

*INTERNATIONAL STANDARDS FOR THE NOMINATION OF JUDGES TO THE EXTRAORDINARY CHAMBERS
IN THE COURTS OF CAMBODIA FOR THE PROSECUTION OF CRIMES COMMITTED
DURING THE PERIOD OF DEMOCRATIC KAMPUCHEA*

February 2004

**Presented by the Working Group on the Extraordinary Chambers* and
the Open Society Justice Initiative (OSJI)†**

- **Selecting judges based on objective criteria and through an open and fair appointment process is critical to the establishment of a competent, independent and impartial tribunal.**

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 (UN-Cambodia Agreement) requires the Extraordinary Chambers to “exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law.” (Article 12.) Under the International Covenant on Civil and Political Rights (ICCPR), to which Cambodia is a party, anyone subject to a criminal charge is “entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” (Article 14.) Selecting judges based on objective criteria and through an open and fair appointment process is essential to the establishment of such a tribunal.

- The United Nations Basic Principles on the Independence of the Judiciary emphasize how important the selection and appointment of judges is to an independent judiciary. These principles reflect the international community’s view of what an independent tribunal requires. Principle 10 states:
 - ⇒ “Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law.”
 - ⇒ “Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status . . .”
- The UN-Cambodia Agreement and the 2001 Cambodian Law on the Extraordinary Chambers lay out a general framework for the selection and appointment of judges. The founding documents of “hybrid” or internationalized tribunals, such as the Special Panels for Serious Crimes in East Timor, the Special Court for Sierra Leone, and the UN-established Kosovo Court system (UNMIK Court), provide additional guidance for defining objective criteria for

* **The Working Group on the Extraordinary Chambers** is an ad hoc coalition of international non-governmental organizations and individuals with expertise in international law and background working in Cambodia. The Working Group is dedicated to ensuring that the investigation and prosecution of Khmer Rouge crimes by the Extraordinary Chambers is fair, full and credible, and that it contributes to reconciliation efforts and advancement of the rule of law sought by Cambodians. Through collaborative efforts, the Group intends to provide legal, technical and other assistance to Cambodians, the Extraordinary Chambers and interested members of the international community.

† **The Open Society Justice Initiative** (www.justiceinitiative.org), an operational program of the Open Society Institute (OSI), promotes rights-based law reform, builds knowledge and strengthens legal capacity worldwide. Among its other programs, the Justice Initiative is committed to reinforcing mechanisms of accountability for international crimes.

the selection and appointment of judges. These tribunals resemble the Extraordinary Chambers, an accountability mechanism that, while part of the Cambodian legal system, similarly involves important international elements. While the recently established permanent International Criminal Court (ICC) differs in nature from the Extraordinary Chambers, its official documents, such as its Statute and Rules of Procedure, also reflect lessons learned from previous international criminal tribunals and provide a valuable reference point for the most recent thinking of the international community on standards for the nomination and appointment of judges to international or “hybrid” courts.

- **Candidates must be persons of “high moral character, impartiality and integrity.” (Articles 3.3 and 5.2 of UN-Cambodia Agreement)**

All international or “hybrid” criminal justice mechanisms have required that judicial candidates be persons of high moral character, impartiality, and integrity. This standard is reflected in Articles 3.3 and 5.2 of the UN-Cambodia Agreement. These characteristics cannot be overemphasized. Both the internal functioning of an international or “hybrid” court, as well as its external credibility (particularly in the eyes of local and international officials, civil society and the public), are significantly dependent on the extent to which judges reflect these qualities. In order to ensure that the Extraordinary Chambers is considered legitimate by both Cambodians and the international community, it is essential that judges demonstrate high standards of impartiality and integrity in their public statements, the conduct of proceedings before the Extraordinary Chambers, and in all other respects.

- UNMIK Court regulations provide an example of what might be required to meet the criteria of impartiality and integrity. These regulations make ineligible for appointment candidates who “have participated in discriminatory measures, or applied any repressive law or have implemented dictatorial policies.” Although these criteria were developed for the particular context of Kosovo, they demonstrate concrete standards that reflect the values of impartiality and integrity.

- **Candidates must be committed to being “independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.” (Articles 3.3 and 5.3 of UN-Cambodia Agreement; Article 10 of the Law on the Extraordinary Chambers)**

All international criminal justice mechanisms require that judges be independent in the performance of their functions. As with the Statute of the Special Court for Sierra Leone, both the UN-Cambodia Agreement and the 2001 Cambodian Law on the Establishment of the Extraordinary Chambers specifically bar judges from accepting or seeking instructions from any Government or any other source. This is consistent with Principle 2 of the UN Basic Principles on the Independence of the Judiciary, which requires that judges decide matters before them “without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”

- Regulations promulgated by the UN Transitional Authority in East Timor for the purpose of establishing an independent judiciary require that judges carry out their “functions without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or all other status.”

- The independence of the judges is considered so significant that that the ICC Statute prohibits sitting judges from engaging in “any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.” This principle would, for example, rule out any candidate who intends to remain actively engaged in political affairs.

- **Judges should not be chosen from among persons who are likely to be repeatedly disqualified from cases.**

Most mechanisms also provide criteria for when a judge must be disqualified from participating in a case. The nomination phase presents a valuable opportunity to pre-empt later delay and possible damage to the Extraordinary Chamber’s reputation, as a candidate who is likely to be repeatedly disqualified from cases brought before the Chambers will not only severely hamper its efficient functioning, but also raise doubts as to the impartiality of the judges and, ultimately, the legitimacy of the Extraordinary Chambers. Under most mechanisms, a judge must be disqualified from hearing a case when he or she has a personal interest in the case or any personal association, including a spousal, parental or other close family, personal or professional relationship, with any of the parties.

- Under the ICC Statute, a judge cannot participate in any case “in which his or her impartiality might reasonably be doubted on any ground.” Applied at the nomination stage to an international or ‘hybrid’ body, this principle would, for example, rule out a candidate who was previously involved in *any* capacity in a case at the national level involving a person likely to be investigated or prosecuted by the tribunal in question.
- The ICC Rules of Procedure and Evidence add that a judge’s impartiality may be called into question if he or she previously performed functions “during which he or she could be expected to have formed an opinion on the case in question, on the parties or on their legal representatives that, objectively, could adversely affect the required impartiality of the person concerned.”

- **Candidates must possess the “qualifications required in their respective countries for appointment to judicial office.” (Articles 3.3 and 5.2 of UN-Cambodia Agreement)**

All international or “hybrid” criminal justice mechanisms require that judicial candidates possess the qualifications required in their respective countries for appointment to judicial offices. This is clearly the minimum that is required. Under the Statutes of the Special Court for Sierra Leone and the ICC, candidates must be qualified for appointment to the *highest* judicial office within their jurisdiction. This does not mean that candidates must be or have been sitting judges, but rather that their personal and professional qualifications must be of the highest order.

- **Candidates should have experience in “criminal law [or] international law, including international humanitarian law and human rights law.” (Article 3.4 of UN-Cambodia Agreement)**

As with the other “hybrid” tribunals, the UN-Cambodia Agreement requires that “the experience of judges in criminal law, international law, including international humanitarian law and human rights law” be taken into account when determining the composition of the court. Experience in these areas is critical to the success and legitimacy of criminal prosecutions in international or “hybrid” settings.

- Regulations promulgated by the UN Transitional Authority in East Timor for the purpose of establishing an independent judiciary provide a good example of criteria in this regard, requiring judicial applicants to “have completed their legal training and hold a university degree in law.”
 - Similarly, UNMIK Court regulations require candidates to have, as a minimum, a university degree in law and relevant work experience in the field of law ranging from three to seven years.
- **Candidates should reflect the experience and stature of the most qualified and respected judges in their respective jurisdictions.**

Sitting judges on international and “hybrid” courts are highly experienced jurists and/or legal scholars. The vast majority have experience as judges in either their domestic systems (many of them in their country’s highest courts) or international bodies (including other criminal tribunals, regional human rights bodies, or international arbitration bodies). Many have academic expertise in issues of international criminal, human rights, or humanitarian law. Choosing the most competent jurists in their respective jurisdictions will enhance the standing and reputation of the Extraordinary Chambers as well as promote its efficiency.

- Seven of the eight judges on the Special Court for Sierra Leone have previous judicial experience, three of them in the Supreme Court or High Court of their respective countries. Additionally, five of the judges have international legal expertise, such as working on international cases like the Pinochet prosecution, serving as their country’s representative to UN bodies, drafting legal instruments like the African Charter on Human and Peoples’ Rights, or working on projects for the UN.
 - Five of the eighteen ICC judges have served at the ICTY and one at the International Criminal Tribunal for Rwanda (ICTR). Six of the judges have international legal expertise related to human rights, including membership on the Committee Against Torture and the Committee on the Elimination of all forms of Discrimination Against Women. Five have extensive expertise in domestic criminal law, including special expertise on crimes against women and children, and ten have significant experience with international law.
- **Candidates should be selected through an open and fair appointment process.**

The experience of other international criminal justice mechanisms has highlighted how important it is to have an open and fair appointment process. Ensuring a process in which judicial vacancies are publicly disseminated, applications are rigorously reviewed, and representatives of civil society are consulted will help to ensure the legitimacy and reputation of the Extraordinary Chambers in the eyes of local and international officials, civil society and the public.

- Article 9 of the Universal Charter of the Judge, drafted by judges from around the world and approved by the International Association of Judges, requires that each appointment of a judge “be carried out according to objective and transparent criteria based on proper professional qualification.” It further recommends that selection be carried out by an independent body that includes judges. Article 9 of the Charter represents the collective thinking of judges from around the world on what a fair and open process of appointment would require.