



Declassified to Public
07 September 2018

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

Kingdom of Cambodia
 Nation Religion King
 Royaume du Cambodge
 Nation Religion Roi

អង្គបុរេជំនុំជម្រះ

Pre-Trial Chamber
 } Chambre Preliminaire

D360/3

In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea

Case File N° 004/2/07-09-2009-ECCC/OCIJ

THE PRE-TRIAL CHAMBER

Before:

Judge PRAK Kimsan, President
 Judge Olivier BEAUVALLET
 Judge NEY Thol
 Judge Kang Jin BAIK
 Judge HUOT Vuthy

Date:

5 September 2018

ឯកសារដើម	
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL	
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Date de reception):	
05 / 09 / 2018	
ពេលវេលា (Time/Heure):	
11:00	
អគ្គិសនីបណ្ណាល័យ/Case File Officer/L'agent chargé du dossier:	
SANN RADA	

CONFIDENTIAL

DECISION ON AO AN'S URGENT REQUEST FOR REDACTION AND INTERIM MEASURES

Co-Prosecutors

CHEA Leang
 Nicholas KOUMJIAN

Co-Lawyers for AO An

MOM Luch
 Richard ROGERS
 Göran SLUITER

Civil Party Lawyers

CHET Vanly
 HONG Kimsuon
 KIM Mengkhy
 LOR Chunthy
 SAM Sokong
 SIN Soworn
 TY Srinna
 VEN Pov

Laure DESFORGES
 Isabelle DURAND
 Emmanuel JACOMY
 Martine JACQUIN
 Daniel MCLAUGHLIN
 Lyima NGUYEN
 Nushin SARKARATI



THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) is seised of the “Urgent Request for Redaction and Interim Measures” filed by the Co-Lawyers for AO An (“Co-Lawyers”) on 22 August 2018 (“Request”).¹

I. PROCEDURAL HISTORY

1. On 16 August 2018, the National Co-Investigating Judge issued his Closing Order,² dismissing the case against AO An, while the International Co-Investigating Judge issued his Closing Order (Indictment)³ (collectively “Closing Orders”).
2. On 22 August 2018, the Co-Lawyers filed the Request in English only, followed by the Khmer version on 30 August 2018, requesting the redaction of AO An’s address from the Closing Order (Indictment)⁴ and further noting that names of certain protected witnesses were erroneously published.⁵
3. On 23 August 2018, the Co-Prosecutors informed the Pre-Trial Chamber and the parties that they did not intend to respond to the Request.⁶
4. On the same day, while the Pre-Trial Chamber was about to issue an interim order, the International Co-Investigating Judge released a *proprio motu* order⁷ for the immediate redaction of protected witnesses’ names in the Closing Order (Indictment).⁸ He further invited the Co-Lawyers to re-file before the Co-Investigating Judges their request regarding

¹ Case No. 004/2/07-09-2009-ECCC-OCIJ (“Case 004/2”), Urgent Request for Redaction and Interim Measures, filed in English only on 22 August 2018, notified in English on 23 August 2018, and notified in Khmer on 30 August 2018, D360/1 (“Request”).

² Case 004/2, Closing Order, issued on 16 August 2018 in Khmer only, D359.

³ Case 004/2, Closing Order (Indictment), issued on 16 August 2018 in English only, D360.

⁴ Request, para. 12.

⁵ Request, para. 6.

⁶ Case 004/2, Email addressed by the Office of the Co-Prosecutors to the Pre-Trial Chamber and Parties, *Re: Case File 004/2 - Ao An Defence's Urgent Request for Redaction and Interim Measures (D360/1)*, 23 August 2018.

⁷ Case 004/2, Order to Redact International Co-Investigating Judge’s Closing Order of 16 August 2018, 23 August 2018, D360/2 (“International Co-Investigating Judge’s *Proprio Motu* Order”).

⁸ International Co-Investigating Judge’s *Proprio Motu* Order, paras 6, 9.



the publication of AO An's address,⁹ considering that the Pre-Trial Chamber is not seised of any appeal yet and hence has no jurisdiction to entertain it.¹⁰

II. ADMISSIBILITY

5. The Request is filed pursuant to Internal Rule 21, Articles 9.1, 9.2 and 9.3 of the Practice Direction on the Classification and Management of Case-Related Information ("Practice Direction on Classification")¹¹ and Articles 3.12 and 3.14 of the Practice Direction on Filing of Documents before the ECCC ("Practice Direction on Filing").¹² The Co-Lawyers submit that the Office of the Co-Investigating Judges is *functus officio* with the issuance of the Closing Orders and that the Pre-Trial Chamber is the only Chamber before which they can file the Request.¹³

6. The Pre-Trial Chamber recalls that the Office of the Co-Investigating Judges has been *functus officio* regarding the investigation in Case 004/2 since the issuance of the Closing Orders.¹⁴ While the Pre-Trial Chamber is seised with the present application, no other judicial office is formally seised of the case, in the sense of Article 3.14 of the Practice Direction on Filing, as no appeal has been filed yet. The Pre-Trial Chamber nonetheless observes that the purpose of the urgent Request would be defeated if not addressed expeditiously and that, in the present case, Article 9.1 of the Practice Direction on Classification should be interpreted in light of Internal Rule 21, so as to safeguard the interests of the parties. The Pre-Trial Chamber thus finds it appropriate to exercise its inherent jurisdiction, as the appellate body at the pre-trial stage and in the absence of specific disposition, to rule on the Request in the interests of justice.

7. For these reasons, the Pre-Trial Chamber considers the Request admissible.

⁹ International Co-Investigating Judge's *Proprio Motu* Order, para. 8.

¹⁰ International Co-Investigating Judge's *Proprio Motu* Order, para. 4.

¹¹ Practice Direction on the Classification and Management of Case-Related Information, ECCC/004/2009/Rev.2 ("Practice Direction on Classification"), Articles 9.1, 9.2 and 9.3.

¹² Practice Direction on Filing of Documents before the ECCC ECCC/01/2007/Rev.8, Articles 3.12 and 3.14.

¹³ Request, paras 1-2.

¹⁴ See, e.g., French Cass. Crim., 9 January 2002, Case No. 01-87123.



III. MERITS

A. Submissions

8. The Co-Lawyers request the Pre-Trial Chamber to redact AO An's personal address from the Closing Order (Indictment) and to order its immediate removal from the Court's website.¹⁵ They contend that the publication of AO An's address violates the presumption of innocence and the Charged Person's right to privacy, and that it enables potential media harassment or worse.¹⁶ Regardless of whether this address has been previously disclosed by journalists, the ECCC judges have a duty to protect AO An's fundamental rights and the confidentiality of the proceedings.¹⁷

9. The Co-Lawyers rely on Internal Rule 21, on the Practice Directions¹⁸ and on ECCC jurisprudence¹⁹ to submit that the International Co-Investigating Judge failed to maintain a proper balance between the interests of the Charged Person and other interests at stake, such as the transparency of the proceedings and the Court's goals of education and legacy.²⁰ They further stress that it is not permitted or practice, in criminal justice systems like Cambodia and France, to publish the full address of a suspect or charged person in pre-trial public documents.²¹

B. Discussion

10. The Pre-Trial Chamber recalls that the investigation remains confidential until its conclusion, in order to protect its integrity and the interests of the parties.²² The Pre-Trial Chamber is further aware of the necessity, when ruling on matters of re-classification and

¹⁵ Request, paras 3, 12.

¹⁶ Request, para. 4.

¹⁷ *Ibid.*

¹⁸ Request, paras 1, 7-8.

¹⁹ Request, paras 9-10.

²⁰ Request, para. 11.

²¹ Request, para. 5 referring to Cambodian Code of Criminal Procedure, Article 121; French Code of Criminal Procedure, Article 11; French Law on the Freedom of the Press, 29 July 1881, Article 38.

²² Case No. 004/1/07-09-2009-ECCC-OCIJ ("Case 004/1") (PTC49), Decision on the International Co-Prosecutor's Appeal on Decision on Redaction or, Alternatively, Request for Reclassification of the Closing Order (Reasons), 8 June 2018, D309/2/1/7 ("Decision on Closing Order Redaction in Case 004/1"), para. 36 referring to Internal Rule 56. See also Case 004/1 (PTC56), Decision on IM Chaem's Request for Reclassification of Selected Documents from Case File 004/1, 26 June 2018, D313/2 ("Decision on Reclassification of Selected Documents in Case 004/1"), para. 4.



redactions after the conclusion of the investigation, to balance the various interests at stake including those of the charged person and the victims, the transparency of the proceedings as enshrined in Internal Rule 21(1), and the interests of justice.²³

11. The Pre-Trial Chamber observes that the Request to redact AO An's address in the Closing Order (Indictment) is closely related to the right to privacy and, more generally, to the protection of the interests of the charged person, as enshrined in Internal Rule 21. While the law before the ECCC does not explicitly refer to the protection of privacy and reputation,²⁴ the Pre-Trial Chamber acknowledges the concerns expressed by the Co-Lawyers regarding the consequences of the publication of AO An's current address for his right to privacy.²⁵ The Pre-Trial Chamber further finds that the redaction in the Closing Order (Indictment) of the domicile of the Charged Person, of which the mention is not a requirement under Internal Rule 67(2),²⁶ would not have any impact on the other interests at stake, namely the need to ensure transparency, the integrity of proceedings, and the Court's purposes of education and legacy.

12. In light of the foregoing, the Pre-Trial Chamber finds it appropriate to order the redaction of AO An's address from the Closing Order (Indictment).

13. Lastly, the Pre-Trial Chamber takes note that the International Co-Investigating Judge, despite no longer having jurisdiction over Case 004/2, issued a redacted version of the Closing Order (Indictment) to ensure the protection of witnesses.²⁷ The Pre-Trial Chamber would have ordered the International Co-Investigating Judge, pursuant to its decision, to undertake such redactions. Consequently, it *post facto* approves the redaction of protected witnesses' names.

²³ Practice Direction on Classification, Article 1.2; Decision on Closing Order Redaction in Case 004/1, paras 27-28, 36. *See also* Decision on Reclassification of Selected Documents in Case 004/1, para. 5.

²⁴ Decision on Closing Order Redaction in Case 004/1, para. 30.

²⁵ International Covenant on Civil and Political Rights, 16 December 1996, Article 17.

²⁶ *See, a contrario*, Cambodian Code of Criminal Procedure, Article 243. *See also* French Code of Criminal Procedure, Article 184.

²⁷ *See supra* para. 4.



FOR THESE REASONS, THE PRE-TRIAL CHAMBER UNANIMOUSLY HEREBY:






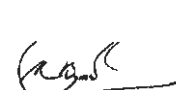
- **GRANTS** the Request;
- **APPROVES** the redaction of protected witnesses' names in the Closing Order (Indictment) (D360) submitted by the International Co-Investigating Judge in his *proprio motu* order D360/2;
- **ORDERS** the Office of the Co-Investigating Judges to redact AO An's address from the Closing Order (Indictment) (D360) and to issue, within two days from the notification of the present decision, an amended public redacted version;
- **ORDERS** the Public Affairs Section to immediately remove the current version of the public redacted Closing Order (Indictment) (D360) from the ECCC media and to replace it with the amended redacted version as set out above.

In accordance with Internal Rule 77(13), the present decision is not subject to appeal.

Phnom Penh, 5 September 2018

President

Pre-Trial Chamber

PRAK Kimsan Olivier BEAUVALLET NEY Thol Kang Jin BAIK HUOT Vuthy