Unofficial translation

Kingdom of Cambodia
Nation Religion King

Constitutional Council
Case No. 038/001/2001, dated 17 January 2001
Decision No. 040/002/2001, dated 12 February 2001

The Constitutional Council

- Having seen the Constitution of the Kingdom of Cambodia;
- Having seen Reach Kram No. dated 8 April 1998 promulgating the Law on the Organisation and Functioning of the Constitutional Council;
- Having seen the Letter from the President of the National Assembly No. 045/RS dated 16 January 2001, received by the Secretariat of the Constitutional Council on 17 January 2001, requesting the Constitutional Council to review the constitutionality of the "Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea", which was adopted by the National Assembly on 2 January 2001, in the 5th session of the 2nd legislature, and which the Senate, on the fifteenth day of the same month and year, in the 4th session of the 1st legislature, approved both form and legal content without any modification.

After hearing comments from its members
After conducting proper discussion according to legal procedure

- Is of the opinion that the National Assembly and the Senate have followed correct procedure in regard to this Law, as set forth in Article 113 of the Constitution;
- Is of the opinion that the National Assembly has abided by the procedure stipulated in Paragraph 2, Article 140 (new) of the Constitution in forwarding this Law to the Constitutional Council for review before promulgation
- Is of the opinion that Paragraph 1, Article 3 of this Law refers to ten Articles of the Penal Code of 1956, of which Articles 209, 500, 506 and 507 mention "…third-degree criminal penalty" (and Article 21 of the Penal Code states that "…third-degree criminal penalty is the death sentence"), and these words and their contents contradict Paragraph 2, Article 32 of the Constitution: "there shall be no capital punishment".
- Is of the opinion that Paragraph 2, Article 3 of this Law extends for an additional 20 years the statute of limitations stipulated at 10 years in Article 109 of the 1956 Penal Code. This Paragraph unquestionably affects a fundamental principle, "the non-retroactivity of any new law over offences committed in the past", which Cambodia, as other civilised countries, recognised both before 1975 and after 1978, including the transitional period of the Supreme National Council.

However, Cambodia has not ruled that this fundamental principle is of equal value with its Constitution, and therefore the Constitutional Assembly, a body elected according to legal procedures and the true representative of the people, was not bound by this principle in inscribing any article of the Constitution or its Preamble. Furthermore, whatever value this principle may have, and whether or not it has been inscribed, they had also to respect another principle, namely "every principle has its counterweight: every rule has its exception". Whatever

value a rule has, its exception will have equal value. Non-retroactivity, which is not mentioned in the Constitution, is found in the 1956 Penal Code. The fundamental principles of the 1956 Penal Code also have exceptions. Paragraph 2 of Article 6 stipulates "but if a new law annuls any offence or reduces the penalty for any offence, offences committed prior to such law shall not be prosecuted, or the reduced penalty shall be applied, unless the sentence has been completely served".

Articles 38 and 39 reduce the death penalty to one of life imprisonment. As well, penalties of imprisonment with labour, imprisonment with hard labour, and solitary confinement are reduced to normal imprisonment. Another favourable point is that the Law narrows criminal jurisdiction and refers to the special characteristics of this case. One Article of this Law further limits the constituent elements of the offences in the mentioned Articles of the 1956 Penal Code, as follows:

- culprits -- limited to senior leaders of Democratic Kampuchea and those who were most responsible
- offences -- limited to crimes and serious violations
- time period – limited to the period from 17 April 1975 to 6 January 1979

  None of the above is considered to infringe the Constitution.

- Is of the opinion that that Articles 9 to 32, which define composition of the Extraordinary Chambers; appointment and decisions of judges, co-prosecutors and co-investigating judges; director and deputy director of the Office of Administration, and various support staff, involve two parties —- Cambodia and the United Nations -- as summarised in the following table:

Components	Trial Court	Appeal Court	Supreme Court	Office of Administration
1. Trial Judges - Cambodian (President) - UN	3 2	4 3	5 4	
Sub-total	5	7	9	
2. Minimum voting majority	4	5	6	
3. Co-Prosecutors - Cambodian (President) - UN	1 1	1 1	1 1	
Sub-total	2	2	2	
4. Co-Investigating Judges - Cambodian (President) - UN	1 1	1 1	1 1	

Sub-total	2	2	2	
5.Office of Administration - Cambodian (Director)				1
- UN (Deputy Director)				1
Sub-total				2

In order to serve in the Extraordinary Chambers all the Cambodian and United Nations components shall be appointed by the Supreme Council of the Magistracy, which is a supreme Cambodian national institution, while the Director and Deputy Director of the Office of Administration are also to be appointed by Cambodian authorities. In this regard the United Nations only provides a list of candidates, and has no decision-making rights. There is no Article in the Constitution found to prohibit a national institution, in particular the Supreme Council of the Magistracy, from appointing people from the United Nations, of which Cambodia is a member state. As an organisation comprising almost all nations of the world, the United Nations may nominate candidates of any nationality, including Cambodians or Cambodians of dual nationality.

At every level of the chambers: the Trial Court, the Appeal Court and the Supreme Court, the Cambodian components are in the majority, and at every level it is a Cambodian who will be the president. However, the minimum number of votes required to reach any decision is set at a high level, as a balancing mechanism in order to give judicial equity, as both parties unquestionably need to work together in cooperation. Utilising the existing Cambodian court system, and selecting Phnom Penh as the location for the proceedings again protect the sovereignty of the Kingdom of Cambodia. The Law on the Establishment of Extraordinary Chambers refers to six items of applicable law, set forth in Articles 3, 4, 5, 6, 7 and 8, of which five are international conventions. Therefore, participation by the United Nations is required.

- Is of the opinion that Article 40 prohibiting the Royal Government of Cambodia to request amnesty or pardon does not infringe the Constitution, because Article 27 of the Constitution gives this right to the King and not to the Royal Government, in stating "the King shall have the right to grant partial or complete amnesty".

Decides

Article 1: Based on the above, the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, which was adopted by the National Assembly on 2 January 2001 and approved by the Senate on 15 January 2001, is hereby declared to be in accordance with the Constitution, except for any mention of "…third-degree criminal penalty" (which is the death sentence) in Articles 209, 500, 506 and 507 of the 1956 Penal Code, referred to in Article 3 of this Law.

Article 2: This decision was made in the Municipality of Phnom Penh on 12 February 2001 at a full session of the Constitutional Council, and is a final decision, not subject to appeal. This decision is binding on all the authorities inscribed in the Constitution, and shall be published in the Official Gazette.

Municipality of Phnom Penh, 12 February 2001
(signed)

Chan Sok
President, Constitutional Council