

MEMORANDUM

To: Secretariat of the Rules and Procedure Committee
From: Sarah Thomas, Legal Associate, Documentation Center of Cambodia
Date: November 16th, 2006
Re: Comments on ECCC Draft Internal Rules

You have invited comments on the ECCC Draft Internal Rules (the “Draft Rules”) of November 3rd, 2006. While constituting a clear and comprehensive consolidation of applicable Cambodian procedure in the context of the Extraordinary Chambers, the Draft Rules fail to address definitively a number of important issues. I outline my concerns below.

1. Failure to Clarify Statute of Limitations for Civil Actions

The civil party procedure, as provided for in Rule 27 of the Draft Rules, provides an opportunity for victims to participate in the process of holding to account senior leaders and those most responsible for the atrocities of Democratic Kampuchea and/or to seek reparation of injury caused by such persons through a civil party action. As required by the ECCC Law¹ and the Agreement,² the inclusion of the civil party procedure accords with existing procedures in force in Cambodia. In light of the fact these atrocities were perpetrated some thirty years ago, any discussion of civil actions by victims would, however, be incomplete without consideration of the applicable statute of limitations.

Regrettably, the Draft Rules fail to stipulate the statute of limitations applicable to civil actions. Rule 2(2) of the Draft Rules provides: “[w]here...a question arises which is not addressed by these IRs, the Co-Prosecutors, Co-Investigating Judges or the Chambers shall decide in accordance with Article 12.1 of the Agreement and Articles 20,³ 23,⁴ 33⁵ or 37 of the ECCC Law...” The relevant Articles of the

¹ Articles 20, 23, and 33 of ECCC Law.

² Article 12(1) of the UN/RGC Agreement: “The procedure shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards., guidance may also be sought in procedural rules established at the international level.”

³ Article 20 of ECCC Law: “The Co-Prosecutors shall prosecute in accordance with existing procedures in force. If these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards, the Co-Prosecutors may seek guidance in procedural rules established at the international level.”

⁴ Article 23 of ECCC Law: “All investigations shall be the joint responsibility of two investigating judges, one Cambodian and another foreign, hereinafter referred to as Co-Investigating Judges, and shall follow existing procedures in force. If these existing procedures do not deal with a particular matter, or if there is a question regarding their consistency with international standards, the Co-Investigating Judges may seek guidance in procedural rules established at the international level.”

Agreement and the ECCC Law provide that existing domestic procedures in force are to apply, unless such procedures fail to deal with a particular matter, are inconsistent with international standards or there is uncertainty regarding their interpretation or application.

Unfortunately, the position of Cambodian law on the statute of limitations applicable to civil actions is ambiguous, largely due to the multitude of potentially applicable laws. Currently applicable with respect to criminal offenses is the Penal Code of 1956 and with respect to criminal procedure are the State of Cambodia Law on Criminal Procedure of 1993 (“SOC Law”) and the United Nations Transitional Authority in Cambodia Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia During the Transitional Period (“UNTAC Provisions”). In addition, there exists a Draft Code of Criminal Procedure and a Draft Penal Code.

Both the currently applicable SOC Law and the UNTAC Provisions fail to address the statute of limitations for civil actions. The Penal Code of 1956 does, however, provide that the statute of limitations for a civil action stemming from a crime runs parallel with that of the criminal offense (Article 110, Penal Code of 1956).⁶ As existing Cambodian procedures are to apply, the statute of limitations for civil actions arising from crimes committed by senior Khmer Rouge leaders should mirror the statute of limitations for the crimes. If this remains the procedure in force, the statute of limitations may allow civil actions.

If Article 110 of the Penal Code of 1956 applies, civil actions for reparations for damage arising from those crimes within the jurisdiction of the Extraordinary Chambers remain a theoretical possibility. Articles 4 and 5 of the ECCC Law provide that no statute of limitations applies to the crimes of genocide, crimes against humanity and war crimes.⁷ An extension of 30 years applies to the statutes of limitations of the crimes of homicide, torture and religious persecution, as set forth in the 1956 Penal Code (Article 3, ECCC Law).⁸ As such, civil actions for damages arising from these crimes may remain possible in theory.

⁵ Article 33 of ECCC Law: “The Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses. If these existing procedure [sic] do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international stand, guidance may be sought in procedural rules established at the international level.”

⁶ Article 110 of Penal Code of 1956: “When the period mentioned above expires, the statute of limitations of the civil party’s action for compensation also expires at the same time as that of the criminal action.”

⁷ Article 4 of ECCC Law: “The acts of genocide, which have no statute of limitations, mean any acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group...”; Article 5: “Crimes against humanity, which have no statute of limitations, are any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds...”

⁸ Article 3 of ECCC Law: “The statute of limitations set forth in the 1956 Penal Code shall be extended for an additional 30 years for the crimes enumerated above, which are within the jurisdiction of the Extraordinary Chambers.”

Worryingly, the judges could reach a very different conclusion, however, if the National Assembly promulgates the Draft Code of Criminal Procedure and/or the Draft Penal Code. The Draft Code of Criminal Procedure provides that the statute of limitations for a civil action shall expire “in accordance with the rules provided for in the Civil Code” (Article L.131-14, Draft Code of Criminal Procedure).⁹ Similarly, the Draft New Penal Code provides that the statute of limitations of civil obligations arising from crimes expires in accordance with provisions of the Civil Code (Article 1251-4, Draft Penal Code).¹⁰

As Cambodia lacks a Civil Code as such, reliance upon the statute of limitations provided therein would likely cause some uncertainty. The law currently applied in civil cases, Decree Law 38, provides for a statute of limitations of 5 years for claims based on breaches of contractual obligations and 3 years for those based on non-contractual obligations (Articles 25 and 135, Decree No. 38).¹¹ The Draft Civil Code of Cambodia provides for a similarly restrictive statute of limitations.¹² As such, if Draft Code of Criminal Procedure and/or the Draft Penal Code apply and the statute of limitations for civil actions mirrors that applicable in civil cases, civil actions would be precluded.

The ambiguous position of Cambodian law on the statute of limitations applicable to civil actions causes considerable uncertainty as to whether civil actions by victims are statute-barred. **The Rules and Procedure Committee must resolve this ambiguity by stipulating in the Draft Rules the statute of limitations applicable to civil actions.** If the Rules and Procedure Committee fails to unequivocally stipulate the applicable statute of limitations, it is likely that potential civil parties will act in reliance on Rule 27 in preparing their claim. If civil actions are later found to be statute-barred, this may severely undermine the credibility of the Extraordinary Chambers.

⁹ Article L.131-14 of Draft Code of Criminal Procedure: “The statute of limitations for a civil action shall be expired in accordance with the rules provided for in the Civil Code. However, a civil action cannot be brought before a criminal court after the statute of limitations of the criminal action has expired.”

¹⁰ Article 1251-4 of Draft New Penal Code: “The expiration of the statute of limitations of civil obligations stemming from criminal judgment in force shall depend upon the rules of the Civil Code.”

¹¹ Article 25 of Decree Law 38: “Except where there are laws which provide differently, the statute of limitations of any liability arising from a contract shall expire if the credit has not brought action for its implementation within the period of 5 years as of the expiry date provided in the contract or, if no such date is provided, the date the contract was concluded.”; Article 135 of Decree Law 38: “Statute of limitations of claims for compensation [in cases of non-contractual liability] is 3 years.”

¹² Article 4-3-9 of Draft Civil Code of Cambodia: “The period of extinctive prescription applicable to the right to demand compensation for damages based on non-performance is five years from the time when the damage occurred.”; Article 16-0-24 of Draft Civil Code of Cambodia: “The right to demand damages on account of a tortious act shall be extinguished by prescription upon expiration of three years from the time that the injured party or such party’s legal representative becomes aware that he is entitled to seek damages against the tortious actor, or ten years from the time that the tortious act occurred.”

2. Failure to Resolve Inconsistency Between Rule 27 of Draft Rules and Articles 38 and 39 of ECCC Law

Rule 27 of the Draft Rules provides that “victims of a crime coming within the jurisdiction of the ECCC”¹³ may bring a civil action in order “to seek reparation of injury caused by...persons [responsible for crimes within the jurisdiction of the ECCC].”¹⁴ The civil action enables victims to participate in criminal proceedings as a civil complainant and to claim damage from the accused. Its inclusion in the Draft Rules reflects current Cambodian procedure, as the SOC Law provides that “[a]ny criminal offense may give rise to two separate legal actions: public action and civil action.”¹⁵ Similarly, the Draft Code of Criminal Procedure provides for civil actions.¹⁶

While provision in Rule 27 for civil actions accords with current Cambodian procedure, its application in ECCC proceedings may be disputed, as it may be at odds with Articles 38 and 39 of the ECCC Law. Article 38 of the ECCC Law provides that “[a]ll penalties shall be limited to imprisonment.”¹⁷ Furthermore, Article 39 provides that the court “may order confiscation of personal property, money, and real property acquired unlawfully or by criminal conduct,” but stipulates that such property “shall be returned to the State.”¹⁸ As such, the Draft Rules fail to clarify whether the damages claims of civil parties prevail over the claims of the State.

This uncertainty as to whether the assets of an accused are to be used to satisfy the damages claims of civil parties or are to be transferred to the State threatens to undermine the credibility of the Extraordinary Chambers. **The Rules and Procedure Committee must resolve this ambiguity by stipulating in the Draft Rules whether the claims of civil parties or the State to assets of an accused are to prevail.**

3. Witness and Victim Protection

A recent study of the Documentation Center of Cambodia (“DC-Cam”) based on a pilot witness fear assessment in Takéo Province has found that, while the vast majority of interviewees expressed a desire to participate in the proceedings of the Extraordinary Chambers as witnesses, more than half professed a fear of the

¹³ Rule 27(2) of Draft Rules: “The right to take civil action may be exercised by victims of a crime coming within the jurisdiction of the ECCC, without any distinction based on criteria such as current residence or nationality.”

¹⁴ Rule 27(1) of Draft Rules: “The purpose of Civil Party action is to participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC and/or to seek reparation of injury caused by such persons.”

¹⁵ SOC Law, Article 2.

¹⁶ Draft Code of Criminal Procedure, Article L.131-1

¹⁷ Article 38: “All penalties shall be limited to imprisonment.”

¹⁸ Article 39: “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.”

consequences of testifying.¹⁹ Interviewees indicated that they feared negative impacts upon their and their families' personal safety, upon their position within in their communities, adverse financial consequences, and unfavorable effects upon their personal living situations.²⁰ Victims wishing to participate in the proceedings likely share the same concerns.

Many interviewees expressed fear that their testimony would make them vulnerable to threats and revenge attacks. The study found fear of threats and revenge attacks to be prevalent amongst potential witnesses for both the prosecution and the defense.²¹ Potential witnesses feared threats and revenge attacks from a number of constituencies, including senior Khmer Rouge leaders, government officials, relatives of the accused, former lower cadres and victims.²² The study indicated that certain witnesses may be more vulnerable than others. Defense witnesses may face the greatest risks, as the public may perceive them to be "betray[ing] the nation."²³

Fear may constitute a significant barrier to effective witness and victim participation. In light of the risks inherent in participation, witness and victim participation should be based upon voluntary cooperation. In order to encourage potential witnesses and victims to participate, it is of paramount importance that provision is made for witness and victim protection. If it is not, there is a danger that witnesses and victims will decide not to cooperate with the Extraordinary Chambers. As such, **the Rules and Procedure Committee must provide in the Draft Rules for a strong Witness and Victim Protection Unit and clear procedures for witness and victim protection.**

Rule 63(3) of the Internal Rules provides that the Co-Investigating Judges may issue orders requesting the Judicial Police to compel witnesses to appear.²⁴ In light of the potential adverse effects of testimony upon witnesses identified in the DC-Cam study, it is of utmost importance that the Co-Investigating Judges exercise this power only when strictly necessary to the proceedings and only if adequate protection is provided to the witness compelled to appear. . As such, **the Rules and Procedure Committee must only empower the Co-Investigating Judges to compel appearance of witnesses if adequate protection is provided to witnesses.**

Rule 34 of the Draft Rules provides for measures for witness and victim protection.²⁵ Rule 34(3) and (4) provides that "the Co-Investigating may...order appropriate

¹⁹ Geerteke Jansen, Documentation Center of Cambodia, *Voices of Takéo: A Pilot Fear Assessment with Respect to Possible Witnesses of the Extraordinary Chambers in the Courts of Cambodia*, p. 45, available at <http://www.dccam.org/Tribunal/Analysis/Voices%20of%20Takeo%20A%20Pilot%20Fear%20Assessment%20with%20Respect%20to%20Possible%20Witnesses%20of%20the%20ECCC.pdf>.

²⁰ Geerteke Jansen, Documentation Center of Cambodia, *Voices of Takéo*, p. 45.

²¹ Geerteke Jansen, Documentation Center of Cambodia, *Voices of Takéo*, p. 45.

²² Geerteke Jansen, Documentation Center of Cambodia, *Voices of Takéo*, p. 45.

²³ Geerteke Jansen, Documentation Center of Cambodia, *Voices of Takéo*, p. 45-47.

²⁴ Rule 63(3) of Internal Rules:

²⁵ Rule 34(1) of Draft Rules: "The ECCC shall ensure the protection of victims who participate in the proceedings, whether as complainants or Civil Parties, and witnesses..."

measures to protect victims and witnesses whose appearance before them is liable to place their life or health or that of their family members or close relatives in serious danger,”²⁶ and provides a non-exhaustive list of such measures. Rule 34(5) provides protections for non-disclosure of witness/victim identity and fines for disclosure of protected identities. Rule 34(6) provides for “physical protection of a victim or witness in safe residence...” In this respect, the Draft Rules are to be commended.

While Rule 34 provides for witness and victim protection similar to witness protection found in the Rules of Evidence and Procedure of the ICTY,²⁷ ICTR²⁸ and SCSL,²⁹ the Internal Rules and the UN/RGC Supplementary Agreement Regarding Safety and Security Arrangements³⁰ fail to provide adequate protective measures to witnesses and victims at the pre- and post-trial stages. In order to guarantee comprehensive witness and victim protection, **the Rules and Procedure Committee must guarantee in the Draft Rules and in amendments to the UN/RGC Supplementary Agreement protective measures not only during the trials, but also at the pre- and post-trial stages.**³¹

As indicated in the DC-Cam study, provision of effective protection will help potential witnesses and victims overcome their fears of testifying and thereby encourage their participation in the proceedings. It is, however, important to note that effective protective measures will only encourage potential witnesses and victims to participate if they believe that they can do so safely. As reported in the DC-Cam study, the majority of potential witnesses currently fear the repercussions of testifying.³² In order to encourage participation, **the Rules and Procedure Committee must stipulate that its plans for witness and victim protection be disseminated in Khmer as a public announcement.**

4. Trials in Absentia

There exists a dispute as to whether accused senior leaders and those most responsible for the atrocities of Democratic Kampuchea may be tried *in absentia*. Rule 79 of the Draft Rules provides in brackets that “[t]he Accused may not be tried *in absentia*. Attached Footnote 137 explains that “[t]he international members of the committee believe that this reflects international standards (*cf. Art 14 ICCPR*) and the

²⁶ Rule 34(3) of Internal Rules: “The Co-Investigating Judges and the Chambers may, on their own motion or the petition of one of the parties or their lawyers, and after having consulted with the Victims United, order appropriate measures to protect victims and witnesses whose appearance before them is liable to place their life or health or that of their family members or close relatives in serious danger.”

²⁷ Rules 69 and 75 of the Rules of Evidence and Procedure of the International Criminal Tribunal for the Former Yugoslavia

²⁸ Rules 69 and 75 of the Rules of Evidence and Procedure of the International Criminal Tribunal for Rwanda

²⁹ Rules 69 and 75 of the Rules of Evidence and Procedure of the Special Court for Sierra Leone

³⁰ Supplementary Agreement Between the United Nations and the Royal Government of Cambodia Regarding Safety and Security Arrangements, *available at* http://www.dccam.org/Tribunal/Documents/ECCC_Safety_&Security_Arrangements.pdf.

³¹ Geerteke Jansen, Documentation Center of Cambodia, *Voices of Takéo*, p. 48.

³² Geerteke Jansen, Documentation Center of Cambodia, *Voices of Takéo*, p. 45.

spirit of the ECCC Law. Cambodian law provides for default judgements, but in the temporal context of the ECCC, there would be little prospect for retrial once the person was arrested. The national judges disagree and propose that default judgements be allowed...”

Undoubtedly, existing criminal procedure in force in Cambodia, found in the State of Cambodia Law on Criminal Procedure of 1993 (“SOC Law”) and the United Nations Transitional Authority in Cambodia Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia During the Transitional Period (“UNTAC Provisions”), does allow trials *in absentia*. Articles 4(4) and 5(b) of the UNTAC Provisions implicitly recognize the lawfulness of trials *in absentia* by providing for procedures applicable in such cases. Similarly, Articles 114, 115, 116, 119, and 178 of the SOC Law provide for and envisage trials *in absentia*.

Article 12.1 of the UN/RGC Agreement and Articles 20, 23, and 33 of the ECCC Law provide that Cambodian criminal procedure is to apply “unless such procedures fail to deal with a particular matter, are inconsistent with international standards or there is uncertainty regarding their interpretation or application.” While many civil law countries allow trials *in absentia*, international human rights treaties suggest that international standards frown upon – but do not place a blanket prohibition on – such trials. The practice of contemporary international criminal tribunals prohibiting trials *in absentia* supports that conclusion that such trials are inconsistent with international standards.

Article 14(3) of the International Covenant on Civil and Political Rights (“ICCPR”), to which Cambodia is a State Party,³³ provides that “in determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality,” and subsection (d) states that the accused has a right to be “tried in his presence.” While the Human Rights Committee has not interpreted Article 14(3) to invariably render “proceedings *in absentia* inadmissible irrespective of the reason’s for the accused person’s absence,”³⁴ it has explained that in such cases “strict observance of the rights of the defence is all the more necessary.”³⁵

Trials in absentia do not reflect the spirit of the ECCC Law. In addition to providing that procedures must be in accordance with international standards,³⁶ Article 35(d) expressly entitles the Accused as a minimum guarantee the right “to be tried in their

³³ ICCPR Status of Ratifications, available at

<http://www.ohchr.org/english/countries/ratification/3.htm> (indicating that Cambodia signed the ICCPR on Oct. 17, 1980, and ratified it on May 26, 1992).

³⁴ Human Rights Committee, *Mbenge v. Zaire*, Communication No. 16/1977, Mar. 25, 1983, para. 14, available at http://www.bayefsky.com/pdf/100_zaire16vws.pdf.

³⁵ Human Rights Committee, General Comment 13: Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (Article 14), Apr. 13, 1984, para. 11, available at

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/bb722416a295f264c12563ed0049dfbd?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/bb722416a295f264c12563ed0049dfbd?Opendocument)

³⁶ Article 12.1 of UN/RGC Agreement and Articles 20, 23, and 33 the ECCC Law.

presence and to defend themselves in person or with the assistance of counsel of their choosing...”

While the International Military Tribunal at Nuremberg allowed for trials *in absentia*, the unequivocal practice of contemporary international criminal tribunals suggests that individuals accused of international crimes may not be tried *in absentia*. As testament to this, the statutes of the ICTY, ICTR, SC-SL and ICC do not allow trials *in absentia*.

Neither the ICTY nor the ICTR allow trials in absentia. Article 21(4)(d) of the ICTY Statute and Article 21(4)(d) of the ICTR Statute state in identical terms that the accused has the right “to be tried in his presence, and to defend himself in person or through legal assistance.” While Article 17(4)(d) of the SC-SL Statute provides for the accused’s right “to be tried in his or her presence,” Rule 60 of the Rules of Evidence and Procedure provides for exceptions to this where: (i) the accused has made his initial appearance, has been afforded the right to appear at his own trial, but refuses to do so; or (ii) the accused, having made his initial appearance, is at large and refuses to appear in court.

The practice emerging from the *ad hoc* international criminal tribunals in the 1990s shaped the provisions of the Rome Statute. Article 63 provides that: “(1) [t]he accused shall be present during the trial; and (2) [i]f the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused... Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as strictly required.” The adoption of Article 63 suggests that international standards in international criminal procedure require a prohibition on trials *in absentia* with provision for narrow exceptions.

Pragmatically speaking, the Rules and Procedure Committee need look no further than People’s Revolutionary Tribunal (“PRT”) in order to see the threat that trials *in absentia* would pose to the credibility of the Extraordinary Chambers. Established pursuant to Decree Law 1, the PRT tried Pol Pot and Ieng Sary *in absentia*, finding them individually criminally responsible for genocide and sentencing them to death. Commentators have criticized the PRT for trying defendants *in absentia*. The 1999 Report of the Group of Experts for Cambodia, for example, indicated that these trials were considered “mere show trials with no regard for due process.”³⁷

Trials *in absentia* compromise the rights of the accused to be present, to defend himself through counsel of his choosing, and to examine witnesses. In order to avoid charges against the Extraordinary Chambers of unfairness, **the Rules and Procedure Committee must stipulate in the Draft Rules that accused individuals may not be tried *in absentia***. This is of utmost importance as public perception of the trials as unfair would serve to undermine the credibility of the Extraordinary Chambers. End.

³⁷ Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135, para. 43.