

# Lawyers' Rights Watch Canada

*NGO in Special Consultative Status with the Economic and Social Council of the United Nations*  
Promoting human rights by protecting those who defend them

[www.lrwc.org](http://www.lrwc.org) – [lrwc@portal.ca](mailto:lrwc@portal.ca) – Tel: +1 604 738 0338 – Fax: +1 604 736 1175  
3220 West 13<sup>th</sup> Avenue, Vancouver, B.C. CANADA V6K 2V5

13 November 2013

H.E. Dith Munty, President  
Supreme Court of Cambodia  
Sothearos Road and Road 240  
Sangkat Chaktomouk, Khan Daun Penh  
Phnom Penh, Cambodia

## **Amicus Brief re: YORM Bopha: Submission to the Cambodia Supreme Court**

Lawyers Rights Watch Canada (LRWC) is a committee of Canadian lawyers who promote human rights and the rule of law internationally. LRWC has conducted an analysis of some international law pertaining to the case of YORM Bopha. LRWC has also made a petition to the UN Working Group on Arbitrary Detention concerning Ms. Yorm Bopha. Accordingly, LRWC respectfully offers to the Supreme Court of Cambodia the following submissions on the occasion of the hearing of the case of Yorm Bopha scheduled for 22 November 2013.

### **Background and chronology:**

Ms. Yorm Bopha is a human rights defender. She is a resident of the Boeung Kak Lake community which, since 2007, has been in conflict over land with Shukaku Inc., corporation owned by Mr. Lao Meng Khin, a businessman and member of the Senate from the Cambodia People's Party (CPP). After being involved in lawful advocacy for several years, including advocacy on behalf of a number of detained land rights activists, Yorm Bopha was arrested, prosecuted and convicted. LRWC submits that Ms Bopha was convicted of unfounded charges in proceedings in which the Municipal and Appeal Courts made serious errors of law, including failure to adhere to Cambodia's Constitution, laws, and international law binding on Cambodia.

- 4 September, 2012: Ms. Yorm Bopha was arrested and charged with intentional violence with aggravating circumstances under Article 217 and 218 of the *Cambodian Penal Code*.
- 4 September 2012: The Phnom Penh Municipal Court ordered the detention of Yorm Bopha
- 7 November 2012: the Court of Appeal upheld the detention order and refused pre-trial release. There was no evidence presented of flight risk or other risks set out in

- f. The ICCPR, Article 14.1 guarantees, “In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

Cambodia’s Constitution also guarantees an independent judiciary:

- g. Article 51 states: “The Kingdom of Cambodia adopts a policy of liberal multi-party democracy... The powers shall be separated between the legislative power, the executive power and the judicial power...”
- h. Article 128 provides that “The Judicial power is an independent power. The Judicial power is the guarantor of impartiality and the protector of the citizens’ rights and liberties.”

Thus, the judiciary must make all decisions strictly in accordance with the law without any influence from any members of the executive whatsoever..

## **2. Violation of Fair Trial Rights under International Law and Cambodia’s Constitution**

The Phnom Penh Municipal Court and the Appeal Court failed to provide a fair trial in accordance with requirements of the ICCPR and Cambodia’s Constitution Article 31. The ICCPR provides that:

- a. verdicts must be based only on relevant evidence presented and tested in open court and not on the basis of unproven theories or directions given by authorities behind the scenes (ICCPR Article 14(3) (e)); and,
- b. the accused must receive timely notice of the charges and of all the relevant inculpatory and exculpatory evidence, and be afforded the opportunity to present exculpatory evidence and to test all inculpatory evidence, whether given in person by witnesses or by documentary evidence (ICCPR Article 14(3) (e)); and
- c. the determination of charges must be made by an independent and impartial tribunal (ICCPR, Article 14(1)).

The failure to adhere to these provisions constitutes errors of law. The conviction of Yorm Bopha for “an act of intentional violence with aggravated circumstances” was contrary to the evidence. A guilty verdict was entered after the Municipal Court heard undisputed evidence that neither Yorm Bopha nor her husband took part in the 7 August 2012 assault. No evidence was presented to support the prosecutor’s theory that the accused had conspired to “mastermind” the assault. The Appeal Court added a conspiracy charge that accorded with the prosecutor’s theory, even though it did not accord with the evidence.

At trial, Yorm Bopha received no notice of a charge of conspiracy, nor was she charged with conspiring to mastermind the assault at the Municipal Court trial or Appeal Court hearing. No notice of a conspiracy charge was provided prior to the appeal. The evidence provided at the Appeal Court was that Yorm Bopha accused one of the victims of

circumstances. Remand in custody must further be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.<sup>[3]</sup>

Decisions of the Phnom Penh Municipal Court on 4 September 2012, the Appeal Court on 7 November 2012 and the Supreme Court on 27 March 2013 failed to meet the legal requirements of Cambodian and international law. The *Code of Criminal Procedure* in Articles 48, 203 and 205, the Constitution and the ICCPR require Cambodian courts to ensure that pre-trial detention is used only when it has been established that detention is necessary to prevent proven risks of: flight, interference with the administration of justice, or re-occurrence of the offence alleged. The court must also be satisfied on lawful grounds that there is no alternative to detention that would prevent the proven risk(s). The courts, in this case incorrectly placed the onus on Yorm Bopha to prove that her health condition required her release.

Failures by the Courts to properly apply the law protecting right to liberty and the presumption of innocence and the law regarding pre-trial release are errors of law. The repeated denial of pre-trial release without legal justification is consistent with the analysis advanced by some observers: namely that the prosecution was not for the purpose of enforcing the law, but for the improper purpose of punishing and preventing Yorm Bopha's legitimate human rights advocacy.

#### **4. Lack of Judicial Independence and Impartiality**

The conviction of Yorm Bopha on the basis of inconsistent and uncorroborated inculpatory evidence and in the face of corroborated and uncontradicted exculpatory evidence constitutes a gross miscarriage of justice and must be set aside.

Respectfully submitted,

Gail Davidson  
Executive Director  
Lawyers' Rights Watch Canada

cc. H.E. Ang Vong Vathna  
Minister of Justice  
No 240, Sothearos Blvd.  
Phnom Penh, Kingdom of Cambodia,  
Fax: 023 364119. Email: [moj@cambodia.gov.kh](mailto:moj@cambodia.gov.kh)

cc. H.E. Chea Leang  
Prosecutor General  
Supreme Court of Cambodia  
Sothearos Road and Road 240  
Phnom Penh, Cambodia