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## ANALYSIS OF THE FAIRNESS OF THE JUDICIAL PROCESS RESULTING IN THE CONVICTION OF ELECTED REPRESENTATIVE MU SOCHUA

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### I. INTRODUCTION

1. This paper is written by the Cambodian Center for Human Rights (“CCHR”). It provides an analysis of the fairness of the judicial process that culminated in the Supreme Court of the Kingdom of Cambodia (the “Supreme Court”) rejecting the appeal by parliamentarian Mu Sochua against her conviction for defamation handed down by the Phnom Penh Municipal Court on August 4, 2009 and upheld by the Appeal Court on October 28, 2009.
2. This litigation stems from a speech made by the Prime Minister of Cambodia, Hun Sen, in Kampot Province, Cambodia on Saturday April 4, 2009 (the “April 4 Speech”). In the April 4 Speech the Prime Minister referred to an unnamed woman clearly identifiable as Mu Sochua as ‘*cheung klang*,’ which translates as ‘*strong leg*,’ ‘*gangster*’ or ‘*unruly person*.’ Mu Sochua subsequently filed a lawsuit for defamation and was countersued by the Prime Minister for the same offence.<sup>1</sup>

### II. THE LAW

3. The Constitution of the Kingdom of Cambodia (the “Constitution”) provides in Article 31: “*The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women’s and children’s rights.*” Specifically – in relation to fair trial rights – Article 31 of the Constitution provides: “*Every Khmer citizen shall be equal before the law...*” Article 128 (as amended) provides: “*The Judicial power shall be an independent power. The Judiciary shall guarantee and uphold impartiality and protect the rights and freedoms of the citizens.*” Of relevance also is the Code of Ethics for Judges and Prosecutors (the “CEJP”), which is binding on judges and prosecutors in Cambodia and states that judges and prosecutors “*shall fulfill their duty independently...without being subjected to such influences as persuasion, pressure, intimidation or interference.*”<sup>2</sup>
4. The Universal Declaration of Human Rights (the “UDHR”) was adopted by the United Nations (the “UN”) General Assembly and proclaims a common standard of respect for rights and freedoms to be achieved for all people and all nations. Article 10 states: “*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal*

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<sup>1</sup> For a fuller examination of the facts of the case, please see CCHR’s legal analysis of the grounds of the Supreme Court appeal, available at [www.cchrcambodia.org](http://www.cchrcambodia.org).

<sup>2</sup> Code of Ethics for Judges and Prosecutors 2007, Article 2.

*charge against him.*”<sup>3</sup> Article 11 of the UDHR elaborates on fair trial rights. Much of the UDHR is regarded as having acquired legal force as customary international law<sup>4</sup> and it is binding on Cambodia pursuant to Article 31 of the Constitution.<sup>5</sup>

5. Article 31 of the Constitution also refers to “*covenants and conventions related to human rights, women’s and children’s rights,*” which includes the International Covenant on Civil and Political Rights (the “ICCPR”) to which Cambodia acceded in 1992.<sup>6</sup> According to a decision of the Cambodian Constitutional Council dated July 10, 2007, all international Conventions that Cambodia has recognized form part of Cambodian law.<sup>7</sup> The provisions of the ICCPR expand on the fair trial rights in the UDHR. Article 14(1) states: “*All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.*”<sup>8</sup> The remainder of ICCPR Article 14 elaborates on fair trial rights.

### III. ASSESSING THE FAIRNESS OF THE JUDICIAL PROCESS

#### *Inequality before the law*

6. On April 27, 2009, Mu Sochua filed a lawsuit against the Prime Minister alleging defamation and seeking 500 riel in symbolic compensation.<sup>9</sup> The Prime Minister responded by filing a countersuit claiming that Mu Sochua had defamed him in comments in which she alleged that the derogatory language of the Prime Minister affected all Khmer women.<sup>10</sup> A defamation suit was also filed against Mu Sochua’s lawyer, Kong Sam Onn.<sup>11</sup> On May 7, 2009, the Phnom Penh Municipal Court first heard arguments from Kong Sam Onn, who presented prosecutor Hing Bun Chea with evidence detailing every aspect of Mu Sochua’s complaint. On June 10, 2009, the Phnom Penh Municipal Court dismissed the case against the Prime Minister, saying it was groundless.<sup>12</sup> Hing Bun Chea explained in a three-page statement that since the Prime Minister’s comments did not refer to Mu Sochua by name, and the Prime Minister did not intend to insult any individual with his comments, the suit was not valid. The court moved ahead, however, with the Prime Minister’s countersuit, asking the National Assembly to lift the parliamentary immunity of Mu Sochua so that it might proceed with questioning.<sup>13</sup>
7. The contrast in the treatment of the two lawsuits raises questions as to whether the parties were treated equally before the law as required by Article 31 of the Constitution. The Royal

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<sup>3</sup> Universal Declaration of Human Rights, Paris, 10 December 1948.

<sup>4</sup> Antônio Augusto Cançado Trindade, *Universal Declaration of Human Rights*, United Nations Audiovisual Library of International Law, 2008, p2. Available at: [http://untreaty.un.org/cod/avl/pdf/ha/udhr/udhr\\_e.pdf](http://untreaty.un.org/cod/avl/pdf/ha/udhr/udhr_e.pdf)

<sup>5</sup> Article 31 of the Constitution states: “The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the... Universal Declaration of Human Rights”.

<sup>6</sup> Office of the United Nations High Commissioner for Human Rights, Cambodia Country Office, *International Covenant on Civil and Political Rights and its Optional Protocols* (Phnom Penh: OHCHR, Cambodia Country Office, October 2009), p10.

<sup>7</sup> Constitutional Council of the Kingdom of Cambodia, Decision No. 092/003/2007, dated July 10, 2007.

<sup>8</sup> The International Covenant on Civil and Political Rights was adopted by the General Assembly on 16 December 1966 and came into force on 23 March 1976.

<sup>9</sup> *Mu Sochua’s official lawsuit against Hun Sen*, DAP News, 27 April 2009.

<sup>10</sup> *PM, Mu Sochua Sue Each Other For Defamation*, Cambodia Daily, 28 April 2009.

<sup>11</sup> *The use and abuse of defamation and disinformation lawsuits dangerously undermine constitutional freedoms of opinions and expression*, United Nations Office of the High Commissioner for Human Rights, 16 June 2009.

<sup>12</sup> *Mu Sochua’s lawsuit rejected*, Phnom Penh Post, 11 June 2009.

<sup>13</sup> *Suspension of Lawmaker’s Immunity*, Voice of America Khmer, 12 June 2009.

Prosecutor has the duty to consider written complaints under Article 40 of the Code of Criminal Procedure. Article 41 states that a decision not to process such a complaint shall be based on grounds of law and fact. The Prosecutor's written reasoning for rejecting the complaint stated that the complaint was not valid because the Prime Minister did not refer to Mu Sochua by name and his comments were not intended to insult any individual. The first of these arguments is a clear misapplication of the law. Article 63 of the Law on the Amendment of the Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period (the "UNTAC Criminal Law") states: "...*the allegation or imputation is punishable, even if it refers to a person who is not explicitly named but whose identity is made evident from the defamatory speech, shout, threat, writing, printing, sign, poster, or audiovisual dissemination.*" The second argument, that the Prime Minister did not intend to insult any individual, appears to be a spurious claim given the content of the April 4 Speech. At the very least there appeared to be sufficient evidence for the complaint to proceed for determination by a court.

#### *Absence of legal representation*

8. The Courts throughout the judicial process rejected the relevance of the repeated protests by Mu Sochua that she had been denied the right to appear with a lawyer of her own choosing. They claimed that despite the charges instigated against her previous lawyer, Kong Sam Onn, which forced him to drop the case, she could have chosen another lawyer to replace him and represent her before the Courts. The Supreme Court noted in its judgment of June 2, 2010 that the offence of defamation is a petty crime which does not require a lawyer according to Article 301 of the Code of Criminal Procedure of the Kingdom of Cambodia (the "Code of Criminal Procedure"). Article 301 states that representation by a lawyer is compulsory if a case involves a felony charge or if the accused is a minor. However, these are minimum requirements. The Supreme Court judgement failed to note that the preceding article of the Code of Criminal Procedure, Article 300, confirms that the accused may be assisted by a lawyer chosen by him or herself. The fact that the Code of Criminal Procedure provides that legal representation is compulsory in cases involving a felony charge or an accused as a minor does not negate the right of an accused who is not a minor and not charged with felony to be represented by a lawyer of his or her own choosing.
9. On July 1, 2009, the UN Special Rapporteur on the independence of judges and lawyers (the "SRIJL") issued a press release in which he expressed concern at the attempt to restrict the freedom of lawyers to represent their clients effectively in Cambodia. Specifically citing the litigation between the Prime Minister and Mu Sochua, the SRIJL stated: "*To be able to represent their clients effectively, lawyers should not be subject to threats or intimidation, nor should they be targeted for prosecution or disciplinary action merely for having acted in the interests of their clients.*"<sup>14</sup> The SRIJL reminded the Royal Government of Cambodia (the "RGC") of its obligations under international law as set out in the UN Basic Principles on the Role of Lawyers, which specifically state that "*lawyers should not be identified with their clients or their clients' causes as a result of discharging their functions.*"<sup>15</sup>

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<sup>14</sup> United Nations press release, 1 July, 2009, *United Nations Expert Concerned at Restriction on Freedom of Lawyers to Represent Their Clients in Cambodia*. Available online at:

<http://www.unhcr.ch/hurricane/hurricane.nsf/view01/2E08F1A3021A329DC12575E60034025D?opendocument>

<sup>15</sup> Ibid.

10. The intimidation of Kong Sam Onn was instigated through the Prime Minister's lawyer, Ky Tech. Though Mu Sochua was theoretically able to seek a new lawyer, she was effectively prevented from being represented by the lawyer of her choosing, in breach of a right guaranteed in Cambodian and international law. Senior officials in the RGC, including the Prime Minister, have cultivated a climate of fear in Cambodia. In such circumstances, and given the nature of the case and its protagonists, the freedom to choose a lawyer must be considered somewhat circumscribed. Mu Sochua appeared before all three courts without legal representation, undermining the fairness of all three trials. Had she had a lawyer, perhaps that lawyer would have raised the concerns addressed in this analysis.

*Independence of the Courts and Separation of Powers*

11. Compounding the above concerns, the judiciary in Cambodia is staffed with high ranking members of, and advisors to, the Cambodian People's Party (the "CPP"). In a political case such as that involving the Prime Minister and Mu Sochua, the importance of the Separation of Powers becomes manifest. Mu Sochua was convicted on the basis of a complaint filed by the Prime Minister of Cambodia, the Vice-Chairman of the ruling CPP. A number of judges in a position to influence the judicial process have clear links to the Prime Minister's political party. The Presiding Judge in the hearing of Mu Sochua's appeal to the Supreme Court was Khim Pon, a member of the Central Committee of the CPP.<sup>16</sup> The President of the Supreme Court, although he did not preside in the hearing, is Dith Munty, a member of the CPP Standing<sup>17</sup> and Permanent Committees.<sup>18</sup> The President of the Phnom Penh Municipal Court, the court which handed down Mu Sochua's conviction and rejected her initial complaint, is Chiv Keng, an advisor to Deputy Prime Minister Sok An, the President of the Council of Ministers' Council of Jurists.<sup>19</sup>
12. As stated above, Article 128 of the Constitution (as amended) provides: "*The Judicial power shall be an independent power. The Judiciary shall guarantee and uphold impartiality and protect the rights and freedoms of the citizens.*" Article 51 also states: "*The legislative, executive and judicial powers shall be separate.*" Article 4 of the CEJP states that Judges and Prosecutors shall be neutral in political activities. The political positions of the judges cited above make a mockery of the provisions in Cambodia's supreme law and reinforce long held and oft-repeated concerns about the lack of independence in the Cambodian judiciary. Cases between political opponents cannot be impartially decided by a judiciary that is clearly politically aligned to the ruling party.
13. The internal rules of the Extraordinary Chambers in the Courts of Cambodia (the "ECCC") were drafted to ensure adherence to international standards at the ECCC. Though the rules do not apply to the domestic legal system, their provisions in this area offer persuasive guidance. Rule 34 provides that a judge may recuse him or herself "*in any case in which he or she...has, or has had, an association which might objectively affect his or her impartiality, or objectively give rise to the appearance of bias.*" It is important to note that the appearance of bias is enough to disqualify a judge from adjudicating in a case. In 1999,

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<sup>16</sup> See official website of the Cambodian People's Party (CPP) at <http://www.thecpp.org/page.php?page=central.htm&lang=eng>

<sup>17</sup> See official website of the CPP at <http://www.thecpp.org/page.php?page=permanent.htm&lang=eng>

<sup>18</sup> See official website of the CPP at <http://www.thecpp.org/page.php?page=permanent.htm&lang=eng>

<sup>19</sup> Asian Human Rights Commission, *Judicial independence is the key to reducing defamation lawsuits against critics and upholding freedom of expression*, Press Release, Hong Kong, 16 June 2009, available online at <http://www.ahrchk.net/statements/mainfile.php/2006statements/2095/>

judges in the UK House of Lords overturned a decision in which a panel of judges that included Lord Hoffman, a Director of the rights group Amnesty International, held that former Chilean dictator, General Augusto Pinochet, could be tried for crimes against humanity. Though it was emphasized by Lord Hope, who ruled on the appeal case, that “(t)here has been no suggestion that he was actually biased,” another judge ruling on the appeal, Lord Hutton, acknowledged that the links between Lord Hoffman and Amnesty International “were so strong that public confidence in the integrity of the administration of justice would be shaken if his decision were allowed to stand.”<sup>20</sup>

14. Similarly, in a case before the International Criminal Tribunal for the former Yugoslavia an appeal court discerned, after examining jurisprudence from both common law and civil law legal systems, a general rule that: “a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias.” The objective test to be applied is whether the circumstances would lead “a reasonable observer, properly informed, to reasonably apprehend bias.”<sup>21</sup>
15. In the case under consideration, judges with such a strong link to the political party of the Prime Minister should not have been allowed to sit in adjudication of a case in which their personal political alignment gave rise to an appearance and real danger of bias. Judge Khim Pon should have recused himself in the hearing by the Supreme Court. Moreover, the appointment of court presidents with clear links to political parties, whether they adjudicate in individual cases or not, is cause for serious concern. The overt alignment of judges with political parties should be prevented in line with the requirements of Article 4 of the CEJP. The entire judicial process and related orders of the courts in this case were discredited by the appearance and real danger of bias throughout the process.

#### IV. THE WIDER CONTEXT

16. The functioning of the judiciary has been amongst the major human rights concerns in Cambodia for some time, central as it is to the protection and enforcement of other rights. The RGC has, in the past decade, increased the sophistication of its political intimidation, utilizing the courts as a tool of political oppression to replace, or in some cases, supplement, the use of threats and violence. Political domination of judicial institutions dates from the 1990s. According to historian David Ashley, following the violent coup of 1997, the CPP used its new parliamentary majority to cement control of the judiciary by establishing key judicial institutions, including the Supreme Council of Magistracy and the Constitutional Council, with clear CPP majorities.<sup>22</sup> In the subsequent years, senior members of the CPP have shown a voracious appetite for litigation, initiating lawsuits against journalists, politicians and ordinary citizens to intimidate and persecute those that question acts of the RGC or its officials.
17. A 2008 evaluation of the USAID-funded Program on Rights and Justice concluded: “there is general consensus that the Cambodian judicial system is at best considered ineffective

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<sup>20</sup> BBC News, *Pinochet judge under pressure*, January 15, 1999. Available at: [http://news.bbc.co.uk/2/hi/uk\\_news/politics/255976.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/255976.stm)

<sup>21</sup> *Prosecutor v. Anto Furundzija (Appeal Judgement)*, IT-95-17/1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 21 July 2000, para 189. Available at: <http://www.unhcr.org/refworld/docid/402768fc.html>

<sup>22</sup> David Ashley, “Between War and Peace: Cambodia 1991 - 1998” in *An International Review of Peace Initiatives ACCORD: Safeguarding Peace: Cambodia's Constitutional Challenge* (London: Conciliation Resources, 1998) p 29.

*and/or incompetent with regard to procedural and human rights, or at worst perceived as utterly corrupt and an active instrument of powerful interests that would prefer to suppress any and all dissent, whether it be about land use or trafficking in women and children.”*<sup>23</sup>

18. More recently, the UN Special Rapporteur for Human Rights in Cambodia (the “SRHRC”), Surya Subedi, concluded a visit to Cambodia focused on the judiciary with a statement setting out familiar concerns: “A combination of a lack of adequate resources, organizational and institutional shortcomings, a lack of full awareness of the relevant human rights standards, and external interference, financial or otherwise, in the work of the judiciary, has resulted in an institution that does not command the confidence of people from many walks of life.”<sup>24</sup> According to a survey by the Asian Development Bank, judicial officers are among the least trusted government actors and provincial courts are among the least trusted institutions in the country.<sup>25</sup>
19. The RGC seemingly lacks the political will or capability to implement the legal and judicial reforms required to restore the faith of Cambodian citizens that the judiciary can fulfill its Constitutional duty to protect their rights and freedoms. Responding to the conclusions of Special Rapporteur Surya Subedi, Prime Minister Hun Sen said that the government had considered the issue of judicial independence “100 or 1,000 times” already.<sup>26</sup> Though the RGC has claimed that it is willing to address judicial shortcomings, government influence of the judiciary is overt, as evidenced by the ability, or perhaps necessity, of judges holding senior positions in the judiciary alongside positions in the CPP party structure.
20. The use of courts as a political tool has continued despite the operation of the internationally-assisted ECCC, which the RGC and international community claimed would serve as a model for Cambodian courts.<sup>27</sup> Indeed the ECCC itself has repeatedly been criticized for political interference. A report released in July 2010 by the longest standing monitor of the ECCC, the Open Society Justice Initiative, noted: “Evidence of political interference in decisions about who is prosecuted and who is called as a witness is damaging the overall legitimacy of the ECCC. Unless it changes course, the ECCC is in danger of failing.”<sup>28</sup> In this regard, it is concerning to note that judges that were involved in upholding the politicized conviction of Mu Sochua, also hold positions at the ECCC. Two of the adjudicating judges at the hearing of Mu Sochua's Supreme Court appeal are also judges at the ECCC. Mr You Ottara and Mr. Som Sereyvuth, are a reserve judge for the Trial Chamber and a judge at the Supreme Court Chamber, respectively.<sup>29</sup>

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<sup>23</sup> Richard Blue and Robert Underwood, *Evaluation of the Program on Rights and Justice (PRAJ): Final Report* (Washington D.C., USAID, 1999) p 25.

<sup>24</sup> UN News Centre, *UN human rights expert urges strengthening of Cambodian justice system*, June 17, 2010.

<sup>25</sup> Asian Development Bank, *Public Opinion Surveys on Judicial Independence and Accountability. Country Report Cambodia*, (Manilla, the Philippines: Asian Development Bank, September 2004).

<sup>26</sup> Sebastian Strangio and Cheang Sokha, “Hun Sen says UN envoy ‘lacks respect,’” *Phnom Penh Post*, June 22, 2010.

<sup>27</sup> Speaking at a reception following the swearing in of ECCC judges, Sok An, Deputy Prime Minister and Chairman of a Royal Government Taskforce on the Khmer Rouge Tribunal, declared “we earnestly hope and expect that the ECCC will be a model Court for Cambodia.” Comments available at:

<http://www.cambodia.gov.kh/krt/pdfs/Sok%20An%20speech%20for%20reception%203%20July%202006.pdf>. Former United Nations Secretary General Kofi Annan stated that the involvement of international personnel was “expected to have considerable legacy value, inasmuch as it will result in the transfer of skills and know-how to Cambodian court personnel for the period after the conclusion of the Extraordinary Chambers.” [Kofi Annan (2004), *Report of the Secretary-General on Khmer Rouge trials* (A/59/432), p 7, paragraph 27].

<sup>28</sup> Open Society Justice Initiative, *Political Interference at the Extraordinary Chambers in the Courts of Cambodia* (Phnom Penh: OSJI, July 2010) p 29.

<sup>29</sup> See official website of the Extraordinary Chambers in the Courts of Cambodia at [http://www.eccc.gov.kh/english/judicial\\_officers.aspx](http://www.eccc.gov.kh/english/judicial_officers.aspx)



## V. RECOMMENDATIONS

21. The CCHR releases this paper with the hope that the RGC will consider its findings, and the findings of other similar reports and statements, and make efforts to implement genuine legal and judicial reform. The required laws and policy changes have been spelled out numerous times.<sup>30</sup> However, the RGC has responded contemptuously towards previous reports that link the failures of the judiciary to political interference. We therefore recommend that all those concerned with the situation of human rights in Cambodia take the following actions to campaign for legal and judicial reform:

### *Domestic*

- Write to the King of Cambodia, highlighting the unfairness of Mu Sochua's case and the deep problems within the Cambodian judiciary. Article 132 of the Constitution states that the King is the guarantor of the independence of the judiciary. Article 8 states that the King is the protector of rights and freedoms for all citizens assisted by the Supreme Council of Magistracy. Cambodia's volatile political culture requires an independent and impartial guardian to ensure that the courts serve the citizens of Cambodia, not the CPP, or any other political or business interests. With utmost reverence and profound respect, request that His Majesty King Sihamoni:
  - Utilize his power under Article 27 of the Constitution to pardon Mu Sochua as a matter of urgency, recognizing that the circumstances of her trial were unfair and her conviction unsound.
  - Investigate adherence to Articles 51 and 128 of the Constitution in the context of the current state of affairs in which officers of the judiciary are able to simultaneously hold ranking positions in a political party or take employment as advisors to politicians or political parties; and
  - Work with the RGC to ensure that the SCM is a multi-partisan body capable of commanding the confidence and respect of all of Cambodia's citizens and political parties.
- Work to raise awareness amongst Cambodians about the importance of a functioning judiciary and rule of law, informing them about the current serious problems, and encouraging demand for justice reform.

### *Regional*

- Submit a complaint about political interference in Cambodia's courts and the use of the courts as a political tool by the RGC to the ASEAN Intergovernmental Commission on Human Rights. This complaint can serve as the Cambodian test case for the new regional rights body.

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<sup>30</sup> See, for example: United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Cambodia*, January 4, 2010 (A/HRC/13/4); Asian Human Rights Commission, *Judicial independence is the key to reducing defamation lawsuits against critics and upholding freedom of expression*, Press Release, Hong Kong, 16 June 2009, available online at <http://www.ahrchk.net/statements/mainfile.php/2006statements/2095/>; Cambodian League for the Promotion and Defense of Human Rights (LICADHO), *Human Rights in Cambodia: The Charade of Justice* (Phnom Penh: LICADHO, 2007).

*International*

- Submit a similar complaint to the UN SRIJL and the SRHRC.
- Submit a complaint to the UN Human Rights Council documenting the consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms resulting from the CPP's continued use of the judiciary as a tool for political persecution.
- Rely on the constitutional human right of freedom of expression, to raise international awareness about the situation of human rights in Cambodia and the continuing use of the judiciary to crack down on fundamental freedoms. Urge democratic countries to use aid, trade and political leverage to push for justice reforms. The ongoing presence of the ECCC in Phnom Penh provides the international community with a unique opportunity to push for this reform as a legacy of the internationalized criminal tribunal.

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Phnom Penh  
Kingdom of Cambodia