

Legal Analysis of the Pre-trial Detention of Mr. Ny Sokha, Mr. Yi Soksan, Mr. Nay Vanda, Ms. Lim Mony and Mr. Ny Chakrya

November 2016

1. Introduction

Mr. Ny Sokha, Mr. Yi Soksan, Mr. Nay Vanda, and Ms. Lim Mony, four senior staff members of the Cambodian Human Rights and Development Association (“ADHOC”), and Mr. Ny Chakrya, a former ADHOC staff member and current Deputy Secretary-General of the National Election Committee, have been detained in Phnom Penh since 28 April 2016. They are charged with bribery of a witness under Article 548 of the Cambodian Criminal Code, and Mr. Ny Chakrya is charged as an accomplice to the same crime.

14 November 2016 was the 200th day of pre-trial detention for the five human rights defenders (“HRDs”). To mark this unfortunate milestone, and ahead of the Supreme Court’s hearing of the five’s appeal against the denial of bail in their case on 23 November 2016, this Legal Analysis will examine whether the continued pre-trial detention of the five HRDs is in conformity with applicable legal standards, reasonable, and sufficiently supported by the available evidence.

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2. The Facts

The charges relate to the Anti-Corruption Unit’s (“ACU”) investigation into an alleged affair between acting leader of the opposition Cambodia National Rescue Party, Mr. Kem Sokha, and Ms. Khom Chandaraty. In their roles as human rights workers, the ADHOC staff provided legitimate and routine legal and material assistance to Chandaraty, who approached ADHOC for assistance upon being subject to investigation as a result of the alleged affair. However, on 22 April 2016 Chandaraty alleged in an open letter that the five HRDs had convinced her to lie in the course of investigations.

Ny Sokha, Yi Soksan and Nay Vanda were initially summoned to the offices of the ACU on Wednesday 27 April 2016 and interrogated for a prolonged period of time. The three were eventually released at around 11pm on the same day, but threatened with arrest if they failed to appear at 8am the following morning for further questioning. Ny Chakrya and Lim Mony were also questioned on Thursday 28 April 2016, and later that same day the five HRDs were all placed in detention. The five HRDs were detained without charge until Monday 2 May 2016, when they were charged in the afternoon.

Lawyers for the detainees filed an application for bail to the Phnom Penh Municipal Court on 16 May; however, the application was denied the next day, 17 May. Bail for all five was denied by the Court of Appeal on 13 June 2016. On 20 June 2016, an appeal regarding the denial of bail was lodged with the Supreme Court. The closed hearing of this appeal will take place – after a delay of over five months - on 23 November.

A closed hearing of the five's appeal against the Investigating Judge's decision of 27 October 2016 to extend their pre-trial detention for a further six months took place before the Appeal Court on 11 November. The Court of Appeal upheld the decision of the Investigating Judge. The analysis below is also relevant to this appeal.

3. The law

3.1 International human rights law

Although it is sometimes necessary to impose pre-trial detention in order assist in the proper administration of justice and to protect victims and witnesses, the excessive or improper use of pre-trial detention unduly restricts the right to liberty and the presumption of innocence.

The **right to liberty** is strongly protected both in Cambodian law and under international human rights law ("IHRL"). IHRL is directly applicable in the Cambodian domestic legal system as a result of Article 31 of the Constitution and a 2007 decision of the Constitutional Council.¹ Article 9(1) of the International Covenant on Civil and Political Rights (the "ICCPR"), to which Cambodia is a State Party, provides that:

"Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law."

Article 38 of the Constitution similarly declares: *"The prosecution, arrest, or detention of any person shall not be done except in accordance with the law."* Where a person is detained not in accordance with Cambodian law, their detention will be unlawful and arbitrary, in violation of the Constitution and IHRL.

The **right to be tried within a reasonable time and to a strong justification for the imposition of pre-trial detention** are also both strongly protected under IHRL. Article 9(3) ICCPR provides that:

"Anyone arrested or detained on a criminal charge [...] shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement."

Therefore, only if judicial supervision or other measures would not be able to adequately address all concerns, and detention of the charged person is determined to be an objective necessity, should pre-trial detention be considered as a last resort. Liberty of the accused should always be the default option, rather than detention.

The United Nations ("UN") Human Rights Committee, the treaty body that may issue authoritative interpretations of the ICCPR, has held that to justify an exception to the general rule that persons awaiting trial are not to be detained in custody, a State must sufficiently describe the concerns that would justify continued detention and why these concerns could not be addressed by bail.²

The right to the presumption of innocence, a key element of the right to a fair trial, is also protected under both IHRL and Cambodian law. Article 38 of the Cambodian Constitution states:

¹ Constitutional Council of the Kingdom of Cambodia, Decision No. 092/003/2007, (10 July 2007)

² *Smantser v Belarus*, UN Human Rights Committee (23 October 2008) para 10.3

“Any accused shall be presumed to be innocent until they are finally convicted by the court.”

Article 14(2) of the ICCPR states that:

“Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”

This includes the duty for all public authorities to refrain from prejudging the outcome of a trial, for example by abstaining from making public statements affirming the guilt of the accused.³ Excessive pre-trial detention can undermine the presumption of innocence by effectively subjecting charged persons to punishment before they have been tried and convicted by a court, or by creating an erroneous impression that they are already considered dangerous criminals in need of imprisonment.

3.2 Cambodian law

Article 204 of the CPC provides that pre-trial detention can be imposed only in cases of felony or misdemeanour charges punishable by one or more years’ imprisonment. As the offence of bribery of a witness in Article 548 of the Criminal Code is punishable by five to ten years’ imprisonment, for both principals and accomplices, in principle it is possible for pre-trial detention to be imposed in this case.

The CPC clearly states in Article 203 that the default position should be that the charged person shall remain at liberty; only exceptionally may the charged person be provisionally detained. If the charged person is detained it must be in conformity with the conditions stated in that section of the CPC. The CPC therefore makes clear that pre-trial detention is to be used as a last resort; judges should start from the presumption that the accused individual should be released until the trial, or should consider judicial supervision (placing conditions on the individual’s liberty until the trial), before they consider pre-trial detention.

Unfortunately, Cambodia continues to have a very high rate of pre-trial detention.⁴ Recent figures released by the General Department of Prisons gave the number of persons in prison as 21,700 (0.14% of the population). This is a 125% increase on the 2006 figure of 9,634 persons.⁵ One reason for this increase may be the increased frequency of pre-trial detention, and the increased length of pre-trial detention periods when it is imposed. The imposition of pre-trial detention is especially common in respect of human rights defenders, severely affecting the presumption of innocence, as well as preventing them from carrying out their legitimate human rights work.

Article 205 of the CPC sets out an exhaustive list of six situations that may justify the imposition of pre-trial detention under Cambodian law. An order for pre-trial detention, which is issued by the investigating judge under Article 206 of the CPC, must justify the imposition of detention by reference to these six criteria:

³ UN Human Rights Committee, General Comment 32, Section IV.

⁴ In 2012, in 70% of the trials monitored by CCHR, the charged persons had been held in pre-trial detention, CCHR Report, ‘Fifth Bi-annual Report: Fair Trial Rights in Cambodia’, November 2012 <http://bit.ly/1NPhuV4>. More recently, external observers have put the percentage of individuals in pre-trial detention in Cambodian prisons at as high as 63.6%, the highest in Southeast Asia, Alice Cuddy and Chhay Channayda ‘Pre-trial lockup rules flouted’, The Phnom Penh Post, 29 May 2015 <http://bit.ly/1QDBfDm>

⁵ Jack Davies, “Prison rates soaring in Cambodia” The Phnom Penh Post (4 November 2016) <http://bit.ly/2fixdWD>

“Pre-trial detention may be imposed when the detention is necessary to:

- i. stop the offense or prevent the offense from happening again;*
- ii. prevent any interferences with witnesses or victims or prevent any collusion between the accused person and the accomplice;*
- iii. maintain evidence or material leads;*
- iv. ensure the accused is kept for the court to decide according to its procedures;*
- v. protect the security of the accused;*
- vi. maintain public order to avoid any chaos caused by the offense.”*

The CPC allows for the Investigating Judge to place someone in provisional detention for up to 18 months; that is, for a period of six months, renewable twice.⁶ The renewal of pre-trial detention for further six-month periods must also be justified by reference to the criteria set out in Article 205.⁷

4. Analysis of the application of the law to the facts of the case

4.1 The initial decision to impose pre-trial detention

In the detention hearing on 2 May, the investigating judge stated that based on the fact that the four ADHOC staff had “committed a crime,” they should be detained, referring to Article 205 (i), (iv), and (v) of the CPC. However, no evidence was offered to support these claims. Further, the assertion of guilt underpinning the investigating judge’s decision to detain clearly fails to respect the presumption of innocence.

The detention order of 2 May, issued in accordance with Article 206 of the CPC, again stated that three of the relevant criteria for the imposition of pre-trial detention under Article 205 of the Code of Criminal Procedure had been satisfied. However, as noted above, no evidence for any of the criteria was presented in court.

4.2 The extension of pre-trial detention

The continuation of pre-trial detention must also be justified or it will be considered arbitrary.⁸ Article 211 of the CPC provides that the extension of pre-trial detention must also be justified with reference to the criteria set out in Article 205 of the CPC.

The order to extend their detention justified the extension on the basis of the need to prevent any interferences with witnesses or victims or prevent any collusion between the accused persons and the accomplice; and to ensure the accused is kept for the court to decide according to its procedures (Article 205 ii) and iv) of the CPC). On 11 November, the Court of Appeal upheld the decision of the Investigating Judge on the basis of Article 205 ii). However, again no evidence was produced to justify the need to prevent the collusion or interferences foreseen in Article 205 ii).

4.3 Analysis of the six criteria in Article 205

Regardless of the varying arguments invoked in the different detention orders, hearings and decisions, analysis of the facts surrounding the five’s arrest and detention, as well as the nature of the charges against them, demonstrates that it none of the six criteria for lawful pre-trial detention are or ever have been applicable in this case. These are the only reasons for which pre-trial

⁶ Article 208 CPC

⁷ Article 211 CPC

⁸ UN Human Rights Committee, *Kwok v Australia*, (23 Oct 2009) para. 9.3.

detention may be imposed under Cambodian law. As a result, there can be no lawful justification for their continued detention:

i. stop the offense or prevent the offense from happening again;

The five continue to insist that they are innocent of the criminal offence with which they have been charged, and that as a result there is no reason to believe they would commit criminal acts in future. In addition, the five are charged in relation to a high-profile criminal investigation, which has received much public and media attention due to the involvement of the acting leader of the opposition party. Under such intense scrutiny from the authorities, and being so well known for their activism and human rights advocacy as staff members of ADHOC, it is very unlikely the five would engage in any illegal activity if released. Moreover, any fears that the five would commit the alleged offence again could be addressed by imposing appropriate bail conditions and judicial supervision.

ii. prevent any interferences on witnesses or victims or prevent any collusion between the accused person and the accomplice;

There is no evidence to suggest any of the five would harass witnesses or alleged victims or engage in collusion. As noted above, taking into account the high-profile nature of this case and of the individuals involved, the potential for such harassment or collusion appears especially unlikely. Again, any fears that the five would engage in harassment of witnesses or collusion could easily be addressed by imposing appropriate bail conditions and judicial supervision that would prevent them communicating with witnesses or other accused persons.

iii. maintain evidence or material leads;

This criterion was not raised by the investigating judge or the Court of Appeal nor in any detention order. There is no material evidence in this case, aside from witness statements, of the alleged crimes.

iv. ensure the accused is kept for the court to decide according to its procedures;

It has been held in relation to this article of the CPC that factors suggesting the charged person may flee include: employing measures to conceal their past; using aliases; changing jobs or locations many times; providing false information; previous disappearances; living in an area with many supporters and potential connections; frequent travels abroad; and financial means.⁹ None of these justifications appear reasonable in this case. Indeed, upon being temporarily released at 11pm on 27 April following interrogation at the ACU, all three of the individuals concerned duly presented themselves again for questioning at 8am the following morning as requested. In addition, as all five have family members living in Cambodia, including in some cases young children, their flight risk is minimal. If the court did have a genuine concern that they may try to flee Cambodia, all five could easily be subjected to travel restrictions while on bail, such as the temporary forfeiture of passports and the requirement to periodically report to a local police station.

⁹ Duch Case, Provisional Detention Appeal, Extraordinary Chambers in the Courts of Cambodia (“ECCC”), Pre-Trial Chamber, 3 December 2007, paras. 37-40 (false names and travel); Ieng Thirith Case, Provisional Detention Appeal, ECCC, Pre-Trial Chamber, 9 July 2008, paras. 54-56 (living in area with many supporters and potential connections, frequent travel abroad, financial means); Ieng Sary Case, Provisional Detention Appeal, ECCC, Pre-Trial Chamber, 17 October 2008, paras. 102-104 (frequent travel abroad, financial means, known and suspected political connections).

v. protect the security of the accused;

As noted above, it has been held in relation to this article of the CPC that where there is no evidence that specific threats to security of charged person can be expected, the charged person cannot be provisionally detained on this ground.¹⁰ No evidence of specific threats of this nature was presented before the court. There seems to be little risk from the facts and surrounding context that the five human rights defenders would be harmed during the period preceding trial. Indeed, it appears that the deplorable prison conditions to which they have been continuously exposed over the past seven months are having a far more detrimental impact on their wellbeing than would release on bail.

vi. maintain public order

This criterion was raised by the investigating judge in the initial detention order dated 09 May 2016. However, no facts or evidence that the release of the five would be likely to disturb public order were included in the order, nor discussed at the hearing. The release on bail of four individuals who strive to promote and protect human rights and the rule of law, and another who is a key non-partisan member of a vital state institution, appears highly unlikely to cause any disturbance to public order.

In conclusion, based on this evaluation of the relevant legal provisions, it appears that there is no justification on any of these grounds for the lengthy pre-trial detention of the five. The failure of the Cambodian authorities to present adequate reasons and supporting evidence for their detention is in violation of the CPC and IHRL. The five's detention is without an adequate legal basis in domestic law, and therefore arbitrary and unlawful, in violation of the Cambodian constitution and IHRL.

Conclusion

As well as contravening domestic law, the extended pre-trial detention of the five also violates international human rights standards, which are directly applicable in Cambodian law. As demonstrated above, there is no justifiable legal basis for the imposition or extension of their detention, nor to deny their request for bail; no adequate justification or evidence for the detention has been provided by the Cambodian authorities. Both the initial detention of the five, and its continuation and recent extension, should therefore be considered arbitrary and unlawful, in violation of Article 38 of the Constitution and Article 9 of the ICCPR. In order to bring the situation of the five into compliance with Cambodian law and IHRL, all five detainees must be immediately released.

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¹⁰ Ieng Thirith Case: Provisional Detention Appeal, ECCC, Pre-Trial Chamber, 9 July 2008, paras. 60 – 63.

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