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Cambodian Center for Human Rights

Amicus Brief regarding Mr. Vorn Pao and Seven Others - Criminal Case #936
Submission to the Court of Appeal
05 January 2016

The [Cambodian Center for Human Rights](#) (“CCHR”) is a non-aligned, independent non-governmental organization (“NGO”) that works to promote and protect democracy and respect for human rights – primarily civil and political rights - throughout the Kingdom of Cambodia (“Cambodia”). CCHR has conducted an analysis of relevant national and international law pertaining to the case of **Mr. Vorn Pao and seven other defendants**. CCHR respectfully offers to the Court of Appeal of Cambodia the following submission on the occasion of the hearing of this case on 26 January 2016.

BACKGROUND AND CHRONOLOGY

By way of background, the defendants to these proceedings are as follows:

1. Vorn Pao (Vorn Pov) – age 39,
2. Theng Savoeun – age 24,
3. Chan Puthisak – age 40,
4. Sokun Sambath Piseth – age 31,
5. Chhim Theurn (aka Chhim Thoeun, Chhem Thoeun) – age 27,
6. Yong Sam An (aka Yong Sam On, Yung Sam Orn) – age 31,
7. Lun San (aka Lorn San, Lorn Sath) – age 20,
8. Teng Chany (aka Teng Chanthy) – age 21.

The ten defendants will from here on be collectively referred to as “the Defendants”.

The current case relates to the arrest and incrimination of the Defendants in connection with protests by garment workers that took place on 2 January 2014 in Phnom Penh.

The trial was heard on 25 April, 6 May and 20-22 May 2014 in the Phnom Penh Municipal Court of First Instance.

All the Defendants were initially charged with “Intentional Violence with Aggravating Circumstances” and “Intentional Damage with Aggravating Circumstances” under Articles 218 and 411 of the Criminal Code. During the investigations, four of the defendants, human rights defenders Vorn Pao, Theng Savoeun, Chan Puthisak and Sokun Sambath Piseth, had the charges against them changed to “Intentional Incitement to Commit Crime” under Articles 494 and 495 of the Criminal Code. The charges against the four defendants were

further aggravated in the prosecutor's closing argument and changed to "instigator" of the acts of violence, which carries the same penalties as if the instigator was the perpetrator pursuant to Article 28 of the Criminal Code.

The judgment handed down on 30 May 2014 found each of the defendants guilty and imposed sentences ranging from two and a half years to four and a half years in prison. The case was filed in the Court of Appeal on 16 September 2014.

Having monitored the case, CCHR respectfully submits that the trial did not comply with international law or domestic law, and that each of the defendants was denied the right to fair trial.

LEGAL FRAMEWORK AND ISSUES

The right to a fair trial forms an important component of the rule of law and the proper administration of justice. It is comprised of a number of different individual rights, which encompass the entire legal process, from the initial arrest of the suspect, through to the completion of the final appeal. The right to a fair trial is a fundamental and universally recognized human right, enshrined at the highest level of international law by the United Nations Universal Declaration on Human Rights ("UDHR") and the United Nations International Covenant on Civil and Political Rights ("ICCPR").

Cambodia acceded to the ICCPR in 1992 and Article 31 of the Constitution of the Kingdom of Cambodia (the "Constitution")¹ enshrines international human rights obligations into Cambodian domestic law and policy. In addition, international human rights norms, including provisions of the ICCPR, are directly applicable in Cambodian courts, as confirmed by a decision of the Constitutional Council in 2007.²

The UDHR³ and the ICCPR⁴ both guarantee the right to a fair and public hearing by an independent and impartial tribunal. The ICCPR further develops the concept of a fair trial, which includes, but is not limited to, the following rights and principles:

- All persons shall be equal before the courts and tribunals;⁵
- Everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law;⁶
- Everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law;⁷

1 Article 31, Cambodian Constitution: '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,' <http://bit.ly/1hcJqYV>

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

3 United Nations General Assembly, Universal Declaration of Human Rights, 10 December 1948, Article 10, <http://bit.ly/1gisTm1>

4 United Nations General Assembly, International Covenant on Civil and Political Rights; 16 December 1966, Article 14 (1), <http://bit.ly/1j1mTd1>

5 Article 14(1) ICCPR

6 Article 14(1) ICCPR

- In the determination of any criminal charge against him/her everyone shall be entitled to the following minimum guarantees:
 - To be informed promptly and in detail in a language which is understood by the person charged to ensure that person understands the nature and cause of the charge against him;⁸
 - To have adequate time and facilities for the preparation of his/her defense and to communicate with counsel of their own choosing;⁹
 - To be tried without undue delay;¹⁰
 - To be tried in his/her presence and to defend him/herself in person or through legal assistance or have one assigned to the person without payment if the person does not have sufficient means to pay for it;¹¹
 - To examine, or have examined, the witnesses against the accused and to obtain the attendance and examination of witnesses on behalf of the accused under the same conditions as witnesses against him;¹²
 - To have the free assistance of an interpreter if the accused cannot understand or speak the language used in court;¹³
 - Not to be compelled to testify against himself or to confess guilt.¹⁴

Additionally, the UDHR provides that:

- Everyone is entitled in full equality to a fair trial and public hearing by an independent and impartial tribunal, in the determination of the accused's rights and obligations of any criminal charge against him/her;¹⁵
- Everyone charged with a penal offense has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.¹⁶

Moreover, Article 22 of the United Nations Minimum Rules for the Treatment of Prisoners¹⁷ stipulates, amongst other things:

- At every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry. The medical services should be organized in close relationship to the general health administration of the community or nation. They shall include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality; and

7 Article 14(2) ICCPR

8 Article 14(3) ICCPR

9 Article 14(3)(b) ICCPR

10 Article 14(3)(c) ICCPR

11 Article 14(3)(d) ICCPR

12 Article 14(3)(e) ICCPR

13 Article 14(3)(f) ICCPR

14 Article 14(3)(g) ICCPR

15 Article 10 UDHR

16 Article 11(1) UDHR

17 Basic Principles for the Treatment of Prisoners, UN General Assembly Resolution 45/111 of 14 December 1990

- Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, the equipment, furnishings and pharmaceuticals shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers.

Fair trial rights are also guaranteed in the Cambodian Constitution. Article 38 of the Constitution provides the basic framework for fair trials in Cambodia. It establishes the rights of Khmer citizens to a fair trial by guaranteeing that:

- There shall be no physical abuse against any individual;
- The prosecution, arrest, or detention of any person shall not be done except in accordance with the law;
- Coercion, physical ill-treatment or any other mistreatment that imposes additional punishment on a detainee or prisoner shall be prohibited; and persons who commit, participate or conspire in such acts shall be punished according to the law;
- Confessions obtained by physical or mental force shall not be admissible as evidence of guilt;
- Any case of doubt shall be resolved in favor of the accused;
- The accused shall be considered innocent until the court has judged finally on the case; and
- Every citizen shall enjoy the right to defense through judicial recourse.

Furthermore, Articles 51, 128, 130, 132 of the Constitution also provide for the separation of powers and an independent judiciary guaranteed by the King.

The right to a fair trial is thus protected in Cambodia, through general and specific provisions, set out in a number of international and national instruments. CCHR observes that the obligations to ensure a fair trial have not been fulfilled in this case, as will be clarified in the sections below.

Right to liberty, right to legal counsel and detention conditions

From the time of their arrest the defendants were held *incommunicado* for five days, without access to lawyers, medical care or their families. The authorities only revealed on 7 January that they were being held at Correctional Center 3 (“CC3”) in Kampong Cham province, six hours from Phnom Penh by car. The defendants were then held in pre-trial detention for over four months with the first hearing being held on 25 April. CCHR submits that both the *incommunicado* detention and the detention awaiting trial were not justified and in violation of the defendants’ rights to fair trial.

Firstly, Article 9(1) ICCPR protects the right to liberty and security of person, including the right not to be subjected to arbitrary arrest or detention. Additionally, the United Nations Human Rights Committee, the body charged with interpreting the provisions of the ICCPR, has recently stated, in its authoritative General comment No. 35, that *incommunicado* detention - detention without access to the outside world – that prevents prompt

presentation before a judge inherently violates article 9(3) of the ICCPR.¹⁸ It also added that depending on its duration and other facts, *incommunicado* detention may also violate other rights under the Covenant, including articles 6, 7, 10, and 14.¹⁹ The rights of detainees to communicate with the outside world and to receive visits are in fact fundamental safeguards against human rights violations, including torture and other ill treatment and enforced disappearance. Also the United Nations Committee against Torture has called for detainees to be given access to a lawyer, a doctor and their family from the time that they are taken into custody, including police custody.²⁰ Anyone who is arrested, detained or imprisoned has the right to inform, or have the authorities notify, someone in the outside world that they have been taken into custody and where they are being held.²¹ Detention without access to the outside world – *incommunicado* detention – can only be permitted in exceptional circumstances and for a very short time. These circumstances were not present in this case.

CCHR observes with concern that many of the defendants reported that the police had beaten them when they were arrested. Of particular concern is the fact that one defendant was beaten to the extent that his hand was broken. He said that the injury required surgery and will prevent him from working. CCHR respectfully submits that this violates Article 38 of the Constitution, which forbids the use of physical violence against a detainee.

Moreover, the right to have access to family, the right to access to doctors and health care in police custody, and the right to prompt access to legal counsel are also enshrined in the Convention against Enforced Disappearances that Cambodia acceded to in 2013²² and in the Body of Principles.²³ Restrictions are only permitted if necessary in the interest of justice or security and good order in the institution.²⁴ The United Nations Human Rights Committee has also stated that the protection of detainees requires that each person detained be afforded prompt and regular access to doctors.²⁵ None of these rights were respected and none of the conditions for lawful restrictions were met in the case here analysed.

The defendants, some of whom had sustained injuries as a result of beatings during their arrest, were interrogated without access to doctors, and the statements obtained were presented as evidence against them in court. This violates Article 321 of the Criminal Procedure Code, which states that any “Declaration given under the physical or mental duress shall have no evidentiary value,” and Article 38 of the Constitution, which protects citizens against confessions obtained by physical or mental force.

18 Article 9 (3) ICCPR: “Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and 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 judgment”.

19 HRC, General comment 35 (Article 9: Liberty and security of person), advanced unedited version, §35.

20 CAT Concluding Observations: Russian Federation, UN Doc. CAT/C/CR/28/4 (2002) §8 (b)

21 CAT General Comment 2, §13

22 Article 17(2) (d) of the Convention on Enforced Disappearance

23 Principle 24 of the Body of Principles

24 Principle 19 of the Body of Principles

25 HRC General Comment 20, §11

Under Article 145 of the Code of Criminal Procedure of the Kingdom of Cambodia (the “Criminal Procedure Code”), “a charged person can be interrogated only in the presence of his lawyer.” However, in case of urgency caused by danger of death or by a risk of losing evidence, the investigating judge may interrogate the charged person without summoning the lawyer. The type of urgency must be written in a report. In violation of this article, in the present case the investigating judge questioned the defendants within 24 hours of their arrest. Furthermore, the defendants were not given adequate time to meet with their legal counsel and prepare a defense before their questioning by the investigating judge and prosecutor, in violation of Article 98 of the Criminal Procedure Code, and Article 14(3)(b) of the ICCPR.

CCHR underlines that the detention of the defendants further violated Article 98 of the Criminal Procedure Code, which provides “*where the period of 24 hours from the starting of the police custody has been lapsed, the detainee may request to talk with a lawyer or other person who is selected by him/her, provided that the selected person is not involved in the offense...*”, and Article 205 of the Criminal Procedure Code, which also provides that provisional detention may be ordered only under specific circumstances.²⁶ Those safeguards were not upheld. Of the defendants arrested, all were denied bail on multiple occasions and remained in prison from early January 2014 up until 30 May 2014. They were denied their right to liberty on the basis that they would pose a threat to public order without any evidence presented in support of this allegation.

The right to a fair trial before an independent and impartial tribunal and the right to be presumed innocent

CCHR also observed that the judges in the case did not afford the defendants their rights to a fair trial before an independent and impartial tribunal.

The trials appeared deeply biased as judges restricted the presentation of evidence by the defense. Prosecutors and judges throughout the hearings repeatedly interrupted defense lawyers and defendants when the latter attempted to mention military and police brutality and to introduce evidence related to violence by the security forces. Defense counsellors were barred from presenting some evidence, such as video footage of the events that took place on 2 January 2014, while, for instance, both the judge and prosecutor introduced new evidence during the trial that was not part of the original case file. The judge produced a video on his own accord that had no relation to the 2 January 2014 events but simply showed one of the defendants giving a public speech on a separate and unrelated occasion. Finally, trials went ahead with the majority of civil parties and witnesses not present, whose written statements were instead read out in court, consequently preventing them from being cross-examined by the defense lawyers.

²⁶ Article 205 of the Cambodian Code of Criminal Procedure: “Provisional detention may be ordered when it is necessary to: stop the offense or prevent the offense from happening again; prevent any harassment of witnesses or victims or prevent any collusion between the charged person and accomplices; preserve evidence or exhibits; guarantee the presence of the charged person during the proceedings against him; protect the security of the charged person; preserve public order from any trouble caused by the offense.”

CCHR respectfully submits that the judge was not independent and impartial resulting in a clear violation of Article 128 and 129 of the Constitution, Article 14(1) of the ICCPR and Article 10 of the UDHR. CCHR also submits that the judge's conduct during the trial was also in breach of Article 11(1) of the UDHR, which provides that people are innocent until proven guilty, the onus for which falls on the prosecution, of Article 14(2) of the ICCPR, which entitles those accused with a criminal offence to "*the right to be presumed innocent until proved guilty according to the law*" and of Article 38 of the Constitution, which states that the accused "*shall be considered innocent until the court has judged finally on the case.*"

CCHR observed that during the trial the judge repeatedly asked all defendants why they were arrested if they had done nothing wrong, so equating arrest with guilt, with all of the accused also wearing orange prison uniforms which read "guilty person" on the back, giving the impression that the accused were already convicted felons. Further, the prosecution and the judge referred to protesters as 'anarchists' and 'gangsters'. CCHR underlines that an arrest does not equate to guilt and that presence at a protest does not indicate guilt for a crime. The entire premise of the trial was thus flawed.

The presumption of innocence until proven guilty according to law, which is fundamental to the protection of fair trial rights, imposes on the prosecution the burden of proving the charges and guarantees that no guilt can be presumed until the charges have been proved beyond reasonable doubt.²⁷

The right to know the nature and cause of the charge and lack of evidence

A further concern observed by CCHR is that during the trial, the prosecutor decided to raise new more serious charges against four of the defendants during his closing argument for which they were found guilty by the judge. The deputy prosecutor informed the judge during his closing argument that the criminal charges against four of the defendants should be changed from "incitement" to "instigation" because there was no evidence that they were simply observers of the protests. CCHR submits that the prosecutor's decision to change the charges and the judges guilty verdict is a violation of Article 325 of the Criminal Procedure Code, which requires that an accused must be informed of the charges against him by the judge presiding over the case as well as Article 14(3) of the ICCPR, which entitles an accused to be promptly informed of the charges against him so that he can prepare a defense. Without such knowledge the accused were not able to address the charge and prepare a defense thereby being unfairly tried.

Finally a complete lack of sufficient evidence linking the defendants to the alleged crimes was observed. No documentary or photographic evidence was presented linking the defendants to the alleged crimes. In fact, when questioned by the defense lawyers, the prosecution witnesses did not identify any of the defendants as persons who had committed the alleged crimes. The questions asked by the prosecution and the judge focused on the presence of the defendants at the protests, what they saw, and inconsistencies in their accounts of events. These questions and the defendants' answers are incapable of

²⁷ HRC, General Comment 32, §30

evidencing guilt for the alleged crimes. CCHR notes that Article 38 of the Cambodian Constitution provides that where there is doubt in the evidence it shall benefit the accused.

CONCLUSION

For all the above reasons, CCHR observes that the right to a fair trial has been repeatedly and seriously violated during the hearings of this case. Furthermore, there was not sufficient credible evidence produced to determine that any of the defendants were guilty of the charges laid against them. Therefore, CCHR calls upon the Court of Appeal to overturn the decision of the Phnom Penh Municipal Court and acquit each of the defendants.