
COMMENTS ON DRAFT INTERNAL RULES FOR THE
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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5 Hanover Square, 24th fl.
New York, NY 10004
TEL +1 917 637 3800
FAX +1 917 637 3900
www.ictj.org

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The International Center for Transitional Justice (ICTJ) welcomes the opportunity to comment on the draft Internal Rules (IR) for the Extraordinary Chambers in the Courts of Cambodia (ECCC) and commends the decision to invite public comment. If the ECCC is to make a meaningful contribution towards justice for Cambodians, it is essential that the proceedings are impartial, fair and able to withstand public scrutiny, both within Cambodia and internationally. As with any court, clear rules of procedure are key to ensuring the fairness, integrity and transparency of the trials of former Khmer Rouge leaders, and it is in this spirit that we offer the following constructive comments.

The ECCC has an important role to play in setting a positive example of a criminal justice process for past human rights crimes that both protect the fundamental rights of suspects and accused persons, while balancing this with the interests of victims. The ICTJ notes the extent to which the Rules Committee has succeeded in combining Cambodian criminal procedure with elements drawn from the experiences of national, international and mixed national-international criminal jurisdictions such as the Special Court for Sierra Leone. The ICTJ believes that the current draft contains some important features that will make a major contribution to the work of the ECCC and its longer-term legacy within Cambodia. Significantly, the draft Internal Rules provide far greater procedural clarity for the ECCC proceedings than the current sources of Cambodian criminal procedure. However, our review also indicates general and specific concerns about the draft Internal Rules, some of which derive from the challenges inherent in the legal structure of the ECCC as a whole, others from the nature of the specific cases likely to come before the ECCC. While in the short time frame provided for public comment it has not been possible to provide a comprehensive set of comments on all aspects of the lengthy draft Internal Rules, the ICTJ has chosen to focus on five areas that we believe deserve special attention if the ECCC is to maximize its ability to serve the transitional justice goals of re-establishing respect for the rule of law and providing an effective remedy for victims. These five areas are as follows:

1. Trials *in absentia*
2. Protection and support for victims and witnesses
3. The ECCC's power to award reparations
4. Public accessibility of the proceedings
5. Some key lessons from the ICTJ's monitoring of the Iraqi High Tribunal

¹ Paper drafted by Caitlin Reiger, ICTJ Senior Associate, with the benefit of comments received from Graeme Simpson, Marieke Wierda, Ruben Carranza, Miranda Sissons and Ari Bassin.

² Article 14 of the International Covenant on Civil and Political Rights, ratified by Cambodia on 26 May 1992, enshrines the right of the accused to be present at trial. Some have interpreted this article to entail an absolute prohibition on *in absentia* trials (*see e.g.*, Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), at para.101, U.N. doc. S/25704, 3 May 1993). However, this is not the way it has been interpreted by the Human Rights Committee, which stated in its General Comment No. 13 (Equality before the courts and the right to a fair and public hearing by an independent court established by law (Article 14), 13 April 1984), in regard to Article 14(3)(d) that “[w]hen exceptionally for justified reasons trials *in absentia* are held, strict observance of the rights of the defence is all the more necessary.” It did not indicate what it would consider as justified reasons.

There are other aspects of the draft Internal Rules that are also worthy of comment but because of the short time frame available the ICTJ is not able to include these at this time, and reserves the right to make such comments in the future.

I. TRIALS *IN ABSENTIA* – DRAFT RULE 79(1)

Draft Rule 79(1) proposes to prohibit trials *in absentia* and should be adopted. While international human rights law protects the right of an accused to be present at his/her trial, the ICTJ accepts that this right is not absolute.² In many national jurisdictions, particularly jurisdictions that follow an inquisitorial system, such trials are allowed. Nevertheless, it should be noted that even in such jurisdictions, trials *in absentia* are usually only allowed in restrictive circumstances and often not allowed for cases involving the most serious crimes.³ Furthermore, international human rights jurisprudence confirms that such trials must be subject to strict safeguards to protect the rights of the accused to be present at trial: ensuring that the accused has been notified; that he or she has unequivocally waived the right to be present; that the interests of an accused are protected by legal counsel; that there is an ongoing right to appear; and most fundamentally, that in the event the accused submits himself or herself to the jurisdiction, that a retrial would be available as of right.

The current draft Rule 79(1) does attempt to reflect at least some of these safeguards. However, international human rights bodies have commented that even where these safeguards are respected, proceeding in the absence of the accused makes it more difficult to observe to the same extent the various other rights accorded to the accused under international human rights instruments.⁴

Nevertheless, there are other legal and policy factors to consider. First and foremost, Article 35(2)(d) of the Law on the Establishment of the Extraordinary Chambers (as amended) enshrines the right of an accused “to be tried in their own presence.” To allow for complete *in absentia* trials would on the face of it be contrary to the Law. However, a distinction may be drawn between entire trials *in absentia* leading to a “default judgment,” and those in which an accused has made an initial appearance before the ECCC (either the Co-Investigating Judges or the Trial Chamber) and subsequently refuses to attend. The second instance would be consistent with recent international practice, while the first may not be.⁵

Furthermore, there are several policy questions that should be taken into account in determining whether trials *in absentia* will best serve the aims of the ECCC. First, would trials *in absentia* positively or negatively affect the legitimacy of the ECCC’s proceedings? On the one hand, where there is a serious risk that an accused cannot be brought within the jurisdiction of the ECCC, the failure to be able to proceed with such long-awaited trials may be widely rejected by

³ For example, Germany and Japan both prohibit trials *in absentia* for serious crimes. While Croatia and Ethiopia are both examples of jurisdictions that do allow such trials, it should be noted that in recent years both countries have been widely criticized for war crimes or crimes against humanity trials that have been conducted *in absentia*.

⁴ Thus, in *Colozza v. Italy*, the European Court of Human Rights referred to the rights to “defend himself,” to “examine or have examined witnesses,” and the right to an interpreter and said that “it is difficult to see how he should exercise these rights without being present.” *Colozza v. Italy*, ECHR Judgement, 12 Feb. 1985, Series A No. 89 at para. 27.

⁵ Both the Special Court for Sierra Leone, and the International Criminal Tribunal for the former Yugoslavia have recognized exceptions to the general prohibition on trials *in absentia*, and have allowed trials to proceed against accused who are already in their custody but who have refused to attend subsequent proceedings.

Cambodians. It is important that the ECCC satisfy public demands for justice, yet this also involves the rights of victims to confront accused persons. However, even in jurisdictions where the majority of indicted persons were outside the jurisdiction and the court had no enforcement power to compel their attendance (such as was the case in Timor-Leste) this did not affect the prohibition of *in absentia* trials. On the other hand, to proceed with trials *in absentia* may significantly detract from the legitimacy of the ECCC. One of the primary reasons that the International Military Tribunal in Nuremberg was criticized for dispensing “victors’ justice” was its inclusion of a trial *in absentia*.⁶ More relevantly, while trials *in absentia* may have a level of legal familiarity in Cambodia, in the context of past crimes they are also strongly associated with the *in absentia* trials of Pol Pot and Ieng Sary before the 1979 Peoples’ Revolutionary Tribunal, which have been widely discredited as political show trials. Similarly, the complexity of the law and facts in cases of serious crimes also means that if the accused is not present to mount a full defense, there is a risk that the Prosecution’s case will not be fully tested in proving guilt beyond a reasonable doubt and can therefore be subsequently questioned. *In absentia* trials are frequently used for political purposes and the ECCC should avoid any practice that allows for the possibility or suggestion of such politicization. It is essential that the ECCC set a positive example for perceptions of fairness and distinguish itself from past efforts that may have left victims inherently dissatisfied.

Second, will trials *in absentia* contribute to or detract from the efficient progress of the ECCC’s work at a practical level? One of the primary arguments in favor of permitting *in absentia* trials in a court with a limited lifespan, such as the ECCC, is to ensure that accused persons cannot frustrate the work of the court by simply avoiding arrest until the court’s mandate has ended. However, although the essential safeguard of allowing a retrial mitigates against this, the limited budget and time estimates for the life of the ECCC would be completely unfeasible if a retrial or trial *de novo* was required where an accused is arrested towards the end of the ECCC’s work. A retrial may involve recalling witnesses, which may raise the potential risk of retraumatizing victims. For all of these reasons, allowing trials *in absentia* on grounds of ensuring the ECCC’s efficacy may be counterproductive. Therefore, even after balancing the competing policy factors, such trials should not be permitted.

II. PROTECTION AND SUPPORT OF VICTIMS AND WITNESSES (RULES 13, 26, 27, 28, 29, 30, 33 AND 34)

As a whole, the draft Internal Rules demonstrate a commitment to protecting the rights and interests of victims of the crimes within the ECCC jurisdiction through allowing for their participation in the process and their right to seek reparation, subject to balancing these with the fundamental rights of accused persons. The ICTJ commends the inclusion of references to the rights and interests of both accused persons and victims in the statement of fundamental principles in draft Rule 26. Rule 26(1)(c) should, however, clarify that the obligation to keep victims informed relates both to their rights as well as to the progress of cases.

The participation of victims in the ECCC proceedings is also set out extensively in the draft, and the ICTJ does not offer substantive comment at this stage on the provisions of Rule 27 other than to note that the IRs should confirm that the statute of limitations for civil claims will be the same as that for the criminal offences within the ECCC jurisdiction. Of greater concern, however, is the adequacy of the provisions relating to protection and support of both victims and witnesses. Article 33(5) of the amended ECCC Law provides that “[t]he Court shall provide for the protection of victims and witnesses. Such protection measures shall include, but not be limited to,

⁶ One accused, Bormann, was tried in his absence pursuant to Article 12 of the IMT Statute.

the conduct of in camera proceedings and the protection of the victim's identity." Article 23 of the Agreement between the United Nations and the Royal Government of Cambodia reiterates this provision.

Based upon the present draft, the various rules dealing with victims and witnesses are not sufficiently clear as to which part of the ECCC will be responsible for implementing this obligation. It is essential that the Internal Rules clarify how protection and support for the victims and witnesses will occur. Draft Rule 34(3) refers to consultation between the judges and "the Victims and Witnesses Unit." However, no such unit with responsibility for witness protection is contained in the Draft. Draft Rule 13 refers only to a Victims Unit, but it is aimed primarily at facilitating victim participation in proceedings as civil parties, including legal representation and advocacy of victims' interests, along similar lines as the assistance provided to suspects and accused persons by the Defence Office.⁷

To this end, the proposed role of the Victims Unit is quite different from the protection and support functions that victims and witnesses units now perform in many other international and internationalized courts, such as the ICTR, the ICTY and the Special Court for Sierra Leone. These functions include not just physical safety, but other measures to ensure that witnesses are appropriately supported so that they can provide the best possible evidence before the court. The ICTJ recommends that the IRs should provide for the establishment of a Victim and Witnesses Unit within the Office of Administration that offers support and protection to all witnesses and victims who appear before the ECCC, including provision for appropriate measures to support those who fall within this category. Such measures may include psychological support, medical support, and accompaniment to court during the provision of testimony, as well as debriefing afterwards. A particularly important aspect of this includes the commitment to providing specialized staff with training in dealing with survivors of trauma, as well as those with specialized experience in dealing with female and child victims.⁸ The matter of providing assistance to victims who seek to participate as civil parties should be maintained but in a separate office.

It should also be noted at the outset that not all witnesses who are called before the ECCC will be victims. In order to prove the nature of command structures for cases of superior responsibility for serious crimes, some of the most critical evidence may come from lower level Khmer Rouge cadres, or even from those who may be potential suspects themselves. Similarly, many witnesses who may be in need of the greatest levels of security protection may in fact be those who can testify for the defense.⁹ A comprehensive support and protection program would therefore require managing the necessary transport and accommodation requirements of these various groups. While Draft Rule 34(1) suggests the security function will be spelled out in greater detail in the "the supplementary agreement on security and safety and the relevant Practice Directions," as

⁷ In relation to the two proposed options of selecting counsel to represent victims and accused persons, ICTJ recommends adopting the list system to ensure transparency in the process.

⁸ For example, Rule 16 of the Rules of Procedure and Evidence of the International Criminal Court explicitly provides, *inter alia*, that the Registrar is responsible for taking gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings; informing victims and witnesses of their rights under the Statute and the Rules, and of the existence, functions and availability of the Victims and Witnesses Unit; and ensuring that they are aware, in a timely manner, of the relevant decisions of the Court that may have an impact on their interests, subject to provisions on confidentiality.

⁹ A recent study by the Documentation Center of Cambodia found that those who testify for the defence are seen as a particularly vulnerable target for revenge attacks within their communities: "Takeo – A pilot fear assessment with respect to possible witnesses of the Extraordinary Chambers in the Courts of Cambodia Project," October 2006.

described above there is a difference between security and support in a broader sense. Furthermore, the ICTJ understands that the security function is likely to rest solely with the Royal Government of Cambodia. While both the ECCC Law and Agreement state that the Royal Government of Cambodia shall take all necessary steps to ensure the safety and protection of persons referred to in the Agreement, this does not absolve the ECCC as a whole of its duty to properly discharge its obligation to protect the interests of both victims and witnesses. There is a particular duty upon the ECCC in this regard as concerns about the lack of adequate protection for victims and witnesses have been raised throughout the process of negotiations for the ECCC's establishment.

The Internal Rules are the appropriate source in which to clarify this obligation, and if adequate funds and personnel to implement the provisions are not available, they should be sought as a matter of urgency. In order to give meaning to draft Rule 34(6), the Director and/or Deputy Director of Administration should be explicitly granted the power to negotiate witness relocation agreements with other states. Failure to address this issue will pose serious risks to the ECCC's ability to foster trust in the proceedings among victims and potential witnesses, which in turn may undermine both its legitimacy and effectiveness, particularly in relation to leaving a positive legacy in Cambodia.

III. REPARATIONS (RULE 27)

One feature of the draft Internal Rules that deserves further examination is the power of the ECCC to award reparations for injury suffered by civil parties. Draft Rule 27(12) provides that reparation can be made for injury suffered by Civil Parties, including by awarding proportionate damages, and that “the Chambers may also award collective or symbolic reparation.” This provision attempts to reconcile the right of victims under existing Cambodian criminal procedure to make civil claims in criminal proceedings with the particularities of the ECCC. Neither the ECCC Law nor the ECCC Agreement specifies the way in which this process shall apply, so to this end it is commendable that the draft Internal Rules have attempted to do so.¹⁰ This is particularly important in part to address the fact that many Cambodian victims may be expecting to participate in the ECCC process and to seek civil awards of compensation for the harm they have suffered. Furthermore, the inclusion of the proposed rule reflects progressive developments in international law regarding the right to a remedy for victims of serious crimes.¹¹ It may be useful therefore to consider briefly the larger context from which the reference to reparations has emerged.

Reparations as a form of justice for victims and a way of holding accountable those responsible for crimes may take a range of forms, individual or collective, material or symbolic, and may be aimed at restitution, rehabilitation, compensation, guarantees of non-repetition and satisfaction.¹²

¹⁰ Relevantly, Article 39 of the ECCC Law states that “In addition to imprisonment, the Extraordinary Chamber of the Trial Court may order the confiscation of personal property, money and real property acquired unlawfully or by criminal conduct. The confiscated property shall be returned to the State.” The ICTJ notes that there still appears to be a gap between this provision and the procedures contained in the Draft IRs which must be resolved.

¹¹ See in particular the adoption by the UN General Assembly of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, A/RES/60/147, 21 March 2006 (“Basic Principles”), and the *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, E/CN.4/2005/102/Add.1, 8 February 2005.

¹² See the *Basic Principles*, *supra* note 11, for explanations of these different categories. For guidance on the implementation of different approaches to reparations, see the forthcoming policy document from the

They may vary from large-scale state legislative programs to individual court-ordered awards of financial payments. This paper is obviously not the appropriate place to provide greater detail on the theory and past practice of efforts in the field of reparations for gross human rights violations.¹³ However, the ICTJ's extensive work in the area of reparations has demonstrated some key points that should be taken into account in examining the potential feasibility and impact of draft Rule 27.

First, there are particular practical challenges that distinguish the claims of civil parties for compensation in ordinary crimes cases from cases on the scale of those that are within the jurisdiction of the ECCC. The draft Internal Rules have gone a considerable way to address the challenges of managing the potentially enormous number of victims who may seek to join the ECCC proceedings as civil parties, by providing for collective and representative claims to be made through "victims associations." This is a commendable inclusion in the draft Internal Rules. In the context of international criminal procedure, only the International Criminal Court (ICC) has incorporated a similar feature into its proceedings.¹⁴ However, the ICC system is also premised on the establishment of a Trust Fund for Victims that may have greater flexibility in awarding assistance and reparations to victims than is likely to be possible in cases that come before either the ICC or the ECCC.¹⁵ Further discussion may be warranted to examine whether a similar process may be useful to complement the ECCC's work in the area, in which case the ICTJ reserves the right to provide more detailed comment.

Second, at a more conceptual level it is important to sound a note of caution that the ECCC should take into account in attempting to provide reparations through such a mechanism. Awards to particular groups of victims as civil parties may be perceived as fragmenting the broader universe of victims of the Khmer Rouge regime, thereby diminishing the aggregate reparatory effect of the awards even if they are made collectively. The meaning of "collective reparations" should be clarified, such as whether it aims to repair broader societal harm, or if it represents an award to a collective of individual civil parties.¹⁶ The crimes that are the main subject of the ECCC's jurisdiction are by definition massive and systematic. Yet not all victims of the crimes

UN Office for the High Commissioner for Human Rights, *Rule of Law Tools for Post Conflict States: Reparations*.

¹³ For extensive materials on the history of reparations, see *The Handbook of Reparations*, Pablo de Greiff, ed. (Oxford: Oxford University Press, 2006), which collects some of the results of a massive research project on reparations programs undertaken by the ICTJ. See also *Out of the Ashes. Reparation for Victims of Gross and Systematic Human Rights Violations*, K. de Feyter, S. Parmentier, M. Bossuyt, and P. Lemmens, eds. (Antwerp: Intersentia, 2005), and in it, Dinah Shelton's account of the process leading to the *Basic Principles* "The United Nations Principles and Guidelines on Reparations: Context and Contents." See also Bernard Buxbaum, "A Legal History of International Reparations."

¹⁴ Rule 97(1) of the Rules of Procedure and Evidence of the International Criminal Court: "Taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both."

¹⁵ For further analysis of this issue in relation to the ICC, see the ICTJ Discussion Paper, "Reparations and the International Criminal Court: A Prospective Role for the Trust Fund for Victims," by Marieke Wierda and Pablo de Greiff, April 2004. Available at:

<http://www.vrwg.org/Publications/02/ICTJTrust%20Fund%20Paper.pdf>

¹⁶ It seems unlikely that the ECCC would be able to fully define what the concept means in different settings; but its practice can identify the nuances (as mentioned above). For instance, Rule 27.8.b of the draft provides that "[w]here a group of Civil Parties is unable to choose common lawyers... [they] may request the [Victims Unit] to choose one or more common counsel for them. In that case the [Unit] shall take into account the wishes of the Civil Parties concerned and the particular circumstances of the case, and any conflicting interests within the group, as well as the need to respect local traditions and to assist vulnerable groups."

will be able to access the civil party process, not least because of the need to demonstrate “harm” that has resulted from the individual criminal responsibility of specific convicted persons as required by draft Rule 27(12). Similarly, the requirement of harm that “continues to exist” should be removed. Symbolic reparations, whether by way of memorials, public apologies, etc., may have greater potential to avoid these concerns by benefiting a larger number of victims than could be individually financially compensated, although purely symbolic gestures risk being seen as token efforts if not accompanied by material reparations.¹⁷ In enforcing the awarding of financial reparations, the likelihood of recovering assets from convicted persons in sufficient amounts to cover the number of claims may be slim. This raises the question of whether a supplementary trust fund financed by voluntary contributions may be necessary.

The ICTJ emphasizes that these cautionary notes are not offered as reason to abandon the idea of reparations in the ECCC Internal Rules, but rather to alert the Court to the importance of being aware of where additional policy may be needed to handle the complex issue of reparations. Such policy may be useful both in terms of developing transparent guidelines for the implementation of the rule and also, most crucially, in terms of managing public expectations through adequate public information and outreach.

In addressing the question of implementation, guidance could be drawn from Rule 97 of the International Criminal Court Rules which anticipates the range of complexity and challenges involved in determining appropriate awards of reparations in cases involving the most serious crimes and high level convicted persons:

(2) At the request of victims or their legal representatives, or at the request of the convicted person, or on its own motion, the Court may appoint appropriate experts to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations. The Court shall invite, as appropriate, victims or their legal representatives, the convicted person as well as interested persons and interested States to make observations on the reports of the experts.

(3) In all cases, the Court shall respect the rights of victims and the convicted person.

On the critical issue of explaining the realistic implications of the rule to the public, outreach efforts must be clear on what the process is for victim participation and reparations claims, and where the likely limits are. This is essential if the ECCC is to give meaning to the underlying rationale that its work should aim to restore the dignity of victims and re-establish trust in the rule

¹⁷ On the ECCC’s “discretion” to award “collective or symbolic” reparations, two points can be made: a) The prudent exercise of this option might be important, given that there will be victims of Khmer Rouge crimes who will not be “civil parties” because (i) the perpetrators who victimized them are dead or not charged, (ii) they are not able to join in the civil aspect, e.g. because they have no access to information on reparations or to the ECCC itself—no radio, no means of transportation, illiteracy. Symbolic reparations might include them, specially those that are “collective” in the sense of embracing either victims of the same perpetrator or victims of the same kind of violation (even carried out by different perpetrators) or “collective” in that the victims have a distinct and shared pre-violation identity that was significant in their victimization, for example Buddhists or Cham Muslims.

b) On the other hand, any “collective reparations” that might be awarded to the civil parties should not preclude reparations for victims who are unable to join as “civil parties.” In other words, it might be important to preserve victims’ right to reparations given that the “civil party”-victims association-based reparations remedy in the draft rules might be seen as similar to the “opt-out” mechanisms often used in class-action suits in certain jurisdictions.

of law. If this is not done, the ECCC could be raising unrealistic expectations that it will be unable to meet, leading to greater disappointment and compounding the suffering of victims, which in the long term would damage the credibility and legacy of the institution as a whole.¹⁸

IV. PUBLIC ACCESSIBILITY OF THE PROCEEDINGS (RULES 10(4), 26, 48, 57(6), 59, 66, 77(5), 83)

Article 34 (as amended) of the ECCC Law states the general principle that ECCC trials shall be open to the public unless exceptional circumstances exist to justify otherwise. Article 12(12) of the ECCC Agreement provides further explanation of the importance and extent of the openness with which ECCC hearings should be conducted. This states that access to the proceedings by NGOs, interested states, the media, etc., should apply *at all times* on the basis that doing so is not only in the interests of securing a fair and public hearing in accordance with international standards, but also for the *credibility of the procedure*. The reference to transparency as a fundamental principle in draft Rule 26 is to be commended for this reason.

The ICTJ recognizes the importance of preserving the integrity of a criminal investigation process, both in terms of the sensitivities of gathering evidence and also in order to ensure the safety of potential witnesses. Furthermore, it is understood that in inquisitorial jurisdictions this extends through the instruction phase until the commencement of trial. However, the ICTJ considers that in the particular context of the ECCC, there is good reason to modify this general approach from that which may apply in the case of ordinary crimes. The well-documented lack of public trust in judicial processes and the fear of politicization are two reasons behind the mixed national-international composition of the ECCC. Furthermore, the ECCC will be the first attempt in 25 years to investigate and hold accountable those accused of crimes that have defined and irreparably damaged Cambodian society. A more closed process may be viewed with far greater suspicion in such a fraught context.

The provisions in draft Rules 57(6) and 59 in which the Co-Prosecutors and Co-Investigating Judges may provide the public with selected access to information about the progress of the investigations are commendable departures from standard inquisitorial practice. These provisions, however, would be strengthened considerably if the language were obligatory rather than permissive, while still allowing discretion in the nature and amount of information provided. Furthermore, as a matter of streamlining and ensuring consistent public information practice within the ECCC, the Internal Rules should make this an explicit part of the functions of the Office of Administration in draft Rule 10(4) by amending it as follows:

Without prejudice to the authority of the Office of the Co-Prosecutors, the Office of Co-Investigative Judges, **the Defence Office and the Victims Unit** to receive obtain and provide information and to establish channels of communication in the conduct of their [judicial] functions, the Office of Administration shall serve as the official channel for both internal and external communication of the ECCC. **Procedures for the internal management of information related to the judicial and administrative functions as**

¹⁸ The ICTJ can make further materials on reparations issues available as required. As part of taking these discussions further, it might even be useful for the ECCC to determine if, on the basis of its authority, it can recommend the initiation of a separate and broader reparations program that would address victims as such rather than as litigants (“civil parties”).

well as procedures for external relations will be subject to the terms of the ECCC Practice Directive on the matter.¹⁹

Clarity of responsibilities for public comment will minimize the risk of unapproved public comment by ECCC judicial or administrative officials, which could lead to perceptions of bias.

The ICTJ believes that the discretion provided to the Co-Investigating judges in draft Rule 59(3), to grant limited access to non-parties to the proceedings during the judicial investigation, sets a positive example compared to existing Cambodian criminal procedure. Draft Rule 77(5) should be amended in a similar way in relation to the proceedings before the Pre-Trial Chamber, particularly in light of its expanded role in hearing pre-trial challenges to the indictments and jurisdiction of the ECCC.

In draft Rule 83, in addition to ensuring that the protection of victims and witnesses is a recognized exception to the general prohibition on *in camera* trial proceedings, provision should be made along similar lines in draft Rule 59(3) to allow for limited access to closed sessions for the purpose of monitoring compliance with minimum due process guarantees and human rights standards. Guidance could be found in Rule 79(C) of the Special Court for Sierra Leone Rules of Procedure and Evidence which provides that “[i]n the event that it is necessary to exclude the public, the Trial Chamber should if appropriate permit representatives of monitoring agencies to remain. Such representatives should, if appropriate, have access to the transcripts of closed sessions.”²⁰ A similar provisions were made in the trials before the Special Panels for Serious Crimes in Timor Leste, and were seen as an important means by which to reassure the public that closed sessions were being used appropriately.

V. ADDITIONAL ISSUES AND LESSONS FROM THE IRAQI HIGH TRIBUNAL

In addition to the key areas detailed above, there are a number of other important issues that deserve greater attention in the process of finalizing the Internal Rules. As it has not been possible to provide more detailed comment on these in the timeframe allowed, the ICTJ offers some preliminary comments only. The ICTJ’s view is informed not just by the comparative experiences of other international and mixed national-international courts, but also from recent lessons drawn from closely monitoring the proceedings before the Iraqi High Tribunal (IHT) in Baghdad.²¹ Despite their many and significant contextual and political differences, the IHT serves as a useful reference point for the ECCC because unlike most other tribunals tasked with

¹⁹ There could be two documents drafted and issued as Practice Directives or Administrative Instructions. The ICTJ suggests that the first document could be “Procedures for the Management of Internal Judicial and Administrative Information,” covering the way in which judicial documents are managed (levels of classification and confidentiality), documents and procedures related to victims and witnesses, and other issues as necessary. This should be decided in conjunction with Court Management and in consultation with the Public Affairs Office. The second document could be a comprehensive “Media and External Relations Policy for the ECCC,” clarifying how all internal information is externally managed and disseminated. Each of these two documents should be cross-referenced to the other where appropriate to ensure coherence (for example, how judicial documents are provided by the relevant office such as Court Management) to the Public Affairs Office.

²⁰ For applications of this Rule, see SCSL, *Prosecutor v. Norman, Fofana, Kondewa*, Case No. SCSL-2004-14-T, Order on Trial Monitoring During Closed Session, 27 October 2004 in *Digest of Jurisprudence of the Special Court for Sierra Leone*, C. Laucci (Dordrecht, Martinus Nijhoff Publishers, 2006), at 676-677 (R79-TC-10).

²¹ See ICTJ Briefing Paper, “Dujail: Trial and Error?,” November 2006, available at www.ictj.org.

adjudicating system crimes, the procedures at the IHT, like those at the ECCC, are based on a civil law or inquisitorial—as opposed to a common law—legal tradition.²²

Some additional issues that should be addressed include the following:

- *Full transcripts should be provided as part of a commitment to transparency and fairness (draft Rule 95).* The length, complexity, and politically charged nature of trials such as those before the IHT and ECCC magnify the need for each trial to have a complete transcript and reserve judges who are ideally available to attend all proceedings from the beginning. The efficiency and effectiveness of the IHT have been greatly hampered by the lack of an official trial transcript. The lack of a transcript has forced judges to become preoccupied with taking copious notes during hearings; denied judges a valuable tool for issuing opinions, decisions and judgments; and will undoubtedly hamper the appellate process because the appellants and the appellate judges will be unable to review exactly what happened during the first long and complex trial. The absence of a transcript has also severely impeded external monitoring and analysis of the IHT, making constructive criticism and outreach more difficult.
- *Transparent procedures for disqualification and replacement of judges (draft Rule 78(7)).* The draft IRs provide an extensive listing of instances in which judges may be replaced. Given the length and politically charged nature of system trials, the experience of the IHT (where four out of the five trial judges were replaced during the Dujail trial) indicates that it is likely that at least one trial judge will not be available to sit for the entire duration of the trial. As a result, appointing at least one reserve judge for all trials is important. Ideally, reserve judges should attend all the proceedings from the beginning of the trial to ensure an adequate assessment of the facts; however, a comprehensive trial transcript may help mitigate the need for such an expensive measure.
- *Greater clarity of administrative responsibilities (draft Rules 10–11).* The IHT has suffered greatly from the lack of a strong registry. Rules regarding the powers and position of key managers should be carefully drafted to prevent the inappropriate downgrading of key managerial responsibilities. The Internal Rules should specify that dossier materials should be appropriately indexed, with a unique identification key and reference to the chain of evidence.
- *Codes of conduct (draft Rule 42).* In Iraq the court had insufficient tools to discipline inappropriate behavior, relying only on the national Bar Association. The Defence Office could play a key role in this regard, as could a clear code of conduct to be signed by defense lawyers before accreditation. Similar codes of conduct should be developed for all lawyers appearing before the ECCC, as well as for judges and all court officials.
- *Greater scope in the right of the Defence to confront witnesses (Draft Rules 29(4), 30, 63(2) and 86(1)).* While it is clear that inquisitorial trials like those at the IHT or the ECCC do not emphasize live oral testimony as much as adversarial trials, the ECCC must remain aware that minimum standards and also perceptions of fairness require that the defense has

²² It should be noted of course that the jurisdictional similarities are limited as the underlying legal framework in Iraq is relatively old. It represents practice from the 1950s, rather than contemporary best practice in civil law countries.

the opportunity to confront witnesses providing important evidence against them, either at trial or during the pre-trial proceedings.

- *The need for clear rules of disclosure that follow the well-established practice of the other international tribunals (draft Rule 78(4)–(5)).* The ECCC should at least specify (and enforce) minimum time requirements for disclosure of evidence to all parties before it can be admitted at trial.
- *Parties should be permitted to confront or challenge court-appointed experts (draft Rule 36(10)).* This should be in addition to the right to seek additional expert evidence.
- *Greater clarity on the scope of admissible evidence (draft Rule 86).* Rules on the admissibility of evidence should include reference to a requirement of probative value, an explicit exclusion of evidence gathered by inappropriate means, and sufficient safeguards in relation to confessions.
- *Obligations of Investigating Judge to gather and disclose exculpatory evidence (draft Rule 58(5)).* This should be made more explicit.
- *Time limits on filing appeals (draft Rule 106).* The draft IRs provide only a very limited time for filing an appeal, which does not necessarily reflect the complexity and scale of cases likely to be heard by the ECCC.
- *Greater transparency and guidance on sentencing (draft Rule 100).* No guidance is currently provided.

VI. CONCLUDING COMMENTS

In conclusion, the ICTJ commends the ECCC's recognition of the need for broader input into the development of the Internal Rules, which will help ensure that the ECCC benefits from comparative experiences in other countries, is made more responsive to the demands of victims, and consequentially has greater positive impact within Cambodia. The decision to open the process to public input also serves as a valuable example for Cambodian legal processes. To this extent, the ECCC is also setting a benchmark for international best practice, although the time permitted for public dissemination and comment could perhaps have been extended to 21–30 days. ICTJ urges the ECCC and its Rules Committee in particular, to continue to involve external actors in providing regular input during further reviews of the procedures as they continue to develop.

As illustrated by its comments in this paper, the ICTJ believes there are important policy issues to consider in addition to the legal technicalities of the drafting process. Any procedure implemented by the ECCC must be assessed in light of its broader role to re-establish respect for judicial processes and to provide an effective remedy in response to systematic human rights violations. An important element of this is for the ECCC to avoid creating unrealistic expectations of what it is able to achieve, while ensuring its basic minimum obligations to ensure fair trials are observed and the interests of victims are protected. Any process which risks undermining respect for the rule of law will thwart the Court's efforts to fulfill this broader role. If the ECCC is to ensure that its proceedings avoid doing more harm than good to the rule of law in Cambodia, the issues raised in this document must be addressed as a matter of priority.

About the ICTJ

The International Center for Transitional Justice (ICTJ) assists countries pursuing accountability for past mass atrocity or human rights abuse. The Center works in societies emerging from repressive rule or armed conflict, as well as in established democracies where historical injustices or systemic abuse remain unresolved.

In order to promote justice, peace, and reconciliation, government officials and nongovernmental advocates are likely to consider a variety of transitional justice approaches including both judicial and non-judicial responses to human rights crimes. The ICTJ assists in the development of integrated, comprehensive, and localized approaches to transitional justice comprising five key elements: prosecution by fair trial of perpetrators, documenting and acknowledging violations through non-judicial means such as truth commissions, reforming abusive institutions, providing reparations to victims, and facilitating reconciliation processes.

The Center is committed to building local capacity and generally strengthening the emerging field of transitional justice, and works closely with organizations and experts around the world to do so. By working in the field through local languages, the ICTJ provides comparative information, legal and policy analysis, documentation, and strategic research to justice and truth-seeking institutions, nongovernmental organizations, governments and others.

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