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BEFORE THE TRIAL CHAMBER

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GROUP 1--CIVIL PARTIES' CO-LAWYERS' REQUEST THAT THE TRIAL CHAMBER FACILITATE THE DISCLOSURE OF AN UN-OIOS REPORT TO THE PARTIES

PUBLIC

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I. INTRODUCTION

1. The United Nations Office of Internal Oversight Services¹ ('OIOS') has conducted an investigation into widely-reported allegations of corruption² at the ECCC. This investigation has resulted in a report ('OIOS Report'), the existence of which is also public.³ The content of the OIOS Report is, however, confidential and has not been disclosed to the public⁴ or the parties in these proceedings. It is also public knowledge that no investigation or oversight mechanism has been established thus far by either the United Nations or the Royal Government of Cambodia ('RGC') to investigate the pending allegations, or monitor future claims of corruption.⁵ It is not clear whether such a mechanism will be put in place, but it can reasonably be assumed that no substantial progress will be made towards establishing such a mechanism before the end of the proceedings in Case No 001.
2. It is the position of the Co-Lawyers for Civil Party Group 1 ('CPG-1') that the existence of the OIOS Report is directly relevant to these proceedings, as its publication after the close of the proceedings may expose the trial judgment to claims on the part of the Accused and others that corruption within the ECCC rendered the trial unfair, or that

¹ See UN Doc. A/Res/48/218B, 28 July 1994 establishing the Office of Internal Oversight Services to assist the Secretary-General in fulfilling his oversight responsibilities in respect of the resources and staff of the United Nations through internal audit, monitoring, inspection, evaluation and investigation services.

² See, for example, John A. Hall, 'Judging the Khmer Rouge Tribunal', *Far Eastern Economic Review*, 2 March 2009; 'Corruption Allegations at the Khmer Rouge Court Must be Investigated Immediately', *Open Society Justice Institute*, 14 February 2007; 'Groups Urge More ECCC Graft Talks', *Asia Daily News Online*, 11 March 2009; Anna Barrowclough, 'Corruption Fears Cast Shadow Over Khmer Rouge Trial', *The Times*, 16 February 2009; 'Tough Job Ahead for Dame Silvia Cartwright in Cambodia', *New Zealand Press Agency*, 29 March 2009; Op-Ed Contributor: Khmer Rouge Tribunal, Trial on Trial', *New York Times*, 11 March 2009.

³ See, for example, 'Daily Press Briefing by the Office of the Spokesperson for the Secretary-General: Noon Briefing' 30 March 2009, acknowledging the existence of an OIOS Report; 'Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: October 2008 Update', *Open Society Justice Institute*, pages 2,3; Dan Rivers, 'Cambodian War Crimes Court in Corruption Probe', *CNN*, 31 March 2009. Moreover, the existence of this report was not refuted by the Co-Investigating Judges in the *Nuon Chea* Case, see *Case of Nuon Chea*, 002/19-09-2007-ECCC/OCIJ, Order on Request for Investigative Action, 3 April 2009, paras 3, 4 ('*Nuon Chea* Order').

⁴ 'Daily Press Briefing by the Office of the Spokesperson for the Secretary-General: Noon Briefing' 30 March 2009, acknowledging the existence of an OIOS Report; 'Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: October 2008 Update'; *Case of Nuon Chea*, 002/19-09-2007-ECCC/OCIJ, Eleventh Request for Investigative Action, 27 March 2009, para. 12 ('*Nuon Chea* Defence Request').

⁵ UN Assistant Secretary-General for Legal Affairs, Peter Taksoe-Jensen has stated that the United Nations would have no further discussions about corruption-reporting mechanisms at the court: Bethany Lindsay & Eang Mengleng, *The Cambodia Daily*, 'UN Negotiations End With No Agreement', 9 April 2009, p 27; see also Vong Sokheng, *The Phnom Penh Post*, 'No agreement at ECCC graft talks', 9 April 2009, p 3.

the corruption constitutes an abuse of process warranting a permanent stay of the proceedings against Kaing Guek Eav ('Duch'). Arguments in this vein would not only undermine the principle of finality of proceedings, but would render elusive the justice and closure for which the victims of these proceedings have been waiting. This possibility should, and can be avoided by the taking of prudent measures to allow the parties to address the contents of the OIOS Report at this stage of the proceedings.

II. BACKGROUND

3. Reports of allegations of corruption within the ECCC are set out in full in publicly filed submissions⁶ and appeals⁷ in Case 002. For the assistance of the Chamber, extracts from these filings are annexed to the present submissions. These extracts are annexed for the sole purpose of illustrating the gravity and extent of the allegations which exist in the public domain. In short, these widely reported allegations render implausible any argument that the operation of the ECCC is free from the influences of corruption. Her Honour Judge Cartwright has been open in her acknowledgement of corruption allegations, stating: '[o]ne of the major issues that has been troubling for all the judges is that of corruption within the ECCC. We welcome all efforts to ensure that allegations are dealt with fully and fairly and that independent measures are put in place to make sure [that claims] are resolved in a transparent manner.'⁸
4. It is against this background that CPG-1 makes the following arguments in support of its request for disclosure of the OIOS Report, to allow for a final resolution of this question before the trial judgment is rendered.

⁶ *Nuon Chea* Defence Request, para. 4 ('Annex B').

⁷ *Case of Nuon Chea*, 002/19-09-2007-ECCC/OCIJ (PTC 19), Appeal Against Order on Eleventh Request for Investigative Action, 4 May 2009, paras 5, 6 ('Annex C'); *Case of Ieng Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 19), Ieng Sary's Appeal Against the Co-Investigating Judges' Order on Request for Investigative Action Regarding Ongoing Allegations of Corruption & Request for an Expedited Oral Hearing, 4 May 2009, paras 2 – 4. ('Annex D').

⁸ Douglas Gillison, 'ECCC Judges Meet to Discuss Trial Procedures', *The Cambodia Daily*, 2 September 2008. See also "Khmer Rouge Judges demand graft-free trials", *The Brunei Times*, 2 September 2008.

III. ARGUMENT

5. The OIOS is in a unique position in terms of credibility, experience and resources to undertake a thorough investigation of the allegations of corruption at the ECCC. The resultant OIOS Report is certainly a document which would be accorded authority and weight by both parties and observers of the ECCC. Past practice shows that a report of this nature from a reputable source will not indefinitely remain confidential. Firstly, General Assembly Resolution 59/272 which governs the work of the OIOS provides for the withholding of an OIOS report only in 'extraordinary circumstances.'⁹ While a determination may have been made that such extraordinary circumstances currently exist, the subsequent public prosecution of individuals named in the Report, or the finalization of trials at the ECCC, may eliminate these circumstances and necessitate the Report's publication.
6. Secondly, the same General Assembly Resolution requires that: '[a]nnual reports submitted by the [OIOS] to the General Assembly contain the titles and brief summaries of all reports of the Office issued during the year.' Accordingly, at least a summary of the contents of the OIOS Report will soon be made available to UN member states, who themselves may then be prompted to seek access to the Report in full. In sum, there is no guarantee that the OIOS Report will remain confidential. It is submitted that there is a significant likelihood that it will not.
7. It is the realistic and genuinely-held concern of CPG-1 that should the OIOS Report become public after the rendering of a judgment in this case, it may give rise to unfounded claims of ineffective representation. Such claims may unnecessarily complicate the process and the available options for redress or the determination of such assertions after the expiration of the ECCC mandate. In addition, disclosure after the ECCC has closed down has the potential to cause significant prejudice to the victims and civil parties as they may no longer enjoy the legal representation they currently benefit from. The closure the civil parties hope to achieve may be opened to doubt

⁹ UN Doc. A/Res/59/272, 2 February 2005, para. 2: '*Also decides* that when access to a report would be inappropriate for reasons of confidentiality or the risk of violating the due process rights of individuals involved in Office of Internal Oversight Services investigations, the report may be modified, or withheld in extraordinary circumstances, at the discretion of the Under-Secretary-General for Internal Oversight Services, who will provide reasons for this to the requesting party.'

which could easily be avoided if the necessary action is taken now. Further, it now appears that no agreement between the United Nations and the RGC will be reached before the end of the current proceedings which would provide for the establishment of an oversight mechanism to investigate pending allegations or monitor future claims.¹⁰ In light of this development, the CPG-1 request for a hearing of the issue becomes even more pressing, given that the possibility that the allegations will be addressed and finally resolved during the course of the current trial is distant.

8. In short, it is the respectful submission of CPG-1, that to obtain disclosure of the OIOS Report now, to ventilate this issue, (even in closed session, if such was required by the Trial Chamber after hearing arguments on that issue) and to obtain the free consent of counsel for the accused and, if necessary, from the accused himself, would act as a safeguard guaranteeing the legitimacy of the trial process and the resultant verdict.
9. It is submitted that these concerns cannot be dismissed on the grounds that they are hypothetical, or that they pre-suppose both the release of the OIOS Report and the subsequent reaction of the Accused and third parties. A significant risk exists that the judgment will be undermined as a result of these events. This risk can be eliminated by an airing of the issue by the parties at this stage. Once the trial is concluded, the opportunity will have been lost. The issue is not premature, rather now is the only time to act.
10. On the question of whether the Trial Chamber has the ability to obtain a copy of the OIOS Report, CPG-1 respectfully directs the attention of the Chamber to the relevant debate in the *Nuon Chea* proceedings. On 27 March 2009, the *Nuon Chea* Defence Team filed its 'Eleventh Request for Investigative Action', in which it invited the Office of the Co-Investigating Judges ('OCIJ') to request an administrative inquiry into outstanding allegations of corruption at the Tribunal. This request was denied.¹¹ Relevantly, however, the defence had also requested 'the OCIJ to obtain from the UN,

¹⁰ Bethany Lindsay & Eang Mengleng, *The Cambodia Daily*, 'UN Negotiations End With No Agreement', 9 April 2009, p 27; see also Vong Sokheng, *The Phnom Penh Post*, 'No agreement at ECCC graft talks', 9 April 2009, p 3.

¹¹ *Nuon Chea* Order, para. 13.

the RGC and/or any other organization or individual: (a) the results of the OIOS Inquiry...’¹²

11. The OCIJ denied this request on the grounds that Internal Rule 55(2) limits the power of the Co-Investigating Judges to investigating the facts set out in a submission from the Co-Prosecutors. The OCIJ held that this power cannot be extended to ascertaining the truth about the Tribunal ‘as this issue is totally foreign to the facts covered by the current judicial investigation.’¹³ CPG-1 takes no position on the correctness or otherwise of the findings in the OCIJ Order, and notes that appeals from the Order have now been filed.¹⁴ However, even if the OCIJ’s conclusions are upheld on appeal, this reasoning can be easily distinguished, and acts as no bar to the Trial Chamber obtaining and disclosing the OIOS Report in this case.
12. The roles of the OCIJ and the Trial Chamber are distinct and vastly different. The OCIJ found that Internal Rule 55(2) limited its ability to act. Irrespective of whether the OCIJ’s findings are correct, no argument can be made that the Trial Chamber is similarly constrained. Rather, the Trial Chamber is responsible for the conduct of the trial proceedings, which are required by the Internal Rules ‘to be fair and adversarial.’¹⁵ The Trial Chamber is specifically charged with the broader responsibility of facilitating ‘the fair and expeditious conduct of the proceedings...’¹⁶ The Chamber is the principal guardian of this task, and it is a task which cannot be delegated.
13. Accordingly, it is clear that the Trial Chamber has both a right and an obligation to act to preserve the fair conduct of the proceedings. The finality of the proceedings is an integral component of a fair trial. Internal Rule 21 which sets out the “Fundamental Principles” which govern trials at the ECCC notes that the applicable laws must be

¹² *Nuon Chea* Defence Request, para. 22.

¹³ *Nuon Chea* Order, paras 9, 10.

¹⁴ *Case of Nuon Chea*, 002/19-09-2007-ECCC/OCIJ (PTC-19), Appeal Against Order on Eleventh Request for Investigative Action, 4 May 2005; *Case of Ieng Sary*, 002/19-09-2007-ECCC/OCIJ (PTC-19), Ieng Sary’s Appeal Against the Co-Investigating Judges’ Order on Request for Investigative Action Regarding Ongoing Allegations of Corruption & Request for an Expedited Oral Hearing, 4 May 2009; *Case of Ieng Thirith*, 002/19-09-2007-ECCC/OCIJ/PTC, Ieng Thirith Appeal against Office of the Co-Investigating Judges’ “Order on Request for Investigative Action” of 3 April 2009; *Case of Khieu Sampan*, 002/19-09-2007-CETC-BCJI (CP22), Appel de la Défense de M. Khieu Sampan Contre L’Ordonnance des Co Juges D’Instruction sur Demande d’Acte d’Instruction en date du 3 April 2009; 3 April 2009.

¹⁵ Internal Rule 21(1)(a).

¹⁶ Internal Rule 79(7).

interpreted so as to ensure 'legal certainty'. Should the Trial Chamber become aware of a real threat to the ability of the proceedings to conclude with finality, it is respectfully submitted that not only does the Chamber have the ability to address this threat, but it is obliged to do so. Accordingly, pursuant to its broad mandate to facilitate the fair and expeditious conduct of the proceedings, CPG-1 submits that the Trial Chamber has the ability to request a copy of the OIOS Report from the Secretary General of the United Nations, with a view to disclosing the Report to the parties in these proceedings. The refusal of the OCIJ in the *Nuon Chea* case does not preclude the Chamber from acting.

14. Nor should the disclosure of the OIOS Report to the parties be prevented by its confidential nature. All parties to the proceedings regularly work with and plead on the basis of confidential information and materials, and the same principles will apply to the disclosed OIOS Report.
15. CPG-1 takes no position as to the truth or otherwise of the allegations of corruption. Nor is a request being made that the Chamber investigate or consider the substance of these allegations. CPG-1 limits its request to obtaining the Trial Chamber's assistance in addressing the real concern that the concluded proceedings will be re-opened should the OIOS Report be disclosed and reveal corruption within one or more organs of the ECCC. The opportunity exists to evade this possibility. It is the position of CPG-1 that the opportunity must be taken.

IV. CONCLUSION

16. It the unfortunate truth that it is no longer possible to separate the conduct of these proceedings from the political realities of the ECCC. Nor is it possible to proceed without addressing an issue of which could prove fatal to the finality of the trial. Allegations have been made. An investigation has occurred. A report has been produced. Internal Rule 21 requires that the applicable laws be interpreted so as to ensure the 'transparency of proceedings.' Consistent with this requirement, CPG-1 requests that this issue be brought to light. To continue with the proceedings while the OIOS Report remains ticking in the background is an unrealistic and imprudent approach. Those involved in these proceedings should not be forced to resorting to hope that a UN Report will remain buried. The necessity of action is compounded by

the fact that it has now appears that no investigative mechanism is likely to be established to investigate, monitor and potentially draw a line under this complicated issue which threatens to jeopardize the legacy of the ECCC.

17. CPG-1 has always been clear in its position that the victims it represents are not motivated by vengeance, but rather seek justice.¹⁷ These victims desire a conclusion of fair and legitimate proceedings that will stand the test of time. The present filing is consistent with this goal. Her Honour Judge Cartwright was resolute in noting that ‘these historic trials, which are so important for the people of Cambodia, must not be tainted by corruption.’¹⁸ CPG-1 adopts this statement, and accordingly seeks a final resolution of this issue.

V. REQUEST

18. For all the above reasons, CPG-1 respectfully requests that the Trial Chamber:

DIRECT a formal request to the United Nations Secretary General for the provision of the OIOS Report;

DISCLOSE the OIOS Report to the parties in these proceedings;

INVITE the parties to make written submissions on the content of the OIOS Report within 21 days of its receipt; and

INSTRUCT the Accused that any written submissions filed on his behalf should include a statement as to his continued commitment to the admissions he has made in these proceedings, in light of both the OIOS Report and the fact that it appears that no investigative or oversight mechanism will be established to investigate pending or future allegations of corruption.

¹⁷ Initial Hearing, T. 18 February 2009, (Public) page 20, per Mr. Khan: ‘Your Honours, I cannot leave this subject without addressing my learned friend’s, -- Mr. Roux’s submission, that to allow the views of victims to be heard would be regression, not progression. That view, with the greatest of respect, is highly presumptuous. There has been no indication from me, in my filing, or in Court, that vengeance is being sought. He expressly stated that vengeance would be sought. Your Honours, international and national experts would be heard, and Your Honours would decide, but I can say, for the record, that the civil parties we represent in civil party group number one do not want vengeance. They do not want blood. They want justice.’

¹⁸ “Khmer Rouge Judges demand graft-free trials”, *The Brunei Times*, 2 September 2008.

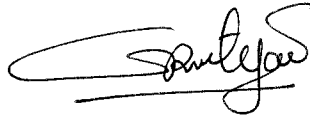
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Signed in Phnom Penh on 11 May 2009




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