

Lawyers' Rights Watch Canada

NGO in Special Consultative Status with the Economic and Social Council of the United Nations

Concerns about Independence of Lawyers and Judges in Cambodia: Trends from 2004-2009

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1. Introduction and overview

Cambodia's legal profession was nearly wiped out during the Pol Pot regime of 1975-1979. Fewer than a dozen university-trained lawyers could be identified in Cambodia until 1997 when the Royal University of Phnom Penh graduated its first new class of about 200 law students. The number of university-trained lawyers rapidly burgeoned to several hundred men and several women. Training of lawyers has thus improved, but many currently sitting judges received legal training during the socialist regime of the 1980s. Many were trained in socialist law and legal systems in the Soviet Union or Vietnam where state purposes take priority over judicial independence.

The UN and other international and local human rights groups have for years expressed concerns about a host of serious human rights issues that are compounded by lack of independence and corruption of the judiciary, the bar and other public institutions including police. Among the issues of serious concern are:

- illegal land concessions, sales and evictions adversely affecting rural and urban people's rights and well-being;
- violence against women and girls and trafficking of children and women for sexual exploitation;
- discrimination against minorities and indigenous peoples;
- a culture of impunity for those threatening or attacking human rights defenders, union officials, journalists or opposition politicians, including corruption, pressure or judicial harassment by powerful or wealthy persons;
- constraint on freedom of expression and assembly through intimidation or judicial harassment of journalists, opposition politicians, human rights defenders and citizen protesters.

At the heart of these concerns is a persistent reluctance by the Royal Government of Cambodia to undertake serious measures to bring laws, policies and practices into line with Cambodia's Constitution and international human rights obligations. The government has been particularly resistant to building independent legal and human rights institutions. The Cambodian public perceives courts to be among the most corrupt institutions in Cambodia.¹ The Bar Association of the Kingdom of Cambodia (BAKC) is also perceived to be under government control, with lack of independence and integrity in bar admission and disciplinary practices.²

Executive control over the judiciary, prosecutors and the legal profession is accomplished through slow-paced and selective law reform, control over appointments and dismissal of judges and prosecutors, control of (or impunity for corruption) of Bar admission practices, complaints against lawyers to the BAKC Bar Council and threats of disbarment, threatened or actual prosecution of lawyers, and impunity for physical threats to the safety of lawyers and human rights defenders. This report summarizes incidents over the past several years that are relevant to issues of independence of lawyers and judges with emphasis on the legal profession.

¹ Household Survey on Perceptions, *Attitudes and Impact of Everyday Forms of Corrupt Practices in Cambodia*. Phnom Penh: Center for Social Development, 2005. <http://www.csdccambodia.org/pdf/Pub/Corruption%20and%20Cambodian%20Households.pdf>.

² Transparency International. "Corruption in the Judiciary of Cambodia." In *Global Corruption Report 2007*. Cambridge: Cambridge University Press, 2007, 183-86.

2. Cambodia's Legal Framework

2.1. UN Conventions

Cambodia has ratified many UN human rights Conventions, but has not ratified individual communications mechanisms (see Appendix A).

2.2. Cambodia's Constitution

Cambodia's 1993 Constitution is a liberal democratic constitution which states in Article 31 that 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."³ The Constitutional Council made a ruling in July, 2007 that "decisively affirms the position of the international human rights treaties as part of Cambodian law..."⁴

2.3. Patchwork domestic legal framework

Sources of Cambodian law are uncertain in many areas because of regime upheavals and changes since the 1970s. Some legislation has been passed since 1993 including a new *Code of Civil Procedure*, and *Code of Criminal Procedure*. There is a draft anti-corruption law, and a draft *Penal Code*. The UN Transitional Authority in Cambodia (UNTAC) *Penal Code*⁵ is still used. After international pressure, UNTAC *Penal Code* Article 63 (defamation) was amended to remove custodial sentences, although heavy fines remain in place. UNTAC *Penal Code* Articles 62 (disinformation), 59-60 (incitement) continue to provide for custodial sentences and are now regularly used in addition to defamation charges. There is a 1995 *Law on the Bar*⁶ and a *Bar Code of Ethics*.⁷

3. Concerns about key legal institutions

3.1. Courts

The Constitution stipulates independence of the judiciary.⁸ However, the UN Special Representative and others have repeatedly noted that Cambodian courts are neither independent nor effective because of executive interference, corruption and lack of competence, leading to politically motivated prosecution of some and impunity of others. The Supreme Council of the Magistracy has been unable to carry out its Constitutional responsibility for integrity of the courts. The government published a Legal and Judicial Reform Strategy in 2003, but progress is disappointing.⁹

³ Constitution dated September 24, 1993 as amended 8 March, 1999, available at <http://www.cambodia.gov.kh/unisql1/egov/english/organ.constitution.html> or http://www.bigpond.com.kh/Council_of_Jurists/Constit/somconsg.htm.

⁴ Decision No. 092/003/2007, 10 July 2007. UN Office of the High Commissioner for Human Rights in Cambodia (OHCHR). Public Statement, 25 July 2007. *Decision of the Constitutional Council Regarding the Law on Aggravating Circumstances for Felonies and the Convention on the Rights of the Child*, http://cambodia.ohchr.org/download.aspx?ep_id=331.

⁵ Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period (UNTAC Penal Code), available at <http://www.cdpcambodia.org/untac.asp>.

⁶ English language version of the *Law of the Bar*, available at http://www.cdpcambodia.org/bar_law.asp.

⁷ English language version of *Code of Ethics for Lawyers Licensed with the Bar Association of the Kingdom of Cambodia*, available at http://www.bigpond.com.kh/Council_of_Jurists/Judicial/jud002g.htm or http://www.cdpcambodia.org/bar_law.asp

⁸ Article 109-116, Constitution dated September 24, 1993 as amended 8 March, 1999, available at <http://www.cambodia.gov.kh/unisql1/egov/english/organ.constitution.html>. Also see http://www.bigpond.com.kh/Council_of_Jurists/Constit/somconsg.htm.

⁹ LICADHO. Legal and Judicial Reform In Cambodia: A LICADHO Briefing Paper. Phnom Penh: LICADHO, February 2006, available at <http://www.licadho.org/reports/files/79LICADHOLegalJudicialReformPaper06.pdf>.

3.2. National human rights institutions

A Cambodian Human Rights Committee established by the government in 1998 is chaired Mr. OM Yien Tieng, an advisor to Prime Minister HUN Sen. This Committee is neither active nor independent. Discussions on an independent National Human Rights Institution (NHRI) began in 2006, but to date the mandate or powers of a NHRI have not been developed and there is no confidence that the government intends to establish an independent body in accordance with the Paris Principles.¹⁰

3.3. Extraordinary Chambers in the Courts of Cambodia (Khmer Rouge Tribunal)

The Extraordinary Chambers in the Courts of Cambodia (ECCC) were set up by agreement as a mixed tribunal to try the leaders and those most responsible for the gross human rights violations of the 1975-1979 Pol Pot regime (Khmer Rouge). The ECCC has both international and Cambodian judges and prosecutors. There have been no transparent investigations of persistent allegations of corruption include reports that Cambodian staff have been pressured into kickbacks of their salary to government officials. .

3.4. Prosecutors

Prosecutors have little independence from the executive branch of government and tend to make decisions based on partisan concerns rather than in the public interest. The 2008 Report of the UN Special Representative notes that “[c]omplaints filed by senior government officials, even when based on weak or unsubstantiated evidence, are prosecuted with vigour, while the vast majority of the populace have little hope or expectation of having their grievances taken up by public prosecutors.”¹¹ Criminal offences involving violation of land rights of communities by powerful individuals or companies are not prosecuted. However, when people resist evictions or appropriation of their land they or their lawyers may be threatened or charged with criminal offences such as incitement, disinformation or defamation.

3.5. Lawyers and the Bar Association of the Kingdom of Cambodia (BAKC)

Efforts of the BAKC to foster an independent bar have been disappointing and have been impeded by government pressures and political divisions particularly over the past several years. Corruption and ineffectiveness of lawyers are reportedly widespread. The 1995 *Law on the Bar* governs lawyers in Cambodia and creates the Bar Association of the Kingdom of Cambodia. The *Law on the Bar*, which upholds the autonomy of the legal profession, provides a significant role for the Prosecutor General of the Court of Appeal who has considerable authority in decisions on bar admissions and disciplinary decisions of the Bar Council. There is reported corruption in the bar admission process.

3.6. International and domestic NGOs including legal aid and human rights NGOs

Cambodia has a number of competent and robust legal aid NGOs and human rights NGOs who work in cooperation with the UN Office of the High Commissioner for Human Rights and other international human rights and legal organizations and donors. Local NGOs have a great deal of expertise at documentation and reporting of human rights violations but rely on unstable foreign funding.

4. Synopsis of key incidents since 2004

The following timeline includes incidents of concern regarding independence of lawyers and judges:

- **1995 to 2002:** The first Presidents of the BAKC were Dr. SAY Bory (1995-1998), and Mr. ANG Eng Thong (1998-2002). In October, 2002, Mr. KY Tech, was elected President for a two- year term.
- **September, 2004:** Prime Minister Hun Sen and three other high-ranking CPP officials gained admission to the Bar even though they do not have the qualifications required by the *Law of the Bar*.¹²
- **November, 2004:** A legal aid lawyer from the Cambodia Defenders Project (CDP), Mr. SUON Visal, was elected president of the BAKC Bar Council, but incumbent President, Mr. Ky Tech sought to set aside the results citing irregularities in membership status of some junior lawyers who voted.

¹⁰ *Principles relating to the status and functioning of national institutions for protection and promotion of human rights* (Paris Principles), Adopted by General Assembly resolution 48/134 of 20 December 1993, available at [http://www.unhcr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/A.RES.48.134.En?Opendocument](http://www.unhcr.ch/Huridocda/Huridoca.nsf/(Symbol)/A.RES.48.134.En?Opendocument)

¹¹ Ghai.Yash. *Report of the Special Representative of the Secretary-General for human rights in Cambodia*. Human Rights Council A/HRC/7/42, 29 February 2008, paragraph 33, available <http://daccessdds.un.org/doc/UNDOC/GEN/G08/115/04/PDF/G0811504.pdf>

¹² See the BAKC's Explanatory Note on the Procedure and Conditions for the Admission of New Members of the Bar: Samdech Hun Sen, H.E Sar Kheng, H.E Sok An and H.E Prum Sokha, http://www.camnet.com.kh/ocm/government/040916_1.htm

The Appeals Court nullified the election and ordered that defeated incumbent, Ky Tech, reassume the presidency pending organization of new election. The election was postponed several times.

- **February and August 2005:** In February 2005, the Municipal Court of Phnom Penh sentenced Mr. CHAN Sopheak for the murder of a union official, Mr. ROS Sovannareth. In August, 2005, the Municipal Court of Phnom Penh sentenced Mr. BORN Samnang and Mr. SOK Sam Oeun for the 2004 murder of a union official, CHEA Vichea. There was reportedly no evidence against those charged for these offences, and it is believed their convictions were shields for the true offenders believed to be still at large. In the case of the murder of Chea Vichea, Trials and appeals were widely considered to have been unfairly decided by judges not acting independently of the executive branch of government. Mr. Born Samnang and Mr. Sok Sam Oeun were finally released on bail December 31, 2008. Chan Sopheak's sentence was confirmed in February, 2009, despite the lack of evidence.
- **October 16, 2006:** The two-year dispute over the presidency of the BAKC was settled by election of Ky Tech as president for a two-year term until October 2008.¹³
- **December 2005 to March 2006:** In December, 2005, YENG Virak, director of the Cambodian Legal Education Centre, and others were charged with defamation and detained as a result of their participation in organizing a Human Rights Day event where a banner was displayed on which members of the public had handwritten comments critical of the government and Prime Minister Hun Sen. Others detained in this incident were Kem Sokha, Director of the Cambodian Center for Human Rights, Pa Nguon Teang (human rights defender), Mom Sonando (journalist) and Rong Chhum (teachers= union leader). They were released after considerable international advocacy.
- **April 21, 2006:** The government responded to international advocacy by agreeing to amend UNTAC Penal Code Article 63 (defamation) to remove the imprisonment penalty.
- **March 2007:** The BAKC attempted to subject foreign lawyers in the ECCC to extremely high fees in order to be allowed to practice in the ECCC. This led to concerns that persons accused in the ECCC would be denied freedom of counsel. After international advocacy, the fees were eventually renegotiated. This issue created delays in ECCC proceedings.¹⁴
- **May 2007:** Global Witness, an international NGO, reported that lawyer Mr. Ky Tech represents companies and persons closely connected to high ranking public officials. It was also alleged that Mr. Ky Tech was implicated in a threat to have a judge fired if he found in favour of the opposing party.¹⁵ Neither government authorities nor the BAKC appear to have investigated this allegation.
- **May 2007:** BAKC officials took the position and made public statements that legal aid and human rights NGOs, including Community Legal Education Center (CLEC), Legal Aid of Cambodia (LAC) and the Cambodian Defenders Project (CDP) must sign Memoranda of Understanding (MOU) with the BAKC in order to employ lawyers.¹⁶ Bar President Ky Tech also threatened to refuse Bar admission to trainee lawyers in a USAID-funded Law Fellows Program (LFP) which placed new lawyers in internships with human rights organizations. As a result, twelve trainee lawyers resigned from the LFP. The requirement of MOUs has no basis in law, and there was considerable concern that agreeing to MOUs would result in inappropriate limitations on NGOs providing legal assistance to poor people affected by illegal expropriation of their lands by wealthy or powerful persons. This stance of the BAKC has been withdrawn since election of a new Bar President in October, 2008.
- **June to August 2007:** There were several threats against human rights defenders, lawyers and journalists in 2007. For example, three lawyers from Legal Aid Cambodia (LAC) and seven lawyers

¹³ Cheang Sokha. "Bar Association presidency dispute resolved at last." *Phnom Penh Post* 15 / 21, October 20 - November 2, 2006, <http://www.phnompenhpost.com/TXT/current/stories/1521/bar.htm>.

¹⁴ LICADHO. "Civil Society Gravely Concerned Over Exorbitant Fees Derailing EC." Press release, 4 April 2007, <http://www.licadho-cambodia.org/press/files/149CHRACPRECCCDerail07.pdf>.

¹⁵ Global Witness. *Cambodia's Family Trees: Illegal Logging and the Stripping of Public Assets by Cambodia's Elite*. London, UK: Global Witness, 2007, http://www.globalwitness.org/media_library_get.php/400/1245832055/cambodias_family_trees_low_res.pdf

¹⁶ LICADHO. "Restrictions On The Legal Profession By The Bar Association: A Threat To Free & Independent Legal Aid In Cambodia." LICADHO, December 2007, <http://www.licadho-cambodia.org/reports/files/114LICADHOPaperCBAThreatIndependentLegalRep07.pdf>

from Cambodian Legal Education Centre (CLEC), all representing indigenous villagers in the Kong Yu land case, experienced threats to their safety. In addition, complaints about the lawyers were made to the BAKC by the defendant in the case, Ms. KEAT Kolney, who is the wife of a prominent official in the Ministry of Land Management, Urban Planning and Construction, and the sister of Cambodia's finance minister, KEAT Chhon. Bar President, Ky Tech, denied placing the lawyers under investigation, but he reportedly called the lawyers to a meeting. The lawyers were also placed under investigation for the UNTAC *Penal Code* offence of incitement of the villagers they were representing to commit fraud. In August, 2007, the investigating judge reportedly warned the lawyers that the criminal investigation was not over and threatened defamation charges if they spoke to the media.¹⁷

- **October, 2008:** BAKC elections resulted in Mr. Chiv Song Hak being elected the new President of the BAKC.¹⁸ Mr. Suon Visal was appointed as Secretary-General. Donors and potential partners have expressed hope for more BAKC independence but have adopted a "wait and see" approach.
- **January, 2009:** ECCC defense lawyers Mr. Victor Koppe and Mr. Michiel Pestman called for investigation of allegations of corrupt practices at the ECCC and were reportedly threatened with defamation lawsuits by Cambodian ECCC judges
- **April to July 2009:** A lawyer, Mr. KONG Sam Onn, represents an opposition politician, Ms. MU Sochua, in a case against Prime Minister Hun Sen who allegedly defamed her. Kong Sam Onn attended a press conference to seek an apology and announce the forthcoming law suit by his client. After Kong Sam Onn commenced the lawsuit he was charged with defamation under UNTAC *Penal Code* Article 63 along with Mu Sochua. The lawyer for Mr. Hun Sen, Mr. Ky Tech, also file a complaint against Kong Sam Onn to the Bar Council alleging unethical conduct. Kong Sam Onn also represents another opposition parliamentarian, Mr. HO Vann who is charged with defamation and incitement. Mu Sochua's and Ho Vann's parliamentary immunity was lifted in a closed meeting of the National Assembly on 22 June 2009. On 18 June, the Bar Council made a decision that Kong Sam Onn had breached articles 4, 6 and 15 of the *Bar Code of Ethics*. Mr. Kong Sam Onn was reportedly under extreme pressure and wrote an apology letter to Mr. Hun Sen, withdrawing from representation of Mu Sochua and Ho Vann on July 7, 2009. On the date of this report, Mu Sochua and Ho Vann are reportedly having difficulty finding another lawyer to represent them.
- **June, 2009:** Journalist Hang Chakra was convicted *in absentia* and sentenced to one year in prison and a fine of 9,000,000 riels (US\$2,167) under UNTAC *Penal Code* Article 62 (disinformation) after publishing articles in April and May 2009 that made allegations of corruption against government officials in the office of Deputy Prime Minister Sok An (who also chairs the Council for Legal and Judicial Reform). There are concerns about judicial harassment to suppress freedom of expression given that Hang Chakra was convicted under the UNTAC *Penal Code* instead of the more recent 1995 Press Law which contains appropriate offence provisions and safeguards press freedom.¹⁹

5. Conclusion

LWRC sees both need and opportunity at this time to intervene vigorously to support the independence of judiciary and the legal profession in Cambodia. The current economic climate creates challenges as well as opportunities to insist on progress towards implementation of Cambodia's Constitution and the international human rights instruments and covenants to which Cambodia is bound by international law. Therefore, we are very pleased that the UN Special Rapporteur for Independence of Lawyers and Judges has focussed particular attention on the current situation of lawyers and judges in Cambodia at this time.²⁰

¹⁷ Amnesty International. Cambodia: A risky business – defending the right to housing, September, 2008, http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/AI_Cambodia_41_1.pdf;

¹⁸ Chhay Channyda. "Bar Association elects new president for two-year term." *Phnom Penh Post*, 17 October, 2008,, http://www.phnompenhpost.com/index.php/component/option.com_jcs/Itemid.52/crestrictid.22196/task.add/

¹⁹ Committee to Protect Journalists. "Cambodian editor sentenced on 'disinformation' charge," CPJ, 26 June 2009, <http://cpj.org/2009/06/cambodian-editor-sentenced-on-disinformation-charge.php>.

²⁰ United Nations Press Release. "UN rights expert concerned at restriction of lawyers' freedom in Cambodia." UN News Centre, 1 July 2009, <http://www.un.org/apps/news/story.asp?NewsID=31325&Cr=despouy&Cr1=>

APPENDIX A

Convention	Cambodia's Status (as of March 2009)
International Covenant on Civil and Political Rights (ICCPR)	ratified 26 May 1992
Optional Protocol to the ICCPR (ICCPR Optional Protocol - Individual Communications)	signed 27 September 2004, not ratified
Second Optional Protocol to the ICCPR (ICCPR Optional Protocol 2) (ICCPR Optional Protocol 2 - Death Penalty)	not signed
International Covenant on Economic, Social and Cultural Rights (ICESCR)	ratified 26 May 1992
Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)	ratified 15 October 1992
CAT Article 21, Article 22, Article 28 (Re: Article 20), amendment re: Articles 17(7) and 18(5)	declarations not signed
Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT Optional Protocol)	ratified 30 March 2007 but optional article 24 (Re: Parts III and IV) not signed.
Convention on the Elimination of All Forms of Racial Discrimination (CERD)	ratified 28 November 1983; Article 14 Declaration not signed
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	ratified 15 October 1992
Optional Protocol to the CEDAW (CEDAW Optional Protocol)	signed 11 November 2001, not ratified
Convention on The Rights of the Child (CRC)	ratified 15 October 1992
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OP Children in Armed Conflict)	ratified 16 July 2004
Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OP Sale of Children)	ratified 30 May 2002
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW)	signed 27 September 2004, not ratified
Convention on the Rights of Persons with Disabilities (Disabilities)	signed 1 October 2007, not ratified
Optional Protocol to the Convention on the Rights of Persons with Disabilities (Disabilities)	signed 1 October 2007, not ratified
International Convention for the Protection of All Persons from Enforced Disappearance (not in force until it has 20 ratifications)	not signed
Rome Statute of the International Criminal Court (ICC)	ratified 11 April 2002. Note: 2003 Bilateral immunity agreement with US.

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