 004/1, including the appeal hearings and the Closing Order (Reasons).[10] In these paragraphs, the ICP merely reiterates, or otherwise outlines supplemental arguments, concerning his view of the appropriate classification of these documents.[11] However, the parties to the proceedings, including the ICP, have already been afforded the right to present their arguments to the Pre-Trial Chamber concerning the publication of the appeal hearings[12] and of a revised version of the Closing Order (Reasons).[13] The ICP's right to respond to the Reclassification Request is not another opportunity to re-pen these arguments or otherwise to advance supplemental arguments without good cause.

[9] *See*, Practice Direction on the Classification and Management of Case-Related Information (Revision 2), ECCC/004/2009/Rev.2, 5 June 2014, Art. 9; Practice Direction on the Filing of Documents before the ECCC (Revision 8), ECCC/01/2007/Rev.8, 10 May 2012, Art. 3.12.

[10] Response to the Reclassification Request, **D304/6/2**, paras. 7-15.

[11] Response to the Reclassification Request, **D304/6/2**, paras. 7-15. *See also*, Response to the Reclassification Request, **D304/6/2**, para. 2 [in which the International Co-Prosecutor expressly "reiterates his request that the appeal hearings before the Pre-Trial Chamber and associated filings be reclassified as public, and that the Closing Order (Reasons) be issued with the full reasoning and findings of the CIJs including the evidence in support thereof."].

[12] *See*, International Co-Prosecutor's Submission on the Pre-Trial Chamber Hearing regarding the Appeal of Closing Order (Reasons), 31 October 2017, **D308/3/1/15**; IM Chaem's Letter entitled "Response to the International Co-Prosecutor's Submission on the Pre-Trial Chamber Hearing regarding the Appeal of Closing Order (Reasons) (D308/3/1/15), 6 November 2017, **D308/3/1/16**.

[13] *See*, International Co-Prosecutor's Appeal of Decision on Closing Order (Reasons) Redaction or, alternatively, Request for Reclassification of Closing Order (Reasons), 9 August 2017, **D309/2/1/2**; IM Chaem's Response to the International Co-Prosecutor's Appeal of Decision on Closing Order (Reasons) Redaction or, alternatively, Request for Reclassification of Closing Order (Reasons), 4 September 2017, **D309/2/1/3**; International Co-Prosecutor's Reply regarding Appeal of Decision on Closing Order (Reasons) Redaction, 11 September 2017, **D309/2/1/4**.

- In regard to the appeal hearings, the Pre-Trial Chamber decided to hold the proceedings *in camera*[14] and to classify the relevant transcripts as 'strictly confidential'.[15] Given that no appeal is open against decisions of the Pre-Trial Chamber, this decision is final.

- In regard to the revised version of the Closing Order (Reasons), the Pre-Trial Chamber has been seised with the parties' submissions and is currently deliberating on the issue.[16] The ICP offers no reason, cogent or otherwise, to depart from established procedural rules at the ECCC (under which timeframes for filing submissions are clearly set out)[17] that would justify the reiteration of his arguments or the filing of supplemental arguments[18] at this stage.

8. In sum, none of the ICP's arguments contained at paragraphs 4-15 of the Response are relevant to the subject matter of the Defence's Reclassification Request, i.e. the reclassification of the Response to the Final Submission in a public redacted form. In light of the fact that the ICP supports the Defence's Request, only his objections to the redactions suggested by the Defence remain to be examined by the Pre-Trial Chamber.

[14] Scheduling Order for the Pre-Trial Chamber's Hearing on Appeal against Closing Order, 14 November 2017, **D308/3/1/19**, EN ERN 01540792.

[15] *See*, Case 004/1/07-09-2009-ECCC/OCIJ (PTC50), Transcript of Appeal Hearings, 11 December 2017, **D308/3/1/19/1.2**; Case 004/1/07-09-2009-ECCC/OCIJ (PTC50), Transcript of Appeal Hearings, 12 December 2017, **D308/3/1/19/2.1**.

[16] *See*, International Co-Prosecutor's Appeal of Decision on Closing Order (Reasons) Redaction or, alternatively, Request for Reclassification of Closing Order (Reasons), 9 August 2017, **D309/2/1/2**; IM Chaem's Response to the International Co-Prosecutor's Appeal of Decision on Closing Order (Reasons) Redaction or, alternatively, Request for Reclassification of Closing Order (Reasons), 4 September 2017, **D309/2/1/3**; International Co-Prosecutor's Reply regarding Appeal of Decision on Closing Order (Reasons) Redaction, 11 September 2017, **D309/2/1/4**. *See also*, ECCC Court Report (Judicial updates: Pre-Trial Chamber), January-February 2018 (Issue 111), p. 2 ["After having received all written submissions and heard the oral arguments of the parties in case 004/1, the Pre-Trial Chamber further advanced preparations for deliberations on appeals concerning the substance and the confidentiality of the Closing Order."].

[17] *See*, Practice Direction on the Filing of Documents before the ECCC (Revision 8), ECCC/01/2007/Rev.8, 10 May 2012, Art. 8; Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (Revision 9), adopted on 12 June 2007 (as revised on 16 January 2015), Rule 39.

[18] *Cf, Case of NUON Chea and al.*, 002/19-09-2007-ECCC-OCIJ, Order on Request for Investigative Action on the Applicability of the Crime of Genocide at the ECCC, 28 December 2009, **D240/3**, para. 6 [rejecting a request to file supplemental arguments because the requesting party could have included those arguments in their initial request].

B. THE ICP'S OBJECTIONS TO THE DEFENCE'S SUGGESTED REDACTIONS ARE WITHOUT MERIT AND OFFER NO REASONABLE ALTERNATIVE APPROACH

9. The ICP opposes the extent of the Defence's suggested redactions in Annex A of the Reclassification Request on the basis that they are unnecessarily broad.[19] He contends that many of the redactions suggested by the Defence are self-serving and do not provide a full and transparent picture of the case.[20] In support of this contention, the ICP claims that the Defence i) unnecessarily suggests the redaction of all witnesses' and civil party applicants' evidence;[21] ii) unjustifiably redacts the names of certain Khmer Rouge officials;[22] and iii) improperly redacts all references to Ms. IM Chaem's statements.[23] These will be addressed in turn below.

10. First, the ICP's contention that the Defence suggested the redaction of "*all* evidence of a witness or civil party applicant"[24] is wholly without merit. As plainly stated in the Request, the Defence merely "suggests redacting any *information potentially identifying* witnesses and civil party applicants".[25] Indeed, even a cursory reading of the Defence's suggested redactions in Annex A shows that a significant amount of evidentiary content is sought to be made public.[26] Moreover, the ICP has merely raised a generalised objection to the Defence approach, without proffering any specific instances where changes would be appropriate. Without any such specific proposals by the ICP, this fails to provide the required assistance to the Pre-Trial Chamber in determining which *specific* portions of information to redact from the Response to the Final Submission (and any future submission sought for reclassification) or otherwise advance any real or practical interest.

[19] Response to the Reclassification Request, **D304/6/2**, paras. 16-20.
[20] Response to the Reclassification Request, **D304/6/2**, para. 16.
[21] Response to the Reclassification Request, **D304/6/2**, para. 17.
[22] Response to the Reclassification Request, **D304/6/2**, para. 18.
[23] Response to the Reclassification Request, **D304/6/2**, para. 19.
[24] Response to the Reclassification Request, **D304/6/2**, para. 17.
[25] Reclassification Request, **D304/6/1**, para. 17 (emphasis added). The Defence further notes that its suggested approach to this issue in the Request squarely aligns with the scope of protective measure afforded to the Pre-Trial Chamber on this issue, pursuant to Rule 3.1(d) of the Practice Direction on Protective Measures: "to redact from the record all other information that could potentially identify the protected person or other information which would permit his or her identification or location." *See*, Practice Direction on Protective Measures (Revision 1), ECCC/03/2007/Rev.1, 29 April 2008, Art. 3.1(d).
[26] Annex A: [Public Redacted] IM Chaem's Response to the International Co-Prosecutor's Rule 66 Final Submission Against Her, 28 November 2016, **D304/6/1.2**.

11. Second, the Defence's suggestion of redacting the name of *Ta* Poal and those of other deceased Khmer Rouge officials is consistent with the Co-Investigating Judges' approach in the Closing Order (Reasons).[27] The ICP claims that the name of *Ta* Poal was redacted in the Closing Order (Reasons) only because his name "appears amid an unbroken 144 consecutive paragraphs that are redacted in their entirety"[28] without valid justification.[29] Whilst the Defence would support leaving the name of *Ta* Poal and any other deceased Khmer Rouge officials unredacted, the proper forum for determining the merits of the ICP's opposition to the Co-Investigating Judges' approach to redactions is in relation to his appeal of the decision implementing that approach,[30] not re-litigation here.

12. Third, the suggested redaction of references to interviews given by Ms. IM Chaem is, as noted by the ICP, consistent with the Defence's submissions taken in separate ongoing proceedings before the Pre-Trial Chamber.[31] The Defence readily accepts that the ultimate approach to redactions in the Reclassification Request and future reclassification requests is contingent upon the Pre-Trial Chamber's determination in that distinct proceeding.[32] However, at present, this position remains the Defence's view of the correct position on this matter.

13. In sum, the ICP's objections to the Defence's suggested redactions are without merit and offer no practical or meaningful alternative approach at this stage.

III. RELIEF REQUESTED

For the reasons above, the Defence respectfully requests the Pre-Trial Chamber to: a) instruct the Greffier of the Pre-Trial Chamber to file the Response to the Final Submission in a public

[27] Reclassification Request, **D304/6/1**, para. 17.
[28] Response to the Reclassification Request, **D304/6/2**, para. 18.
[29] Response to the Reclassification Request, **D304/6/2**, para. 18.
[30] International Co-Prosecutor's Appeal of Decision on Closing Order (Reasons) Redaction or, alternatively, Request for Reclassification of Closing Order (Reasons), 9 August 2017, **D309/2/1/2**.
[31] Response to the Reclassification Request, **D304/6/2**, para. 19, *referring to* IM Chaem's Response to the International Co-Prosecutor's Appeal of Decision on Closing Order (Reasons) Redaction or, alternatively, Request for Reclassification of Closing Order (Reasons), 4 September 2017, **D309/2/1/3**, para. 75.
[32] International Co-Prosecutor's Appeal of Decision on Closing Order (Reasons) Redaction or, alternatively, Request for Reclassification of Closing Order (Reasons), 9 August 2017, **D309/2/1/2**.

redacted form with the redactions suggested in Annex A; and b) reclassify all written submissions relevant to the Reclassification Request as public.[33]

Respectfully submitted,

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Signed on this 2nd day of April, 2018

[33] Including IM Chaem's Request for Reclassification of her Response to the International Co-Prosecutor's Final Submission, 12 March 2018, **D304/6/1**; International Co-Prosecutor's Response to IM Chaem's Request for Reclassification, 23 March 2018, **D304/6/2**; this Reply; and the Pre-Trial Chamber's decision on these proceedings.