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CAMBODIAN DEFENDERS PROJECT

Promoting Human Rights by strengthening Rule of Law, Legal System and Liberal
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SUBMISSION

to

Universal Period Review(UPR) of Cambodia 2009

ADMINISTRATION OF JUSTICE

I. INDEPENDENCE OF JUDICIARY

1. The independence of judiciary in Cambodia is still an issue. The law of statute of magistrates has not yet been passed even though this draft law has been finished since 2002. The rotation of judges in whole country for every four year has been implemented but it is not yet transparent and alleged political and favoritism involved. Even though the salary of judges and prosecutors are increased since 2002, but they are still not adequate and in particularly when they had moved to another province in every four year¹. Because judges and prosecutors can be members of any political party and nomination for high position in judiciary and public prosecutor department are made from ruling parties, the ruling parties can gain a lot of advantage. During election, some chief justice and judges were seen involving election campaign for ruling party. According to the law on organization and functions of the Supreme Council of Magistracy, three of its members shall be chosen by election by all magistrates, but until now they are still chosen by appointment by ministry of justice.
2. **Recommendations:** In order to assure the independence of judiciary:
 - Judges and prosecutors must be non-partisan, have adequate salaries and the state must provide security to the court houses and must provide houses to the judges while they are moved to another province.
 - The law on statutes of magistrates and law on amendment of supreme council of magistracy must be passed and consulted with all judges and prosecutors with open for public comments. A General Secretariat of the Supreme Council of Magistracy shall be established to assist the Supreme Council.
 - Stop selecting members of the Supreme Council of Magistracy by political nomination and must be chosen by election as stated in the current law.

II. HUMAN RIGHTS IN CRIMINAL JUSTICE

3. Cambodia is the one of signatories on the International Covenant of Civil and Political Rights (ICCPR) and the Constitution of Cambodia of 1993 also recognizes the international

¹ According to the decision of Supreme Council of Magistracy, every judge shall be moved to another court for every four years. So every year there is one fourth of judges and prosecutors are moved to another court.

instruments on Human Rights². There for the rights of the accused and of the victims stated in the ICCPR must be protected in domestic laws of Cambodia.

a. Right to Counsel

4. In general the right to counsel is not yet well understood in Cambodian criminal justice system. According to the law on bar statute³, the state gives the burden of providing legal assistance to the poor to the poor bar association which is an association of private lawyers and are not funded by the government. Prime Minister contributed some money from his own pocket to the Bar Association in last couple years but it was not on behalf of the state. However, there
5. According to the Criminal Procedure Code⁴, the accused cannot access to his or her lawyer within 24 hours. In practice, no accused can access to his or her lawyer during the accused is in police custody. In Criminal Procedure Code, there is no provision permitting the criminal accused to have his or her lawyer present during his or her interrogation by police. Therefore, the accused has no right to have lawyer present during his or her interrogation.
6. For felony cases and juvenile cases only, the court has obligation to assign a lawyer for the accused during trial, so, most of misdemeanor cases were tried without defense lawyer. However, the court has no money to pay for lawyer fee. Mostly, they depend on legal aid NGOs if the accused are really poor people and it has obligation to appoint a lawyer for the accused.
7. Most prisons do not have any room for the lawyer and his or her client to be able to meet in private to ensure the confidentiality. In most cases, the prison guard is always nearby or in the room with the lawyer and prisoner.
8. **Recommendations:** In order to ensure the right to counsel for any criminal accused:
 - The state should have legal aid budget so that the court can find a defense lawyer for the criminal accused.
 - The Criminal Procedure Code shall be amended and the following points shall be included:
 - Every criminal accused shall be able to access to lawyer immediately after arrest.
 - Miranda rule shall be applied during interrogation.
 - The practice of recognizing attorney power through appointment by the court shall be stopped. Police and court must respect the right of the accused to choose legal counsel by his or her own.
 - The prison shall provide private room for lawyer to meet his or her client and the prison shall ensure for their private meeting.

b. Pre-trial Detention and Pre-trial Release

9. Criminal Procedure Code⁵ states that in principle the suspect shall be free except only in special cases that the suspect may be under pretrial detention and there must not be pre-trial detention if the imprisonment shall be under one year⁶. But in general practice, all accused or criminally alleged were detained by the court. The meaning of imprisonment under one year is not clear because many offenses have more than one year imprisonment for maximum period. The Investigation Judges in Cambodia have both roles in conducting further

² Article 31 of the Constitution of Kingdom of Cambodia.

³ Article 29 on budget for the legal service for the poor of Law on Bar Statute 1995.

⁴ Article 98 on legal counsel during arrest of Criminal Procedure Code 2007.

⁵ Article 203 on Principles of Temporary Detention of Criminal Procedure Code 2007.

⁶ Article 204 on Case of Temporary Detention of Criminal Procedure Code 2007.

investigation after police and deciding for pre-trial detention or release. These both conflict roles cause automatic detention after the court has received any criminal complaint even without any clear evidence.

10. Cambodian system has no preliminary hearing. The accused is brought by police before investigation judge without accessing to any defense lawyer. In many cases, the accused were detained by investigation judge after they appeared to the court according to the invitation for inquiry by the investigation judge. Even though according to the criminal procedure code⁷, the pretrial detention can be used only for felony case and the cases to be able imprisoned at least one year, but most cases were charged higher crime and the investigation judge decided to detain the suspect based on the charge made by police or by complaint of the civil plaintiff without considering the evidence.
11. Before 2007, according to UNTAC law and old SOC law⁸, the pre-trial detention cannot be longer than six months, but according the new criminal procedure code, the court can detain the suspect 18 months for felony cases. The problem is that police and investigation judge like to charge the suspect on felony so that they can keep them in jail for pre-trial detention longer than six months.
12. After the Iron Fist Operation declared by the Prime Minister, the judge tried to deny request for bail or pre-trial release as much as they can in order to alleging by government on irregularities.
13. **Recommendations:** The Criminal Procedure Code of 2007 shall be amended and the following points shall be included:
 - Bail/pre-trial release or detention shall be done by a hearing before both prosecutor and defense lawyer. In this session, the accused shall have lawyer which at least legal aid lawyer or public defender assigned by the court or chosen by the accused. This hearing shall be done during first appearance or later.
 - Judge for bail or pre-trial hearing must be incompatible with Investigation Judge.
 - The article 204 of the Criminal Procedure Code shall be amended by stating clearly that there is no pre-trial detention for any crimes having minimum period of punishment less than one year imprisonment.

c. Right to Appeal

14. In Cambodian criminal system, there are one appeal court and one supreme court. At present, any party who does not agree with court's judgment can appeal to the higher court. However, in some cases, the appellant decides to withdraw his or her appeal complaint because otherwise he or she will be in jail over imprisonment term stated in the sentence. It is because during the appeal process, in particular in the Appeal Court, the criminal procedure code does not limit time for hearing for the Appeal Court.
15. In one case in Battambang, a suspect was arrested on charge of murder. He shot a family caused a woman and her husband wounded and their son to death. But he blamed that the woman was accomplish with him to kill her husband and then the woman was arrested based on his accusation. In court he denied his accusation and confessed that he blamed her because he was angry with her and the provincial court found her not guilty. But this case was appealed by the prosecutor so she was still kept in jail waiting for appeal hearing. The law states that the suspect shall continue being in jail if she or he has been in pre-trial detention and if any party appeals. In court of appeal, she was found not guilty again. However, she

⁷ Article 204 on Temporary Detention of Criminal Procedure Code 2007.

⁸ SOC is an acronym of State of Cambodia and it means the criminal procedure code passed by State of Cambodia. This law was passed in 1993 and now it has been replaced by new criminal procedure code of 2007.

was in jail for two years and half and had a baby in jail only waiting for final judgment and two levels of courts found her not guilty.

16. In another case, three men were convicted on robbery and sentenced three years each. One of them who stated that he was innocent had filed an appeal and others plead guilty. The two men who did not appeal were released on parole after two years serving the sentence. The man who filed the appeal to find justice still continued being in jail waiting for calling for trial by the court of appeal. At last, he decided to drop his appeal after he had been in jail for three years, because he would be in jail more than his sentence if he did not drop the appeal. Even though he can fine an appeal but the court procedure still violates his right to appeal and he lost his right to be on parole.
17. **Recommendations:** The Criminal Procedure Code of 2007 shall be amended and the following points shall be included:
 - The accused must be released immediately when he or she found not guilty or pre-trial release.
 - The prosecutor must not have power to appeal against judgment on bail or pre-trial release.
 - The time period for appeal hearing must stated in the law. Within at most 6 months, the court of appeal must open trial.
 - The number of court of appeal shall be increased of at least two other regional court of appeal⁹.

d. Right to Free from Torture

18. Cambodia is one of the countries who signs on Convention Against Torture. After a number of cases of death of prisoners in jail were brought to the court and even though those cases were not success, the serious physical tortures have been reduced. There are still some physical tortures happened but less serious than before. However, the mental torture is not perceived as torture and police still perceives that it is a legal use for obtain confession.
19. **Recommendation:**
 - The crimes relating to torture must be included in draft of Penal Code.
 - Miranda rule and the presence of defense lawyer during interrogation made by police can reduce torture.
 - The capacity building and the prison management reform must be needed.

e. Right to Confront Witness

20. At presence, many trials were done without presence of witnesses. The trial judges mostly based their judgment on the written statement of witnesses made by Investigation Judge or police by asking the court clerk read them in trial. Therefore, the defense counsel cannot challenge or cross-examine those witnesses. The trial judges may base on provisions in criminal procedure code stating that any statements made by judicial police (including the investigation judges) shall be presumed truthfulness until there is any contradictory evidence¹⁰. On another hand, the trial judge may pre-judge based only those statements are endorsed by the Investigation Judge. I said “endorse” because most statements are done by the clerk only and the investigation judge is the one who legalizes it by endorsing the statement.
21. **Recommendations:** The Criminal Procedure Code of 2007 shall be amended and the following points shall be included:

⁹ This recommendation is also seen in strategies of legal and judicial reform of government, but it has not yet been implemented.

¹⁰ Article 118 on Power of Weighting Evidence of Trial Judge of the Criminal Procedure Code 2007.

- The written statements cannot be used as evidence against any person if it has not been endorsed and the witness has not been examined by both prosecutor and defense lawyer.

f. Release after acquittal and power of appeal of Prosecutors

22. According to old criminal procedure code, the accused that was found not guilty was still kept in jail at least 24 hours more to wait for any appeal made by prosecutor. So, the accused must be in jail without guilty only waiting for the decision of prosecutor to appeal or not. The new criminal procedure code is worse than the old one. 24 hours is increased to one month¹¹. So the accused may be kept after found not guilty for another month. Even though this law gives power to prosecutor to decide to keep in jail or release, but in practice most of them were kept in jail waiting for the decision of prosecutor. This law is really violating human rights.
23. **Recommendations:** The Criminal Procedure Code of 2007 shall be amended and the following points shall be included:
- The accused who has been found not guilty must be released immediately even if the prosecutor or any other party declare to appeal.

III. COURT ADMINISTRATION

24. Because of confusion of establishment of courts in Cambodia, the Supreme Court and the Court of Appeal has no power to control lower courts. The Appeal Court is not supervisor of courts of first instance and the Supreme Court is not supervisor of the Court of Appeal. Even though the President of Supreme Court is the Chairman of Disciplinary Committee for judges of the Supreme Council and the Chief Prosecutor General, they have no mechanism to control judges and prosecutors. They only take any action if there is any complaint against any judges or prosecutors.
25. **Recommendations:** In order to strengthen the judiciary, the following points must be included in the draft of Law on Organization and Functions of Courts:
- Between all levels of the court, the higher courts must not be only for appeal but must be superior in controlling and monitoring, too.
 - The Chief Judges of lower courts must report to the Chief Judge of Court of Appeal and the Chief Judge of Court of Appeal must report to the Chief Justice of Supreme Court.



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¹¹ Article 298 on the effects of the appeal file on the execution of judgment of the Criminal Procedure Code 2007.