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Cambodia: Amnesty International's preliminary views and concerns about the draft agreement for the establishment of a Khmer Rouge special tribunal

On 18 December 2002, the United Nations General Assembly adopted resolution (57/228), calling on the Secretary-General of the United Nations to resume negotiations with the Cambodian authorities to reach agreement on the establishment of an international tribunal under UN auspices, for the prosecution of those charged with the most grave international crimes committed during the Khmer Rouge period between 1975-1979.

Following two rounds of negotiations, in New York and in Phnom Penh, a draft agreement was issued by the two sides on 17 March 2003.

Amnesty International welcomes any steps that ensure that those responsible for the most serious violations of human rights be held to account, provided that this is achieved according to the highest international legal standards.

Amnesty International welcomes some of the provisions in the draft. However, the organization is deeply concerned about serious deficiencies in the proposed agreement that reflect a significant retreat from current international law and standards. The organization therefore calls on all members of the General Assembly to ensure that these concerns are addressed without delay before the agreement is signed. The deficiencies in the draft are so serious that Amnesty International would oppose the United Nations signing the agreement without major revision.

On the positive side, the draft provisions which Amnesty International welcomes, include the exclusion of amnesty or pardon for anyone investigated or convicted for crimes covered by the agreement, a clause which potentially applies to anyone previously granted an amnesty by the Cambodian authorities (draft Article 11); provisions for proceedings at all times to be held in public (draft Article 12.2); and the exclusion of the death penalty (draft Article 10), which is consistent with other international courts.

Amnesty International's preliminary concerns about the current draft text

are the following:

Insufficient guarantees for international fair trial standards

The current draft agreement limits the applicable international standards of justice, fairness and due process of law to those set out in articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR) of 1966, but does not incorporate other important provisions of the ICCPR (for example article 9). Clearly, the full provisions of the ICCPR must apply. In addition, the draft does not make reference to many other stronger contemporary international standards including those in the Rome Statute of the International Criminal Court and other United Nations standards such as the Basic Principles on the Independence of the Judiciary.

Insufficient guarantees for an independent and impartial court

In Amnesty International's view, the Cambodian judicial system is weak and subject to political pressures, especially in high profile cases. It is therefore currently unable to ensure that such trials are conducted in a manner that would conform to international standards of fairness. Cambodian citizens are well aware of the inadequacies and the political interference in the judicial system where corruption is also commonplace. Amnesty International therefore welcomes the inclusion of international judges, an international co-investigating judge and an international co-prosecutor in the draft proposal as essential to address current weaknesses.

However, current proposals fail to guarantee the necessary independence and impartiality of the judicial process. The proposed mixture of Cambodian and international judges and complicated decision making process has no precedent in any domestic or international court. Amnesty International is also concerned about provisions for Cambodian judicial control to settle potential differences between the Cambodian and international co-investigating judges and co-prosecutors over investigations and indictments. Amnesty International believes that this proposed structure could seriously compromise the integrity of the judicial process.

Failure to incorporate strongest principles of criminal responsibility and law on defences

The draft agreement fails to incorporate the strongest possible international principles of criminal responsibility and limits on defences as recognised in conventional and customary international law. For example, nothing in the agreement prevents an accused from successfully claiming superior orders as a defence.

Inadequate victim and witness protection

There is scant provision for victim and witness protection. Amnesty International recommends that these deficiencies are remedied in a subsequent accompanying document detailing the procedures of the Extraordinary Chambers that should provide an effective victim and witness protection program with sufficient resources, built on the extensive experience gained by existing international tribunals. Such a program would need to apply to judges, prosecutors, defence lawyers and others. Victims and witnesses will not come forward to testify without the necessary assurances for their safety from international, rather than domestic authorities.

Absence of provisions on reparations

It is a matter of grave concern that there is no provision in the draft agreement for the Extraordinary Chambers to award reparations. Unless this is provided, it would constitute a major retreat from the Rome Statute. The Extraordinary Chambers should be able to award all forms of reparations to victims and their families, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

Failure to link the proposed judicial procedure to the rebuilding of the Cambodian criminal justice system

There is virtually nothing in the present draft agreement that will help address the longer-term deficiencies and weakness of the present Cambodian judicial system. Amnesty International believes that the considerable investment required from both the international community and Cambodia to set-up a judicial process that meets international standards to try only a handful of people responsible for serious crimes must also be made to benefit the Cambodian judicial system as a whole. The work of the Extraordinary Chambers must be used to assist the continuing program of capacity building and technical assistance in the Cambodian judicial sector. The problems of impunity in Cambodia cannot be addressed simply by a handful of high profile prosecutions.

Amnesty International is reviewing the draft agreement in detail and plans to comment further after it has time to study it.

Amnesty International has for many years urged that those responsible for crimes against humanity, committed during this dark period in Cambodian history, be held to account. This is important for two reasons: first, in order at last to ensure that justice is done for the victims and their families who suffered the most serious international crimes under Khmer Rouge rule and, second, to put an end to the culture of impunity that has plagued Cambodia to this day.

For more information please see:

Cambodia: Special Khmer Rouge Tribunals in Cambodia - Justice is not served by diluting international standards (ASA 23/012/2002, December 2002)

Cambodia: Cambodians deserve international standards of justice (ASA 23/010/2002, November 2002) Cambodia: Flawed trials in no one's best interests (ASA 23/001/2002, February 2002)

Cambodia: Amnesty International's reaction to the charging of Duch (ASA 23/10/99, May 1999)

Cambodia: Time to judge past atrocities (ASA 23/04/99, March 1999)

Cambodia: International tribunal must not be politically selective (ASA 23/15/98, April 1998)

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