

គណៈកម្មាធិការប្រព្រឹត្តិកម្ម នៃ អង្គការសមាគមការពារសិទ្ធិមនុស្សកម្ពុជា

CAMBODIAN HUMAN RIGHTS ACTION COMMITTEE

ADHOC - CARAM Cambodia - CCPCR - CDP - CHHRA - CKIMHRDA - CSD - CWCC - GENEROUS - HROTP - IDA
KID - KKKHRA - KKKHRDA - KSA - KYA - LAC - LICADHO - OUTREACH - PDP - PJJ - TASK FORCE - VIGILANCE
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COMMENTS ON THE ECCC DRAFT INTERNAL RULES

17 November 2006

Phnom Penh, Cambodia

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To the Distinguished Members of the Second Plenary Session of the Extraordinary Chambers in the Courts of Cambodia:

The Cambodian Human Rights Action Committee is pleased to note that the Draft Internal Rules for the ECCC (“Rules”) include a number of very positive developments that can set a good example for Cambodian law generally. CHRAC welcomes the opportunity to give comments and believes that involving civil society in this historic process will only make the Extraordinary Chambers stronger.

Given the short period of time to comment, and the Cambodian holidays, CHRAC reserves the right to make further comments at a later time. In addition, CHRAC would like the ECCC to ensure that NGOs are involved in the drafting subsequent rules or amendments to these procedures to the greatest extent possible.

CHRAC has nine main areas of concern regarding the ECCC Draft Internal Rules:

1. The additional power of the Pre-Trial Chamber
2. The nature of supermajority voting
3. Protecting defence rights
4. Ensuring meaningful victim participation, protection and reparations
5. Providing widespread public access to reasoned decisions of the Court
6. Preventing *in absentia* trials
7. Clarifying the role of the Constitutional Council
8. Guaranteeing high quality interpretation
9. Protecting ECCC personnel, victims, witnesses, and accused from defamation and libel actions in the Cambodian courts.

Some other comments regarding specific rules are also attached.

Finally, CHRAC notes significant differences in the English, French and Khmer versions of the Rules that were provided for comment. CHRAC is hopeful that when final rules are adopted a faithful translation will be provided.

CHRAC looks forward to working constructively with the ECCC in coming years and wishes the Plenary success in the days ahead.

1) The Pre-Trial Chamber

Rule 21 and 74. Additional Jurisdiction of the Pre-Trial Chamber

CHRAC would like to see the Chambers adopt the most streamlined procedures possible that are consistent with the ECCC Law, ECCC Agreement, and rights of the Defence.

However, CHRAC is very concerned that the current Rules allow the Pre-Trial Chamber to block cases from going forward. It would be a tragedy for justice in Cambodia if an Investigating Judge's decision to indict was blocked in a secret hearing of the Pre-Trial Chamber -- especially if this could be achieved by a minority of judges.

As such the PTC should have the power:

- To resolve disputes between the co-Prosecutors and between the co-Investigating Judges as laid out in the Agreement.
- To oversee the conduct of the investigations as set out in Rules 74.3.b - e.
- To resolve conflicts between the office of the co-Investigating Judges and the office of the co-Prosecutors about which individuals and crimes to indict. (Rule 74.2)
- To review appeals by the accused relating to provisional detention and bail. (Rule 74.3.f). But those decisions should be final and not reviewable at the Trial Chamber or Supreme Chamber (Rule 80.5). The IRs currently set out *four* levels of review over detention determinations; this is unnecessary to protect the rights of the detained.

The PTC should *not* have the power:

- To resolve jurisdictional questions related to the entire ECCC. Questions of legality and jurisdiction are of fundamental importance; they should go to the Trial Chamber with appeal to the Supreme Chamber. (Rule 74.3.a)
- To review challenges to the indictments made by the accused. It is CHRAC's understanding that the Rules require co-Investigating Judges to notify the parties when they have completed their investigation. Their file would be made available to the parties and subject to appeals. However, once the final decision to *indict* has been made, that decision should not be reviewable by *any* Chamber. Yet, CHRAC takes note of the Theory of Complex Indictments -- therefore, if the final indictment resolves multiple issues (such as the decision to not to return property to the defence) those ancillary issues can be resolved by the Pre-Trial Chamber, while the case presented in the indictment goes forward to trial.

The principle concern is that the Pre-Trial Chamber not be permitted to stop cases from going to trial.

Rule 77.5. In camera proceedings of the Pre-Trial Chamber

CHRAC urges the ECCC to adopt procedures that require the Pre-Trial Chamber to be open to the public.

2) Supermajority Voting

Rule 16, 18 and 77. Decision-making by Supermajority

In footnote 9 and Rule 77.9, the rule drafters clearly perceive the problem of having a supermajority voting system on issues other than guilt or innocence -- for non dispositive issues there are two conflicting interests set out in the Agreement: 1) the prosecution going forward and 2) the rights of the defence.

CHRAC supports the proposal that in case a supermajority of judges do not agree (on issues other than guilt or innocence), the prosecution shall proceed. The supermajority was not intended to be used as means of hindering and blocking further investigations or proceedings. CHRAC is of the opinion that the rights of the defence are protected because the supermajority voting system in decisions of guilt or innocence are weighted in favor of the defence.

3) Defence Rights

CHRAC is concerned that the Extraordinary Chambers adequately protect the rights of the defendants. NGOs in Cambodia are hopeful that this court will provide a model for the proper treatment of suspects, charged persons, and accused in the criminal process.

Rule 12. The Defence Counsel

The Rules should make clear that foreign lawyers, acting as co-lawyers, can work efficiently and independently of their Cambodian counterparts. The Rules should not require Cambodians to act as “lead” lawyers. If registration with the Cambodian Bar Association is required, there should be no limitations or conditions placed on foreign lawyers. If a list of authorized Defence Counsel is created, the Rules should specify a minimum number of people on the list in order to ensure true choice of representation.

Rule 26. Statements Obtained by Coercion

CHRAC welcomes the provisions of Rule 26.3 preventing physical coercion or threats thereof. However, the Rule should clarify whether, if such statements are obtained, they can be used for other purposes, such as indictments. CHRAC’s position is that statements obtained by coercion should not be used for any purpose.

Rule 29. Waiver of Right to Counsel.

The Rules should include a standard: that waiver of the right to counsel must be voluntary and informed.

Rule 33 and 88.1: Questioning of the Accused.

The Rules do not define “witness” and so it is not clear whether Rule 33 applies to accused who are testifying. Rule 28.4 suggests that the term “witness” does not include the accused -- which means there are *no* standards to protect the rights of the accused against self-incrimination.

The Agreement that created the ECCC explicitly stated that the ICCPR should be followed with respect to defence rights. ICCPR 14.3.g states that the everyone is entitled to the right, “not to be compelled to testify against himself or to confess guilt.”

The Rules, which permit judicial questioning of the accused, would violate this right. The accused should be told of their rights under the ICCPR, and should be allowed to refuse to answer questions posed by the judges or Prosecutors or lawyers for civil parties.

Rule 34. Secret Witnesses

Secret witnesses have often been linked to governmental abuse. Resolution of this issue calls for a delicate balancing test between the rights of the defendant and the security of witnesses. CHRAC encourages the ECCC to adopt clearer standards on the use of secret witnesses.

Rule 55. Garde à vue (Police Custody)

The Prosecutors should not be able to question suspects without the presence of their attorney; this rule permits only a 30 minute consultation period (pre-questioning). Suspects must be apprised of their right to remain silent and their right to an attorney; the attorney should be present, and available for consultation, throughout questioning.

In addition, CHRAC recommends that detainees be provided with a medical examination by right during the *Garde à vue*. Doctors can ensure respect for the fundamental obligation to prevent torture by observing the state of health of the detainee before and after detention (Article 12(2) of the Transitional Provisions; Principle 24 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment). Currently, Rule 55 does not include this guarantee; it states only that the Co-Prosecutors “may order that the detainee be examined by a doctor” without the detainee or the family being able to request an independent medical examination.

Rule 55 and Rule 60. Notification that One is a Suspect

The rules on when a suspect is notified are currently located in several places in the Rules. In order to clarify this point, CHRAC would like the Rules to adopt a specific standard. Cambodian NGOs propose that, “A person has a right to be informed, prior to being questioned *or* as soon as it becomes evident in the course of questioning, that there are grounds to believe he/she committed a crime within the jurisdiction of the ECCC.” At that time he/she should also be informed of their rights to competent counsel free of charge and their right to remain silent.

CHRAC’s position is that this language is required in addition to the protections for witnesses spelled out in Rule 33.

Rule 80. Provisional Detention of an Accused

Paragraph 1, permitting provisional detention, should be subject to subrule 2, *and* Rule 66.6.b (the total period of detention cannot exceed 3 years).

Rule 86. Rules of Evidence

Paragraph 2 says that “Any decision shall be based only on the evidence in the case file, or that has been before the Chamber and subjected to examination.”

It is unclear whether information in the case file (that the defence was not present for/could not confront) can be the basis of decision (Rule 59.8). If so, that would contravene the stated aim of having an “adversarial” process (Rule 26.1.a), and the ICCPR 14.3.e. The Human Rights

Committee General Comment on this Rule (14.3.e) states that: “This provision is designed to guarantee to the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.”

The right (ICCPR 14.3.e) to confront witnesses may not be satisfied at the investigation stage in these proceedings because the Rules permit the Co-Investigating Judges to first interview/notify/charge the accused after the bulk of the investigation is complete.

Rule 88.2/ 89.2-3/108.5. Questioning Witnesses in the Courtroom

The co-Prosecutors and Defence lawyers should have the right to fully question the witnesses and accused (if called by the Defence) without seeking the permission of the court. This is a necessary element of an adversarial process (Rule 26.1.a).

It would contravene the interests of justice to give the President of the court the sole power to limit questioning. As a last resort, the Rules should allow the chamber to review questions and should permit questions to go forward absent a supermajority ruling to block the questions.

Rule 109.4: Effects of the Appeal

The Rules currently allow the Supreme Chamber to review the facts and law where the defendant has been found “not guilty” by the Trial Chamber; the Supreme Chamber can make the first determination of guilt without the possibility of appeal. This violates ICCPR 14.5 which reads that, “Everyone convicted of a crime shall have the right to his conviction and sentence reviewed by a *higher* tribunal according to law.” (emphasis added).

Disclosure of Exculpatory Evidence

The Rules should specifically note the requirement that the Prosecution turn over all exculpatory evidence to the defence at the earliest possible time.

Double Jeopardy

The Rules should specifically note that a defendant cannot be tried twice for the same offense by the same government.

Ineffective Assistance of Counsel

A defendant is entitled to an attorney with sufficient time and means to prepare his/her defence. Generally, the law does not require that the defendant’s counsel be given equal opportunity to prepare a defence as long as the defendant is provided with effective assistance of counsel. Therefore, ineffective assistance of counsel should be recognized as grounds for appeal -- in order to protect the equality of arms.

Self-Representation

The Rules should specify whether a defendant can represent himself/herself. The Rules should specify a standard for judging the competence of the accused. The Rules should also permit the assistance of counsel (by choice of the accused) in cases where the accused is representing himself/herself.

4) Victim Participation, Protection and Reparations

CHRAC applauds the commitment of the Rules to involve victims in the Extraordinary Chambers. Victim participation will help bridge the gap between the court and the people and will give victims a voice in this important process. Cambodian victims have been waiting a very long time to see consequences for 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.

However, CHRAC wants to ensure that victims have a meaningful opportunity to participate in this historic process. Therefore, the complaint procedure and the victims' participation through civil party action need to be reconsidered.

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.

Rule 27. Civil Party Action by Victims

The civil party system, as laid out in the Rules, does not provide a meaningful opportunity for victims to participate in the process. The 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.

84 percent of Cambodians live in the rural areas where there is currently little understanding of the ECCC. In addition, 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 can make it difficult for victims of these atrocities to participate in the ECCC process. The 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. This should be among the tasks of the Victim's Unit (discussed in further detail).

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.

Rule 27.9 Victims Associations

Rule 27.9 allows groups of victims to participate as civil parties. CHRAC welcomes this Rule. However, it should be made clear that these associations would not be required to register with the government, and should not be subject to the proposed Cambodian Law on Local Associations and Non-Governmental Organizations, which is viewed by many local organizations as limiting the freedom of local associations.

Rule 27.12 Creation of a Trust Fund and Procedures for the Administration of the Fund

We consider the provisions of the Rules relating to reparations to be unclear and insufficient. The reparations process is a key element to the success of the process which ultimately aims at national healing and reconciliation.

CHRAC encourages the ECCC to consider a Trust Fund on the model of the ICC. In addition, the Court should attempt to enter into a memorandum of understanding with the government that confiscated assets will be placed in the Trust Fund (in light of Article 39 of the Law on the Establishment of the Extraordinary Chambers).

In addition, a meeting of the Rules and Procedure Committee (to be initiated as soon as practicable) should research options for administering the Trust Fund and set up a “think tank” for elaborating principles relating to reparations. This “think tank” should be guided by the aspirations 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*.

Rule 14. Complaint Registration and Case File Management Unit

As noted above, it is unrealistic to think that a representative number of victims will be able to write complaints, find lawyers, or deliver their complaints to the court. Other procedures that simplify the ability of victims to communicate with the court should be considered. CHRAC’s proposal is spelled out below, regarding the Victims Unit.

Rule 13, 14 and 34. The Victims Unit

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 Unit on the model of the existing Defence Office. Just like the Defence Office, the Victim’s Unit should enjoy operational autonomy, an ample operating budget and clear missions.

We understand that the initial ECCC budget will need to be amended in this respect and additional funding needs to be obtained. However, these changes are required in order to comply with the Rules.

In addition, Cambodian NGOs note that there are two very different functions that will need to be accomplished to adequately involve, support and protect victims. As such, CHRAC recommends that the unit be divided into two components.

Creation of a Victim Participation Unit:

Encouraging true, representative victim participation should be among the highest priorities of the Extraordinary Chambers. If only wealthy, literate, urban Cambodians are able to participate it could seriously damage the legitimacy of the court for the rest of the population.

Therefore, the Victims Unit noted in Rule 13 should be specifically tasked with going out into the provinces to register and record complaints and civil party applications from victims. The possibility of permanent Victim Unit offices in the provinces should also be discussed. This Unit should be coordinated (or combined) with the work of the Complaint Registration Unit (Rule 14).

Their main function should be linking the work of the Court to majority of Cambodians who live outside cities and have limited ability to reach the Court on their own.

Also, because there is no functioning postal system, both units would have to coordinate responses from the court back to the people. Significant resources will be required to allow these units to function properly.

Furthermore, if victimization is seen as being tied to a right of compensation, there is a high likelihood of opportunistic behavior: scams seeking payment in exchange for filing a petition for compensation or filing false claims. Planning for how to manage these problems should begin now.

Victim's Protection Unit.

We recommend the creation of a Protection Unit responsible for protective and support measures for victims or victims and witnesses. Such Unit would be established as part of the Victims Unit within the Office of Administration.

If the Court does permit high levels of victims' participation then those victims should also be provided with necessary protective measures. A strong Protection Unit with appropriate funding is needed to guarantee the safety of witnesses and victims.

The 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 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 Rules should set out special measures for victims of sexual violence, children, elderly persons and persons with disabilities.

NGO Involvement:

Additional Rules will be necessary to clarify the role of NGOs in facilitating victim participation. Cambodian NGOs are eager to assist the court in this manner, to the extent resources permit. CHRAC strongly encourages the ECCC to engage NGOs in drafting these regulations.

5) The Form and Publication of Judgments

Rule 100: Form of the Judgment

CHRAC welcomes the decision of the ECCC to require that judgments of the Chambers include the findings, setting out the facts and legal reasons supporting the decision, in addition to the disposition of the Chamber. CHRAC hopes that this will help illuminate the history of Cambodia.

However, CHRAC strongly suggests that the same should be required of dissenting judges, judges who dissent on the reasoning but concur in the overall disposition, and all situations where the Chamber is unable to reach a disposition. Rule 100.2 should be modified to say that "where there is no unanimity, a judge *must* write the facts and legal reasons supporting their decision in a separate or dissenting opinion, or sign the opinion of another judge..."

The interests of justice in Cambodia require that the reasoning of all of the judges is known to the public, particularly for those judges disagree with the disposition of the Chamber, or fail to reach a supermajority.

Rule 101. Announcement of the Judgment at a Public Hearing

The announcement at a public hearing will be important. But CHRAC anticipates that the judgment (and possible separate or dissenting opinions) in these cases will be long. The Rules should also require the Chambers to publish their opinion and make it available to the public and NGOs within 24 hours of the announcement of the judgment at the public hearing.

Disposition by Confession

CHRAC recognizes that guilty pleas are not a part of normal procedure in civil law systems, although other international tribunals have accepted them. Nevertheless, where a case is resolved because the accused had admitted to the crime, the accused should be required to allocute to the full extent of the crimes. No confidentiality agreements, relating to confessions, should be accepted.

In addition, in conformity with international standards, the judges of the Chambers should be required to satisfy themselves that the statements of the accused were both knowing and voluntary.

6) *In Absentia* Trials

Rule 79: In Absentia Trials

CHRAC opposes the use of *in absentia* trials in the ECCC. Cambodian NGOs are aware that there are some instances where these sorts of trials are permitted. In addition, NGOs are aware that there is always a possibility that one or more of the potential defendants could flee the country, possibly to a non-extradition state. And, of course, this would be a tragedy for justice in Cambodia and for humanity.

However, CHRAC opposes the use of these trials at the ECCC because they will undermine the credibility of the court, and will not set a good example for the functioning of the ordinary courts. *In absentia* trials can be perceived as being political in nature, and lacking appropriate fairness guarantees.

7) Constitutional Council

Currently, the Rules say nothing about how constitutional issues will be resolved. The Rules should explicitly note that the ECCC has the power to resolve constitutional issues, and that those issues need not be referred out to the Constitutional Council.

The Extraordinary Chambers is an *extraordinary* court within the courts of Cambodia -- and, as a result, there will need to be allowances for this process to function properly. It is not appropriate for issues before the Chambers to be referred out to other Cambodian courts, including the Constitutional Council.

CHRAC recommends that, in addition to modifying the Rules, the ECCC enter into a memorandum of understanding with the Constitutional Council regarding the resolution of constitutional issues.

8) Interpretation

Rule 35. Interpreters

High quality interpretation will be one of the keys to the success of the ECCC. Suspects, charged persons, the accused, witnesses and victims should all be apprised of their right to interpretation before questioning begins. In addition, Rule 35 should be changed to say that, “In case of need, the Co-Prosecutors, Co-Investigating Judges, *Defence Counsel, or victims’ counsel* shall use interpreters. Any *suspect, charged person, accused, witness, or party shall be* provided with an interpreter where *requested.*”

9) Protecting ECCC Personnel, Victims, Witnesses, and Accused from Defamation and Libel Actions in the Cambodian Courts

In order for the ECCC to function properly, everyone involved must feel free to speak. In particular, victims and witnesses should not have to fear retaliation by defamation and libel actions. While false testimony should be punishable, victims’ participation would be adversely affected if related proceedings did not remain within the jurisdiction of the ECCC.

Therefore, at the very least, the Rules should adopt a procedure ensuring that cases of false testimony or perjury would not be referred to ordinary Cambodian courts or any other authorities in the Kingdom of Cambodia, but that all such cases would remain within the exclusive jurisdiction of the ECCC. Other measures to ensure the freedom of expression of ECCC personnel, victims, witnesses, and accused would also be welcome.

Other Suggestions:

Rule 10: The Office of Administration

This Rules strikes a good balance between judicial leadership of the court process and the role of the Office of Administration. However, the Rules should also underline the neutrality of the OoA, and include the Office of the Principal Defender and the Victim’s Unit as entities to be assisted.

Rule 19. The Judicial Police

The second sentence of first paragraph should be re-written slightly to say that: “They carry out inquires *personally* under the sole instructions..”. It should be clear in the rules that Judicial Police work for the court, and cannot delegate their tasks to others working under them. Others will not have the training the court will provide Judicial Police to ensure the integrity of the process. See also Rule 65.

Remote Participation

All of the sections that permit the remote participation of judges should note that remote participation will only be allowed in exceptional circumstances. Judges need to be present to properly confer with one another.

This could be fixed by modifying Rule 22 to say that Judges may participate remotely for a short period, but for no more than five consecutive sitting days.

Rule 33. Right against Self-Incrimination of Witnesses

Rule 33.b should be mandatory, not discretionary where compelled testimony of witnesses is sought.

Rule 39. Interference with the Administration of Justice

Rule 39.2.a is not clear. What does “deal with the matter summarily” mean? And part (b), instigating proceedings, in which Chamber?

Contempt procedures need to be spelled out more, with clearly articulated standards.

Rule 53. Exercising Public Action

The normal Cambodian courts give the complainant the right to appeal (to the Appellate Court) against the decision of the Co-Prosecutors not to charge. The Rules do not foreclose this option, or provide an alternate appeal mechanism. The current procedures only deal with the right of the accused in Rule 74.g. CHRAC’s position is that there should be no appeal of the decision not to make an introductory submission.

Rule 61. Interview of a Charged Person -- Impending death of the Charged Person

This seems unnecessary and creates too much potential to be abused. If a charged person wants to make a death bed statement, certainly those in the room (including court personnel) can record it. But no charged person should be questioned without the presence of an attorney if one is requested.

Rule 86. Protecting Confidential Relationships

Attorney-client privilege should be respected throughout the proceedings. Standards setting out that privilege should be included in the Rules.

In addition, doctor-patient confidentiality should be protected, particularly in the area of mental health. This is particularly important for victims who participate as witnesses in the trial -- other tribunals have encountered problems where psychological records have been used to impeach witnesses who suffered from serious crimes. The ECCC should protect the confidentiality of these documents in order to respect the privacy of victims and to encourage victims to access psychological services.

Finally, other confidential relationships (including marital relationships) should be protected as well. It seems that Rule 28 is attempting to partially manage this concern, but the effect of the Rules is unclear. Soliciting unsworn testimony could violate the rights of the defence in some instances.

Rule 91. Additional Investigations by the Trial Chamber

Current Cambodian procedure does not allow judges who have acted in an investigative capacity to rule on the merits of the case. This seems to be based on policy consideration that investigating can color a judge’s objectivity. As such, Rule 91 should be modified to send requests for additional investigations back to the Co-Investigating Judges.

Creation of a Lawyers Unit

CHRAC is interested in ensuring that Defence Counsel and Victims Lawyers are subject to equivalent selection criteria, receive equivalent pay, provided equivalent training, and meet the same standards of professional conduct. Creation of a Lawyers Unit, within the Office of Administration, to manage these issues would help ensure the highest quality representation for all concerned.

We consider that setting criteria specifically for 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.