

Memorandum to the Group of
Interested States:

Priority Issues for the
Extraordinary Chambers in the
Courts of Cambodia (ECCC)

October 2006

INTRODUCTION

The Extraordinary Chambers¹ officially started operations on July 10, 2006, when the Co-Prosecutors, Robert Petit (Canada) and Chea Leang (Cambodia), began work. They launched initial investigations the week after the international and Cambodian judges convened on July 3 for a five-day workshop in Phnom Penh. On September 4, the two Co-Investigating Judges, Marcel LeMonde (France) and You Bun Leng (Cambodia), took up office. The Principal Defender, Rupert Skilbeck (United Kingdom), is due to start work in October, with his office expected to be fully operational by January 2007. The speed with which these key staff members have come on board at the Chambers is a tribute to the significant progress the ECCC has made since the Office of Administration opened its doors in February this year.

Nonetheless, **several serious issues demand immediate attention and action by the GIS.** The GIS needs to:

- Address budgetary inadequacies and monitor budgetary policy;
- Ensure judges are convened immediately to adopt clear internal regulations;
- Facilitate judicial leadership and cooperation;
- Develop independent investigative resources and enhance capacity;
- Provide financial resources to ensure adequacy of outreach;
- Create, adequately train, and staff a Victim and Witness Protection and Support Unit;
- Fund defense counsel training;
- Monitor hiring procedures;
- Address additional translation, interpretation and transcription needs and build staff capacity.

UPDATE ON ECCC DEVELOPMENTS SINCE APRIL 2006

CONVENING OF ECCC JUDGES: JULY 2006

International and Cambodian judges convened for the first time in early July in Phnom Penh for a week-long workshop. They were joined by the Co-Prosecutors, Co-Investigating Judges, the Principal Defender and several resource people. The judges accomplished several crucial tasks during this meeting, including:

- Agreement that the ECCC judges have authority to adopt internal regulations to supplement Cambodian procedure, to guide the work of the Chambers, and ensure compliance with international standards of due process and justice.
- The creation of a Rules Committee to draft proposed internal regulations for consideration by the judges. This committee will consist of three Cambodian and two international judges.
- The creation of a Judicial Administration Committee dealing with issues relating to the administration of the ECCC, including the infrastructure of the Chambers, physical and human resource needs and matters of protocol. This committee will also comprise three Cambodian and two international judges.

The Principal Defender also secured informal agreement with Cambodian stakeholders that international defense counsel would be allowed to fully participate in all proceedings related to

¹ Also referred to herein as “the Chambers” and “the ECCC.”

the representation of accused.² The methods to ensure that this occurs are still subject to negotiation.

OTHER DEVELOPMENTS:

- The Co-Prosecutors began work on July 10, 2006. Staff has been hired and investigations have begun.
- Both the International and the Cambodian Co-Prosecutors have expressed a commitment to assist the Chambers' outreach effort and have already addressed several public audiences.
- The Prosecutors' Office has expressed a commitment to develop a system to accept complaints from victims of the Khmer Rouge.³ The internal regulations will also address this process.
- The Co-Investigating Judges started work in Phnom Penh, along with their staff, on September 4, 2006.
- The Public Affairs Section is developing an outreach and public affairs plan and is regularly coordinating with the NGO community to provide public information about the Chambers. One outreach professional called the public information plan the "most impressive of all the tribunals at the same stage of operations."⁴
- Senior administrators from the Office of Administration and the Public Affairs Unit are actively engaging with civil society and the public about ECCC issues through regular meetings with NGOs and at press conferences.
- The Extraordinary Chambers are hiring staff for tasks including translation, transcription, security, and archiving.
- Improvements to the office space for the Chambers are being accomplished, including satellite internet connections, internal phone lines, and a cafeteria space for staff. Nearly 100 staff members have adequate office space.
- The pre-qualification of bidders for the detention facility's construction is complete. The facility is expected to be built by January 2007 and will contain eight cells, interview rooms, fitness equipment and a television.
- The ECCC is currently planning a training course for translators and interpreters in Phnom Penh, sponsored by the Netherlands. A four week English language class, funded by Singapore, was taught for ECCC Cambodian staff in August-September.
- The Rules Committee met in Phnom Penh between September 11 and 19. Four of the five committee members continue to discuss the rules in Phnom Penh. A completed draft is expected in October, which will be circulated for civil society comment before being presented to the judges.

Significantly, the 'Friends of the ECCC,' convened jointly by the French and Japanese embassies, met in June and August 2006 and plans to reconvene every two months. Constituted as an active working group, it will focus on three sets of activities:

- (1) compiling updates on the Chambers' progress and budget;
- (2) providing advice on non-judicial problems which arise; and
- (3) strategizing on the potential legacy of the Chambers for the national system.⁵

While these achievements are significant, important concerns remain which must be addressed immediately.

² See 'Statement from the Principal Defender of the ECCC Mr. Rupert Skilbeck,' ECCC Press Release, July 7, 2006. Copy on file with the Justice Initiative.

³ This plan was unveiled to Cambodian NGOs in a meeting hosted by France-based NGO Victims Collective on August 23, 2006.

⁴ See Wanda Hall, Notes from NGO meeting at the Cambodiana Hotel, July 2006. Copy on file with Justice Initiative.

⁵ Interview, Diplomatic Community, Phnom Penh, July 2006.

ISSUES NEEDING IMMEDIATE ATTENTION

ISSUE 1: SUPPLEMENT INADEQUATE BUDGET

The Chambers' unrealistically thin original budget must be supplemented, or budgetary constraints may undermine the fundamental aims of the ECCC. The ECCC is currently operating on a skeletal budget of \$56.3 million. Unless this figure is increased significantly, the ECCC is unlikely to deliver effective justice. The experience of the Special Court for Sierra Leone (SCSL)—the hybrid institution most resembling the ECCC in structure and budget—demonstrates that a realistic budget is at least double the ECCC's current budget. The SCSL's operational budget was originally projected at \$57 million for three years.⁶ Now in its fifth year of operations, the SCSL is currently expected to cost \$107 million by the end of 2006.⁷ The SCSL did not exceed its budget due to poor fiscal management. As donor states themselves recognized when called on to give extra funds in 2005, the Court boasts a "highly impressive and efficient record"⁸ and remains a "good model for an independent, efficient and effective tribunal."⁹

The ECCC urgently needs more money. The current budget is clearly insufficient for the ECCC to do its job effectively:

- After meeting for a week in June 2006, all international trial and appellate judges left Cambodia and are not scheduled to return for full-time duties for at least a year.¹⁰ The budget does not contain funds to reconvene the judges in 2006 (or for plenary sessions at any time), yet a plenary session will be crucial to ensuring that the judges have the opportunity to adequately discuss, develop, and adopt appropriate procedural rules for the ECCC. Although the Office of Administration is planning to reconvene the judges this year, to do so will require funds to be taken from other areas of the current budget. Funds will likely be taken from the Chambers training budget, which was already depleted by one-half by the June plenary. As a result, fundamental needs, such as training for the judges and other key staff, may have to be cut.
- There is \$84,800 budgeted for UN staff travel in 2006, but none of it is allocated for travel for outreach efforts. This severely limits the ECCC's ability to engage with rural

⁶ In fact, the Court was originally projected by UN analysts to cost \$114.6 million, but Member States' concerns cut this figure in half to \$57 million. See 'Letter Dated 12 July 2001 from the Secretary-General Addressed to the President of the Security Council,' 13 July 2001, UN Doc S/2001/693.

⁷ International Center for Transitional Justice, 'The Special Court for Sierra Leone under Scrutiny,' Prosecution and Case Studies Series, March 2006, p.30.

⁸ See, for example, comments supporting further financial contributions to the SCSL by Canada's Representative to the UN's Fifth Committee of the General Assembly, Adelle Ferguson, in 'Financing for Sierra Leone Court, Somalia Political Office Among Issues Taken Up in Budget Committee,' UN Press Release, May 16, 2005, <http://www.un.org/News/Press/docs/2005/gaab3676.doc.htm>.

⁹ See comments by United States Representative to the UN's Fifth Committee of the General Assembly, Candice Ebbesen, in 'Financing for Sierra Leone Court, Somalia Political Office Among Issues Taken Up in Budget Committee,' above n.6.

¹⁰ See *Criteria for the Selection of Judges and Prosecutorial Candidates for the Extraordinary Chambers for the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea*, which states: "It is accordingly anticipated that the international judges who are appointed to the Trial Chamber will not in fact be called upon to serve until some time into the second year of the operations of the Extraordinary Chambers. It is anticipated that they will then be required to serve continuously until towards the end of the third year of operations. It is anticipated that international judges who are appointed to the Supreme Court Chamber will most probably not be called upon to serve until late in the second year of operations of the Extraordinary Chambers and that they will then most probably serve on a continuous basis until the end of the third year." Available at <http://www.un.org/law/khmerrougetrials/documents/judges.TOC.html>

Cambodians about the Chambers.¹¹ Nor is there a travel budget for other important training and speaking opportunities.

- No money is allocated for international witness protection and support personnel, beyond a low-level P-2 post. This post, when budgeted, was only intended to facilitate the transport of witnesses. Realities at the ECCC, however, mean that the person filling this post may have to take on much higher-level duties. Given the magnitude of the task, the lack of training available for the two Cambodian personnel in the Victim and Witness Unit, and the lack of movement on witness protection and support issues, genuine concerns exist about psychological protection and support for those already being interviewed by the Prosecutors' Office.
- Currently, there is no funding for an officer devoted to developing either legacy¹² or completion strategies¹³ (both posts exist in the Special Court for Sierra Leone), meaning both issues may be neglected.
- No money is specifically allocated for travel and equipment for the Prosecutors' Office: and nothing for scanners, visual and audio recording equipment or internet-based research tools (such as Westlaw or Lexis). The Prosecutors' Office staff (and staff in other organs of the Chambers) has limited access to the Chambers' 15 UN four-wheel drive vehicles. These shortcomings will impede the Office's ability to conduct investigations and develop a high quality prosecutorial strategy. While the Office of Administration may soon provide basic equipment, funds budgeted for other important needs must be sacrificed to do so.
- All sections of the Extraordinary Chambers are working with inadequate staff to accomplish the goals of the ECCC within three years. As a comparison, the Special Court for Sierra Leone budgeted for a lean staff of 45 posts for the Office of the Prosecutor (OTP) for the 2005-2006 financial year (including investigative, trial, appellate, legal operations and immediate OTP staff). The maximum staff budgeted for the Prosecutors' Office and Investigative Judges' Office combined at the ECCC is 38 posts—approximately 16 percent less than the Special Court's OTP.

When faced with similar budgetary shortages, Special Court officials were tenacious in tracking down extra money to support the Court's work. The SCSL Registrar and Prosecutor actively engaged with donors and other States to help fill the shortfall. These efforts have been effective in keeping the Court operational, but as one human rights watchdog put it, "the need to raise funds

¹¹ Extraordinary Chambers proposed budget, December 2004. Copy on file with the Justice Initiative.

¹² Legacy, in this memorandum, means measures designed to have a lasting and positive impact on Cambodian society and legal system after the Chambers has finished operations. The Special Court has interpreted this to include: building the professional capacity of national legal professionals; raising the domestic community's expectations of justice processes; and helping to ensure that local courts have the capacity to undertake domestic prosecutions to complement the work of the Special Court. The Special Court's Legacy Officer develops legacy goals and strategies, and works to facilitate their implementation and achievement. For an outline of how the Special Court conceived of legacy, see 'Address by Special Court Registrar, Robin Vincent,' official opening ceremony of the Special Court's courthouse, March 10, 2004, available at <http://www.sc-sl.org/vincent100304.html>. For an outline of the issues of legacy related to the Special Court, see Human Rights Watch, *Bringing Justice: the Special Court for Sierra Leone: Accomplishments, Shortcomings, and Needed Support*, available at <http://hrw.org/reports/2004/sierraleone0904/index.htm>.

¹³ Completion strategies are plans developed to ensure that international or hybrid tribunals are able to finish their tasks by the time their mandated lifespan expires. An officer in charge of developing and implementing an ECCC completion strategy would work out what needs to be done to finish trials and appeals on time, identifying obstacles which may hinder the completion of work on schedule, devising solutions to overcome those hurdles, and ensuring the effective implementation of the strategy as a whole.

has weakened the Special Court diplomatically, as its senior officials must travel the world with their hands out.”¹⁴

The ECCC’s inadequate budget means the Office of Administration has no choice but to immediately increase fundraising efforts. While the Office of Administration has exercised its authority to shift funds to critical expenses such as the first plenary meeting of judges, the shortfalls from this policy will eventually become critical. Shifting funds insures that immediate needs are met, but it does not guarantee that adequate funds will be available as the court ramps up to full operation over the next year. Already, budgetary constraints are affecting the Chambers’ operations:

- Training for pre-trial, trial and appellate judges and senior staff, which ideally should have already occurred, appears to have been put on hold partly due to budgetary concerns. Yet training in the Chambers’ initial operational phases is crucial to ensuring high quality performance.
- Implementation of witness protection and support measures, investigation capacity and training, and adequate outreach efforts have all been stalled, at least in part because of inadequate funds.

If short-sighted (while fiscally prudent) budgetary policy decisions continue to be made based on current funding levels, the negative impact will be both deep and far-reaching. It will limit the Chambers’ ability to work effectively and to meet international standards. Immediate measures to bolster the budget must be taken by Chambers’ staff and by GIS members.

An excessively lean budget also places undue pressure on the Chambers’ staff to make decisions based solely, or predominantly, on financial considerations. Yet other legal and non-financial factors must be taken into account to ensure that the ECCC develops and delivers a vision of justice commensurate with its mission, including the following components:

- regular training in international and Cambodian law for judges, prosecutors, defense counsel and their staff to ensure the emergence of high quality and legally sound jurisprudence and a legitimate prosecution process;
- instituting regular workshops and exchanges between ECCC staff and Cambodian legal professionals working in and outside the Chambers to ensure a lasting legal legacy in the Cambodian national legal system;
- prioritization of outreach activities and investment in projects which make ECCC processes comprehensible and meaningful to the broader Cambodian population, particularly in rural areas;
- other efforts aimed at instilling in the millions of victims of Pol Pot’s regime a genuine sense that justice is being done, and increasing their expectations of the rule of law in day-to-day life; and
- sufficient staff and equipment for the prosecutors and investigating judges to adequately prepare cases for trial.

Ensuring that these considerations are addressed requires regularly convening representatives from all ECCC organs to discuss budgetary policy decisions which impact the ECCC’s operations. Other tribunals have recognized the importance of convening members from the various organs of the court to develop budgetary policy and contribute to financial decision-making. The procedural rules governing the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), both mandate

¹⁴ International Center for Transitional Justice, ‘The Special Court for Sierra Leone Under Scrutiny’ Prosecution and Case Studies Series, March 2006, p.31.

the creation of a management committee, comprising the President, the Vice-President, one elected judge on a one-year renewable mandate, the Registrar, the Deputy Registrar and the Chief of Administration. Under Rule 23 *ter*, the management committee coordinates the “preparation and implementation of the budget of the Tribunal with the exception of budgetary lines specific to the activities of the Office of the Prosecutor.” Similar committees should be created at the ECCC. This will also help identify other activities and resource needs which—if adequately funded—would assist the ECCC to more effectively fulfill its function. GIS members should solicit and financially support proposals emerging from these forums that contribute to the Chambers’ overall effectiveness. The Chambers should as a matter of priority promulgate practice directives outlining mechanisms to ensure regular, mandatory, inter-organ meetings led by judges.

Donors also have a key role to play in determining larger, overarching budgetary policy goals and directions. In the case of the Special Court for Sierra Leone, a Management Committee comprised of donor states was created by an Agreement between the United Nations and the Sierra Leonean government. Part of the Management Committee’s role is to provide “advice and policy direction on all non-judicial aspects of the operation of the Court, including questions of efficiency.” In practice, the Management Committee has helped guide the overarching budgetary policy decision-making of the Court.

While provisions creating such a committee do not exist in either the Agreement or the Law governing the ECCC, the Friends of the ECCC can informally take up this role when the ECCC provides budget updates to the group, and through the body’s provision of non-judicial advice and guidance to the Chambers. The Friends of the ECCC can also ensure that the budget is sufficiently detailed, regularly updated and—given that the contributions come from public monies—publicly available to enable and encourage civil society analysis.

RECOMMENDATIONS FOR GIS ACTION:

There are four ways the GIS can help alleviate the negative consequences of the budget shortfall and its impact on budgetary policy:

- Immediately convene key Chambers officials (judges, Co-Prosecutors, Co-Investigating Judges, the Principal Defender, top administrators) to identify specific areas where additional funding is needed to ensure the ECCC achieves its goals. Seek input from civil society representatives and other tribunal experts on these issues. Indicate, publicly and privately, that GIS states are willing to consider specific discrete proposals to ensure that the ECCC works as effectively and efficiently as possible.
- Use the Friends of the ECCC meetings in Phnom Penh to monitor the budget, assist the Chambers in securing additional funds, and remain vigilant to prevent financial constraints from gutting critical activities.
- Monitor the Chamber’s progress in ensuring an inter-organ budgetary policy committee is regularly convened. This committee should be led jointly by an international and a Cambodian judge (ideally the ECCC President and Vice President, if appointed) and work with the Office of Administration to help stave off financially-driven funding decisions that reduce the Chambers’ ability to do its work.
- Given the ECCC is funded by public monies, ensure that a detailed budget for the ECCC—setting out the line items for both the international and the Cambodian contributions—is publicly released. Regularly encourage and invite civil society input on the budget, its gaps and issues which require attention.

ISSUE 2: FACILITATE ADOPTION OF CLEAR RULES OF PROCEDURE

The ECCC urgently requires its own set of rules, based on Cambodian procedure and adhering to international standards, to regulate the unique set of cases it will prosecute and try.¹⁵ The draft internal regulations produced by the Rules Committee must be finalized and adopted by the ECCC judges before investigations proceed very far. The Office of Administration is willing to reconvene the judges this year, but no budget exists specifically to cover the costs. This can be easily and quickly remedied by the GIS.

RECOMMENDATION FOR GIS ACTION:

- Provide funds to pay for a judicial plenary session in November 2006. This could be undertaken by one GIS member, or collaboratively as a group to share the cost burden.

ISSUE 3: FOSTER JUDICIAL LEADERSHIP AND COOPERATION

The judges agreed at the July workshop that the ECCC should be a judge-led court. This is consistent with the rules and practice of other tribunals.¹⁶ This reflects the operating principle that a court's leadership structure is most appropriately comprised of its judicial officers. The challenge facing the ECCC is that the judiciary will not be present at the Extraordinary Chambers until midway through the ECCC's lifespan. This has serious implications for decision making affecting the Chambers as a whole. If not managed carefully, the Chambers' decision making will fall to others not as well suited to determining overall (and potentially far reaching) policy decisions affecting the entirety of the ECCC.

There is a pressing need for a mechanism to ensure judicial leadership, to foster a cohesive judicial identity, and to coordinate the activities of the Chambers' organs. The Judicial Administration Committee formed this summer—consisting of judges situated thousands of miles from each other—cannot manage the intensive interaction required for efficient decision making on major issues. Distance, language and cultural barriers are not insurmountable; but they require more face-to-face interaction than the present plan permits. At least one international and one Cambodian judge should be at the ECCC—on a full time basis, starting immediately—to take up these crucial policy and coordination roles. If this is simply not possible, then at a minimum, a full time, high level legal officer, with the stature and authority to represent the judges and answerable directly to the judges, should be appointed to facilitate collaborative judicial leadership and coordinate the Chambers' organs. Existing administrative support staff cannot perform this task. They are simply overstretched and understandably focused on issues other than judicial policy.

¹⁵ The Secretariat of the KRT Task Force, charged with preparing for the establishment of the ECCC, did preparatory work on internal rules for the Chambers with assistance from experts, including Greg Stanton, (who created an initial draft in 2004), David Scheffer, Helen Brady, Judge Patricia Wald, Giles Cuniberti, a group of Cambodian judges and prosecutors and others.

¹⁶ In the ICTY and ICTR, the judicial leadership role is largely fulfilled by the tribunals' respective Presidents, who have judicial, administrative and diplomatic duties. The Presidents are also members of the Bureau – a judicial body comprising the President, Vice-President and the presiding judges of the trial chambers. Under Rule 23 of each tribunal's Rules of Procedure and Evidence, "the President shall consult the other members of the Bureau on all major questions relating to the functioning of the Tribunal" and a judge "may draw the attention of any member of the Bureau to issues that the Judge considers ought to be discussed by the Bureau or submitted to a plenary meeting of the Tribunal."

RECOMMENDATIONS FOR GIS ACTION:

- Monitor the development of the internal regulations to ensure they provide for adequate judicial leadership.
- Provide funds immediately for an international and Cambodian judge to start work in Phnom Penh to facilitate effective judicial leadership. Failing this, funds should be provided so the judges can immediately appoint a high level legal officer who will represent their needs and report directly to them.
- Provide funds to ensure that judges are regularly convened in Phnom Penh before trials start to facilitate a cohesive judicial identity.

ISSUE 4: STRENGTHEN INVESTIGATIVE INDEPENDENCE AND CAPACITY

Competent criminal investigation, crucial to the performance of the ECCC, is far from assured. The budget currently allows for five international and five national investigators for the Co-Investigating Judges' office for the first two years of operations, before being reduced to two internationals and two Cambodian nationals. No budget for international investigators exists for the Prosecutors' Office for 2006, but three international investigators have been hired, funded with 2007 money.

The Cambodian Government has indicated that members of the Judicial Police will assist ECCC investigations.¹⁷ Yet it still remains unclear how local law enforcement agents will cooperate with, and carry out, prosecution and judicial orders to gather evidence, question witnesses, follow leads, ensure safety, and maintain the confidentiality of investigations. The selection process for choosing which officers will work with the ECCC is opaque and under current plans, judicial police officers will not be allocated full time to the Chambers. This will limit the ability of the Co-Prosecutors and Co-Investigating judges to develop ongoing relationships of confidence with judicial police and may expand the possibilities for improper influence of the investigation.

The ECCC and the GIS should consider other alternatives and/or potential supplements. One might be to select and train independent Cambodian nationals, who are not judicial police officers, to undertake investigative tasks and be based, full-time, at the ECCC premises. This could come within the scope of UN assistance provided for under Article 17 of the Agreement between the UN and the Cambodian government regarding the ECCC. Article 17(f) states that the UN shall be responsible for "such other limited assistance as may be necessary to ensure the smooth functioning of the investigation, the prosecution and the Extraordinary Chambers." Extra, and independent, investigative resources would be a valuable addition to the ECCC's capacity. This may also help overcome some of the bureaucratic difficulties, diminish (to some extent) fears about outside influence over the investigations, and alleviate concerns about potential conflicts in loyalties between the officers' roles as ECCC investigators, and their ongoing duties as Cambodian judicial police answerable also to the Cambodian government. This will require extra funding by GIS states.

The ECCC Co-Prosecutors and Co-Investigating Judges must be able to call upon sufficient, independent and skilled investigative resources. In addition to the international investigative resources currently on staff, Cambodian investigators should be immediately identified and

¹⁷ The Judicial Police operate under the Prosecutor General of the Court of Appeals. However, its officers take orders and assignments from the head of the National Police, which some human rights organizations say may undermine the control and authority that prosecutors exercise over the judicial police. See Adhoc, Licadho and Human Rights Watch, *Impunity in Cambodia: How Human Rights Offenders Escape Justice*, June 1999, available at <http://www.hrw.org/reports/1999/cambo2/Cambo996-02.htm>.

transparently selected, based on their competence and integrity. Selected investigators must be freed from structural constraints that might compromise their independence, and be placed full-time in an ECCC investigative unit which answers solely to the ECCC's Co-Investigating Judges and/or Co-Prosecutors. Training in international criminal law, international humanitarian law and the techniques used to investigate international crimes (which are often more complicated and may require skills beyond those required for ordinary crimes) should start as soon as the officers are selected.

RECOMMENDATIONS FOR GIS ACTION:

- Fund extra investigators to be employed directly by the Chambers.
- Advocate with the Cambodian Government for the immediate merit-based identification and selection of competent Judicial Police officers to work as investigators for the ECCC.
- Advocate for the creation of a separate investigative unit within the ECCC whose officers would answer solely to the Co-Investigating Judges and/or Co-Prosecutors directing investigations. Extra funding may be needed for this essential body.
- Fund the training of investigative officers by experienced international investigative trainers in international criminal law, international humanitarian law and investigative techniques for international crimes.

ISSUE 5: ENHANCE OUTREACH TO MAXIMIZE THE ECCC'S IMPACT

In 2004, the UN Secretary-General identified outreach as an “integral part” of the ECCC’s work.¹⁸ Reinforcing the point, a 2004 UN expert report on combating impunity in domestic settings highlighted outreach as a crucial component of any prosecutorial efforts to bring perpetrators of international crimes to justice. According to the report, “effective outreach programs are essential to ensure that:

- (a) citizens are aware of and understand important developments in respect to prosecutions for serious violations of human rights;
- (b) citizens understand why the prosecutor has brought charges for some offences but not others;
- (c) judicial officials are aware of how human rights prosecutions are perceived by citizens; and
- (d) public prosecutions are not distorted either as a result of lack of information or because judicial officials have failed to counter revisionist interpretations of prosecutions.”¹⁹

Other tribunals’ outreach programs have suffered from lack of funding because outreach was viewed as a core activity but not funded from the core budget,²⁰ or else not viewed as a core

¹⁸ *Report of the Secretary-General on the Khmer Rouge Trials*, UN. General Assembly, 59th Session, UN doc A/59/43, October 12, 2004, para 22.

¹⁹ See ‘Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening Their Domestic Capacity to Combat all Aspects of Impunity,’ by Professor Diane Orentlicher, February 27, 2004, UN Doc E/CN.4/2004/88, para 40.

²⁰ With the ICTY, “[a]lthough regarded as a core element of the Tribunal, the Outreach Programme has been funded exclusively through voluntary contributions since its inception in September 1999” See *Twelfth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, UN Doc A/60/267-S/2005/532, para 210, available at <http://www.un.org/icty/rappannu-e/2005/index.htm>.

activity at all,²¹ and forced to fundraise to survive.²² In each case, these courts have had to rely on voluntary contributions to achieve their outreach goals.

The ECCC's outreach budget currently stands at \$20,000 for the entire three-year operational period of the Chambers. This is not sufficient to ensure that Cambodians can learn about and engage with the ECCC. Often belatedly, the leaders of other international and hybrid tribunals have recognized the crucial importance of public outreach—and the harm incurred by their own failure to institute effective, early and comprehensive outreach efforts. The ICTY, for example, set up an outreach program six years after its establishment, and did so only after finding that the Tribunal was “viewed negatively by large sections of the population” and that its work was “frequently politicized and used for propaganda purposes by its opponents.”²³ In Rwanda, the ICTR, based in neighboring Tanzania, has been criticized for its lack of effective outreach and general detachment from the community.²⁴ An empirical survey involving 2,000 Rwandans, found that 87.2 per cent of respondents were either not well informed, or not informed at all about the work of the ICTR.²⁵ The ECCC is in danger of repeating these mistakes due to lack of resources.

To many Cambodians living in rural areas, the concept of a court is unfamiliar (most disputes tend to be settled by village chiefs in rural areas). So strategies to make the prosecutorial and trial processes meaningful will depend on local knowledge, understanding, and contributions. Similarly, legal concepts including those of defense rights, for example, will be foreign to many, and will require sustained effort to ensure they are accessible to and have resonance with the broader population. The Friends of the ECCC can help by regularly convening potential donors, civil society engaged in outreach activities, and ECCC staff, to identify gaps in outreach efforts, develop strategies to address them, and financially assist worthy outreach projects.

RECOMMENDATIONS FOR GIS ACTION:

- Provide more funds to the ECCC's outreach program. Ensure it has adequate resources for travel, staff, the development and production of effective materials to engage low-literacy or illiterate communities, money for air time on radio and television and resources to respond quickly and effectively to the community's changing information needs and concerns throughout the investigations and trials. Ideally, extra funds could be directed towards the establishment of satellite offices to facilitate more regular contact with rural communities.
- Complement ECCC efforts with appropriate initiatives from civil society. This will involve convening civil society actors and the ECCC outreach team, and reviewing and supporting promising Cambodian NGO outreach proposals. (On request, the Justice

²¹ See discussion in Human Rights Watch, *Bringing Justice: The Special Court for Sierra Leone: Accomplishments, Shortcomings, and Needed Support*, September 2004, Vol.16, No. 8(A), p.33. which notes that within the Court's Management Committee existed a “perception that outreach was not an essential component of the Special Court and on the basis that funding for these activities would be sought from outside sources.”

²² Outreach at the Special Court for Sierra Leone is funded by the European Commission and the Open Society Institute for West Africa. See <http://www.sc-sl.org/outreach.html>.

²³ See *Sixth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia Since 1991*, August 25, 1999, UN Doc A/54/187 - S/1999/846, available at <http://www.un.org/icty/rappannu-e/1999/index.htm>, para 148.

²⁴ See Alison Des Forges and Timothy Longman, ‘Legal Responses to Genocide in Rwanda’ in Eric Stover and Harvey M. Weinstein (eds) *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge University Press, 2004) p.49.

²⁵ *Ibid*, p.56.

Initiative can provide GIS members with proposals developed by Cambodian NGOs interested in undertaking outreach in the provinces).

ISSUE 6: IMPROVE VICTIM AND WITNESS SUPPORT

The Co-Prosecutors have started questioning witnesses as part of their initial investigations, yet no effective victim and witness support measures are in place. To date, the ECCC budget makes no provision for a Victims and Witnesses Unit. The P-2 witness coordinator, provided for within the UN budget, arrives in Phnom Penh in October. This post was originally envisioned as a transportation officer for witnesses, however the lack of funds or movement on witness protection and support issues means this person may be relied upon to take on a more expansive role.

RECOMMENDATIONS FOR GIS ACTION:

- Fund the creation of a specific, adequately staffed and resourced Victim and Witness Unit within the ECCC.
- Fund NGO activities to facilitate victim and witness support, including psychological and other support.
- Coordinate and fund training workshops for ECCC staff focused on support and protection of victims and witnesses.

ISSUE 7: INCREASE DEFENSE TRAINING

Given the procedural specificities of the ECCC, and the significant needs of the Cambodian bar, training of defense counsel, both Cambodian and international, will be essential. This training should be focused on international criminal law, international humanitarian law, international criminal procedural standards, relevant Cambodian law and procedures, and defense tactics for internationalized trials. An initial training for Cambodian defense lawyers, undertaken jointly by the Defense Office and the International Bar Association, is likely to take place in November or December this year. This type of effort needs to be repeated regularly.

An instructive model for Cambodian defense counsel training can be found in the work of the ECCC's Principal Defender, Rupert Skilbeck, during his previous role as Director of Odsjek Krivicne Odbrane (OKO), the criminal defense section of the specialist war crimes chamber of the Court of Bosnia and Herzegovina in Sarajevo. In Bosnia Skilbeck instituted regular training programs which resulted in 200 Bosnian defense counselors (working both within and outside the war crimes chambers), being trained in defense advocacy techniques, and international and national criminal law and procedure.²⁶ This effort was undertaken in addition to the OKO's regular legal defense duties. In Cambodia, his office intends to do the same for 100 Cambodian defense counselors. Efforts such as this, which aim to create a genuine and lasting legacy within the Cambodian domestic legal system, should be fully, actively and sustainably supported by GIS states.

²⁶ The training is now self sustaining and aims to train 300 counsel by the end of 2007. For more information on this training project, see the OKO website at <http://www.okobih.ba/?opcija=sadrzaj&id=2&jezik=E>

RECOMMENDATION FOR GIS ACTION:

- Ensure adequate funding for regular, repeated training of defense counsel to contribute towards the development of an “equality of arms” with the ECCC’s prosecution team and contribute to the creation of a positive legacy in the Cambodian national legal system.

ISSUE 8: ENSURE TRANSPARENCY OF HIRING PROCEDURES

The hiring process for Cambodian nationals appears to suffer from a lack of transparency. The Justice Initiative has received reports that, in certain instances, political litmus tests have been applied to interviewees and appointees. This highlights the urgent need to institute a transparent hiring process for all ECCC staff. The hiring procedures instituted by Judge Phillip Rapoza, former Coordinator for the Special Panels in East Timor (a hybrid court set up by the UN to prosecute perpetrators of crimes against humanity committed after the East Timorese population voted for independence from Indonesia in 1999) provides a useful model. Judge Rapoza instituted a process in which the judges reviewed applications, interviewed candidates, prepared a ranked shortlist, and passed the list to the UN body responsible for administering the Panels (UNMISSET). Prior to this, UNMISSET independently selected staff without a clear and transparent hiring procedure. This new process, according to one commentator, resulted in “a significant improvement in both transparency and the quality of successful candidates.”²⁷

RECOMMENDATIONS FOR GIS ACTION:

- Use the Friends of the ECCC as forum for reviewing hires within the Chambers to ensure that quality personnel have been recruited whose skills match those required under the job descriptions.
- Use the Friends of the ECCC to encourage the institution of a transparent hiring mechanism, which involves both international and Cambodian staff for mid- and high level positions, particularly with respect to Cambodian national hires. The GIS, through the Friends of the ECCC, should have the opportunity review these hires and, if they choose to do so, discuss any hires of concern with Chambers’ staff.

ISSUE 9: IMPROVE INTERPRETATION, TRANSLATION AND TRANSCRIPTION

Little has been done to address the critical lack of qualified interpreters and translators for the ECCC. Action is needed immediately to address this shortage. A top priority is the identification and training of individuals who could potentially qualify as translators and interpreters. One encouraging sign of progress in this area is the training program, anticipated for October-November 2006 and supported by the Netherlands, designed for recently hired translators. Regular, repeated, and intensive training of this type is necessary to ensure top quality performance.

Full transcripts of proceedings should be mandated by the ECCC’s internal regulations. Corresponding rules of the International Criminal Court (ICC), the ICTY, ICTR, and the SCSL explicitly require “full and accurate” transcripts to be made. The ECCC’s budget was originally developed on the assumption that a summary of proceedings, as normally required under

²⁷ See David Cohen, *Indifference and Accountability: The United Nations and the Politics of International Justice in East Timor*, East West Center Special Report no.9, June 2006, at p. 109, footnote 306.

Cambodian procedural law, would apply. In order to meet international standards, however, the ECCC should follow the precedents of other international and hybrid tribunals.

RECOMMENDATIONS FOR GIS ACTION:

- Assist the ECCC in identifying potential pools of translators and creating training courses to ensure they are qualified to work in the ECCC.
- Fund regular training courses in legal translation; consecutive translation techniques (for field interpreters); and simultaneous translation techniques (for courtroom interpreters).
- Collaborate with local NGOs to organize and fund regular counseling for field interpreters.
- Coordinate with the ECCC's Office of Administration to determine and fund equipment needs, such as recording devices and appropriate interpretation booths.
- Provide funding for adequate resources and staff to ensure "full and accurate" transcripts are possible.

CONCLUSION

Donor states have already made valuable contributions to the ECCC, both financially and substantively. Examples include: the Japanese and French embassies in Phnom Penh created the Friends of the ECCC; the Netherlands funded training for translators; the United States indicated interest in funding NGO efforts supporting the Chambers; the British and the Australians funded outreach projects for the ECCC and NGOs; Singapore is supporting English lessons for Chambers personnel; and the Spanish government contributed 250,000 Euros to the UN side of the ECCC budget earlier this month.

Yet greater, and more active, GIS leadership will be needed to ensure that this fledgling court operates effectively and efficiently. This means, in practice, that GIS states must pro-actively look for ways to support the ECCC and follow through on them. Other international justice efforts are struggling to live up to the ideals upon which they were founded. For example, due to a lack of financial, logistical and political support, the East Timor Serious Crimes Panels was shut down in May 2005 before effective justice was delivered, and the ICTY is racing against time to secure state cooperation to arrest high profile indictees such as Ratko Mladic and Radovan Karadzic before it ends operation in 2010. Recent history demonstrates that the ECCC will need immediate and effective assistance to help it achieve its goals. Ongoing and active engagement by donor states will be crucial in ensuring the ECCC does not fail.

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The Open Society Justice Initiative, an operational program of the Open Society Institute (OSI), pursues law reform activities grounded in the protection of human rights, and contributes to the development of legal capacity for open societies worldwide. The Justice Initiative combines litigation, legal advocacy, technical assistance, and the dissemination of knowledge to secure advances in the following priority areas: national criminal justice, international justice, freedom of information and expression, and equality and citizenship. Its offices are in Abuja, Budapest, and New York.

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