ក្រុមការពារក្តីឱ្យអ្នកស្រី អ៊ឹម ចែម នៅ អ.វ.ត.ក
DEFENCE TEAM FOR MS. IM CHAEM AT THE ECCC

BIT Seanglim and Wayne JORDASH, QC
Phnom Penh/London
06 November 2017

To: **Pre-Trial Chamber**

Subject: **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)**

Dear Judges,

We, the Co-Lawyers for Ms. IM Chaem, hereby respond to the International Co-Prosecutor's Submission on the Pre-Trial Chamber Hearing regarding the Appeal of Closing Order (Reasons).

This response is necessary as the International Co-Prosecutor has addressed an issue that was not requested by the Pre-Trial Chamber in its invitation for submissions: whether the hearing(s) should be public. Indeed, the Pre-Trial Chamber asked the parties for comment *only* on their availability to attend on the proposed dates and the time allocation for oral arguments. In order to protect Ms. IM Chaem's fair trial rights, it is therefore necessary for us to respond to this additional proposition.

We respectfully ask the Pre-Trial Chamber to reject the International Co-Prosecutor's request for a public hearing.

The International Co-Prosecutor, pursuant to Internal Rule 77(6), is entitled to request a public hearing before the Pre-Trial Chamber. However, Internal Rule 77(6) does not automatically provide for a public hearing where the case may be brought to an end by the Pre-Trial Chamber's decision, but *merely* provides this as a possibility under particular special circumstances. As has been held previously, it is important that any decision to publicise this stage of the proceedings should carefully weigh the interests of justice and "take account of objective criteria, such as preservation of the rights and interests of the parties" that may militate in favour of the proceedings being held *in camera* in order to

protect the confidentiality of sensitive information and the integrity of the proceedings as a whole.[1] Yet, the International Co-Prosecutor's submission does not offer any demonstration as to how taking this approach would be "in the interests of justice and [would] not affect public order or any protective measures authorized by the court."[2]

A significant portion of the issues that will be dealt with at the hearing(s) are, at this stage, classified as confidential. These include appeal grounds concerning the permissible scope of an indictment,[3] evidence relating to allegations in relation to which Ms. IM Chaem was not charged,[4] the factual analysis underpinning alleged crimes against humanity,[5] the evidence underlying the Co-Investigating Judges' findings concerning Ms. IM Chaem's alleged role in the Southwest Zone,[6] and a myriad of other issues that remain sensitive and give rise to confidentiality and security concerns.

As we have outlined previously in submissions to the Pre-Trial Chamber, there are cogent reasons why, in the absence of a convincing showing of sufficiently serious infringement of public interest, most or all of this information ought to remain confidential. Most pertinently, the current level of disclosure does not appear to infringe upon any public interest in accessing the critical judicial reasoning in Case 004/1.[7] As argued in the Response to the

1 *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ, Order on Breach of Confidentiality of the Judicial Investigation, 3 March 2009, **D138**, para. 12. *See also*, Decision on International Co-Prosecutor's Request for Closing Order Reasons and CIJ's Decision to be made Public, 10 July 2017, **D309/2**, paras. 12-18; Practice Direction on Classification and Management of Case-Related Information (Practice Direction ECCC/004/2009/Rev.2), Art. 1.2 [Emphasising "the need to balance the confidentiality of judicial investigations and ... other parts of judicial proceedings which are not open to the public with the need to ensure transparency of public proceedings"].

2 Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (Rev. 9), adopted on 12 June 2007 (as revised on 16 January 2015), Rule 77(6).

3 International Co-Prosecutor's Appeal of Closing Order (Reasons), 9 August 2017, **D308/3/1/1**, paras. 11-22. *See also*, Closing Order (Reasons), 10 July 2017, **D308/3**, paras. 244-45. *Cf*, [REDACTED] Closing Order (Reasons), 10 July 2017, **D308/3**, paras. 244-45.

4 International Co-Prosecutor's Appeal of Closing Order (Reasons), 9 August 2017, **D308/3/1/1**, paras. 23-37. *See also*, Closing Order (Reasons), 10 July 2017, **D308/3**, paras. 246-80. *Cf*, [REDACTED] Closing Order (Reasons), 10 July 2017, **D308/3**, paras. 246-80.

5 International Co-Prosecutor's Appeal of Closing Order (Reasons), 9 August 2017, **D308/3/1/1**, paras. 38-57. *See also*, Closing Order (Reasons), 10 July 2017, **D308/3**, paras. 287-88, 302. *Cf*, [REDACTED] Closing Order (Reasons), 10 July 2017, **D308/3**, paras. 287-88, 302.

6 International Co-Prosecutor's Appeal of Closing Order (Reasons), 9 August 2017, **D308/3/1/1**, paras. 58-81. *See also*, Closing Order (Reasons), 10 July 2017, **D308/3**, paras. 143-50. *Cf*, [REDACTED] Closing Order (Reasons), 10 July 2017, **D308/3**, paras. 143-50 (fns. 261-62, 264-66, 270-75, 277-81).

7 Response to the International Co-Prosecutor's Appeal of the Decision on *Closing Order (Reasons)* Redaction or, alternatively, Request for Reclassification of *Closing Order (Reasons)*, 4 September 2017, **D309/2/1/3**, paras. 29-39.

International Co-Prosecutor's Appeal relating to redactions of the Closing Order, the singular nature of a dismissal in the current circumstances requires a very rigorous approach to confidentiality.[8] The nature and scope of the publicity the International Co-Prosecutor seeks, including reasoning *ultra vires* the object and purpose of the Closing Order,[9] and risks endangering Ms. IM Chaem's right to private life and the presumption of innocence.[10] These considerations are no less important because the issues are being aired in the court room rather than through written pleadings and judicial reasoning.

In any event, as the question of the appropriate level of public disclosure in Case 004/1 is a matter currently under judicial review (the International Co-Prosecutor's Appeal of Decision on Closing Order (Reasons) Redaction or, alternatively, Request for Reclassification of Closing Order (Reasons) (D309/2/1/2)), the matter may need to be decided following oral submissions prior to the substantive hearing. This would allow the International Co-Prosecutor an opportunity to make the necessary showing and all parties and the Pre-Trial Chamber a reasonable opportunity to explore any countervailing arguments and concerns.

For the foregoing reasons, we respectfully ask the Pre-Trial Chamber to reject the International Co-Prosecutor's request for a public hearing, and to hold the proposed hearing(s) *in camera* pursuant to Internal Rule 77(5). The Defence also reserves its right to make oral submissions on the matter at the time of the hearing(s).

Yours sincerely,

BIT Seanglim

Wayne JORDASH, QC

[8] Response to the International Co-Prosecutor's Appeal of the Decision on *Closing Order (Reasons)* Redaction or, alternatively, Request for Reclassification of *Closing Order (Reasons)*, 4 September 2017, **D309/2/1/3**, paras. 40-47.

[9] Response to the International Co-Prosecutor's Appeal of the Decision on *Closing Order (Reasons)* Redaction or, alternatively, Request for Reclassification of *Closing Order (Reasons)*, 4 September 2017, **D309/2/1/3**, paras. 62-67.

[10] Response to the International Co-Prosecutor's Appeal of the Decision on *Closing Order (Reasons)* Redaction or, alternatively, Request for Reclassification of *Closing Order (Reasons)*, 4 September 2017, **D309/2/1/3**, paras. 48-61.