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# The Importance of Monitoring the Trials at the Extraordinary Chambers

**Richard J. Rogers** considers the role of court monitors and states the case for independent monitoring of the EC trials.

The independent monitoring of criminal trials is not a new concept, but it has become more popular in recent years. Trial monitors have long been sent by inter-governmental organizations, NGOs, or international organizations to cover specific trials. Until recently, these have tended to include three categories of trial: politically charged trials, such as those following the presidential elections in Azerbaijan in 2003;[1] trials in which judicial actors are threatened, pressured, or at risk, which are monitored by the International Commission of Jurists (ICJ) throughout the world;[2] or unique high profile trials, such as the trial of those charged with blowing up the Pan Am flight over Lockerbie in 1988.[3] But within the last decade, trial monitoring has been used in the broader context of transitional justice and longer term programs have been established in numerous domestic jurisdictions such as Bosnia and Herzegovina, Croatia, Kosovo, Liberia, Macedonia, and Serbia and Montenegro, or in hybrid tribunals such as those in East Timor and Sierra Leone. Indeed, the Secretary-General of the United Nations has noted the importance of the UN's trial monitoring in the context of transitional justice.[4]

Some trial monitoring programs have been administered by NGOs—an example is the Judicial System Monitoring Program in East Timor—while others function as part of international organizations—examples include the OSCE's Legal System Monitoring Section in Kosovo and the UN's Legal System Monitoring Program in Liberia. Although trial monitoring programs may have different structures and mandates, they all share one or more of the following goals:

1. To help ensure fair trial and due process, according to international standards.

2. To build capacity in the legal system, including the judiciary.

3. To disseminate information about the trials to the public.

This article will look at the arguments for including a trial monitoring presence at the Extraordinary Chambers in the Courts of Cambodia (EC), with particular emphasis on the three aims enumerated above.

### The basic functioning and principles of trial monitoring

How do trial monitoring programs function? For the most part, monitoring programs go through a two- or three-step process. The first step is observing the trials from the public gallery and obtaining public documents. Thus, the trial monitors attend court, observe the substantive and procedural aspects of the day's hearing and note any irregularities or concerns with respect to fair trial or due process. Depending on the program's mandate and the issue under consideration, the monitors may attend all sessions of a particular case or just specific hearings. Because additional information may be required to fully assess the issues in the case, monitors also collect copies of public court documents—such as motions, responses, and decisions—from the court registry. Depending on the level of access granted to the program, monitors may also make copies of evidence, including witness statements and transcripts of hearings. This process forms the basis for identifying fair trial violations and for obtaining accurate case information to disseminate to the public.

The second step is the issuance of reports, which contain analyses of the trials or of certain aspects of the trials. Generally, the analysis is done by assessing whether the procedures applied by the court conformed to the applicable domestic law and to international human rights provisions. Trial monitors are less likely to analyze the substantive aspects of the decisions for the purpose of raising concerns, unless a decision (or a verdict) is clearly unreasonable in light of the facts and evidence presented.[5] However, the substantive aspects of the case may form the basis of reports that are aimed at providing general case information to the public. The reports may be public or confidential and vary in terms of style and content, depending on the type of trial monitoring program, the intended audience, and the desired effect.[6] Most reports contain recommendations which are addressed to the governmental organs that administer the justice sector, court officials (judges, prosecutors, defense counsel), or other judicial actors. These recommendations may include a variety of suggestions aimed at improving the functioning of the courts, particularly with respect to international standards of fair trial and due process. Specifically, these may include recommendations for legislative reform, amendments to court procedural rules, changes in certain aspects of court practice, and training for judicial actors.[7]

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Some trial monitoring programs also incorporate a third step, which involves following up on recommendations in order to build judicial capacity. This has been particularly

program could complement efforts to use the lessons learned through the EC process to benefit the general legal and judicial reform program in Cambodia.[17]

The $57 million budget is being paid mainly by voluntary contributions by member states, primarily Japan. Donor governments will want to know that their money is being spent wisely and will likely welcome independent reports by programs that have no vested interest in the success or failure of the EC.

The potential advantages enumerated above presuppose that the trial monitoring programs set up to cover the EC function effectively and report responsibly; a poorly administered program is likely to do more harm than good. Each monitoring program must: define clearly its objectives; ensure that its monitoring and reporting style suit those objectives; remain objective, independent, and impartial; and, so far as possible, establish good working relationships with the relevant actors in the EC. While trial monitors will never be a panacea for all the potential ills of any court or tribunal, they have made a significant, positive contribution to the administration of justice in many jurisdictions. Such an outcome is highly desirable in Cambodia.

## Notes

Richard J. Rogers was chief of the Organization for Security and Co-operation in Europe (OSCE)'s Legal System Monitoring Section from 2002 to 2005. He is currently a consultant in international and transitional justice, based in Phnom Penh.

1. These trials were monitored by a consultant hired by the OSCE office in Baku, Azerbaijan, and the OSCE's Office for Democratic Institutions and Human Rights (ODIHR). The trial monitoring program followed the October 2003 presidential election, which sparked violent clashes in Baku between security forces and demonstrators protesting against election fraud. The violence led to 600 detentions, and 125 people, including prominent leaders of opposition parties, were eventually brought to trial. All of the trials were observed under the program in order to assess their compliance with international obligations. The report concluded that the trials were not always conducted in a manner that guaranteed the full implementation of international fair trial standards. See OSCE Office in Baku, "Report on the Trial Monitoring Project in Azerbaijan 2003-2004" (2004), available at: http://www.osce.org/publications/odihr/2005/04/13762_209_en.pdf.

2. The ICJ's Centre for the Independence of Judges and Lawyers aims to promote and protect judicial independence and impartiality. As part of its program, it monitors trials and issues public reports. See for example, ICJ, "Attacks on Justice: The Harassment and Persecution of Judges and Lawyers: 2002" (2003).

3. United Nations Secretary-General Kofi Annan appointed Dr. Hans Koechler of the Vienna-based International Progress Organisation to monitor the trial at Camp Zeist in the Nertherlands, in 2000 and 2001. Koechler strongly criticized the conduct of the trials and the verdict. See "Report on and evaluation of the Lockerbie Trial conducted by the special Scottish Court in the Netherlands at Kamp van Zeist by Dr. Hans Köchler, University Professor, international observer of the International Progress Organization nominated by United Nations Secretary-General Kofi Annan on the basis of Security Council resolution 1192 (1998)" (February 3, 2001) and "Report on the appeal proceedings at the Scottish Court in the Netherlands (Lockerbie Court) in the case of Abdelbaset Ali Mohamed Al Megrahi v. H. M. Advocate by Professor Hans Köchler, international observer of the International Progress Organization nominated by UN Secretary-General Kofi Annan on the basis of Security

Council resolution 1192 (1998)," (March 26, 2002), both available at: http://i-p-o.org/lockerbie_observer_mission.htm.

4. "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies," Report of the Secretary-General, U.N. Doc. S/2004/616, August 23, 2004, para. 12.

5. The report by Dr. Hans Koechler on the Lockerbie trials is an example of where the substantive findings (i.e. the assessment of the evidence) were criticized.

6. Trial monitoring reports tend to follow a similar layout to legal motions or court decisions. Therefore, for each issue, the report may include: an introduction stating which fair trial norm may have been violated and in which court; an outline of the relevant domestic and international applicable law; a summary of the facts of the case, which led to the concern; an analysis in which the facts are applied to the law; and, a recommendation of suggested action. The types of reports typically issued by trial monitoring programs include:

Reports highlighting a particular decision issued by a court, which is considered to be in violation of fair trial norms; for example, when a court issues a decision excluding the public from the court without valid justification. These single issue / single court reports tend to be comparatively brief (one to two pages).

Reports analyzing a procedural concern observed in numerous cases (i.e., a problem which appears to be systemic within the legal system); for example, the failure of courts to justify properly their decisions on pre-trial detention. These reports are likely to cite numerous examples from different courts, but are unlikely to be longer than five pages.

Reports summarizing the evidence and outlining the concerns observed in a particular case; for example, the overall assessment of a completed war crimes case. These "case-reports" generally include background information, such as the charges, procedural history and verdict, as well as the fair trial concerns and analysis. Thus, they are likely to be longer reports of 10 – 40 pages. See e.g. the East Timor-based Judicial Systems Monitoring Program's (JSMP) report "The Lolotoe Case: A Small Step Forward," July 2004 (available at: http://www.jsmp.minihub.org/reports.htm); or the Kosovo-based OSCE Legal System Monitoring Section's (LSMS) report "The Llapi Case," December 17, 2003 (available at: http://www.osce.org/kosovo/documents.html).

Reports analyzing the courts' treatment of specific types of cases or issues; for example, how the courts have dealt with cases involving witness intimidation (see the LSMS report "The Protection of Witnesses in the Criminal Justice System" April 2003), or war crimes cases (see the OSCE Mission in Croatia's "Background Report: Domestic War Crimes Trials 2004," April 26, 2005, available at http://www.osce.org/croatia/publications.html).

Reports providing information and an overall assessment of the problems in the legal system. This may include a number of categories of concerns, statistical information, and an outline of the positive developments. These reports tend to range between 20 and 70 pages. See, for example, the JSMP report "Overview of the Justice Sector, March 2005."

7. Examples of each of these may be found in the LSMS and JSMP and OSCE Croatia reports cited in the above footnote.

8. Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, Articles 12 and 13.

9. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, as promulgated on 27 October 2004, Articles 33 and 35.

10. The EC structure is a compromise, which the UN begrudgingly accepted after the Cambodian government refused to allow the cases to be heard by a majority of international judges. Some human rights organizations and experts fear that the trials may be subject to political interference by the Royal Government of Cambodia, because the UN failed to secure full control over the functioning of the EC. Violations may also occur because the judicial actors are unfamiliar with the legal