



**Comments on certain provisions of the draft Law on the organisation of courts
in relation to international human rights standards**

May 2014

The following comments have been prepared by the Office of the United Nations High Commissioner for Human Rights (OHCHR) in order to assist the process of adoption of the draft Law on the organisation of courts. The comments are based primarily on Cambodia's international human rights obligations. The adoption of the Law on the organisation of courts provides an important opportunity for Cambodia to strengthen its compliance with these international obligations.

The draft Law on the organisation of courts, together with the draft Laws on the status of judges and prosecutors and on the reform of the Supreme Council of Magistracy, constitute the three fundamental laws on the judiciary. There can be no rule of law without a solid legal foundation for the justice system. These three fundamental laws are essential to establish a functioning, effective and fair justice system which will in turn ensure better legal protection for human rights in Cambodia. The adoption of the Law on the organisation of courts was already envisaged in the 1993 Constitution. Indeed, Article 135 of the Constitution provides that "the status of judges and public prosecutors and the judicial organisation shall be stipulated in separate laws".

Earlier comments had been submitted to the Ministry of Justice in February 2014 and OHCHR is pleased to note that some of the comments have been reflected into the draft Law.

As previously, the present comments focus on provisions which may be problematic, as well as on areas which OHCHR believes should be included in the Law. The Law on the organisation of courts represents a long awaited and important step forward in strengthening the court system of Cambodia. In this regard, the Special Rapporteur on the human rights situation of Cambodia has previously commented in his report on the judiciary that "the absence of the Law on the Organization and Functioning of the Courts seems to have had a detrimental impact on the effectiveness and independence of the judiciary in providing speedy and impartial justice. This law is needed to achieve a degree of unity, cohesion and certainty within the system of justice."¹

¹ A/HRC/15/46, para.49.

As a matter of established good practice, OHCHR recommends that a public consultation be organised to discuss this draft. In this regard, OHCHR stands ready to provide assistance with the organisation of such consultation. OHCHR further stands ready to provide briefings to the members of the National Assembly and Senate on its analysis of the draft law from the perspective of Cambodia's international human rights obligations.

1. General principles

The principal objective of this Law is to provide a clear legal foundation for an independent and effective court system capable of delivering justice to all in Cambodia. The right to a fair trial can only be implemented before a tribunal established *by law*.

OHCHR recommends setting out in Article 1 a number of general principles for the organisation of courts, including

- **The principle of independence of courts and judges**
- **The principle of separation of powers (legislative, executive and judiciary)**
- **The principle of impartiality of judges**

These basic principles are enshrined in the 1966 International Covenant on Civil and Political Rights (ICCPR) to which Cambodia became a party to in 1992. In accordance with Article 31 of the 1993 Constitution and the decision of the Constitutional Council of 10 July 2007, the ICCPR is part of Cambodian law.

The most relevant provision of the ICCPR is Article 14 which protects the right to a fair trial. This includes the right to a “fair and public hearing by a *competent, independent and impartial* tribunal established by law” (emphasis added). The Human Rights Committee, which is the international monitoring body established under the ICCPR, has adopted General Comment No.32 on Article 14, which provides detailed guidance to States on how to interpret Article 14.² In this document, the Human Rights Committee has recalled that courts should be independent of the executive and legislative branches of government”.³

The principles mentioned above are also included in the Basic Principles on the Independence of the Judiciary and the Guidelines on the Role of Prosecutors.⁴ They are explicitly stated in the 1993 Constitution in the Chapter on the judiciary.

The Law on the organisation of courts could state clearly, in accordance with the Basic Principles on the Independence of the Judiciary, that

The independence of the judiciary is guaranteed by the Constitution. It is the duty of all to respect and observe the independence of the judiciary.

² See full text of General Comment No.32 on Article 14 at <http://cambodia.ohchr.org/EN/PagesFiles/PublicationsIndex.htm>.

³ See General Comment No.32 on Article 14, para.18.

⁴ Both documents are available at <http://cambodia.ohchr.org/EN/PagesFiles/PublicationsIndex.htm>

The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

In addition, OHCHR recommends restating explicitly the principle of independence of prosecution offices from the court offices. Article 8 could state (in accordance with the Guidelines on the Role of Prosecutors) that

The office of prosecutors shall be strictly separated from judicial functions.

2. Independence of the courts

The principle of independence of the courts means that the courts should not be subject to any interference. It also implies that courts should not have to report on their decisions to any other authority. The principle of independence of the courts is closely related to the principle of separation of powers which provides that the executive, legislative and judicial branches of power shall be separate from each other.

It follows that the courts and the Ministry of Justice should be as separate as possible and the Ministry of Justice should not interfere in the way courts are organised. In this regard, the Special Rapporteur on the human rights situation in Cambodia has recommended that “The Supreme Court, and not the Ministry of Justice, should have overall responsibility for supervising the lower courts.”⁵

For instance, if a court needs to request the service of a judge from another court because there are not enough specialised judges to hear a particular case, such a request should be made to the Supreme Council of Magistracy or the Court of Appeal/Supreme Court, not to the Ministry of Justice.

OHCHR therefore recommends that any request from the courts regarding the re-allocation of judges should be made to the Supreme Council of Magistracy or the Court of Appeal/Supreme Court, not the Ministry of Justice. In Articles 16 and 17, the phrase “Minister of Justice” should be replaced accordingly.

Similarly, when it comes to transferring cases from one court to another, the decision should not be made by the executive. While the Ministry of Justice may have some general responsibilities in the area of the administration of justice, it should not have any say on which court or judge will examine any particular case.

OHCHR recommends amending Article 19 and replace the phrase “Ministry of Justice” by “Supreme Court”.

With regard to court inspections, these should be carried out in compliance with the principle of judicial independence.

⁵ A/HRC/15/46, para.69.

OHCHR recommends that where court inspections are conducted by the Ministry of Justice under Article 11, there be a public disclosure of the matters to be inspected and the Supreme Council of Magistracy should supervise the organisation of these inspections in order to ensure that they do not constitute or lead to inappropriate interference with the court system.

The Government has the responsibility of ensuring that the court system has adequate resources to deliver justice. While the Ministry of Justice is currently in charge of preparing an overall budget proposal for the justice sector, which include budget for the courts, it is crucial to ensure that funding for the courts is not subject to political interference. In this regard, the Consultative Council of European Judges has stated, for instance, that “decisions on the allocation of funds to the courts must be taken with the strictest respect for judicial independence”.⁶

OHCHR is encouraged to see that, following its previous recommendation, Article 79 was introduced to allow courts to have their own budget. In this regard, OHCHR recommends that appropriate staff and resources be allocated to each court in order to enable them to prepare budget proposals.

3. Juvenile courts

Article 14 of the draft Law introduces a number of specialised Chambers in each court, namely a Civil Chamber, a Criminal Chamber, a Commercial Chamber and a Labour Chamber (see also Articles 37 and 55). The list of specialised Chambers does not include a Juvenile Chamber.

Article 40(3) of the Convention on the Rights of the Child, to which Cambodia is a party, envisages that “State parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law”.⁷

A draft Juvenile Justice Law has been discussed for many years, but has not been finalised yet. There have been many recommendations from international bodies on the establishment of a juvenile justice system in Cambodia.⁸ The Royal Government of Cambodia has also recently accepted a recommendation made on this subject during the 2014 Universal Periodic Review at the UN Human Rights Council.⁹

⁶ See Opinion no 2 (2001) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on the funding and management of courts with reference to the efficiency of the judiciary and to article 6 of the European Convention on Human Rights, available at <https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE%282001%29OP2&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3>

⁷ See also Committee on the Rights of the Child, General Comment No.10 (2007) – children’s rights in juvenile justice, CRC/C/GC/10.

⁸ See for instance A/HRC/15/46, para.86; CAT/C/KHM/CO/2, para.23; and CRC/C/KHM/CO/2-3, para.77.

⁹ A/HRC/26/16, para.118.93.

OHCHR recommends including in Articles 14, 37 and 57 "a Juvenile Chamber" in the list of specialised Chambers.

4. Accountability of courts

The administration of courts is in urgent need of strengthening in order to improve both court and case management.

OHCHR is encouraged to see in Article 10 that each court shall have a Secretariat which will assist the President of the Court to manage the court. It is crucial that such Secretariat have adequate financial and human resources.

Courts need to be accountable to the public (and not to the Ministry of Justice) for the services they provide. Accountability requires transparency. In this regard, courts should be required to collect and publish information on the services they provide. Such information will also be useful when preparing budget proposals for each court.

The Special Rapporteur on the human rights situation in Cambodia has previously recommended that "Every court should have its own registrar and have a proper system of record/file keeping. The judges themselves should not keep the case files with them nor move to other courts with such case files when transferred to another court."¹⁰

OHCHR recommends that the Law include a provision requesting courts to collect and publish information on the number of court cases pending and decided, the proportion of cases in which there was legal representation, the proportion of cases in which the defendant was present at trial, the average length of court proceedings, the rates of pre-trial detention/judicial supervision, the number of decisions appealed, etc.

OHCHR also recommends that the Law include a provision requiring courts, including prosecution offices, to systematically and regularly exchange information on the status of cases with prisons. Prosecution offices should report on the number of cases prosecuted, the number of cases filed without processing, on the Police-Court-Prison meetings organised and the recommendations made at these meetings, and on visits to prisons and police stations conducted during the reporting period.

In order to assist courts, it would be useful to develop a template for their reports. OHCHR stands ready to provide any assistance in this regard.

5. Mobile courts

OHCHR has always supported the proposal of hold hearings outside the courts in order to facilitate the defendant's presence before the judge or the prosecutor.¹¹ Article 18 provides that "when necessary, the Minister of Justice may authorize the Court of First Instance to

¹⁰ A/HRC/15/46, para.92.

¹¹ This possibility was discussed at the Workshop organised by the Court of Appeal on promoting cooperation between courts, prosecutors and prisons and held in Phnom Penh on 6-7 September 2012.

conduct the hearing outside its head office upon the request of the President of the Court of First Instance.”

In this regard, Article 309 of the Code of Criminal Procedure already provides that the Court President may order the interrogation of an accused at his or her place of residence. The Interrogation shall be conducted by the presiding judge in the presence of the prosecutor, the court clerk and the defense lawyer. It follows that the Code of Criminal Code already allows some court hearings to be held outside the court without the express authorisation of the Minister of Justice.

OHCHR recommends amending Article 18 to read as follows

When necessary, the President of the Court of First Instance shall authorise the Court to conduct a hearing outside its head office.

OHCHR further recommends that the possibility for Courts of first instance to hold hearings outside their head office, as provided for in Article 18, be introduced also for the Court of Appeal.

6. System of appellate review

Article 14, paragraph 5, of the ICCPR provides that “everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law”. In the current Cambodian court system, there is only one Court of Appeal which receives appeals from all over the country. Despite improvements in case management at the Court of Appeal, it can take still a significant amount of time before an appeal case is heard. The lack of transportation at the General Department of Prisons, coupled with difficulties to sharing information promptly about appeal hearings, means that many defendants are unable to attend their appeal hearing in Phnom Penh, resulting in repeated violations of their right to defend themselves in person.

The establishment of regional Courts of Appeal might help addressing this problem and bring justice services closer to the populations, especially to those who live in remote provinces. In this regard, OHCHR welcomes the decision to establish such regional Courts of Appeal. Pending the establishment of such regional Courts of Appeal, the Ministry of Justice could consider setting up mobile Courts of Appeal, i.e. panels of appeal judges which could go and hear appeal cases in the provinces, using the facilities of courts of first instance for a limited period of time.¹²

In line with its previous recommendation, OHCHR is encouraged to see that Article 35 envisages the establishment of regional Courts of Appeal. It is crucial that such new Courts receive adequate financial and human resources.

¹² This possibility was discussed at the Workshop organised by the Court of Appeal on promoting cooperation between courts, prosecutors and prisons and held in Phnom Penh on 6-7 September 2012.

7. Impartiality of judges

The right to a fair trial demands that judges be impartial. As mentioned above, the draft Law needs to reaffirm the principle of impartiality of judges. As recalled by the Human Rights Committee, this principle has two aspects:

First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial. For instance, a trial substantially affected by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be impartial.¹³

It follows that judges must not only be impartial, they must also be seen as being impartial. The principle of impartiality creates a duty for judges to step down from cases in which they think that they may not be able to decide impartially or in which “it may appear to a reasonable observer that the judge is unable to decide the matter impartially”¹⁴. In such cases, judges should excuse themselves from participating in the proceedings regardless of whether there is a request from the parties. Such a rule on recusal is for instance contained in Rule 34 of the Internal Rules of the Extraordinary Chambers of the Courts of Cambodia (ECCC).¹⁵

OHCHR is encouraged to see that the draft Law contain provisions requiring judges to step down from cases in Articles 74 to 77.

OHCHR recommends adding to Articles 74 to 77 a requirement for judges and prosecutors to step down from cases in which they, or a member of their family, have, or have had, a personal or financial interest, or an association which might affect their impartiality or objectively give rise to the appearance of bias.

8. Military courts

There is currently one military court in Cambodia based in Phnom Penh and with jurisdiction over the entire country. With regard to military courts, the Human Rights Committee has insisted that “The provisions of article 14 [of the International Covenant on Civil and Political Rights] apply to all courts and tribunals within the scope of that article whether ordinary or specialized, civilian or military.”¹⁶

OHCHR notes that the chapter on military courts has been deleted from the draft Law and that new Article 81 envisages a new law on this subject.

¹³ See General Comment No.32 on Article 14, para.21.

¹⁴ See *The Bangalore Principles of Judicial Conduct*, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices at The Hague, 2002, Principle 2.5.

¹⁵ Available at <http://www.eccc.gov.kh/en/document/legal/internal-rules-rev8>

¹⁶ See General Comment No.32 on Article 14, para.22.

OHCHR recommends that some provisions of the present Law apply to military courts. In particular, the Law should explicitly state that the general principles for the organisation of courts set out at the beginning of the Law (including independence of courts and judges, separation of powers and impartiality of judges) apply to military courts and judges.

Where military courts exist, their aim should only be to serve the specific disciplinary needs of the military. It follows that, in the words of the Special Rapporteur on the independence of judges and lawyers, the jurisdiction *ratione materiae* of military courts should be restricted to “criminal offences of a strictly military nature, in other words to offences that by their own nature relate exclusively to legally protected interests of military order, such as desertion, insubordination or abandonment of post or command”.¹⁷ Military personnel accused of having committed ordinary crimes should be tried by ordinary courts.

With regard to jurisdiction *ratione personae*, while international law does not explicitly prohibit the trial of civilians by military courts, there is now a clear consensus that such practice should be exceptional¹⁸ or even prohibited.¹⁹

OHCHR recommends that the Law define clearly and precisely the scope of the jurisdiction of the military court as limited to military personnel accused of have committed criminal offences of a strictly military nature.

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¹⁷ See A/68/285, para.98.

¹⁸ See General Comment No.32 on Article 14, para.22.

¹⁹ See A/68/285, para.101.