

KEY COMMENTS AND PROPOSALS ON ECCC DRAFT INTERNAL RULES

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Key Comments and Proposals on
ECCC DRAFT INTERNAL RULES
(17 NOVEMBER 2006)

FIDH, ADHOC, LICADHO and the Collective for Khmer Rouge Victims submit to the ECCC Rules and Procedure Committee, Judges, Co-Investigating Judges and Co-Prosecutors the following comments and proposals on the ECCC Draft Internal Rules dated 3 November 2006 (the “**Draft**”).

The above organizations welcome the consultation process undertaken by the ECCC and the possibility thereby given to civil society to comment on the draft Internal Rules of the ECCC and hope that the ECCC will continue this productive dialogue including through the organization of regular expert meetings of the Rules and Procedure Committee (or other ECCC committee, as suggested below).

We consider that the general regime established in the Draft on the participation of victims is a very positive signal, which shows that the recommendations of the civil society and in particular the content of the “White Paper” issued by the Collective for Khmer Rouge Victims were seriously considered.

The following recommendations have been drafted with a view to make a positive contribution to the ongoing drafting process in particular by ensuring the effectiveness and respect of victims’ and defense’s rights and, more globally, the success of the ECCC judicial process. We are hopeful that the ECCC will provide a model for the proper treatment of suspects, charged persons, accused, witnesses and victims in the criminal process. Appropriate suggestions are included in the Draft with this respect.

As a preliminary remark we deeply regret that the recommendation included in the White Paper submitted by the Collective for the Khmer Rouge Victims² that complaints from victims could automatically trigger criminal prosecution, was not included in the Draft, even though such a mechanism is part of the current draft Cambodian Criminal Code. This was a key issue for the victims.

Given the specific nature of the ECCC, we believe that the ECCC should adopt a set of principles and guidelines regarding the prosecution strategy, the participation of victims, the protection of victims and witnesses and the regime of reparation. These guidelines would explain the limited mandate of the ECCC and contribute to limit the expectation gap that may exist between the narrowly defined jurisdiction of the ECCC and the perception of the national and international community including, in particular, the victims’ community.

The signatory organizations have identified priority issues that are developed below. Because of the limited time to prepare a coordinated presentation of our comments, we have taken the liberty to provide our detailed suggestions in the form of the attached mark-up of the Draft (Annex A).

² http://www.justicepourleCambodge.org/article.php3?id_article=53

1. Perception of the process by the public

a) the need for a clear and early outreach program

We strongly believe it is crucial that the ECCC deliver to the public and the international community a clear and coherent message on the process.

Therefore we recommend that:

- i. the Internal Rules contain an initial section outlining their purpose and essential features,
- ii. outreach missions are performed by the ECCC based on materials (booklets, presentations) outlining in accessible terms for the Cambodian population the process from the victims' and defense's standpoint in order to avoid the creation of "expectation gaps" in the public,
- iii. ECCC spokespersons be in charge of delivering a coherent message (there should be one spokesperson for the Office of Administration, one for the Co-Investigating Judges and one for the Co-Prosecutors),
- iv. civil society organizations and experts, are invited to regular meetings of the Rules and Procedure Committee (or other ECCC committee) to discuss general issues such as revisions of the Internal Rules and key ancillary ECCC regulations, reparations related issues etc,
- v. TV broadcasting of the trials is organized on national channels and on the Internet (with the usual half hour time delay to ensure protection of the parties), and that
- vi. Judges dissenting opinions be translated in all working languages and published without delay.

All trial records (minutes, video and audio) should eventually be provided to a reputable Cambodian institution for safekeeping. Access to all such records by historians and researchers should be organized.

b) the need for transparency at all stages of the proceedings

We also strongly recommend that :

- i. the prosecution policy should be transparent and that written and oral consultation with civil society be permitted to express views and concerns on the implementation of such a policy,
- ii. regular and accurate information should be published at all stages of the proceedings and in particular when a judicial investigation is initiated so that all victims may exercise their right to take civil action under the Internal Rules.

Similarly, the fact that the Draft provides (Rule 53) that decisions by the Co-Prosecutors to reject a complaint do not need to be reasoned decisions and are not opened to appeal is, we believe, potentially harmful to the process as this will inevitably appear untransparent and discretionary.

2. Ensuring the effective implementation of victim's rights : the need to establish a distinct Lawyers Unit and a Victims and Witnesses Protection Unit separated from the ECCC Defense and Victims Offices

a) Rules should not place unreasonable demands on victims

We applaud the commitment of the Draft to recognize victims as a full “party” in the ECCC proceedings. Victims’ participation will help bridge the gap between the Court and the people and will give victims a voice in this important process. Cambodian victims are struggling for justice and have been waiting a very long time to see consequences of the crimes of the Democratic Kampuchea period, and to have answers about why these crimes happened. The trial process should be responsive to their needs to the greatest extent possible.

Therefore, the ECCC needs to ensure that victims have a meaningful opportunity to participate in this historic process. The Internal Rules should allow the Court to meet victims on their own terms, by creating procedures that seek out the participation of rural, illiterate Cambodian victims.

84 percent of Cambodians live in the rural areas where there is currently little understanding of the ECCC. In addition, rural illiteracy rates are very high: 45 percent of women and 25 percent of men are completely illiterate, and 71 percent of women and 50 percent of men are functionally illiterate. 35 percent of Cambodians live on less than \$0.45 (U.S.) a day. These practical limitations on the vast majority of Cambodian victims make submitting a written application, seeking an attorney, even getting to the Court, far out of the range of possibility.

If only urban and diaspora Cambodians have the resources to participate, it can lead to the perception that the Court is for the rich, and is fundamentally unfair. One way to achieve that aim would be for the Court to staff the Complaint Registration and Case File Management Unit to seek out and record the statements of complainants and civil parties. Without such efforts, the voices of the vast majority of victims will go unheard.

b) Rules should set up an independent Victims Office...

Furthermore, given the rights granted to victims to participate in the ECCC proceedings as complainants and civil parties, the signatory organizations believe that it is crucial for the ECCC to establish a Victim’s Office on the model of the existing Defense Office. Just like the Defense Office, the Victim’s Office should enjoy complete operational autonomy, an ample operating budget and clear missions.

We understand that the initial ECCC budget requires to be amended with this respect and additional funding needs to be obtained. This is a requirement to make the process compliant with the Internal Rules and international justice standards.

c) ...and a separate Protection Unit.

The provisions of the Draft regarding the Victim’s Unit show a dangerous confusion of tasks. The same Unit or Office may not, unless expressly structured for that purpose, be in charge of setting up and implementing protection programs, assist victims’ legal representatives etc. Indeed, the expertise required to organize and implement protection and support to the victims (psychological, medical...) and to defend and promote victims rights and participation before

Courts are drastically different. Confidentiality rules also command to have separate personal, internal rules and guidelines. Maintaining one single unit in charge of both aspects would seriously compromise the process.

Therefore we recommend the creation of a Protection Unit responsible for protective and support measures for victims and witnesses. Such Unit would be established within the Office of Administration.

Since the Court will permit high levels of victims' participation, those victims should also be provided with necessary protective measures. A strong Victims and Witness Protection Unit with appropriate funding is needed to guarantee the safety of witnesses and victims. The Victims and Witness Protection Unit should have the power to undertake certain measures, such as organizing safe transportation to and from the ECCC, without seeking orders from either the Co-Investigating Judges or Chambers. The Internal Rules should also list the necessary expertise of Victims and Witness Protection Unit staff, with a special emphasis on the need for experts in psycho-social services. In addition, the Internal Rules should specify special measures for victims of sexual violence, children, elderly persons and persons with disabilities.

Suggested wording concerning the Protection Unit are contained in the attached mark-up of the Draft (Rule 14 *bis*).

d) The Lawyers Unit

As for the list of lawyers admitted to appear before the ECCC, our view is that the Defense Office and the Victim's Office should not be in charge of creating, maintaining and implementing such list. Such a duty should remain an administrative core function of a specific Unit within the Office of the Administration dealing with the admission, training, remuneration and professional conduct of both Cambodian and foreign lawyers appearing before the ECCC on behalf of both victims and defenders. This would avoid the same functions to be fulfilled by two different offices and would respect the principle of equality of arms.

Such a Unit will maintain the list of lawyers representing both victims and accused persons and shall guarantee that standards required for lawyers to be admitted on the list are consistently applied.

We consider that a list specific to the ECCC would not "*limit the rights of Cambodian lawyers to have access to any court*" (as stated in the Draft), especially if the practice directions provide for different admission criteria for Cambodian and foreign nationals, such as before the Special Panels for Serious Crimes in East-Timor. If registration with the Cambodian Bar Association were required, there should be no limitations or conditions placed on foreign lawyers except for conditions set out in the relevant practice document.

We are concerned by the fact that the Draft seems to have opted for a system where only Cambodian lawyers could act as Lead lawyers, while foreign lawyers could only act as co-lawyers. We consider that such option is not compatible with the freedom of choice of counsel recognized by the ECCC Law. If "internationalized" lawyers teams were to be imposed, then victims or defenders should be able to choose who would act as Lead lawyer, irrespective of his / her nationality or Bar.

Suggested wording concerning the Lawyers Unit are contained in the attached mark-up of the Draft (Rule 11 *bis*).

3. Reparations: Creation of a Trust Fund and role of the Rules and Procedure Committee

We consider that the provisions of the Draft relating to reparations are insufficient. Although we understand that this issue may not have been considered in depth at this stage, it is important to provide for basic elements of the reparation regime. Reparations are indeed a key element to the success of the process, which ultimately aims at national healing and reconciliation.

With respect to reparations, our suggestion is firstly that a Trust Fund be set up based on the example of the Fund existing in the context of the International Criminal Court. Such Fund would be operated independently and would receive confiscated assets, fines, as well as voluntary contributions.

Secondly, regular expert meetings of the Rules and Procedure Committee should be initiated as soon as practicable with a view to research and elaborate principles relating to reparations, in accordance with the aspiration of the Cambodian people and based on the UN *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*.

This would satisfy the need for accurate field investigations on the issue of reparation (basically what the Cambodian people feel would constitute adequate reparations) and for creativity as reparations may take many forms particularly where symbolic reparations are concerned. The signatory organizations have a great interest in such experts meetings and would welcome the possibility to make positive contributions with this respect.

Suggested wording concerning the Trust Fund are contained in the attached mark-up of the Draft (Rule 27 *bis*).

4. False testimony and other judicial actions based on the participation in the ECCC proceedings

Many victims fear retaliation through libels actions. While false testimony should be punishable, victims' participation would be adversely affected if relating proceedings did not remain within the jurisdiction of the ECCC.

Therefore, we consider that the procedures relating to false testimony should not be referred to ordinary Cambodian courts or any other "*appropriate authorities of the Kingdom of Cambodia*" but remain within the exclusive jurisdiction of the ECCC. Besides, an additional provision should prohibit judicial actions based on the participation of victims to the ECCC proceedings before the ordinary Cambodian courts.

Suggested wording concerning such provision are contained in the attached mark-up of the Draft (Rule 42 *bis*).

5. Civil Parties: individuals, associations and NGOs

We strongly believe that Civil Parties should include individuals, association made up of victims and also human rights NGOs when their purpose is to fight in favor against impunity. Victims may not always have the awareness, resources, and necessary knowledge to organize themselves in associations and will need to obtain the support of local and international NGOs to do so. Such NGOs should therefore be authorized to become Civil Parties along with those victims without restrictions. This is particularly the case in the context of the proposed Cambodian Law on Local Associations and Non-Governmental Organizations, which is viewed by many local organizations as limiting local NGO's freedom.

Additional Rules will be necessary to clarify the role of NGOs in facilitating victims participation. Cambodian NGOs are eager to assist the Court in this manner, to the extent resources permit. We request that the ECCC involve NGOs in the drafting of regulations regarding the role of NGOs in this process. In no circumstances could the NGOs be simply kept out of the process.

6. Language

These comments are solely based on the English version of the Draft. We have noted various discrepancies and inaccuracies on the French and Cambodian versions. We assume that the French and Cambodian versions will be made strict faithful translations of the English version. We attach as Annex B suggestions for Cambodian equivalents of French/English legal terms.

Annex A

Mark-up of the Draft

Annex B

French-English/Cambodian Glossary