



TO: Interested Parties

FROM: Open Society Justice Initiative

RE: Priority Issues For Interested States concerning the Extraordinary Chambers¹

DATE: April 2006

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Interested states² have been and will continue to be key actors in making sure the Extraordinary Chambers of the Courts of Cambodia (ECCC) works fairly and effectively. Continued and intensified engagement by states which have a financial and/or policy interest in the ECCC is all the more important now that Court officials have started work in Phnom Penh. Urgent issues remain unaddressed and critical needs under-funded. As a result, it remains an open question whether the ECCC will successfully carry out the prosecution and trial of senior Khmer Rouge leaders and those “most responsible” for the deaths of an estimated two million victims between 1975 and 1979. The Extraordinary Chambers represents the final chance to bring the architects of these horrors to justice. The ECCC’s success (or failure) will also prove a crucial litmus test for hybrid war crimes tribunals in an era where international justice mechanisms are increasingly subject to critical scrutiny, financial strains, and pressure to perform. Donor state engagement will be essential in ensuring that the ECCC process is transparent, credible, impartial, and effective.

To maximize their contributions, we suggest that interested states should perform three principal functions: (i) actively engage the Court through the creation of an informal advisory committee; (ii) monitor, fund and advocate on key issues of ECCC law, procedure, administration and public outreach; and (iii) support the Court and the Cambodian government in developing a legacy strategy for the ECCC. Efforts on each of these fronts will further the broader aim of strengthening the rule of law in Cambodia.

In addressing the first two functions, this memo offers 11 practical recommendations for action.³

¹ Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (hereafter referred to as the “ECCC”, the “Extraordinary Chambers”, or the “Court”).

² This memorandum is primarily addressed to all states in the international community with an interest in the Extraordinary Chambers, including but not limited to states that have contributed financially to its operations.

³ A subsequent Justice Initiative memo will address the question of legacy strategy.

1. CREATE AN INFORMAL ADVISORY COMMITTEE

The ECCC is still US\$ 9.6 million away from its target budget of \$56.3 million over three years. Moreover, there are likely to be additional financial needs that require donor resources above and beyond the existing budget.⁴ Many administrative and other non-judicial challenges confront the ECCC, particularly in its start-up phase. The ECCC's ability to meet international standards will require regular monitoring, and like other tribunals, the Court will need to take corrective action when it appears to fall short of those standards. Interested states can assist on all of these fronts. An effective and coordinated approach would be to create an informal advisory committee which could:

- (a) assist in fundraising for the Court;
- (b) provide non-judicial and administrative policy advice to the ECCC; and
- (c) regularly monitor the Court, identify potential problems early, and help develop solutions.

Ideally based in Phnom Penh, this body would act collectively in the interests of both the Court and international justice more broadly. It would develop and set benchmarks to ensure international standards are met by the Court; institute an independent financial monitoring mechanism to ensure the Court's resources are used efficiently and transparently; and provide a forum through which its members could articulate their expectations of the Court, including that the ECCC will meet international human rights standards. This type of "hands-on" engagement will benefit the ECCC and could provide an excellent model of collective interested state action for future international justice mechanisms.

RECOMMENDED ACTION:

- Create an informal advisory committee of interested states in collaboration with the ECCC's Office of Administration (OA).

2. MONITOR THE SELECTION, TRAINING AND CONVENING OF JUDGES, PROSECUTORS AND OTHER STAFF

Selection

The quality of both Cambodian and international judges and prosecutors is the single most important factor in securing sound prosecutions, fair trials, and due process. The selection and training of these actors are therefore critical.

The Agreement between the United Nations and the Royal Government of Cambodia⁵ and the 2004 Law on the Establishment of the Extraordinary Chambers⁶ lay out a general

⁴ Some of the most pressing items needing funding include victim and witness protection; psychological support for victims, witnesses and staff; and outreach.

⁵ Agreement Between The United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, promulgated by the Cambodian National Assembly on October 19, 2004 (hereafter referred to as "the Agreement").

framework for the selection and appointment of judges and prosecutors. The Cambodian Supreme Council of the Magistracy—a national body responsible for all judicial and prosecutorial appointments—makes the final selections. For international positions, it chooses from among nominations provided by the UN Secretary-General. For Cambodian posts, the Supreme Council of the Magistracy is empowered to make its own choices with no international involvement.

The process of selecting judges, prosecutors and others has already suffered from a lack of transparency. To its credit, the United Nations first publicly released a short list of international judicial and prosecutorial ECCC candidates for civil society scrutiny, then on March 8, 2006, transmitted its nominations to the Cambodian government. A year ago, the Cambodian government announced that it was “drawing up detailed criteria for the selection of the best possible individuals for appointment to these highly trusted positions.” To date, these criteria have not been published.⁷

A short list of Cambodian judicial and prosecutorial nominees should be publicly released along with the selection criteria, to allow for meaningful civil society input. This will improve quality and contribute to the perception that the method of selection is free of partisan political considerations. Of course, transparency and properly applied criteria must also guide the ongoing recruitment and hiring of staff at all levels for the ECCC.

Training

Cambodian and international personnel at all levels will need high quality and practically focused training to ensure the Court’s successful operation. This should be seen as an ongoing process, as the experience of other international and hybrid tribunals suggests a need for continuing education through the course of the trials. To varying degrees, both Cambodian and international judges will almost certainly benefit from training in international and Cambodian criminal law and procedures. Some combined sessions may be useful to support consistent judicial criteria regarding international and Cambodian law, as well as a shared sense of professional and institutional responsibility. Other Court personnel will need intensive training to ensure the credible and competent operation of the court.

Early Arrival and Regular Convening of Judicial Appointees

According to the announcement released by the United Nations when it called for judicial and prosecutorial nominations for the ECCC on June 30, 2005, international judges are intended to serve from the second year of the Court’s operations until its completion, and the Pre-Trial Chambers judges will serve on an as-needed basis. Yet it will be crucial to the success of the tribunal for all judges to be convened early and regularly from the start

⁶ Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, promulgated by the Cambodian National Assembly on October 27, 2004 (hereafter referred to as “the Law”).

⁷ Meeting of the Group of Interested States, ASEAN and other Countries on the Cambodian Share of the Budget for the Extraordinary Chambers, Office of the Council of Ministers, Phnom Penh , 30 May 2005, Opening Remarks by His Excellency Sok An, Deputy Prime Minister and Chairman of the Royal Government Task Force for the Khmer Rouge Trials.

of the ECCC's operations. This will facilitate cooperation between Cambodian and international appointees, and importantly, will provide the opportunity to address vital legal and other issues which cannot be left to the Pre-Trial Chamber judges or other Court officials.

Trial Court and Supreme Court judges must be available on an as-needed basis from the time the prosecutors and investigating judges begin work to address numerous issues, including:

- Pre-trial detention and bail issues that suspects are entitled to appeal on a timely basis to either the Trial Court or the Supreme Court.
- Procedural or substantive errors during the investigation and trial preparation period that impact a suspect's substantive rights.
- Disputes between the Co-Prosecutors and the Co-Investigating Judges (the Pre-Trial Chamber only has jurisdiction to handle disputes between the two Co-Prosecutors or the two Co-Investigating Judges).

At an early stage in the proceedings, ECCC judges must perform other functions critical to the ECCC's ability to meet international standards, including:

- Preparing and adopting "internal regulations" (the rules developed by the judges to govern the procedural operation of the trials).
- Preparing and adopting a code of conduct for the judges.
- Exercising judicial control and providing input related to budgetary and other issues that directly impact their work.

Bringing the international judges to start work in Cambodia early in the process would enhance the legitimacy and effectiveness of the Court. Failure to do so, while cost-effective in the short-term, will lead to delays, confusion, and greater long-term financial and other costs, and will hamper the ECCC's ability to meet international standards.

RECOMMENDED ACTION:

- Advocate for the public release of selection criteria for Cambodian judges, as well as the short list for judicial and prosecutorial candidates, in advance of the final announcements.
- Secure funding for training of judges, prosecutors and other court staff by experienced Cambodian and international trainers.
- Encourage the early deployment of international judges to Cambodia and secure the funds to cover the necessary extra costs.

3. ENSURE THE PROTECTION OF VICTIMS AND WITNESSES

Intimidation of witnesses is likely to occur as soon as active investigation begins. This underscores the urgent need to create and activate a support system for witnesses. Article 23 of the Agreement and Article 33 *new* of the Law provide for victim and witness protection measures. Given the real and perceived dangers for witnesses, arrangements must be in place to ensure that individuals may testify voluntarily and without undue risk to their wellbeing. Where necessary, witnesses and their families should be relocated

outside of Cambodia. Measures must be undertaken to protect the identity of certain witnesses inside and outside the courtroom.

Urgent attention needs to be paid to victim and witness issues, and to the division of tasks between bodies (in the ECCC and in the Cambodian Government) responsible for them. While progress has been made in developing plans for the physical protection of victims and witnesses, important issues—such as the question of psychological support—have not been addressed in any meaningful way. To date, the ECCC budget makes no provision for a Victims and Witnesses Unit. This requires priority attention.

RECOMMENDED ACTION:

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

4. SUPPORT OUTREACH

In 2004, the UN Secretary-General identified outreach as an “integral part” of the ECCC’s work. He saw it as a means of meeting the broader expectations of the Cambodian government and international community that the ECCC could “contribute substantially to national reconciliation in Cambodia.”⁸ This is an enormous challenge for any outreach program, and some have questioned the extent to which any international or hybrid court can contribute to national reconciliation in post-war societies.⁹ Yet the experience of other tribunals demonstrates that successful outreach provides a meaningful opportunity for national dialogue about issues of accountability, even if the Court itself cannot be seen as a sole vehicle through which reconciliation can be achieved.

The dangers of failing to implement early and effective outreach strategies are striking. Other war crimes courts have faced serious problems precisely because they paid too little attention to early outreach activities.

One comparative success story is the Special Court for Sierra Leone, which is seen as more effective than others because of the interactive way in which it engaged the local population.¹⁰ Despite being hampered by a lack of funding in its early years, the Special Court has made the most of limited resources: it hired a respected Sierra Leonean national with a grassroots NGO background to head its outreach team; it brought high

⁸ *Report of the Secretary-General on the Khmer Rouge Trials*, UN. General Assembly, 59th Session, U.N. doc A/59/43, October 12, 2004, para 22.

⁹ See, for example, Harvey M. Weinstein and Eric Stover, “Introduction: Conflict, Justice and Reclamation” 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) at pp.4-5.

¹⁰ See, for example, Human Rights Watch, *Justice In Motion: The Trial Phase of the Special Court for Sierra Leone*, October 2005, p.28, available at <http://hrw.org/reports/2005/sierraleone1105/sierraleone1105.pdf>

level Court personnel—including the Registrar, the Prosecutor and the Principal Defender—to the countryside to participate in town hall meetings, community gatherings and school lessons; it held regular seminars and conferences with academics, students and victims; it produced television shows, distributed information booklets, organized radio call-in shows and participated in radio information panels; and it engaged specific groups—including the military, the police, the local judiciary, prison officers and religious leaders—with an outreach strategy targeted to each group’s particular information needs.¹¹

The ECCC and local civil society groups planning to engage in outreach should draw lessons from this approach. Donors can play an important role in helping them to undertake effective outreach.

RECOMMENDED ACTION:

- Fund local civil society outreach proposals, particularly ones which focus on getting outreach efforts up and running early and effectively.
- Ensure earmarked, and continued, funding for outreach by the ECCC.
- Monitor the degree to which the ECCC and civil society coordinate their outreach activities.
- Fund and facilitate a workshop for ECCC outreach staff and local civil society groups on best practices for outreach. Outreach officials from other hybrid and international tribunals would be valuable trainers.

5. BUILD INVESTIGATIVE CAPACITY

Competent criminal investigation, crucial to the performance of the ECCC, is far from assured. The Cambodian Government has indicated that members of the Judicial Police or the Gendarmerie will assist ECCC investigations.¹² These law enforcement bodies have not been trained in international criminal investigative techniques. To date, no information has been made public regarding the nature and scope of the training they will receive. Further, it 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 work on the ECCC is opaque and should be clarified.

ECCC co-prosecutors and co-investigating judges must be able to call upon sufficient and skilled investigative resources. Officers should be selected based on their competence and

¹¹ For more information about the outreach program’s work, see the SCSL outreach page of its website, at <http://www.sc-sl.org/outreach.htm>.

¹² 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 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>. The Gendarmerie, on the other hand, was created by subdecree in 1994 and comes under the auspices of the Ministry of Defense. The two bodies are mandated to share criminal investigation powers; however, the lines of authority between them are unclear.

integrity. 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.

RECOMMENDED ACTION:

- Advocate with the Cambodian Government for merit-based selection of competent Judicial Police or Gendarmerie 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 co-prosecutors directing investigations. Extra funding may be needed for this essential body.
- Fund the training of investigative officers in international criminal law, international humanitarian law and investigative techniques for international crimes by experienced international investigative trainers.

6. PROMOTE THE PARTICIPATION OF INTERNATIONAL DEFENSE COUNSEL

International Participation

Article 21(3) of the Agreement states that “any counsel, whether of Cambodian or non-Cambodian nationality, engaged by or assigned to a suspect or an accused shall, in the defense of his or her client, act in accordance with the present Agreement, the Cambodian Law of the Statutes of the Bar and recognized standards and ethics of the legal profession.” The Law of the Cambodian Bar, however, ostensibly prohibits international lawyers from directly representing clients in court.¹³

Such a prohibition—if allowed to stand—would impact significantly on the ability of the Extraordinary Chambers to meet international fair trial standards in two distinct ways: (1) a fair trial, in part, requires the defense and the prosecution to have an “equality of arms.” Failure to allow full participation by international defense counsel will put this fair trial element at risk; and (2) a fair trial is marked by the ability of an accused individual to choose his or her own counsel.

The Appeals Chamber for both the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) has held that, while the principle of “equality of arms” does not mandate equivalent resources for Prosecution and Defense, it “obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case.”¹⁴ Pitting ill-prepared Cambodian defense counsel against seasoned international prosecutors in the courtroom would profoundly

¹³ See Article 5 in the Cambodian *Law on the Bar*, adopted by the Cambodian National Assembly on June 15, 1995 (translated unofficially into English and available at http://www.cdpcambodia.org/bar_law.asp).

¹⁴ *Prosecutor v Dusko Tadic*, (Appeals Chamber), Case No. IT-94-1-A, July 15, 1999, para 48. See also *Prosecutor v Clément Kayishema and Obed Ruzindana*, (Appeals Chamber), Case No. ICTR-95-1-A, June 1, 2001, para 69.

disadvantage the accused. Throughout 2005, the Cambodian Bar Association was paralyzed by internal conflicts which impaired the Bar's ability to contribute to the ECCC's development, or to help prepare members to play useful roles during investigation and trial. Intensive training of Bar members is needed in the lead-up to the trials, but this in itself will not remedy the acute inequality of experience and ability which may be found on each side of the courtroom.

The ability of an accused to choose his or her own counsel is enshrined in the International Convention on Civil and Political Rights (ICCPR), to which Cambodia is a party,¹⁵ and which is referred to in Article 33 new of the ECCC law. This right to choice of counsel is limited, however, and these limitations have been recognized by both the ICTR and ICTY.¹⁶ Yet significant developments in national jurisdictions dealing with international crimes have emerged in the past year as a result of "right to counsel" discussions at the ad hoc tribunals. For example, the Bosnian State Court—the governing law for which prohibits defense counsel not authorized to practice in Bosnia from appearing before it—amended its Rules of Procedure and Evidence to grant special permission to defense counsel to continue to represent clients in cases handed back to national courts from the ICTY.¹⁷ The judges appointed to the Extraordinary Chambers should consider adopting a similar exceptional rule when they develop the Court's "internal regulations." This would provide those accused who are able to pay for their own defense with adequate enjoyment of their right to choose their own counsel, including international counsel. For those indigent accused individuals who receive a court-appointed lawyer, access to international defense attorneys through such a rule change (if a reasonable fee-payment scheme could be negotiated) would also contribute greatly to ensuring that all defendants have access to high quality representation, and would augment the perceived legitimacy and fairness of the trials.

Training

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.

RECOMMENDED ACTION:

- Provide technical assistance to the international and Cambodian judges appointed to the ECCC to establish a mechanism within the ECCC's "internal regulations," allowing the full participation of international defense counsel in the ECCC.

¹⁵ The Cambodian Government signed the ICCPR on October 17, 1980 and acceded to it on May 26, 1992.

¹⁶ See *Prosecutor v Vesselin Slijivancanin: Decision on Assignment of Defense Counsel*, Case No IT-95-13/1, August 20, 2003, para 20, in which it was found that "[w]hatever may be the scope of the right to counsel of one's own choosing when a defendant hires his own counsel, the right to publicly paid counsel of one's own choice is limited." Similarly, in *Prosecutor v Akayesu* (Appeals Chamber judgment) Case No. ICTR-96-4, June 1, 2001, para 61, the court found that "in principle, the right to free legal assistance of counsel does not confer the right to counsel of one's own choosing."

¹⁷ See discussion in *Prosecutor v Gojko Jankovic* (Decision on Referral of Case Under Rule 11 bis) Case No. IT-96-23, July 22, 2005, para 78.

- Work with the Cambodian Defense Bar to facilitate full participation of international defense attorneys in the ECCC process in ways that would also benefit local defense lawyers' skill development and professional opportunities. "Buddy" or mentoring programs would allow international counsel to work intensively with Cambodian colleagues on each case coming before the court. Cooperation between international and Cambodian counsel in developing defense arguments and presenting them in court will foster learning and skills transfer.
- Create and contribute to a "defense fund" to which the Court could have access to ensure that Cambodian and international defense lawyers are reasonably and timely paid.
- Fund the training of defense counsel to contribute towards the development of an "equality of arms" with the ECCC's prosecution team.
- Ensure the ECCC Defense Support Unit is responsible for identifying and creating a pool of defense counsel for assignment to indigent defendants. This will contribute to the independence and impartiality of those selected.

7. PROMOTE THE DEVELOPMENT OF "INTERNAL REGULATIONS" WHICH MEET INTERNATIONAL STANDARDS

Clear and consistently applied procedural rules are a critical benchmark of fair trials and procedures. Such rules help to prevent delay, ensure adequate notice to all parties, preserve impartiality, and provide a foundation for appellate review.

However, Cambodian criminal procedure law is not contained in a single source, but is instead spread across a variety of laws and judicial and executive proclamations, some of which are inconsistent and many of which are ignored in practice. At the same time, there is no single international agreement that comprehensively or definitively establishes international standards of due process for criminal proceedings.

Identifying the relevant sources of international due process standards, combined with the identification of gaps in Cambodian criminal procedure, though a substantial task, will prove fundamental to the ECCC's success. Opening the process as much as possible to local civil society and international expert consultation can enhance the chances that these rules will be widely accepted and meet international standards.

RECOMMENDED ACTION:

- Fund a workshop involving judges, local civil society leaders and international legal experts to develop "internal regulations" for the ECCC that will meet international standards.

8. ADDRESS INTERPRETATION, TRANSLATION AND TRANSCRIPTION ISSUES

A critical lack of qualified interpreters and translators in Cambodia confronts the ECCC as it sets up operations. Action is needed now to address this shortage. Already qualified individuals should receive continued training to ensure the ECCC benefits from high quality translation and interpretation services. Other individuals who could potentially qualify as translators and interpreters should be identified and trained as a matter of priority.

Full transcripts of proceedings should be mandated by the ECCC's "internal regulations." Corresponding rules of the International Criminal Court (ICC), the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone (SCSL) explicitly require "full and accurate" transcripts to be made. The ECCC should follow these precedents.

RECOMMENDED 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 translators).
- Coordinate with the ECCC's Office of Administration to determine and fund equipment needs, such as recording devices and appropriate interpretation booths.
- Collaborate with local NGOs to organize and fund regular counseling for field interpreters.
- Provide either gratis personnel or funding for adequate resources and staff to ensure "full and accurate" transcripts are possible.

9. MONITOR OTHER PROCEDURAL AND ADMINISTRATIVE ISSUES

Codes of Ethics

No codes of ethics regulating the conduct of judges and other staff of the ECCC currently exist. The creation of and adherence to such codes will be crucial for the Court's success, and consistent with the practice of other internationalized tribunals. There is no shortage of models that can be adapted to the Cambodian context, including various codes created for the ICC, the ICTY and the SCSL.

Accounting System

An effective accounting system must be put in place to ensure that ECCC funds are properly used, tracked and accounted for. Once the Court is up and running, and again on a continuing basis thereafter, the ECCC budget should be re-examined in light of its evolving needs.

RECOMMENDED ACTION:

- Fund workshops involving international experts, civil society and ECCC staff (including judges) to develop codes of ethics. These codes could ideally be incorporated into the ECCC’s “internal regulations.”
- Collaborate with the ECCC’s Office of Administration to design and fund the development of an appropriate accounting mechanism for the Extraordinary Chambers.

10. ENHANCE COURT MONITORING AND CIVIL SOCIETY ENGAGEMENT

International and Cambodian civil society can act as important watchdogs on the ECCC’s operations through their work as court monitors. Effective monitoring—which can include behind-the-scenes advocacy with Court officials and public dissemination of regular reports—can assist in identifying and correcting operational flaws and help to ensure that international standards of due process are met. Monitors have played a key role in the tribunals for the former Yugoslavia, Sierra Leone and East Timor. In Cambodia, local and international monitoring will be fundamental in ensuring greater transparency in the Court’s operations. Monitoring can also act as an effective early warning system by highlighting any structural, political or procedural impediments to the ECCC’s ability to conduct fair and independent trials. The Open Society Justice Initiative has had a full-time international court monitor in Phnom Penh since October 2005. Cambodian NGOs, including the Cambodian Defenders Project (CDP), are currently developing monitoring programs and training potential monitors.

The ability of civil society organizations to effectively monitor a court’s operations depends on the existence of an operating environment which permits, and ideally fosters, a free exchange of ideas—supportive and critical—about the operation of the court. In Cambodia, worrying signs have emerged in the past year about the overarching political climate. A spate of legal charges and cases against opposition leaders and human rights activists who have criticized the government discourages civil society engagement with the ECCC. Donors will need to play a highly pro-active role in guaranteeing that the operating environment remains open, and that civil society is free to voice concerns about the ECCC in the coming years.

RECOMMENDED ACTION:

- Fund Cambodian NGOs to monitor the ECCC.
- Provide civil society actors and the ECCC with technical and political support for the development of an NGO monitoring protocol which could be negotiated between civil society groups and the ECCC (and possibly separately with the Cambodian government). Such a protocol, among other things, should recognize civil society’s right to monitor the processes of the Court to help foster the rule of law in Cambodia. It should also affirm the principle of freedom of expression in relation to the ECCC and bar retributive measures or punishment.
- Make repeated public statements recognizing the importance of civil society engagement in the ECCC process.

- Establish a point person to provide a coordinated donor response to political developments which inhibit civil society’s ability to engage constructively with the ECCC.

11. ENSURE A “PUBLIC AND OPEN” PROCESS

Media Access

Article 34 of the ECCC Law provides that trials shall be “public and open,” including to media and international and Cambodian NGOs, except under “exceptional circumstances” where “publicity would prejudice the interests of justice.”

The degree to which the media will be able to record and broadcast the ECCC’s proceedings remains unclear. In other hybrid and international tribunals, the media’s ability to document and transmit court proceedings has been circumscribed by regulations set down by the courts themselves. The rules of the ICTY, ICTR and SCSL allow for photographs, video-recordings and audio-recordings to be authorized “at the discretion of the trial chamber.”¹⁸ The ICTY, the ICTR and the SCSL have also developed guidelines for media to follow when journalists do record the trials. Media access to the ECCC should be monitored closely by donor states, as print, television and radio broadcasts of the trials will serve as important supplements to outreach activities. Ideally, physical presence at the Court should be supplemented by a Court-sponsored video-link center in Phnom Penh which can broadcast the trials daily.

Public Access

The ECCC is located in a military facility situated 11 miles outside Phnom Penh, posing significant challenges for public access. When the UN first agreed to this site in June 2005, it released a statement underscoring the need for “provision of adequate public transportation arrangements between the center of Phnom Penh and the site to ensure the widest public attendance possible.” The budget includes some provision for transport between Phnom Penh and the Court, but the degree to which this will be available for the general public remains unclear.

RECOMMENDED ACTION:

- Monitor media access and ability to broadcast and print news about the trials.
- Fund a technical expert to assist the Court in developing guidelines for media in a manner consistent with international standards, including those developed by other tribunals.
- Contribute funds to the ECCC to set up a video-link/information center from which the trials could be broadcast live in Phnom Penh.
- Clarify the availability of transport for the general public to and from the trials, and provide extra funding if needed.

¹⁸ For ICTY, see Rule 81(d) in ICTY Rules of Procedure and Evidence; for ICTR, see Rule 81(d) in the ICTR Rules of Procedure and Evidence; for the SCSL, see Rule 81(d) in the SCSL Rules of Procedure and Evidence.

- Establish a program to provide occasional free public transport between the provinces and the ECCC for residents of rural areas who want to watch the trials.

CONCLUSION

The product of nearly a decade of negotiation, the ECCC is an imperfect, long-delayed, but necessary vehicle to combat impunity for the Cambodian genocide before its remaining principal progenitors pass away. Interested parties have a financial, political, and moral stake in ensuring that the tribunal operates effectively, impartially, and with broad public engagement. For the ECCC to succeed, donors must engage actively and strategically to address these challenges immediately.

Actions taken by interested states today will have a profound impact on the ECCC and on the legacy it leaves within the Cambodian legal system. That legacy—and the role of interested states in shaping it—will be the subject of an upcoming memo from the Open Society Justice Initiative.