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BEFORE THE TRIAL CHAMBER

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**GROUP 2 - CO-LAWYERS FOR CIVIL PARTIES' RESPONSE ON REQUEST
 BY GROUP 1- CIVIL PARTIES' CO-LAWYERS ON THE DISCLOSURE OF AN
 UN-OIOS REPORT TO THE PARTIES**

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I. INTRODUCTION

1. On 11 May 2009, the Co-Lawyers for the Civil Parties- Group 1 filed a request to the Chamber to ask for the disclosure of copy of the United Nations Office of Internal Oversight Services (“OIOS”) Report from the Secretary General of the United Nations, to the parties in the ongoing Trial proceeding (“Request”).¹ The OIOS report contains the result of internal investigations done by the OIOS following a kickback allegation in ECCC. The Co-Lawyers argued that such disclosure serves as a mean to provide justice for victims,² as it will ensure the conduct of a fair proceeding.³
2. On 21 May 2009, the Trial Chamber directed the parties to file a written submission with regards to the Request.⁴ The Trial Chamber requested that the parties address how the disclosure of the OIOS Report to parties would impact the conduct of a fair trial in the current case.
3. The Co-Lawyers for the Civil Parties Group 2 hereby request that the Trial Chamber grant the Request because the disclosure of the OIOS Report is necessary to reveal the truth regarding kickback allegations in the ECCC, as well as to provide fair trial proceedings. Moreover, by enabling such transparency, the Trial Chamber will meet the objective required by Internal Rule 21.

II. ARGUMENT

¹ *Case against KAING Guek Eav*, case no. 001/18-07-2007-ECCC/TC, *Group 1- Civil Parties Co – Lawyers’ Request that the trial Chamber Facilitate the disclosure of an UN-OIOS Report to the Parties* (“Request”), Doc. No. E65, ERN.

² *Id.*, para 17.

³ *Id.*, para. 13.

⁴ *Case against KAING Guek Eav*, case no. 001/18-07-2007-ECCC/TC, *Direction Setting Time Limites for the Filing of Submissions by the Parties to Group 1-Civil Parties Co-Lawyers’ Request that the Trial Chamber Facilitate the Disclosure of an UN-OIOS Request to the Parties*.

4. The allegation that kickbacks are occurring within the ECCC has been an issue for almost two years.⁵ The ongoing failure to address and resolve such allegations has led to a stalemate. As the Co-Lawyers for the Civil Parties had argued in their response to the Joint Appeal filed by the Defense concerning the issue of corruption allegations,⁶ this situation primarily concerns the interests of the victims and civil parties. As the people who were directly affected by the crimes committed during the Khmer Rouge period, the victims and civil parties have long awaited for justice to be properly served. Such hope could only be achieved by having a fair proceeding, which upholds the principles of independence and impartiality. Therefore, as will be shown below, the disclosure of OIOS Report will certainly have an impact upon the fairness and legitimacy of the ECCC proceedings.

THE IMPACT OF THE OIOS REPORT ON THE CONDUCT OF FAIR TRIAL

5. The disclosure of the OIOS Report facilitates judicial transparency. In addition to being a requirement set forth by the Internal Rules,⁷ judicial transparency is also one of the requirements needed to ensure the fairness of the proceedings.⁸ As such, the likelihood of a having a fair trial is diminished if an investigative authority analyzes concealed information that might concern public interest and prevents the disclosure of such information to the parties before the court.⁹ As

⁵ This issue indeed has started since 2007, see UNDP, Report of Human Resource Management at the ECCC, 4 June 2007, Report No. RCM01; "Corruption Allegations at Khmer Rouge Court Must Be Investigated Thoroughly," Open Society Justice Initiative (February 14, 2007); "OSJI's retraction without investigation into alleged corruption? ECCC's Cambodian judges want easy way out: Cambodian genocide tribunal judges demand retraction over corruption allegation, The Associated Press (Friday, March 9, 2007).

⁶ *Case 002/19-09-2007-ECCC-OCIJ, Co-Lawyers for Civil Parties' Response on the Appeals by Charged Persons Nuon Chea, Ieng Sary Khieu Samphan and Ieng Thirith on the Co-Investigating Judges Order on Eleventh Request for Investigative Action*, D158/5/3/10, ERN (English) 00330867-00330879, para 15

⁷ Rules 21 of the Internal rule

⁸ Wim Voermans, "Judicial transparency furthering public accountability for new judiciaries," *Utrecht Law Review*, Volume 3, Issue 1 (June) 2007 available at <http://www.utrechtlawreview.org/publish/articles/000042/article.pdf>

⁹ See *Condron v United Kingdom*, Eur. Ct. H.R., judgment, 2 May 2000, Application no. 35718/97, paragraph 65; *Allan v United Kingdom*, Eur. Ct. H.R., judgment, 19 June 2001, Application no. 36533/97, paragraphs 38 et seq; *Dowsett v United Kingdom*, Eur. Ct. H.R., judgment, 24 June 2003, Application no.

affirmed in *Lubanga*,¹⁰ as well as in *Jasper v. UK*,¹¹ a judicial control is needed to determine which documents shall be revealed and which shall be kept confidential.¹²

6. In this case, although the existence of the OIOS report of the investigation is public, the content of the report is confidential and has not been disclosed to the public or the parties in these proceedings.¹³ Therefore, the Trial Chamber, which serves as a judicial control in the ECCC, needs to determine if this report, which is directly related to the trial and the ECCC as a whole, shall be revealed. This is mostly due to the fact that this document relates to the corruption issue that has been highlighted by the public. To ensure that these proceedings are consistent with the standards of international law, the Trial Chamber must ensure that information that would serve the public interest is disclosed. This relates to the principle of public hearing,¹⁴ which gives the public the right to know how justice is administered.¹⁵

39482/98, paragraphs 44 et seq ;see also *V. v Finland*, Eur. Ct. H.R, judgment, 24 April 2007, Application no. 40412/98, paragraph 78.

¹⁰ *Situation in the Democratic Republic of the Congo, in the case of the prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, ("Lubanga"), ICC-01/04-01/06 OA 13, 21-10-08.

¹¹ *Jasper v. United Kingdom*, Eur. Ct. H.R, judgment of 16 February 2000, Application no. 27052/95

¹² *Jasper, id*, para 56; *Lubanga*, 47.

¹³ Request, *para* 1

¹⁴ Human Rights Committee General Comment 13, para.6, Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., at 72, U.N. Doc. A/810 (1948), Article 10, 11; International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, Article 14(1); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 312 U.N.T.S. 221, E.T.S. 5, as amended by Protocol No. 3, E.T.S. 45, Protocol No. 5, E.T.S. 55, and Protocol No. 8, E.T.S. 118, Article 6(1); Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted 25 May 1993 by Resolution 827, as amended 13 May 1998 by Resolution 1166, as amended 30 November 2000 by Resolution 1329, Article 20(4); Statute of the International Criminal Tribunal for Rwanda, adopted by Security Council Resolution 955 (1994) on 8 November 1994, as amended 30 April 1998 by Resolution 1165 (1998), as amended 30 November 2000 by Resolution 1329 (2000), as amended 17 May 2002 by Resolution 1411 (2002), as amended 14 August 2002 by Resolution 1431 (2002), as amended 28 August 2003 by Resolution 1503 (2003), as amended 27 October 2003 by Resolution 1512 (2003), Article 19(4); Rome Statute of the International Criminal Court, A/CONF.183/9, 17 July 1998 entered into force 1 July 2002., Articles 64(7) and 67(1); GA recommendation No. A/RES/40/146 of 13 December 1985, Principle 36(1); American Convention on Human Rights, Nov. 22, 1969, I.L.M. 673., Article 8(5) of the American Convention and American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International

7. In this context, the public has the right to know of any matter or misconduct that has tainted the ECCC proceedings because the ECCC's objective is to serve the public interest, especially in the people of Cambodia. Although there is a risk that revealing this report to the public will hamper the rights of certain names mentioned in the report, at the very least, the civil parties as parties to the proceeding must be given right of disclosure as this relates to their dependence on the ECCC to pursue justice.
8. It is important to note that the allegations that corruption might exist in the Office of Administration will have an impact on the current proceeding. This relates to the mandate of the Office of Administration to support, service, and partially supervise the judicial chambers, along with the Office of the Co-Prosecutors and Office of the Co-Investigating Judges, and is essentially responsible for running the proceeding.¹⁶ Therefore, any misconduct in the administration service, for example among the legal officers, case file officers, ICT, translators and interpreters, and other technical support staff who are very essential to the proceedings,¹⁷ will jeopardize the impartiality of the proceeding.
9. Therefore, the disclosure of the OIOS report to public, or at the very least, a confidential disclosure of the report to the parties, will support the fairness of the trial proceedings in the current case. By knowing the result of the OIOS investigations, the Chamber and the parties would be able to take any necessary measures to guarantee that the trial is not tainted by the corruption allegations. All parties to the proceedings could participate to ensure that the administration in the court is run properly, and prevent any misconduct revealed by the OIOS report.

Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992), Article XXVI.

¹⁵ Amnesty International, *Fair Trial Manual*, available at <http://www.amnesty.org/en/library/asset/POL30/002/1998/en/81bf7626-d9b1-11dd-af2b-b1f6023af0c5/pol300021998en.pdf>

¹⁶ Rule 9 of the Internal Rules

¹⁷ See *Case of Nuon Chea*, 002/19-09-2007-ECCC/OCIJ (PTC 21), *Nuon Chea's Eleventh request of Investigative action*, 27 March 2009, Doc. No. D/158, para. 19

Therefore, this would serve the Civil Parties' interest in obtaining a Trial judgment that is based on fair, impartial and independent proceedings.

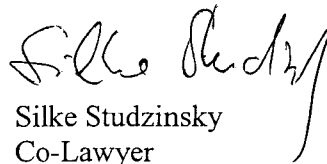
10. Moreover, the importance of this issue in the future proceedings in the ECCC, in particular with regards to the fair trial principle, also serves as an "extraordinary circumstance" under General Assembly Resolution 59/272,¹⁸ which allows the parties to access this report. As justice must not only be done, but also be seen to be done,¹⁹ we believe that by disclosing the OIOS report, the ECCC will make another important step to ensure fairness in its proceeding.

III. REQUEST

11. For all the reasons stated above, the Co-Lawyers of Civil Parties Group 2 request that the Trial Chamber grant the Request in its entirety.

Respectfully submitted,

Yung Panith
Co-Lawyer
(Absent)


Silke Studzinsky
Co-Lawyer

Signed in Phnom Penh on 4 June 2009.

¹⁸ UN Doc. A/Res/59/272, 2 February 2005, para. 2; Request para. 5

¹⁹See European Court of Human Rights, *Delcourt v. Belgium*, 17 January 1970, 11 Ser. A 17, para. 31