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GROUP 1--CIVIL PARTIES' CO-LAWYERS' REPLY TO CO-PROSECUTORS' RESPONSE TO CPG-1 REQUEST FOR DISCLOSURE OF AN UN-OIOS REPORT

PUBLIC

Filed by:

Co-Lawyers for Civil Parties:

Mr. Karim A. A. Khan
Ms. TY Srinna
Mr. Alain WERNER
Ms. Brianne McGONIGLE

Distributed to:

The Trial Chamber:

Judge NIL Nonn, President
Judge Silvia CARTWRIGHT
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge THOU Mony

Copied to:

Accused:

Mr. KAING Guek Eav
alias "Duch"

Counsel for the Accused:

Mr. KAR Savuth
Mr. François ROUX

Assisted by:

Ms. Daniella RUDY
Ms. Kate GIBSON

Office of the Co-Prosecutors:

Ms. CHEA Leang
Mr. Robert PETIT
Mr. YET Chakriya
Mr. William SMITH
Mr. PICH Sambath
Mr. Alex BATES

ឯកសារត្រួតពិនិត្យស្របតាមច្បាប់ដើម	
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Co-Lawyers for Civil Parties

Mr. KIM Mengkhy
Ms. MOCH Sovannary
Ms. Martine JACQUIN
Mr. Philippe CANONNE
Mr. KONG Pisey
Mr. HONG Kimsuon
Mr. YUNG Panith
Ms. Silke STUDZINSKY
Mr. Pierre-Oliver SUR

I. INTRODUCTION

1. On 11 May 2009, CPG-1 lawyers filed a *Request that the Trial Chamber Facilitate the Disclosure of an UN-OIOS Report to the Parties*¹ requesting disclosure of the UN-OIOS Report and a hearing of the parties' submissions on its content. On 2 June 2009, following an Order from the Trial Chamber,² the Co-Prosecutors filed its *Response to Certain Civil Parties' Request for Disclosure of the UN-OIOS Report*.³

2. The Co-Prosecutors' Response suffers from two major flaws. Its primary submission that the Trial Chamber is required to defer its consideration of the CPG-1 Request in favour of proceedings before a different Chamber in a different case is untenable, and has no legal basis. The Trial Chamber cannot delegate its responsibility to ensure the integrity of the proceedings currently before it. The Co-Prosecutors' secondary submissions suffer from a significant internal contradiction. The Co-Prosecutors firstly argue that the *'[t]he request for the OIOS Report should be denied'*,⁴ but then also submit that *'the credibility of this Court's process would be enhanced by a release of the OIOS Report and a timely and credible resolution of this issue.'*⁵ The CPG-1 Request sought the disclosure of the UN-OIOS Report and a resolution of the issue through submissions from the parties. The Co-Prosecutors' Response therefore supports the CPG-1 position, and the relief requested by CPG-1 lawyers. It is accordingly submitted that the 12 paragraphs of the Response which argue against the disclosure of the UN-OIOS Report should be disregarded by the Chamber as being inconsistent with the Co-Prosecutors' final argument that the credibility of the Court's process would be enhanced by the Report's disclosure.

3. The flaws in the Response are examined in detail below. This examination illustrates that none of the Co-Prosecutors' arguments warrant the continued non-disclosure of a UN-OIOS Report which addresses the corruption allegations at the ECCC; allegations which continue to occupy column inches in national and international press, and which have the potential to undermine the finality of the proceedings in this case.

¹ *Case of Kaing Guek Eav*, 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, 11 May 2009 ('CPG-1 Request').

² *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Direction Setting Time Limits 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 Report to the Parties, 21 May 2009.

³ *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Co-Prosecutor's Response to Certain Civil Parties' Request for Disclosure of the UN-OIOS Report, 2 June 2009 ('Response').

⁴ Response, paras 6 – 18.

⁵ Response, para. 20.

II. ARGUMENT

A. Deferral in Favour of the Pre-Trial Chamber is unwarranted

4. On 3 April 2009, the Office of Co-Investigating Judges ('OCIJ') rendered an Order dismissing a *Nuon Chea* request,⁶ and refusing to obtain and disclose materials relevant to corruption allegations (including the UN-OIOS Report), or to initiate 'an administrative inquiry into the outstanding allegations of corruption.'⁷ The Co-Prosecutors have taken the position that the four appeals⁸ filed in Case 002 from this OCIJ Order require the Trial Chamber in Case 001 to defer its consideration of the CPG-1 Request. Although the Corruption Appeals and CPG-1 Request both have at their heart the endemic corruption allegations at the ECCC, they are very different filings which request very different relief. In effect, therefore, the Co-Prosecutors are asserting that if submissions are filed in different cases, before different Chambers, on the same general topic, primacy should be attributed to the Chamber which was seized first. This is not the case.

5. The Co-Prosecutors' acknowledge that '*the Trial Chamber and Pre-Trial Chamber are coequal in the judicial hierarchy of the Court.*'⁹ This starting point is correct. However, while equal, the Trial Chamber and the Pre-Trial Chamber have different mandates and responsibilities. As set out in the Internal Rules, the Trial Chamber is responsible for the conduct of the trial proceedings. The Trial Chamber is specifically charged with the broader responsibility of facilitating '*the fair and expeditious conduct of the proceedings...*'¹⁰ which are required by the Internal Rules '*to be fair and adversarial.*'¹¹ The Chamber is the principal guardian of this task, which cannot be delegated, or offloaded on the basis of filings in another case. It is these principles by which the Chamber is required to be guided, and not the Co-Prosecutors' ideas of

⁶ *Case of Nuon Chea*, 002/19-09-2007-ECCC/OCIJ, Order on Request for Investigative Action, 3 April 2009, para. 13 ('Order').

⁷ *Case of Nuon Chea*, 002/19-09-2007-ECCC/OCIJ, Eleventh Request for Administrative Action, 27 March 2009, para. 22.

⁸ *Case of Nuon Chea*, 002/19-09-2007-ECCC/OCIJ, Appeal Against Order on Eleventh Request for Investigative Action, 4 May 2009; *Case of Ieng Sary*, 002/19-09-2007-ECCC/OCIJ, 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 Khieu Samphan*, 002/19-09-2007-ECCC/OCIJ, Appel de la Défense de M. Kieu Sampan Contre L'Odonnance des Co-Juges d'Instruction sur Demande d'Acte d'Instruction en Date du 03 Avril 2009, 4 May 2009; *Case of Ieng Thirith*, 002/19-09-2007-ECCC-OCIJ-PTC-19, Ieng Thirith Appeal against Office of the Co-Investigating Judges' "Order on Request for Investigative Action" of 3 April 2009, 4 May 2009 ('Corruption Appeals').

⁹ Response, para. 5.

¹⁰ Internal Rule 79(7).

¹¹ Internal Rule 21(1)(a).

when the Chamber should decide an issue, or when it should defer to another 'co-equal' judicial organ.

6. The Co-Prosecutors attempt to bolster their position by stating that *'[t]he Corruption Appeals, filed on 4 May 2009, were first in time and they are expected to be decided jointly and expeditiously. There is also no urgency necessitating the Trial Chamber to decide on [sic] this Application before the decision on the Corruption Appeals.'*¹² This argument is without merit. Mathematical calculations reveal that the Pre-Trial Chamber of this Court averages 6.45 months to render decisions.¹³ In a joint appeal from an OCIJ Order where five parties have filed extensive briefs, it is not unreasonable to assume that the time taken will be longer than the average.

7. In 6.45 months from 29 May 2009 (the date of the Co-Prosecutors' Corruption Appeals Response),¹⁴ the proceedings in Case 001 will be completed. The opportunity to address the corruption allegations will have been lost, and the judgement will be unprotected from the fallout from the inevitable disclosure of the UN-OIOS Report. The Prosecution's argument that *'there is no urgency necessitating the Trial Chamber to decide on [sic] this Application'* is untenable.

8. CPG-1 lawyers acknowledge the in-court remark by Her Honour Judge Cartwright that the Trial Chamber did not rule on issue of the reliance on the content of confessions obtained under torture, because the issue was pending before the OCIJ in Case 002.¹⁵ CPG-1 respectfully accepts that in doing so, the Trial Chamber was acting within its discretion to wait until the issue is decided in Case 002. However, any argument that a Trial Chamber is **obliged** to defer to proceedings in another Chamber is erroneous. This is particularly so when the Trial Chamber is seized with an issue, the immediate resolution of which is vital to the integrity of the proceedings. As each day passes, Case 001 is getting closer to its conclusion and the rendering of a judgement left open to challenge on the basis that the parties and the Chamber willfully ignored the endemic corruption allegations plaguing the Court. The Trial Chamber is not precluded from acting to

¹² Response, para. 5 (emphasis added).

¹³ *Case of Ieng Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 17), Transcript, 26 February 2009, page 26.

¹⁴ *Case of Nuon Chea et al.*, 002/19-09-2007-ECCC/OCIJ, Co-Prosecutors' Joint Response to Defence Appeals Against the Co-Investigating Judges' Order Denying Request for Administrative Action Regarding Allegations of Administrative Corruption, 29 May 2009 ('Corruption Appeals Response').

¹⁵ Transcript, 28 May 2009, page 11: 'It was for precisely that reason, namely that this matter is currently before the Co-Investigating Judges in relation to case 2, that no ruling has been given.'

alleviate the risk that the judgement will be undermined because of a filing in a different case, before a different Chamber.

9. Some guidance can be drawn from the approach adopted at the International Tribunals. The ICTY Appeals Chamber was asked to '*postpone its deliberations*'¹⁶ of a particular legal issue on the basis that the exact same issue was being argued in another case before the same Chamber. The Appeals Chamber's brief dismissal of this request is instructive:¹⁷

The Applicant's request is unfounded. The Martić case and the Mrškić and Šljivančanin case are distinct legal proceedings, both at the trial and appellate level. The Appeals Chamber is required to decide on the merits of the individual respective appeals. While similar legal issues in different cases may arise, those issues always have to be considered in the context of each individual case.

10. To follow the approach advocated by the Co-Prosecutors would mean that the Trial Chamber would be precluded from deciding all issues – even those an immediate resolution of which is necessary for the fair and expeditious conduct of the case – on the basis that a party to different proceedings had seized a different Chamber on a similar issue. This cannot be the approach of a Trial Chamber whose mandate is to ensure the integrity of the proceedings before it, particularly in situations where the length of Pre-Trial Chamber deliberations mean that opportunities will be lost. The Co-Prosecutors' primary submission should be dismissed.

B. The Internal Inconsistency in the Co-Prosecutors' 'Secondary Submissions'

11. In its Response, the Co-Prosecutors '*adopt by reference*'¹⁸ the arguments made in their Corruption Appeals Response and then proceed to simply summarise the same arguments contained therein, without directing any thought to the particular relief requested by CPG-1. In the CPG-1 Request, CPG-1 lawyers sought limited and specific relief, being the disclosure of the UN-OIOS Report, and the hearing of submissions from the parties on the content of the report. However, in the Corruption Appeals in Case 002, the defence was appealing against the refusal of

¹⁶ *Prosecutor v. Martić*, IT-95-11-A, Decision on Veselin Šljivančanin's Motion Requesting Simultaneous Adjudication of the *Prosecutor v. Milan Martić* and *Prosecutor v. Mile Mrškić and Veselin Šljivančanin* Cases, 16 April 2008, para. 2.

¹⁷ *Ibid.*, para. 6.

¹⁸ Response, para. 6.

more extensive relief, such as ‘an administrative inquiry into the outstanding allegations of corruption at the Tribunal.’¹⁹

12. In its Corruption Appeals Response in Case 002, the Co-Prosecutors opposed the more extensive relief requested by the defence teams, but nonetheless concluded that:

Despite lack of jurisdiction, there are indeed “compelling motives” to address, transparently and forcefully, this issue which may severely endanger the Court’s reputation.

To this end, the Co-Prosecutor’s observe that the credibility of this Court’s process would be enhanced by a release of the OIOS Report and a timely and credible resolution of this issue.²⁰

13. By cutting and pasting these two paragraphs directly into the current Response, the Co-Prosecutors are, in fact, signaling their complete agreement with the CPG-1 position, and are requesting the same relief as that requested by CPG-1; namely, the disclosure of the UN-OIOS Report and a timely and credible resolution of this issue. This cannot be reconciled with the other arguments made in the Response against the disclosure of the UN-OIOS Report.²¹ CPG-1 submits therefore that these 12 paragraphs should be disregarded as being inconsistent with the Co-Prosecutors’ final argument that the UN-OIOS Report should be disclosed.

C. The UN-OIOS Report Should be Disclosed

14. Despite the CPG-1 position that the Co-Prosecutors’ arguments against disclosure of the UN-OIOS Report must be disregarded, CPG-1 lawyers also address the merits of these arguments for the assistance of the Chamber.

15. The Co-Prosecutors begin by arguing that ‘*fair trial rights are fundamental and must be upheld by all organs of the Court.*’²² CPG-1 lawyers agree with this argument, which in no way supports the Co-Prosecutors’ position that a UN-OIOS report should remain buried, despite the fact that its late disclosure has the ability to undermine the proceedings in this case.

¹⁹ *Case of Nuon Chea*, 002/19-09-2007-ECCC/OCIJ, Eleventh Request for Administrative Action, 27 March 2009, para. 22.

²⁰ See Corruption Appeals Response, paras 77, 78 (internal footnotes omitted); and Response, paras 19, 20.

²¹ Response, paras 6 – 18.

²² Response, paras 8 – 10.

16. The Co-Prosecutors next argue that '*fair trial rights issue has not been raised by the Accused*',²³ and as such imply that the relief requested by CPG-1 should be denied. This argument is without merit and should be dismissed. It is trite law that the fairness of the proceedings is not the sole domain of the defence. All parties and the Chamber have an interest in, and obligations to ensure that the proceedings are fair. A Chamber can not dismiss arguments which raise an issue integral to the fairness of the proceedings on the grounds that they were raised by a party other than the defence. The Co-Prosecutors' argument is also rendered moot by the Defence filing of 10 June 2009, which provided '[l]a défense souhaite faire part de sa préoccupation concernant les allégations de corruption au sein de CETC.'²⁴ It should also be noted that all other Civil Party Groups have since considered the issue and reached the same conclusion as CPG-1.²⁵

17. The Co-Prosecutors also contend that the CPG-1 Motion for Disclosure is '*limited to mere speculation regarding claims that DUCH and unspecified others "may" make in the future.*'²⁶ It is surprising and disappointing that the Co-Prosecutors are opposed to taking steps to eliminate the significant risk that all the work that has gone into these proceedings will be undermined as a result of these future claims. The Co-Prosecutors' argument suggests that the Trial Chamber should wait until the authority of the judgement has been undermined before acting. By then, the opportunity to preserve the integrity of the proceedings will have been lost. This can not be the correct approach. The issue is not premature, rather now is the only time to act.

18. The Co-Prosecutors then allege that '*fair trial rights are not impinged*',²⁷ and argue that CPG-1 has failed to '*demonstrate a nexus between the alleged administrative corruption and the judicial decision making of this Court*'²⁸ or provide '*any evidence of actual unfairness with respect to any party.*'²⁹ The CPG-1 Request must not be misunderstood. CPG-1 lawyers were clear in not taking any position on the truth or otherwise of the corruption allegations, or in speculating as to the depths or effect of the alleged corruption. CPG-1 lawyers simply acted in

²³ Response, para. 11.

²⁴ *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Observations de la Défense Relatives à la Requête des Co-Avocats du Groupe 1 des Parties Civiles Demandant à la Chambre de Faciliter la Divulgateion aux Parties d'un Rapport du Bureau des Services de Contrôle Interne de l'ONU, 10 June 2009, para. 2.

²⁵ See, for example, *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Group 2 – Civil Parties' Co-Lawyers' Response to CPG-1 Request that the Trial Chamber Facilitate the Disclosure of an UN-OIOS Report to the Parties, 4 June 2009.

²⁶ Response para. 12.

²⁷ Response, paras 13 – 16.

²⁸ Response, para. 13.

²⁹ Response, para. 16.

the interests of the CPG-1 victims by advocating for a discussion of a UN-OIOS Report which itself addresses the corruption allegations. The disclosure of this report, and the nexus between corruption and the judicial decision making of the Court are separate and distinct matters. It is not incumbent on CPG-1 lawyers to establish a nexus between corruption and judicial decision making as a pre-requisite to disclosure of the UN-OIOS Report. Cutting and pasting from the Corruption Appeals Response has again left the Co-Prosecutors arguing in parallel with the CPG-1 Request, and not in response to it.

19. The final argument made by the Co-Prosecutors before the dramatic about-turn to argue in favour of the disclosure of the UN-OIOS Report, is that '*the Court is not the appropriate forum to investigate the corruption allegations.*'³⁰ CPG-1 has not asked the Trial Chamber to investigate the corruption allegations.³¹ This argument should be dismissed.

III. CONCLUSION

20. There are no arguments in the Co-Prosecutors' Response which warrant dismissal of the CPG-1 Motion requesting the disclosure of the UN-OIOS Report to the parties, and the resolution of this issue in Case 001. Accordingly, CPG-1 respectfully reiterates its request 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 his guilty plea.

³⁰ Response, paras 17 – 18.

³¹ CPG-1 Motion for Disclosure, para. 15.

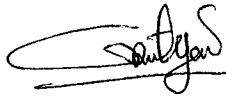
The whole respectfully submitted by

Co-Lawyers for Civil Parties (Group 1)

Signed in Phnom Penh on 15 June 2009



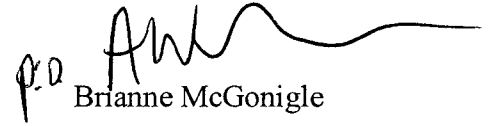
Karim A. A. Khan



TY Srinna



Alain Werner



Brianne McGonigle