

**Fact Sheet: Fair Trial Rights in Cambodia**

**Snapshot:** Fair Trial Rights that are enshrined in domestic and international law are not being effectively implemented in Cambodia. The Cambodian Center for Human Rights (“CCHR”) calls for the Royal Government of Cambodia (“RGC”) and the president of each court at all levels to take urgent action to ensure that these Fair Trial Rights are properly protected under domestic law and are being implemented in practice.

**Introduction**

Despite certain efforts to improve respect for fair trial rights over recent years, Cambodia’s judiciary and court system continue to be subject to criticism for their persistent shortcomings. Continuing challenges for the realization of these rights include the lack of a truly independent judiciary, the practice of the changing of charges during the trial process, and the imposition of excessively lengthy pre-trial detention. This fact sheet has been produced by CCHR, a non-aligned, independent, non-governmental organization (“NGO”) that works to promote and protect democracy and respect for human rights – primarily civil and political rights – throughout the Kingdom of Cambodia (“Cambodia”).

**What are fair trial rights?**

The right to a fair trial applies to both civil and criminal legal proceedings. With respect to criminal trials, it entitles each and every person charged with a criminal offense to be treated fairly and equally while the state determines their guilt or innocence. When implemented correctly, it protects the rights of the accused and the victim, and ensures the proper administration of justice. The right to a fair trial is comprised of a number of different individual rights, which encompass the entire legal process, from the initial arrest of the suspect through to the completion of the final appeal.

**Legal Framework**

Fair trial rights are explicitly protected in Cambodian law in Article 38 of the Constitution. Articles 51, 128, 130 and 132 of the Constitution provide for the separation of powers and the independence of the judiciary. The Code of Criminal Procedure of the Kingdom of Cambodia (2007) (“CCPC”) sets out in detail how suspects should be treated and the roles and responsibilities of judges, prosecutors and defense counsel. The Penal Code of the Kingdom of Cambodia (2009) (“Penal Code”) sets out classes of offenses, principles of criminal responsibility and principles of sentencing.

The Universal Declaration of Human Rights (UDHR) and International Covenant on Civil and Political Rights (ICCPR) both guarantee the right to a fair and public hearing by an independent and impartial tribunal.<sup>1</sup> Under Article 31 of the Constitution, Cambodia’s international human rights obligations are directly applicable in Cambodian law and the direct applicability of these obligations was confirmed by a 2007 decision of the Constitutional Council.<sup>2</sup> The ICCPR explicitly states a number of rights that constitute this overarching right to a fair trial, such as the right to a public hearing, to be tried without undue delay, to adequate time and facilities to prepare a defense and to legal representation.

**Situation for Fair Trial Rights in Cambodia**

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<sup>1</sup> UDHR Article 10; ICCPR Article 14

<sup>2</sup> Constitutional Council of the Kingdom of Cambodia, Decision No. 092/003/2007, (10 July 2007)

CCHR's trial monitoring has found some improvements in adherence to some of the procedures that underpin fair trial rights in recent years,<sup>3</sup> as well as examples of good practices. From November 2016 to January 2017 trial monitors recorded no instances of obstruction of individuals from entering the courtroom or dismissal from courtroom proceedings in the 133 cases monitored. Nor was there any evidence of the permissible restrictions on the right to a public hearing being inappropriately invoked to justify the expulsion of the public or press at trials in the Appeal Court.<sup>4</sup>

However, fundamental structural problems remain. The persistent weaknesses of Cambodia's judicial system are reflected in Cambodia's World Justice Project 2016 rule of law ranking, where it ranked 113<sup>th</sup> out of 113 on civil justice and 104<sup>th</sup> on criminal justice.<sup>5</sup> In Cambodia's 2014 Universal Periodic Review (UPR) by the UN Human Rights Council, a number of states referred to fair trial rights.<sup>6</sup> 12 states recommended taking measures to guarantee the independence of the judiciary.<sup>7</sup> Two states referred to pre-trial detention, with Belgium recommending the taking of measures to ensure conditions meet international standards, while Austria recommended the strengthening of the independence and functioning of the judiciary in order to reduce the time individuals spent in pre-trial detention. The RGC accepted all the aforementioned recommendations with the exception of Austria's, which it noted.<sup>8</sup>

#### **a) Right to communicate with a lawyer**

Article 98 of the CCPC is inconsistent with the rights protected by the ICCPR as a result of its denial of the right of the suspect to have access to a lawyer during the first 24 hours in custody. Article 14(3)(b) of the ICCPR stipulates that the accused has the right to "communicate with counsel of his own choosing." The UN Human Rights Committee has interpreted this provision to mean that "the accused is granted prompt access to counsel."<sup>9</sup> Prohibiting access to legal counsel for the first 24 hours does not comply with this requirement of prompt access and therefore the domestic law should be revised. This interpretation was confirmed by the United Nations Working Group on Arbitrary Detention ("WGAD") decision in the case of the #FreeThe5KH detainees. The WGAD concluded that "international human rights standards require that persons deprived of their liberty have access to legal assistance at any time during their detention, including from the outset of their deprivation of liberty."<sup>10</sup>

#### **b) Right to a trial by an independent judiciary**

This right has been described by the UN Human Rights Committee as "an absolute right that may suffer no exception."<sup>11</sup> Several months after the 2014 UPR, the RGC adopted three laws on the

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<sup>3</sup> CCHR Report, "Fair Trial Rights in Cambodia: Monitoring at the Court of Appeal" (June 2014) <http://bit.ly/2m2wsFP>

<sup>4</sup> CCHR Fair Trial Monitoring Newsletter, Issue 1 (20 February 2017) <http://bit.ly/2ncuti6>

<sup>5</sup> 'WJP Rule of Law Index 2016 (World Justice Project) <http://bit.ly/1e1OyIP>; Cristina Maza "Cambodia worst in region for rule of law: report" (*Phnom Penh Post*, 20 October 2016) <http://bit.ly/2glE9yL>

<sup>6</sup> UNGA, "Report of the Working Group on the Universal Periodic Review: Cambodia" A/HRC/26/16 (27 March 2014)

<sup>7</sup> Portugal, Italy, Switzerland, Belgium, Chile, Botswana, Kenya, Poland, France, Slovakia, Republic of Korea, Austria

<sup>8</sup> UNGA, "Report of the Working Group on the Universal Periodic Review: Cambodia Addendum" A/HRC/26/16/Add.1 (25 June 2014)

<sup>9</sup> UN Human Rights Committee, "General comment no. 34, Article 19, Freedoms of opinion and expression" CCPR/C/GC/34 (12 September 2011), para 34

<sup>10</sup> Human Rights Council Working Group on Arbitrary Detention, "Opinions adopted by the Working Group on Arbitrary Detention at its seventy-seventh session, 21-25 November 2016" A/HRC/WGAD/2016/45 para 50

<sup>11</sup> Human Rights Committee, Communication No. 263/1987; *M. Gonzalez del Rio v. Peru* (CCPR/C/46/D/263/1987), October 28, 1992, para. 5.2., <http://bit.ly/1h33UDx>

judiciary that negatively impacted its independence by putting the Minister of Justice at the center of decision-making by the judiciary and the Supreme Council of the Magistracy.<sup>12</sup> In July 2014 the UN Special Rapporteur on the independence of judges and lawyers expressed concern that the laws threatened to undermine “the important and basic principles of judicial independence, neutrality and the separation of powers”.<sup>13</sup>

Aside from the *de jure* lack of independence, there are a number of problems with how the judiciary operates in practice. For example, convictions of human rights defenders despite a lack of inculpatory evidence<sup>14</sup> suggest that the outcomes of such trials are a foregone conclusion, while those critical of government have faced criminal charges and investigations.<sup>15</sup> The independence and technical capacity of the judiciary is further limited by insufficient resources and training. In the courtroom, the failure of the judiciary to follow basic legal procedures is evident. Between 1 March 2013 and 31 January 2014, out of 204 cases heard by the Court of Appeal, in only one case did the judges explain the right to remain silent and in only five cases did they explain the right to be legally represented.<sup>16</sup>

### c) Excessive pre-trial detention

Prolonged pre-trial detention is frequently used in Cambodia, impeding on fair trial rights including the presumption of innocence. Such controversial usage of pre-trial detention was seen in the case of three environmental activists from NGO Mother Nature who were detained for 10 months and 15 days before their trial.<sup>17</sup> Articles 204 and 205 of the CCPC set out the limited circumstances in which pre-trial detention can be used but in practice, pre-trial detention is being used in cases where it is dubious whether such circumstances exist. Detention in custody of persons awaiting trial should be the exception rather than the rule, and must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances.<sup>18</sup> Yet, in the course of observing 2,558 trials between 2009 and 2012, CCHR’s Trial Monitoring program found that two-thirds of the 3,360 defendants charged had spent time in pre-trial detention.<sup>19</sup>

Further, the potential length of pre-trial detention allowed under the CCPC could lead to breaches of the ICCPR. Articles 208-209 and 213-214 set out the maximum periods permitted as determined by age. The CCPC allows for very lengthy periods of pre-trial detention: if the accused is over 18 years old and the case involves a felony then they may be detained for 6 months, which may be extended twice for a further six months each time. Article 9(3) of the ICCPR states that the accused “shall be

<sup>12</sup> The Law on the Organization and Functioning of the Supreme Council of Magistracy, Article 4; The Law on the Statute of Judges and Prosecutors Article 33; The Law on the Organization and Functioning of the Courts, Articles 11 and 79

<sup>13</sup> IBA, ‘Press conference – Cambodia’s judicial reform laws’ (IBA, 15 July 2014), <http://bit.ly/2ik8twL>

<sup>14</sup> Ananth Baliga and Lay Samean, “Activist Vanny gets 30 months while security guards beat man in City Mall” (*Phnom Penh Post*, 24 February 2017) <http://bit.ly/2mHEnr3> See also: “Defamation Case against Ny Chakrya” (*Front Line Defenders*, 28 September 2016) <http://bit.ly/2g9f0wD>

<sup>15</sup> See for example Kuch Naren and Khy Sovuthy, “Hun Sen slaps analyst with \$500 lawsuit” (*Cambodian Daily*, 14 February 2017) <http://bit.ly/2npEZTx> and Khouth Sophak Chakrya, “Men with links to analyst detained overnight in PP” (*The Phnom Penh Post*, 15 February 2017) <http://bit.ly/2numN8i> See also: CCHR, ‘CPP spokesman files defamation suit against independent analyst Ou Virak while the Anti-Corruption Unit summons civil society workers’ 26 April 2016 <http://bit.ly/2ik1W5b>; Khy Sovuthy, ‘Opposition Senator’s Defamation Trial Begins’ (*The Cambodia Daily*, 29 October 2016) <http://bit.ly/2hBlqW4>

<sup>16</sup> CCHR, “CCHR Briefing Note – October 2014: Judicial Reform” <http://bit.ly/1F85iNb>

<sup>17</sup> “Mother Nature Activists Convicted, Released on Suspended Sentence” (LICADHO, 1 July 2016) <http://bit.ly/2hBnvRy>

<sup>18</sup> UN Human Rights Committee, General Comment No. 35, CCPR/C/GC/35 (16 December 2014) paras. 36–38

<http://bit.ly/2nuiMk5>

<sup>19</sup> For further information, please visit CCHR’s Trial Monitoring Database: <http://bit.ly/2nlU4pp>

entitled to trial within a reasonable time or to release.” Article 14(3)(c) ICCPR contains the right to be tried without undue delay. The reasonableness of any delay in bringing the case to trial will depend on the circumstances of each case, taking into account the complexity of the case, the conduct of the accused during the proceeding and the manner in which the matter is dealt with by the executive and judicial authorities. In cases where the accused are denied bail by the court, they must be tried as expeditiously as possible.<sup>20</sup> If not applied consistently with these requirements, pre-trial detention imposed under these provisions of the CCPC, which potentially allows for imprisonment before trial for up to 18 months, may be in breach of international law.

The continued practice of excessive pre-trial detention has met with international condemnation. The Special Rapporteur on the situation of human rights in Cambodia gave specific attention to the matter in her first report on the human rights situation. Significantly, the WGAD has shown its concern about the practice, ruling that the use of pre-trial detention in the case of the #Freethe5KH detainees is arbitrary.

### Conclusions and recommendations

Fair trial rights continue to be disrespected in Cambodia, in violation of Cambodian and international law, and despite concerns raised by Human Rights Council members in the 2014 UPR. In order to ensure respect for fair trial rights in Cambodia, CCHR urges the RGC to:

- *Ensure no instrumentalization of the criminal justice system to harass and silence human rights defenders and civil society;*
- *Review and revise the Law on Organization and Functioning of the Courts, the Statute of Judges and Prosecutors, and the Law on the Organization and Functioning of the Supreme Council of Magistracy in order to comply with international obligations on the independence of the judiciary;*<sup>21</sup>
- *Review and comply with the UN Working Group on Arbitrary Detention Opinion and release the four ADHOC workers and NEC official, as well as other persons illegitimately detained for exercise of their fundamental freedoms;*

CCHR also urges the president of each court at all levels to:

- *Fully comply with its obligations to protect and respect fair trial rights under domestic and international law, including through implementation of recommendations made in the UN Human Rights Committee’s 2014 Universal Periodic Review of Cambodia;*
- *End the practice of changing charges in a manner that violates fair trial rights;*
- *Limit the use of pre-trial detention to the most serious cases and ensure that such detention is administered in accordance with domestic law provisions as well as international human rights standards.*

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<sup>20</sup> UN Human Rights Committee, General Comment No. 35, CCPR/C/GC/35 (16 December 2014) paras. 36–38 <http://bit.ly/2nuiMk5>; UN Human Rights Committee, General Comment No. 32, CCPR/C/GC/32 (2007) <http://bit.ly/2ncc700>

<sup>21</sup> For more detailed recommendations see CCHR Legal Analysis, ‘Three draft laws relating to the judiciary,’ May 2014, <http://bit.ly/1uJ6TVY>