

ABOLITION OF DEATH PENALTY: RATIFICATION OF 2nd OPTIONAL PROTOCOL TO THE ICCPR & CAMBODIA

A LICADHO Briefing Paper
January 2007



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I. Abolition of the death penalty in Cambodia: Political context and legal situation

In April 1989, in response to the political and economic reforms that commenced in the Soviet Union and that ultimately led to the demise of the cold war era, the People's Republic of Kampuchea (PRK) amended its 1981 Constitution. The State of Cambodia became the direct successor of the People's Republic of Kampuchea (PRK). The change of the country's name was accompanied by various other constitutional amendments, including the abolition of the death penalty for all crimes, set forth in Article 35 of the revised Constitution.

As a result of the conclusion of the international "*Agreement on a Comprehensive Political Settlement of the Cambodia Conflict*" (Paris Agreements) on 23 October 1991, a new Constitution that of the Kingdom of Cambodia was promulgated on 24 September 1993. The Constituent Assembly that was elected to office following general elections in May 1993 and that was mandated with the drafting and adoption of the new Constitution subsequently transformed itself into the National Assembly of Cambodia in accordance with Articles 1 and 12 of the Paris Agreements, effectively concluding the transitional period.

Human rights were a salient element of the Paris Agreements. The inclusion of a comprehensive catalogue of basic freedoms and human rights in the 1993 Constitution was based on Article 23 in connection with Annex 5 of the Paris Agreements. Moreover, Article 15 (2) (a) of the Paris Agreements placed firm obligations on future Cambodian governments to -inter alia- guarantee the protection and observance of human rights, and to adhere to relevant human rights instruments.

In keeping with its international obligations emanating from the Paris Agreements, the Supreme National Council (SNC), the legitimate body representing Cambodia's sovereignty and independence during the transitional period, acceded to five major human rights treaties in 1992, including the International Covenant on Civil and Political Rights (ICCPR). The Supreme National Council fell short, however, of acceding to the Second Optional Protocol to the International Covenant on Civil and Political Rights (Second Optional Protocol), aiming at the abolition of the death penalty that was adopted on 15 December 1989 by the UN General Assembly and officially entered into force on 11 July 1991.

At the domestic level though, the Supreme National Council passed legislation that effectively abolished the death penalty in Cambodia. On 10 September 1992, the SNC adopted the "*Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia During the Transitional Period*" (UNTAC Law).

Article 67 of that instrument stipulated concisely that the "*The death penalty is abolished in Cambodia*". To date, awaiting the passage of a comprehensive Penal Code since 1993, the transitional UNTAC Law is still in force in the Kingdom of Cambodia.

Furthermore, Article 32 (2) of the 1993 Constitution stipulates that "*There shall be no capital punishment*", thereby effectively abolishing the death penalty for all crimes in Cambodia at the level of the highest law of the land.

With the inclusion of the prohibition of the death penalty in the 1993 Constitution, the Kingdom of Cambodia basically restituted the legal situation that existed in April 1989, when the government of the State of Cambodia banned capital punishment at the constitutional level.

Beyond domestic abolition, successive coalition governments since 1993 failed to demonstrate genuine commitment toward further ensuring the permanent prohibition of capital punishment in Cambodia by acceding to Second Optional Protocol to the International Covenant on Civil and Political Rights. For more than a decade now, Cambodia has been firmly enlisted in the camp of the more than 30 abolitionist none-State Parties to the Second Optional Protocol.

II. Rationale behind Cambodia's unwillingness to adhere to the Protocol

Article 1 of the Second Optional Protocol requires State Parties not to execute anybody and to undertake "all necessary measures to abolish the death penalty within its jurisdiction." These principles are enshrined in Article 32 of the Cambodian Constitution and Article 67 of the applicable criminal law.

Hence, the question arises, as to why the Cambodian government seems to be unwilling to accede to the Second Optional Protocol, given that the instrument's main requirements have already been incorporated in domestic law.

Part of the rationale behind the government's refusal to join the more than 50 States in embracing the Second Optional Protocol appears to emanate from actual legal concerns; others are owed to the intricacies of Cambodia's domestic, regional and international political agenda:

Legal and domestic political aspects

- Ratification of international instruments is invariably accompanied by a partial loss of control over the domestic political and legal agenda, including larger international scrutiny. In case the Cambodian government considered

for some reason to revert to the death penalty, this would, under the current legal conditions, only require an amendment of the criminal law (UNTAC Law) and the Constitution. If Cambodia was State Party to the Second Optional Protocol such an initiative would be tantamount to a breach of the country's international obligations and invariably lead to severe international criticism. International supervision of individual State compliance is also enshrined in Article 3 of the Second Optional Protocol that would require Cambodia to regularly report to the Human Rights Committee on its compliance measures undertaken to give effect to this treaty. In case of non-fulfillment of its obligations, other State Parties (Article 4) as well as individuals subject to its jurisdiction (Article 5) could complain to the Human Rights Committee. It seems unlikely that the Cambodian government, which has proved to be extremely sensitive vis-à-vis the slightest criticism of its human rights track-record, will forego national sovereignty over its legal agenda and ratify yet another treaty that would merely increase its international human rights obligations without providing any political benefits.

- By ratifying the Second Optional Protocol each State Party declares its willingness- as stipulated in the Preamble- to undertake "an international commitment to abolish the death penalty". Insofar, the Preamble clearly expresses the notion that the State Parties to the Second Optional Protocol are partners in a global campaign to promote the abolition of capital punishment in the wider context of the protection of the defense of human rights and human dignity. The Preamble to Second Optional Protocol transcends the concept that the abolition of capital punishment is simply a "domestic affair". It requires State Parties to take an active stance in promoting the campaign against the death penalty in the international arena. This is clearly not in the interest of the Cambodian government which has supported for more than a decade the tenet of "non-interference in domestic affairs" as one of its major foreign policy principles, particularly following Cambodia's admission to ASEAN in 1999.
- The Second Optional Protocol places close restrictions on State Parties in terms of the application of the death penalty in times of war (Article 2). State Parties are contractually obliged to report to the Secretary-General under specific conditions set out in Article 2 (2) and 2(3) of the Second Optional Protocol with regard to the application of the death penalty in wartime. In Cambodia, where the military still plays an influential role in all sections of society, such restrictions would not bode well with the ruling political elite which is closely associated with the upper echelons of the armed forces.
- Furthermore, Cambodia currently does not have a National Human Rights Institution that conforms to the Paris Principles. Three branches of

government in Cambodia have however, created human rights agencies in an effort to purportedly protect the human rights of all its citizens: (i) The National Assembly's "Commission on Human Rights and Reception of Complaints" created in 1993, following the UNTAC sponsored elections. (ii) The Council of Ministers' "Cambodian Human Rights Committee" created in 1997. (iii) The Senate's "Commission on Human Rights and Reception of Complaints" created in 1999, following the creation of the Senate in the wake of the 1998 general elections. Each agency is established, funded, staffed by, and answers to the entity that created it. Due to the tight executive control over all three institutions, each agency has failed to conform to any of the Paris Principles. This was confirmed by the Human Rights Committee, the UN treaty body charged with monitoring State's compliance with the ICCPR. In its concluding observations (CCPR/C/79/Add.109) on 27 July 1999 in response to Cambodia's initial report, the Committee expressed concern-inter alia- that Cambodia "has not yet established an independent and legally constituted body with power to oversee and report on the implementation of human rights obligations..." Thus, in absence of an independent National Human Rights Institution comprised of representatives from non-governmental organisations, trade unions, social and professional organisations, such as associations of lawyers, doctors, journalists and scientists, there have been very few internal debates on the importance of international human rights treaties, including the Second Optional Protocol.

Regional and international political aspects

- Within ASEAN, apart from Cambodia, East Timor and the Philippines- that abolished the death sentence less than a year ago on 24 June 2006- are the only abolitionist States. Neither East Timor nor the Philippines have acceded to the Second Optional Protocol. In fact, the retentionist States within ASEAN vastly outnumber the abolitionist members. Given this negative ratio, the Cambodian government is certainly not inclined to rethink its attitude towards signing the Protocol for lack of any form of effective and long-term "peer pressure". On the contrary, by accepting the Second Optional Protocol, Cambodia might alienate some of the more powerful and economically potent retentionist members within ASEAN, including its close political ally Vietnam as well as Singapore and Malaysia.
- In terms of international relations, it has to be noted that some of the most potent donors and partners of the Cambodian government are retentionist States, such as China, Japan, South Korea, Taiwan, Malaysia and the USA. These States have continued to implement the death penalty in their respective territories. Compared to that, the influence of another important aid provider, the European Union- which in its *1998 Guidelines to EU Policy*

Towards Third Countries on the Death Penalty "espoused abolition for itself and others" is relatively minimal. Consequently, there are few external factors to influence the Cambodian government in a way to make it genuinely consider the ratification of the Second Optional Protocol.

Annex: Cambodia, Historical Context

- 1975: "Year Zero"
- 1978: Vietnamese oust the Khmer Rouge from power.
- 1979 -1991: Civil war.
- 1991: Paris Peace Accords, UNTAC takes the helm.
- 1993: First general elections are held. Royalist FUNCINPEC wins 58 seats; Former Communist CPP 51; BLDP 10 and Molinaka Party 1. A coalition government is formed.
- 1997: 2nd Prime Minister Hun Sen stages a coup
- 1998: Second general elections are won by CPP party (CPP 64, FUNCINPEC 43, SRP 15). Weeks and weeks of demonstrations ensue. Another coalition government is formed.
- 2002: First Commune level elections. CPP wins.
- 2003: Third general elections. CPP wins but does not win enough seats to govern alone (CPP 73; FUNCINPEC 26 and SRP 24). Political deadlock.
- 2004: National Assembly approves a new coalition government with the CPP and FUNCINPEC, ending nearly 12 months of political deadlock.
- 2004: After being at the fore front of the Kingdom's politics for more than half a century, Norodom Sihanouk abdicates the throne, and is succeeded by his son Norodom Sihamoni.
- 2004: National Assembly passes legislation to enable trials of former Khmer Rouge leaders to take place
- 2006: Constitution is amended to enable a party winning a simple majority (51%) in a general election to form a government.