



Mr. Ban Ki-moon
Secretary-General
United Nations
New York, NY 10017

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February 12, 2010

Dear Secretary-General:

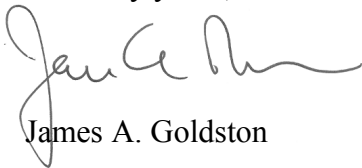
Attached, please find a memorandum encouraging you to appoint, with the utmost urgency, an ASG level advisor to the Extraordinary Chambers in the Courts of Cambodia (ECCC).

The ECCC has made great progress with the recent completion of its first trial, but that success remains dependent on its continued ability to render independent judgments and carry out fair proceedings. The Court's hard fought achievements will be undermined without sustained engagement at the highest levels with its two principal partners, the United Nations and the Government of Cambodia. A range of issues, from an effective anti-corruption mechanism, to oversight on independence, to funding, require diplomacy and skill to navigate. Each of these demands ongoing involvement by someone with the stature to command respect on all sides.

As the only court in Asia currently trying international crimes, it is critical that the ECCC succeeds on your watch. We are confident that this position will go a long way to helping the court fulfill its mandate in bringing justice to the victims of the Khmer Rouge.

Please do not hesitate to contact me if we can be of assistance.

Sincerely yours,



James A. Goldston

MEMORANDUM

Open Society Justice Initiative Memo for the Secretary-General of the United Nations Regarding the Appointment of Senior UN Adviser for the Extraordinary Chambers in the Courts of Cambodia

The Open Society Justice Initiative, which has been monitoring the work of the Extraordinary Chambers in the Courts of Cambodia (ECCC) since its inception, urges the Secretary-General of the United Nations to appoint a senior-level advisor to lead UN participation in the ECCC for the remainder of the court's operation.

The ECCC has demonstrated that, with rigorous oversight, it can hold a credible trial that meets international standards and engages a large number of Cambodians in better understanding their history and the value of an independent judicial process. The road to this accomplishment has been difficult and the achievements of the ECCC are at risk if due attention is not paid by the UN, a partner in the court, to troubling issues that threaten its credibility and independence. Serious challenges include ongoing evidence of political interference from the Cambodian Government in prosecutorial and judicial decision making, failure to implement an adequate anti-corruption mechanism, key management issues impacting efficiency and timeliness of proceedings, and critical but time-consuming fundraising needs.

In order to address these challenges, the UN should appoint a senior advisor at the level of an Assistant Secretary-General (ASG) with full authority to deal with Cambodian government officials, donor states, and the ECCC. The appointment should be co-terminus with the remaining life of the court. A temporary appointment, or appointment of a person with less authority and stature than an ASG, will not likely have sufficient authority to produce the necessary results.

Experience has repeatedly shown that progress in improving the ECCC's performance is marginal without the sustained involvement of high-level UN authorities. Representatives of the Office of Legal Affairs (OLA) have performed admirably as interlocutors under the circumstances. However, the press of other matters has not permitted full-time, on-hands engagement on an ongoing basis by an official with the requisite gravitas. The appointment in 2008 of David Tolbert as Assistant Secretary-General to handle serious management, budgetary and corruption issues was welcome. However, the post was eliminated within six months, at which point progress halted and problems resurfaced. In late 2009, the appointment of Clint Williamson as a temporary advisor to OLA on a part-time basis yielded progress in the development of an anti-corruption mechanism. However, the mechanism stalled after Williamson's assignment ended.

The political and diplomatic complexities of the issues to be tackled, and the Cambodian government's consistent failure to fulfill prior commitments agreed with a succession of UN interlocutors, make clear the need for more sustained, high-level UN engagement. The appointment an ASG level advisor, with adequate administrative support, is the most effective way to accomplish this.

In recent meetings we have had in New York, Phnom Penh, and Washington, D.C., judges, prosecutors, and court administrators, as well as members of the ECCC Steering Committee and other stakeholders, have universally affirmed the importance of this position. We understand some governments have already pledged financial support to secure the ASG level advisory position on the ECCC.

An ASG level advisor must urgently address the following problems:

Implementation of an Effective Anti-Corruption Mechanism

After two years of efforts, considerable progress has been made in dealing with systemic corruption practices on the Cambodian side of the court. To maintain this progress, it is essential that the court have in place a credible and effective mechanism to deal with any resurgence of corrupt practices. Obtaining cooperation from the Government of Cambodia on such a mechanism has been a slow and tortured process that required repeated trips to Cambodia by the OLA. The agreed mechanism of a Cambodian "Independent Counsellor" to deal with reports from the staff of wrongdoing, flawed as it is, will provide a deterrent to reemerging corrupt practices only if it is 1) implemented (to date it is a skeletal plan, with only nominal efforts to implement it); 2) actively monitored by a high-level UN representative with the ability to deal with government officials if problems arise; and 3) reinforced by active and united engagement of the donor community to deal with problems that may arise.

Eliminating Political Interference

Recent statements by the Prime Minister, government spokesperson, and president of the Cambodian Peoples Party have repeatedly threatened political interference in ECCC decision-making. Confidential discussions with international and Cambodian officials and staff of the ECCC confirm that instructions from government officials are influencing, if not determining, important decisions at the court. In October 2009 government spokesperson Khieu Kanharith said that persons holding positions with the Government of Cambodia do not have to respond to summonses to testify in Case 002 against the four most senior surviving Khmer Rouge leaders, and that the investigation of five additional suspects in Case 003 should not proceed. By all accounts there has been no Cambodian cooperation on either of these matters, thus frustrating the effectiveness and independence of the court. Evidence of political interference has been increasing over the last 18 months and the periodic efforts of court officials, OLA and the donors to address it have been ineffectual. The threat of political interference emanates from the highest reaches of the Cambodian government. Only an ASG level advisor from the UN can meet and speak with authority – to both the government and international donors – to resolve this problem.

ECCC Management Needs

Management decisions necessary to the effective and timely functioning of the proceedings often require timely intervention on the part of a senior UN official. A recent example was the need to ensure that the Pre-Trial Chamber Judges were deployed in Phnom Penh full time to deal with the increasing work load of that chamber and avoid contributing to a delay of the trial of Case 002 or the need to release accused persons because the investigation continues beyond the three year limit for provisional detention. A second example was the need to press the Government of Cambodia to formalize the appointment of a replacement international prosecutor after the nomination had languished for several months. Both of these issues required delicate complex negotiations at the highest levels of the Cambodian government, the court and the donor community. Similar issues would be handled much more quickly and with more finesse by a senior advisor with real time understanding of management issues facing the court before they become a crisis.

Ongoing Funding of the Court

The international portion of the budget of the ECCC is funded by voluntary donations for UN member states. As a result the court must reach out to donors each year to raise operating funds. The original estimates that the court could complete its work in three years were unrealistic. It now appears that the ECCC will not wind up operations until the end of 2014 at the earliest. Japan has to date provided over half of the funds needed by the court but has indicated it expects to cut back considerably on its contribution over the next two years and possibly phase out altogether after 2012.

All of these factors point to the need for creative and active fundraising on behalf of the court. To date, no one has assumed a leadership role in this effort. During his tenure as acting ASG, David Tolbert and his staff spent considerable time developing a budget that was acceptable to donors, and meeting with those donors in their capitals, where the key decisions are often made. No one has taken up these tasks since he left and the ability to both expand the existing donor base and keep current donors on board is compromised as a result. Appointing an ASG level advisor that can deal with donor states at the appropriate diplomatic level is critical to the financial viability of the court.

Conclusion

For all of the above reasons the Justice Initiative urges the Secretary-General to immediately appoint an ASG level advisor to the ECCC to ensure adequate leadership and attention to pressing problems. The advisor must have both sufficient authority and support to engage directly and in-depth on the critical issues facing the court. Without stronger and more sustained UN leadership, the recent progress of the ECCC may be undermined by challenges to its credibility, independence and effectiveness.