

# Fair Trial Rights in Cambodia

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*“Injustice anywhere is a threat to justice everywhere.”*

Martin Luther King

## I. Introduction

According to the Court of Strasbourg, the right to a fair trial is “a basic principle of the Rule of Law in a democratic society and aims to secure the right to a proper administration of justice.”<sup>1</sup> The proper administration of justice can refer either to administrative or judicial proceedings.<sup>2</sup> It is designed to protect individuals charged with criminal offences from having their basic rights and freedoms arbitrarily curtailed or deprived.<sup>3</sup> Therefore, the right to a fair trial has an important role to play in preventing injustice, by protecting the innocent from being wrongly convicted and ensuring the guilty are punished for their crimes.

Further, an accused’s access to fair trial rights serves as an important yardstick against which to assess the credibility and integrity of any criminal justice system.<sup>4</sup> If the right to a fair trial is not respected and protected, the public will lose faith in the justice system, and the rule of man will prevail over the rule of law. In this respect, it can be argued that the right to a fair trial is one of the bedrocks of a just society.

The concept of ‘the right to a fair trial’ is inherently linked with the concept of ‘justice’. Understanding the concept of ‘justice’ as well as ‘the right to a fair trial’ is highly intuitive and complicated, due to its multiple and distinctive meanings in various points of views in law, ethics, politics, economics and sociology.<sup>5</sup> However, to ensure fairness in criminal proceedings, it is absolutely essential that judges make objective decisions based on legal principles and fair trial standards, rather than on intuition. This chapter therefore seeks to provide a brief overview and analysis of fair trial rights in Cambodia as compared to international standards.

This chapter will explore Cambodia practices and laws related to fair trial rights, especially *the Constitution of the Kingdom of Cambodia* (the Constitution) and *Code of Criminal Procedure of the Kingdom of Cambodia* (the CCP). Relevant international human rights treaties and their commentary texts will be largely used as a benchmark against which Cambodia domestic laws and practices will be assessed. Practices from other jurisdictions, as well as relevant reports, will be also referred to and used as a key indicator to understand the situation of fair trial rights in

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<sup>1</sup> Leanza, P & Pridal, O 2014, *The Right to a Fair Trial: Article 6 of the European Convention on Human Rights*, §1.01[B].

<sup>2</sup> Doebbler, CFJ 2006, *Introduction to International Human Rights Law*, Washington DC: CD Publishing, p. 108.

<sup>3</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), adopted on 4 November 1950, entered into force 3 September 1953, Art. 6; International Covenant on Civil and Political Rights (ICCPR), UN General Assembly resolution 2200A (XXI), December 16, 1966, entered into force March 23, 1976, Art. 14.

<sup>4</sup> Cassese, A 1997, ‘The International Criminal Tribunal for the Former Yugoslavia and Human Rights’, *European Human Rights Law Review*, vol. 4, p. 333.

<sup>5</sup> Leanza & Pridal, *supra note 1*, p. 3.

Cambodia. The scope of this chapter is limited to legalistic approach and selective topics based on the author's view of fair trial rights issues that are considered the most relevant in contemporary Cambodian society.

## II. International Human Rights Treaties Related to Fair Trial Rights and Cambodia's Obligations

The right to a fair trial is universally recognized as one of the most fundamental norms of international human rights law, and is guaranteed under various key international human rights instruments.<sup>6</sup> It is most prominently expressed in Article 9(3) and 14(1) of the *International Covenant on Civil and Political Rights* (ICCPR), which provides that "anyone arrested ... shall be brought promptly before a judge" and "everyone shall be entitled to a fair and public hearing", respectively.<sup>7</sup> Article 14 enumerates minimum standards of the right to a fair trial, which is a comprehensive right that encompasses the following basic rights, among others: the right to access to court; the right to a public hearing; the right to equality of arms; the right to be heard by a competent, independent and impartial court; the right to a speedy trial; the right to counsel; and the right to be presumed innocent until proven guilty. These rights are interlinked, so a violation of a specific right may also violate other rights. However, whether a trial is fair or not does not necessarily require every aspect of fair trial rights to be respected; all that is required is that an accused has a fair chance to defend themselves.<sup>8</sup>

Cambodia became a party to the ICCPR on 26 August 1992 as a result of the *1991 Paris Peace Accords*,<sup>9</sup> which formally ended the longstanding conflict in Cambodia and aimed to establish lasting peace and stability based on human rights norms. By ratifying the ICCPR, Cambodia is bound to respect, protect and promote fair trial rights in the ICCPR.

Article 2 of the ICCPR generally determines the scope of the legal obligations of States Parties. Under this article, one of Cambodia's statutory obligations is to integrate fair trial rights standards in the ICCPR into its internal law and policies by adopting legislative, judicial, administrative, educative and other appropriate

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<sup>6</sup> ICCPR, Art. 14; ECHR, Art. 6; Article 10-11 of the Universal Declaration of Human Rights (UDHR), UN General Assembly resolution 217A (III), December 10, 1948; The American Convention on Human Rights (ACHR), adopted at the Inter-American Specialized Conference on Human Rights, San Jose, Costa Rica, entered into force 18 July 1978, Art. 8; African Charter on Human and Peoples' Rights (ACHPR), adopted 27 June, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 Oct., 1986, Art. 7; ASEAN Human Rights Declaration, adopted by the Heads of State/Government of ASEAN Member States at Phnom Penh, Cambodia, 19 November 2012, Principle 20.

<sup>7</sup> ICCPR, Arts. 9(3) & 14(1).

<sup>8</sup> Judge Shahabuddeen, ICTY, *The Prosecutor v Slobodan Milosevic* Case state that "the fairness of a trial need not require perfection in every detail. The essential question is whether the accused has had a fair chance of dealing with the allegations against him."

<sup>9</sup> Agreement on a Comparative Political Settlement to the Cambodia Conflict (Extracts), signed by the States participating in the Paris Conference on Cambodia on 23 October 1991 and endorsed by Security Council Resolution S/RES/718 (1991) of 31 October 1991 and General Assembly Resolutions 46/18 of 20 November 1991.

measures in order to meet its obligations.<sup>10</sup> Cambodia must also raise awareness about fair trial rights not only among public officials but also among the population generally.<sup>11</sup>

In case of conflict with domestic law, Article 2 requires Cambodia to amend the domestic law or practice to meet international standards imposed by substantive guarantees in the ICCPR.<sup>12</sup> Being a signatory to *the Vienna Convention on the Law of Treaties*,<sup>13</sup> Cambodia must respect Article 27 of the Convention by not invoking provisions of its domestic laws to justify any failure to perform a treaty obligation. Moreover, Cambodia's obligations extend to all arms of the government, such as the executive, the legislature and the judiciary, as well as other relevant public authorities at all levels.<sup>14</sup> Therefore, the Cambodian government cannot absolve itself of any failure to fulfill its treaty obligations by blaming a particular state agency.

In addition, as a party to the ICCPR, Cambodia is obliged to submit periodic reports on measures taken or progress made toward the implementation the provisions of the ICCPR, including fair trial rights. This requires Cambodia to submit a report every four years to the UN Human Rights Committee (HRC), the treaty body established to perform this monitoring role. This monitoring mechanism is aimed not to criticize State Parties but to address concerns and provide meaningful recommendations called 'Concluding observations' to State Parties in order to ensure that individuals accused of crimes have their fair trial rights respected. To ensure the veracity of the situation of fair trial rights, the HRC also obtains periodic reports from stakeholders, including national and international non-governmental organizations and other UN agencies. However, since ratifying the ICCPR in 1992, Cambodia has submitted only two reports to the HRC, in 1998 and 2013.<sup>15</sup>

Aside from these treaty obligations, the Constitution explicitly reaffirms Cambodia's commitment to the guarantee of fair trial rights in the ICCPR by incorporating international human rights standards into domestic laws, providing 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."<sup>16</sup> In dealing with the application of international human rights treaties in domestic courts, the Constitutional Council clearly articulated, in its decision of 10 July 2007, that Cambodia judges should be reminded of their obligations, in deciding cases, to consider all Cambodia law "within the framework of the Constitution itself and the human rights treaties guaranteed by the

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<sup>10</sup> United Nations Human Rights Committee, *General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13 [General Comment 31], para. 7.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.* para. 13.

<sup>13</sup> Cambodia is a signature to the Vienna Convention on the Law of Treaties on 23 May 1969.

<sup>14</sup> General Comment 31, *supra note 10*, para. 4.

<sup>15</sup> See the status of Cambodia periodic report under the ICCPR, viewed 26 October 2015, <http://cambodia.ohchr.org/EN/PagesFiles/TreatyReportingIndex.htm#ICCPR>

<sup>16</sup> The Constitution of the Kingdom of Cambodia, adopted by the Constitutional Assembly on September 21, 1993 at its 2<sup>nd</sup> Plenary Session [the Constitution], Art. 31.

Constitution.”<sup>17</sup> Hence, it can be submitted that, by providing that the Constitution is the supreme law of the country, this decision simply indicates that all domestic laws should be interpreted and applied in a manner that does not contradict to the Constitution or international human rights treaties.

### III. Application of Fair Trial Standards in International and Cambodia Law

Since fair trial rights must be observed throughout the entirety of criminal proceedings, from the moment of arrest until a final appeal verdict, the analysis of each aspect of fair trial rights under this article is divided into three stages of criminal proceedings: pre-trial rights, rights at trial, and post-trial rights. However, the author recognizes that this distinction is somewhat artificial, given that one aspect of fair trial rights may apply to all stages and a violation of rights at one stage may affect another stage.<sup>18</sup> It is also important to remember that there are other principles of fair trial rights that are not explicitly included in the ICCPR, which provides only minimum standards.

#### A. Pre-Trial Rights

##### a. Rights Concerning Arrest and Detention

Fair trial rights begin at the moment of the arrest. Article 9(1) of the ICCPR, echoed by Article 32 of the Constitution, provides that “everyone has the right to liberty and security of person.”<sup>19</sup> In its narrow sense, individual liberty means freedom of bodily or physical movement without confinement to a specific space, such as a detention facility or prison.<sup>20</sup> Security of person refers to the right to be free from interference with personal integrity; this protects individuals from intentionally inflicted bodily or mental injury.<sup>21</sup>

Article 9(1) further provides that “no one shall be subjected to arbitrary arrest or detention” and “no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”<sup>22</sup> Likewise, Article 38 of the Constitution safeguards individuals from any arrest or detention except in accordance with law. Provisions providing for the deprivation of a person’s liberty must be proportionate, just, predictable and non-discriminatory.<sup>23</sup>

The right to be free from arbitrary arrest requires relevant authorities, particularly judicial police, to have reasonable grounds to suspect someone has committed a

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<sup>17</sup> Constitutional Council Decision, 092/003/2007, 10 July 2007, viewed 26 October 2015, [http://cambodia.ohchr.org/WebDOCs/DocProgrammes/CC\\_decision.pdf](http://cambodia.ohchr.org/WebDOCs/DocProgrammes/CC_decision.pdf)

<sup>18</sup> Lawyers Committee for Human Rights, 2000, *What Is a Fair Trial? A Basic Guide to Legal Standards and Practice*, p. 4.

<sup>19</sup> ICCPR, Art. 9(1); The Constitution, Art. 32.

<sup>20</sup> Nowak, M (2<sup>nd</sup> ed.) 2005, *U.N. Convention on Civil and Political Rights, CCPR Commentary*, N.P. Engel, Publisher [Nowak Commentary], p. 212.

<sup>21</sup> United Nations Human Rights Committee (HRC), *CCPR General Comment No. 35: Article 9 (Liberty and Security of Person)*, 16 December 2014, CCPR/C/GC/35, 16 December 2014, [General Comment 35], paras. 3 & 9.

<sup>22</sup> ICCPR, Art. 9(1).

<sup>23</sup> Nowak Commentary, *supra note 20*, p. 225.

crime.<sup>24</sup> At the time of arrest, Article 9(2) of the ICCPR provides that an individual who is arrested must be promptly informed of the reason for their arrest and the charge against them.<sup>25</sup> These rights, as well as other relevant rights, such as the right to legal counsel, must be explained to a person in a language that they understand.<sup>26</sup> The HRC has suggested that promptness, in relation to the period of custody before trial, means not more than “a few days.”<sup>27</sup>

Rights concerning arrest and detention are well articulated under the CCP.<sup>28</sup> Article 96 of the CCP allows judicial police to detain individuals in police custody for 48 hours. That time commences on arrival at a police station. This may be extended for a further 24 hours with legal justification. Once the time limit has expired, the detainee must be sent to a prosecutor or released.<sup>29</sup> However, a child aged under 14 must not be detained.<sup>30</sup>

During interrogation, in particular in police custody, a suspect cannot be compelled to testify against themselves. Article 38 of the Constitution specifically states that “Coercion, physical ill-treatment or any other mistreatment that imposes additional punishment on a detainee or prisoner shall be prohibited.”<sup>31</sup> Any confession obtained through physical or mental force is not admissible as evidence of guilt.<sup>32</sup> The suspect also enjoys the right to remain silent; they must be informed of their right to refuse to answer any question.<sup>33</sup>

Finally, it is important that a suspect is made aware of their right to defense counsel at the earliest stage of proceedings. Article 98 of the CCP entitles a suspect to defense counsel once they have been under arrest for 24 hours. Judicial police must promptly inform a suspect of this right.<sup>34</sup>

In Cambodia, Human Right Watch (HRW) has noted that police officers often physically mistreat accused persons to extract confessions from them. These confessions are then used as evidences in the police reports. Consequently, the courts normally rely on such coerced evidence to convict suspects, which severely jeopardizes the right to presumption of innocent of an accused.<sup>35</sup> However, the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (the ECCC) has held that, forced confessions may be used for their contents only, meaning that they

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<sup>24</sup> Code of Criminal Procedure of the Kingdom of Cambodia (CCP), adopted by the National Assembly on 7<sup>th</sup> June 2007, Art. 96.

<sup>25</sup> *Ibid.* Art. 198.

<sup>26</sup> United Nations Human Rights Committee, *CCPR General Comment No. 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law*, 13 April 1984, [General Comment 13], para. 8.

<sup>27</sup> United Nations Human Rights Committee, *CCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Persons)*, 30 June 1982, [General Comment 8], para. 2.

<sup>28</sup> CCP, Arts. 96, 197, 203, 205, 206, 211 & 278.

<sup>29</sup> *Ibid.*, Art. 103.

<sup>30</sup> *Ibid.*, Art. 96.

<sup>31</sup> The Constitution, Art. 38.

<sup>32</sup> *Ibid.*; CCP, Art. 321.

<sup>33</sup> CCP, Art. 143.

<sup>34</sup> *Ibid.* Arts. 98 & 143.

<sup>35</sup> Human Rights Watch (HRW), *Universal Periodical Review Submission – Cambodia*, June 2013, [HRW UPR Submission], p. 2.

can be used as investigative leads to other sources of information, but not as evidence of the truth of the alleged confession.<sup>36</sup>

Furthermore, HRW has drawn attention to the poor conditions of many prisons. These, it is argued, put detainees in situations that make them vulnerable to cruel, inhuman or degrading treatment.<sup>37</sup> HRW has urged the Cambodian government to ensure that prison conditions meet *the UN Standard Minimum Rules for the Treatment of Prisoners*, to which Cambodia is a party.<sup>38</sup>

Another key concern that adds to the steady increase in pretrial detainees is the shortage of judges, lawyers, and courtrooms in the country.<sup>39</sup> A lack of basic necessities to work properly, coupled with insufficient legal aid, also causes congestion in most provincial courts. These problems continue to cause unnecessary delays in criminal proceedings, resulting in many people being detained without trial.<sup>40</sup>

#### b. Right to be Tried Without Undue Delay

Article 14(2)(c) of the ICCPR stipulates that every person accused of a crime has the right to be tried without undue delay. Further, Article 9(3) states that an accused is entitled to “trial within a reasonable time or to release.” While the right to be tried without undue delay requires judicial officials to conduct proceedings in a manner that ensures an effective and speedy trial, this must be balanced against the need to respect other rights of accused persons.

When assessing the time taken for an accused to be tried, time starts counting when a suspect is informed that the authorities are taking specific steps to prosecute them, and concludes on final judgment of the whole proceedings.<sup>41</sup>

For immediate appearance proceedings, the court must announce the judgment on the merits of the case within two weeks of a charged person appearing in court.<sup>42</sup> For cases where a prosecutor orders an investigation, the time limit for the judgment on the merits is not specified; however, it should be made within a reasonable time.<sup>43</sup>

What constitutes a reasonable time depends on the overall circumstances of the case, such as its complexity, the nature of the offence and the diligence of the investigating and prosecutorial authorities.<sup>44</sup>

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<sup>36</sup> Case of Kaing Guek Eav alias “Duch,” Case No. 001/18-07-2007-ECCC/TC, *Decision on Parties Requests to Put Certain Materials Before the Chamber pursuant to Internal Rule 87(2)*, (28 October 2009), para. 8.

<sup>37</sup> HRW UPR Submission, *supra note 35*, p. 2.

<sup>38</sup> *Ibid.* p. 5.

<sup>39</sup> United State Department of State, 2012, *Cambodia 2011 Human Rights Report, Executive Summary*, pp. 8-9, viewed 26 October 2015, <http://www.state.gov/j/drl/rls/hrrpt/2011/eap/186266.htm>

<sup>40</sup> Certo, BD 2013, ‘Cambodia: Justice in the Dock’, *Southeast Asia Globe (Phnom Penh)*.

<sup>41</sup> Nowak Commentary, *supra note 20*, p. 335.

<sup>42</sup> CCP, Arts. 303 & 304.

<sup>43</sup> CCP, Art. 305.

<sup>44</sup> Nowak Commentary, *supra note 20*, p. 335 (discussing decisions of the European Court of Human Rights).

While it is difficult to categorically state the appropriate duration of an entire criminal trial process, where deliberate acts by the State increase the length of time taken, this may violate the requirement to conclude the process within a reasonable time.<sup>45</sup> Much will depend on the circumstances of the particular case. Therefore, depending on the circumstances of the case, a trial that last longer than 10 years may be compatible with the notion of reasonable time, while one that is completed within 12 months may violate the principle.<sup>46</sup>

The CCP provides for provisional detention. Article 205 enumerates legal grounds<sup>47</sup> to temporarily detain an accused for six months, in the case of a felony,<sup>48</sup> and four months for a misdemeanor,<sup>49</sup> subject to six month and two month extensions, respectively.

In practice, the extension of periods of detention permitted by the CCP<sup>50</sup> is susceptible to abuse by prosecutors and courts. Consequently, pretrial detainees are usually incarcerated beyond the statutory limit.<sup>51</sup> Based on the International Centre for Prison Studies, by September 2014, detainees awaiting trial constituted 63.6 per cent of all inmates in Cambodian prisons, the highest in Southeast Asia.<sup>52</sup> In the meantime, the Cambodian League for the Promotion and Defense of Human Rights (LICADHO) has observed that all 18 prisons in Cambodia remain overcrowded, operating at about 152% capacity, with 12,719 inmates in March 2014.<sup>53</sup> According to HRW, former detainees have reported abuse, both physical and sexual, including electric shock, beating with electrical wire, forced labor, and harsh military drills.<sup>54</sup>

## **B. Rights at Trial**

### **a. Right to be Tried by a Competent, Independent and Impartial Tribunal**

The right to be tried by a competent, independent and impartial tribunal finds its expression in Article 14(1) of the ICCPR.<sup>55</sup> It is the most fundamental aspect of the

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<sup>45</sup> *Ibid.* p. 337.

<sup>46</sup> Nowak Commentary, *supra note 20*, p. 334.

<sup>47</sup> CCP, Art. 205 states that "Provisional detention may be ordered when it is necessary to:

1. Stop the offense or prevent the offense from happening again;
2. Prevent any harassment of witnesses or victims or prevent any collusion between the charged person and accomplices;
3. Preserve evidence or exhibits;
4. Guarantee the presence of the charged person during the proceedings against him;
5. Protect the security of the charged person;
6. Preserve public order from any trouble caused by the offense."

<sup>48</sup> *Ibid.* Art. 208.

<sup>49</sup> *Ibid.* Art. 209.

<sup>50</sup> *Ibid.* Art. 211.

<sup>51</sup> HRW UPR Submission, *supra note 35*, p. 2.

<sup>52</sup> International Centre for Prison Studies, World Prison Brief – Cambodia, 15 September 2014, viewed 26 October 2015, <http://www.prisonstudies.org/country/cambodia>

<sup>53</sup> Cambodian League for the Promotion and Defense of Human Rights (LICADHO), 2014, *Report on Torture & Ill-Treatment: Testimony from inside Cambodia's Police Stations and Prisons*, [LICADHO 2014 Report], p. 17.

<sup>54</sup> *Ibid.*; See also HRW UPR Submission, *supra note 35*, p. 2.

<sup>55</sup> ECHR, Art. 6(1); ACHR, Arts. 8(1) & 27(2); ACHPR, Arts. 7(1) & 26; ASEAN Declaration, Principle 20.



right to a fair trial, so much so that the HRC has stated that there can be no exception to it.<sup>56</sup>

For a tribunal to be independent, it must be free from interference, both from external sources, such as the executive and legislature, and internal sources, such as superior judges.<sup>57</sup> Further, *the UN Basic Principles on the Judiciary* (the Basic Principles) expound some fundamental requirements and mechanisms that are necessary to ensure judicial independence.<sup>58</sup> These Basic Principles require courts to have the power to assign cases or judges.<sup>59</sup> They also require the qualifications for judicial appointment to be clearly specified.<sup>60</sup> Further, the term of a judicial officer's appointment, and their position, must be adequately secured and guaranteed.<sup>61</sup> Disciplinary measures against judges must be fair, efficient and independent.<sup>62</sup> Finally, the Basic Principles require the judiciary to be adequately resourced in order to enable it to perform its functions.<sup>63</sup> This includes providing adequate salaries and training. Most of these requirements are addressed in the three judicial laws (see further on these below).

The Constitution strongly protects judicial independence. Article 128 guarantees an independent power of the judiciary, while Article 129 entrusts the judiciary with the exclusive power to adjudicate according to the laws and procedures in force. Article 130 stresses the principle of the separation of powers, providing that the judiciary is entirely independent from the executive and the legislature. Finally, the Constitution requires there to be separate laws that set out the functions of the judiciary.<sup>64</sup>

In 2007, in order to address concerns about the independence of the judiciary, the Supreme Council of Magistracy established a *Code of Ethics for Judges and Prosecutors*.<sup>65</sup> Subsequently, in May 2013, and following consistent calls by the UN and human rights organizations,<sup>66</sup> the government passed three judicial laws: the *Law on the Status of Judges and Prosecutors*, the *Law on the Organization and*

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<sup>56</sup> Human Rights Committee, *Views of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights*, Communication No. 263/1987, U.N. Doc. CCPR/C/46/D/263/1987 (1992), para. 5.1.

<sup>57</sup> Larkins, CM 1996, 'Judicial Independence and Democratisation: A Theoretical and Conceptual Analysis', *American Journal of Comparative Law*, vol. 44, p. 44.

<sup>58</sup> Basic Principles on the Independence of the Judiciary adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 [the Basic Principles].

<sup>59</sup> *Ibid.* Principle 2.

<sup>60</sup> *Ibid.* Principle 10.

<sup>61</sup> *Ibid.*; For the process for appointing judges, see Parts 6 and 7 of Law on the Status of the Judges and Prosecutors, passed by the National Assembly on 23<sup>rd</sup> May 2014, reviewed by the Senate on 12<sup>th</sup> June 2014, and approved by the Constitutional Council in its decision N<sup>o</sup> 149/003/2014 KBTH.Ch on 2<sup>nd</sup> July 2014.

<sup>62</sup> The Basic Principles, *supra note 58*, Principles 17-20.

<sup>63</sup> *Ibid.* Principle 7.

<sup>64</sup> The Constitution, Art. 135.

<sup>65</sup> Vidjia, P & Jenifer, H 2011, 'Cambodia', in *Rule of Law for Human Rights in the ASEAN Region: A Base-line Study*, Human Rights Resource Centre.

<sup>66</sup> *Report of the Special Rapporteur on the Situation of Human Rights in Cambodia*, U.N. A/HRC/24/36, (5 August 2013) [Special Rapporteur 2013 Report], para. 17.

*Functioning of the Courts*,<sup>67</sup> and the *Law on the Organization and Functioning of the Supreme Council*.<sup>68</sup> While rights groups have criticized these laws on the basis that they cannot guarantee the true independence of the judiciary, they are an important step towards improving the effectiveness and independence of the judiciary, and address most of the requirements set out in the Basic Principles.

Despite these small steps towards progress, it must be acknowledged that, even with two decades of donor assistance in judicial reform, fair trial rights in Cambodia continue to be inadequately respected in practice. Corruption in appointment processes, as well as the allocation and promotion of judges, remains seriously concerning.<sup>69</sup> It is fundamental that corruption is addressed, as it can affect the competence of judges. Further, without competent judges adjudicating cases, an accused's right to receive a reasoned judgment is undermined. Corruption also jeopardizes the independence of the judiciary, as it renders them more likely to perform their duties in a manner that serves the interest of the appointing authority.

Impartiality requires judges to deliver justice when making their decisions, by objectively assessing the evidence and the merits of a case, without favoring any party due to personal connection or feelings.<sup>70</sup> In the Cambodian context, Article 556 of the CCP sets out potential conflicts of interests that will disqualify judges from presiding over a case.<sup>71</sup> However, while Article 54 of the *Law on the Status of Judges and Prosecutors* allows judges to use their discretion in implementing the law, there are no provisions for holding judges accountable for biased decisions or poor decisions that may be caused by predetermining the outcome of a case.<sup>72</sup>

#### b. Right to a Public Hearing

Article 14(1) of the ICCPR guarantees an accused's right to a public hearing. This is one of the core elements of the right to a fair trial and due process.<sup>73</sup> While the right to a public hearing is personal to the parties to a proceeding, in a democracy, the public also has a right for proceedings to be conducted in public.<sup>74</sup> The ultimate objective of this right is to ensure that justice is not conducted in secret,<sup>75</sup> thereby

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<sup>67</sup> Law on the Organization of the Court, passed by the National Assembly on 22<sup>nd</sup> May 2014, reviewed by the Senate on 12<sup>th</sup> June 2014, and approved by the Constitutional Council in its decision N<sup>o</sup> 149/003/2014 KBTH.Ch on 2<sup>nd</sup> July 2014. This article takes notice of its predecessor, Law on the Organization and Activities of the Adjudicative Courts of the State of Cambodia entered into force 28<sup>th</sup> January 1993, viewed 15 May 2015, [http://cambodia.ohchr.org/klc\\_pages/KLC\\_files/section\\_002/section02\\_001\\_1993.pdf](http://cambodia.ohchr.org/klc_pages/KLC_files/section_002/section02_001_1993.pdf)

<sup>68</sup> Law on the Organization and Function of the Supreme Council of Magistracy, passed by the National Assembly on 23<sup>rd</sup> May 2014, reviewed by the Senate on 12<sup>th</sup> June 2014, and approved by the Constitutional Council in its decision N<sup>o</sup> 148/002/2014 KBTH.Ch on 2<sup>nd</sup> July 2014. This article takes notice of first enactment of the Law by the National Assembly on 22<sup>nd</sup> December 1994, viewed 15 May 2015, [http://cambodia.ohchr.org/klc\\_pages/KLC\\_files/section\\_002/section02\\_008\\_1994.pdf](http://cambodia.ohchr.org/klc_pages/KLC_files/section_002/section02_008_1994.pdf)

<sup>69</sup> Un, K & So, S 2012, 'Cambodia's Judiciary: Heading for Political Judicialization?' in Dressel, B (ed.) 2012, *The Judicialization of Politics in Asia, USA and Canada*: Routledge 2012, p. 196.

<sup>70</sup> Larkins, *supra note 57*, p. 44; *Cambodian Code of Ethics for Judges and Prosecutors 2007*, Art. 10.

<sup>71</sup> CCP, Art. 556.

<sup>72</sup> Transparency International Cambodia, 2014, *Corruption and Cambodia's Governance System: The Need for Reform*, [TI 2014 Report], p. 60, viewed 26 October 2015, <http://ticambodia.org/index.php/whatwedo/publication/nisa-report-2014>

<sup>73</sup> Nowak Commentary, *supra note 20*, p. 314.

<sup>74</sup> *Ibid.* p. 325.

<sup>75</sup> *Ibid.* p. 323.

ensuring transparency in the administration of justice and the public's confidence in the judicial system, while also guarding against any potential manipulation or influence.

At international law, the right to a public hearing requires all criminal decisions to be publicly pronounced, subject to certain exceptions in relation to matrimonial disputes where children are involved.<sup>76</sup> Further, courts must make their written judgments publicly accessible.<sup>77</sup> It also requires courts to publicize the time and venue for hearings,<sup>78</sup> while also requiring them to provide adequate facilities to enable interested members of the public to attend hearings, subject to a court's resource capacity and imposing reasonable limits on this number.<sup>79</sup>

However, the right to a public hearing may be limited in appropriate circumstances. Thus, Article 14(1) of the ICCPR states that members of the public and the media may be excluded from all or parts of a trial for moral, public order or national security reasons, as well as to protect the private lives of parties, or to avoid any prejudice against the interests of justice. In contrast, Article 316 of the CCP only includes public order or morality reasons for excluding members of the public or the media for all or part of a hearing.

Domestically, the CCP protects the right to a public hearing, with Article 316 requiring trial hearings to occur in public. In relation to restrictions on access to hearings, the CCP only allows access for members of the public or the media to be restricted for public order or morality reasons. Notably, such a decision cannot be appealed.<sup>80</sup>

In practice, the Cambodian public has limited access to public hearings of court cases, particularly at the Court of Appeal, whether civil or criminal.<sup>81</sup> Further, neither the CCP nor the three judicial laws, require the judiciary to disclose general information on judicial statistics, hearing schedules, transcripts or legal reasoning.<sup>82</sup> Although information about individual cases is available on notice boards in each Cambodian court, there are no online sources that provides information on current cases before the courts.<sup>83</sup> Moreover, there is no comprehensive website for the judiciary. For instance, no functional website exists for the Supreme Council of Magistracy and there is no website for the Supreme Court.<sup>84</sup> Therefore, the lack of access to such information undermines the public's capacity to access public hearings.

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<sup>76</sup> *Ibid.* p. 326.

<sup>77</sup> *Ibid.* p. 314.

<sup>78</sup> *Van Meurs v. The Netherlands*, HRC, Communication No. 215/1986, para. 6.2.

<sup>79</sup> Nowak Commentary, *supra* note 20, p. 324.

<sup>80</sup> CCP, Art. 316.

<sup>81</sup> Cambodian Center for Human Rights (CCHR), 2014, *Fair Trial Rights in Cambodia: Monitoring at the Court of Appeal*, [CCHR 2014 Report], pp. 7-8.

<sup>82</sup> TI 2014 Report, *supra* note 72, p. 57.

<sup>83</sup> *Ibid.* p. 57.

<sup>84</sup> *Ibid.* p. 58.

### c. Presumption of Innocence

The presumption of innocence is fundamental to the protection of human rights.<sup>85</sup> It is a norm of customary international law, and widely recognized in various international human rights instruments.<sup>86</sup> For instance, Article 14(2) of the ICCPR provides that “everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law.”<sup>87</sup> Domestically, Article 38 of the Constitution states, “accused persons shall be considered innocent until the court has finally decided upon the case.” This means that a person charged with a crime should not be determined to be guilty without a trial. The overriding purpose of this principle is to protect innocent people from being convicted, even if this means that some who are guilty are not convicted.<sup>88</sup>

The presumption of innocence cannot be derogated from in any way, even in times of war or other public emergency.<sup>89</sup> It applies throughout criminal proceedings, from pre-trial stage, or even prior to the filing of a criminal charge, until a final appeal verdict is reached.<sup>90</sup>

Practically, there are several requirements for the presumption of innocence to be satisfied. Firstly, the burden is on the prosecution to prove the guilt of an accused beyond reasonable doubt; an accused does not need to prove their innocence.<sup>91</sup> If there is any doubt, this must be resolved in an accused’s favour, even if this results in acquittal or stay of proceedings.<sup>92</sup>

In theory, the denial of pre-trial bail does not impair the presumption of innocence for accused persons.<sup>93</sup> However, there must be legal grounds compatible with the presumption of innocence for any decision to reject bail.<sup>94</sup> Excessively long pre-trial detention and poor prison conditions, without adequate justification, may violate the presumption of innocence.<sup>95</sup>

The presumption of innocence requires judges to refrain from predetermining an accused’s guilt.<sup>96</sup> It is equally important that it does not appear that a judge has prejudged a case: “Not only must justice be done; it must also be seen to be done.”<sup>97</sup> The prohibition against prejudgment also requires other police, judicial and government officials, as well as the media, to refrain from making public comments

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<sup>85</sup> United Nations Human Rights Committee, *CCPR General Comment No. 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial*, 23 August 2007, CCPR/C/GC/32, [General Comment 32], para. 30.

<sup>86</sup> ECHR, Art. 6(2); ACHR, Art. 8(2); ACHPR, Art. 7(1)(b); ASEAN Declarations, Principle 20(1).

<sup>87</sup> ICCPR, Art. 14(2).

<sup>88</sup> Naughton, M 2011, “How the Presumption of Innocence Renders the Innocent Vulnerable to Wrongful Convictions,” *Irish Journal of Legal Studies*, vol. 2, no. 1, p. 41.

<sup>89</sup> General Comment 32, *supra note 85*, para. 6.

<sup>90</sup> Nowak Commentary, *supra note 20*, p. 330.

<sup>91</sup> General Comment 32, *supra note 85*, para. 30.

<sup>92</sup> The Constitution, Art. 38.

<sup>93</sup> Nowak Commentary, *supra note 20*, p. 330.

<sup>94</sup> Amnesty International, (2<sup>nd</sup> ed.) 2014, *Fair Trial Manual*, p. 127.

<sup>95</sup> General Comment 32, *supra note 85*, para. 30.

<sup>96</sup> *Ibid.*

<sup>97</sup> See *R v Sussex Justices, Ex parte McCarthy* [1924 1 KB 256, [1923] All ER Rep 233.

that may imply an accused's guilt, before judgment is made in a case, or following an accused's acquittal.<sup>98</sup> If such comments are made, the State must respond to them.<sup>99</sup>

The presumption of innocence may also be undermined if an accused appears in a courtroom in a cage, handcuffs, shackles, or in a prison uniform.<sup>100</sup> The manner in which an accused is treated in the courtroom may also prejudice the presumption of innocence if the courts fail to control aggressive behavior from prosecutors or public observers.<sup>101</sup>

In practice, the presumption of innocence is regularly violated in Cambodia. Despite the high legal threshold for conviction, conviction rates are alarmingly high.<sup>102</sup> Judges normally rely on witness testimonies and especially police reports, which often contain confessions obtained through torture or intimidation.<sup>103</sup> Consequently, having received only inculpatory evidence, judges may subconsciously prejudice the outcome of a case. Arguably, the shortage of judges<sup>104</sup> may put more pressure on judges to decide cases expeditiously, and without adequately evaluating all the evidence. Moreover, judges are free from scrutiny or discipline for failing to provide reasons for their judgments, thus facilitating a practice that renders it more likely than not that an accused's right to be presumed innocent will be compromised.<sup>105</sup>

The presumption of innocence of the accused at the ECCC is severely jeopardized because of the historical narrative of guilt imposing on the accused. Local media has played a major role in prematurely instilling within the public a presumption of guilt.<sup>106</sup> Further, government figures, especially Prime Minister Hun Sen, have regularly remarked on the guilt of the accused about which the accused lawyers have filed complaints to seek appropriate action from the ECCC.<sup>107</sup>

#### d. Equality of Arms

The principle of equality of arms is an 'inherent' and 'indivisible' element of a fair trial.<sup>108</sup> It affects the credibility of the entire judicial process. It derives from the concept of 'equality' before the court, aimed to safeguard the rule of law.<sup>109</sup> Put simply, it refers to procedural equality between parties to criminal proceedings and

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<sup>98</sup> General Comment 13, *supra note 26*, para. 7.

<sup>99</sup> Nowak Commentary, *supra note 20*, p. 330.

<sup>100</sup> General Comment 32, *supra note 85*, para. 30.

<sup>101</sup> *Ibid.*, para. 25.

<sup>102</sup> Freedom House, 2012, *Countries at the Crossroads 2012: Cambodia, Section on Rule of Law*, Washington D.C., p. 8.

<sup>103</sup> *Ibid.*

<sup>104</sup> US Department of State, *supra note 39*, pp. 8-9.

<sup>105</sup> TI 2014 Report, *supra note 72*, p. 60

<sup>106</sup> Barton, C 2007, 'Presumed Guilt could taint KRT', *Phnom Penh Post*, 27 July, viewed 26 October 2015, <http://www.phnompenhpost.com/national/presumed-guilt-could-taint-krt>

<sup>107</sup> Certo, BD 2012, 'Khmer Rouge Court Judges called on to reproach Hun Sen', *Phnom Penh Post*, 13 June, viewed 26 October 2015, <http://www.phnompenhpost.com/national/khmer-rouge-court-judges-called-reproach-hun-sen> ; Certo, BD 2012, 'Condemn Minister's Actions, Say Nuon Chea's Lawyers', *Phnom Penh Post*, 15 August, viewed 26 October 2015 <http://www.phnompenhpost.com/national/condemn-ministers-actions-say-nuon-cheas-lawyers>

<sup>108</sup> Summers, SJ 2007, *Fair Trials: the European Criminal Procedural Tradition and the European Court of Human Rights*, Hart Publishing, Oxford, p. 104.

<sup>109</sup> General Comment 32, *supra note 85*, para. 2.

requires that no party be in a more advantageous position than their opponent.<sup>110</sup> The principle finds its expression in Article 14(1) and 14(3) of the ICCPR. Although equality of arms may seem to be more relevant in adversarial criminal systems,<sup>111</sup> it applies across various legal systems “regardless of the nature of the proceedings”<sup>112</sup>, including inquisitorial criminal proceedings.<sup>113</sup>

The principle of equality of arms addresses a range of fair trial rights that are set out in legal instruments of international criminal courts and international human rights treaties.<sup>114</sup> However, equality of arms does not mean that specific fair trial rights must be guaranteed; instead it seeks to guarantee that these rights are fairly applied vis-à-vis the rights of others.<sup>115</sup> In brief, equality of arms means that an accused is entitled to be informed promptly of the charges against them, to have adequate time and resources to prepare their defense,<sup>116</sup> to know the evidence against them and be able to challenge that evidence, including through cross-examination of prosecution witnesses, and to secure the attendance of witnesses for their defense.<sup>117</sup>

The European Court of Human Rights (ECtHR) has concluded that it is not necessary that there be a “quantifiable unfairness flowing from a procedural inequality”<sup>118</sup> for the principle to be breached. A violation of the right will occur where there is the appearance of inequality or non-compliance with particular rights that, in the circumstances of a case, denies justice for an accused. A proceeding as a whole will not necessarily be unfair merely because a particular procedural requirement is overlooked.<sup>119</sup>

At the ECCC in Case 001, an issue regarding equality of arms arose when the defense claimed that the manner and extent to which the civil party lawyers performed their role (that of a support to the prosecution) transformed them into “second prosecutors”.<sup>120</sup> In ruling on this argument, the Trial Chamber failed to clearly delineate the role of the civil parties’ lawyers in the proceedings, but did reaffirm the accused’s right to “face one prosecuting authority only”.<sup>121</sup>

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<sup>110</sup> *Ibid.* paras. 7-14; Summers, *supra note 108*, p. 105.

<sup>111</sup> Tuinstra, JPWT 2009, *Defence Counsel in International Criminal Law*, The Hague: T.M.C. Asser Press, p. 3.

<sup>112</sup> General Comment 32, *supra note 85*, para. 3.

<sup>113</sup> Summers, *supra note 108*, p. 104.

<sup>114</sup> ICCPR, Art. 14; ECHR, Art. 6.

<sup>115</sup> Summers, *supra note 108*, p. 104.

<sup>116</sup> *Rome Statute of the International Criminal Court*, UN Doc. A Conf. 183/9, 1998), 17 July 1998, [ICC Statute], Art. 67(1)(b).

<sup>117</sup> *Ibid.* Art. 67(1)(e).

<sup>118</sup> *Lanz v Austria*, Judgment, European Court of Human Rights (ECtHR), Appl. No. 24430/94, 31 January 2002, §58.

<sup>119</sup> *Öcalan v Turkey*, Judgment, ECtHR, App. no. 46221/99, 12 May 2005, §146.

<sup>120</sup> Asian International Justice Initiative’s Khmer Rouge Tribunal Trial Monitoring Group (AIJI), 2009, *Lessons Learned from the ‘Duch’ Trial: A Comprehensive Review of the First Case before the Extraordinary Chambers in the Courts of Cambodia*, [AIJI 2009 Report], p. 22, viewed 20 October 2015, [https://www.ocf.berkeley.edu/~changmin/documents/Lessons%20Learned%20from%20the%20Duch%20Trial\\_MRSK\\_FINAL.pdf](https://www.ocf.berkeley.edu/~changmin/documents/Lessons%20Learned%20from%20the%20Duch%20Trial_MRSK_FINAL.pdf)

<sup>121</sup> *Ibid.* p. 22.

*i. Adequate Preparation*

The principle of equality of arms requires both parties to proceedings to have adequate time and facilities to prepare their case. This is an essential ingredient to safeguard a fair trial and raises various practical considerations.<sup>122</sup>

The right to have adequate time and facilities is associated with an accused's right "to be informed promptly, in detail, and in a language which the accused understands, of the nature and cause of the charge."<sup>123</sup> Thus, the sooner an accused learns of the accusation against them, the more time they have to prepare their defense. This right also requires competent authorities dealing with criminal offences to release formal notification of the charge or name of an accused or suspect as soon as possible.<sup>124</sup>

In relation to the right to adequate facilities, an accused has the right to access documents and evidence, as well as legal assistance, so that they can prepare their cases.<sup>125</sup> Further, all documents and evidence, whether inculpatory or exculpatory, must be disclosed to all parties, especially an accused.<sup>126</sup> This includes evidence that supports an accused, and may include evidence obtained through torture or forced confession.<sup>127</sup> There are, however, limits to what the prosecution is required to provide. In *van Marcke v. Belgium*,<sup>128</sup> the HRC observed that the prosecution is not required to put all documents and evidence before a court, unless a failure to release certain information would jeopardize the effectiveness of an accused's defense.

The right to adequately prepare one's defense also requires that an accused have access to legal support throughout a criminal proceeding. Under Article 14(3)(d) of the ICCPR, an accused may elect to defend oneself or be represented by someone of their choosing. It also requires an accused to have prompt access<sup>129</sup> to their counsel and that private communications between an accused and their counsel remain confidential.<sup>130</sup>

While the principle of equality of arms requires an accused to have access to adequate facilities, this does not require them to have equal resources as the prosecution. In *Prosecutor v. Kayishema*, the defense claimed that equality of arms obliges a tribunal, "in the interest of justice", to provide similar numbers of lawyers, investigators, and legal assistants to the defense as it provides to the prosecution.<sup>131</sup> In dismissing this argument, the Trial Chamber held that equality of arms does not

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<sup>122</sup> General Comment 32, *supra note 85*, para. 32.

<sup>123</sup> ICCPR, Art. 14(3)(a); CCP, Arts. 322, 325, 330 & 331.

<sup>124</sup> General Comment 32, *supra note 85*, para. 31.

<sup>125</sup> General Comment 13, *supra note 26*, para. 9.

<sup>126</sup> General Comment 32, *supra note 85*, para. 33.

<sup>127</sup> *Ibid.*

<sup>128</sup> *Van Marcke v Belgium*, HRC Communication 904/2000, UN Doc. CCPR/C/81/D/904/2000 (2004), para. 8.3.

<sup>129</sup> General Comment 32, *supra note 85*, para. 34.

<sup>130</sup> *Ibid.*

<sup>131</sup> *Prosecutor v. Kayishema*, Case No. ICTR-95-I-T, Trial Chamber, Judgment, paras, 20, 55-60 (May 21, 1999).

require the defense to have the “same means and resources as the Prosecution.”<sup>132</sup> The Appeals Chamber upheld this decision, noting that equality of arms should be understood as equality of right rather than equality of resources and means.<sup>133</sup>

Domestically, the Court of Appeal appears to have developed good practices that respect an accused’s right to understand the nature of the charge against them. In most cases, accused persons attending their trials are well re-informed of the charges alleged, facts, dates and information related to the charges.<sup>134</sup>

## ii. *Right to Legal Representation*

The ICCPR incorporates both fairness and equality before independent and impartial courts. This includes the right to legal assistance in order to ensure an accused is accorded procedural fairness.<sup>135</sup> This right is widely recognized as one of the most vital prerequisites of the right to a fair trial.<sup>136</sup> It is necessary in order to achieve the principle of equality between parties, which requires “[...] each side be given the opportunity to contest all the arguments and evidence adduced by the other party.”<sup>137</sup> Access to legal assistance is also an important way in which barriers to justice may be removed, especially for indigent accused.<sup>138</sup>

The right to legal assistance is generally deemed to apply to all phases of criminal proceedings, including the investigative phase. Thus, in *Aliev v. Ukraine*, the accused faced the death penalty if found guilty. However, he was not given the opportunity to access counsel for five months while he was detained awaiting trial. The HRC found that this violated Aliev’s right to counsel.<sup>139</sup>

According to the UN Basic Principles, lawyers have a duty to assist the court as “essential agents of the administrative justice.”<sup>140</sup> A competent, independent, and committed defense is vital to assisting criminal courts to ensure that an accused’s rights are respected, that evidence against them is fully tested and that legal principles are appropriately applied to alleged crimes. In adversarial criminal systems, the principle of partisanship requires counsel to represent their clients zealously.<sup>141</sup> This principle also demands that counsel work diligently, exhausting all legal means, to ensure that their client’s right to a fair trial is protected in the face of an opponent which has the support of the resources of the state.<sup>142</sup> Given that an

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<sup>132</sup> *Ibid.* para. 60.

<sup>133</sup> *Ibid.* paras. 58-60.

<sup>134</sup> CCHR 2014 Report, *supra note 81*, pp. 9-10.

<sup>135</sup> General Comment 32, *supra note 85*, para. 10.

<sup>136</sup> Tuinstra, *supra note 111*, p. 463.

<sup>137</sup> General Comment 32, *supra note 85*, para. 13.

<sup>138</sup> Inter-American Commission on Human Rights, *Access to Justice as a Guarantee of Economic, Social and Cultural Rights: A Review of the Standards Adopted by the Inter-American System of Human Rights*, OEA/Ser.L/V/II.129, doc. 4 (Sept. 7, 2007) para. 7.

<sup>139</sup> *Aliev v Ukraine*, HRC, CCPR/C/78/D/781/1997 (18 September 2003), § 7.2, 7.3 & 8.

<sup>140</sup> The Basic Principles, *supra note 58*, Principle 12.

<sup>141</sup> Dare, T 2009, *The Counsel of Rogues? A Defense of the Standard Conception of the Lawyer’s Role*, Burlington, TV: Ashgate, p. 5.

<sup>142</sup> See Kerr, K 2005, ‘Fair Trials at International Criminal Tribunals: Examining the Parameters of the International Right to Counsel’, *Georgetown Journal of International Law*, vol. 36, no. 4, p. 1229.



accused's individual rights and liberty is often at stake, it is vital that an accused is represented by competent defense counsel, who can provide accurate advice as to how charges may be successfully defended.

Under Cambodian law, anyone charged with a criminal offense has the right to their choice of legal assistance.<sup>143</sup> The Constitution explicitly acknowledges the right to legal assistance, providing that "every citizen shall enjoy the right to defense through judicial recourse."<sup>144</sup> The Constitution also incorporates key international human rights treaties<sup>145</sup> to which Cambodia is a party. These provide an accused with the right to legal representation of their choice and free legal assistance for an indigent accused where the interests of justice require.<sup>146</sup> Domestic law also requires an accused charged with a felony, or a child accused, to be provided legal assistance.<sup>147</sup>

If an accused cannot afford to retain their own lawyer, they may "request to have a lawyer appointed for him in accordance with the Law on the Bar."<sup>148</sup> Under *the Law on the Bar*, the Bar Association of Kingdom of Cambodia is responsible for ensuring that the right to legal assistance of indigent accused is fully respected.<sup>149</sup> Further, lawyers assigned to indigent accused must represent such clients in the same manner as they would represent clients with the capacity to pay.<sup>150</sup> *The Internal Rules of the Bar* also provides that the Bar is responsible for funding and maintaining a legal staff to provide legal services to the poor.<sup>151</sup>

In reality, however, the right to legal assistance is lacking. This is largely attributable to the fact that there is not enough support from the judicial system for legal aid, which largely depends on external funding.<sup>152</sup> As a consequence of this dearth of funds, the UN Office of the High Commissioner for Human Rights (OHCHR) has found that the number of legal aid lawyers reduced dramatically in recent years, from 199 lawyers in 2010 to 76 in 2013.<sup>153</sup> As a result, accused persons are tried without legal assistance, ultimately denying them access to justice.<sup>154</sup>

More importantly, the number of practicing lawyers is relatively low.<sup>155</sup> This contributes to the longstanding ineffectiveness of judicial system and the denial of people's access to justice. Although the shortage of lawyers is historically due to the Khmer Rouge regime, and their numbers have steadily increased over the last 20

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<sup>143</sup> CCP, Art. 300.

<sup>144</sup> The Constitution, Art. 38.

<sup>145</sup> *Ibid.* Art. 31.

<sup>146</sup> ICCPR, Art. 14(3)(d).

<sup>147</sup> CCP, Art. 301.

<sup>148</sup> *Ibid.* Art. 300.

<sup>149</sup> *Cambodia Law on the Bar 1995*, [Law on Bar], Art. 30.

<sup>150</sup> CCP, Art. 300.

<sup>151</sup> Law on Bar, Art. 30.

<sup>152</sup> Special Rapporteur 2013 Report, *supra note 66*, para. 25.

<sup>153</sup> Crothers, L 2013, 'Lack of Legal Aid in Cambodia Puts Children, Poor at Risk', *The Cambodia Daily*, 30 November, viewed 27 October 2015, <https://www.cambodiadaily.com/archives/lack-of-legal-aid-in-cambodia-puts-children-poor-at-risk-48219/>

<sup>154</sup> Global Integrity Report, 2012, *Global Integrity Scorecard: Cambodia, 2012*, Washington D.C.: Global Integrity, [Global Integrity 2012 Report], indicator 82d.

<sup>155</sup> Special Rapporteur 2013 Report, *supra note 66*, para. 24.

years, numbers remain disproportionately low when compared to the overall population and their legal needs.<sup>156</sup>

### C. Post-Trial Rights

#### a. Right to Appellate Review

Article 14(5) of the ICCPR guarantees that “everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.”<sup>157</sup> Appeal proceedings restricted only to a review of issues of law might be insufficient.<sup>158</sup> This does not mean that appeal proceedings are confined to a mere factual retrial, either. It rather requires having a full assessment of facts and law as well as conduct of trial.<sup>159</sup> All convicted persons must have the right to appeal proceedings, irrespective of the severity of the crime.<sup>160</sup>

The CCP clearly articulates the right to review of a conviction.<sup>161</sup> While the Court of Appeal can review appeals based on both aspects of facts and law,<sup>162</sup> Article 436 states clearly that the Supreme Court is confined to the review of questions of law. Although such practice appears to be consistent with practices in some countries, the HRC observed in *Perra v. Australia*<sup>163</sup> and *Gómez Vázquez v. Spain*<sup>164</sup> that the reviewing of a conviction limited only to issues of law falls short of the requirements of Article 14(5) of the ICCPR. Thus, the CCP appears to fail to meet the standard set by the ICCPR.

According to the ICCPR, appellate proceedings against both conviction and sentence must be possible.<sup>165</sup> In principle, appellate courts should not decide on aggravation of sentence unless the State imposing such practice submits reservations of Article 14(5).<sup>166</sup> In accordance with the ICCPR, Article 399 of the CCP does not allow aggravation of sentence by the Court of Appeal, whose judgments should only be

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<sup>156</sup> Global Integrity 2012 Report, *supra note 154*, indicator 80b.

<sup>157</sup> ICCPR, Art. 14(5).

<sup>158</sup> Nowak Commentary, *supra note 20*, pp. 348-49.

<sup>159</sup> *Ibid.* pp. 349; General Comment 32, *supra note 85*, para. 48.

<sup>160</sup> General Comment 13, *supra note 26*, para 17.

<sup>161</sup> CCP, Arts. 375, 415, 418 & 419; Article 419 provides grounds for request for cassation:

“The Supreme Court may grant a request for cassation:

- for illegal composition of the trial panel;
- for lack of jurisdiction of the court;
- for abuse of power;
- for breaching the law or for misapplication of the law;
- for violations or failure to comply with procedure causing nullity;
- for failure to decide on a request made by the Prosecutor or a party, given it was unambiguous and made in writing;
- for manipulation of facts;
- for lack of reasons;
- for contradiction between holding and ruling.”

<sup>162</sup> Kong, P 2012, ‘Overview of the Cambodian Legal and Judicial System’, in Hor, P, Kong, P & Menzel, J (Eds.) 2012, *Introduction to Cambodian Law*, Phnom Penh: Konrad-Adenauer-Stiftung, p. 11.

<sup>163</sup> *Perra v. Australia*, No. 536/1993, para. 6.4.

<sup>164</sup> *Gómez Vázquez v. Spain*, No. 701/1996, para. 11.1.

<sup>165</sup> *Bandajevsky v Belarus*, HRC, Communication 1100/2002, UN Doc CCPR/C/86/D/1100/2002 (2006), para. 10.13.

<sup>166</sup> Nowak Commentary, *supra note 20*, p. 351.

made in favor of the accused. This restriction also extends to financial compensation for civil parties, where appellate courts cannot require an accused to pay more compensation.<sup>167</sup>

In addition, the underlying principle of the right to appeal is that all procedural guarantees must apply to appellate proceedings for the right to appeal to be meaningful and effective.<sup>168</sup> To that end, it can be argued that the CCP contains several provisions that fairly guarantee procedural rights at appellate hearings, including the right to be tried in a timely manner<sup>169</sup> (including timely<sup>170</sup> and reasoned<sup>171</sup> judgments), the right to defense lawyer,<sup>172</sup> the right to access case files<sup>173</sup> and have adequate time to prepare written submission,<sup>174</sup> and the right to a public hearing.<sup>175</sup> Where an accused appeals against all of a judgment in the Court of First Instance, or their conviction only, Article 398 requires the execution of any sentence to be suspended until the final conclusion of appellate proceedings.<sup>176</sup> The Court of Appeal however has the discretion to decide whether to release an accused.<sup>177</sup> Finally, the right to review of the Supreme Court's decision is also guaranteed, provided that new evidence determining the innocence of a convicted person is found.<sup>178</sup>

In practice, the right of prisoners to appeal in Cambodia is severely and systematically curtailed. The limited capacity of the Court of Appeal is a matter of great concern. There is only one appellate court, located in Phnom Penh, for the entire country. Accordingly, accused incarcerated in provincial prisons or detention must be transferred to Phnom Penh, and wait for the day of their appeal hearing.<sup>179</sup>

At this point, the Cambodian Center for Human Rights (CCHR) report shows some serious concerns regarding communication problems in the transfer process that undermine an accused's rights to timely appellate proceedings. While accused are supposed to be transported Phnom Penh for the appeal hearing, it often does not happen because incorrect information is sent to the wrong correctional center.<sup>180</sup> As a consequence, unnecessary delays of appeal proceedings, due mainly to an accused's absence, occur.<sup>181</sup> CCHR suggested that this communication failure could be minimized with better record keeping and updating between the Court and correctional centers.

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<sup>167</sup> CCP, Art. 99.

<sup>168</sup> Nowak Commentary, *supra note 20*, pp. 349-350.

<sup>169</sup> CCP, Arts. 381, 382, 383, 384, 386, 387, 407, 420 & 433.

<sup>170</sup> *Ibid.* Art. 438.

<sup>171</sup> *Ibid.* Arts. 403 & 453.

<sup>172</sup> *Ibid.* Arts. 376, 422 & 426.

<sup>173</sup> *Ibid.* Art. 391.

<sup>174</sup> *Ibid.* Arts. 427 & 429.

<sup>175</sup> *Ibid.* Art. 434.

<sup>176</sup> *Ibid.* Art. 398.

<sup>177</sup> *Ibid.* Art. 414.

<sup>178</sup> *Ibid.* Art. 445.

<sup>179</sup> *Ibid.* Art. 389.

<sup>180</sup> CCHR 2014 Report, *supra note 81*, p. 12.

<sup>181</sup> *Ibid.* pp. 12-13.

In addition, LICADHO has reported that appeal hearings *in absentia* are widespread.<sup>182</sup> The transportation of prisoners to attend their appeal proceedings in Phnom Penh has been crippled by the lack of budget in staffing, vehicles, and gasoline. In these circumstances, prisoners from long distance prisons usually use their own funds to be present at their appeal hearings, otherwise their appeal hearings inevitably ended up conducted *in absentia*.

In its 2013 report, LICADHO found that prisoners are generally disinclined to invoke their fundamental right to criminal appeal due to poor condition in prisons.<sup>183</sup> Prisoners' survival in prison depends largely on external support from family and friends due to lack of nutritious food, clean water and especially health care provided by prisons. Another concern raised by prisoners is the overcrowded prisons in Phnom Penh, as they fear not being allowed to return to their home prisons after appeal hearings. It is therefore reasonable that prisoners prefer staying closer to family and friends to going to Phnom Penh for their appeal hearings.

In its reports, LICADHO also noted the government's acknowledgment in the above shortcomings and commendable efforts to ameliorate them.<sup>184</sup> There has been progress toward numbers of prisoners transported from provincial prisons free of charge. There is also a slight decrease in numbers of pending cases in appeal hearings from 17.1% in 2012 to 15% in 2013. The fact that the government is open to cooperation with other stakeholders, such as the OHCHR and LICADHO, in order to improve the situation of appeal hearings, is certainly a positive step.

In respond to the scarcity of the appellate court, the recently passed *Law on Court Organization* will establish more provincial appeal courts.<sup>185</sup> The government is yet to release any definite plans to realize this objective. Yet, it is important that such objectives have legal force.

#### b. Right to an Effective Remedy

Article 2(3) of the ICCPR generally requires State Parties to provide access to effective remedies for breach of the provisions. Compensation for a violation of particular fair trial rights, which results in the miscarriage of justice, should be guaranteed. This proposition is further supported by Article 14(6), which specifically offers remedies to persons who suffer from wrongful convictions. By virtue of these provisions, State Parties are obliged to enact legislation and adopt administrative mechanisms through independent and impartial bodies to guarantee access to effective remedies for a miscarriage of justice.<sup>186</sup> In addition to the explicit remedies required, the HRC in its General Comment 31, stipulates certain forms of appropriate compensation involving "restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in

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<sup>182</sup> LICADHO, 2013, *In Absentia 2013: An Update on Cambodia's Inmate Transportation Crisis and the Right to Appeal*, [LICADHO 2013 Report], viewed 27 October 2015, <https://www.licadho-cambodia.org/reports/files/179LICADHOBriefInAbsentia2013-English.pdf>

<sup>183</sup> *Ibid.* pp. 1 & 6.

<sup>184</sup> *Ibid.* p. 7.

<sup>185</sup> *Law on Court Organization*, Art. 35.

<sup>186</sup> General Comment 32, *supra* note 85, para. 52.

relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.”<sup>187</sup>

In Cambodia, compensation for violations of fair trial rights is a grave concern. There is no explicit legal provision for vindicating failures to guarantee fair trial rights. Article 39 of the Constitution broadly states that victims have the right to make complaints against state agents or officials for any breach of the law and consequently claim compensation. Under the CCP, there are several provisions concerning compensation, but only for civil damage or victims of criminal offense. It also seems that the CCP provides only one form of compensation, that is an acquittal of an accused if an appellate court finds in favour of an accused.<sup>188</sup> Therefore, access to an effective remedy for a violation of fair trial rights is almost impossible, given that there is almost neither explicit provision nor mechanisms in place to guarantee the full realization of such fundamental rights.

The case involving Born Samnang and Sok Samoeun is a clear example of these problems. These two were falsely accused of the murder of Chea Vichea, president of a trade union, a decade ago. Both were found guilty and sentenced to 20 years in prison. They served almost six years before being acquitted by the Supreme Court in 2013. However, neither man was awarded any compensation, and rights groups demanded that the judicial system take “moral responsibility” for the miscarriage of justice.<sup>189</sup>

Further, in *Prosecutor v. Kaing Guek Eav alias ‘Duch’* of the ECCC, the Trial Chamber acknowledged that Duch was illegally detained without trial for eight years beyond the statutory limit, before being transferred to the ECCC.<sup>190</sup> Thus, when imposing a life sentence on Duch, the Trial Chamber reduced that sentence by five years as a remedy for Duch’s illegal detention and provisional detention. However, the Supreme Court Chamber revoked this decision to discount the sentence. The manner in which the Trial Chamber ruled on Duch’s illegal detention was unarguably a welcome precedent for Cambodian judges and should be used as an example for lawyers to advocate for appropriate sentences and remedies.

#### **IV. Conclusion**

This chapter has provided readers with a brief overview of fair trial rights in law and practice in Cambodia, comparing the respect for this right in Cambodia with the standards set out at international law in international human rights treaties and norms.

It is a fundamental aspect of upholding the rule of law that every accused is entitled to a fair and just trial, regardless of how serious the alleged crime is. Respect for the

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<sup>187</sup> General Comment 31, *supra note 10*, para. 16.

<sup>188</sup> CCP, Art. 405.

<sup>189</sup> May, T & Seiff, A 2013, ‘Scapegoat ‘Killers’ Acquitted’, *Phnom Penh Post*, 26 September, viewed 27 October 2015, <http://www.phnompenhpost.com/national/scapegoat-killers-acquitted>

<sup>190</sup> See a brief overview of ECCC Case 001 *via*, viewed 27 October 2015, <http://www.eccc.gov.kh/en/case/topic/1>

right to a fair trial requires adherence to a complex set of procedural rules and practices to ascertain the truth. It is not concerned with the ultimate outcome of a trial, as long as those procedures are respected. If those procedures are not respected, it is imperative that individuals have access to an effective remedy.

Although fair trial rights are generally protected under Cambodia, there are serious inadequacies in the practical implementation of such laws. Further, access to an effective remedy where the right has been violated, other than through quashing a sentence imposed on an offender, is virtually non-existent, both at law and in practice. It is to be hoped that the Cambodian government will address this shortcoming by reviewing the CCP and considering adopting or adding necessary provisions to ensure access to an effective remedy.

As a party to the ICCPR, Cambodia has a duty to make progress towards ensuring the full realization of fair trial rights, especially by raising awareness and building capacity through training and school curricula. The fact that education regarding fair trials at law schools and for judicial officers and police is limited means that the concept of fair trial rights is alien to most officials working in the justice sector, academics and the community more broadly. It is to be hoped that the lessons from ECCC can leave a legacy of increased awareness of, and respect for, fair trial rights, among the Cambodian population, but especially those working in the justice sector. For if Cambodia is serious about improving the effectiveness and legitimacy of, and increasing public confidence in, the criminal justice system, it must respect and guarantee fair trial rights.

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