



អង្គការសហប្រជាជាតិ

ការិយាល័យនៃឧត្តមស្នងការអង្គបណ្តុះបណ្តាលសិទ្ធិមនុស្សប្រចាំកម្ពុជា



Public Statement, 25 July 2007

Decision of the Constitutional Council regarding the Law on Aggravating Circumstances for Felonies and the Convention on the Rights of the Child

The Office of the United Nations High Commissioner for Human Rights (OHCHR) in Cambodia welcomes the important decision of the Constitutional Council of 19 July 2007 which reaffirms, in accordance with the Constitution, that the courts in Cambodia must take into account Cambodia's commitments under the international human rights treaties, and in particular the Convention on the Rights of the Child, when interpreting the law and deciding cases.

The Constitutional Council has ruled that the 2002 Law on Aggravating Circumstances for Felonies was not intended to extinguish the protection provided to juvenile offenders by article 68 of the 1992 UNTAC criminal provisions and that judges should continue to take into account an offender's age when considering appropriate sentences in cases involving under eighteen year olds, in accordance with the Convention on the Rights of the Child.

Article 68 of the UNTAC criminal provisions obliges judges to take into account mitigating factors, such as the convicted person's age and mental health, when sentencing and instructs judges to reduce by one half any sentence imposed on an under-eighteen year old. This provision implements Article 37 (b) of the Convention on the Rights of the Child which states that custodial sentences should be imposed only exceptionally as a last resort and for the shortest period necessary. The Convention is guaranteed by articles 31 and 48 of the Constitution.

Article 8 of the Law on Aggravating Circumstances for Felonies removed the possibility of judges considering attenuating circumstances to reduce or suspend sentences in cases involving felonies. The Constitutional Council had been asked to consider whether this article was compatible with the Constitution because it seemed to violate article 37 of the Convention on the Rights of the Child.

Since its promulgation in January 2002, the Law on Aggravating Circumstances had created considerable legal uncertainty with regard to juvenile cases. Judges in some courts began to impose harsh prison sentences on minors, notwithstanding the requirements of the Convention on the Rights of the Child, whereas other judges had continued to apply article 68 of the UNTAC provisions in accordance with international human rights law. The application of the Law in juvenile cases proved to have a disproportionately harsh effect on children in conflict with the law. Thus, for example, two boys found guilty of stealing a pair of plastic sandals could receive a longer prison sentence than an adult guilty of stealing a motorcycle.

The Constitutional Council has now ruled that the 2002 Law is not unconstitutional because it was never intended that it should apply to minors and therefore does not go against the provisions of the Convention on the Rights of Child. In so ruling, it has given the all-clear for judges once again to take into account the age of the perpetrator and to impose lesser sentences.

The Constitutional Council's ruling has restored consistency in the application of the law and reinforced the constitutional protection of the rights of children under the rule of law. It also decisively affirms the position of the international human rights treaties as part of Cambodian law, protected by the Constitution, and makes the important point that trial judges should take basic human rights concerns into account when considering cases.

OHCHR Cambodia looks forward to all judges in the country taking note of the decision and applying the law accordingly. It also urges the early adoption of the Juvenile Justice Law, currently being drafted by the Ministry of Justice in collaboration with UNICEF, in order to strengthen further the protection of child rights within the Cambodian justice system.

OHCHR Cambodia remains concerned about the position of people with diminished criminal responsibility as a result of mental health problems under the Law on Aggravating Circumstances and hopes that article 68 of the UNTAC provisions will continue to be applied in these cases.

An unofficial English translation of the decision is attached to this Press Statement along with extracts of the relevant legal provisions.

Note: although the decision refers to article 70 of the UNTAC provisions, rather than article 68, it is clear that article 68 is intended in accordance with the message transmitted by His Majesty on 20 June 2007. The error does not affect the substance of the ruling.

Kingdom of Cambodia
Nation Religion King

Constitutional Council

Case-file No. 131/003/2007 Dated 26 June 2007

Decision No. 092/003/2007 Dated 10 July 2007

The Constitutional Council

- having seen the Constitution of the Kingdom of Cambodia;
- having seen Royal Kram No. 0498/06 dated 08 April 1998 promulgating the law on the organization and functioning of the Constitutional Council;
- having seen Royal Kram No. 0107/005 dated 13 January 2007 promulgating the amendment of the law on the organization and functioning of the Constitutional Council;
- having seen the royal message dated 20 June 2007 of King Sihamoni asking the Constitutional Council for the constitutional review of article 8 of the law on the aggravating circumstances of felonies, received by the Constitutional Council on 26 June 2007 at 14h30.

After having heard the report from the *rapporteur*,

After having discussed properly according to the law

- Understands that the royal message of King Sihamoni dated 20 June 2007 is submitted properly according to article 141-new of the Constitution and article 18-new of the law on the organization and functioning of the Constitutional Council;
- Understands that article 8 of the law on the aggravating circumstances of felonies stated that “The Judge shall not consider attenuating circumstances or reduction of sentence to below the minimum term or suspension of the sentences, for sentences of imprisonment for felonies or felonies with forced labour. For misdemeanours, the sentences may be suspended partly or totally. In this case, the convicted persons shall not serve out the whole of the sentence, provided that he/she has not committed one of the offences as provided for in the preceding articles within a period of five (5) years of his/her judgment.”
- Understands that [although] **article 8 modifies article 70 [68?] of UNTAC law, it does not affect [undermine] the rights and interests of children.** The provision of article 8 of the law on the aggravating circumstances above is not unconstitutional.
- Understands that at case trial, in principle, a judge shall not only rely on article 8 of the law on the aggravating circumstances, but also relies on law. The term law here refers to the national law including the Constitution which is the supreme law and other applicable laws as well as the international conventions that Cambodia has recognized, especially the Convention on the Rights of the Child.

Hereby decides

Article 1: article 8 of the law on the aggravating circumstances promulgated by Royal Kram No. 0102/004 dated 07 January 2002 is declared to be in conformity with the Constitution.

Article 2: this decision is made in Phnom Penh on 10 July 2007 at the plenary session of the Constitutional Council regarded as final and binding decision and is applicable to all authorities stipulated in the Constitution and shall be published in the Royal Gazette.

Phnom Penh, 10 July 2007

Stamped and sealed

Chairman
Ek Sam Ol

Extracts of relevant legal provisions

Law on Aggravating Circumstances for Felonies:

Article 8

The Judge shall not consider attenuating circumstances or reduction of sentence to below the minimum term or suspension of the sentences, for sentences of imprisonment for felonies or felonies with forced labour. For misdemeanours, the sentences may be suspended partly or totally. In this case, the convicted persons shall not serve out the whole of the sentence, provided that he/she has not committed one of the offences as provided for in the preceding articles within a period of five (5) years of his/her judgment.

Article 9: *“any provision which is contrary to this law shall be hereby repealed”.*

Provisions related to the Judiciary and Criminal Law and Procedure applicable during the Transitional Period (the “UNTAC criminal provisions”)

Article 68

- 1. Judges must weigh attenuating circumstances to reduce even below the minimum punishments prescribed in the present text, and in particular:
 - a. The age of the convicted person;*
 - b. The personal background of the convicted person which might reduce responsibility;*
 - c. The psychological or psychiatric state of the accused which is certified by a psychologist or psychiatrist;*
 - d. Circumstances of the crime or misdemeanour which rendered absolutely necessary the actions of the convicted person.**
- 2. For any accused person under 18 years of age, the punishments set out in the preceding articles shall be reduced to half, without prejudice for more favourable provisions contained in the standards defined by the existing administrative structures.*

Convention of the Rights of the Child

Article 37 (b): *'imprisonment of a child [...] shall be used only as a measure of last resort and for the shortest appropriate period of time'.*

[Cambodia became a State party to the Convention on the Rights of the Child on 14 November 1992 and thereby undertook to implement the Convention in all its aspects.]

Constitution of the Kingdom of Cambodia

Article 31

The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women's and children's rights.

Article 48

The State shall protect the rights of children, as stipulated in the Convention on the Rights of the Child [...].