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The Cambodian Extraordinary Chambers

Replies and Comments

Simon Meisenberg
Research Associate

For comments
simon@meisenberg.net

On the Web

<http://www.ifhv.de>

Focus

Draft 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, 17 March 2003. Approved by GA Res. 57/ 228B, 13 May 2003.

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

Documents and information on the Extraordinary Chambers can be found under:
<http://www.cambodia.gov.kh/krt>

In October 2004, the Cambodian Parliament ratified an agreement with the United Nations to establish the Extraordinary Chambers in Phnom Penh to prosecute the senior leaders of the Khmer Rouge. The obligatory approval of the agreement by the Senate and the Cambodian Head of State is regarded as a minor formality. 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" (Agreement), which had already been approved by the UN General Assembly in May 2003, is the result of seven years of fierce negotiations between the two parties trying to find a balance between impunity and State sovereignty. The Extraordinary Chambers represent a different category than other war crimes tribunals currently in place. As the Special Court for Sierra Leone (SCSL) the Extraordinary Chambers are established by a bilateral agreement. Unlike the SCSL the Extraordinary Chambers are established within a domestic legal system. This important fact will have an enormous influence on the future work of the Chambers. "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" (Extraordinary Chambers Law) implemented by the government of Cambodia – and not the bilateral agreement with the UN – is the constitutive instrument of the Extraordinary Chambers. The Agreement only regulates the cooperation between the two parties and provides for, *inter alia*, the legal basis and the principles and modalities for such cooperation. However, as an international treaty governed by the Vienna Convention on the Law of Treaties it prevails over inconsistent and contradicting norms of the Extraordinary Chambers Law and other national law of Cambodia. The Cambodian government is therefore obliged under international law to eradicate any discrepancies between the Agreement and Extraordinary Chambers Law.

The Extraordinary Chambers have temporal jurisdiction for crimes committed from 17 April 1975 to 6 January 1979. The personal jurisdiction is limited to "senior leaders of Democratic Kampuchea" and those who were "most responsible" for the crimes falling within the temporal and subject matter jurisdiction of the Extraordinary Chambers. This approach reflects the limited resources and mandate of the Extraordinary Chambers. The wording "senior leaders of Democratic Kampuchea" clearly indicates the course of investigations. However, it seems to be debatable if the wording "and those who were most responsible" limits the prosecution to persons of Cambodian nationality.

The subject matter jurisdiction of the Extraordinary Chambers covers crimes under international and domestic law. International offences prosecuted are genocide, crimes against humanity, and grave breaches of the Geneva Conventions. Unique and unprecedented in war crimes tribunals are two new international crimes, which cover the destruction of property as defined by the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) and offences against international protected persons under the Vienna Convention on Diplomatic Relations (1961). Concerning the crime of genocide it seems doubtful if the large amounts of acts committed by the Khmer Rouge fall under the genocide definition of the Genocide Convention (1948), as most of the acts were committed out of political rather than national, ethnic, racial, or religious reasons. In regard to crimes against humanity the Extraordinary Chambers need to establish whether customary international law in 1975 still required a nexus with an armed conflict. The Extraordinary Chambers do not have jurisdiction to prosecute serious violations of Common Article 3 of the Geneva Conventions and Additional Protocol II. National crimes covered by the Extraordinary Chambers include homicide and religious persecution as defined under the criminal code of Cambodia.

The Extraordinary Chambers will have a two-tiered system, comprising a Trial and a Supreme Court Chamber. Unlike other war crimes tribunals' international judges are not represented in the majority. The Trial Chamber consists of three national and two international, the Supreme Court Chamber of four national and three international judges. Given the concerns about the weakness of the Cambodian judiciary and the Cambodian government's insistence on a majority of judges during the negotiations, a "supermajority" requirement was adopted. This exceptional solution requires an affirmative vote of at least one international judge. This "international veto" guarantees that no decision and sentence be taken without the consent of at least one international judge. Further, the national and the international co-prosecutors will head the prosecutions equally. The investigations will as well be lead through a national and an international investigating judge. If the international and national co-prosecutors or investigation judges are in disagreement about their strategy they may bring their dispute to the attention of the Pre-Trial Chamber, which is established solely for the settlement of such disputes. The Supreme Council of the Magistracy of Cambodia will appoint the national judges as well as the co-prosecutor and will select the international candidates from a list of nominees provided by the Secretary General.

The sentence of the Extraordinary Chambers is limited to life imprisonment. As the SCSL the Extraordinary Chambers will have to deal with the legality of amnesties and pardons. One potential suspect, *Ieng Sary*, convicted for genocide by the former *People's Revolutionary Tribunal* in 1979, was granted a formal royal pardon in 1996. Even though his trial was often referred to as a "show trial", the Extraordinary Chamber will have to decide whether such a pardon is legally valid for international crimes before its jurisdiction. The SCSL has recently decided that unconditional amnesties are not a bar to prosecution before international criminal courts. The forthcoming tasks need to ensure sufficient funding for an estimated budget of \$ 57 m for a three year mandate and to appoint highly competent and independent judges so that the Extraordinary Chamber, though a national institution, will have a high reputation beyond Cambodian borders.

Responsibility

BOFAXE are published by the Institute for International Law of Peace and Humanitarian Law of the Ruhr-University Bochum: IFHV, NA 02/33 Ruhr-Universität Bochum, 44780 Bochum, Germany. Tel: +49.234.3227366, Fax: +49.234.3214208.

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