

Memorandum to the
Group of Interested States:

Critical Issues Surrounding the
Fundraising Drive of the
Extraordinary Chambers in the
Courts of Cambodia

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Memorandum to the Group of Interested States: Critical Issues Surrounding the Fundraising Drive of the Extraordinary Chambers in the Courts of Cambodia (ECCC) – November 2007 is part of the Open Society Justice Initiative's regular reporting on the progress, priorities, and challenges at the ECCC. Other Justice Initiative reports and publications on the ECCC can be found at the Justice Initiative website at <http://www.justiceinitiative.org/activities/ij/krt>.

OVERVIEW

In December 2007, the Extraordinary Chambers in the Courts of Cambodia (ECCC) are expected to ask States for an estimated \$45 million in funding to supplement the court's original budget.¹ These additional funds are needed to meet underestimated costs in several areas that are crucial to the court's effective operation, including key staffing positions, outreach, legal and investigation expertise, training and translation, and also to cover costs that were not anticipated in the court's original budget, including those pertaining to the regular convening of judges for plenary sessions, the creation of real-time transcripts and the establishment of a victims unit. Beyond these categories of unanticipated costs, the ECCC is expected to operate beyond its originally anticipated three-year lifespan² and to extend at least to the end of 2010. This also generates a need for additional funding.

The ECCC's funding request comes in the wake of significant, if long-overdue, progress on several fronts: In June 2007, the ECCC judges adopted internal rules of procedure; in July, the Prosecutor made an introductory submission against five individuals; as a result of this submission, Kaing Guek Eav, also known as "Duch," the head of the notorious S-21 prison, was arrested in July; and in August, Nuon Chea, known as "Brother No. 2" and second only to Pol Pot in formal command within the Khmer Rouge, was arrested. On November 12, 2007, Ieng Sary, deputy prime minister and foreign minister of Democratic Kampuchea, and his wife Ieng Thirith, minister of social affairs and Education during the Khmer Rouge rule between 1975 and 1979, were arrested. All four accused have been transferred to ECCC detention facilities.

With this progress in mind, the Justice Initiative urges governments to provide the support that is needed to enable the ECCC to complete its historic task successfully. At the same time, it is equally important that donor States take effective measures to ensure that the ECCC successfully addresses continuing and serious challenges.

Key problems include allegations of corruption that have not yet been adequately addressed; weak administrative leadership, which allows ineffective and inefficient operational practices to continue; irregularities in ECCC human resource practices, which have allowed the court to hire unqualified staff and to pay inflated salaries; and, more generally, the court's failure to develop transparent practices within its administrative and judicial arms. The Extraordinary Chambers must address these problems if they are to gain the full confidence of donors and the Cambodian public.

Strategic use of donor money and diplomatic engagement can exert a powerful influence on the ECCC's willingness to address the concerns identified in this memorandum. The ECCC's 2007 fundraising drive presents an important opportunity for donors to ensure that the ECCC operates in a manner that satisfies international fair trial standards. Donors

¹ This figure is based on the most recent estimates available, and may change before the funding request is submitted to States.

² The ECCC's budget was based on the premise that it would shut down in July 2009, three years after it officially started prosecutorial operations.

now have the opportunity to enhance their role as a bulwark against problems that threaten the ECCC's independence and undermine its capacity to hold fair, impartial and expeditious trials.

As governments consider their responses to the ECCC's fundraising appeal, the Open Society Justice Initiative urges them to act jointly to:

- Create an active Donor Management Board to consolidate oversight of fund management, ensure that the court unifies and strengthens its administration, and certify that the ECCC is achieving the benchmarks set by donors.
- Request that the United Nations appoint a Special Advisor to the ECCC—at a level similar to that of a Special Representative or Undersecretary to the Secretary-General—to assist in the immediate implementation of needed administrative and management changes and to monitor their ongoing effectiveness. The person who fills this role should also be responsible for assessing compliance with the ECCC *Agreement*³ and with international fair trial standards as the court moves forward.
- Insist on additional transparency in court administrative and juridical matters.
- Set specific benchmarks for the Extraordinary Chambers to achieve before additional funding is pledged, with each goal accompanied by a timetable and designed adequately to address the serious problems described in this memorandum. Donor disbursements of pledged funds should be tied to the achievement of these benchmarks.

To address ECCC operational deficiencies in key areas, the Justice Initiative encourages States to insist that additional funds are earmarked by the court for priority needs, including:

- Proactive outreach by the ECCC;
- Establishment and staffing of a fully-functioning Victims Unit;
- Hiring of international staff who are experts in witness protection and support functions;
- Judicial training;
- Creation and staffing of a unit of real-time transcribers for court and investigation proceedings;
- Implementation of a credible plan to deal with translation backlogs;
- Procurement of equipment and staff to professionally video-record trial proceedings; and
- Preparation of courtrooms for imminent public hearings.

³ *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*, available at http://www.eccc.gov.kh/english/cabinet/agreement/5/Agreement_between_UN_and_RGC.pdf (“the Agreement”). The *Agreement* is the treaty that governs the operations of the ECCC.

BACKGROUND

The ECCC's Original Budget

The Extraordinary Chambers began administrative operations in February 2006 with a budget of \$56.3 million for a three-year period, the anticipated life of the court. Of this amount, the Cambodian Government was responsible for contributing or raising \$13.3 million while the remaining \$43 million was to come from voluntary contributions by United Nations Member States. To date, both the Cambodian Government and international donors have contributed \$8.3 million to the Cambodian share of the budget and governments have given \$40.5 million to the UN portion.⁴ With a shortfall of approximately \$7.1 million in its original budget, the ECCC now seeks to raise an additional \$11 million for the Cambodian side and \$34 million for the UN side of its operations to fund its work through 2010.⁵

Already, it is clear that the original \$56.3 million budget estimate is inadequate to enable the ECCC to conduct trials that satisfy international fair trial standards.⁶ The original budget estimates left the ECCC insufficiently funded for three principal reasons:

- **Underestimated time-frame:** The assumption that the ECCC would complete its work within three years was unrealistic. Judicial investigation of proposed charges against five suspects did not begin until July 2007, more than 12 months after prosecutorial activity started. While other delays in the ECCC's operations have suffered from the court's peculiar set of challenges, the time involved in completing the prosecutor's investigations is not unusual for crimes of the magnitude and complexity at issue here. Four suspects have thus far been named, formally charged and placed in ECCC detention. Additional suspects are expected to be submitted for judicial investigation by the co-prosecutors. Under the most optimistic scenario, the ECCC's operations will last at least one, if not several, year(s) longer than the originally estimated three-year period.
- **Underestimated foreseen costs:** The original budget seriously underestimated expenses for many critical functions, including outreach, training of judges and other key international and national staff, translation, investigation, and witness protection. Additional experienced legal staff in the prosecution and judicial investigation offices, as well as in chambers, will be needed for the ECCC to maintain a reasonable pace and meet minimum fair trial standards.

4 See figures posted on the finances section of the ECCC website: for the Cambodian side figures, see

<http://www.eccc.gov.kh/english/finances.aspx>; for the UN portion, see http://www.eccc.gov.kh/english/un_finances.aspx.

5 These figures are based on the most recent estimates available and may change before the funding request is submitted to States.

6 The initial budget estimate for the Special Court in Sierra Leone, a somewhat similar hybrid institution applying international and national laws, and comprising international and national staff and judges, and based in the victimized community, was \$57 million.

The Special Court has now run for five years and has cost more than \$100 million. Its need to raise supplemental funding has hindered the Special Court's operations.

- Unbudgeted costs: The original budget failed to provide for some essential costs, including regular plenary sessions for the judges, real-time transcripts of proceedings, adequate audiovisual equipment and professional staff to record court proceedings, expert witness protection and witness support staff, and the establishment of a Victims Unit.

While these three factors affect the ECCC budget as a whole, a recent United Nations Development Programme (UNDP) report, addressed in more detail below, highlights other factors that contributed to a shortfall in the Cambodian side of the budget, including an average salary inflation for Cambodian staff of 46 percent above the ECCC salary scale for national hires;⁷ the unexplained salary increases for some Cambodian staff (at least one of whom saw her salary more than quadruple in 2006);⁸ and the “significant increase” in numbers of staff hired, costing an additional \$357,000.00, for which, the UNDP reported, “the ECCC could not provide any justifications” other than the fact that these staffing numbers had been “reflected in the 2007 annual work plan and budget submitted to UNDP.”⁹

The ECCC’s Spending Record

Despite the shortfall in funding, the most recent available information relating to ECCC expenditures reported underspending by the international side of the ECCC administration¹⁰ in the period ending in December 2006.¹¹ This was, however, the result of two key factors that in principle should not affect current and future spending:

1. Delays in the initiation of cases: Judicial and formal investigative operations did not begin as quickly as anticipated. When the ECCC budget was drawn up, it was anticipated that the first introductory submissions would be filed by December 2006 at the latest. Instead, these submissions were filed in July 2007. Only then could full investigative operations begin. Spending figures from 2006 operations, then, did not represent the needs of a fully functional court.
2. A financial policy that was designed to underspend an already inadequate budget: The ECCC’s Office of Administration took a fiscally conservative approach to spending throughout 2006, seeking to keep money “in reserve” for emergencies.¹² While this assured a “healthy” financial bottom line for 2006, needs that were

⁷ See United Nations Development Programme, *Audit of Human Resources Management at the Extraordinary Chambers in the Courts of Cambodia (ECCC)*, available on the UNAKRT website at <http://www.unakrt-online.org/Docs/Other/2007-06-04%20UNDP%20Special%20Audit%20of%20ECCC%20HR.pdf> at pp.10-11.

⁸ Ibid at pp. 19.

⁹ Ibid at pp. 11-12.

¹⁰ Interview with ECCC Office of Administration staff, Phnom Penh, January 2007.

¹¹ The ECCC has not publicly released any joint Cambodian and international spending information. The last time that spending information relating to the Cambodian side of the ECCC was released, it covered a period ending in December 2006. For a broad overview of 2006 spending figures of the ECCC’s ‘Cambodian side’ budget, see <http://www.eccc.gov.kh/english/finances.aspx>.

¹² Interview with ECCC Office of Administration staff, Phnom Penh, January 2007.

essential to the ECCC's proper functioning suffered. For example no 2006 money was estimated for, or specifically reallocated towards, travel for outreach initiatives or dedicated outreach staff despite the fact that in 2004 the UN Secretary-General rightly identified outreach as an "integral part" of the ECCC's work.¹³ As a consequence, the Cambodian population remains under-informed of the court's work.¹⁴

In addition, although \$113,211 was estimated for international staff training in 2006, most of this money was spent on two unbudgeted but crucially important judicial plenary sessions in July and November 2006. Instead of reallocating money from other budget lines to conduct essential trainings for judges and other key staff, these needs remain unmet. As of October 2007, neither international nor national judges had been trained in international and Cambodian law and procedure.

Yet even with this fiscally conservative approach, by early 2007 the ECCC's Office of Administration recognized an impending shortfall in key operational areas for reasons previously noted. Without additional funds, the Cambodian Government has stated that its share of the budget, which includes money to cover Cambodian staff and judicial salaries, will be exhausted in early 2008. The United Nations Assistance to the Khmer Rouge Trials (UNAKRT), which administers the international aspects of the Extraordinary Chambers, has also acknowledged that more funds will be needed for its efforts during 2008.¹⁵

Additional Pledges Should Be Based on the ECCC's Meeting Performance Targets

The Justice Initiative continues to believe that the Extraordinary Chambers have the potential to provide an important measure of justice by prosecuting those most responsible for the Khmer Rouge atrocities of 1975-1979 who are still alive. If the court is unable to serve its historic role, Cambodians will be forever denied the opportunity to see perpetrators of Khmer Rouge-era crimes brought to justice. With these considerations in mind, the Justice Initiative urges States to address the budgetary shortfall that threatens to stall the ECCC's further progress just when it is beginning its core mandate.

¹³ 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.

¹⁴ This does not mean that the Extraordinary Chambers have failed to undertake outreach efforts altogether. ECCC officials regularly participate in public forums, the Public Affairs section has developed posters and booklets which nongovernmental organizations (NGOs) have distributed throughout the country, and the Public Affairs section also regularly organizes radio broadcasts. However, the Extraordinary Chambers have no dedicated outreach office and rely largely on NGOs to facilitate its outreach activities. This is not a sustainable approach to effective outreach. An especially positive model is the outreach program of the Special Court for Sierra Leone, which has placed outreach officers in every province of the country. For an overview of the SCSL outreach efforts, see <http://www.sc-sl.org/outreach.html>.

¹⁵ See Erika Kinetz, "Donors Eager to See ECCC Problems Fixed," *Cambodia Daily*, October 9, 2007: "The Cambodian side is slated to run out of funds early next year and the UN side towards then end of 2008."

At the same time, however, we do not believe that the Extraordinary Chambers can or will succeed in reaching its goals unless the court makes a broad range of significant operational changes. Nor is it reasonable in light of past experience to expect the court to make these changes unless external actors take meaningful and joint steps to ensure reform. Along with the United Nations itself, donors can be particularly effective in ensuring that needed reform occurs.

The Justice Initiative urges donors to set benchmarks for the ECCC to achieve; pledge funds based on the ECCC's achievement of these performance targets; and disburse funds in installments at regular intervals—each fiscal year, for example, or every six months—with payments made only when the ECCC demonstrates that it has met the benchmarks established for the previous period. Pledged funds should be withheld if there is inadequate movement towards the achievement of these benchmarks.

To assist States as they consider additional contributions to support the ECCC, this memorandum provides detailed recommendations, which derive from the Justice Initiative's experience monitoring the ECCC, benchmarks developed by international and Cambodian civil society and official recommendations set forth in two recent United Nations-sponsored reports. First, however, this memorandum provides a more detailed analysis of the problems that must be addressed in order for the ECCC to meet international fair-trial standards and to operate effectively and efficiently.

IMMEDIATE CHALLENGES FACING THE ECCC

Need for More Effective Administrative Leadership

The ECCC Agreement provides for a Cambodian Director of Administration who “shall be responsible for the overall management of the Office of Administration, except in matters that are subject to United Nations rules and procedures.”¹⁶ The Deputy Director of Administration, who is appointed by the United Nations, is responsible for “recruitment of all international staff and all administration of the international components of the Extraordinary Chambers, the Pre-Trial Chamber, the Co-Investigating Judges, the Prosecutor’s Office and the Office of Administration.”¹⁷ The Director and Deputy Director “shall cooperate in order to ensure an effective and efficient functioning of the administration.”¹⁸

In practice, however, there are two parallel systems of management that operate largely independently. There are separate offices of personnel, budget, and finance for Cambodians on one side and international staff on the other side. Cambodian national staff report directly or through their Cambodian superiors to the Cambodian Director of Administration. International staff report to the international Deputy Director. Key functional arms of the court, such as court management, are allocated to the Cambodian side and are controlled and staffed almost exclusively by Cambodian nationals regardless of the expertise needed to perform the job in question. This system has created inefficiencies in areas including courtroom construction as well as growing translation backlogs, which have set the ECCC far behind schedule.

Two recent UN-sponsored reports—the UNDP *Audit of Human Resource Management at the ECCC* and the *Expert Assessment* of the ECCC’s administrative readiness for trial—have highlighted major administrative and management difficulties on both the national and international sides of the court. The *UNDP Audit* was designed to address issues including the selection and recruitment of Cambodian staff; the degree to which the skills of Cambodian staff matched their job vacancy notices; payment of Cambodian staff in accordance with the ECCC’s salary scales; and the accuracy of financial reporting of salary payments. The *Expert Assessment*, commissioned by the UN Office of Legal Affairs, assesses the readiness of the ECCC for judicial operations. This assessment includes an analysis of the ECCC’s administrative leadership and its operations in areas including court management and translation capacity.¹⁹ While the reports focus on different functional areas and stages of the ECCC’s operations, the recommendations of each complement the other. Both reports propose significant operational and organizational changes.

UNDP Audit of Human Resource Management at the ECCC

¹⁶ Article 8(2), Agreement, above n 3.

¹⁷ Article 8(3), *ibid.*

¹⁸ Article 8(4), *ibid.*

¹⁹ As noted below, only the recommendations of the UN *Expert Assessment* are publicly available.

The UNDP maintains a trust fund of donor money earmarked for the national side of the ECCC's budget. In response to transparency concerns regarding the Extraordinary Chambers' hiring process, UNDP commissioned an audit into the ECCC's administration of UNDP trust funds in early 2007. The report was confidentially issued on June 4, 2007 and, after public pressure, was publicly released on October 2, 2007.²⁰

The UNDP audit report found that, by almost every measure, the ECCC's human resources management was inadequate. The report found that:

- A sizeable portion of Cambodian staff did not meet minimum job requirements set out in the court's own vacancy announcements.²¹
- Cambodian salaries were inflated on average by 46 percent above the ECCC pay scales.²²
- There was an unjustified excess of staff, with 52 positions appearing in the 2007 budget that did not exist in the December 2004 budget estimate and which were not accompanied by a written justification. These additional 52 posts cost the court \$357,000.00 more than anticipated.²³
- Four of 28 Cambodian Government-appointed staff received significant and unexplained salary increases during 2006. A translator saw her salary more than quadruple from US\$650.00 to \$2850.00 a month. An Information Technology Development Officer's salary more than doubled, from \$1000.00 a month to \$2300.00.²⁴

The auditors concluded that these problems were so serious that the UNDP should consider withdrawing from participation in the ECCC altogether if the Cambodian side did not agree to the "essential measures ... necessary to ensure the integrity and success of the project."²⁵

The UNDP report made a series of recommendations for change in the areas audited. The ECCC has stated that it has begun to address some of the shortcomings identified in the UNDP audit "to ensure greater transparency and effectiveness." A joint UNDP-ECCC-Cambodian Government statement released on September 25, 2007 highlighted how new procedures have been implemented at the ECCC, including "open advertising and competitive selection through transparent screening procedures," and reported the revision of a personnel manual that "formalizes detailed steps including how to create posts, advertise, screen and contract staff." The Project Board, which oversees the

²⁰ See United Nations Development Programme, *Audit of Human Resources Management at the Extraordinary Chambers in the Courts of Cambodia (ECCC)*, available on the UNAKRT website at <http://www.unakrt-online.org/Docs/Other/2007-06-04%20UNDP%20Special%20Audit%20of%20ECCC%20HR.pdf>.

²¹ Ibid p. 3.

²² Ibid.

²³ Ibid p.4.

²⁴ Ibid, p.19.

²⁵ Ibid p.5.

expenditure of UNDP funds channeled to the ECCC, has “agreed on further improvements on performance review and decisions on contract extensions of ECCC employees, expected to be implemented by the end of December 2007.”²⁶

These are welcome, if long overdue, steps in the right direction. More needs to be done, however, and some necessary measures—addressed in greater detail later in this memorandum—may take time to implement. Donors should, at regular six month intervals in the coming year, monitor the adequacy and effectiveness of measures put in place to address these issues.

UN Expert Assessment of the ECCC’s Readiness for Judicial Activity

The second report was commissioned by the UN Office of Legal Affairs to evaluate the ECCC’s readiness for judicial proceedings. Robin Vincent, former registrar of the Special Court for Sierra Leone (SCSL), and Kevin St. Louis, chief of administration at the International Criminal Tribunal for the former Yugoslavia (ICTY), spent three weeks at the ECCC beginning in late May 2007. The full evaluation report (referred to here as the *Expert Assessment*) has not been released publicly but has been leaked to the press. According to press accounts, the *Expert Assessment* concludes that the divided nature of the court “serves only to constantly hinder, frequently confuse and certainly frustrate the efforts of a number of staff on both sides of the operations.”²⁷ The report’s recommendations, which have been publicly released, include a proposal that the responsibilities of the director of administration and the deputy director be clarified to ensure more effective decision-making.²⁸

The report also recommends several structural changes to the ECCC’s operations. Key functions, such as translation, interpretation, witness support and protection—previously the responsibility of the Cambodian side—should now report to the (international) deputy director of administration. Implicitly, these recommendations suggest that such changes are a necessary first step towards alleviating a range of problems, including current backlogs in translation, which are reported to be six months or more (and growing) as the work of the court increases; the poor quality of translation and transcription services; and the ECCC’s failure to establish credible witness protection strategies. The *Expert Assessment* report recommends that the ECCC bring in high-level experienced consultants to work with its staff to address some of the problems the report identifies. Among them, the ECCC does not yet possess the capacity to hold public hearings²⁹ and has been unable to establish workable court management functions.

²⁶ UNDP Joint Statement, ‘ECCC Project Board Agrees on New Recruitment and Contracting Procedures,’ September 26, 2007, available at http://www.un.org.kh/undp/content/index.php?option=com_content&task=view&id=86&Itemid=31.

²⁷ Erika Kinetz, ‘Report Finds Flaws in ECCC Administration,’ *Cambodia Daily*, September 25, 2007.

²⁸ UNAKRT *Summary of Recommendations of the Assessment Team* (Vincent/St.Louis), available at <http://www.unakrt-online.org/Docs/Other/2007-06-13%20UNAKRT-Summary%20of%20Expert%20Recommendation.pdf>

²⁹ As of early November 2007, work had not begun to prepare the trial chamber, which still looks like a theatre with a stage at the front of the courtroom, for trial proceedings. The Pre-Trial Chamber does not have room for public access, and the ECCC plans to feed the video and original audio of the proceeding to a screen in the Trial Chamber (still in its auditorium state).

The UN has already begun to address these issues. Emergency measures, including the recruitment of short-term experts in court management, witness protection and support and translation services, have been instituted to address pressing needs. The engagement of consultants, however, is a stop-gap measure, and these efforts must be reinforced by putting in place a stronger leadership structure and by hiring additional experienced staff in key roles.

While the *Expert Assessment* recommendations highlight the need for stronger international leadership within the court, the UN has so far interpreted its “assistance” mandate³⁰—the rubric under which international staff operate—both narrowly and passively. A justification sometimes proffered by the ECCC’s international staff is that UN participation in the court is advisory only.³¹ International administrators and key international staff within the Office of Administration have failed to address serious administrative problems because they were said to be the responsibility of the “Cambodian side.”

This approach is based on the unwarranted and deleterious premise that the UN is not an active and joint decision-maker with the responsibility to ensure that the ECCC meets minimum international standards for fair trials. The *Expert Assessment* recommendations indicate that the UN should assert itself more vigorously to ensure that the right people are in place to do necessary tasks. More generally, the UN should view its role in a more assertive way. Donors need to support the UN in this revitalization of its role, while giving due regard to Cambodian ownership and sensitivities.

The Need for Measures to Prevent Corruption

On February 14, 2007, the Justice Initiative issued a statement calling for the thorough investigation of allegations that Cambodian staff and judges were required to kick back a percentage of their salaries in exchange for their jobs. This issue received substantial media attention in September 2007.³² Press articles during this period lent substantial support to earlier reports of corruption. According to an article published in the *Cambodia Daily* on September 25, 2007, for example, an ECCC staff member, speaking

³⁰ Article 17 of the *ECCC Agreement* sets out the financial and other assistance to be provided by the United Nations. This includes remuneration of the international personnel (including judges); costs for utilities and services, as well as safety and security agreements, as separately agreed with the Cambodian Government; defense counsel remuneration; witness travel from within Cambodia and abroad; and “such other limited assistance as may be necessary to ensure the smooth functioning of the investigation, the prosecution and the Extraordinary Chambers.”

³¹ See for example, quotes of UNAKRT Press Officer Peter Foster in Erika Kinetz, ‘Officials Stand by Structure of KR Tribunal,’ *The Cambodia Daily*, October 3, 2007.

³² See, for example, John Hall, ‘Yet Another UN Scandal,’ *Wall Street Journal*, September 21, 2007, available at http://online.wsj.com/article/SB119032899373334471.html?mod=googlenews_wsj; Cat Barton, ‘Public Disclosure or Damage Control,’ *Phnom Penh Post*, October 15, 2007; Erika Kinetz, ‘Donors Eager to See ECCC Problems Fixed,’ *Cambodia Daily*, October 9, 2007; Erika Kinetz and Prak Chan Thul, ‘Audit of ECCC Found No Proof of Kickbacks,’ *Cambodia Daily*, October 4, 2007; Editorial, ‘Cash for Cambodians,’ *Wall Street Journal Asia*, September 25, 2007.

on condition of anonymity, admitted to paying 25 percent of his salary in exchange for his job.³³

Yet in the cover letter accompanying its audit report on the ECCC's human resource management dated June 4, 2007, UNDP stated that after "preliminary assessments," UNDP auditors "found no evidence that would conclusively support the [kickback] allegations." In UNDP's opinion, "given the nature of the allegations ... additional efforts to establish their validity are unlikely to provide more material that would warrant further actions in this respect."³⁴ On September 25, 2007, UNDP attempted to clarify this finding in a press release, stating that its "audit did not find evidence proving that there were payments by ECCC personnel to third parties. This was primarily because the allegations pertained to personnel beyond UNDP's jurisdiction. UNDP would have had to obtain irrefutable evidence to address the specific allegations."³⁵

The later announcement indicates that a key reason why the UNDP did not find "irrefutable evidence" of corruption is that its auditors did not make substantial efforts to investigate this issue.³⁶ The corruption allegations are not mentioned anywhere in the audit report itself beyond a background reference to the Justice Initiative's February 2007 statement calling for the allegations to be investigated.³⁷ The only reference to UNDP efforts to address the corruption allegations were in the audit's cover letter, which said that UNDP auditors took "a number of steps including the interview of individuals who volunteered to share information" with UNDP.³⁸ However, no more information was provided indicating what these steps were, how many people were interviewed, the content of these interviews, or whether the security and confidentiality arrangements of the inquiry—the audit was conducted publicly in an office set up near that of the ECCC's Cambodian director of administration—provided adequate safeguards to ensure that those with relevant information would come forward. UNDP has not provided further clarification about the nature of its efforts to address the corruption allegations.

In the wake of media reports concerning corruption allegations, the ECCC has instituted several measures to prevent corruption. These include posting notices within the ECCC condemning kickbacks and setting up anonymous complaint boxes at the court. The ECCC has also instituted a code of conduct, which employees are supposed to sign, containing a provision stating that "employees shall not solicit or accept any gift,

³³ Erika Kinetz, 'Report Finds Flaws in ECCC Administration,' *Cambodia Daily*, September 25, 2007.

³⁴ See cover letter to the United Nations Development Programme, Audit of Human Resources Management at the Extraordinary Chambers in the Courts of Cambodia (ECCC), above n 20, at pp. 1-2.

³⁵ UNDP Cambodia Statement, September 25, 2007, available at <http://content.undp.org/go/newsroom/2007/september/undp-statement-cambodia-20070926.en?jsessionid=axbWzt8vXD9>.

³⁶ John Hall, a commentator for the *Wall Street Journal* on September 21, 2007, noted the failure of the UNDP audit to address allegations of corruption at all within the report. He stated it was "deeply troubling" that "allegations of corruption may have been, in effect, covered up." See John Hall, 'Yet Another UN Scandal,' *Wall Street Journal*, September 21, 2007, available at http://online.wsj.com/article/SB119032899373334471.html?mod=googlenews_wsj.

³⁷ See UNDP Audit Report, above n. 20 at p.8.

³⁸ See UNDP cover letter to the UNDP Audit Report, above n 20 at p. 1.

payment or other item of monetary value from any person employed by, or seeking employment by, the ECCC” and another provision that requires employees to “disclose waste, fraud, abuse and corruption to the appropriate authorities.”³⁹

These measures represent a welcome acknowledgement of the need to combat potential corruption, but more significant measures must be undertaken to quell lingering doubts about the ECCC’s integrity and to ensure that its code of conduct is rigorously enforced. The Extraordinary Chambers should institute best-practice anti-corruption measures in consultation with experienced experts, including the placement of an independent ombudsman within the court to whom corrupt practices can be reported under conditions that assure strict confidentiality. Without such proactive measures, concerns about the court’s integrity—and UNDP’s stewardship of trust funds contributed to the Cambodian side of the court’s budget—will not be dispelled. Against the background of the widely-publicized reports of corruption noted above, the ECCC’s failure to take additional, effective steps to prevent corruption would further compromise the court.

Lack of Transparency and Need to Strengthen Freedom of Expression Guarantees

Transparency is a prerequisite for meaningful monitoring of the ECCC’s integrity, efficiency, and impartiality. As such, it is also crucial to the credibility of the court. Yet the transparency record of both the ECCC and the UN is deeply flawed. Recent examples of failures by the court, UNDP, and the United Nations in general to disclose information that should be public include:

- Refusal of the court and UNDP to release information about the UNDP audit findings until four months after they were issued, and then only after public pressure had mounted and a copy of the audit had been obtained by the press.
- Refusal of UNAKRT or any other part of the UN to release the full *Expert Assessment* of court administration.
- Refusal by the court and UNAKRT to release meaningful and current information about budgets and spending.
- Failure to adopt practice directives establishing that pleadings, documents and information filed or produced by the Pre-Trial Chamber will presumptively be publicly released.
- Policies that unduly limit public information and access to important pre-trial proceedings.
- Failure of the court to hold regular press conferences to update the public about the progress of cases and other issues before the ECCC.

Each of these examples alone is problematic. Combined, they point to an emerging institutional culture of opacity. Unless rectified, this will continue to impede the capacity of Cambodian society, donors, and international NGOs to monitor the ECCC and ensure that it operates in accordance with international standards of fair process.

³⁹ See Extraordinary Chambers in the Courts of Cambodia Code of Conduct Declaration of the Employee, ECCC website, available at http://www.eccc.gov.kh/english/cabinet/files/handBook_conductCode/Code_conduct_agreement.pdf.

Outside the court, independent monitors have at times been hampered in their ability to raise concerns about its operations. One example is the Cambodian Government's threat in March 2007 to evict the Justice Initiative from Cambodia in response to our call for an investigation into corruption allegations at the ECCC.⁴⁰ Yet the ability of civil society organizations to comment on, and when necessary in their judgment to criticize, the operation of the ECCC as a public institution—without fear of retribution—is a key element in any democratic society. The Cambodian Government has expressed its commitment to free expression in domestic and international legal instruments.⁴¹ Reaffirming this obligation in the context of its approach to the ECCC would signal the Government's commitment to ensuring that civil society can meaningfully engage with the ECCC throughout its lifespan.

Together, the concerns identified above represent serious hurdles that the ECCC must surmount if it is to operate efficiently, effectively and with integrity. The Justice Initiative believes that strategic use of donor finances is an especially effective way to improve the ECCC's administrative operations and ensure that it is capable of dispensing justice.

⁴⁰ See Justice Initiative Progress Report, June 2007 at p. 9 regarding threats to evict the Open Society Justice Initiative, and September 2007 Monthly Report regarding the threat to terminate the ECCC if former King Sihanouk is charged, in response to a domestic NGOs public call for withdrawal of Sihanouk's immunity. Available at http://www.justiceinitiative.org/db/resource2?res_id=103814.

⁴¹ See, for example, Article 19, International Covenant on Civil and Political Rights, adopted for signature and ratification by the General Assembly, resolution 2200A (xx1), 16 December 1966, acceded to by the Royal Government of Cambodia in 1992; Constitution of the Royal Government of Cambodia, adopted by the Constitutional Assembly in Phnom Penh on September 21, 1993, at its 2nd Plenary Session, available at <http://www.embassy.org/cambodia/cambodia/constitu.htm>.

RECOMMENDED CONDITIONS FOR ADDITIONAL FUNDING

Create a Donor Management Board

During the past 20 months of administrative operations, the ECCC has not operated effectively or efficiently. Nor has UNDP proved to be a sufficiently engaged trustee of donor monies—one that is prepared promptly to address problems as they arise transparently and adequately. States must therefore step into the breach and undertake a more active oversight role. To this end, States should create a Donor Management Board that would work with the ECCC’s Director and Deputy Director to ensure that critical tasks are achieved and to provide policy oversight. This Board would set benchmarks for the ECCC in advance of funding and also act as a certification body that assesses whether the court has satisfied relevant benchmarks when donor pledges are due to be disbursed. States might also create a sub-committee of donor representatives in Phnom Penh or New York with oversight responsibility for the management of donor funds.

To ensure effectiveness, the Donor Management Board must have a robust mandate and should include a representative from the UN bodies involved with the ECCC, including the UN Special Advisor to the ECCC described in the following section. It would be extremely helpful if the board had a staffed secretariat⁴² and provided general oversight over all international funding for the court as a replacement for the flawed system of dual UN and UNDP oversight. All international donor funds could be managed jointly to prevent the current problem of splintered administration and responsibility. This can be accomplished even if the technical distinction which currently exists between the “international side” and the “Cambodian side” of the budget is maintained. The Director of Administration would be chiefly responsible for overall management but would administer donor funds subject to the oversight of the Donor Management Board with the assistance of the Deputy Director. The Donor Management Board should to be small enough to operate effectively and could report to the larger *Groupe des Amis des Chambres Extraordinaires* in Phnom Penh and to interested States in New York

Details of operation of a Donor Management Board must be worked out carefully. Important issues include whether it should be based in Phnom Penh or in New York, its relationship with the ECCC, the UN and the Government of Cambodia, and the powers it would possess and procedures it would follow to manage funds. Assuming a mandate by ECCC donors for the establishment of a Donor Management Board, the details of its operation should be determined by donors in consultation with the UN-appointed Special Advisor described in the section immediately below.

Secure Appointment by the Secretary-General of a Special Advisor to the ECCC

In addition to donor States, the United Nations has a critical role to play in ensuring that the ECCC meets international standards of fair process. The United Nations has

⁴² It may be feasible to create a combined secretariat for the Donor Management Board and the UN Special Advisor to the ECCC whose appointment is recommended in the following section.

substantial experience with international and hybrid courts, as well as an interest in ensuring that the ECCC operates with high integrity and effectiveness: The ECCC *Agreement* includes an opt-out clause under which the United Nations reserves the right to cease providing financial or other assistance to the court should the “Royal Government of Cambodia change the structure or organization of the Extraordinary Chambers or otherwise cause them to function in a manner that does not conform with the terms of the present *Agreement*.”⁴³ This is a critical safeguard to ensure that the court meets international fair trial standards. Yet this safeguard has scant value unless the UN Secretariat and its head, the Secretary-General, have access to independent information about the ECCC’s operations and objective advice upon which they can act.

Accordingly, the United Nations should take an active role with the Donor Management Board recommended in this memorandum to ensure that needed improvements in the administration of the court are developed and implemented. More generally, it should constructively engage with donors and the Government of Cambodia to expeditiously solve management, administrative or political problems that interfere with the effective work of the court on an ongoing basis.

To this end, the United Nations should appoint an independent, high-level Special Advisor to the ECCC to assess compliance with the *Agreement* and to mediate and help resolve issues that threaten the success of the court. The stature of the Special Advisor should be commensurate with the importance of his or her role: The advisor should be designated at the level of a Special Representative or Undersecretary of the Secretary-General. Donor States should support the appointment of such an advisor to facilitate urgently needed changes in the administration of the court, to monitor such changes after they are implemented, and to proactively engage with donors, the court, the Government of Cambodia and others on an ongoing basis to solve significant problems that threaten the success of the court.

In addition to helping solve urgent administrative problems, a high-level advisor would be able to address other difficult issues that have hampered the ECCC since its administrative operations began in February 2006. Several situations have threatened the independence and credibility of the court, including difficulties that plagued the drafting of rules of procedure,⁴⁴ a decision by the Cambodian Government to reassign a Co-Investigating Judge soon after he became actively seized of his investigative role,⁴⁵ and pervasive difficulties with human resource practices. A highly respected and independent jurist or legal professional, with the authority to make public statements and private

⁴³ See ECCC Agreement, Article 28. None of the restructuring that the Justice Initiative has recommended in this memorandum is precluded by the terms of the *Agreement*. Instead, the restructuring that the Justice Initiative recommends is designed to enhance the Extraordinary Chambers’ operations in their efficiency, effectiveness and consistency with the *Agreement*’s provisions and broader spirit.

⁴⁴ See Open Society Justice Initiative, ECCC Progress and Challenges – June 2007, at p.8, accessible at <http://www.justiceinitiative.org/activities/ij/krt> in the link titled ‘Background Reports on the ECCC’.

⁴⁵ See Open Society Justice Initiative, ECCC Monthly Report – September 2007, pp.5-7, available at <http://www.justiceinitiative.org/activities/ij/krt>.

interventions and to advise the Secretary-General concerning significant problems, could help ensure that the United Nations takes appropriate and timely corrective action when needed.

Currently, the Open Society Justice Initiative is the only international organization independently monitoring the ECCC with a full-time presence in Phnom Penh. Even its role is uncertain, however. In response to the Justice Initiative's monitoring activities, the Cambodian government threatened its staff with expulsion from Cambodia in March 2007. The uncertainties that face NGOs in their engagement with the ECCC underscore the need for the UN to place its own special advisor with a monitoring function on the ground. As the ECCC begins legal proceedings, additional threats to its independence may arise.

A UN Special Advisor to the ECCC would:

- Initially, work full time with the ECCC and the Donor Management Board to unify the administrative functions of the court and negotiate and implement changes necessary to ensure effective management, including addressing many of the issues set forth in this memorandum. Once many of the urgent problems of the court are addressed, the Special Advisor would likely be called upon on a less than full-time basis to work with the Donor Management Board to provide oversight of the operations of the court, provide advice and ensure that problems that impact the basic integrity or effectiveness of the court are adequately addressed as early and efficiently as possible;
- Ensure that the deterrent power of the opt-out provision of the *ECCC Agreement* is effective;
- Augment current NGO efforts to raise issues that threaten the ECCC's integrity and/or implicate compliance with international standards; and
- Act as a backstop for judges and ECCC staff who may face considerable pressure when they act to ensure compliance with international standards.

Set Benchmarks for the ECCC as a Condition of Additional Funding

Benchmarks should include specific standards aimed at (1) addressing the previously-noted problems relating to the ECCC's administrative leadership and structure; (2) ensuring that the ECCC institutes proactive and effective measures to combat corruption; and (3) providing an incentive for the ECCC to adopt measures to ensure transparency in its operations. Measures that the ECCC can and should institute immediately are set forth below.

Measures to Address ECCC Leadership and Organizational Problems

In light of the issues identified by the Justice Initiative, the *UNDP Audit* and the *UN Expert Assessment*, five key steps, each designed to streamline and systemically restructure administrative leadership, should be taken immediately:

1.) Require Administrative Section to Be Unified

As noted above, the current administrative system comprising parallel offices—one set Cambodian, the other international—creates unnecessary duplication, waste and inefficiencies. As the *Expert Assessment* reportedly noted, the ECCC’s divided nature hinders, confuses and frustrates staff.

Nothing in the *Agreement* prevents donors from insisting that the ECCC’s administrative arm have a single, professionally qualified human resource division, budget section, and finance section. Unified offices in these areas would help ensure greater efficiency within the ECCC itself, so long as the recommended unification is undertaken with concerted efforts to (1) streamline functions to prevent duplication from re-emerging in the restructured offices, and (2) ensure that consistent reporting and administrative procedures are followed throughout the court. (We provide further recommendations concerning how responsibility for supervising unified functional offices should be allocated in sub-sections iii and iv.b, below.)

This recommendation may take time to implement fully, but before pledges are made, structural changes should be required at the ECCC. Within six months, donors should be able to certify a vastly more efficient administrative operation that has eliminated wasteful and duplicative practices. Progress can be measured through regular spot-check audits and ideally assessed over time with six month follow-up reports to the Donor Management Board. The latter should assess the degree to which the problems regarding duplication, waste and confusion cited in the recent *Expert Assessment* caused by parallel systems of administration had been alleviated.

2.) Assure Strong Leadership in the Office of Administration

a.) Appoint a Qualified Successor to the Current Deputy Director

The Deputy Director of Administration is the ECCC’s highest-ranking UN staff member and is responsible for administering UN funds and managing UN interests in the court. The current Deputy Director, Michelle Lee, has announced that she will retire in 2008 and a vacancy announcement for this post has been advertised within the UN system.⁴⁶ The person who replaces Ms. Lee will critically affect the ECCC’s ability to implement necessary reforms.

Proven leadership skills in politically delicate situations and excellent management and financial skills should be mandatory for the new Deputy Director of Administration. If the UN selects a Deputy Director who allows the status quo to continue, ensuring continuation of a divided and ineffective administration, the ECCC has little chance of succeeding. Donors should actively follow the selection and hiring process to ensure that the person tapped for this position is well qualified to administer donor funds, manage staff effectively and navigate the difficult political, diplomatic and administrative challenges that face the ECCC in the months and years ahead. The vacancy notice for the Deputy Director post should be modified to ensure that the post is filled by a person with judicial or legal experience, and consideration should be given to raising the level of the

⁴⁶ See United Nations Assistance to Khmer Rouge Trials (UNAKRT) website at http://www.unakrt-online.org/06_recruitment.htm.

post to attract qualified and experienced candidates. The mandate for the position of Deputy Director of Administration should be strengthened to allow the incumbent to operate effectively and ensure that needed administrative changes are accomplished.

b.) Hire a Senior Judicial Advisor

The ECCC should create a new international position of Senior Judicial Advisor, who would work with both the Director and Deputy Director to facilitate changes identified in this memorandum. This person should undertake day-to-day responsibility for key administrative functions, including court management and victim and witness support, and should also take lead responsibility for the diplomatic tasks associated with liaising with donors, the Cambodian government and ECCC judges. The creation of this position would provide an added safeguard to ensure that necessary changes are made.

c.) Appoint a UN Special Advisor to Negotiate and Implement Change

The ECCC does not have the luxury of waiting another six months before changes are made. The court is now undertaking some of its most critical functions, including the establishment of the Pre-Trial and Trial Chambers and the conduct of core judicial investigations, and must be supported by skilled administrative assistance if it is to succeed. To ensure that planning for unifying the administration of the court, correcting administrative and management problems and developing a workable Donor Management Board is done as professionally and quickly as possible, a high-level advisor, with experience in senior court management, ideally at an international tribunal, should be placed at the ECCC as soon as possible. The mandate for this position should be to ensure that needed administrative changes are negotiated with the relevant parties and implemented smoothly. This person would serve a critical role in the selection and transition to a new Deputy Administrator.

3.) Allocate Responsibilities between the Director and Deputy Director; Integrate National and International Staff

The UN *Expert Assessment* recommended that the Director and Deputy Director of Administration should clarify their responsibilities, “preferably by their agreeing to divide responsibilities for certain key areas between them and that staff working in each of those areas should report directly to the one of them responsible for that area.” This approach would replace the current administrative structure, in which international staff report to the Deputy Director while Cambodian staff report to the Director of Administration in a system of parallel administration.

As noted earlier, the current structure has prevented the ECCC from operating in an integrated fashion and has produced serious inefficiencies. Currently, many functional tasks are wholly allocated to either the national or international side of the court. In practice, this means that certain tasks—court management being the prime example—are headed and staffed nearly exclusively by Cambodians. This staffing practice often ignores the need to hire staff members with relevant experience and expertise—qualifications that do not necessarily match up with nationality requirements. The approach taken to date has translated into serious knowledge gaps in the ECCC’s operations, most notably in the court management section. Without a more integrated

personnel practice, critical tasks will not get done—or will not be done well.⁴⁷ The *ECCC Agreement*, *ECCC Law* and *Internal Rules* provide sufficient flexibility to allow the coherent allocation of functional responsibilities under the leadership of either the Director or Deputy Director. (Please see page 23 for more detailed recommendations about how certain functional responsibilities should be allocated.)

Within three months, donors should be able to see an integrated staff operating under the supervision of either the Director or Deputy Director of Administration, with functional responsibilities coherently allocated between those two administrative officials. They should also be able to see key improvements in administration and operations, achieved through the combined efforts of an integrated staff, led by experienced professionals and bolstered by the short-term injection of experts to help get problematic areas back on track. Progress will be measured through, among other goals, the significant reduction of translation backlogs; the completion of courtroom renovations; and the installation of facilities necessary to an operational court.

Within six months, donors should be able to see fully integrated, functional sections led by experienced staff, with measures in place to build capacity among less experienced staff and to help ensure that future challenges can be addressed effectively in-house. The Office of Administration should report on progress towards achieving this integration to the Donor Management Board based in Phnom Penh or New York.

4.) Implement Specific Changes from the *Audit Report* and *Expert Assessment*

Donors should require the changes set forth below and should monitor their implementation.

a.) UNDP Audit Report Recommendations

The UNDP audit report found that critical management failures have undermined both the ECCC's effectiveness and its integrity. Before donors commit funds to the ECCC, the court should demonstrate that it has developed concrete plans, with realistic but firm timetables, to address the problems identified in the UNDP audit effectively. These plans should include:

- Assessment and, where appropriate, readjustment of Cambodian staff salaries to align with ECCC salary scales.⁴⁸
- Identification of Cambodian staff who fail to meet the minimum requirements in job vacancy notices, and their gradual replacement with qualified candidates as each of their current contracts expires.⁴⁹

⁴⁷ This approach would have the added advantage of a legacy impact: the international and national staff could work together to enhance each others skills and knowledge, including of international and Cambodian law and practice.

⁴⁸ The issue of inflated salaries for staff hired for the Cambodian side of the budget is complex. It appears that, although the initial ECCC budget pegged Cambodian staff salaries at 50 percent of the UN pay scale, the Cambodian government pays Cambodian professional staff salaries that are approximately 90 percent of comparable salaries for UN staff.

⁴⁹ The UNDP Project Board has already insisted on this procedure and the ECCC has accepted UNDP's position, indicating that it expects to complete its assessment and, where necessary, replacement of staff by December 2007.

- Institution of transparent hiring processes as a matter of course, which includes international participation in all ad hoc selection committees that constitute the ECCC's job interview panels for both professional and non-professional posts and, particularly for the professional posts, rigorous documentation of all candidates' job applications, interview processes, reference checks and written decisions explaining why candidates were short-listed and why each new staff member was chosen for his or her job.
- Adoption of a procedure to ensure that any salary increases for individual staff members are fully documented, justified, and approved by the ECCC administration and UNDP Project Board.

Progress in implementing each of these commitments should be monitored by donors. Within three months of initial pledges, tangible results should be evident in each area.

If donors decide to provide additional money to the trust fund for the Cambodian side of the budget, UNDP must also improve its own performance as a trustee of donor funds. Donors can help improve UNDP's performance by requiring UNDP to:

- Undertake regular and transparently conducted audits and spot checks, whose results must be issued in a timely fashion and publicly released.
- Assess, and where appropriate, adjust Cambodian staff salaries in accordance with ECCC salary scales.
- Institute a procedure requiring the ECCC to justify any major increase in staff salaries and requiring UNDP to approve any such increases.
- Regularly obtain documentation from the ECCC to determine if its hiring practices address the problems identified in the UNDP audit report and require the ECCC to provide such documentation.
- Institute procedures to ensure that any increase in ECCC staff are explained, justified and approved by UNDP and its Project Board before salary expenses for new staff can be paid.
- Reassign the UNDP Project Board chairmanship from the ECCC to avoid conflicts of interest.⁵⁰

Full implementation of these measures may take time, but it is reasonable to expect some results within six months. These include the public release of regular spot checks and larger scale audits by UNDP, documentation of hiring practices, removal of the ECCC as the UNDP Project Board chair, full and satisfactory resolution of issues pertaining to Cambodian staff salaries.

b.) UN Expert Assessment Recommendations

Before committing additional funds, donors should require the ECCC to address the problems identified in the *Expert Assessment* through steps that include:

⁵⁰ See Recommendation 5 of *UNDP Audit*, above n.20, at p.6.

- Placing the Translation and Interpretation Section under the authority of the Deputy Director of Administration to address backlog and quality problems.
- Establishing the Witness Protection Section and placing it under the authority of the Deputy Director of Administration.
- Establishing a procedure for ECCC managers regularly to review progress and identify future challenges in administration that need to be addressed.
- Appoint a Detention Liaison Officer responsible for liaising with national detention authorities.
- Adopt specific measures to improve reporting to the *Groupe des Amis*, including by providing a written report in advance of *Groupe* meetings to all of the *Groupe*'s members.
- Adopt measures to improve communication with, encourage participation by and facilitate stronger working relationships with NGOs.
- Appoint a liaison/resident judge to represent the interests of the judges and facilitate communication among the judges, some of whom will not be resident in Phnom Penh on a regular basis or working full-time for the ECCC for the next six to twelve months.

Tangible progress can reasonably be expected within six months. Donors should require that the ECCC submit a written report to either the *Groupe des Amis* or the recommended Donor Management Board six months after pledges have been made to determine the level and effectiveness of measures taken to address the concerns outlined in the Vincent/St. Louis assessment. Donors should also seek information from NGOs, court staff and other informed sources to confirm how well the court is addressing those issues.

Institute Effective Measures to Prevent Corruption

Before giving additional funds to the court, donors should require the ECCC to institute best-practice anti-corruption measures to minimize the possibility that corrupt practices will occur in the future and to ensure that any person asked to act in an illegal or corrupt fashion has effective recourse.⁵¹ These measures could include:

⁵¹ In implementing this recommendation, it would be useful to look at how other tribunals have dealt with corruption allegations. The International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) have each faced corruption allegations. In each case, there were allegations of 'fee-splitting' arrangements whereby defense counsel agreed to share fees with their clients in exchange for the opportunity to represent them. The ICTY announced to the press that it was looking into the allegations. Meanwhile UN headquarters' internal investigators started their own inquiries. The investigators made 16 recommendations to help curb abusive practices within the tribunals. When UN investigators undertook a follow-up investigation one year later, they found that both tribunals had implemented most of the 16 recommendations and had also taken "additional proactive steps to prevent abuses". This follow-up investigation found more concrete and specific information about the existence of fee-splitting arrangements and made a further five recommendations for the tribunals. These recommendations included a revision of the tribunals' statutes to ensure that reports of solicitations by defense counsel to Registrars would not be viewed as a breach of attorney-client privilege; a requirement that defense counsel sign forms declaring that fee-splitting is prohibited and obliging counsel to report breaches promptly; and ensuring that "proper controls are instituted so that the approval systems for payments, reimbursements etc cannot be exploited for corrupt purposes." The transparent and effective way that both tribunals dealt with this problem enabled them to maintain credibility.

- Issuing a clear and unambiguous statement by ECCC leadership that kickbacks of any kind or payments to others of funds or portions of salaries are illegal and will not be tolerated.
- Appointing an experienced international ombudsman at the ECCC to whom employees and officials can confidentially report inappropriate requests for payments or any other violations of employment practices or unethical conduct. This person should be charged with ensuring that all staff and officers understand that corrupt practices, violations of codes of conduct, or incursions against employee rights will not be tolerated and that appropriate action will be taken if there is evidence of such practices. This person must be empowered to establish an effective process for receiving and acting on complaints and to effectively communicate the results of the process to all ECCC staff.

Within three months, the ECCC should report on the best-practice measures it has adopted and on how these measures are operating. The ombudsman—preferably an international appointee—should report to the Donor Management Board about the freedom he or she has to do the work assigned to him or her and the adequacy of the procedures in place at the ECCC.

Institute Measures to Enhance Transparency and Protect Freedom of Expression

In determining future funding for the ECCC, donors should:

- Insist that the ECCC adopt and publish written rules and practice directives that reflect a presumption that court documents will be publicly released absent a judicial determination of a specific, fact-based need for confidentiality.
- Require the ECCC to publicly release figures pertaining to court expenditures for both international and Cambodian budget lines every six months.
- Urge relevant UN entities, including UNDP; the Department of Economic and Social Affairs, which oversees the international ECCC budget; and the Office of Legal Affairs, publicly and promptly to release future assessments of the ECCC's efficiency and effectiveness.
- Request the ECCC to provide opportunities for additional public access to Pre-Trial proceedings, including hearings of the Pre-Trial Chamber and adversarial hearings and initial appearances before the Co-Investigating Judges, subject to appropriate conditions for protecting witnesses and the integrity of the process.
- Urge the ECCC to conduct at least weekly press conferences or briefings.
- Encourage the ECCC to provide monthly briefings for NGOs and other interested parties. Ideally, these meetings should include representatives of each section of the court—either together or on a rotational basis—to provide updates on the ECCC's operations. These events should allocate time for questions and answers.

Within six months, donors should be able to assess progress in realizing these targets. In this period the ECCC can reasonably be expected to adopt clear rules or practice directives and to post a list of publicly released documents on its web site; publicly

release spending figures for the previous six-month period; publicly release any UN reports prepared in the previous six-month period; and convene at least six public briefings. Court monitors, domestic and international, can provide additional information about the levels of access provided during the pretrial process.

Additionally, the ECCC and the Government of Cambodia must tolerate robust criticism and other dimensions of monitoring the ECCC's operations. Cambodia has committed to protecting the rights of expression in its Constitution and as a party to international conventions protecting freedom of expression.⁵² In view of past threats against independent monitors, donors should ensure that the Government fully respects these obligations. In particular, donors should act to ensure that civil society is free to engage in public commentary, including critical commentary, of the ECCC by making clear that continued funding will be conditioned on the Cambodian Government's respect for the right of freedom of expression, particularly as the exercise of this right pertains to commentary on the performance of the ECCC.

Insist that Funds are Budgeted to Address Unmet Needs

Key budget lines that were seriously underestimated or omitted from the original ECCC budget should be specifically addressed by the ECCC as a part of an additional funding request. Most of these funding categories have been addressed in detail in other Justice Initiative reports⁵³ and are briefly summarized here. These include:

- **Proactive outreach by the ECCC.** Cambodians need far more information about the ECCC and opportunities to engage with the court if the ECCC is to address meaningfully the needs of the victimized community; educate the Cambodian public about atrocities committed during the Khmer Rouge era and, ideally, about fair-trial procedures; and enable the Cambodian public to monitor the court itself. Yet the current budget does not provide sufficient resources for pro-active outreach. Outreach to date has consisted of publishing materials about the court and cooperating with NGOs in their outreach efforts. The ECCC must create and maintain an active presence in both urban and rural areas of the country. In doing so, it may benefit from the positive example set by the Outreach Programme of the Special Court for Sierra Leone, which maintains outreach personnel in every Sierra Leonean province and tailors its events, publications and other efforts to specific target audiences.⁵⁴ Donors should earmark specific funds for this crucial need and—either through the *Groupe* or the recommended Donor Management Board—require regular updates on the ECCC's pro-active efforts to engage the Cambodian population.

⁵² Article 19, *International Covenant on Civil and Political Rights*, adopted for signature and ratification by the General Assembly, resolution 2200A (xx1), 16 December 1966, acceded to by the Royal Government of Cambodia, in 1992; Article 41, Constitution of the Royal Government of Cambodia, adopted by the Constitutional Assembly in Phnom Penh on September 21, 1993, at its 2nd Plenary Session, available at <http://www.embassy.org/cambodia/cambodia/constitu.htm>.

⁵³ Previous Justice Initiative periodic and monthly reports are available at <http://www.justiceinitiative.org/activities/ij/krt>.

⁵⁴ For more information, see the Special Court for Sierra Leone's outreach website at <http://www.sc-sl.org/outreach.html>.

- **Creation and staffing of Victims Unit.** The Victims Unit, created by the internal rules passed in June 2006, is designed to facilitate the right of victims to participate as civil parties in ongoing proceedings. The unit requires adequate funding by donors and immediate staffing. Donors should require two reports in the next two six-month intervals detailing measures taken to staff the unit and make it as accessible as possible to the Cambodians who wish to participate as civil parties.
- **Experienced international witness protection staff.** The ECCC's witness protection and support services need more resources. The expectation that the court can rely on Cambodian judicial police to provide witness protection to the range of witnesses anticipated—including crime-base witnesses, insiders, expert witnesses, defense witnesses and others—is unrealistic given their lack of experience and training. International expertise is required to build capacity among the Cambodian personnel and to help ensure compliance with emerging international standards for witness protection. Donors should ensure that the ECCC accepts the recommendations made by the short-term witness protection expert who was resident at the ECCC for three months in 2007. She concluded, among other things, that the ECCC should hire more international experts and garner further assistance for both witness protection and coordination of the unit. Seconded witness protection officers from donor states would be an excellent way to address this issue.
- **Judicial training.** No training has been provided for any of the judges in international law, nor have international judges received training in Cambodian law and procedure. While all of the ECCC judges bring useful experience to the bench, few have direct experience in adjudicating complex international crimes such as crimes against humanity, genocide, and war crimes. The challenges inherent in applying this complex body of substantive law are compounded by procedural challenges: The ECCC is constructing and must apply an amalgamation of international law and Cambodia's civil law. Funding should be earmarked to ensure that the ECCC judges receive specialized training to meet these challenges. Donors should provide whatever assistance they can in facilitating these trainings, through funding and/or the provision of in-kind assistance of facilities and high-quality trainers. The Groupe or the recommended Donors Management Board should also require six-monthly updates on the progress of judicial training efforts.
- **Creation and staffing of unit for real-time transcribers.** Full transcripts of court proceedings should be mandated by the ECCC's internal regulations. The ECCC's budget was originally developed on the assumption that only a summary of proceedings, as normally required under Cambodian procedural law, would be prepared rather than a verbatim transcript. The ECCC should, however, follow the precedents of other international and hybrid tribunals by requiring full

transcripts of proceedings.⁵⁵ During the ECCC's operations, lawyers and judges must be able immediately to access an accurate, real-time transcript, particularly when there is confusion or debate about the exact statement of a victim, witness or defendant. Moreover complete transcripts will ensure that the ECCC contributes as fully as possible to the historical record of Khmer Rouge atrocities. Donors should require progress reports at six-monthly intervals in the coming year to ensure progress.

- **Revamping management; addressing translation backlogs and current needs.** As noted in the *Expert Assessment*, translation delays at the ECCC are a pervasive concern. UNAKRT has hired a short-term translation specialist to evaluate the management and staffing of a translation unit. Donors should provide additional funding for this unit to ensure that translation delays do not produce further delays in court proceedings. As noted above, significant improvements in the delivery of translation services should be a necessary benchmark for future funding.
- **Immediate preparation of courtrooms for public hearings.** The Pre-Trial Chamber of the ECCC has ordered that the hearing on its first appeal be open to the public.⁵⁶ Yet the ECCC courtrooms are not ready for public hearings. The Pre-Trial Chamber does not have a public gallery, and by mid-November 2007 renovations to the Trial Chamber had not yet begun. Donors should insist that the court place immediate and high priority on ensuring that these premises are readied for public hearings.
- **Procuring adequate audiovisual equipment and expert staff.** The ECCC has not yet acquired recording equipment or professional staff to create accurate and complete audiovisual records of trials and other public proceedings. Recordings of proceedings will form an integral part of the ECCC's historical legacy. Donors should provide adequate funding or donate in-kind contributions to ensure that this need is met.

⁵⁵ Corresponding rules of the International Criminal Court, the ICTY, ICTR and SCSL explicitly require preparation of "full and accurate" transcripts.

⁵⁶ The President of the Pre-Trial Chamber announced that the hearing on the appeal filed by Kaing Guek Eav (otherwise known as 'Duch') of the Provisional Detention Order would be held in public.

CONCLUSION

The ECCC has made significant strides with the arrest of four high-level suspects, the judges' adoption of internal rules, the beginning of judicial investigations and the court's adoption of measures to address a range of concerns relating to its integrity and operational effectiveness. Yet it is still struggling to become a credible institution that can deliver transparent justice.

Potential and committed donors are uniquely poised to help the court address problems that may yet imperil trials unless they are adequately confronted. The active engagement of the United Nations and donor States is needed if the ECCC is to succeed in its historic task of delivering justice to the Cambodian people.

OPEN SOCIETY
JUSTICE INITIATIVE

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.

The Justice Initiative is governed by a Board composed of the following members: Aryeh Neier (Chair), Chaloka Beyani, Maja Daruwala, Anthony Lester QC, Juan E. Méndez, Diane Orentlicher (on leave from August 2007-August 2008), Wiktor Osiatyński, András Sajó, Herman Schwartz, Christopher E. Stone, Abdul Tejan-Cole and Hon. Patricia M. Wald.

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