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Joint NGO Submission on Fair Trial Rights and Due Process in the Cambodian Legal System for the Universal Periodic Review of Cambodia’s Human Rights Obligations – June 2013

This joint submission has been prepared by Legal Aid of Cambodia (LAC) in consultation with key Cambodian NGOs. This Joint Submission is made by LAC, the International Bridge to Justice (IBJ) and the Cambodian Human Rights Action Committee (CHRAC). While not exhaustive, it outlines some of the key due process and fair trial rights available in the Cambodian justice system.

A. Constitutional and Legislative Framework

1. Fair trial rights and due process have a number of sources in the Cambodian legal system. The Constitution of the Kingdom of Cambodia guarantees a number of rights and freedoms that form the foundation of fair trial rights and due process in the country. Chief among the rights and freedoms provided for by the Constitution are: equality before the lawⁱ; the right to life, personal freedom and securityⁱⁱ; the presumption of innocenceⁱⁱⁱ; and the independence of the judiciary^{iv}.

2. Criminal procedure in Cambodia is codified in the Code of Criminal Procedure (CCP), promulgated in 2007. The CCP outlines the procedures for investigating and prosecuting crime in Cambodia in addition to the rights of victims and those charged with offences. In 2009, the Penal Code was passed in the National Assembly. The general provisions of Book I came into effect on December 10, 2009, while the remaining provisions were implemented in Phnom Penh on December 10, 2010 and on December 20, 2010 in the rest of the country. The new Penal Code sets out classes of offences, principles of criminal responsibility and sentencing, the territorial jurisdiction of the courts and numerous new offences. Both of these pieces of domestic legislation set out a number of procedural and substantive rights aimed at ensuring fair trials.

3. Additionally, in accordance with Article 31 of the Constitution, Cambodia has committed itself to recognizing and respecting human rights provided for by the international treaties and covenants to which it is a party. This commitment was confirmed by the Constitutional Council in July 2007, who held that Cambodia’s treaty obligations form part of the law which should be considered by the judiciary in the trial process.^v As such, the rights guaranteed in such instruments as the International Convention on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (UNHR) form part of the domestic law of Cambodia and mandate respect for fair trial rights and due process in the Cambodian legal system.

B. The Policy Context

4. Legal and judicial reform has been a key component of the Royal Government of Cambodia’s (RGC) strategy for encouraging growth, equity and efficiency in Cambodia for over a decade as of 2013. In 2003, the government approved a Legal and Judicial Reform Strategy, which remains the framework for establishing a “credible and stable legal and judicial sector.”^{vi} The LJR Strategy relies on four principles found in the Constitution to guide reform: the rights of individuals, liberal democracy, separation of powers and the rule of law. Legal and judicial reform was further recognized as a priority for the RGC as part of the National Strategic Development Plan (NSDP) released in 2003. The second phase of NSDP implementation was set by the RGC for 2009 through 2013. During this period, the government committed itself to implementing a number of

measures intended to ensure that the legal and judicial system functions efficiently and respects Cambodia's fundamental human rights obligations. In particular, the government was to prioritize: adopting major fundamental laws (such as the Penal Code); providing training and disseminating information on laws and rights to citizens; strengthening the capacity of judges, prosecutors, court clerks and law enforcement officials to implement the law; providing legal aid; promoting the use of alternative dispute resolution mechanisms; and expanding judicial services.^{vii} While progress continues to be made on some of these priorities, legal and judicial reform remains an ongoing process within Cambodia. **As a necessary step towards ensuring that fair trial rights and due process are fully respected in the Cambodian legal system, the RGC should ensure that it honours and fulfills the commitments made in the NSDP with respect to legal and judicial reform.**

C. Due Process and Fair Trial Rights On the Ground

1. The principle of legality

5. The principle of legality holds that no one can be found guilty of a criminal offense for an act or omission that did not constitute a criminal offence at the time that the alleged act or omission was committed. It also mandates that a penalty heavier than the one applicable at the time of the alleged offence cannot be imposed. This principle is contained in article 11(2) of the UDHR and article 15 of the ICCPR.

6. From the experience of NGO participants in Cambodia's legal system, it appears that this right has largely been respected in the Cambodian courts, even with the enactment of the new Penal Code in 2009, which could have provided an opportunity for confusion between new and old offences. While the principle may not be fully understood, the courts have tried to follow the principle of legality in both charging and sentencing. However, it should be noted that NGO participants were aware of at least one case where the accused was charged with committing a crime which did not constitute an offence at the time the act was committed, but which was subsequently criminalized in the Penal Code. **As such, it is recommended that judges, prosecutors and the police be reminded of the principle of legality, through supplementary or initial training, so as to prevent the misapplication of the Penal Code to acts which were not criminal at the time they were committed.**

2. The right to a public hearing

7. As guaranteed by article 316 of the CCP and article 14(1) of the ICCPR, everyone has the right to a public hearing, comprised of several elements: trials should be open to the public and conducted orally; information on the venue and date of the hearing should be made available to the public; and there should be adequate facilities for public attendance.^{viii} In cases where a public hearing would cause significant danger to public order or morality, the courts have been granted the discretion to conduct hearings completely or partially in-camera.^{ix} According to NGO participants in and observers of the Cambodian legal system, this exception is most often used in rape cases, where the victim requests a private hearing, or in cases involving child victims, witnesses or perpetrators. Otherwise, it is generally the case that hearings remain open and accessible to the public.

8. However, while courtrooms remain open to the public, it has been noted by trial observers that notification of hearings, through a public notice board or other means, is inconsistently done in some courts and completely absent in others.^x As it is a fundamental principle of fair trial rights that justice

must be seen to be done, it is **recommended that all courts strive to compile and advertise the court's schedule to the public, through the use of noticeboards erected outside of the courtroom.**

9. Further, **courts should look to the Extraordinary Chambers of the Courts of Cambodia (ECCC) as a positive example of public hearing practices which should be emulated, especially where hearings deal with politically sensitive and divisive cases,** as concerns have been raised by NGO observers about obstruction of the public from the courtroom in such cases.

3. The right to liberty and to be tried without undue delay

10. It is a fundamental principle of human rights and the criminal law that everyone has the right to liberty and that any prosecution, arrest or detention of an individual must be done in accordance with the law. This right is guaranteed in Cambodian law in both the Constitution and CCP.^{xi} Further, the ICCPR provides that any person charged with a criminal offence is entitled to be tried without undue delay.^{xii}

11. Despite the fact that both the CCP and ICCPR stipulate that accused persons are, in general, to remain at liberty, many NGO participants in the Cambodian legal system note that pre-trial detention and/or detention in police custody occurs in many, if not most, criminal cases. Judicial supervision remains an underutilized alternative to pre-trial detention, as NGO observers have indicated that it is only occasionally used for petty offences and misdemeanours. **Judges should be encouraged to consider judicial supervision in cases where it may be an appropriate substitute for pre-trial detention.**

12. Additionally, through supplementary or initial training, the **judiciary must be reminded that pre-trial detention can only be ordered where one or more of the conditions outlined in article 205 of the CCP is fulfilled.** When asked for reasons for ordering pre-trial detention, NGO observers reported that judges in some cases noted factors such as the case being complicated or that the accused was charged with a felony. Such considerations do not fall within the conditions outlined in article 205 and, as such, are insufficient reasons for ordering provisional detention.

13. There is a general consensus amongst NGO observers and participants in the Cambodian legal system that both the police and judiciary have in recent years improved in ensuring that the duration of police custody or detention does not extend beyond the statutory limits outlined in the CCP^{xiii}. Notwithstanding this improvement, there remain reports of persons held in police custody or pre-trial detention for periods longer than those permitted by the law. In particular, problems were noted in the provinces where investigating judges are on a rotation, which can result in delays in proceeding to a hearing when a judge leaves a province while in the midst of an investigation. Further, once a case has proceeded to trial, there is no limit as to the number of times a case may be returned to an investigative judge by the court, contributing to detention periods extending beyond the statutory limits. According to article 249 of the CCP, if a charged person is not brought to trial within the statutory period, they must be **automatically released.**

14. **It is recommended that judges and the police are reminded, through additional or initial training, of the statutory limits for custody and detention,** in order to ensure that detainee's rights to liberty are respected. Additionally, **judges are encouraged to respect and apply article 249 in cases where detention extends beyond the periods allowed under the law.** Finally, both the police and judiciary are encouraged to keep and maintain detention period records and

databases, so that they can more easily comply with statutory detention limits. The National Assembly is also encouraged to consider amendments to the CCP outlining limits on the number of times that a case may be returned to an investigating judge, in order to limit opportunities for delays which can push detention periods over the statutory limits.

4. Right to understand the nature of the charge and reasons for detention

15. Under Cambodian and international law, persons charged with a crime have the right to understand the nature of the charge against them and, if they are detained, the reasons for the detention.^{xiv} This right additionally imposes obligations on the state to provide interpreters or other forms of accommodation if such measures are necessary in order to communicate with the accused.

16. Judges generally do an adequate job of stating the charge and relevant law to accused persons when they appear in court for a hearing. As will be discussed in further detail regarding the right to legal representation, because legal representation is available in Cambodia only after 24 hours of being in police custody, it is unclear whether the police follow the same practice. There are reports from detainees indicating that they do not.

17. The provision of interpreters for those who speak a different language or are deaf varies according to location and court resources. While in urban centres, such as Phnom Penh, interpreters are generally readily available for accused who speak Vietnamese, Mandarin/Cantonese, English or require sign language, there are reports of trials in the provinces being delayed where an interpreter was needed. Additionally, a lack of court resources means that accused are sometimes required to find and finance their own interpreter if one is needed, despite the guarantee of free assistance provided in article 14(3)(f) of the ICCPR. Accommodation services for the mentally ill or disabled are also lacking. While efforts are usually made to find a family member who can interpret for a mentally ill or disabled accused, if no family member is found, no further efforts are made to ensure that the accused understands the charges against them or the reasons for their detention.

18. Understanding the nature of the charge against an accused and the reasons for detention are essential for an accused to mount an adequate defence. As such, the **Ministry of Justice is strongly encouraged to ensure that it has allocated adequate resources to the courts to guarantee that interpreters can be provided free-of-charge to accused as necessary. It should also evaluate existing accommodation practices for the mentally ill or disabled, and encourage retaining medical professionals and support workers as interpreters where necessary.**

5. Providing an adequate explanation of rights

19. The obligation to provide an adequate explanation of rights flows from an accused's right to understand the nature of the charge against them, as a detainee must first be aware of their rights in order to properly exercise them. There is a general lack of consistency in informing accused persons of their rights, by both the police and the judiciary, and even where an accused is informed, it is unclear whether the explanation is adequate. There have been reports by detainees of a complete failure by the police to inform them of their rights when they were taken into custody. While judges generally do inform accused persons of their basic rights (such as the right to legal representation), there have been reported instances where they have failed to inform them of the right to silence or have only provided a cursory explanation of basic rights. **It is recommended that the judiciary and law enforcement officials receive additional training regarding informing and explaining basic rights to accused persons. If required, law enforcement officers should be provided with cards**

outlining an accused's rights that can be given or read to accused persons to ensure that they are informed of their rights upon arrest.^{xv}

6. The right not to be compelled to confess guilt

20. This right encompasses and flows from the prohibition against torture and inhumane treatment outlined in the Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment, to which Cambodia is a signatory. This prohibition means that the authorities cannot use physical or psychological pressure to extract an admission of guilt from a suspect, a right which is further protected by both the Constitution and the ICCPR.^{xvi}

21. Despite these protections, reports of violence or threats of violence while in police custody remain a feature of the Cambodian justice system, although improvements have been noted. NGO observers of the Cambodian justice system have witnessed a perception amongst the police force that confessions are necessary in order to secure convictions, leading to a culture which promotes obtaining confessions of guilt from suspects using whatever means are necessary. **Improved training for law enforcement officers on evidence gathering and criminal investigation is needed to remove any existing pressures on the police to obtain confessions.** Such training must emphasize that the strength of the case is based on the strength of all the evidence, with a confession only being one form of evidence.

22. Further, when prosecutors or judges are made aware that a confession has been obtained using violence or threats of violence, **they should immediately exclude the confession from the trial, as mandated by article 38 of the Constitution, which prohibits the use of such confessions as evidence of guilt.**

7. Exclusionary rules

23. NGO observers and participants in Cambodia's justice system have noted that article 38 of the Constitution and other exclusionary rules in the CCP^{xvii} are rarely used by the judiciary, even though they are powerful tools for safeguarding fair trial rights and due process. **It is recommended that further training be given to the judiciary regarding laws which mandate the exclusion of evidence or declarations that proceedings are null and void following severe violations of fair trial rights and due process.**

8. The right to legal representation

24. The right to legal representation is constitutionally guaranteed in Cambodia.^{xviii} A detainee may request to speak to legal counsel after 24 hours of being in police custody^{xix} and in cases where the detainee is a minor or the accused has been charged with a felony, the assistance of a lawyer is mandatory.^{xx}

25. By the time a detainee arrives in court for a hearing, they have generally obtained legal representation or the court at that time will assign a lawyer to them. However, an accused's awareness of their right to representation seems to vary depending on geographical and educational factors. While most accused in urban centres, such as Phnom Penh, are aware that they have a right to the assistance of a lawyer, those who live in rural areas or who have otherwise not had the opportunity to pursue education do not know of this right. Further, even where an accused is aware of their right to legal representation, they may be unaware of the availability of legal aid and opt to

represent themselves unless the court appoints a lawyer on its own initiative, as they believe legal services will be too expensive. **The police and judiciary are reminded that it is their responsibility to inform detainees upon being taken into custody of their right to legal representation.** Further, **it is recommended that detainees be additionally informed of the availability of legal aid services should they be unable to afford a private lawyer.**

26. Many NGO observers and participants in the Cambodian justice system noted that the 24 hour delay in accessing legal counsel found in the CPC is a key impediment to accused persons fully exercising and being made aware of their rights.^{xxi} As most lawyers are not retained until a case has been transferred to an investigative judge, they are unable to ensure that their clients' fair trial rights are respected and due process followed throughout the criminal justice system, especially at the police level. **Policymakers are encouraged to amend the CCP so that legal assistance can be provided to accused persons immediately upon being taken into police custody.**

9. The right to adequate time and facilities to prepare a defence

27. Under international and Cambodian law, an accused is entitled to have adequate time and facilities to prepare a defence, preferably with the assistance of a lawyer.^{xxii} Troublingly, however, there are continued reports of lawyers being assigned a client a few days before or even the day of a hearing, providing them with no opportunity to appropriately prepare their new client's case. Some NGO's that provide legal aid have begun refusing to take on clients referred to them by the court if they have not been provided with adequate time to prepare. The Bar Association of the Kingdom of Cambodia has also issued directives to attempt to prevent judges from trying to assign lawyers to clients on the day of a hearing. It was noted by NGO observers that these practices may only affect a minority of cases. However, **it is recommended that either practice directives and legislation mandating the minimum amount of time that a lawyer can have to prepare their client's case be respected by the courts and, if necessary, hearings delayed in order to afford an accused the requisite amount of time to mount a defence.**

10. The right to an equal opportunity to present evidence

28. In order to properly adjudicate on a case, all parties must have the opportunity to present evidence to the court to support their arguments. This includes the right to call and examine witnesses before the court, as well as provide documentary evidence.^{xxiii} While it appears that procedurally, this right is respected in Cambodian courtrooms, some providers of legal aid services for accused persons note that ongoing distrust of the justice system or practical difficulties in transporting and providing for witnesses to attend at court mean that the defence is not often able to present all of the evidence that may be available. As a result, while the defence may be afforded the opportunity to present evidence in court, in reality, the difficulties associated with gathering evidence in order to mount a defence - difficulties not necessarily experienced by the prosecution - result in an uneven playing field.

29. It is recommended that judges maintain open dialogue with defence lawyers concerning whether they have been afforded enough time to gather sufficient evidence in order to maximize their opportunity to present their case. Additionally, **more resources are required for legal aid providers to ensure that they are able to support bringing witnesses to court if necessary to mount a complete defence.**

11. The presumption of innocence

30. It is a fundamental principle of criminal justice that an accused is innocent until proven otherwise. Despite the fact that this right enjoys protection both in the Constitution and ICCPR in Cambodia, there are inconsistencies as to the degree to which it is actually respected in practice. Many detainees continue to appear before the court in prison uniforms rather than plain clothes, although improvements have been noted in some jurisdictions as a result of NGO advocacy. There have been reports of judges making remarks about the guilt of the accused prior to rendering a decision, raising the possibility that they have pre-judged a case prior to receiving all of the evidence. Additionally, there have been instances where the silence of the accused has appeared to be taken as an admission of guilt rather than an exercise of the right against self-incrimination. At the police level, some NGO observers have noted that law enforcement officers have collected evidence based on the assumption that a suspect is guilty, rather than fully investigating a crime. As a result, **it is recommended that law enforcement officials and the judiciary receive initial and supplementary training on the presumption of innocence, and the obligations it imposes upon them to act in an impartial, truth-seeking manner.**

12. The right to be tried before an impartial and independent tribunal

31. Supporting and maintaining the independence of the judiciary has been a key goal of the legal and judicial reform measures by the RGC, as found in the NSDP. The focus and recognition of this goal is laudable and progress remains ongoing. Many NGO observers and participants in the Cambodian justice system felt that the judiciary generally operated independently in the cases in which they were involved. However, they cautioned that the cases they deal with generally concern the economically underprivileged, where there are few sources of external pressures that would affect judgments. There are still doubts as to the ability of the judiciary to operate independently in politically controversial cases.^{xxiv}

32. Even in cases where a judge may be acting in an independent and impartial manner, the appearance of judicial independence may be compromised by the conduct of the judge, weakening public faith in the judiciary. There are reports of judges behaving in an intimidating manner towards parties, making disparaging or discriminatory comments about a party's economic status, and it remains commonplace courtroom conduct for judges to answer their phones or leave the room during a hearing. **It is recommended that the judiciary be reminded through training that maintaining the appearance of judicial independence is a fundamental component of judicial independence itself. To that end, judges are reminded that they must hold themselves to the highest standard of behaviour and should not: behave in an overly aggressive manner towards any of the parties; make discriminatory remarks about a party's race, gender, mental ability or economic status; answer their mobile phones while conducting hearings; and leave the courtroom while in the midst of hearings.**

33. Further action is also required from the RGC to guarantee judicial independence. As was promised in the second phase of NSDP implementation, **the Law on the Status of Judges and Prosecutor and the Law on the Organization and Functioning of the Courts should be passed as soon as possible in order to solidify the separation of powers guaranteed in the Constitution.** These two major laws have been stalled in the National Assembly at the draft stage for nearly two decades, despite the fact that they are enshrined in the Constitution. **It is also respectfully requested that the RGC abide by the Constitution and respect the principle of**

judicial independence by refraining from interference in the courts, even in cases that involve politically controversial or divisive issues.

ATTACHMENT A – List of Supporting Organizations

Legal Aid of Cambodia (LAC)

International Bridge to Justice (IBJ)

Cambodian Human Rights Action Committee (CHRAC)

Endnotes

ⁱ Article 31 of the Constitution of the Kingdom of Cambodia [the Constitution].

ⁱⁱ Ibid, article 32.

ⁱⁱⁱ Ibid, article 38.

^{iv} Ibid, article 128.

^v Constitutional Council of the Kingdom of Cambodia, Decision No. 092/003/2007, dated July 10, 2007.

^{vi} Council for Legal and Judicial Reform, *Legal and Judicial Reform Strategy*, adopted by the RGC at the Plenary Session on June 20, 2003, p 2.

^{vii} Royal Government of Cambodia, *National Strategic Development Plan Update 2009-2013: For Growth, Equity and Efficiency to Meet Cambodia Millennium Development Goals*, November 2009, <http://www.theredddesk.org/countries/cambodia/info/plan/the_national_strategic_development_plan_2009_2013_cambodia>, pp 101-102.

^{viii} United Nations Human Rights Committee, Communication No. 213/1986, *Van Meurs v The Netherlands*, para 6.2.

^{ix} Article 316 of the CCP.

^x See, for example, Cambodian Centre for Human Rights, “Fifth Bi-annual Report: Fair Trial Rights in Cambodia,” November 2012, pp 20-21.

^{xi} Article 38 of the Constitution; Article 203 and 205 of the CPC.

^{xii} Article 14(3)(c) of the ICCPR.

^{xiii} Outlined in articles 208-214 of the CCP.

^{xiv} These rights can be found in articles 9(3), 14(3)(a) and 14(3)(f) of the ICCPR, and articles 97, 322, 235, 330, and 331 of the CCP.

^{xv} Modelled after a program first piloted by the Office of the High Commissioner for Human Rights in Cambodia. See Human Rights Council, *The Role and Achievements of the Office of the United Nations High Commissioner for Human Rights in assisting the Government and people of Cambodia in the promotion and protection of human rights: Report of the Secretary-General*, September 20, 2013 (A/HRC/21/35), p 14.

^{xvi} Article 38 of the Constitution; Article 14(3)(b) of the ICCPR.

^{xvii} Such as article 252 of the CCP.

^{xviii} Article 38 of the Constitution.

^{xix} Article 98 of the CCP.

^{xx} Ibid, article 301.

^{xxi} This provision was also noted with concern by international observers, such as the Committee against Torture, “Consideration of reports submitted by States parties under article 19 of the Convention: Concluding observations of the Committee against Torture - Cambodia” 1-19 November 2010, <<http://www.ohchr.org/EN/Countries/AsiaRegion/Pages/KHIndex.aspx> >, p 5.

^{xxii} See article 14(3)(b) of the ICCPR and articles 98 and 319 of the CCP.

^{xxiii} This right has informed article 14(3)(e) of the ICCPR, and articles 153, 298, 324, 326 and 334 of the CCP.

^{xxiv} For example, see the ongoing controversy regarding the trial and conviction of BoeungKak community activist, YormBopha. LICADHO: Cambodian League for the Promotion and Defense of Human Rights, “Briefing Update: The YormBopha Case,” April 2013, <<http://www.licadho-cambodia.org/reports.php?perm=177>>.