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CAMBODIAN HUMAN RIGHTS ACTION COMMITTEE

ADHOC - CARAM Cambodia - CCPCR - CDP - CHHRA - CKIMHRDA - CSD - CWCC - GENEROUS - HROTP- IDA
KID - KIND - KKKHRA - KKKHRDA - KSA - KYA - LAC - OUTREACH – PDP - PIJ - TASK FORCE - VIGILANCE
#09, St 330, Sangkat Boeung Keng Kang3, Khan Chamcar Mon, Phnom Penh, Cambodia, Tel/Fax: 023 350 415 E-mail: chrac@forum.org.kh



SUBMISSION

Universal Periodic Review (UPR) of Cambodia

2009

“Legal and Judicial Reform Issues in Cambodia”

Submitted by:

Cambodian Human Rights Action Committee (CHRAC)

I. Background of CHRAC:

1. The Cambodian Human Rights Action Committee (“CHRAC”, also referred to as “Action Committee”), was created on August 02, 1994 by a group of local non-governmental organizations and associations for the purpose of joint cooperation in the promotion of human rights, liberal democracy, and development in the Kingdom of Cambodia. The establishment of the Action Committee took place one year after the first general election in Cambodia under the auspices of the United Nations Transitional Authority in Cambodia (UNTAC), and after many years of civil war.
2. Since its establishment, new members have successively joined CHRAC. Currently, the coalition has 21 member NGOs and Associations, all of them being independent, impartial, non-political and non-profit organizations operating in the Kingdom of Cambodia.

II. Key Issues of Legal and Judicial Reform:

3. According to the Rectangular Strategy of the Royal Government of Cambodia (RGC), both in the first phase (2003-2008) and the second phase (2008-2013), legal and judicial reform is one of the top reform priorities to guarantee the rule of law in Cambodia. The strategy aims at improving and developing a sound legal framework, modernizing existing laws, and taking necessary strategies and measures to enhance the competence, independence and impartiality of the judiciary, which are crucial to strengthen the rule of

law.¹ To ensure proper legal and judicial reform, the RGC has developed strategies for legal and judicial reform based on the Constitution of Cambodia which clearly recognizes the rights of the individual, liberal democracy and the separation of powers.² While these frameworks and strategies have been adopted by the RGC, legal and judicial reform still remains one of the most pressing issues today in Cambodia. The reform process has moved very slowly, and there has been little progress in its substance.

A. Slow Progress of Necessary Law Enactment:

4. There had been some positive developments in the field of law making and legal reform in the reporting period. For instance, 140 laws have passed and promulgated in the third legislature of the National Assembly, including three major codes – the Criminal Procedure Code, the Civil Procedure Code and the Civil Code.³

5. However, of the eight fundamental laws which the RGC promised to adopt, also as part of the Joint Monitoring Indicators (JMIs), at the Consultative Group meeting (CG) of the RGC and major donors in December 2004, many significant laws are still pending in 2009. The remaining fundamental laws urgently require adoption. They include the Penal Code, the Anti-Corruption Law, the Law on the Statute of Judges and Prosecutors, the Law on the Organization and Functioning of the Court, and the Law on the Amendment of the Law on the Organization and Functioning of the Supreme Council of Magistracy. These key laws are necessary to ensure the independence of the judiciary, proper functioning of the courts, increasing the transparency and confidence in the public administration and the courts, good governance and effective functioning of state institutions.

6. The Anti-Corruption law, which the RGC promised to adopt in the third legislature of the National Assembly (by 2008), is still pending under the review of the Ministry of National Assembly-Senate Relations and Inspection (MoNASRI) and has not yet been sent to the National Assembly for adoption. Civil society organizations are very committed to this law and have advocated strongly with the Ministry to finalize the draft law. They have provided crucial inputs since 2006 to enhance the draft law, but there has been no visible progress so far. This development clearly shows the lack of political will to go ahead with this key legal reform project, despite a government's promise that this law would follow the adoption of the Criminal Code.⁴

7. The other four draft laws and codes have been under drafting and review processes at the relevant ministries of the Government. No consultations with civil society have been sought. For instance, the draft Law on the Amendment of the Law on the Organization and Functioning of the Supreme Council of Magistracy, which was proposed by the National Assembly in 2002, has not yet made any progress and is still under the review of the Ministry of Justice. The Law on the Statute of Judges and Law on the Organization and Functioning of the Court are at present placed under the review of the Ministry of Justice

¹ See speech addressed by Prime Minister Hun Sen, Rectangular Strategy for Growth, Employment, Equity and Efficiency, Phase II, at the first Cabinet meeting of the 4th legislature of the National Assembly, Phnom Penh, 26 September 2008.

² Royal Government of Cambodia: *Legal and Judicial Reform Framework*, prepared by Legal and Judicial Reform Council, 20 March 2003.

³ Speech addressed by Prime Minister Hun Sen, Rectangular Strategy for Growth, Employment, Equity and Efficiency, Phase II, at the first Cabinet meeting of the 4th legislature of the National Assembly, Phnom Penh, 26 September 2008, para. 22

⁴ NGO Position Paper on Cambodia's Development in 2007-2008: *Monitoring the Implementation of 2007 CDCF Joint Monitoring Indicators and the National Strategic Development Plan 2006-2010*, (Phnom Penh: November 2008), p.8

and Council of Minister's Council of Jurist. These draft laws are fundamentally significant to guarantee the real independence of the judiciary and the separation of powers as enshrined in the Constitution of the Kingdom of Cambodia. As many reports of national and international observers show the judiciary is under strong criticisms because of corruption, a lack of independence and impartiality.⁵

Recommendations:

8. In order to help address these challenges, the Royal Government of Cambodia and Cambodian Parliament must:

- Keep earlier promises and speed up the legislative processes to have these fundamental laws enacted and promulgated in accordance with international standards;
- Open space for working and engaging with civil society in consultative processes and to consider their comments on those laws;
- Draft articles of the laws in precise terms in order to ensure a correct interpretation of their meaning;
- Engage as soon as possible in further necessary legal reform, particularly in relation to the establishment of much needed specialized courts, such as the Commercial Court, Family and Juvenile Court, and Administrative Court.

B. Independence of the Judiciary:

9. As spelled out in the Cambodian Constitution, the judiciary is an independent power that upholds impartiality and guarantees the protection of the rights and freedom of citizens.⁶ Therefore the organization and functioning of the judiciary must be in accordance with the laws which directly govern this body and ensure its independence. Necessary related laws such as Law on the Statute of Judges and Law on the Organization and Functioning of the Court, and in particular the Law on Amendment of the Law on Organization and Functioning of the Supreme Council of Magistracy, are still under review and need to be passed urgently. However, the current practice reveals a dangerous lack of independence which is evident in both insufficient and non-functioning disciplinary mechanisms and in the outcome of some high profile disciplinary cases.

10. The institution's insufficient and ineffective disciplinary action is a major cause for the lack of independence of the judiciary. For example, the replacement of the President of the Court of Appeals by Royal Decree dated 9 August 2007 amounts to a violation of the Constitution and the Law on the Organization and Functioning of the Supreme Council of Magistracy (SCM). The SCM is the only body to authorize and to decide upon judicial appointments, transfers, promotions suspensions, or disciplinary actions. Although the Royal Decree was issued by the King of Cambodia, it did not appear to have been passed on the basis of a SCM's decision, and the King's signature followed a request by the executive power.⁷ Furthermore, the judicial control mechanism within the Ministry of Justice raises additional concerns in relation to interferences into the independence of the

⁵ Ibid, 12

⁶ See Constitution of Cambodia (revised on March 04, 1999), Chapter 11, Article 128 (new)

⁷ Center for Social Development: 2007 *Annual Court Watch Report*, (Phnom Penh: March 2008), p.6. The Center for Social Development (CSD) is a non-governmental organization that has a Court Watch Project to monitor Cambodian domestic courts' functioning and operations. It makes regularly public its finding on the implementation of both the laws and international treaties of which Cambodia is a signatory to.

judiciary. The Sub-Decree on the Organization and Functioning of the Ministry of Justice, which created the *Judicial General Inspectorate*, also allows for disciplinary actions.. For example, the Chief prosecutor of the Kampong Cham provincial court was suspended in 2007 upon inspection by the Ministry of Justice, which is part of the executive branch.

11. Moreover, civil society organizations have also observed that “despite repeated public pledges by the Royal Government of Cambodia of its commitment to judicial and legal reforms, and millions of dollars invested by foreign donors in reform program since 1992, there has been no progress whatsoever in the single most important issues affecting the court is the lack of independence from political and financial influence.”⁸

Recommendations:

12. Urgent steps need to be taken by the Government of Cambodia and the Parliament to ensure the proper functioning, organization and the independence of the judicial system. Therefore law-makers must:

- Review carefully and adopt urgently the Amendment of the Law on the Organization and Functioning of the Supreme Council of Magistracy and other related laws and statutes;
- Guarantee that the members of the Supreme Council of Magistracy are truly independent from any political affiliation and not a member of any political party;
- Provide an autonomous and transparent budget for the organization and functioning of the Supreme Council of Magistracy;
- Ensure adequate salaries for judges and prosecutors in order to protect from political interference;
- Create provisions on disciplinary offenses, a code of conduct for judges and prosecutors and disciplinary councils to ensure that any judge or prosecutor who is incapable or is found to have committed any wrong doing can be subject to a suspension of his assignment, replacement or dismissal;

C. Lack of Law Enforcement or Improper Law Enforcement:

13. Although many laws have been passed in the past, there exists a fundamental lack of law enforcement, and practices of improper law enforcement committed by the law enforcers are widespread. The lack of law enforcement and improper law enforcement can be witnessed in many cases and have also been recorded as human rights violations. In his report to the Seventh Human Rights Council, UN Special Representative Yash Ghai noted that a major problem is the failure to apply the law fairly and consistently. If law is applied or not applied often depends on the objectives of the Government or local authorities. This unprincipled approach to the law is the cause of numerous human rights violations in Cambodia today.⁹

14. The most serious cases, that have increasingly become a concern during the reporting period, involve the use of criminal action for unsolved civil cases, especially in relation to

⁸ See full discussion in *2007 Human Rights Report* published by the Cambodian League for the Promotion and Defense of Human Rights (“LICADHO”); or Report of the Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia, Yash Ghai to the Seventh Session of Human Rights Council, 28 February 2008, p.10.

⁹ Ibid, p.9

land dispute cases and forced evictions. The land law, which was adopted in 2002, has not been properly implemented by both the authorities and the courts. There are at least 31 cases in which affected community representatives have been arrested and detained in courts' detention facilities charged with defamation, disinformation or destroying private property while their land had been grabbed by other parties, mostly local authorities or private companies.¹⁰

15. Civil society organizations found that out of 306 cases of land disputes in 2008, 125 cases involve military officials, who are supposed to fulfill a neutral function. However, the practice that the Government grants rights to military units to develop new areas has led to numerous conflicts with people and villagers living in these areas and to unlawful and sometimes forceful resolution of land dispute cases.¹¹

16. The increasingly violent climate is evident by the number of high profile cases of homicide and killing, particularly against politicians, trade union leaders, opposition party activists. In most of these cases, no credible investigation has taken place and the perpetrators have not been found and brought to trials. Thus, impunity persists in many parts of Cambodia. The most prominent case is the murder case of Chea Vichea, chief of Free Labor Union, who was shot dead in 2004. Two defendants were arrested and charged of having committed the crime, namely Sok Sam Oeun and Born Samnang. Both local rights and international rights group called for release of the two defendants due to torture and coercion by the police force to get confession, and eye witness's testimony claiming that the two men were not present at the crime scene at all.¹²

Recommendations:

17. So recommendations are as follows:

- Further train judicial officials, police officers and other law enforcement officials so that they fully understand the law and apply it properly and lawfully;
- Guarantee the transparency, neutrality and impartiality of judicial officials and the armed forces in hearing the cases and settling the disputes;
- Law enforcers must be punished in accordance with the law if they fail to fulfill their duties properly.

D. Abuses of Power

18. There are many examples that demonstrate an abuse of power in the implementation of the law either by the executive or by the judiciary itself. The most controversial issues relate to abuse of power with regard to the Prime Minister's "*iron fist*" approach interfering regularly in the courts' operation especially in relation to politically related cases. An example of such a case is the charge of "*mistrust*" against Prince Norodom Rannarith, former President of the National Assembly and president of the FUNCINPEC Party, subsequently named new President of Norodom Rannarith Party, after an internal dispute within his old party – a complaint lodged by his former party's Secretary-General. Similar complaints were lodged against the political opposition leader Sam Rainsy citing

¹⁰ Land case statistic compiled by NGO coalitions working on land rights in Cambodia, updated by September 2008. Those coalitions include CHRAC, the Housing Rights Task Forces, and the NGO Forum on Cambodia.

¹¹ *The 2008 Human Rights Situation Report* published by the Cambodian Human Rights and Development Association ("ADHOC"), (Phnom Penh: 2009), p.39.

¹² CHRAC's Investigation Report (conducted by the Sub-Committee on Investigation team) in 2004, 2005, 2006 .

“*disinformation*” during the 2008 National Elections Campaigns which developed from a electoral case to a court case.

19. Another controversial issues are the so-called “*Notification Letters*” which are often issued by state authorities, including the district, provincial/municipal offices, and ministries or from the Council of Ministers, to make public their decisions. Civil society organizations are concerned about the power of these administrative notification letters which appear to outweigh the law or judgments of courts, particularly in relation to land disputes cases.

20. Moreover, in a recent speech by Prime Minister Hun Sen¹³ about the legal proceedings of the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Prime Minister stated publicly that no further suspects should be investigated and that only the current five charged persons¹⁴ should face trials by this tribunal. There have been various concerns concerning political interferences into the independence of the ECCC and in its efforts to deal with corruption allegations. Any disrespect of the ECCC’s independence will seriously affect the Court’s credibility.¹⁵ In relations to the Prime Minister’s comments, one of the five ECCC’s Trial Chamber Judges, Dame Silvia Cartwright, a New Zealander, was in the opinion that “countries where the rule of law is respected and where their citizens can be sure of a fair trial are those in which the independence of the courts and judges is guaranteed. The comments, politically motivated or otherwise, which appear to be an attempt to interfere with that independence, are therefore to be deplored.¹⁶”

Recommendations:

21. Recommendations are as follow:

- End immediately the practice of politically-related arrests and political influenced court charges against political opponents and other people who exercise their freedom of speech to criticize Government action;
- Respect the separation of power and end in particular interferences of the executive branch into the judiciary;
- Political interference in any court affair, including the ECCC, must be terminated in order to ensure proper functioning and the independence of the judiciary and to guarantee justice for victims of crimes;
- In relation to the practice of “notification letters”, state precisely the power these administrative letters have, particularly in relation to the existing legal framework;

E. Protection of Fundamental Human Rights:

22. Cambodia is party to many international human rights treaties and instruments. The Constitution of Cambodia¹⁷ requires that the State must fully oblige to these treaties to

¹³ Prime Minister’s speech on 31 March 2009 at an inauguration ceremony in Preah Sihanouk province, Cambodia.

¹⁴ Kaing Guek Eav (Duch), former chief of S-21 Center, Nuon Chea (former president of national assembly), Ieng Sary (former deputy prime minister in charge of foreign affairs), Ieng Thirith (former minister of Social Action) and Khieu Samphan (former head of presidium).

¹⁵ NGO Joint Statement dated on 14 January 2009, See also Lao Mong Hay: *Khmer Rouge tribunal must have autonomy*, UPI Asia.com at

http://www.upiasia.com/Human_Rights/2009/03/18/khmer_rouge_tribunal_must_have_autonomy/8850/ and See also Amnesty International’s Statement on “*Cambodia: A Historic Day for Khmer Rouge Victims*” March 27, 2009

¹⁶ MAGGIE TAIT – NZPA: *Interference ‘deplored’ by judge* available at <http://www.stuff.co.nz/world/asia/2315921/Interference-deplored-by-judge>

¹⁷ See Constitution of Cambodia, Article 31

ensure the promotion, protection and respect for human rights. However, there have only been rare cases in which both the lower court and upper court use international human rights treaties, especially the International Covenant on Civil and Political Rights (ICCPR) to recognize and defend fundamental fair trials rights. Those rights are regularly violated, such as the presumption of innocence, rights to counsel, right to have a fair, competent and impartial tribunal, right to liberty and security in person (detention over time limited by the criminal procedure law), right to undue delay of trial, right to remain silence (tortured for confession), and some of the defendant's rights.¹⁸

23. It can be further noted that the implementation international treaties, which can also defined as domestic law, is insufficient, and as a consequence there are still ongoing violations of human rights which need to be taken into consideration. Therefore, international treaty obligations are rarely applied to recognize fundamental rights in the Cambodian criminal justice system.¹⁹

Recommendations:

24. The following are the recommendations for addressing the above-mentioned issues:
- Fully incorporate international human rights treaties which the State of Cambodia has ratified into domestic law;
 - Better train judges, prosecutors and other judicial officials, especially the judicial police, on human rights principles and international human rights treaties;
 - The judges and prosecutors should engage in public activities, especially in relations to discussion about the “law and human rights”, to raise awareness about the rule of law;
 - Implement the international human rights treaties.

Phnom Penh, April 10, 2009

This Stakeholder’s Report is endorsed by CHRAC’s Members:

No.	Name	Position	Name of Organization
1	Mr. SOK Sam Oeun	Chairman/ Executive Director	Cambodian Human Rights Action Committee (CHRAC)/ Cambodian Defenders Project (CDP) email: samoeun_sok@cdpcambodia.org
2	Mr. THUN Saray	President	Cambodian Human Rights and Development Association (ADHOC) Email: saray@online.com.kh
3	Ms. Theary SENG	Executive Director	Center for Social Development (CSD) Email: theary@csdcambodia.org
4	Mr. HANG Chhaya	Executive Director	Khmer Institute of Democracy (KID) Email: director.kid@online.com.kh
5	Ms. SAY Saravathany	Executive Director	Cambodian Women Crisis Center (CWCC) Email: vathany.say@gmail.com
6	Mr. RUN Saray	Executive Director	Legal Aid of Cambodia (LAC)

¹⁸ See detail discussion in the Annual Court Watch Report 2007 published by the Center for Social Development (CSD).

¹⁹ Interview with Mr. Sok Sam Oeun, Chairman of CHRAC and Executive Director of Cambodian Defenders Project (CDP). CDP is a legal aid NGO providing free of charge counsel to defendants, particularly the poor.

7	Mr. YA Navuth	Executive Director	Coordination Action Research on AIDS and Mobility (CARAM-Cambodia)
8	Mr. YONG Kim Eng	President	People Center for Development and Peace (PDP-Center)
9	Ms. SUN Chansen	President	Khmer Youth Association (KYA)
10	Mr. ANG Chanrith	Executive Director	Khmer Kampuchea Krom Human Rights Association (KKKHRA)
11	Mr. KIM Sovann	Executive Director	Human Rights Vigilance of Cambodia (VIGILANCE)
12	Ms. SIM Souyeang	Executive Director	Protection of Juvenile Justice (PJJ)
13	Mrs. DY Ratha	President	Indradevi Association (IDA)
14	Mr. YIM Po	Executive Director	Cambodian Center for Protection of Children's Rights (CCPCR)
15	Mr. SA Mohamadsen	Executive Director	Cham Khmer Islam Minority Human Rights and Development Association (CKIMHRDA)
16	Mr. CHHON Sokhoeun	Executive Director	Mission of Generous Cambodian Alliance (GENEROUS)
17	Mr. SON Yoeung	Executive Director	Khmer Kampuchea Krom Human Rights and Development Association (KKKHRDA)
18	Mr. SIN Kim Horn	Executive Director	Cambodian Health and Human Rights Alliance (CHHRA)
19	Mr. SAO Sopheak	President	Khmer Youth Association (KSA)
20	Mrs. MOM Sitha	Executive Director	Human Rights Organization for Transparency and Peace (HROTP)
21	Mr. SAN Chey	Executive Director	Khmer Institute for National Development (KIND)
22	Mr. SUON Sareth	Executive Secretary	Secretariat of the Cambodian Human Rights Action Committee (CHRAC)