


2006

## To What Extent Does The Cambodian Extraordinary Chambers Meet The Requirements For A Tribunal To Be Deemed Legitimate As Set Out By The Appeals Chamber Of The ICTY In The Tadic Case?

Brianne Draffin

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**CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW  
INTERNATIONAL WAR CRIMES RESEARCH LAB**

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**MEMORANDUM FOR THE  
EXTRAORDINARY CHAMBERS IN THE  
COURTS OF CAMBODIA**

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**ISSUE:**

**TO WHAT EXTENT DOES THE CAMBODIAN EXTRAORDINARY CHAMBERS  
MEET THE REQUIREMENTS FOR A TRIBUNAL TO BE DEEMED LEGITIMATE AS  
SET OUT BY THE APPEALS CHAMBER OF THE ICTY IN THE *TADIC* CASE?**

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**Prepared by Brianne Draffin  
Fall 2006**

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## **I. INTRODUCTION AND SUMMARY OF CONCLUSIONS**

### **A. ISSUE\***

As a new tribunal, the Extraordinary Chambers in the Courts of Cambodia [“ECCC”] can expect to face challenges against its own legitimacy. Specifically, the Defense is likely to challenge the validity of the establishment of the tribunal and allege that the tribunal has not been duly established by law. The Appeals Chamber of the International Tribunal for the Former Yugoslavia [“ICTY”] addressed this challenge in the *Tadic*<sup>1</sup> case. It set forth the requirements for a tribunal to be deemed legitimate and described what elements are necessary for a court to be “established by law.”<sup>2</sup> This memo will examine to what extent the Extraordinary Chambers meets those requirements.

### **B. SUMMARY OF CONCLUSIONS**

#### **1. The ECCC has the authority to determine its own jurisdiction.**

The Extraordinary Chambers has not only the authority to determine its own jurisdiction, but also the duty under international law to exercise the principle of *la compétence de la compétence*, or its “jurisdiction to determine its own jurisdiction.” The ECCC must address the question of the legitimacy of its own establishment, rather than rejecting such a challenge as a non-justiciable or political question. The Extraordinary Chambers is a groundbreaking tribunal, and as such needs to accept that it is treading on new legal ground which must be explored. No other hybrid tribunal has had such a high degree of association with a national judiciary.

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\* The Defense is likely to challenge the legitimacy of the Extraordinary Chambers in the Courts of Cambodia. The International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber in the *Tadic* case set out the requirements for a Tribunal to be deemed legitimate. Analyze the extent to which the Cambodia Tribunal meets those requirements.

<sup>1</sup> Prosecutor v. Tadic, Case No. IT-95-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, (Oct. 2, 1995) [hereinafter Tadic Appeal] [reproduced in accompanying notebook at Tab 15].

<sup>2</sup> *Id.* at ¶ 42.

**2. The ECCC has been established in accordance with the general principle whereby courts must be “established by law.”**

The Appeals Chamber’s decision in the *Tadic* case is currently the international standard for determining the legality of the establishment of an international criminal tribunal. Although the Extraordinary Chambers incorporates many different elements from those of the ICTY, many of the standards that the Appeals Chamber used to judge the legitimacy of the ICTY’s establishment can also be applied to the ECCC.

In particular, the Appeals Chamber determined that in order for a tribunal to be deemed legitimate, it must be “established by law.”<sup>3</sup> The Appeals Chamber then examined several possible meanings of the term “established by law.” One meaning suggested was that the tribunal had to be promulgated by a legislature. The Extraordinary Chambers was established by such an act, the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea.<sup>4</sup>

Equally importantly, the Extraordinary Chambers was also established by a treaty, the 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.<sup>5</sup> Although this meaning of the term “established by law” was raised by the defense

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<sup>3</sup> Tadic Appeal, Case No. IT-95-1-AR72, at ¶ 41 [reproduced in accompanying notebook at Tab 15].

<sup>4</sup> Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on 27 October 2004 [hereinafter ECCC Law] [reproduced in accompanying notebook at Tab 8].

<sup>5</sup> Royal Government of Cambodia, 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 (signed 6 June 2003; promulgated 19 October 2004; entered into force 29 April 2005) [hereinafter ECCC Agreement] [reproduced in accompanying notebook at Tab 9].

in the *Tadic* case at trial,<sup>6</sup> it was not thoroughly investigated by the *Tadic* court, due to its lack of application to the ICTY. It was later examined by the Special Court for Sierra Leone [“SCSL”], which was also founded by a treaty, and this method was found by the SCSL to be a legitimate method by which to establish an international criminal tribunal.<sup>7</sup>

**3. The ECCC incorporates the minimum fair trial guarantees from Article 14 of the International Covenant on Civil and Political Rights [“ICCPR”].**

Continuing in its analysis of possible meanings of the term “established by law,” the ICTY Appeals Chamber determined that its preferred definition of “established by law” was that international tribunals “must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments.”<sup>8</sup> Ultimately, the ICTY Appeals Chamber found that the most important factor in the determination of a tribunal’s legitimacy was procedural fairness.<sup>9</sup> In particular, the tribunal must provide the minimum fair trial guarantees set forth in Article 14 of the ICCPR.

**4. The legitimacy of the ECCC will ultimately depend upon whether the due process and fair trial guarantees incorporated in the ECCC Law are followed by the Extraordinary Chambers.**

On paper, the Extraordinary Chambers meets the *Tadic* legitimacy requirements. It was founded both by the Cambodian legislature and by a treaty between the United Nations and the

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<sup>6</sup> Prosecutor v. Tadic, Case IT-94-1-T, Decision on the Defence Motion on Jurisdiction in the Trial Chamber of the International Tribunal, ¶ 2 (Aug. 10, 1995) [hereinafter *Tadic* Decision at Trial] [reproduced in accompanying notebook at Tab 14].

<sup>7</sup> Prosecutor v. Charles Taylor, Case No. SCSL-2003-01-I-059, Decision on Immunity from Jurisdiction (May 31, 2004) at ¶ 35 [hereinafter *Taylor* Decision on Immunity from Jurisdiction] [reproduced in the accompanying notebook at Tab 17].

<sup>8</sup> *Tadic* Appeal, Case No. IT-95-1-AR72, at ¶ 45 [reproduced in the accompanying notebook at Tab 15].

<sup>9</sup> *See id.*

Royal Government of Cambodia, and incorporates into its governing law the minimum fair trial guarantees from Article 14 of the ICCPR. However, the Extraordinary Chambers will still face numerous challenges to its legitimacy, stemming primarily from the fact that it has been established in a Cambodian judicial system that, in the past, has been far from a model justice system. The ability of the Cambodian judges to remain independent and impartial from a government that is accustomed to interfering in court matters remains to be seen. Additionally, it remains to be seen whether the procedures of the Extraordinary Chambers will be feasible, for the ECCC incorporates several untested procedural methods at the international criminal level, in particular the requirement that a supermajority of judges be required for any decision to be made. How the Extraordinary Chambers responds to these challenges will ultimately determine whether or not it is viewed as a legitimate tribunal.

## **II. FACTUAL BACKGROUND**

Dusko Tadic was a Bosnian Serb café owner accused of heinous crimes against Bosnian Muslims and Croats in 1992.<sup>10</sup> As the first person to appear before the International Criminal Tribunal for the Former Yugoslavia [“ICTY”], he was indicted on February 13, 1995 for “various violations of international humanitarian law.”<sup>11</sup> On June 23, 1995, he filed a preliminary motion seeking dismissal of all charges against him, alleging that the ICTY lacked jurisdiction.<sup>12</sup> Tadic alleged that the ICTY 1) was founded illegally, 2) had wrongful primacy over national courts, and 3) lacked subject matter jurisdiction.<sup>13</sup> The ICTY Trial Chamber dismissed the motions relating to primacy and subject matter jurisdiction and determined itself to be incompetent to rule on its own establishment.<sup>14</sup> The defense then filed an interlocutory appeal on jurisdiction.<sup>15</sup>

The ICTY Appeals Chamber determined to hear challenges both to “the jurisdiction of the Appeals Chamber to hear this appeal” and “the jurisdiction of the International Tribunal to hear this case on the merits.”<sup>16</sup> The Appeals Chamber determined that the legality and primacy

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<sup>10</sup> Aaron K. Baltes, Prosecutor v. Tadic: *Legitimizing the Establishment of the International Criminal Tribunal for the Former Yugoslavia*, 49 ME. L. REV. 577, 590 (1997) [reproduced in accompanying notebook at Tab 20].

<sup>11</sup> *Id.* at 591.

<sup>12</sup> *Id.*

<sup>13</sup> Tadic Decision at Trial, Case No. IT-94-1-T, [reproduced in the accompanying notebook at Tab 14].

<sup>14</sup> *Id.* at ¶ 33.

<sup>15</sup> Tadic Appeal, Case No. IT-95-1-AR72 [reproduced in accompanying notebook at Tab 15].

<sup>16</sup> *Id.* at ¶ 3.

of the Tribunal itself could be used as the basis of an interlocutory appeal,<sup>17</sup> and therefore continued to examine the jurisdiction of the ICTY to hear the case on the merits.<sup>18</sup>

First, the Appeals Chamber determined whether it could examine the question of its own jurisdiction. Relying on the principle of “*la compétence de la compétence*,”<sup>19</sup> the Appeals Chamber stated in the affirmative that the inherent ability of a tribunal to determine its own jurisdiction “is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents of those tribunals.”<sup>20</sup>

Secondly, the Appeals Chamber determined whether it could examine the legality of its establishment by the United Nations Security Council, or essentially examine the legality of an act by its “creator.”<sup>21</sup> While the Tribunal determined that it had not been “established for that purpose,”<sup>22</sup> it determined that it could exercise this “‘incidental’ jurisdiction . . . solely for the purpose of ascertaining its own ‘primary’ jurisdiction over the case before it.”<sup>23</sup>

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<sup>17</sup> *Id.* at ¶ 6.

<sup>18</sup> This memo will focus on only the first challenge brought by Tadic against the ICTY, that of the legitimacy of the establishment of the Tribunal. The issues relating to primacy and subject matter jurisdiction are beyond the scope of this memo. For more information on these two issues and the *Tadic* case, see Aaron K. Baltes, *Prosecutor v. Tadic: Legitimizing the Establishment of the International Criminal Tribunal for the Former Yugoslavia*, 49 ME. L. REV. 577 (1997) [reproduced in accompanying notebook at Tab 20].

<sup>19</sup> Tadic Appeal, Case No. IT-95-1-AR72, at ¶ 18 (meaning “jurisdiction to determine its own jurisdiction” or “*Kompetenz-Kompetenz*” in German) [reproduced in accompanying notebook at Tab 15].

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at ¶ 20.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

Additionally, the Appeals Chamber rejected the argument that the question of legitimacy was a “political question” or “non-justiciable” dispute.<sup>24</sup> It stated,

[a]s long as the case before it or the request for an advisory opinion turns on a legal question capable of a legal answer, the Court considers that it is duty-bound to take jurisdiction over it, regardless of the political background or the other political facets of the issue.<sup>25</sup>

The ICTY found that the jurisdictional challenges raised by the Defense were all legal questions and therefore examinable by the Court.

Next, the Court turned to the Defense’s allegations that the establishment of the ICTY was invalid under the United Nations [“UN”] Charter. The Appeals Chamber examined the power of the Security Council to create an international criminal tribunal under Chapter VII and determined that its establishment was included in appropriate “measures not involving the use of force” delineated in Article 41 of the UN Charter. The Court thereby held that the ICTY had been lawfully established under the UN Charter.<sup>26</sup>

Finally, the ICTY Appeals Chamber concluded its investigation into the legitimacy of the establishment of the Tribunal by asking whether the ICTY had been “established by law.”<sup>27</sup> The Court recognized that for a tribunal to be “established by law” is “a general principle of law;” however, it “impos[es] an international obligation which only applies to the administration of criminal justice in a municipal setting.”<sup>28</sup> Nevertheless, the Appeals Chamber maintained that an

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<sup>24</sup> The political-question doctrine is “[t]he judicial principle that a court should refuse to decide an issue involving the exercise of discretionary power by the executive or legislative branch of government.” BLACK’S LAW DICTIONARY 1197 (8th ed. 2004).

<sup>25</sup> Tadic Appeal, Case No. IT-95-1-AR72, at ¶ 24 [reproduced in accompanying notebook at Tab 15].

<sup>26</sup> See *id.* at ¶¶ 26-40.

<sup>27</sup> *Id.* at ¶ 41.

<sup>28</sup> *Id.* at ¶ 42.

international tribunal “ought to be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments. Then the court may be said to be ‘established by law.’”<sup>29</sup>

Furthermore, the ICTY Appeals Chamber continued in its investigation of the term “established by law,” and determined that there are three possible interpretations of its meaning which might apply to an international tribunal.<sup>30</sup> First, it could mean that a court must be established by a legislature. This would “ensure that the administration of justice is not a matter of executive direction, but is regulated by laws made by the legislature.”<sup>31</sup> While this would be necessary for most municipal systems, the Appeals Chamber determined that the requirement of being established by a legislature “does not apply to the international setting nor, more specifically, to the setting of an international organization such as the United Nations.”<sup>32</sup> Judicial, executive, and legislative bodies do not exist in the international context in the way they do in a national setting; therefore, “the separation of powers element of the requirement that a tribunal be ‘established by law’ finds no application in an international law setting.”<sup>33</sup>

Alternatively, the Appeals Chamber proposed that “established by law” could refer to the establishment of a tribunal “by a body which, though not a Parliament, has a limited power to take binding decisions,” such as the Security Council.<sup>34</sup> The Appeals Chamber again articulated that the Security Council has the power to create a tribunal as a measure combating a threat to the peace under Chapter VII, and stated that an amendment to the Charter is not necessary for

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at ¶ 43.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at ¶ 44.



such a creation.<sup>35</sup> The ICTY also mentioned the endorsement of an International Tribunal by the General Assembly as a “representative” organ of the United Nations.<sup>36</sup>

Finally, the Appeals Chamber stated as a third possible interpretation of “established by law,” and the “most sensible and most likely meaning of the term in the context of international law,”<sup>37</sup> is that “its establishment must be in accordance with the rule of law.”<sup>38</sup> An international tribunal “must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice, and even-handedness, in full conformity with internationally recognized human rights instruments.”<sup>39</sup> The Appeals Chamber pointed out that the International Covenant on Civil and Political Rights should be used as a guideline, specifically, Article 14, which states as follows:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. . .
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
  - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
  - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at ¶ 45.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.<sup>40</sup>

“What is important,” the Appeals Chamber continues, “is that [a tribunal] be set up by a competent organ in keeping with the relevant legal procedures, and . . . that it observes the requirements of procedural fairness.”<sup>41</sup> The provisions of the Article 14(3) are considered the ICCPR’s fair trial guarantees. Because these fair trial guarantees were adopted in Article 21 of the ICTY Statute, and other guarantees were included in the Statute and the Rules of Procedure and Evidence, the Appeals Chamber determined that the ICTY had “all the necessary safeguards of a fair trial” and dismissed the appeal on the grounds of unlawful establishment of the International Tribunal.<sup>42</sup>

The ICTY and the Extraordinary Chambers are markedly different tribunals. Inherently international in nature, the ICTY is an ad-hoc tribunal established by the Security Council pursuant to its Chapter VII powers.<sup>43</sup> The Extraordinary Chambers, on the other hand, is a

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<sup>40</sup> International Covenant on Civil and Political Rights art. 14, Dec. 16, 1966, G.A. Res. 2200A (XXI), UN. Doc. A/6316 (1966), 999 U.N.T.S. 171, [hereinafter ICCPR] [reproduced in accompanying notebook at Tab 3].

<sup>41</sup> Tadic Appeal, Case No. IT-95-1-AR72, at ¶ 45 [reproduced in accompanying notebook at Tab 15].

<sup>42</sup> *Id.* at ¶¶ 46-48.

<sup>43</sup> *See id.* at ¶¶ 28-40.

hybrid tribunal founded within the existing structure of the Cambodian court system through an agreement between the Royal Government of Cambodia and the United Nations,<sup>44</sup> and established by the Cambodian legislature.<sup>45</sup> Nevertheless, it is possible to apply many of the findings by the ICTY Appeals Chamber in the *Tadic* case to the structure of the ECCC. This memo will explore the application of the relevant sections of the *Tadic* opinion as they apply to the legitimacy of the establishment of the Extraordinary Chambers in the Courts of Cambodia.

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<sup>44</sup> See ECCC Agreement, *supra* note 5 [reproduced in accompanying notebook at Tab 9].

<sup>45</sup> See ECCC Law, *supra* note 4 [reproduced in accompanying notebook at Tab 8].

### **III. LEGAL ANALYSIS**

#### **A. THE AUTHORITY OF THE ECCC TO EXAMINE ITS OWN JURISDICTION.**

##### **1. *La compétence de la compétence***

Before it can determine the legality of its establishment, the ECCC must determine that it has the authority and capability to examine the question of its own jurisdiction. The Defense may, as did the defense in the *Tadic* case, argue for a narrow concept of jurisdiction,<sup>46</sup> here limited to the prosecution of the people “most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.”<sup>47</sup> Indeed, nowhere in the ECCC Law does it specifically state that the Extraordinary Chambers has the power to examine its own establishment.

However, the “competence” of the Extraordinary Chambers defined in both Chapter I and Chapter II of the ECCC Law<sup>48</sup> is what the Appeals Chamber of the ICTY referred to as the “original,” “primary,” or “substantive” jurisdiction of the tribunal.<sup>49</sup> The ECCC Law does not, by defining the original competence of the tribunal, preclude it from exercising “incidental” or “inherent” jurisdiction “which derives automatically from the exercise of the judicial function.”<sup>50</sup> The ECCC’s position as an Extraordinary Chambers, while integrated within the judicial system

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<sup>46</sup> *Tadic* Decision at Trial, Case No. IT-94-1-T, at ¶ 8 [reproduced in accompanying notebook at Tab 14].

<sup>47</sup> ECCC Law, *supra* note 4, art. 1 [reproduced in accompanying notebook at Tab 8].

<sup>48</sup> *Id.*, arts. 1-8.

<sup>49</sup> *Tadic* Appeal, Case No. IT-95-1-AR72, at ¶ 14 [reproduced in accompanying notebook at Tab 15].

<sup>50</sup> *Id.*

of Cambodia, demands that it fulfill its role as a tribunal and appropriately give a considered examination of the legality of its own foundation.

The “jurisdiction to determine its own jurisdiction,”<sup>51</sup> more commonly known as *la compétence de la compétence* in French or *Kompetenz-Kompetenz* in German, is “part, and indeed a major part, of the incidental or inherent jurisdiction of *any* judicial or arbitral tribunal.”<sup>52</sup> In fact, the ICTY Appeals Chamber goes so far as to state that the ability for a court to determine its own jurisdiction “is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents of those tribunals.”<sup>53</sup>

However, the Extraordinary Chambers is something of an anomaly in the arena of international law. Essentially, the ECCC results from a hybrid domestic and international establishment. Unlike the Special Court for Sierra Leone, which was established solely by a treaty between the United Nations and Sierra Leone,<sup>54</sup> yet has been determined to be an international tribunal completely separate from the judicial system of Sierra Leone,<sup>55</sup> the ECCC was set up with the intention that it would exist within the Cambodian judicial system, but would be “extraordinary” in the sense that it would receive international assistance and incorporate international elements. Therefore, the ECCC is at once operating both under international law and under the justice system of Cambodia. The incorporation of those extraordinary

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<sup>51</sup> *Id.* at ¶ 18.

<sup>52</sup> *Id.* (emphasis added).

<sup>53</sup> *Id.*

<sup>54</sup> See Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, U.N.-Sierra Leone [reproduced in accompanying notebook at Tab 5].

<sup>55</sup> Taylor Decision on Immunity from Jurisdiction, Case No. SCSL-2003-01-I-059 (affirming that the SCSL “is not a national court of Sierra Leone and is not part of the judicial system of Sierra Leone exercising judicial powers of Sierra Leone.”) [reproduced in accompanying notebook at Tab 17].

international elements not common to the rest of the Cambodian courts mandates that the Extraordinary Chambers go through the exercise of determining its own competence and legality of its establishment.

The ICTY Appeals Chamber concedes that the power of *la compétence de la compétence* can be limited “by an express provision in the arbitration agreement or in the constitutive instruments of standing tribunals;”<sup>56</sup> however, such an express provision cannot be found in the ECCC Law<sup>57</sup> or the ECCC Agreement.<sup>58</sup> A broad reading of this omission would demonstrate that the drafters of the ECCC, similar to those for the ICTY, viewed the exercise of *la compétence d la compétence* as necessary to the independence of the Extraordinary Chambers. In any event, even when reading the ECCC Law and ECCC Agreement narrowly, one cannot infer “such a limitation . . . without an express provision allowing the waiver or shrinking of such a well-entrenched principle of general international law.”<sup>59</sup> Again, such an express provision simply does not exist.

## **2. The Ability of the ECCC to Examine Its Establishing Body**

Determining the ability of the Extraordinary Chambers to examine its own establishing body raises the question of what body actually established the Extraordinary Chambers. Although the ECCC is established in the existing court structure of Cambodia,<sup>60</sup> its special relationship as an extraordinary chamber tied to the United Nations cannot be overlooked. While

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<sup>56</sup> Tadic Appeal, Case No. IT-95-1-AR72, at ¶ 19 [reproduced in accompanying notebook at Tab 15].

<sup>57</sup> See ECCC Law, *supra* note 4 [reproduced in accompanying notebook at Tab 8].

<sup>58</sup> See Agreement, *supra* note 5 [reproduced in accompanying notebook at Tab 9].

<sup>59</sup> Tadic Appeal, Case No. IT-95-1-AR72, at ¶ 19 (referring to the principle of *la compétence de la compétence*) [reproduced in accompanying notebook at Tab 15].

<sup>60</sup> ECCC Law, *supra* note 4, art. 2 [reproduced in accompanying notebook at Tab 8].

the ECCC Law promulgated by the Cambodian legislature created and implemented the Extraordinary Chambers in the Cambodian court structure, the Agreement between the United Nations and the Royal Government of Cambodia also applies to the ECCC.<sup>61</sup> Specifically, Article 2(2) of the ECCC Agreement states that Article 27 of the Vienna Convention on the Law of Treaties applies to the Agreement.<sup>62</sup> Article 27 states, “A party may not invoke the provision of its internal law as justification for its failure to perform a treaty.”<sup>63</sup> As the ECCC Agreement is a treaty between the Members of the United Nations and the Royal Government of Cambodia, governed by the Vienna Convention, it cannot be denied that both the United Nations and the Royal Government of Cambodia “intended to establish a judicial body”<sup>64</sup> where one did not previously exist. The fact that this judicial body was established within the existing Cambodian judicial structure does not take away the extraordinary nature of these Chambers, which was intended by the United Nations and the Royal Government of Cambodia from the beginning; that is, they intended to create a tribunal where the Cambodians with international assistance could bring the Khmer Rouge to justice.

Therefore, while the Extraordinary Chambers was established by the Cambodian Legislature, the ECCC Agreement demonstrates that at its core, the ECCC plays a dual role, both inherently Cambodian and explicitly international in nature. Cambodia and the UN have created a new kind of hybrid tribunal that draws its legitimacy from two separate and distinct sources; the ECCC is simultaneously both national and international.

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<sup>61</sup> Agreement, *supra* note 5, art. 2, ¶ 1-2 [reproduced in accompanying notebook at Tab 9].

<sup>62</sup> *Id.* at art. 2, ¶ 2.

<sup>63</sup> Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, art. 27 [reproduced in accompanying notebook at Tab 2].

<sup>64</sup> Tadic Appeal, *Case No. IT-95-I-AR72*, at ¶ 16 (citing Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, 1954 I.C.J. Reports 47, at 60-1 (Advisory Opinion of July 13)) [reproduced in accompanying notebook at Tab 15].

Just as the ICTY Appeals Chamber determined that it could examine the legality of its establishment by the Security Council, in reference to the United Nations Charter,<sup>65</sup> so must we examine the establishment of the Extraordinary Chambers, but in a two-pronged fashion. First, its establishment by the Cambodian legislature must be evaluated with reference to both the Cambodian constitution and international standards of capacity. Secondly, its establishment via international treaty must be explored to determine whether or not it retains characteristics of an international organization set up by treaty.

### **3. Legitimacy: Not A Political or Non-Justiciable Question**

Although the ICTY Trial Chamber found the issue of tribunal legitimacy to be a political question, the Appeals Chamber reversed that finding.<sup>66</sup> The ICTY Trial Chamber found that the question of the legitimacy of the Security Council's establishment of the ICTY rested on a fact-based question of whether the events in the former Yugoslavia constituted a threat to the peace.<sup>67</sup> The Trial Chamber cited the United States Supreme Court's opinion in *Baker v. Carr* in an attempt to demonstrate that a question regarding the establishment of a tribunal was indeed a political question:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a co-ordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due co-ordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>68</sup>

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<sup>65</sup> See *id.* at ¶¶ 20-21.

<sup>66</sup> *Id.* at ¶ 61.

<sup>67</sup> Tadic Decision at Trial, Case No. IT-94-I-T, at ¶ 24 [reproduced in the accompanying notebook at Tab 14].

<sup>68</sup> *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).



In essence, the Trial Chamber was trying to show that questioning the body which established it was not actually a legal question, but rather an attempt to force the Tribunal to rule on a political debate. If the question were really a legislative or executive issue in disguise, the Tribunal should refuse to rule on it.

However, the ICTY Appeals Chamber completely disagreed with the Trial Chamber's analysis. It stated, "As long as the case before it or the request for an advisory opinion turns on a *legal question* capable of a *legal answer*, the Court considers that it is *duty-bound* to take jurisdiction over it."<sup>69</sup> Moreover, the Appeals Chamber dismissed the theories of "political questions" and "non-justiciable disputes" as antiquated ideas that have "receded from the horizon of contemporary international law."<sup>70</sup> The Appeals Chamber thus found that the question of the legality of the establishment of a tribunal is inherently a legal question, regardless of the political issues that may come into play when examining the competence of a tribunal.

Ultimately, it must also be recognized that there is a policy interest in articulating the competence of a new tribunal. International eyes will be on the Extraordinary Chambers to see how it handles challenges against it, and meeting a challenge to its own establishment and legitimacy with forceful legal arguments will set a much stronger tone of justice and fairness than just dismissing the challenge as political or non-justiciable. To ignore a challenge that the Extraordinary Chambers was not legally established is to brush the issue under the rug. The challenge becomes a self-fulfilling prophecy, undermining the legitimacy of the tribunal, unless it is properly addressed and dismissed in court.

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<sup>69</sup> Tadic Appeal, Case No. IT-95-1-AR72, at ¶ 24 (emphasis added) [reproduced in accompanying notebook at Tab 15].

<sup>70</sup> *Id.*

## **B. THE CONSTITUTIONALITY OF THE ESTABLISHMENT OF THE ECCC**

In the *Tadic* case, the challenge was made by the Defense that the ICTY was not “established by law.”<sup>71</sup> The Defense claimed that the establishment of a court by law is one of the “general principle[s] of law recognized by civilized nations” referred to in Article 38 of the Statute of the International Court of Justice as one of the sources of international law.<sup>72</sup> The Appeals Chamber examined the assertion that an individual is “entitle[d] . . . to have a criminal charge against him determined by a tribunal which has been established by law.”<sup>73</sup> To bolster this argument, the Defense pointed toward the International Covenant on Civil and Political Rights, the European Convention on Human Rights, and the American Convention on Human Rights, all of which refer to a “fair and public hearing” by an “independent and impartial tribunal.”<sup>74</sup> While in dicta the Appeals Chamber makes it clear that the requirements articulated in these conventions impose an “international obligation” on national criminal justice systems, the Court stops short of demanding all these requirements from an international criminal tribunal.<sup>75</sup> However, the Appeals Chamber then appears to double back by stating that an international criminal court “ought to be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments. Then the court may be said to be established by law.”<sup>76</sup> Moreover, the Extraordinary Chambers has a unique dual standing in the international community. The ECCC is not only an international tribunal, but is also part of the national

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<sup>71</sup> *Id.* at ¶ 41.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at ¶ 42.

<sup>76</sup> *Id.*

judicial system of Cambodia. Therefore, it is even more clear, according to the *Tadic* opinion, that the Extraordinary Chambers must be “established by law” in order to be deemed a legally founded legitimate tribunal.

Effectively, the Appeals Chamber requires that even an international tribunal be “established by law” and continued by examining three possible meanings of that phrase: 1) established by a legislature,<sup>77</sup> 2) established by a body “which, though not a Parliament, has a limited power to take binding decisions,”<sup>78</sup> and 3) established in accordance with the rule of law.<sup>79</sup> This section will discuss these three possibilities and how they apply to the Extraordinary Chambers, as well as an additional possible meaning put forth by the Defense at trial, which is that the “consensual act of nations” can constitute a tribunal duly established by law,<sup>80</sup> the latter interpretation is demonstrated more adequately by the Special Court for Sierra Leone.

### **1. Establishment by a Legislature**

The first possible meaning for “established by law” that the Appeals Chamber sets forth in *Tadic* is the possibility that a tribunal could be established by a legislature.<sup>81</sup> The theory behind this meaning, supported by the European Court of Human Rights, is that the establishment should not depend on the whim of the executive, but should evolve from parliamentary law in a democratic society.<sup>82</sup>

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<sup>77</sup> *Id.* at ¶ 43.

<sup>78</sup> *Id.* at ¶ 44.

<sup>79</sup> *Id.* at ¶ 45.

<sup>80</sup> *Tadic* Decision at Trial, Case No. IT-94-1-T, at ¶ 2 [reproduced in the accompanying notebook at Tab 14].

<sup>81</sup> *Tadic* Appeal, Case No. IT-95-1-AR72, at ¶ 43 [reproduced in the accompanying notebook at Tab 15].

<sup>82</sup> *See id.*

While the ICTY Appeals Chamber dismissed the notion of creating a tribunal by law from a legislature in the international law setting, saying it found no application,<sup>83</sup> as there is no true international legislature, this notion does now apply in the case of the Cambodian Extraordinary Chambers. The Cambodian legislature passed the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, which created the ECCC and effectively serves as its statute.<sup>84</sup>

While it appears clear that the Extraordinary Chambers were established by the Cambodian legislature, there is concern about the legitimacy of the Cambodian legislature itself; that is, its degree of autonomy from the Cambodian executive. Violence and intimidation dominates the political scene during elections, and members of parties not affiliated with the ruling Cambodian People's Party (CPP) have had reasons to fear for their safety.<sup>85</sup> The National Election Committee (NEC), which oversees the electoral process, has a questionable amount of independence.<sup>86</sup> In 2005, the Prime Minister arrested and jailed many opposition parliamentarians.<sup>87</sup> However, there are indications that the legislature is more than just a rubber stamp for the executive's actions. In particular, the parliament passed several changes to the Law on the Establishment of the Extraordinary Chambers before it passed it.

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<sup>83</sup> *Id.*

<sup>84</sup> ECCC Law, *supra* note 4 [reproduced in the accompanying notebook at Tab 8]. See also Gerald V. May, III, Comment, *An (Un)Likely Culprit: Examining the U.N.'s Counterproductive Role in the Negotiations over a Khmer Rouge Tribunal*, 27 B.C. INT'L & COMP. L. REV. 147 (2004) [reproduced in the accompanying notebook at Tab 30].

<sup>85</sup> Human Rights Watch, *The Run-Up to Cambodia's 2003 National Assembly Election: Political Expression and Freedom of Assembly under Assault*, June 2003, at 1 [reproduced in the accompanying notebook at Tab 40].

<sup>86</sup> *Id.*

<sup>87</sup> Human Rights Watch, *Country Summary: Cambodia*, January 2006, at 1 [reproduced in the accompanying notebook at Tab 41].

In the *Tadic* case, the ICTY Appeals Chamber also suggested that “established by law” refer to an establishment by a non-Parliamentary organ that still nonetheless “has a limited power to take binding decisions.”<sup>88</sup> As applicable to the ICTY, the Appeals Chamber found that the Security Council acting under Chapter VII was such a body.<sup>89</sup> However, in the case of the Extraordinary Chambers, its founding was done both through the creation of a law by an actual legislature and by a treaty between the United Nations and the Royal Government of Cambodia.<sup>90</sup>

## **2. Establishment by a Treaty**

In arguing that a resolution of the Security Council could not establish an ad-hoc tribunal, at trial, *Tadic* raised the argument that the ICTY should have been created by treaty, the consensual act of nations, or by amendment of the UN Charter.<sup>91</sup> While these possibilities were irrelevant in the *Tadic* case, an international tribunal, the Special Court for Sierra Leone, was later created by treaty.<sup>92</sup> The SCSL is not a subsidiary organ of the United Nations established by the Security Council, or a national court established by law.<sup>93</sup> It is a “treaty-based organ not anchored in any existing system.”<sup>94</sup> As a court established by an agreement between the United

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<sup>88</sup> *Tadic* Appeal, Case No. IT-95-1-AR72, at ¶ 44 [reproduced in the accompanying notebook at Tab 15].

<sup>89</sup> *Id.*, see also, Charter of the United Nations, 1945 [reproduced in the accompanying notebook at Tab 1].

<sup>90</sup> ECCC Agreement, *supra* note 5 [reproduced in the accompanying notebook at Tab 9].

<sup>91</sup> *Tadic* Decision at Trial, Case No. IT-94-1-T, at ¶ 2 [reproduced in the accompanying notebook at Tab 14].

<sup>92</sup> See Agreement on the Establishment of a Special Court for Sierra Leone, *supra* note 47 [reproduced in the accompanying notebook at Tab 5].

<sup>93</sup> Taylor Decision on Immunity from Jurisdiction, Case No. SCSL-2003-01-I-059, at ¶ 35 [reproduced in the accompanying notebook at Tab 17]; see also Prosecutor v. Kallon, Norman, and Kamara, Case No. SCSL-04-15-PT-059, Decision on Constitutionality and Lack of Jurisdiction (Mar. 13, 2004) [reproduced in the accompanying notebook at Tab 16].

<sup>94</sup> *Id.*

Nations and Sierra Leone, the Special Court viewed itself as “an expression of the will of the international community,” and therefore an international, not domestic, court.<sup>95</sup> The Special Court also determined that because it was established by treaty, it “has the characteristics associated with classical international organisations” and similar competence and jurisdiction to the other international courts, the ICTY, ICTR, and ICC.<sup>96</sup>

Like the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia was also established by treaty, the Agreement between the United Nations and the Royal Government of Cambodia.<sup>97</sup> The Agreement provided that the Vienna Convention on the Law of Treaties<sup>98</sup> governed the treaty, which meant that the parties were required to act in good faith and respect the ECCC Agreement as the supreme law of the land. Cambodia was therefore required to amend its law to bring it into compliance with the treaty, and could not claim that its own domestic law required violation of the treaty.<sup>99</sup>

### **3. Establishment in Accordance with the Rule of Law**

The interpretation of the phrase “established by law” that the ICTY Appeals Chamber preferred is that a tribunal “must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full

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<sup>95</sup> *Id.* at ¶ 38.

<sup>96</sup> *Id.* at ¶ 41. *But see* Ahran Kang, *The Key Lessons the Iraqi Special Tribunal Can Learn from the ICTY, ICTR, and SCSL*, Memorandum for the Iraqi Special Tribunal, November 2004 [reproduced in the accompanying notebook at Tab 35] and Erin Page, *The Legitimacy of the Establishment of the Iraqi Special Tribunal*, Memorandum for the Iraqi Special Tribunal, Spring 2005 [reproduced in the accompanying notebook at Tab 36] (discussing the issue of legitimacy in the context of the Iraqi High Tribunal, another court that was not established similarly to the ICTY, the ICTR or the ICC).

<sup>97</sup> ECCC Agreement, *supra* note 5 [reproduced in the accompanying notebook at Tab 9].

<sup>98</sup> Vienna Convention on the Law of Treaties, *supra* note 63, arts. 26-27, [reproduced in the accompanying notebook at Tab 2].

<sup>99</sup> Human Rights Watch, *Serious Flaws: Why the U.N. General Assembly Should Require Changes to the Draft Khmer Rouge Tribunal Agreement*, April 2003, at 3 [reproduced in the accompanying notebook at Tab 39].

conformity with internationally recognized human rights instruments.”<sup>100</sup> The Appeals Chamber called this view of the phrase the “most sensible and most likely meaning of the term in the context of international law,”<sup>101</sup> and continued by stating that what is important in determining the legality of a tribunal is “not whether it was pre-established or established for a specific purpose or situation; what is important is that it be set up by a competent organ in keeping with the relevant legal procedures, and should that it observes the requirements of procedural fairness.”<sup>102</sup> The procedural fairness referred to by the Appeals Chamber in *Tadic* is taken to refer to the basic fair trial guarantees enumerated in Article 14 of the International Covenant on Civil and Political Rights.<sup>103</sup> Additionally, the ICTY Appeals Chamber pointed out that the Human Rights Committee views compliance with these fair trial guarantees as the standard by which a “special” or “extraordinary” criminal court should be scrutinized.<sup>104</sup>

The Appeals Chamber then examined the Statute of the ICTY and its Rules of Procedure and Evidence to determine whether the proper fair procedures had been afforded defendants by the ICTY.<sup>105</sup> In determining that the ICTY “provides all the necessary safeguards of a fair trial”<sup>106</sup> and “is thus ‘established by law,’”<sup>107</sup> the court pointed out that the fair trial guarantees of

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<sup>100</sup> *Tadic* Appeal, Case No. IT-95-1-AR72, at ¶ 45 [reproduced in the accompanying notebook at Tab 15].

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *See id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at ¶ 46. *See also* Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended 19 May 2003 by Resolution 1481) [reproduced in the accompanying notebook at Tab 4].

<sup>106</sup> *Id.* at ¶ 47.

<sup>107</sup> *Id.*

Article 14 of the ICCPR have been adopted almost verbatim.<sup>108</sup> Similarly, the Article 14 guarantees have also been adopted nearly verbatim in Article 35 of the ECCC Law.<sup>109</sup>

Moreover, Article 33 of the ECCC Law states that the Extraordinary Chambers “shall exercise their jurisdiction in accordance with international standards of justice, fairness, and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights.”<sup>110</sup> A list of the Article 14 guarantees and an evaluation of how they are implemented in the Cambodian Extraordinary Chambers follows.

**a. Minimum fair trial guarantees afforded by ICCPR Article 14.**

The following chart sets the ICCPR fair trial guarantees up directly against their implementation in the ECCC Law Article 35.

*Table 1. Minimum Fair Trial Guarantees in the ICCPR and ECCC Law*

<b>ICCPR Article 14<sup>111</sup></b>	<b>ECCC Law Article 35<sup>112</sup></b>
a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;	a) to be informed promptly and in detail in a language that they understand of the nature and cause of the charge against them;
b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;	b) to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing;
c) To be tried without undue delay;	c) to be tried without delay;
d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case	d) to be tried in their own presence and to defend themselves in person or with the assistance of counsel of their own choosing, to be informed of this right and to have legal assistance assigned to them free of charge if they do not have sufficient means to pay for it;

<sup>108</sup> *Id.* at ¶ 46.

<sup>109</sup> ECCC Law, *supra* note 4, art. 35 [reproduced in the accompanying notebook at Tab 8].

<sup>110</sup> *Id.* at art. 33.

<sup>111</sup> ICCPR, *supra* note 40, at art. 14 [reproduced in the accompanying notebook at Tab 3].

<sup>112</sup> ECCC Law, *supra* note 4, art. 35 [reproduced in the accompanying notebook at Tab 8].



if he does not have sufficient means to pay for it;	
e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;	e) to examine evidence against them and obtain the presentation and examination of evidence on their behalf under the same conditions as evidence against them;
f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;	f) to have the free assistance of an interpreter if the accused cannot understand or does not speak the language used in court;
g) Not to be compelled to testify against himself or to confess guilt.	g) not to be compelled to testify against themselves or to confess guilt.

As the above table demonstrates,<sup>113</sup> for the most part, there is a negligible difference between the wording of the ICCPR provisions and the related provisions in the ECCC Law Article 35. The one notable exception is in section e) of both documents. While the ICCPR mentions the defendant's right to examine witnesses against him, the ECCC Law mentions evidence instead. It is likely that this reflects the reality of the civil law procedures which will be implemented in the Extraordinary Chambers; in the civil law system, more emphasis is placed on the examination of the evidence in the dossier prepared by the investigating judge than on the cross-examining of witnesses at trial as in the common law tradition.

## **b. Guarantees beyond the basic fair trial requirements.**

### *i. Innocence presumed until proven guilty.*

One example of a fair trial guarantee beyond the basic requirements of ICCPR Article 14 is the right to be presumed innocent until proven guilty. The ECCC Law incorporates the ICCPR's stipulation that "[e]veryone charged with a criminal offence shall have the right to be

<sup>113</sup> The English version of the ECCC Law is an unofficial translation by the Council of Jurists and the Secretariat of the Task Force. It was last revised on November 23, 2006. Some of the slight differences between the wording of the ICCPR and the ECCC Law could therefore be accounted for by the process of translation.

presumed innocent until proven guilty according to law”<sup>114</sup> by changing the wording slightly. It instead states, “The accused shall be presumed innocent as long as the court has not given its definitive judgment.”<sup>115</sup> The different wording does not appear to change the meaning of the right in any substantial way, and can possibly be attributed to translation.

ii. *Nullem crimen sine lege*

The principle of *nullum crimen sine lege*, or the theory that no punishment should be imposed by a previous penal law, is fundamental in international criminal law. In the case of the Extraordinary Chambers, it means that the crimes prosecuted before the ECCC must have been crimes at the time they were committed, in 1975.<sup>116</sup>

Article 33 of the ECCC Law states that the Extraordinary Chambers “shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the [ICCPR].”<sup>117</sup> Article 15 of the ICCPR states the following:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.<sup>118</sup>

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<sup>114</sup> ICCPR, *supra* note 40, at art. 14 § 2 [reproduced in the accompanying notebook at Tab 3].

<sup>115</sup> ECCC Law, *supra* note 4, at art. 35 [reproduced in the accompanying notebook at Tab 8].

<sup>116</sup> STEVEN R. RATNER, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY (1997), at 269.

<sup>117</sup> ECCC Law, *supra* note 4, at art. 33 [reproduced in the accompanying notebook at Tab 8].

<sup>118</sup> ICCPR, *supra* note 40, at art. 15 [reproduced in the accompanying notebook at Tab 3].

This article articulates the principle of *nullum crimen sine lege*. The defense may try to apply this principle to some of the crimes under the jurisdiction of the Extraordinary Chambers because they were not crimes under Cambodian penal law<sup>119</sup> at the time they were committed. However, this argument will fail, for by incorporating Article 15 into the ECCC Law, the Extraordinary Chambers has imported the Article 15 definition of what constituted a previous criminal offense.<sup>120</sup> This means that if the offense was criminal under international law, not just domestic law, at the time it was committed, then it can be prosecuted at the Cambodian Extraordinary Chambers.<sup>121</sup>

### C. PROCEDURAL CONCERNS FACING THE ECCC

On paper, the Extraordinary Chambers provides nearly all of the due process elements enumerated in the ICCPR. However, a culture of respect in Cambodia for these due process concerns did not exist before the establishment of the ECCC.<sup>122</sup> When questioning the legitimacy of the Extraordinary Chambers, scholars have posited the question of whether or not the Chambers will stand up for the rights enumerated in its founding documents, or if the culture of corruption is so entrenched in the Cambodian judicial system that the ECCC will not be able

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<sup>119</sup> See the Cambodian Penal Code of 1956, excerpts in English provided by the ECCC, Oct. 18, 2006. [reproduced in the accompanying notebook at Tab 6].

<sup>120</sup> ICCPR, *supra* note 40, at art. 15 [reproduced in the accompanying notebook at Tab 3].

<sup>121</sup> See *id.* See also Helen Horsington, *The Cambodian Khmer Rouge Tribunal: the Promise of a Hybrid Tribunal*, 5 MELB. J. INT'L L. 462 (2004) [reproduced in the accompanying notebook at Tab 25].

<sup>122</sup> Sylvia de Bertodano, *Problems Arising from the Mixed Composition and Structure of the Cambodian Extraordinary Chambers*, 4 J. INT'L CRIM. JUST. 285, 286 (2006) [reproduced in accompanying notebook at Tab 22]. See also James Cockayne, *Cambodian Extraordinary Chambers: Justice at Long Last?*, 4 J. INT'L CRIM. JUST. 2, 283 (2006) [reproduced in the accompanying notebook at Tab 23].

to escape its hold.<sup>123</sup> The Secretary-General of the United Nations himself voiced these concerns, stating that he “found there to be little respect on the part of the Cambodian courts for the most elementary features of the right to a fair trial.”<sup>124</sup> Since the Extraordinary Chambers rely so heavily on the existing Cambodian judicial system and contain a majority of Cambodian judges, it remains to be seen whether or not the ECCC will be able to overcome the entrenched obstacle to a fair trial and legitimate tribunal that is the Cambodian justice system.<sup>125</sup>

### **1. Competent, Independent, and Impartial Tribunal**

One of the most serious concerns regarding the ability of the Extraordinary Chambers to function as a legitimate institution regards the questionability of its independence and impartiality from governmental and partisan influence. This independence and impartiality is crucial to the legitimacy of the tribunal and is required by Article 14 of the ICCPR.<sup>126</sup> Throughout the negotiation process between Cambodia and the United Nations, much concern was voiced over the composition of the ECCC.<sup>127</sup> One of the primary reasons that the United Nations pushed for so long, albeit ultimately unsuccessfully, for a majority of international judges in the ECCC is that the UN had reservations about the independence of the Cambodian

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<sup>123</sup> See Katheryn M. Klein, Comment, *Bringing the Khmer Rouge to Justice: The Challenges and Risks Facing the Joint Tribunal in Cambodia*, 4 NW. J. INT’L HUM. RTS. 549, 555 (2006) [reproduced in the accompanying notebook at Tab 27].

<sup>124</sup> The Secretary-General, *Report of the Secretary-General on Khmer Rouge Trials, delivered to the General Assembly*, ¶ 28, U.N. Doc. A/57/769 (March 31, 2003) [reproduced in the accompanying notebook at Tab 14]. See also Michael Lieberman, Comment, *Salvaging the Remains: The Khmer Rouge Tribunal on Trial*, 186 MIL. L. REV. 164, 166 (2005) [reproduced in the accompanying notebook at Tab 28].

<sup>125</sup> See generally, Sarah Williams, *The Cambodian Extraordinary Chambers--A Dangerous Precedent for International Justice?*, 53 INTL & COMP. L.Q. 227 (2004).

<sup>126</sup> ICCPR, *supra* note 33 at art. 14 [reproduced in the accompanying notebook at Tab 3].

<sup>127</sup> See Bertodano, *supra* note 122, at 286-288 [reproduced in accompanying notebook at Tab 22].

judiciary.<sup>128</sup> Historically, the judicial system of Cambodia has been weak and corrupt.<sup>129</sup> Most of the judges have belonged to the government's political party. Additionally, political figures, members of the police force, and the Ministry of Justice are believed to exert much control and influence over the Cambodian judicial system.<sup>130</sup>

The public has very little confidence in the Cambodian court system; in fact, a “culture of impunity” has been allowed to dominate the judicial landscape.<sup>131</sup> The belief is widespread that the Cambodian People's Party (CCP) often instructs judges how they should rule and prosecutors what cases and charges they should bring.<sup>132</sup> The threat goes beyond monetary issues; judges are worried about threats to their safety if they do not rule as they are told, and there have been assassinations.<sup>133</sup>

Further complicating the impartiality of the Extraordinary Chambers, Hun Sen, the Cambodian Prime Minister, has been vocal in his demands on the ECCC.<sup>134</sup> As a former Khmer Rouge soldier himself, Hun Sen is not removed from the actions of the Extraordinary Chambers,

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<sup>128</sup> *Id.* at 288.

<sup>129</sup> For a historical discussion of the Cambodian judiciary, see BRAD ADAMS, *Cambodia's Judiciary: Up to the Task?*, in BRINGING THE KHMER ROUGE TO JUSTICE: PROSECUTING MASS VIOLENCE 127 (Jaya Ramji & Beth Van Schaack eds., 2005) [reproduced in accompanying notebook at Tab 18]; for a more ECCC-centered history, see Daniel Kemper Donovan, *Joint U.N.-Cambodia Efforts to Establish a Khmer Rouge Tribunal*, 44 HARV. INT'L L. J. 551 (2003) [reproduced in the accompanying notebook at Tab 24].

<sup>130</sup> Bertodano, *supra* note 122, at 286 [reproduced in the accompanying notebook at Tab 22].

<sup>131</sup> Adams, *supra* note 129, at 162 [reproduced in the accompanying notebook at Tab 18].

<sup>132</sup> See Human Rights Watch, *Serious Flaws*, *supra* note 99, at 4 [reproduced in the accompanying notebook at Tab 39]; see also Amnesty Int'l, *Kingdom of Cambodia: Urgent Need for Judicial Reform*, AI Index ASA 23/005/2003, April 2003 [reproduced in the accompanying notebook at Tab 37].

<sup>133</sup> *Id.*

<sup>134</sup> Seth Mydans, *Justice in Cambodia? It won't come easily; Clock ticking for UN-backed tribunal as inquiry into Khmer Rouge opens*, INT'L HERALD TRIB., Aug. 5, 2006, at 1 [reproduced in the accompanying notebook at Tab 46].

nor is he necessarily immune from prosecution.<sup>135</sup> He has stated publicly that lower ranking members of the Khmer Rouge will not be subject to trial, and indeed, it was written into the ECCC Law that the court would only try “those who were most responsible for the crimes and serious violations,”<sup>136</sup> effectively ensuring that Hun Sen will never be brought before the ECCC. As he has been successful in dictating the affairs of the ECCC in the past, there is concern that this could continue in the future.<sup>137</sup>

In an effort to enhance professional security, discourage susceptibility to bribes and provide the judges with the ability to be as impartial and independent as possible, measures have been taken to compensate the Cambodian judges of the Extraordinary Chambers considerably more than their colleagues in other Cambodian courts.<sup>138</sup> While they will still only be paid about half the salary of their international counterparts, the salary will be much more than a typical Cambodian judge would receive.<sup>139</sup> It is assumed that this will alleviate some of the pressure on the judiciary to take bribes. Unfortunately, this does not solve the problems of political and physical pressure that also occur in the Cambodian justice system.

## **2. Conditions for the Arrest and Custody of Accused**

If there is an element of the Cambodian justice system that has even a greater cloud of suspicion upon it than the judiciary, it is the police. Police and soldiers have been allowed free

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<sup>135</sup> See Klein, *Case No. IT-95-I-AR7205*, at 554 [reproduced in the accompanying notebook at Tab 27].

<sup>136</sup> ECCC Law, *supra* note 4, at art. 2 [reproduced in the accompanying notebook at Tab 8].

<sup>137</sup> See Klein, *supra* note 123, at 559 [reproduced in the accompanying notebook at Tab 27].

<sup>138</sup> Patricia M. Wald, *Iraq, Cambodia and International Justice*, 21 AM. U. INT’L L. REV. 541, 555 (2006).

<sup>139</sup> See generally, Suzannah Linton, *Safeguarding the Independence and Impartiality of the Cambodian Extraordinary Chambers*, 4 J. INT’L CRIM. JUST. 327 (2006).

reign in the country for years, and have essentially lived above the law.<sup>140</sup> In fact, the police have been considered the “biggest source of human rights violations in the country,”<sup>141</sup> particularly in the context of pre-trial detention.<sup>142</sup> This is particularly problematic for the Extraordinary Chambers because Article 33 of the ECCC Law states that “[c]onditions for the arrest and the custody of the accused shall conform to existing law in force.”<sup>143</sup> If the police force is committing human rights violations, and the investigation or interrogation processes are corrupted, then a legitimate institution cannot allow evidence obtained into court. Moreover, if the Extraordinary Chambers is forced to acquit some of Cambodia’s most notorious criminals due to police violations and improper treatment of defendants, it will be viewed as powerless and ineffectual.

In a related measure, the ECCC has yet to fully incorporate the international prohibition of trials in absentia into its Draft Rules.<sup>144</sup> Trials in absentia have occurred frequently in Cambodia.<sup>145</sup> Therefore, it is imperative that the right of a person to appear at his trial in order to aid in his defense be explicitly stated in the Rules.<sup>146</sup>

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<sup>140</sup> Adams, *supra* note 129, at 162 [reproduced in the accompanying notebook at Tab 18].

<sup>141</sup> *Id.*

<sup>142</sup> Goran Sluiter, *Due Process and Criminal Procedure in the Cambodian Extraordinary Chambers*, 4 J. INT’L CRIM. JUST. 314, 316 (2006) [reproduced in the accompanying notebook at Tab 31]; *See also* Mohamed Ali Lejmi, *Prosecuting Cambodian Genocide*, 4 J. INT’L CRIM. JUST. 300 (2006) (discussing right to trial without undue delay) [reproduced in accompanying notebook at Tab 27].

<sup>143</sup> ECCC Law, *supra* note 4, at art. 33 [reproduced in the accompanying notebook at Tab 8].

<sup>144</sup> Extraordinary Chambers in the Courts of Cambodia Draft Internal Rules (Nov. 3, 2006) *available at* [http://www.unakrt-online.org/04\\_documents.htm](http://www.unakrt-online.org/04_documents.htm), Rule 12 [hereinafter “Draft Internal Rules”] [reproduced in the accompanying notebook at Tab 9].

<sup>145</sup> *See* Stan Starygin and Johanna Selth, *Cambodia and the Right to Be Present: Trials In Absentia in the Draft Criminal Procedure Code*, SING. J.L.S. 170 (2005) [reproduced in the accompanying notebook at Tab 32].

<sup>146</sup> Amnesty Int’l, *Cambodia: Extraordinary Chambers Must Not Rush to Adopt Flawed Rules*, AI Index ASA 23/012/2006, November 22, 2006 [reproduced in the accompanying notebook at Tab 38].

### 3. Equality of Arms

There appear to be a few issues regarding the equality of arms in the Extraordinary Chambers. Specifically, an international co-prosecutor will be given the competence to appear in the Extraordinary Chambers,<sup>147</sup> but international lawyers acting as defense counsel who are not members of the Cambodian bar will not be permitted to speak in court. It has been assumed that since this is the case under traditional Cambodian law, international lawyers will be permitted to act only in an advisory capacity.<sup>148</sup> However, it appears that this matter is still under debate and has yet to be resolved. The Draft Internal Rules show several propositions, some of which would allow international defense lawyers to appear before the ECCC.<sup>149</sup> The first proposition involves international lawyers registering with the Bar Association of the Kingdom of Cambodia, which would maintain a special list recognizing the right of those lawyers to represent clients before the ECCC as co-lawyers.<sup>150</sup> Alternatively, the Defence Unit may maintain such a list.<sup>151</sup> Most interestingly, however, the Draft Rules state that international lawyers “shall work in conjunction with a lawyer admitted in Cambodia, as co-lawyers, with equal rights of audience.”<sup>152</sup> It appears that this Rule would satisfy equality of arms, because the international prosecutor would be a co-prosecutor as well. These Rules, however, are just drafts, and could change before the Extraordinary Chambers hold their first court session.

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<sup>147</sup> ECCC Law, *supra* note 4, at art. 18 [reproduced in the accompanying notebook at Tab 8].

<sup>148</sup> See Bertodano, *supra* note 122 [reproduced in the accompanying notebook at Tab 22].

<sup>149</sup> Draft Internal Rules, *supra* note 144 [reproduced in the accompanying notebook at Tab 9].

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*



Moreover, this particular Rule has been a sticking point for the Cambodian Bar Association, which holds the position that international lawyers should not be allowed to represent defendants in the Cambodian courtroom, only serve as advisors to Cambodian counsel.<sup>153</sup>

#### **4. Possibility of Procedural Gridlock: The Supermajority Requirement**

The supermajority formula,<sup>154</sup> which requires a majority of judges plus one for any judicial decision to be made in the ECCC, even procedural decisions, evolved from a compromise that theoretically would allow a majority of Cambodian judges while forcing the international judges to be relevant. It requires that at least one of the international judges be in the majority for any decision to be made; therefore, the Cambodian judges cannot ignore the input of the international judges.<sup>155</sup>

The problem arises when a supermajority decision cannot be reached, for example, if the bench were to split along international / national lines. It is unclear as to how the Extraordinary Chambers would then proceed. It could result in an effective acquittal, because retrial before a different chamber has no precedent in Cambodia.<sup>156</sup> Alternatively, the decision could be left in an “unsatisfactory limbo, where there is neither a conviction nor an acquittal,” similar to the

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<sup>153</sup> See Officials Mull Khmer Rouge Trials, BBC NEWS, Nov. 20, 2006 [reproduced in the accompanying notebook at Tab 48]; Associated Press, *International Bar Association Cancels Legal Training for Cambodian Genocide Trial*, INT’L HERALD TRIB., Nov. 24, 2006 [reproduced in the accompanying notebook at Tab 49]; and *Cambodian Khmer Rouge Trial Strikes Yet Another Delay*, DEUTSCHE PRESSE-AGENTUR, Nov. 25, 2006 [reproduced in the accompanying notebook at Tab 50].

<sup>154</sup> See ECCC Law, *supra* note 4, at art.14 [reproduced in the accompanying notebook at Tab 8].

<sup>155</sup> Bertodano, *supra* note 122, at 286-287 [reproduced in the accompanying notebook at Tab 22].

<sup>156</sup> Caitlin Reiger, *Marrying International and Local Justice: Practical Challenges Facing the Khmer Rouge Tribunal*, Open Society Justice Initiatives, Spring 2006, at 100 [reproduced in the accompanying notebook at Tab 45].

Scottish verdict of “not proven.”<sup>157</sup> Again, this would result in the person being freed without a decision. As a practical matter, this is problematic, because it would result in no answer after considerable time and money has been spent in holding a trial.<sup>158</sup> However, as demonstrated by the Scottish model and the American “hung jury,” such a result is not without precedent.<sup>159</sup>

Particularly troublesome is the use of this supermajority formula for procedural decisions. Even establishing when Cambodian law is in conflict with international law, and how international law should be applied can become gridlock decisions. The ECCC Law states that if the judges are unable to come to a supermajority decision, the trial shall continue. However, the meaning of “continue” is ambiguous. In such a case, continue could mean to continue applying Cambodian law until a supermajority decision was made. Rules must be put in place either by the ECCC or by the judges themselves that international law will be the default option in such a conflict. At the very least, a procedure must be articulated to solve this ambiguity.

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<sup>157</sup> Bertodano, *supra* note 122, at 290 [reproduced in the accompanying notebook at Tab 22].

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

#### **IV. CONCLUSION**

As a new kind of hybrid tribunal, the Extraordinary Chambers in the Courts of Cambodia draws on dual sources of national and international legitimacy. While this creates many dichotomies and conflicts, it allows the tribunal a special opportunity to draw on international lessons and precedent while integrating itself into the judicial system of Cambodia. The ECCC must never lose sight of the extraordinary position in which it finds itself and the extraordinary role which it must play. To lose sight of this position could cause the court to falter and become bogged down in corruption and procedural quagmire. In order to maintain the legitimacy which the United Nations and Cambodia have carefully laid out in its founding instruments, the ECCC must successfully mesh international and Cambodian law into fair procedures which carry out justice and ensure that the Extraordinary Chambers serve as an example which both the Cambodian judiciary and international tribunals will want to emulate, not forget.