



Justice versus corruption

Challenges to the independence of the judiciary in Cambodia

September 2015

Report of the International Bar Association's Human Rights Institute

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List of Acronyms

ASEAN	Association of Southeast Asian Nations
BAKC	Bar Association of the Kingdom of Cambodia
CCHR	Cambodian Center for Human Rights
CCP	Cambodian Code of Criminal Procedure
CNRP	Cambodia National Rescue Party
CPP	Cambodian Peoples' Party
CPRG	Commission on Promotion in Grade and Rank
ECCC	Extraordinary Chambers in the Courts of Cambodia
HRW	Human Rights Watch
IBA	International Bar Association
IBAHRI	International Bar Association's Human Rights Institute
ICCPR	International Covenant on Civil and Political Rights
MoJ	Ministry of Justice
NGO	non-governmental organisation
OHCHR	Office of the High Commissioner for Human Rights
PTC	Professional Training Centre
RAJP	Royal Academy for the Judicial Professions
SCM	Supreme Council of the Magistracy
TI	Transparency International
UN	United Nations
UNAKRT	United Nations Assistance to the Khmer Rouge Trials

Executive summary

In April 2014, drafts of three new laws on the judiciary in Cambodia were leaked to civil society. Their provisions attracted a torrent of criticism from local and international non-governmental organisations (NGOs), with commentators expressing concern that the drafts threatened to establish executive control over the judiciary, give immoral practices the veneer of legality and be passed into law without any consultation with wider society. Several Cambodian NGOs published critiques on the draft laws' shortcomings and proposed amendments in the hope that the government might take them into account before passing them into law.

The International Bar Association's Human Rights Institute (IBAHRI) added its voice to these critiques in July the same year. In an emergency press conference, held in Phnom Penh in conjunction with the United Nations (UN) Special Rapporteur on the independence of judges and lawyers Gabriela Knaul, the IBAHRI stressed that, as drafted, the three new laws would impact negatively on the independence of the judiciary and could allow for an excessive transfer of power from the judiciary to the executive. Accordingly, the IBAHRI urged authorities to delay the process by which the drafts were being made law and to engage in 'broad public consultation on the legislation'.

All this was to no avail: the day after the IBAHRI press conference, the King of Cambodia signed the three drafts – which now cover almost all aspects of the Cambodian judicial framework – without amendment, into law. In response, an IBAHRI delegation visited Phnom Penh in April 2015 to examine the situation of the Cambodian judiciary and legal profession in the context of the three newly passed laws.

This report, which is the product of that visit, research and subsequent interviews, first examines judicial independence, concluding that the Cambodian Minister of Justice has been granted – both in law and in practice – an excessively powerful role in the judiciary, with the capacity to exercise discretion and influence over almost every element of a judge's career. The scope of the Minister of Justice's power over the judiciary – including a vast amount of official influence over judicial budgets, resources, training, appointments, promotions, tenure and removal – is now legitimised by the three new laws and is inconsistent with international standards.

This report also considers other key issues facing the judiciary in Cambodia, and, in particular, bribery and corruption. Corrupt influence – political and financial – appears to be exerted at will over all judicial activities. Trainee judges are asked for bribes in order to enter onto professional training and those judges who are members of the incumbent Cambodian Peoples' Party (CPP) are favoured for appointments and promotions. It is widely acknowledged that court decisions are dictated by financial and political pressures on judges: cases in which the authorities have an interest are consistently resolved in their favour and in other cases, the party able to offer the largest bribe to a judge or clerk will almost certainly win the case, regardless of the merits.

Beyond corruption, the judiciary also faces chronic under-representation of women on the bench, and clerks and bailiffs usurping the roles of judges by effectively sitting in judgment over their cases, sometimes with – and sometimes without – the knowledge of the appointed judge. The result of all

this is that the judiciary is perceived to be an extension of the government in Cambodia; it is feared and resented by ordinary people who, where possible, avoid dealing with it altogether.

In examining the role of the legal profession in Cambodia – a key part of the framework that underpins the judiciary – the IBAHRI identified similarly serious problems. In particular, this report finds the Bar Association of the Kingdom of Cambodia (BAKC) is too politicised to be capable of fulfilling its proper function of representing and advocating for lawyers and the legal profession. There are credible allegations that the BAKC accepts bribes from lawyers entering into training, artificially restricts the number of lawyers entering the profession, permits entry by unqualified members of the CPP and is controlled by the CPP and government. This last allegation is evidenced by the BAKC's withholding of support from lawyers who are known to represent clients litigating against the interests of the state, where those lawyers then become the subjects of spurious criminal charges.

Judicial corruption and the inadequate governmental support given to the legal profession has significantly undermined the public's ability to access legal advice and representation. Cambodia's legal aid budget is insufficient for the provision of adequate legal assistance to those who need it, many of whom then appear in court without any representation at all. Where lawyers do appear, they are frequently given little time to consult with their clients and are asked for bribes in order to be permitted to see court papers. Many lawyers (though not all) engage in bribe-giving and consider it the only method by which cases can be won – an indication of how pervasive and inescapable judicial corruption in Cambodia seems. As a result of this, and the fact that many in Cambodia are not educated on what lawyers do, public confidence in the legal profession is very low.

Finally, this report considers other relevant institutions and stakeholders (Chapter Five), the first group of which is those in Cambodia who have been dispossessed of their land rights. The removal of residents of Boeung Kak (in the north of Phnom Penh) from their land following its sale by the government to a private company is typical of the situation faced by thousands across Cambodia. Their reluctance to turn to the courts for the enforcement of their rights underlines the suspicion of, and alienation from, the Cambodian judiciary felt by many.

The other two institutions and stakeholders considered in this report and the IBAHRI fact-finding mission are the Cambodia National Rescue Party (CNRP) – Cambodia's main opposition party – and the Extraordinary Chambers in the Courts of Cambodia (ECCC). Commendably, the CNRP has adopted judicial reform as part of its policy platform. However, it has been complicit in deals that serve to secure executive control over the judiciary. Similarly, while the ECCC is, in some ways, isolated from the problems that pervade the rest of the judiciary, it is nevertheless subjected to political pressure from both the government in Phnom Penh and international donors, some of whom have been alleged to withhold payments if the ECCC reaches the 'wrong' verdict.

But the situation for Cambodia is not hopeless. Despite the huge challenges, there remains significant promise for the Cambodian judiciary and legal profession if the three new laws are appropriately amended and policies adopted by relevant stakeholders to begin to reverse the damage already done. In Chapter Six, the IBAHRI sets out recommendations to the Cambodian government, the National Assembly and Senate, Supreme Council of the Magistracy (SCM), BAKC, CNRP, the NGO community, the international community, International Bar Association (IBA) and the international business

community, to begin the process of tackling the issues identified in this report and to enhance safeguards for the independence of the judiciary. There is every reason to believe that, with the right support, Cambodia's judges and lawyers can begin to play a positive role in protecting individual rights and delivering justice to ordinary Cambodians.

Chapter One:

Terms of Reference and Methodology

1.1 The International Bar Association's Human Rights Institute delegation and its mandate

This report has been prepared following an IBAHRI fact-finding mission to Cambodia in April 2015.

The mission's terms of reference were to:

- examine the independence of the judiciary in Cambodia and identify the factors, including systemic issues, affecting this independence;
- examine whether the level of judicial independence has had an impact on the resolution of flashpoint human rights issues;
- analyse the contribution of the legal profession of Cambodia to the independence of the judiciary;
- examine any related matters, including the responsibilities of key stakeholders; and
- publish a report detailing the delegation's findings and make recommendations.

1.2 Interviews and consultations

The findings are primarily based on 20 individual and group interviews, and consultations conducted by IBAHRI delegates both in Phnom Penh, Cambodia, from 21–26 April 2015, and subsequently. During the week-long mission, the IBAHRI held 19 meetings with more than 40 key stakeholders comprised of: a cross-section of the Cambodian judiciary including judges of the Cambodian Court of Appeal and the Supreme Court; representatives of the Ministry of Justice; representatives of the CNRP (the main opposition party in Cambodia); representatives of the UN Office of the High Commissioner for Human Rights (OHCHR) in Cambodia; representatives of the Bar Association of the Kingdom of Cambodia; representatives of Cambodian and international NGOs; several Cambodian lawyers; residents of the Boeung Kak area of Phnom Penh; campaigners; and the ambassador of the United Kingdom in Phnom Penh. Most individuals and organisations with which the delegation met are listed at Annex A, though some requested that they not be named.

An analysis of applicable domestic and international legal instruments, secondary sources, including NGO and UN human rights reports, academic articles and media reports was also undertaken and the report was compiled in accordance with the Guidelines on International Human Rights Fact-Finding Visits and Reports (the 'Lund-London Guidelines').

1.3 Delegation members

The IBAHRI would like to express its gratitude to the members of its fact-finding delegation: Professor Vitit Muntarbhorn, Judicial Justice Brenda Edwards, IBAHRI Director Dr Phillip Tahmindjis AM,

IBAHRI Programme Lawyer Nadia Hardman and barrister Mark Wassouf.

Professor Vitit Muntarbhorn is currently professor of law at the Chulalongkorn University in Bangkok, teaching international law, human rights, the law of regional organisations, migration and refugee law, child rights, international humanitarian law and European Union law. He has served on many UN bodies, was formerly UN Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea, as well as Special Rapporteur of the UN Commission on Human Rights on the Sale of Children, Child Prostitution and Child Pornography. He was the Chair of the International Commission of Inquiry on the Ivory Coast in 2011 and since September 2012 has been serving as a Commissioner on the Independent International Commission of Inquiry on Syria. He has performed a substantial amount of work with NGOs in the field of human rights and was awarded the UNESCO Human Rights Education Prize in 2004. He is the author of many publications on human rights issues, including women, children and human rights and human development. He holds undergraduate and graduate law degrees from Oxford University. He also holds a degree on European law from the Free University of Brussels.

Judicial Justice Brenda Edwards is a sitting Judicial Justice in Victoria's Integrated Court – a specialised Criminal Court for mentally disordered and substance-addicted persons – and a board member of several administrative law tribunals. Having graduated from the University of Ottawa in 1989, she was called to the bar of British Columbia in 1990. She practised law as legal counsel in the Ministry of the Attorney General (1990–1997) during which time she appeared as legal counsel in the Supreme Court of Canada on a major aboriginal land title case. In 1997, she was appointed as an Assistant Deputy Minister and Legal Counsel in the Office of the Premier, where she provided legal advice to the Premier of British Columbia and Executive Branch of government. In 1999, she was appointed as Assistant Deputy Minister of the Crown Corporations Secretariat of the Ministry of Finance. In 2006, she returned to the practice of law as legal counsel in the Office of the Chief Judge where she provided legal, strategic and policy advice to the Chief Judge. She was appointed a Judicial Justice of the Provincial Court of British Columbia in 2008.

Dr Phillip Tahmindjis is the Director of the IBAHRI and a trustee of the Southern Africa Litigation Centre. Admitted to the bar of New South Wales in 1978, he was a professor of human rights, teaching and researching in Australia, North America and Hong Kong. He has been a consultant to private industry and government on human rights implementation (particularly with respect to anti-discrimination) and is the author of four books and several articles in this area, including *Sexuality and Human Rights: A Global Overview* (Haworth Press, 2005) and the 2005 special issue of the International Journal of Discrimination and the Law devoted to comparative studies of sexual harassment laws. He was for three years a Member of the Queensland Anti-Discrimination Tribunal and is a trained mediator. He has undertaken fact-finding missions for the IBAHRI in Syria, Swaziland, Nepal and Pakistan.

Nadia Hardman is a Programme Lawyer at the IBAHRI and her portfolio includes the management of fact-finding missions in Egypt and Azerbaijan, including following up on their recommendations, and the design and implementation of a capacity-building project working with the new unified bar association in Tajikistan. Nadia is an English qualified lawyer with a Master's in Human Rights from University College London. She has worked in the Prosecutor's Office at the International Criminal Court, several London-based human rights NGOs and as an International Legal Consultant for an

anti-human trafficking NGO in Cambodia, where she implemented several access to justice projects. Prior to working for the IBAHRI, Nadia was Deputy Head of Partnerships and Legal Services at the London-based development charity Advocates for International Development, where she managed an international pro bono project.

Mark Wassouf is an English barrister practising at Doughty Street Chambers. He specialises in public international law, human rights and international arbitration. Mark has represented governments, corporations and individuals in proceedings before the International Criminal Court, international arbitrations and domestic proceedings in England and Wales. He regularly advises governments and individuals on international law and has acted alongside local counsel in several developing jurisdictions to advise on the invocation of international law before domestic courts. Mark was previously an assistant to the rapporteur on the IBAHRI's report on the independence of the Egyptian judiciary. Among other cases, he is currently co-counsel to Mohamed Fahmy, a Canadian-Egyptian imprisoned in Egypt for journalistic activities related to his role at Al-Jazeera; co-counsel to Ibrahim Halawa, an Irish citizen currently detained in Egypt having been arrested during confrontations between the Muslim Brotherhood and the Egyptian police; and junior counsel to the Goddard Inquiry into allegations of child sexual abuse in England and Wales.

Chapter Two: The Evolving Context

2.1 Recent history

The reign of Pol Pot's Khmer Rouge – known as the 'Democratic Kampuchea' regime – lasted less than four years (from April 1975 until January 1979) and ended more than 35 years ago, but its legacy casts a long shadow over Cambodia today. In an era of extreme ideologies, the Khmer Rouge's brand of communism was radical and uncompromising, and under it Cambodia became the scene for a vast and brutal social and political experiment. The party's aim was to create nothing less than an agrarian utopia, purged of all individuals and institutions deemed to be incompatible with the Khmer Rouge's understanding of communism. To that end, all existing laws were abolished, courts were shut down, intellectualism became punishable by death, and millions upon millions were killed or perished.¹

The judiciary was all but non-existent. By the time the Khmer Rouge was driven from Phnom Penh there were no laws to implement – and no one to administer their application had there been any. So thoroughly had the Khmer Rouge purged society of its intellectuals that on the liberation of Phnom Penh in January 1979 there remained, by one estimate, only ten individuals with any kind of legal education in the whole of Cambodia.² The judiciary, which had been a civil, French-modelled system until 1975, then slipped into obscurity and lost its place in the Cambodian social compact.

In April 1979, Vietnamese communist forces invaded Cambodia and took control of Phnom Penh from the Khmer Rouge. That action, though celebrated in much of Cambodia, was viewed with suspicion in the non-communist world and ushered in a period of more than ten years during which Cambodia was left to its own devices. Despite the fact that it was no longer governed by Pol Pot's Khmer Rouge, with its government dominated by Vietnam, Cambodia was perceived to be a part of the communist bloc of nations and was subjected to aid and trade embargoes by the United States.³ From 1979 until 1991, Cambodia grew steadily poorer and the problems created by the Khmer Rouge – including the abolition of the judiciary and legal rights – went almost entirely unaddressed. In 1985, Hun Sen, a former Khmer Rouge commander-turned-rebel, became the Vietnam-approved prime minister of Cambodia, a position he continues to occupy today.

After the fall of the Soviet Union in 1991, a peace accord was finally signed to mark the official end of the Vietnam–Cambodia war. Vietnamese forces withdrew from Cambodia and the UN was given an extraordinary mandate to take over the administration of the country, leading to the drafting of Cambodia's present constitution (the 'Constitution') and, in 1993, the holding of Cambodia's first elections. Under significant international pressure to reform the country, the elected government – ruling in conjunction with Hun Sen⁴ – made judicial reform one of its key policy platforms and promised to introduce legislation to support the creation of a judicial framework for Cambodia.

1 'Introduction to the ECCC' (ECCC, 2015), www.eccc.gov.kh/en/about-eccc/introduction, last accessed 26 July 2015. All URLs hereafter last accessed 26 July 2015, unless otherwise specified.

2 Roderic Broadhurst, 'Cambodia: A criminal justice system in transition', in Cindy J Smith, Sheldon X Zhang and Rosemary Barberet (eds), *Routledge Handbook of International Criminology* (Routledge, 2011) 338.

3 'No More Embargoes' (*The Phnom Penh Post*, 30 July 1993), www.phnompenhpost.com/national/no-more-embargoes.

4 According to Joel Brinkley, a journalist who was present in Cambodia during this period, Hun Sen refused to step down to make way for the elected government, hence the decision to come to a compromise.

Between 1975 and 1993, Cambodia had no laws to direct the performance of any kind of judicial function. After the 1993 elections, there was a push to improve the legislative framework and a law on the organisation of the judiciary was promulgated. Cambodia enacted its second law on the legal framework underpinning the judiciary in 1994: a law on the SCM. Those first versions of these two laws were short and, in the opinion of judges with whom the IBAHRI delegation met in April 2015,⁵ inadequate as a means by which to protect the independence of the judiciary. The three laws passed in 2014 (detailed in section 2.3) were supposedly attempts to rectify the problems that were created, or otherwise left unaddressed, by this initial legislative framework.

2.2 Cambodia today

Cambodia has come a long way since 1995 and, while it continues to face great challenges, today it is a country aspiring to success. In recent years, efforts to address the country's economic and social problems have borne some fruit: in the course of the first decade of this century, the poverty rate almost halved,⁶ the economy grew at a sustained rate and healthcare for particularly devastating diseases such as HIV and tuberculosis improved significantly.⁷

Cambodia also has a robust civil society in Phnom Penh (though the IBAHRI delegation was told that civil society is much weaker outside the capital), the confidence of which is at times surprising, given the political climate. Cambodia is a country with an extraordinary number of NGOs and an outspoken, engaged population, which is sophisticated and vocal in addressing important issues. Although the number and purpose of these NGOs has caused controversy recently in Cambodia (by some estimates the country has the second highest number of NGOs per capita in the world, exceeded only by Rwanda)⁸ it has helped Cambodia to develop pockets of free expression that stand starkly at odds with the prevailing political atmosphere. Many of these NGOs are dominated by Cambodians belonging to a generation that is reaping the benefits of increased education levels and greater international assistance with the issues facing Cambodia over the past two decades.

Partly as a result of campaigning by civil society and pressure from foreign organisations and governments, judicial reform and capacity-building has received a greater degree of attention in the past two decades than it has previously. In 1995, when the BAKC was formed, there were still only 30 lawyers in the whole of Cambodia, serving a population of over ten million.⁹ As of 2014, the number of practising lawyers had risen to 698 – the vast majority of whom have undertaken training courses delivered at the new Professional Training Centre (PTC) and hosted by the Royal Academy for the Judicial Professions (RAJP) in Phnom Penh.¹⁰

5 IBAHRI meeting with senior members of the Court of Appeal, 20 April 2015; meeting with the Vice-President of the Supreme Court, 22 April 2015.

6 World Bank, 'Poverty has fallen, yet many Cambodians are still at risk of slipping back into poverty, new report finds' (World Bank, 20 February 2014), www.worldbank.org/en/news/press-release/2014/02/20/poverty-has-fallen-yet-many-cambodians-are-still-at-risk-of-slipping-back-into-poverty.

7 World Bank, 'Cambodia: Overview' (World Bank, April 2015), www.worldbank.org/en/country/cambodia/overview.

8 Ven Rathavong, 'Cambodia Prepares NGO Law' (*Khmer Times*, 22 January 2015), www.khmertimeskh.com/news/8200/cambodia-prepares-ngo-law.

9 IBAHRI meeting with the BAKC.

10 This figure is taken from the 2014 Cambodian Directory of Lawyers, an annual publication that sets out the names and details of all legal practitioners in the country.

Other positive developments for the judiciary have been cautiously welcomed by the international community. In July 2014, though her speech highlighted many of the shortcomings of the Cambodian judicial system, the UN Special Rapporteur on the independence of judges and lawyers Gabriela Knaul, ‘commend[ed] the efforts made by Cambodia to promote judicial reforms’.¹¹

But problems persist and, notwithstanding certain positive social and economic changes in Cambodia, the country continues to be run more or less as an autocracy by the CPP. Thirty of the 35 years since the Khmer Rouge’s ouster have been dominated by one man, Prime Minister Hun Sen, and his administration. Hun Sen’s rule has attracted a great deal of criticism from international NGOs and governments: according to Human Rights Watch (HRW), the Hun Sen years have been marked by ‘political violence, repression and corruption’; all manner of human rights abuses have been tolerated, or even encouraged, in the course of the past three decades.¹² The last general election, held in 2013, attracted allegations of widespread fraud against members of the CPP and both local and international NGOs called for an independent commission to examine the validity of these allegations (at the time of writing, none has been carried out).¹³

Of immediate relevance to the IBAHRI delegation, Cambodians have continued to routinely report that they lack confidence in their judiciary’s ability to deliver justice. In June 2015, the World Justice Project ranked Cambodia 99th out of 102 countries studied for the strength of the rule of law in them,¹⁴ with only Afghanistan, Venezuela and Zimbabwe ranking lower. Cambodia was one of the few countries in which all of the nine factors suggested by the survey as potentially influencing an individual’s decision to take a dispute to court – including fees, lack of legal aid, bias against marginalised people and corruption – were deemed not only applicable but ‘important’ or ‘very important’.¹⁵ Faith in the reliability and accountability of the police is equally low.¹⁶ NGOs with whom the IBAHRI delegation spoke reported that this combination of low regard for the courts and low regard for the police has been toxic and has led to a situation where many Cambodians not only distrust the courts’ agendas but fear any engagement with them whatsoever.¹⁷

2.3 The three new laws¹⁸

It is against this background of widespread dissatisfaction with the judiciary and judicial institutions that, in June 2014, three new laws on the judiciary were passed, supposedly aiming to improve organisation and regulation:

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- 11 Gabriela Knaul, ‘Intervention by the United Nations Special Rapporteur on the independence of judges and lawyers’ (IBAHRI 15 July 2014), 4, delivered at the IBAHRI Press Conference on Cambodia’s Draft Judicial Laws, Raffles Hotel Le Royal, Phnom Penh, Cambodia, available at www.ibanet.org/Document/Default.aspx?DocumentUid=6499E34F-B76A-4CF5-89D8-3E798D8461EE.
 - 12 ‘Cambodia: 30 years of Hun Sen Violence, Repression’ (HRW, 13 January 2015), www.hrw.org/news/2015/01/13/cambodia-30-years-hun-sen-violence-repression.
 - 13 ‘Cambodia: Ruling Party Orchestrated Vote Fraud’ (HRW, 31 July 2013), www.hrw.org/news/2013/07/31/cambodia-ruling-party-orchestrated-vote-fraud.
 - 14 World Justice Project, Rule of Law Index 2015, 6, available at http://worldjusticeproject.org/sites/default/files/roli_2015_0.pdf; United Nations, The Millennium Development Goals Report 2013 (United Nations 2013), <http://mdgs.un.org/unsd/mdg/Resources/Static/Products/Progress2013/English2013.pdf>.
 - 15 The nine factors are: court fees, attorney fees, lack of legal aid, location of courts, duration of cases, bias against marginalised people, cumbersome procedures, corruption and lack of awareness of remedies. World Justice Project, Rule of Law Index 2015, 45 (see n 14).
 - 16 *Ibid.*, 49.
 - 17 IBAHRI meeting with Transparency International, 22 April 2015.
 - 18 Unofficial English translations of drafts of these laws (as well as other key Cambodian laws) are available on the website of a Cambodian NGO: ‘Source of Human Rights Information Sharing in Cambodia’ (*sithi.org*), http://sithi.org/temp.php?url=law_infrastructur.php&tab_id=&type=1&lg=#.VBpmlZSSx0x.

- the Law on the Organization and Functioning of the Supreme Council of the Magistracy (the ‘Law on the SCM’);
- the Law on the Status of Judges and Prosecutors (the ‘Law on Judges and Prosecutors’); and
- the Law on the Organization and Functioning of the Courts (the ‘Law on the Courts’).

(Collectively, the ‘three new laws’)

Background to the three new laws

The three new laws have been in existence as proposed drafts since at least 2004.¹⁹ For almost a decade, there was no substantial action taken to progress the drafts or to pass them into law. This inaction led to a great deal of criticism of the Cambodian government, with international organisations accusing it of ‘foot-dragging’ over the question of judicial reform during this period.²⁰ Several individuals with whom the IBAHRI delegation met expressed disappointment at the fact that the government had not been more proactive in developing the framework governing the judiciary in conjunction with members of civil society. In 2013, then-UN Special Rapporteur for the situation of human rights in Cambodia Professor Surya Subedi included in his report to the UN Human Rights Council an appeal to the Cambodian government to pass the laws as soon as possible, though only after due consultation with key stakeholders.²¹

Events gathered pace quickly in the first half of 2014. Drafts of the three new laws were hurriedly adopted by the Council of Ministers on 18 April 2014 and the government prepared to put them to the National Assembly. This gathering took place against the backdrop of a CNRP boycott of parliament and it has been suggested that the absence of the CNRP politicians was seen as an opportunity to limit any potential for opposition to the drafts.²² The Council of Ministers had not followed an inclusive consultation process prior to adopting the drafts and seemed to wish to avoid engaging in one.²³ Prime Minister Hun Sen even acknowledged that civil society was concerned at the lack of consultation in a speech on 28 April 2014 in which he is reported to have said that NGOs and civil society organisations ‘say that it is too soon to pass the law because we have not consulted with them.’ He nevertheless took no steps to rectify the situation.²⁴

It was during the period following the submission of the draft laws to the National Assembly that copies of them were leaked and strong concerns about certain provisions were expressed. A great number of NGOs and civil society organisations encouraged the government to withdraw the drafts before they became law and to make time for a proper consultation on their content.²⁵ The IBAHRI was one such organisation and, in July 2014, it held an emergency press conference in Phnom Penh

19 The IBAHRI delegation was told by more than one source that drafts had first been put to cabinet in 2004. The CCHR confirms that a draft of the Law on the Statute of Judges and Prosecutors was put before the MoJ and the Cabinet of Ministers in 2005: see ‘Three Draft Laws Relating to the Judiciary’ (CCHR, May 2014), 2, available at [www.cchrcambodia.org/admin/media/analysis/analysis/english/2014_06_17_CCHR_Analysis_of_the_Draft_Laws_on_Judicial_Reforms_\(ENG\).pdf](http://www.cchrcambodia.org/admin/media/analysis/analysis/english/2014_06_17_CCHR_Analysis_of_the_Draft_Laws_on_Judicial_Reforms_(ENG).pdf).

20 ‘Years of outrageous foot-dragging,’ Brad Adams, HRW Asia Director, as quoted in ‘Cambodia: Withdraw Fundamentally Flawed Judiciary Laws’ (HRW 4 May 2014), www.hrw.org/news/2014/05/03/cambodia-withdraw-fundamentally-flawed-judiciary-laws.

21 Report of the Special Rapporteur on the situation of human rights in Cambodia, Surya P Subedi, A/HRC/24/36 (5 August 2013) 7.

22 Freedom House, ‘Cambodia: Overview’, available at <https://freedomhouse.org/report/freedom-world/2014/cambodia#.VYgznSvF9PI>.

23 See n 19, ‘Three Draft Laws’ (CCHR 2014). See also Human Rights in ASEAN, ‘Civil society condemns the passing of three flawed judicial reform bills and reiterates call for public consultation’ (Human Rights in ASEAN Online Platform), <http://humanrightsinasean.info/campaign/civil-society-condemns-passing-three-flawed-judicial-reform-bills-and-reiterates-call>.

24 *Ibid.*

25 See n 20, ‘Withdraw Fundamentally Flawed Judiciary Laws’ (HRW, 2014).

in conjunction with Gabriela Knaul, UN Special Rapporteur on the independence of judges and lawyers, during which it ‘expressed deep concern over controversial judicial reforms which could provide an excessive transfer of power from the judiciary to the executive in the Royal Kingdom of Cambodia.’²⁶

The government bypassed a consultation process altogether and the drafts were passed into law by the National Assembly on 23 May 2014.²⁷ Many of the NGOs and individuals with which the IBAHRI delegation met during its 2015 visit told the delegation that they had made repeated requests to be consulted on the text of the draft law but none were granted. The same complaint was made to the delegation by members of Cambodia’s main opposition party – the CNRP – who described the way in which the government had handled the consultation phase as more of a ‘presentation’ than a ‘consultation’. Many NGOs published their views about the three new laws online and in Cambodian publications, hoping to influence the drafting process from afar.²⁸

The hopes of these organisations appear to have been in vain, as the Cambodian senate, having made no amendments to the drafts at all, approved them on 12 June 2014. On 2 July 2014, the Constitutional Council announced that it had no objection to the laws and they were signed into effect by the King on 16 July 2014.²⁹ Today, the laws are binding in Cambodia and govern almost every aspect of the way in which its judiciary operates.³⁰

Summary of the laws and concerns raised

Each of the three laws functions to regulate a distinct element of the Cambodian judiciary but, while the criticisms from civil society similarly differed, many of the concerns raised ultimately related to the powerful and privileged position reserved for the Minister and Ministry of Justice (respectively, the ‘Minister’ and the MoJ).

The text for all three draft laws became public soon after their adoption by the Council of Ministers on 18 April 2014 and attracted criticism both from within Cambodia and internationally. A description of each law’s purpose and substance, and a summary of the primary concerns raised, is given hereafter.

THE LAW ON THE SCM

The purpose of the Law on the SCM is to regulate the composition and functions of the SCM, which acts as the overall regulatory body for judges and prosecutors, and has the power to appoint, promote, discipline and remove them from office. Although it is nominally chaired by the King, the IBAHRI delegation was informed by several individuals with whom it met that the King has only very occasionally assumed the chair in practice, with the Minister chairing the vast majority of the SCM’s meetings.

26 IBA, ‘Press conference – Cambodia’s judicial reform laws’ (IBA, 15 July 2014), www.ibanet.org/Article/Detail.aspx?ArticleUid=8ca302f7-abba-4a74-a462-372d751da449.

27 ‘Cambodia’s Parliament Passes Laws “Threatening Judicial Independence”’ (Radio Free Asia, 23 May 2014), www.rfa.org/english/news/cambodia/laws-05232014201001.html.

28 See n 19, ‘Three Draft Laws’ (CCHR, 2014); and n 20, ‘Withdraw Fundamentally Flawed Judiciary Laws’ (HRW, 2014).

29 Stuart White, ‘King Oks Judiciary Laws’ (*The Phnom Penh Post*, 15 August 2014), www.phnompenhpost.com/national/king-oks-judiciary-laws.

30 See Chapter Three of this report, which discusses specific provisions of the laws and the way in which they dictate that the judiciary should be governed.

Serious concerns were raised by civil society and NGOs both inside Cambodia and internationally, about the potential impact and effectiveness of the law. In particular, that:

- the inclusion of members of government and the National Assembly on the SCM would undermine the principle of separation of powers;³¹ and
- the proposed law would grant too much power to members of the executive and the legislative branches – most notably the Minister himself – over the judiciary.³²

THE LAW ON JUDGES AND PROSECUTORS

The Law on Judges and Prosecutors is intended to complement the Law on the SCM and it sets out in greater detail the functions required and standards expected of judges and prosecutors. The law concerns, for example, the mechanics and standards applied to judicial promotion and discipline; the principles of conduct of judges and prosecutors; and the composition of key bodies that exercise power over judges and prosecutors.

Criticism of the draft by NGOs and civil society again focused on the role proposed for the Minister and the MoJ, specifically:

- the law granted the Minister a seat on the Commission on Promotion in Grade and Rank (CPRG), the body responsible for appointing and promoting judges, again threatening the principle of the separation of powers; and
- the draft law permitted the Minister to appoint other members of the CPRG, raising a concern that judges would have an incentive to decide issues related to promotions in the Minister's favour.³³

THE LAW ON THE COURTS

The Law on the Courts governs administrative matters related to the structure and functioning of courts in Cambodia and of prosecutorial units attached to them. The law's ambit covers, for example, budgets of judicial institutions, their structure and other matters relevant to their administration.

The criticism of the draft focused on the proposed role given to the Minister, for example:

- the law granted the Minister a great deal of power over courts' budgets;³⁴ and
- the Minister would be responsible for all administrative matters relating to the courts.³⁵

2.4 Plans for the future

The three new laws, and Cambodia's judiciary more widely, cannot be viewed in either a historical or legislative vacuum. During its visit to Cambodia, the IBAHRI delegation heard from representatives of

31 See n 19, 'Three Draft Laws' (CCHR, 2014).

32 *Ibid.* See also n 20, 'Withdraw Fundamentally Flawed Judiciary Laws' (HRW, 2014).

33 See n 19, 'Three Draft Laws' (CCHR, 2014) 8.

34 See n 19, 'Three Draft Laws' (CCHR, 2014) 10.

35 See n 19, 'Three Draft Laws' (CCHR, 2014) 10.

the judiciary and the CPP that the three new laws form a fundamental part of the government's five-year policy paper, and should therefore be viewed as a step towards the achievement of the aims set out in that document.³⁶ Others with whom the delegation met considered the situation to be much bleaker: the opinion repeatedly voiced, by NGOs and others, was that the three new laws can be seen as part of a trend towards of government-sponsored legislation that entrenches and codifies executive control over various sectors of society, not only the judiciary.³⁷

The Rectangular Strategy

The aforementioned policy paper, entitled the 'Rectangular Strategy',³⁸ sets out the Cambodian government's development policy platform for five years (2013–2018). Among other agendas, the document identifies the development of the judiciary as one of its 'core' development strategies. Specifically, it sets out the following aims, all of which are intended to be achieved within the present parliament:

- '(1) Further promoting the adoption of key legislation concerning judiciary [...];
- (2) Further strengthening of professional capacity and responsibility of judges and prosecutors;
- (3) Further promoting the establishment of court administration attached to tribunals at all levels;
- (4) Further equipping the tribunals with appropriate means to perform their functions;
- (5) Further implementing law dissemination and training programs;
- (6) Further extending cooperation and support to the Bar Association of the Kingdom of Cambodia to provide legal assistance to the poor for defending their rights and interests in the court system; and
- (7) Further promoting the out-of-court settlement mechanisms.'³⁹

Alongside reform of the judiciary, the document identifies 'fighting corruption', 'public administration reform' and 'reform of the armed services' as other key policy areas for the advancement of good governance in Cambodia.⁴⁰

Concerns regarding planned legislation

During the IBAHRI delegation's visit to Cambodia, many of the individuals and organisations with whom it spoke expressed concern about other legislation currently planned (or rumoured to be planned) by the government.⁴¹ Given the scope of the present report, the delegation has not considered these other draft laws in any detail, but has included brief descriptions of the concerns raised in this section for completeness. Given the frequency with which these laws were mentioned

36 IBAHRI meeting with the MoJ, 22 April 2015; meeting with the Vice-President of the Supreme Court, 22 April 2015; meeting with senior members of the Court of Appeal, 20 April 2015.

37 Among others, IBAHRI meeting with Transparency International, 22 April 2015; meeting with the Raoul Wallenberg Institute, 22 April 2015; meeting with the Cambodian Human Rights and Development Association (ADHOC), 23 April 2015.

38 Available at www.cambodiainvestment.gov.kh/content/uploads/2013/11/2013-Rectangular-Strategy-III-En8.pdf.

39 Rectangular Strategy [42].

40 *Ibid*, part 2.

41 In particular, IBAHRI meeting with Cambodian League for the Promotion and Defense of Human Rights (LICADHO), 23 April 2015.

during the delegation's visit to Cambodia and the fact that they were considered by some to fall within the same legislative programme as the three new laws on the judiciary, they form important background to the legal and political context within which the delegation has carried out its fact-finding. In brief, concerns were raised about the following:

THE DRAFT LAW ON CYBERCRIME⁴²

Concerns were expressed that a draft law on cybercrime imposes unreasonable restrictions on the publication of views online, threatening to undermine freedom of expression on the internet.⁴³ Despite the fact that some reports suggested the draft law had been abandoned at the end of 2014,⁴⁴ the delegation nevertheless heard from many people interviewed that they understood the project to introduce this law to be ongoing and feared that draft legislation would be tabled with the National Assembly in the near future.⁴⁵

THE DRAFT LAW ON THE REGULATION OF NGOS

At the time of writing, a draft law on the regulation of NGOs had been adopted by the Council of Ministers and plans were in motion for it to be submitted to the National Assembly on 23 June 2015.⁴⁶ Even prior to the leaking of its contents, the law had already attracted a great deal of criticism from NGOs.⁴⁷ On 14 June 2015, a draft of a new law on NGOs was finally disclosed and critics have protested that its provisions give the government effectively arbitrary power to deny registration to associations and NGOs, as well as suspend and dissolve them.⁴⁸ The IBAHRI delegation heard from several individuals and organisations with which it met that they feared the law would be abused to stifle civil society and erode freedom of expression in the country.

THE DRAFT LAW ON TELECOMMUNICATIONS

A draft for a new telecommunications law was released in July 2014; its present status is, however, unclear. The 2014 draft expressly gave powers to the government to seize telecoms companies and infrastructure in order to maintain 'effective security, national stability and public order'.⁴⁹ Individuals with whom the IBAHRI delegation spoke expressed concern that the law would be used to restrict telecoms networks in Cambodia and to bring them under the effective control of the government.

42 'Cambodian Authorities Drafting New Laws to Curtail Freedom, Groups Say' (Radio Free Asia, 10 October 2014), www.rfa.org/english/news/cambodia/new-laws-10102014182751.html.

43 'Cambodia: Secret Draft Cybercrime Law Seeks To Undermine Free Speech Online' (Article 19, 9 April 2014), www.article19.org/resources.php/resource/37516/en/cambodia-secret-draft-cybercrime-law-seeks-to-undermine-free-speech-online.

44 Chris Mueller and Khuon Narim, 'Controversial Cybercrime Law "Scrapped"' (*The Cambodia Daily*, 12 December 2014), www.cambodiadaily.com/news/controversial-cybercrime-law-scrapped-74057.

45 IBAHRI meeting with LICADHO, 23 April 2015.

46 Agence France Presse, 'Cambodian government passes controversial NGO law' (*The Daily Star*, 5 June 2015), www.dailystar.com.lb/News/World/2015/Jun-05/300732-cambodian-government-passes-controversial-ngo-law.ashx.

47 'Cambodia: Rights Groups Urge End to NGO Law' (HRW, 1 June 2015), www.hrw.org/news/2015/06/01/cambodia-rights-groups-urge-end-ngo-law.

48 The CNRP has taken a strong stance against the passage of the new law and vowed to 'kill it' at the national assembly; see Neou Vannarin, 'Opposition Hopes To Kill Draft NGO Law at National Assembly' (Voice of America Khmer 23 June 2015), www.voacambodia.com/content/opposition-hopes-to-kill-draft-ngo-law-at-national-assembly/2832352.html.

49 Eddie Morton, 'Gov't gives telecom firms time to digest new draft law' (*The Phnom Penh Post*, 29 July 2014), www.phnompenhpost.com/business/gov%E2%80%99t-gives-telecom-firms-time-digest-new-draft-law.

A draft of a new law on trade unions was disclosed in May 2014. In the aftermath of that leak, civil society criticised the law for ‘underlin[ing] the government’s intent to interfere with and infringe upon union formation and activities’.⁵⁰ At the time of writing, the law remains in the drafting stage, with several Cambodian trade unions continuing to express concern about potentially negative repercussions if it were to be passed.⁵¹

50 Community Legal Education Center (CLEC) and LICADHO, ‘Joint Legal Analysis of the Draft Law on Unions of Enterprises’ (LICADHO, 18 September 2014), available at www.licadho-cambodia.org/pressrelease.php?perm=359.

51 Phorn Bopha, ‘Labor Law Still Being Drafted, Despite Union Concerns’ (Voice of America Khmer, 1 June 2015), www.voacambodia.com/content/labor-law-still-being-drafted-despite-union-concerns/2803157.html.

Chapter Three: The Judiciary

Against the background set out in Chapter Two, the remainder of this report considers, first, in this Chapter, the extent to which the independence of the judiciary is protected in Cambodia, both in theory and in practice; and, second, the contribution of the legal profession to the Cambodian judiciary (Chapter Four). Chapter Five of the report sets out the delegation's observations on other stakeholders and institutions, before closing with the delegation's conclusions and recommendations at Chapter Six.

3.1 International standards

Judicial independence is one of the fundamental building blocks of a just and effective state. It is 'a pre-requisite to the rule of law and a fundamental guarantee of a fair trial'.⁵² In principle, 'judicial independence' does not exist for the protection of the judiciary; it exists for the protection of the public and is intended to protect the right of the public to appear before an independent and impartial tribunal.

The right to a fair trial is enshrined in Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR), to which Cambodia is a party.⁵³ This means that the rules regulating the court system – including the procedure and requirements for the appointment of judges, their security of tenure, the conditions governing their promotion, transfer and suspension, and the rules on judicial immunities – must guarantee judicial independence.

Non-binding agreements and instruments provide a greater level of detail. International standards on judicial independence are found in UN instruments including the UN Basic Principles on the Independence of the Judiciary, published in 1985 (the 'UN Principles'). The UN Principles state that the 'independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country'.⁵⁴ The IBA has also promulgated IBA Minimum Standards of Judicial Independence,⁵⁵ and judicial ethics and codes of conduct regarding professionalism are the subject of numerous national, regional and international instruments.⁵⁶

Also relevant are the standards set out in the Bangalore Principles of Judicial Conduct (the 'Bangalore Principles'). The product of several years of work by the Judicial Group for the Strengthening of Judicial Integrity (JGSJI) comprising ten Chief Justices from Asia and Africa, the

52 The Bangalore Principles of Judicial Conduct 2002, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, 25–26 November 2002), available at www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf.

53 Cambodia ratified and acceded to the ICCPR in 1990 (see <http://indicators.ohchr.org>). The status of international obligations in Cambodian law is unclear. The delegation was told by some that Article 8 of the Constitution, which makes the King 'the guarantor of international treaties', acts to make treaties entered into directly applicable as a matter of domestic law. However, the delegation was not able to obtain an authoritative explanation of the point.

54 UN Basic Principles on the Independence of the Judiciary (1985), adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August – 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Art 1, available at www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx.

55 IBA Minimum Standards of Judicial Independence, adopted 1982, available at www.ibanet.org/Document/Default.aspx?DocumentUid=bb019013-52b1-427c-ad25-a6409b49fe29.

56 See, for example, the International Criminal Court Code of Judicial Ethics (2003); European Charter on the Statute for Judges of the Council of Europe (1998); Code of Judicial Conduct by the House of Delegates of the American Bar Association (1972).

Bangalore Principles were endorsed by the UN Commission on Human Rights in 2003.⁵⁷ They provide guidance on a range of issues relating to judicial independence. In summary, they establish that the hallmark of judicial independence is a judiciary that operates without any restrictions, improper influences, inducements, pressures, threats or interference from either the legislative or the executive branches of government, to ensure that individual judges are truly independent and are neither beholden to, nor subject to influence from, the executive.

National legal systems differ greatly in how they structure their judicial and other branches of government in order to comply with international standards and there is no single way to achieve the right balance. Nevertheless it is widely accepted that, whatever mechanism is chosen, it should at its core have the guarantee of impartiality and independence. States should therefore adopt legislation and measures to ensure that there is a clear demarcation between the competences of the executive and judicial branches of government so that the former cannot interfere in matters for which the judiciary is responsible. In addition, judges may not, during their term of office, serve in executive functions – such as ministers of the government – nor may they serve as members of the legislature or of municipal councils.

3.2 The Cambodian constitutional framework

The starting point in determining the place of international obligations under Cambodian law is Article 26 of the Cambodian Constitution, which provides that '[t]he King shall sign and ratify international treaties and conventions after a vote of approval by the National Assembly'.⁵⁸ Obligations under the core human rights treaties are referenced specifically in the Constitution at Article 31, which requires Cambodia to 'recognise and respect' human rights in particular international conventions.⁵⁹

The IBAHRI delegation received inconclusive advice as to whether this framework creates a monist or dualist legal system – which is to say, whether rights created by treaties are directly enforceable in court as a matter of Cambodian domestic law or whether they require enacting legislation in order to become so. The delegation was provided with examples of cases in which international obligations had been invoked during domestic proceedings, suggesting that some lawyers are at least open to the idea of using them as a cause of action, or in support of a cause of action.⁶⁰

A 2007 decision from the Constitutional Council also confirms that international law is a 'source' of Cambodian law, but did not go so far as to say that international treaties could be relied upon in the same way as statutes.⁶¹ Nevertheless, some of the individuals with whom the IBAHRI delegation met were of the view that international treaties could not create causes of action before the domestic courts without enacting domestic legislation.⁶²

57 UN General Assembly, Report of the Human Rights Council, A/HRC/Res/19/36, 23 March 2012, [16(b)].

58 Cambodian Constitution, Art 26.

59 Art 31 of the Constitution, in relevant part, reads as follows: '[t]he Kingdom of Cambodia shall recognize and respect human rights as stipulated in the UN Charter, the Universal Declaration of Human rights, the covenants and conventions related to human rights, women's and children's rights'.

60 Case summaries received from OHCHR in a meeting with the delegation on 21 April 2015.

61 The Constitutional Council of Cambodia, Case No 131/003/2007 of 26 June 2007, Decision No 092/003/2007 CC.D, 10 July 2007.

62 Representatives of the MoJ, for example, in a meeting on 22 April 2015, told the delegation that treaties may only be relied upon after their text has been included in the body of an implementing law.

The Constitution itself does enshrine the independence of the judiciary at Article 128,⁶³ while Article 130 prevents the legislative and executive branches from being granted judicial power and Article 132 makes the King the guarantor of the independence of the judiciary, to be assisted by the SCM.⁶⁴

The protection and guarantees of judicial independence provided by the Constitution are expressed to be the subject of rules envisaged in the Constitution to ‘be defined in separate laws’. Articles 134 and 135 of the Constitution delegate the regulation of judicial functions to two of the three new laws, namely, the Law on Judges and Prosecutors and the Law on the Functioning of the Judiciary. Relevant provisions of these two laws, as well the Law on the SCM, are referenced below, where relevant.

3.3 Challenges to the independence of judges

At its press conference in July 2014, the IBAHRI, speaking with UN Special Rapporteur on the independence of judges and lawyers Gabriela Knaul, voiced concerns that the way in which the three new laws were drafted threatened to undermine ‘the important and basic principles of judicial independence, neutrality and the separation of powers’.⁶⁵

Following a more detailed examination of the laws and after the many discussions with stakeholders during the delegation’s visit to Cambodia, the IBAHRI has identified a number of further challenges to judicial independence in Cambodia. Overarching these challenges is the influence of the Minister of Justice over all elements of judges’ careers, including their appointment, professional conduct, disciplining and removal from office. However, other challenges persist, in both the law and practice.

For example, the IBAHRI has identified a need for greater professionalism in the judiciary, including improved training on professional ethics, greater efforts to make infrastructure and financial resources available to the Cambodian judiciary (currently a systemic lack) and a focus on addressing the gross underrepresentation of women among the ranks of judges and prosecutors.

Appointment and promotion

RELEVANT INTERNATIONAL STANDARDS

The appointment of judges must be based on merit;⁶⁶ although some participation in judicial appointments and promotions by the executive or legislative branches is not inconsistent with judicial independence, appointments and promotions of judges should be based on objective factors, in particular ability, integrity and experience. The power of appointment should also generally be vested in a judicial body of which members of judiciary and the legal profession form a majority.⁶⁷

In order to ensure judicial independence, judges must have security of tenure. This means that judicial appointments should generally be for life and, if they are for a set term, it must be

63 Cambodian Constitution, Art 128 states that, ‘[t]he Judicial power shall be an independent power’.

64 Cambodian Constitution, Art 130 states that, ‘[j]udicial power shall not be granted to the legislative or executive branches’. Art 132 states that ‘The King shall be the guarantor of the independence of the Judiciary. The Supreme Council of the Magistracy shall assist the King in this matter’.

65 See n 26, ‘Press Conference’ (IBA, 2014).

66 See n 55, UN Basic Principles (1985), Art 10.

67 See n 56, IBA Minimum Standards (1982), Art 3(a).

non-renewable to avoid any undue influence or perception of bias.⁶⁸ The power to transfer a judge from one court to another should be vested in a judicial authority; its exercise should be transparent and should be based on the legitimate needs of the court and preferably subject to the judge's consent.⁶⁹

A judge should also enjoy immunity from legal actions arising during the course of his/her duties and from any obligation to testify concerning such matters.⁷⁰ This does not mean that judges are 'above the law' as they are not immune from criminal prosecution for any breach of criminal law.

RELEVANT PROVISIONS OF CAMBODIAN LAW

Article 21 of the Constitution grants the King power to appoint and promote judges, to be exercised 'upon proposals by the Supreme Council of Magistracy'.⁷¹

Article 18 of the Law on the SCM also grants the SCM the power to 'decide and submit requests to His Majesty the King regarding the appointment, transfer, discharge from post, suspension from job, and the removal of all judges' and prosecutors.⁷² Article 43 of the Law on Judges and Prosecutors provides for the same in almost identical terms.⁷³

Promotions, though technically requiring endorsement by the King, are effectively determined by the CPRG and the SCM. As with the SCM, the CPRG is chaired by the Minister, who convenes its meetings annually, prior to Khmer New Year (mid-April in the Gregorian calendar).⁷⁴ During these meetings, the CPRG first prepares a list of judges eligible for promotion. While all members of the CPRG have equal say in the process by which this list is prepared, the Minister is able to make an explanatory speech in respect of each judicial candidate, which is taken into account by the CPRG when assessing how many points each judge should receive.⁷⁵ The shortlist is transferred to the SCM (which the Minister also chairs) and the SCM then considers each candidate and makes a recommendation as to whether he or she should be promoted or not.⁷⁶ A list of those put forward for promotion is then transferred to the Minister, who is tasked with preparing the Royal Decree granting the promotion.⁷⁷ By operation of law, therefore, the Minister now presides over every stage in the selection process for promotion of judges.

OBSERVATIONS OF THE IBAHRI DELEGATION

Despite the fact that the provisions outlined allow for some executive role in appointments and promotions, the Cambodian system is not necessarily incompatible with international standards,

68 See n 55, UN Basic Principles (1985), Art 12.

69 See n 56, IBA Minimum Standards (1982), Art 4.

70 See n 55, UN Basic Principles (1985), Art 16.

71 Art 21 of the Constitution reads, in relevant part: 'Upon proposals by the Supreme Council of Magistracy, the King shall sign decrees (Kret) appointing, transferring or removing judges'.

72 Law on the SCM, Art 18.

73 Art 43 of the Law on Judges and Prosecutors: 'The Supreme Council of Magistracy shall decide and propose to the King about the appointment, transfer, discharge, putting outside cadre, temporary suspension from duty, and resignation of all judges'.

74 Law on Judges and Prosecutors, Arts 33 and 39.

75 Under Art 38 of the Law on Judges and Prosecutors, each member of the commission is able to give marks out of 20 for each judge on the list.

76 Law on Judges and Prosecutors, Art 39.

77 *Ibid.*

provided the SCM itself is considered to be independent and professional. In some developed systems, the executive (or legislature) maintains an even more direct role in the appointment process for some judges, but this is deemed acceptable only where there are safeguards, such as security of tenure and the immunity of judges from punitive disciplinary, or other measures are secured.⁷⁸

In the Cambodian system, the King's role in the appointment process for judges is dependent on the recommendation of the SCM. Moreover, the Constitution makes clear that the King's role is a formality and, as a matter of practice in Cambodia, the present King (Norodom Sihamoni) does not play an active role in the country's political or judicial affairs. Indeed, during its visit to Cambodia the IBAHRI delegation heard from several individuals that the King rarely attends meetings of the SCM and does not question its decisions, meaning that the SCM generally has final say over all matters involving the appointment of judges.⁷⁹

What the delegation considers more problematic is the prominent role given to the Minister and the MoJ by the Law on Judges and Prosecutors at all stages of decision-making relevant to appointments and promotions. As aforementioned, the Minister effectively chairs both bodies relevant to a judge's appointment and promotion – the CPRG and the SCM – and is the individual tasked with drafting the Royal decree to implement the decision of the SCM. This legal framework gives the Minister influence over every stage of the decision-making process with respect to judges' careers and, theoretically, provides wide scope for abuse, thereby further undermining public confidence in the independence of the judiciary.

These issues with the text of the law are compounded by the approach of the Minister in practice. The delegation heard from almost all individuals and organisations with whom it met that the Minister (and the executive more broadly) exercises complete control over judicial appointments and promotions. For example, legal practitioners told the IBAHRI delegation that only those with connections to the executive, to the CPP – or to both – tended to be appointed as judges.⁸⁰ They referenced, as an example of this, the son of the President of the Phnom Penh Court of Appeal, who was himself appointed a judge at the same court in October 2014.⁸¹

The IBAHRI delegation also heard that particularly well-connected judges have been promoted more quickly than others.⁸² For example, the current Chief Justice of the Supreme Court, Judge Dit Munt, was a member of the CPP Central Committee until 1997 and remains a member of the party today.⁸³

In response to these allegations, representatives of the MoJ told the delegation that, while the Minister has a role on the SCM, decisions are not taken by him alone but by majority vote.⁸⁴ They asserted that it is impossible for the Minister to determine the decisions taken by the CPRG and the SCM without the agreement of all other members of those bodies. The delegation heard from MoJ

78 In the United States, for example, federal judges are appointed by the president on the advice of the senate. However, in practice this is not considered to undermine their independence.

79 Only one source – a CPP party member and senior official in the judiciary – suggested that the King regularly attends meetings of the SCM. However, in light of the great number of individuals that hold the opposite view, the delegation found this assertion unconvincing.

80 IBAHRI meeting with a group of lawyers, 23 April 2015.

81 Eang Mengleng, 'Appeal Court President's Son Appointed New Judge' (*The Cambodia Daily*, 6 October 2014), www.cambodiadaily.com/news/appeal-court-presidents-son-appointed-new-judge-69123.

82 IBAHRI meeting with a group of lawyers, 23 April 2015.

83 'CPP Central Committee: old and new members' (*The Phnom Penh Post*, 7 February 1997), www.phnompenhpost.com/national/cpp-central-committee-old-and-new-members.

84 IBAHRI meeting with the MoJ, 22 April 2015.

officials that they did not consider the Minister's presence on the CPRG or the SCM to undermine the principle of separation of powers and, by contrast, considered it desirable for the Minister to have administrative power over judicial affairs.

On the basis of the evidence and testimony it heard, the IBAHRI delegation considers that there is a pressing need for greater transparency in the area of judicial appointments and promotions. Although the fact of the Minister sitting on the CPRG and the SCM, while undesirable, does not in itself necessarily breach international standards, there is evidently a strong perception among Cambodians that the Minister, acting on behalf of the executive, has abused his position to appoint party officials and government loyalists to key positions in the judiciary. If this is true, this would constitute a serious breach of international standards, which require that all judicial appointments be based on merit and that any government involvement in those appointments be based on purely objective standards.

Standards of conduct and professional ethics

RELEVANT INTERNATIONAL STANDARDS

The core values that must be displayed by the judiciary include integrity, propriety, equality, competence and diligence, as well as independence.⁸⁵ Judges are also required to be impartial – meaning that a judge should not sit on a case where a member of the public might have a reasonable apprehension that the judge is biased in favour of one of the parties. Judges should not hold positions in political parties and should conduct their personal and professional dealings so as to preserve their independence, protect the dignity of the court and encourage public confidence in the administration of justice.

RELEVANT PROVISIONS OF CAMBODIAN LAW

Article 129 of the Cambodian Constitution imposes high standards on judges, who are required to fulfil their duties 'with strict respect for the laws, wholeheartedly and conscientiously'.⁸⁶

Several articles in the Cambodian legal framework require judges to abide by general principles of good conduct and professional ethics. Article 4 of the Law on Judges and Prosecutors requires that '[a]ll persons recruited to serve their career as judges and prosecutors shall be competent, and honest with good morals'.⁸⁷ Article 8 of the same law requires that judges 'make decisions impartially, based upon legal principles, without pressure, threat or intimidation, or order whether direct or indirect, from any party to the case or any other person'.⁸⁸ Article 50 requires judges to 'strictly abide' by their code of ethics and to adhere to a 'neutral attitude' in respect of matters political.

85 See Bangalore Principles of Judicial Conduct adopted by the Judicial Integrity Group in 2001 and subsequently endorsed by several UN organs. For regional standards see, for example, African Commission on Human and People's Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted by the African Commission on Human and People's Rights in 2001, available at www.afrimap.org/english/images/treaty/ACHPR_Principles&Guidelines_FairTrial.pdf.

86 Art 129 states that '[o]nly judges shall have the right to adjudicate'.

87 Law on Judges and Prosecutors, Art 4.

88 *Ibid*, Art 8.

Anecdotal evidence provided to the delegation suggests that judges routinely fail to observe basic standards of professional and ethical conduct in the manner in which they preside over cases and render judgments.⁸⁹ One striking example of the lack of judicial professionalism is the frequency with which they answer their personal telephones during the course of a trial. According to the Cambodian Center for Human Rights (CCHR), judges answered their telephones or left the court room without explanation in 86.1 per cent of 273 trials monitored at the Phnom Penh Court of Appeal between March 2013 and June 2014.⁹⁰ This behaviour is not in keeping with professional standards of conduct and raises concerns about the extent to which judges may be influenced by individuals outside the court room during trial.

Related to this frequent outside communication, the IBAHRI delegation heard from the majority of those interviewed that it is extremely common for Cambodian judges to be ‘instructed’ by members of the executive as to the judgment to be given in a particular case. The delegation heard from several sources that such instructions come either from the Minister or another member of the government, and are given to the judge directly or to the judge’s clerk, who frequently drafts and issues the judgment, for practical purposes, in place of the judge (detailed herein).⁹¹ Many held the view that, where a powerful politician had an interest in one side of a case prevailing, they would always actively pressure the judge to decide in favour of that side and that side would then invariably prevail. The delegation also heard that disciplinary procedures have been misused by the authorities to punish judges who do not obey directions as to the content of their judgments (see further below).⁹²

Representatives of the MoJ emphatically denied that this activity takes place in the Cambodian judiciary. Interviewees from government departments and the courts were keen to stress to the IBAHRI delegation that all decisions of the Cambodian courts are taken on principle and no political influence is brought to bear on the decision-making process.⁹³ They told the delegation that neither the Minister nor any other party has any means of exerting influence over judges or court staff. All other interviewees, however, told the delegation that the exertion of political influence over judicial decision-making in cases of interest to the government is so common as to be the norm.

In addition, almost every individual with whom the delegation spoke – including members of courts and government departments – acknowledged, to a greater or lesser extent, that members of the Cambodian judiciary accept bribes during the course of exercising their professional duties. At its most conservative, this was expressed to be limited activity, with only a small number of ‘bad apples’ accepting illicit payments in return for deciding in a particular way.⁹⁴ More commonly, however, interviewees expressed the opinion that bribe-taking is ubiquitous among the judiciary, to the extent

89 Such evidence was given to the IBAHRI delegation in almost all its meetings, however, in particular during its meeting with a group of lawyers, 23 April 2015.

90 Statistics available at <http://tmp.sithi.org>.

91 IBAHRI meeting with a group of lawyers, 23 April 2015; meeting with a legal assistant, 26 April 2015; meeting with LICADHO, 23 April 2015.

92 See section 3.3 of this report, at ‘The politicisation of disciplinary procedures’, 33.

93 IBAHRI meeting with the MoJ, 22 April 2015.

94 This was the way in which the Vice President of the Supreme Court expressed the issue to the IBAHRI delegation in its meeting with him on 22 April 2015.

that there are very few – if any – judges who will not accept bribes and alter their decisions according to the size of the payment.

One group of legal professionals with whom the IBAHRI delegation met expressed its conviction that 90 per cent of cases heard by the courts involve the payment of bribes in one form or another, either to judges or to judicial clerks.⁹⁵ According to the same group, less than five per cent of cases with which they have been involved in Cambodia did not involve payment and, even then, such cases often involved other problems inherent to the Cambodian judiciary, such as procedural delays or unenforceability of judgments. Only one person with whom the delegation met relayed a first-hand anecdote about dealing with a single judge who was not corrupt.⁹⁶

More worrying still, the delegation heard that, where judges are convinced the individuals involved in proceedings have limited financial and political clout, they often give their cases no attention at all, deeming them unlikely to have the means to afford a bribe. In such circumstances, case files are ignored, with complaints failing to be addressed at all.⁹⁷

Lawyers with whom the delegation spoke also reported that payments are not always for the sole purpose of decision-making in a case; payments are more frequently demanded by judges and clerks for ‘follow-up’ work – that is, for simply tracking the progress of a case. Lawyers reported that they are unable effectively to follow-up on their cases if they do not make payments to court staff and such payments often come out of the lawyer’s own finances. Some lawyers reported that, if they refused to pay such fees, court staff would neither let them have any information about their clients nor give them access to their clients (where clients were held in prison cells).⁹⁸

Some public evidence exists to support these reports regarding corruption in the judiciary: in 2002, Judge Nil Nonn, who now presides over the Trial Chamber at the ECCC, was alleged to have admitted to a Public Broadcasting Service documentary series, ‘Frontline’, that he had accepted bribes from parties to disputes heard in his court.⁹⁹ Although the alleged admission resulted in a challenge to Judge Nil Nonn’s position at the head of the ECCC, that application was dismissed and Judge Nil has not been investigated further by the Cambodian authorities as a result of these allegations.¹⁰⁰

Other commentators also consider bribery to be endemic in Cambodia, pervading all elements and functions of society and finding reflection in the judiciary. Joel Brinkley, an author and journalist who had covered Cambodia since 1979, wrote that children in Cambodian classrooms have been reported to openly bribe teachers in exchange for their assistance during examinations.¹⁰¹ Where an individual makes public the fact that they have been asked for a bribe, reports suggest that they may be silenced with threats of legal action for libel or defamation. According to Brinkley:

‘[...] Yorn Than, a circuit court clerk in Ratanakiri Province, acknowledged to reporters that his

95 IBAHRI meeting with a group of lawyers, 23 April 2015.

96 *Ibid.*

97 IBAHRI meeting with a group of lawyers, 23 April 2015; meeting with LICADHO, 24 April 2015; meeting with the CCHR, 20 April 2015.

98 IBAHRI meeting with a group of lawyers, 23 April 2015; meeting with the CCHR, 20 April 2015.

99 ‘Battambang – the Judge’ (PBS, October 2002), available at www.pbs.org/frontlineworld/stories/cambodia/diary04.html.

100 The ECCC Trial Chamber’s decision on the application to disqualify Judge Nil Nonn is available at www.eccc.gov.kh/sites/default/files/documents/courtdoc/E5_3_EN.PDF. The Trial Chamber rejected the application on the basis that the admission, even if it were true, did not give rise to a ‘risk of misconduct arises in the present case’ by Judge Nil Nonn, even if he had been guilty of misconduct in the past (a matter on which the Trial Chamber did not comment).

101 Joel Brinkley, *Cambodia’s Curse: The Modern History of a Troubled Land* (Public Affairs, 2012), 209.

boss, the judge, had asked him to request five hundred dollars from relatives who wanted a young man released from prison. When the relatives complained about the bribe request, Yorn Than acknowledged asking for the bribe but warned that he would sue them “for defamation or disinformation” if they kept talking about it.’¹⁰²

Despite its alleged pervasiveness, bribery in the judiciary appears to largely go unpunished. Transparency International (TI), in its 2014 report on the judiciary (and other Cambodian institutions), confirmed that ‘[o]nly a limited number of... cases appear to have been prosecuted by the Judiciary’.¹⁰³ Although there exists a handful of cases in which the authorities have attempted to tackle judicial corruption, the delegation heard from TI that these are few and far between: in 2010, a prosecutor from Pursat province was charged with, and convicted of, corruption and extortion, and in 2012, a judge was charged with, and convicted of, accepting a bribe in Kandal province.¹⁰⁴ Both decisions were upheld on appeal. Despite their infrequency, such cases give some hope that reform to tackle judicial corruption remains possible in Cambodia.

The IBAHRI delegation considers that a fundamental reform of the justice system is needed in order to address the issues raised in this area and that this reform must include a mixture of training and accountability. The delegation was told by the MoJ that it had plans to offer training to judges and prosecutors on key legal principles associated with deciding cases on principle, including, for example, the presumption of innocence and the weight given to different types of evidence. The delegation was also told that there are plans to put details of all fees payable to court staff on signs in courthouses, in order to end the practice of court staff requesting arbitrary sums for their services.

The IBAHRI welcomes and encourages these plans and encourages the Ministry to ensure that future programs include training with respect to international standards regarding judicial ethics, impartiality and independence.

Tenure, discipline and removal

RELEVANT INTERNATIONAL STANDARDS

The power to discipline or remove a judge must be vested in an institution that is independent of the executive and the process must be both transparent and accountable. The grounds for removal of judges must be fixed by law and clearly defined. The dismissal of judges by the executive – other than for serious misconduct and in compliance with fair procedures provided for by law – has been held to violate Article 14(1) of the ICCPR.¹⁰⁵

RELEVANT PROVISIONS OF CAMBODIAN LAW

Cambodian judges are nominally appointed for life but are considered to have reached retirement

¹⁰² *Ibid*, 232.

¹⁰³ Transparency International, *Corruption and Cambodia’s Governance System* (TI Cambodia, 2014), 62, available at www.ticambodia.org/files/2014EN-NISA-WEB.pdf.

¹⁰⁴ *Ibid*, 62. The delegation met with TI on 22 April 2015.

¹⁰⁵ OHCHR, *Mr Mikhail Ivanovich Pastukhov v Belarus*, Communication No 814/1998, UN Doc CCPR/C/78/D/814/1998 (2003) [7.3]; OHCHR, *Adrien Mundy Busyo et al v Democratic Republic of the Congo*, Communication No 933/2000, UN Doc CCPR/C/78/D/933/2000 (2003), para 5.2.

age at 60 years old.¹⁰⁶ All judges are compulsorily retired at 60, except members of the Supreme Court who, upon reaching 60, may choose either to retire or continue serving.¹⁰⁷ Once a Supreme Court judge has reached the age of 65, they may continue serving only with the permission of the SCM.¹⁰⁸ Despite this lifelong appointment, judicial tenure is, in practice, subject to provisions permitting the removal of judges for disciplinary violations and those permitting early retirement of judges, outlined below.

Disciplinary proceedings that result in finding a judge guilty of having violated a code of conduct can result in either their transfer or removal. Confusingly, the Cambodian Constitution prohibits the removal of judges altogether at Article 132, which provides, without qualification, that ‘Judges shall not be dismissed’ and instead grants disciplinary power over them to the SCM. Notwithstanding that provision, Article 21 of the Constitution explicitly grants the King the power to transfer or remove judges and, as noted above with respect to appointments, this power is to be exercised ‘upon proposals by the Supreme Council of Magistracy’.¹⁰⁹ Given that the King rarely attends meetings of the SCM, the power to remove and transfer is today exclusively vested in the members of the SCM, with the King’s acceptance of any decision taken by the SCM generally regarded as a foregone conclusion.

Article 43 of the Law on Judges and Prosecutors grants power over, among other things, transfer and removal of judges, to the SCM.¹¹⁰ Section II of the Law on the SCM establishes a disciplinary council, which has jurisdiction over penal matters related to judges and prosecutors (the ‘Disciplinary Council’).¹¹¹ The Disciplinary Council is chaired by the President of the Supreme Court.¹¹² The same law also establishes an ‘inspection team’ at the SCM to assist the Disciplinary Council with ‘investigation and inquiry’.¹¹³

The Law on the SCM provides that all complaints regarding judicial conduct must first go to the Minister, who acts as a preliminary filter.¹¹⁴ Only those complaints that the Minister has approved may be submitted to the Disciplinary Council for investigation and action. Disciplinary proceedings are held in private and their outcomes are not ordinarily publicised.¹¹⁵

Where the Disciplinary Council finds there to be ‘gaps of judges in fulfilling their profession, the harmfulness to honour, good morals and dignity’, it will recommend a disciplinary sanction against the judge or prosecutor in question to the SCM.¹¹⁶ These range from verbal reprimands for minor violations, to removal or revocation of status as a judge for major ones.¹¹⁷ All sanctions are subject to the review and approval of the SCM. Serious sanctions must be imposed by a royal decree, while more minor sanctions may be imposed directly by the SCM. However, even when the most severe sanction is

106 Law on Judges and Prosecutors, Art 62.

107 *Ibid.*

108 *Ibid.*

109 Art 21 of the Constitution reads, in relevant part, as follows: ‘Upon proposals by the Supreme Council of Magistracy, the King shall sign decrees (Kret) appointing, transferring or removing judges’.

110 Law on Judges and Prosecutors, Art 43. This article, in full, reads: ‘The Supreme Council of Magistracy shall decide and propose to the King about the appointment, transfer, discharge, putting outside cadre, temporary suspension from duty, and resignation of all judges.’

111 Law on the SCM, Art 20.

112 *Ibid.*

113 Law on the SCM, Art 21.

114 Law on the SCM, Art 23.

115 Law on the SCM, Art 25.

116 Law on the SCM, Art 54.

117 Law on the SCM, Art 55.

applied, the judge in question will continue to receive all pension benefits to which he or she is entitled at the date of termination.¹¹⁸

In addition to termination on the grounds of disciplinary reasons (as set out above), the new Law on Judges and Prosecutors includes wide provisions permitting the SCM and Minister to, effectively, end a judge's term prematurely by forcing him or her to take early retirement (that is, prior to reaching the age of 60). Article 67 grants the Minister discretion to submit a report to the SCM where the Minister believes that a judge has lost *compos mentis* in such a way that prevents him or her from carrying out designated duties. The SCM will then consider the case and, where it is found that the judge is indeed incapable of discharging judicial duties, the SCM will recommend forced retirement. If this decision is taken by the SCM, the Minister must prepare the decree in question and submit it to the King.¹¹⁹

OBSERVATIONS OF THE IBAHRI DELEGATION

The outlined framework allows for significant executive influence over the disciplinary procedure for judges, a fact that gives the IBAHRI delegation great cause for concern regarding the system's compatibility with Article 14(1) of the ICCPR. Of greatest concern, as with other aspects of the three new laws, is the role granted to the Minister: specifically, that the Minister both vets complaints against judges (determining which complaints are taken forward and which are dropped at the outset) and chairs meetings of the SCM at the end of the process once the Disciplinary Council has made its decision as to the penalty, if any, that should be imposed. In effect, the Minister therefore has the power to determine both whether a judge is investigated and, upon being investigated, whether the judge is to be punished and to what degree. Such pervasive interference in the disciplinary process by a member of the executive is entirely incompatible with international standards.

In addition to the problems with the legal framework around the disciplining and removal of judges established by the text of the Law on the SCM, the day-to-day practice around disciplinary procedures in Cambodia raises further serious causes for concern. During the IBAHRI delegation's visit it identified two fundamental problems with the way in which disciplinary proceedings are carried out.

Infrequency of disciplinary proceedings

The delegation noted an apparent infrequency of disciplinary proceedings against judges, in comparison to the pervasive and open misconduct found in the judiciary (described elsewhere in this report). The delegation requested, on a number of occasions during its visit, statistics on the number of judges that had been disciplined and the types of misconduct for which they had been disciplined but was unable to obtain any. One interviewee, a judicial official, told the delegation that over 100 judges had been disciplined by the Disciplinary Council but was unable to clarify the length of time to which this statistic related or to provide any supporting documentation.¹²⁰

This apparent lack of disciplinary proceedings may partly be a function of an atmosphere that

118 *Ibid.*

119 Law on the SCM, Art 67.

120 IBAHRI meeting with the Vice-President of the Supreme Court, 22 April 2015.

operates to discourage individuals from making complaints against members of the judiciary who engage in misconduct. The delegation was informed of one lawyer who had made a complaint against a judge to the SCM¹²¹ and, while the complaint did not result in any substantive action being taken, the judge harboured a grudge against the complaining lawyer and subsequently ruled against the lawyer whenever he appeared before the judge, regardless of the merits of his argument. The delegation heard that this judge had, on one occasion, summoned one of the lawyer's clients and explicitly discouraged him from continuing to instruct the lawyer in question, on the grounds that he was 'rude' and not to be trusted. Regardless of the verity of this particular story, its apprehension – that complaints against judges and prosecutors will not be taken seriously and will adversely affect lawyers – was shared by several interviewees and has clearly eroded the willingness of lawyers and members of the judiciary to report misconduct.

Of even greater concern was anecdotal evidence relayed to the delegation that judges, far from becoming subject to censure, often benefit professionally where there is a proliferation of complaints against them.¹²² Several interviewees with whom the IBAHRI delegation met observed that the greater the number of complaints against a judge the more likely that judge was to be promoted. They explained to the delegation that this phenomenon arises because judges against whom complaints are made are more likely to meet and develop professional relationships with members of the SCM, who can later favour those judges when considering annual promotions. Again, even if unfounded, this perception exemplifies the lack of public confidence in the administration of justice in Cambodia, which should be alarming to both the government and the King.

The politicisation of disciplinary procedures

Although disciplinary proceedings appear to be relatively rare, where they do occur, the delegation heard that they are often used as a form of political retribution against a judge for ruling against the interests or orders of the government, and not as a means by which to ensure judges abide by professional codes of conduct and ethics.¹²³ According to several interviewees, transfers to provincial courts are considered to be an effective form of punishment because pay is lower outside Phnom Penh and does not take into account relocation costs for the families of judges and prosecutors.

The delegation was told about a recent case that supports these assertions. In February 2015, Judge Ang Mealaktei, the director of the Phnom Penh Municipal Court – and one of Cambodia's top ranking judges – was removed from his position pending an investigation into his conduct in the course of performing his duties.¹²⁴ Mealaktei was accused of having accepted a US\$5m bribe in return for releasing on bail members of the Sarath family charged with illegal possession of firearms in connection with the alleged murder, by another member of their family, of a high-profile Cambodian businessman.¹²⁵ Immediately after the suspects were released on bail, on 17 February 2015, Prime Minister Hun Sen made a speech accusing Mealaktei of corruption. Less than 24 hours later, on 18

121 IBAHRI meeting with a group of lawyers, 23 April 2015.

122 IBAHRI meeting with a group of lawyers, 23 April 2015.

123 IBAHRI meeting with the CCHR, 20 April 2015.

124 Alex Willemyns, Khy Sovuthy and Hul Reaksmei, 'Phnom Penh's Top Judge Ousted Amid Graft Claims' (*The Cambodia Daily*, 18 February 2015), www.cambodiadaily.com/news/phnom-penhs-top-judge-ousted-amid-graft-claims-78159.

125 Ouch Sony, 'Court Questions General in Corruption Case' (*The Cambodia Daily*, 11 March 2015), www.cambodiadaily.com/news/court-questions-general-charged-in-corruption-case-79472.

February 2015, Mealaktei was removed from his post without the benefit of any of the disciplinary procedures outlined in this chapter.

Individuals with whom the delegation met, and commentators on social media, suggested that this episode provided yet more evidence of the establishment's interference with the judiciary. The delegation heard that no proper disciplinary procedures had been followed in Mealaktei's removal and that the prime minister had improperly intervened to remove him because of his personal connection with the murdered businessman's family and not out of a concern for the proper conduct of justice.¹²⁶ In any case, press reports subsequently asserted that Mealaktai was compensated with a new political appointment to a position in the MoJ, though the delegation was unable to corroborate these reports.¹²⁷

Such misuse of disciplinary procedures – both in not employing them where they ought to be and in employing them for improper purposes – threatens to fatally undermine what faith the public have in the Cambodian judiciary. The IBAHRI delegation considers that there is a pressing need for reform in this area to ensure that disciplinary procedures are used appropriately and for the purpose that they were intended, namely, ensuring that the professional conduct of judges is in accordance with international standards and provisions under Cambodian law.

Resources and budgets

RELEVANT INTERNATIONAL STANDARDS

A fundamental pillar of judicial independence and critical to judicial impartiality is judicial remuneration; judicial salaries and pensions should be adequate and be regularly adjusted to account for inflation independent of executive control.¹²⁸ Court services should also be adequately financed by the relevant government authorities.

RELEVANT PROVISIONS OF CAMBODIAN LAW

Cambodian law provides that judges are eligible to receive 'salaries calculated in accordance with their ranks and grades, the duty allowances, other allowances and the bonus as provided by law'.¹²⁹ The amount of such remuneration is left to sub-decree.¹³⁰ Judges are also entitled to other employment benefits, including, for example, 30 days' annual leave, 90 days' maternity leave and sabbaticals after service milestones have been reached.¹³¹

OBSERVATIONS OF THE IBAHRI DELEGATION

The delegation heard that the Cambodian judiciary suffers from a lack of physical, financial and human resources, which leaves it struggling to cope with the cases brought before it. This was one of

¹²⁶ See for example, tweet by Alex Willemyns on 17 February 2015: 'Phnom Penh's top judge Ang Mealaktei ousted amid graft claims, hours after scathing speech by Prime Minister Hun Sen', available at <https://twitter.com/alexwillemyns/status/567898921852219392>, further information at <http://cambodiadaily.com/news/phnom-penh-top-judge-ousted-amid-graft-claims-78159>.

¹²⁷ Khy Sovuthy and Alex Willemyns, 'Ousted Judge Given Position in Justice Ministry' (*The Cambodia Daily*, 19 February 2015), www.cambodiadaily.com/news/ousted-judge-given-position-in-justice-ministry-78262.

¹²⁸ See n 19, UN Basic Principles, Art 11.

¹²⁹ Law on Judges and Prosecutors, Art 14.

¹³⁰ Law on Judges and Prosecutors, Art 15.

¹³¹ Law on Judges and Prosecutors, Arts 16–17.

the few issues on which there was consensus among all interviewees met by the IBAHRI delegation: all relayed concerns that the resources and funding available to the courts was wholly inadequate.

Judicial salaries were a particular point of concern as some of the interviewees felt that they did not adequately compensate judges for the type and volume of work that they were expected to undertake. The delegation was given differing estimates of judicial salaries by different interviewees. One interviewee told the delegation that Cambodian judges make approximately US\$200–400 per year – less than half the average salary in the country. Another told the delegation that judicial salaries are more typically around US\$700–900 per year, which is just below the average salary.¹³² Either way, the delegation heard concerns that judges' salaries in Cambodia are not commensurate with the nature and complexity of their work.

Other interviewees felt that the low level of judicial salaries was one of the main reasons why members of the judiciary engage in bribe-taking.¹³³ The delegation heard the view from more than one interviewee that, were judicial salaries higher, fewer judges would be corruptible. One interviewee with whom the delegation met – a judicial official – denied allegations of bribe-taking, but told the delegation that judicial salaries were so low that many judges lead their lives from pay cheque to pay cheque throughout their career and have to continue working (in non-legal areas such as agriculture) after they retire or face a life of abject poverty.¹³⁴

Issues surrounding judicial remuneration are exacerbated by the amount of work faced by judges. There are only 264 judges in Cambodia,¹³⁵ equivalent to 1.76 judges per 100,000 inhabitants. By comparison, the equivalent figure in France, for example, is 8.45 judges per 100,000 inhabitants and in Germany, around 4.46.¹³⁶ These judges are concentrated largely in Phnom Penh, where there are 70 judges, with only 22 courthouses in other parts of the country. The vast majority of these other courthouses have fewer than ten judges each.¹³⁷ The delegation heard that this lack of physical and human resources has contributed to procedural delays in hearing and concluding cases. Judges frequently hear more than 20 cases a day, a rate which, although incredibly high, is nevertheless insufficient to get through all the cases filed at court, the IBAHRI delegation was told.

Judicial efficiency is also affected by the fact that judges in Cambodia still operate in an antiquated and chaotic environment that prevents them from working as effectively as many of their counterparts in countries with access to greater technological resources. The delegation heard, for example, that legal materials are not widely available online. Court transcripts are handwritten (if written at all), and legislation and case law are housed in a variety of disparate locations. There has been some success in digitising judgments of the Supreme Court; however, judgments of the lower courts remain handwritten and hard to locate.¹³⁸ Entire case files are frequently misplaced, meaning that some cases are fatally interrupted or never begin, and have to be refiled as if from fresh due to the court's inability to track documents.

¹³² IBAHRI meeting with the Vice President of the Supreme Court, 22 April 2015.

¹³³ IBAHRI meeting with senior members of the Court of Appeal, 20 April 2015.

¹³⁴ IBAHRI meeting with the Vice President of the Supreme Court, 22 April 2015.

¹³⁵ Figures received from the MoJ, correct as at September 2014.

¹³⁶ Maria Dakolias, 'Court Performance Around the World: A Comparative Perspective' [2014] 2 YHRDLJ, 87, 104, available at <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1009&context=yhrdlj>.

¹³⁷ Figures received from the MoJ, correct as at September 2014.

¹³⁸ Judgments of the Supreme Court are available in Khmer on the Supreme Court's website, www.supremecourt.gov.kh/index.php/en.

In meetings with the IBAHRI delegation, representatives of the MoJ acknowledged that there was a problem with the number of courts and judges available and with the resources available to courts and judges.¹³⁹ The delegation was told that the MoJ planned to increase the number of courts in the near future, with a focus on rural Cambodia, a plan that the IBAHRI welcomes and encourages. The MoJ also told the delegation that it had recently introduced a case register book to improve efficiency with regard to management of information on cases. It is currently updated manually but the MoJ expressed hope that it would eventually become an electronic resource.

The delegation was told that issues of resources were being examined and that two new courts have recently opened (one in Kep province and one in Phnom Penh) to assist rural populations with accessing justice. The delegation heard that the MoJ has put in place mechanisms to promote access to justice for rural populations and that efforts were being made to extend access to alternative dispute resolution to rural communities. However, no further details on such schemes were forthcoming.¹⁴⁰

Finally, the delegation was informed that plans are presently being considered for the introduction of specialised family and juvenile courts, which would, in theory, lighten the workload of other courts. Other officials told the delegation that the creation of such courts would not, in practice serve to lighten judicial workloads provided that the number of judges remained the same because the same judges would simply have to attend at two different courts. In any case, the delegation understands that no steps have been taken to implement this plan to date.

The concerns related to judicial resources and budgets are long-standing and serious but they can be addressed in large part through funding and infrastructure initiatives. The IBAHRI believes that salaries should be commensurate with the complexity and requirements of judges' work and should be raised to the level necessary to guarantee a high standard of professionalism (and possibly to remove incentives to accept bribery). The delegation is confident that international assistance with aspects of such initiatives would undoubtedly allow the government of Cambodia to achieve tangible results more quickly.

Freedom of expression and association

RELEVANT INTERNATIONAL STANDARDS

Members of the judiciary are, like other citizens, entitled to freedom of expression, belief, association and assembly – provided, however, that in exercising such rights, they always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.¹⁴¹

The balance between judges' rights to freedom of expression and their independence is one that is struck differently in different countries. Some countries forbid any activity by judges related to party politics. In Scotland, for example, the Statement of Principles for Judicial Ethics for the Scottish

¹³⁹ IBAHRI meeting with the MoJ, 22 April 2015.

¹⁴⁰ IBAHRI meeting with the MoJ, 22 April 2015.

¹⁴¹ See n 20, IBA Minimum Standards (1982), Art 40.

Judiciary makes clear that ‘[i]t is a cardinal feature of judicial independence that a judge should have no party political involvement of any kind’.¹⁴² The same rule is applied in Canada.¹⁴³

The judiciary should, as far as possible, conduct itself transparently and publicly, especially in the manner in which it adjudicates cases.¹⁴⁴

RELEVANT PROVISIONS OF CAMBODIAN LAW

The Cambodian Constitution enshrines the principle that the judiciary should be separate from the executive and legislative branches of the state.¹⁴⁵ Article 50 of the Law on Judges and Prosecutors requires judges to ‘adhere to a neutral attitude’ on political matters.¹⁴⁶ Article 53 of the same law requires judges to obtain the authorisation of the SCM in advance, ‘if they want to publish, or request to broadcast by all means of any text or written note as well as other comments in relation to their works’.¹⁴⁷

OBSERVATIONS OF THE IBAHRI DELEGATION

The delegation was concerned by the provision of the Law on Judges and Prosecutors set out above, which requires judges to obtain prior authorisation from the SCM in order to make any public statements regarding their work. Such a blanket requirement is incompatible with the principle that judges should be entitled to freedom of expression and may also abrogate the principle that judicial affairs should be conducted as transparently and publicly as possible.

Of greater concern, however, were reports that judges who professed allegiance to the CPP were more likely to advance in their careers than those who did not profess such an allegiance or who professed allegiance to the CNRP or another party.¹⁴⁸ The delegation heard from several interviewees that most serving judges belong to the CPP and that there exists active discrimination in the judiciary against those with differing political views. The delegation was not convinced by explanations that were offered about this phenomenon to the effect that the tendency of judges to be members of the CPP reflects the high incidence of CPP members in society as a whole.¹⁴⁹

The IBAHRI considers the freedom of expression and association of judges to be crucial to the proper functioning of their office. Judges must be allowed to operate in an environment that protects those rights and that, moreover, permits them to hold and express any political views, provided they do so in a manner that does not undermine the dignity of their office or the independence of the judiciary.

Moreover, Cambodia should consider passing legislation banning judges from being members of political parties altogether. As set out above, while such a step is not necessarily required under

¹⁴² Statement of Ethics for the Scottish Judiciary, Art 4.5.

¹⁴³ Canadian Judicial Council, Ethical Principles for Judges, section D (endorsing the statement that ‘all partisan political activity and association must cease absolutely and unequivocally with the assumption of judicial office’).

¹⁴⁴ See n 86, Bangalore Principles, Art 6.

¹⁴⁵ Cambodian Constitution, Art 130.

¹⁴⁶ Cambodian Constitution, Art 96 imposes the same obligation on prosecutors.

¹⁴⁷ Law on the Judges and Prosecutors, Art 53.

¹⁴⁸ IBAHRI meeting with the CCHR, 20 April 2015.

¹⁴⁹ IBAHRI meeting with the Vice-President of the Supreme Court, 22 April 2015.

international standards, it has been implemented in several jurisdictions to prevent party political influence over judicial decision-making.

Legal education and capacity building

RELEVANT INTERNATIONAL STANDARDS

Continuous training for all members of the legal profession is a cornerstone of many legal systems around the world. The importance of continuous professional training and rigorous evaluation for judges has also been noted by the UN Special Rapporteur on the Independence of Judges and Lawyers, who has stated that judges:

‘Should receive continuing education on human rights principles, norms, jurisprudence, declarations, guidelines and rules as a means of strengthening the national systems of administration of justice. [Moreover,] the specific role of judges within the State structure confers upon the judiciary the obligation to provide for stringent entry exams for admission as judges and subsequently for a continuing scheme of legal education.’¹⁵⁰

RELEVANT PROVISIONS OF CAMBODIAN LAW

The Law on Judges and Prosecutors provides the framework within which judicial education and training are given. Article 19 sets out the conditions that an individual must fulfil before he or she is eligible to be selected as a judge student. Among other things, a student must be a Khmer national of less than 35 years of age who holds a bachelors degree in law.¹⁵¹ All elements of the professional training of judges, including the entrance examination, the number of students accepted every year and the content of the syllabus, are determined by regulations promulgated by the Minister.¹⁵²

In practice, presently in Cambodia, judicial education is undertaken in the first instance by universities, which provide undergraduate degree courses in law. Once students graduate with one of these degrees, they may apply to the RAJP, which provides professional training for graduates who wish to become professionals in the judiciary.

After students have been accepted into the RAJP, they must study a two-year course at judges’ school. On successful completion of that course, a student must then undertake a year-long professional internship with a judge, the terms of which again, are set by the Minister.¹⁵³ Upon successful completion of the internship (which the delegation was told is determined by the president of the court at which the student is undertaking the internship), the student is then accepted into the ‘cadre of judges’ and begins to work as a judge.¹⁵⁴

Cambodian law presently provides for training and education for those studying to become judges or

150 UNHRC, Report of the Special Rapporteur on the Independence of Judges and Lawyers, 9 April 2010, UN Docs A/HRC/14/26, [36]. See also Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle I(a).

151 Law on Judges and Prosecutors, Art 19.

152 Law on Judges and Prosecutors, Arts 21 and 22.

153 Law on Judges and Prosecutors, Art 24.

154 Law on Judges and Prosecutors, Art 25.

prosecutors, however, there are no provisions requiring those practising in the Cambodian judiciary to undertake continued professional training.¹⁵⁵

OBSERVATIONS OF THE IBAHRI DELEGATION

The delegation was heartened by reports that judicial training in Cambodia is increasingly incorporating modules that teach some element of international and domestic human rights law to students.¹⁵⁶ The delegation learned that the RAJP's course now offers an accredited human rights module; that many universities are offering modules in human rights law as part of their undergraduate courses; and that the Paññāsāstra University of Cambodia is now offering a post-graduate degree in human rights law.¹⁵⁷ The IBAHRI welcomes and commends the incorporation into legal education of human rights specialisms and encourages Cambodia to continue to entrench human rights principles in the training offered to judges and legal professionals.

Notwithstanding the progress achieved on that front, the legal framework around training, summarised above, itself gives rise to two concerns:

- First, as with the other issues considered in the present report, the Minister is given a vast amount of influence over the substance and form of the training, including over the administration of entrance examinations. This gives rise to a concern that the Minister – as a member of the executive – could either improperly influence judges during their education or use the influence over access to the judicial profession that the law gives him in order to ensure that all judges are amenable to his influence, or both. Indeed, the IBAHRI delegation heard allegations that the judicial internship phase in the education of a judge can be exploited by the Minister who has influence over whether trainee judges pass or fail. The delegation also heard allegations that the decision as to whether individuals should pass or fail was frequently the subject of political manipulation, depending on the identity and politics of the trainee.¹⁵⁸
- Secondly, the law does not provide a requirement that judges engage in continued legal education, training and development after graduating. As set out above, international standards and guidance applicable to judges consider the provision of continuous professional education to be fundamental to the proper practice of the judicial profession. The IBAHRI shares this view wholeheartedly.

Beyond the issues that arise in relation to the legal framework within which legal education is provided, the delegation heard serious concerns that the Cambodian system for judicial education, as presently organised, severely restricts the number of students who get in to the RAJP and therefore keeps artificially low the number of judges able to hear cases in Cambodia. The delegation understands that approximately 50–60 student judges are selected every year. As set out above, the small number of judges relative to the population is a serious issue for the Cambodian judiciary and has contributed to the judiciary's inability to fulfil its obligations in relation to cases submitted to it.

¹⁵⁵ The provisions on training during legal education are found at Arts 19–23 of the Law on Judges and Prosecutors.

¹⁵⁶ IBAHRI meeting with the Raoul Wallenberg Institute, 22 April 2015.

¹⁵⁷ 'Master Programme in International Human Rights Law Paññāsāstra University of Cambodia' (Raoul Wallenberg Institute, 10 February 2014) <http://rwi.lu.se/2014/02/master-programme-international-human-rights-law-pannasastra-university-cambodia>.

¹⁵⁸ IBAHRI meeting with TI, 22 April 2015.

The delegation was extremely concerned to hear reports that judicial students are expected to pay large bribes, allegedly including to the Minister or the MoJ, to secure their place in the RAJP.¹⁵⁹ The delegation heard from several interviewees that these bribes, which the delegation was told range from US\$20,000 to US\$50,000 (or some 30 to 60 times the average annual income in Cambodia),¹⁶⁰ not only act as a barrier to entry to poor students or those without connections but also ensure that the culture of bribe-giving and receiving is inculcated in judges from the very beginning of their careers.

Legal training remains, to a great extent, reliant on funding from foreign sources. Previously the lawyers' training element of the RAJP was funded by the Japanese government, which also provided technical assistance and trainers. The delegation heard from lawyers who had trained in the late 1990s and early 2000s that they did not have to pay any money towards their legal education because the programmes were fully funded by technical assistance from abroad.

The IBAHRI considers judicial training and capacity-building to be of utmost importance to the creation of an independent judiciary and many of the existing problems with the Cambodian system could be resolved by the provision of greater funding and international assistance. It is important that training and qualifications should be accessible to all who are capable of undertaking them, that specialised elements of the training – such as human rights related courses – should be fully integrated within the national education system, and that continuous training after a student has graduated from academic studies should be regarded as a requisite component of practice as a judge.

The under-representation of women in the Judiciary

RELEVANT INTERNATIONAL STANDARDS

The representation of women and minorities in the judiciary is not strictly a question of independence, but it does call into question the ability of the judiciary as a whole to be, or appear to be, impartial and representative of the public that it serves. Although international standards do not tend to refer explicitly to gender equality and minority rights, they do insist that the '[s] election of judges shall be based on merit' and free from discrimination.¹⁶¹ Where, therefore, there is a preponderance of one ethnic or social group among those selected to be judges, questions are invariably raised about the extent to which the judiciary is making an effort to remain representative of wider society.

RELEVANT PROVISIONS OF CAMBODIAN LAW

Article 45 of the Cambodian Constitution provides that '[a]ll forms of discrimination against women shall be abolished' and that '[m]en and women are equal in all fields'. Article 46 requires the state to 'provide opportunities to women, especially to those living in rural areas without adequate social support, so they can get employment, medical care, and send their children to school, and to have

159 IBAHRI meeting with a group of lawyers, 23 April 2015; meeting with the CCHR, 20 April 2015.

160 'Cambodia – World Development Indicators' (World Bank, 2013), <http://data.worldbank.org/country/cambodia>.

161 See n 20, IBA Minimum Standards (1982), Art 26.

decent living conditions'. Article 12 of the 1997 Cambodian Labour Law prohibits discrimination on the basis of sex (among other things).¹⁶²

OBSERVATIONS OF THE IBAHRI DELEGATION

Out of 264 judges serving in Cambodia in September 2014, only 36 (13 per cent) were women, which is a low proportion by international standards.¹⁶³ By comparison, in most European countries approximately 50 per cent of judicial roles are occupied by women.¹⁶⁴

The delegation was told by the MoJ that increasing the representation of women in the Cambodian judiciary was a key policy of the present government. The delegation was told that efforts have been made to involve women in the legislative process and in other activities undertaken at ministerial level. To the extent that these efforts have resulted in substantive changes to the position of women in the Cambodian judiciary, the IBAHRI welcomes them and encourages the MoJ to incorporate such efforts into official policy.

However, the MoJ also acknowledged that, in practice, women continued to be under-represented in ministries and in the courts and continued to be treated in a discriminatory manner. The delegation heard that, in certain government departments, women are viewed as inefficient and are therefore not permitted to conduct meetings or to lead certain work streams, views that the delegation considers to be unacceptable that should be confronted through training and discipline.

The IBAHRI encourages the MoJ, and the judicial authorities more widely, to make a greater effort to ensure that women are adequately represented in the judiciary. Attitudes and practices that impede women's participation and advancement in the judiciary should be discouraged and subject to disciplinary or legal measures as appropriate. It is not possible for the Cambodian system to develop into a truly representative and independent one without permitting women to participate more meaningfully in it.

The role of clerks and bailiffs

Finally, in relation to judicial independence and public confidence in the administration of justice, many individuals and organisations with whom the delegation met relayed concerns about the role of clerks, bailiffs and other court staff. Concerns were twofold:

First, many of those with whom the delegation met reported that court staff often take on an excessively powerful role in court, effectively sidelining judges and taking on their role for the purpose of a large number of cases.¹⁶⁵ The delegation heard from several individuals that court clerks regularly conduct entire cases in the judge's name, including the handing down of judgments at their conclusion, without involving the judge at all.

162 This provision reads, in relevant part, as follows: 'Except for the provisions fully expressing under this law, or in any other legislative text or regulation protecting women and children, as well as provisions relating to the entry and stay of foreigners, no employer shall consider on account of... sex'.

163 Figures received from the MoJ, correct as at September 2014.

164 Paul Gallagher, 'UK is "one of the worst countries in Europe" for number of female professional judges' (*The Independent*, 9 October 2014), www.independent.co.uk/news/uk/crime/uk-is-one-of-the-worst-countries-in-europe-for-number-of-female-professional-judges-9785696.html.

165 IBAHRI meeting with ADHOC, 23 April 2015; meeting with a group of lawyers, 23 April 2015; meeting with the CCHR, 20 April 2015.

Secondly, and related to the first concern, the delegation heard on several occasions that court staff regularly request bribes in exchange for information and documentation related to a case. Several lawyers with whom the delegation spoke informed it that if they refused to pay a bribe to court staff they would be denied all access to their clients' case files and, in the case of criminal cases involving clients held in court cells, all access to the accused client.¹⁶⁶

The superficial performance of judicial functions by untrained court staff seeking to make an illicit income from corrupt practices is a very serious challenge to the judiciary that Cambodia must address as a matter of urgency. The IBAHRI delegation strongly emphasises the need to end such practices altogether to advance the quality and impartiality of justice dispensed. The IBAHRI welcomes plans to introduce boards setting out court fees to all courts, but does not consider that this will go the full way to remedying the problems created by clerks and bailiffs usurping the role of judges.

¹⁶⁶ IBAHRI meeting with a group of lawyers, 23 April 2015; meeting with a lawyer, 20 April 2015.

Chapter Four: The Contribution of Lawyers to the Independence of the Judiciary

4.1 International framework

A robust, independent and accessible legal profession is one of the prerequisites for an independent judiciary. The Universal Declaration of Human Rights¹⁶⁷ enshrines the principles of equality before the law, the presumption of innocence, the right to a fair and public hearing, and the right to have all the guarantees necessary for a defence when charged with a penal offence.¹⁶⁸

More specific guidance on the role of the legal profession is provided by guidelines setting out best practices for the legal profession. The IBA, for example, has published the International Principles on Conduct for the Legal Profession.¹⁶⁹ The UN Basic Principles on the Role of Lawyers also provide guidance on the proper role of the legal profession.¹⁷⁰ These guidelines set out standards of conduct for both states – in the sense of requiring them to take steps that will guarantee the independence and accessibility of the legal profession – and for lawyers. Applicable parts of these standards are set out below under the relevant sub-headings.

4.2 Cambodian legal framework

The Constitution makes limited provision for the conduct of the legal profession. It devolves laws regarding the conduct of legal proceedings to statutes, stating at Article 129 that trials should be conducted ‘in the name of the Khmer citizens in accordance with the legal procedures and laws in force’.¹⁷¹ Article 128 provides that members of the judiciary should ‘uphold impartiality and protect the rights and freedoms of the citizens’.¹⁷²

4.3 The role of lawyers in the Cambodian justice system

The role of the Bar Association of the Kingdom of Cambodia

RELEVANT INTERNATIONAL STANDARDS

Lawyers are entitled to form independent, self-governing professional bodies ‘to represent their interests’.¹⁷³ Those professional associations should cooperate with the government ‘to ensure that everyone has effective and equal access to legal services and that lawyers are able, without

167 Universal Declaration on Human Rights, adopted on 10 December 1948, available at www.un.org/en/documents/udhr.

168 *Ibid*, Arts 10 and 11.

169 IBA International Principles on Conduct for the Legal Profession, adopted on 28 May 2011, available at www.ibanet.org/Document/Default.aspx?DocumentUid=1730FC33-6D70-4469-9B9D-8A12C319468C.

170 UN Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990 available at www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx.

171 Cambodian Constitution, Art 129

172 Cambodian Constitution, Art 128 states that: ‘[t]he Judiciary shall guarantee and uphold impartiality and protect the rights and freedoms of the citizens’.

173 See n 170, Art 24.

improper interference, to counsel and assist their clients in accordance with the law and recognized professional standards and ethics'.¹⁷⁴

RELEVANT PROVISIONS OF CAMBODIAN LAW

The BAKC was established in 1995 by Article 8 of the Cambodian Law on the Bar. This law provides for many administrative matters now governed by the BAKC's own regulations.¹⁷⁵

The BAKC's internal regulations (the 'BAKC Regulations') provide that the organisation should consist of two distinct bodies: the general assembly, which includes all members of the BAKC,¹⁷⁶ and the bar council, which acts as a governing board of the BAKC and to which members are elected by the general assembly.¹⁷⁷ Elections to the bar council take place every three years, while elections for the president of the bar council (and therefore the president of the BAKC) take place every two years.¹⁷⁸

The BAKC plays a central role in the training and education of lawyers in Cambodia. The organisation governs entry into, and graduation from, the PTC, the only training institution for lawyers in Cambodia and therefore the only means by which one may become qualified to practise law. The PTC is presently run from the same building as the RAJP, but is technically a separate educational institution and the IBAHRI delegation heard that there are plans to separate the two.¹⁷⁹ The BAKC determines the number of lawyers that will be recruited into the PTC in any year, the curriculum to be taught there, the manner in which the students will be examined and who will examine them.¹⁸⁰ It also supervises the internship procedure: a one-year stage of professional training that takes place once students have graduated from the academic training at the PTC.¹⁸¹

OBSERVATIONS OF THE IBAHRI DELEGATION

In theory, the legal framework for the BAKC, as here set out, does not provide any cause for concern in and of itself. In practice, however, the delegation repeatedly heard that the BAKC operates in a highly politicised manner and is widely regarded as a biased institution, fundamentally loyal to the CPP and to the Hun Sen administration, rather than to its members and the legal profession.

The delegation heard from several interviewees that the BAKC does not offer a robust defence to anyone who is not a member of the CPP (or who is not known to be pro-government) often neglecting entirely to defend members of the CNRP (for example, when they are faced with attacks from political authorities). Many expressed the view that the BAKC presently operates as a de facto part of the Cambodian government, rather than as an independent association established in order to protect the interests of Cambodian lawyers. The delegation heard, for example, criticism that the BAKC had failed to publish any comment on the three new laws, despite the fact that they were (and

¹⁷⁴ See n 170, Art 25.

¹⁷⁵ Law on the Bar, Arts 8–17.

¹⁷⁶ Internal Regulations of the Bar Association of the Kingdom of Cambodia (the 'BAKC Regulations'), Art 2, www.bigpond.com.kh/Council_of_Jurists/Judicial/jud008g.htm.

¹⁷⁷ BAKC Regulations, Art 4.

¹⁷⁸ BAKC Regulations, Art 3.

¹⁷⁹ IBAHRI meeting with the BAKC, 23 April 2015.

¹⁸⁰ BAKC Regulations, Arts 8–9.

¹⁸¹ BAKC Regulations, Arts 11–13.

remain) important laws for the legal profession and many lawyers encouraged the BAKC to take a lead in speaking out against them.¹⁸²

There is some evidence in recent events to corroborate assertions regarding the lack of independence of the BAKC from government. In 2004, the BAKC admitted Prime Minister Hun Sen and three other high-ranking members of the CPP to the Cambodian bar, despite the fact that they did not meet the legal requirements to practise as lawyers.¹⁸³ The decision to admit them reportedly came after the donation by the government of vehicles and property to the BAKC.¹⁸⁴ Additionally, successive presidents of the BAKC have been CPP members or former CPP members. The current president, for example, Bun Hon, is a former CPP member and previously served as the undersecretary of state at the MoJ.¹⁸⁵ The previous president, Ky Tech, had the open support of the CPP and was alleged to have been complicit in attempts to assassinate a rival candidate for the presidency of the bar association who ultimately went into self-imposed exile.¹⁸⁶

In its meeting with the IBAHRI delegation, the BAKC said that elections for its membership are always free and fair and that there is no political influence over the way in which members of the BAKC vote. However, the delegation heard from others that there is explicit intervention in the electoral process at the BAKC by the MoJ and other members of the executive. The delegation was told that this usually takes the form of ‘instructing phone calls’ in which member individuals are effectively ordered to vote for certain candidates in the election – often with the aim of ensuring the CPP’s preferred candidate retains control of the association.¹⁸⁷

The BAKC also refuted claims that it does not defend its members. It told the delegation that its primary mission was to manage and strengthen the legal profession and that it always takes action to remove obstacles to the practice of law. The BAKC told the delegation that it has taken action in the past to prevent lawyers being wrongfully charged with crimes for doing their jobs; or from being wrongfully accused of serious misconduct, such as submitting fake documents.

The IBAHRI considers the existence and functioning of a robust bar association that is capable of, and willing to, defend its members’ interests against attack by the government to be a crucial check and balance against attacks on the legal profession. It is of great concern to the IBAHRI that the BAKC evidently does not fulfil this function and that such significant reforms would be required to transform the BAKC into an institution capable of making a significant contribution to the independence of the Cambodian judiciary on behalf of the legal profession and the public.

182 IBAHRI meeting with a group of lawyers, 23 April 2015.

183 Phann Ana and Porter Barron, ‘Hun Sen, Three Senior CPP Officials Join Bar’ (*The Cambodia Daily*, 16 September 2004), www.cambodiadaily.com/archives/hun-sen-three-senior-cpp-officials-join-bar-42795.

184 *Ibid.*

185 *Ibid.*

186 *Ibid.*

187 IBAHRI meeting with a group of lawyers, 23 April 2015; meeting with a lawyer, 20 April 2015.

Access to legal advice by members of the public

RELEVANT INTERNATIONAL STANDARDS

Access to the legal profession must be universal, without discrimination on any basis, including economic status.¹⁸⁸ To that end, governments must ensure that there is a sufficient legal aid budget to which citizens may have recourse if they are unable to pay for legal representation independently.¹⁸⁹ Governments also bear a responsibility to educate people on their legal rights and the role of the legal profession in protecting them so as to permit them to assert their rights and ‘where necessary, call upon the assistance of lawyers’.¹⁹⁰

Governments and professional bodies are required to ensure that lawyers are adequately trained in the law of the jurisdiction in which they practice and that they are ‘made aware of the ideals and ethical duties’ of their profession.¹⁹¹ Lawyers’ training should include information on human rights, both as recognised domestically and by international law.¹⁹² Where a part of the population has particular cultural, linguistic or other needs, members of those groups should be given special support to enter the legal profession and should be given specific training to enable them to address the needs of their communities.¹⁹³

Where an individual faces criminal proceedings, further protections should be applied to their right to consult with legal counsel. They should, for example, be given access to a lawyer, in a private setting, within 48 hours of arrest or detention whether or not they have been charged.¹⁹⁴

RELEVANT PROVISIONS OF CAMBODIAN LAW

The Cambodian Constitution provides that trials should be conducted ‘in accordance with the legal procedures and laws in force’.¹⁹⁵ Article 300 of the Cambodian Code of Criminal Procedure (CCP) provides that all accused persons have the right to legal representation.¹⁹⁶ Article 303 provides that minors and those accused of crimes may not appear in court without the assistance of a lawyer, meaning that if the accused is unable to pay for a lawyer the state must provide one.¹⁹⁷

Article 29 of the Law on the Bar requires that a part of the funds held by the BAKC be reserved for ‘providing income to lawyers who defend poor people’. In practice, the IBAHRI delegation was told, this money is given to the BAKC by the MoJ and amounts to approximately US\$73,000 per year.

OBSERVATIONS OF THE IBAHRI DELEGATION

In theory, the legal framework on access to justice in Cambodia guarantees legal representation for

188 See n 170, UN Basic Principles on the Role of Lawyers, Arts 1 and 2.

189 See n 170, UN Basic Principles on the Role of Lawyers, Arts 3 and 6.

190 See n 170, UN Basic Principles on the Role of Lawyers, Art 4.

191 See n 170, UN Basic Principles on the Role of Lawyers, Art 9.

192 *Ibid.*

193 See n 170, UN Basic Principles on the Role of Lawyers, Art 11.

194 See n 170, UN Basic Principles on the Role of Lawyers, Art 7.

195 Cambodian Constitution, Art 129.

196 Cambodian Code of Criminal Procedure (CCP), Art 200: ‘The accused person may be assisted by a lawyer chosen by him/herself. The accused may also request to have a lawyer appointed for him/her in accordance with the Law on Statute of Lawyers.’

197 CCP, Art 201.

all individuals facing criminal charges in Cambodia. The Cambodian legal aid regime is, for practical purposes, split into two parts. On the one hand, the government allocates a legal aid budget, which is administered by the BAKC's legal aid department. On the other, quasi-legal aid is provided by certain NGOs, such as the CCHR, Legal Aid Cambodia, International Bridges to Justice, the Cambodian Defenders Project and Legal Support for Children and Women.

In practice, the IBAHRI delegation heard from several individuals with whom it met that the government-financed legal aid programme was inadequate. Interviewees told the delegation that the programme was, above all else, too small to cover even nominal fees of legal aid lawyers. It therefore cannot permit them to represent all those that require it. The legal aid budget, which is set and controlled by the MoJ, was KHR300m last year, equivalent to approximately US\$73,000. This is, by any standard, a very small legal aid budget. For Cambodia, which has at the time of writing a population of 15 million people, a relatively large proportion of whom live in poverty and are unlikely to have funds to pay for a lawyer, it is wholly inadequate. In addition to its small size, the delegation was informed that the government legal aid programme has not succeeded in educating the public about its existence and purpose: most ordinary Cambodians have no knowledge or understanding of it.

Several interviewees told the IBAHRI delegation that the international organisations providing legal aid – while offering a valuable service to the country – tend to focus on representing defendants in particularly high-profile or sensitive cases. The cases chosen ordinarily align with the legal and philosophical aims of the NGO in question, meaning that, in practice, cases they fund are likely to have an explicitly human rights, political or international dimension.

The result is that neither the government nor NGO-run programmes effectively cater for individuals accused of petty or low-profile crimes. Such individuals were, to the extent that they could not afford to pay for their own counsel, frequently left without legal representation in court at all, the delegation heard. According to information received from the CCHR,¹⁹⁸ levels of legal representation are reasonably high in felony cases but very low in less important cases concerning misdemeanours. In Ratanakkiri and Phnom Penh courts, for example, defendants were represented by lawyers in 100 per cent of felony cases observed by the CCHR.¹⁹⁹ However, only 61 per cent of defendants in misdemeanour cases at Ratanakkiri court were represented in the first half of 2012 and that figure was 21 per cent for the same period in Banteay Meanchey court.²⁰⁰

Even where legal aid lawyers do appear in court on behalf of defendants, the delegation heard that they face challenges in addition to those faced by their non-legally aided colleagues. Lawyers with whom the delegation met complained that judges are often dismissive when they know that a client is represented by counsel paid for by an NGO or the government legal aid programme, because they know that there is unlikely to be a substantial bribe paid in the case. The delegation also heard that the inability of NGO-funded advocates to pay bribes to court and other officials results in an effective inequality of arms between them and prosecution lawyers. One defence advocate who works exclusively with NGOs on legal aid programmes told the delegation that he had lost the vast majority of his cases due to his refusal to pay bribes.

198 Statistics also available through the Trial Monitoring Database: <http://tmp.sithi.org>.

199 CCHR, 'Trial Monitoring Project', January 2012 – June 2012, available at <http://tmp.sithi.org/index.php?p=detail&id=98&l=en>.

200 *Ibid.*

There are other problems associated with lawyers who appear for clients on the legal aid programme. The delegation heard that some lawyers, having been paid to represent an individual out of the legal aid budget, often do not report to court when the case is being heard outside Phnom Penh, allowing their nominal client to go unrepresented instead. The delegation also heard that lawyers working through the government legal aid programme often demand that clients pay them an amount in addition to the amount they receive from the government by way of supplementing their fees, meaning that legal representation is often no longer free to clients at all, whether the BAKC provides funds to the advocate or not.

Many of these issues appear to stem almost exclusively from the lack of funding available to Cambodia's legal aid programme. Over the past few years, Cambodia has suffered greatly as a result of the withdrawal of large amounts of foreign funding for NGOs and programmes dedicated to providing access to justice. The delegation heard that the result has been a drastic reduction in the number of legal aid lawyers available and, on the basis of anecdotal evidence, a rise in the number of defendants who are unrepresented in court.

The concerns and problems around legal aid are serious, but they can be addressed in the short term by an increase in the legal aid budget, both domestically and through the re-introduction of foreign funding to legal aid projects. In the longer term, Cambodia will need to implement a more holistic strategy to ensure that it establishes and maintains a robust legal aid programme that provides a valuable service to those who need it most.

Barriers to becoming a lawyer

RELEVANT INTERNATIONAL STANDARDS

Other than a requirement that lawyers should hold the nationality of the country in which they practice, the means by which individuals gain entry to the legal profession should not permit discrimination of any kind.²⁰¹

RELEVANT PROVISIONS OF CAMBODIAN LAW

In 1995, when the Law on the Bar was first passed in Cambodia, permission to sit exams to become a lawyer was granted to a wide category of individuals. All those who had graduated from high school, all those who had been unofficially practising as advocates in the court and all those who had legal qualifications, were granted immediate permission to sit the exams to become lawyers.²⁰² These arrangements were expressed to be transitional by virtue of the fact that they were designed to assist the legal profession in growing at the outset but were not intended to become the norm. The provisions permitting automatic eligibility for legal examination therefore lapsed on 31 December 1997.²⁰³

At the time of writing, there are two ways in which one can become a lawyer in Cambodia.

201 See n 170, UN Basic Principles on the Role of Lawyers, Art 9.

202 Law on the Bar, Art 80.

203 Law on the Bar, Art 89.

- **Article 31 of the Law on the Bar** provides that an applicant for a licence to practise law must ordinarily fulfil certain criteria: he or she must be a Khmer national, have a clear criminal record, and hold an undergraduate degree in law and a ‘Certificate of Lawyers Professional Skill’ issued by the PTC.²⁰⁴ Lawyers who follow this path must study for two years and complete an internship with a lawyer approved by the bar council before they can practise on their own.²⁰⁵
- **Article 32 of the Law on the Bar** is expressed as an alternative route to becoming a lawyer and permits ‘judges who have served... for over 5 years’, certain Khmer lawyers who are registered in foreign countries and those who have a doctorate in law.²⁰⁶ Those applying under Article 32 are not required to undertake the educational and professional elements of training required of applicants under Article 31. Instead, where they are approved, Article 32 applicants are immediately issued with a licence to practise.

As already noted, the BAKC has exclusive control over the selection, training and continuing education of lawyers.²⁰⁷ The delegation heard from multiple interviewees that approximately 50–60 students are selected each year to enter the PTC.

OBSERVATIONS OF THE IBAHRI DELEGATION

Although the legal framework itself is sound, serious concerns were communicated to the IBAHRI delegation that the Cambodian system severely restricts the number of people that can become lawyers in circumstances in which the legal system cries out for a dramatic increase in the number of legal professionals.

Restrictions on the number of individuals that can become a lawyer in any given year have led to a chronic shortage of legal professionals. The result is that many individuals practise as ‘legal defenders’ or ‘legal assistants’ – meaning that, although, by virtue of their inability to access the legal education establishments, they are not officially qualified to make submissions before the Cambodian courts, they are legally educated and have some training.

The delegation heard that, in practice, the 50–60 lawyers who are admitted to the legal profession through the RAJP are supplemented by a number of lawyers who are admitted instead through the Article 32 route (see above). This latter category of lawyers tends to be individuals who are well connected or who can afford to pay bribes. Significant concerns were voiced to the delegation that Article 32 effectively gives access to the legal profession to those individuals who would not otherwise be qualified to enter it. By way of example, Prime Minister Hun Sen and other CPP officials were admitted to the bar in September 2014 through Article 32, despite having no formal legal education or experience.²⁰⁸ According to individuals with whom the delegation met, many politicians view the legal profession as a means by which to make money – through receiving bribes – after retiring from their posts in government.

204 Law on the Bar, Art 31.

205 *Ibid.*

206 Law on the Bar, Art 32.

207 See section 4.2, ‘Cambodian legal framework’, of this report.

208 See n 187.

The delegation heard concerns that individuals who entered the legal profession through the Article 32 route often had superior political and commercial connections and financial clout than their colleagues who entered the profession through the ordinary, Article 31 route. Such lawyers therefore tend to be given more lucrative cases and appointments, leaving ordinary lawyers with fewer possibilities of earning a good living.

Another barrier to entry to the legal profession is the informal requirement that candidates pay significant bribes to officials before they are allowed to become legal professionals. The delegation heard that most students applying to become legal professionals through Article 31 have been asked to pay up to US\$20,000. Those applying through Article 32 are asked to pay even more in bribes – the delegation heard rumours that some had been asked to pay as much as US\$30,000 – before they are certified as having completed the academic and professional stages of legal training. It proved difficult to ascertain which body received the bribes, but the delegation variously heard that officials either from the BAKC or the MoJ ask for money from trainees.²⁰⁹

The BAKC denied that allegations either regarding bribery or the admission of individuals unqualified for admission were true. According to the BAKC, the admissions process is run in good faith and no bribes are accepted by the BAKC or any other body during it. The BAKC also denied to the delegation that those admitted through Article 32 enjoyed any improper privileges or benefits as a result of any previously held positions.

Legal training remains, to a great extent, reliant on funding from foreign sources. However, this component of funding is diminishing; one interviewee told the delegation that he or she considered this fall in funding to have encouraged the present culture of bribe-taking. Previously the lawyers' training element of the RAJP was funded by the Japanese government, which also provided technical assistance and trainers. The delegation heard from lawyers who had trained in the late 1990s and early 2000s that they did not have to pay any money towards their legal education because the programmes were fully funded by technical assistance from abroad.²¹⁰ The absence of fees (and certainly of bribes) of course would remove a significant barrier to entry into the legal profession.

The delegation considers the existence of a culture of bribery, made all the worse by the scale of the bribes being requested and the fact that they appear to be endemic, to be one of the most serious hindrances to a robust legal profession in Cambodia today. Cambodia is an overwhelmingly poor country. When divided per capita, Cambodia's gross national income amounts to US\$950 dollars per year.²¹¹ Payments of 20 or 30 times that figure are therefore only within reach of the very wealthiest members of society, meaning that they represent an insurmountable barrier to entry to the legal profession for the vast majority of Cambodians.

The IBAHRI considers it to be of critical importance, given the scale and depth of the problem, that the government of Cambodia take urgent and immediate steps to begin tackling this issue.

209 IBAHRI meeting with ADHOC, 23 April 2015; meeting with LICADHO, 24 April 2015; meeting with a lawyer, 20 April 2015.

210 IBAHRI meeting with BAKC, 23 April 2015; meeting with a group of lawyers, 23 April 2015.

211 See n 160, 'World Development Indicators' (World Bank, 2013).

Professionalism and performance of lawyers and disciplinary measures

RELEVANT INTERNATIONAL STANDARDS

Lawyers are expected to behave as ‘essential agents of the administration of justice’.²¹² They are expected to act in the best interests of their client, to ‘uphold human rights and fundamental freedoms’ and to assist clients before courts, tribunals or administrative authorities.²¹³ In doing so, lawyers should ‘exercise independent, unbiased professional judgment’ and ‘maintain the highest standards of honesty, integrity and fairness’.²¹⁴

In order to allow lawyers to discharge their functions, governments must ensure that lawyers:

- are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference;
- are able to travel and to consult with their clients freely both within their own country and abroad; and
- do not suffer, or are threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognised professional duties, standards and ethics.²¹⁵

RELEVANT PROVISIONS OF CAMBODIAN LAW

The ethics and conduct rules applicable to Cambodian lawyers are established by the BAKC. Upon being sworn in, all Cambodian lawyers agree to ‘apply and respect the professional rules determined by the “Code of Ethics of the Attorney Entered into the Bar Association of the Kingdom of Cambodia.”’²¹⁶ This code of ethics (the ‘Code of Ethics’) includes principles found in many other codes of ethics applicable to the legal profession: namely, a requirement that lawyers abide by ‘the principles of conscience, humanity, and tact’;²¹⁷ that they keep matters confidential;²¹⁸ and that they do not take on matters that give rise to a conflict of interest.²¹⁹

The BAKC provides a complaints-handling mechanism for the Cambodian legal profession, available to individuals who feel that a lawyer has breached their professional obligations. Where a complaint is made the bar council acts as a quasi-court of first instance.²²⁰ If the person against whom the complaint is made is unhappy with the verdict of the bar council they may appeal it to the Court of Appeal.²²¹ Thereafter, ordinary legal procedures are followed to determine the claim and the appeal.

Disciplinary sanctions for breach of professional conduct range from, at the lowest, verbal warnings, to, at the highest, removal from the bar.²²²

212 See n 170, UN Basic Principles on the Role of Lawyers, Art 12.

213 See n 170, UN Basic Principles on the Role of Lawyers, Arts 12–14.

214 See n 169, IBA International Principles on Conduct, Principles 1 and 2.

215 See n 170, UN Basic Principles on the Role of Lawyers, Art 16.

216 BAKC Regulations, Art 1.

217 Code of Ethics, Art 6, available at www.bigpond.com.kh/Council_of_Jurists/Judicial/jud002g.htm.

218 Code of Ethics, Art 7.

219 Code of Ethics, Art 19.

220 Law on the Bar, Art 60.

221 Law on the Bar, Art 62.

222 Law on the Bar, Art 63.

Many of the issues here identified are relevant to the extent to which Cambodian lawyers habitually observe their own laws and codes of ethics. The delegation met many impressive lawyers in Cambodia who were evidently honest, talented and hard-working. Many of them were forced to work long hours, far from their homes, for low pay or, on occasion, no pay at all. The delegation is encouraged by the self-evident contributions of these individuals to the administration of justice in Cambodia.

It was made clear to the delegation, however, that many lawyers in Cambodia do not observe the high professional and ethical standards that are required of the profession. The delegation was told that (as set out elsewhere in this report) a majority of lawyers engage in regular bribery of judges and judicial officials; that many who are legal-aid funded fail to appear in court on behalf of their clients; and that many themselves accept bribes from the party in dispute with their client.²²³

The approach of certain NGOs to the payment of their lawyers supports the notion that an impression of lawyers as generally being unreliable or untrustworthy exists. The delegation heard, for example, that the CCHR pays its advocates in increments to encourage a system of transparency and accountability, whereby advocates are ‘paid on delivery’, meaning that remuneration is only released to advocates once certain milestones have been reached in the case.

In light of the reported misconduct of lawyers, the delegation was told that the BAKC had received fewer than ten complaints against lawyers in the past three years.²²⁴ If true, this may be a function of the fact that the public is not inclined to complain or that it does not know that it can complain to the BAKC when lawyers are perceived to engage in misconduct, or that it does not trust the BAKC to investigate and deal appropriately with lawyers who are found to have misconducted themselves.

Finally, concerns were raised by individuals with whom the delegation met that, where disciplinary proceedings are used by the BAKC, they are not used in cases of misconduct but as a form of retribution against lawyers who take stances against the government’s political interests. The delegation heard about the case of high-profile lawyer Choung Chou Ngy, who was charged with aiding his client to escape prison in 2012. According to reports by the CCHR and others, Ngy instructed his client to leave the prison in which he was being detained on the grounds that the investigating judge had not issued a detention order and the detention was therefore illegal.²²⁵ Ngy was subsequently subjected to criminal proceedings and, in March 2015, convicted by the Kendal court of first instance. Ngy, who has been lead advocate on a number of highly political cases in Cambodia, did not receive any support from the BAKC during his trial or conviction.

The IBAHRI considers the concerns it has heard regarding frequent misconduct by lawyers to be of critical importance and very troubling. It urges all relevant parties to take action to ensure that lawyers uphold, and are held to, the highest standards of professionalism and ethical conduct.

223 IBAHRI meeting with LICADHO, 24 April 2015; meeting with TI, 22 April 2015; meeting with ADHOC, 23 April 2015; meeting with a group of lawyers, 23 April 2015 (among others).

224 IBAHRI meeting with the BAKC, 23 April 2015.

225 The case in question concerned a high-profile land dispute in the Kien Savay district of Cambodia. More is said about land disputes below. See Chapter Five of this report.

Freedom of expression and association

RELEVANT INTERNATIONAL STANDARDS

Lawyers, like judges, are entitled to freedom of expression, belief, association and assembly. They may participate in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and may join or form local, national or international organisations and attend their meetings. In so doing, however, lawyers are required to be mindful of their professional obligations and the recognised standards and ethics of the legal profession.²²⁶

RELEVANT PROVISIONS OF CAMBODIAN LAW

Under their code of ethics, lawyers are not permitted to speak with members of the media except ‘in strict conformity with professional obligations’.²²⁷ Where lawyers do wish to speak to the media, they must do so ‘with diligence’. However, as of 2013, the requirement to inform the BAKC of any plans to do so, which was present in the 1995 Code of Ethics, was scrapped.²²⁸

OBSERVATIONS OF THE IBAHRI DELEGATION

The delegation was told that, in the past, the BAKC and the Cambodian Ministry of Information have attempted to exercise control over public pronouncements made by lawyers. On 31 January 2012, before the national elections of that year took place, the Ministry of Information sent instructions to television and radio channels directing them to refrain from inviting lawyers on to their programmes without the prior permission of the BAKC.²²⁹ On the same day, the BAKC issued a letter to its members telling them that:

‘[...] From now on, lawyers must not give interviews or otherwise disseminate information related to their profession as lawyers via any media whatsoever without the authorization of the Bar’.²³⁰

Although the IBAHRI understands that these instructions were subsequently withdrawn, the delegation considers such interference in public pronouncements made by lawyers to be incompatible with their human rights and it encourages the BAKC to strive to play a supportive role in respect of the legal profession rather than one in which it seeks to control and silence its members.

226 See n 170, UN Basic Principles on the Role of Lawyers, Art 23.

227 Code of Ethics, Art 17.

228 Code of Ethics, Art 17.

229 ‘Cambodia: Government muzzles Lawyers’ (HRW, 11 February 2013), www.hrw.org/news/2013/02/11/cambodia-government-muzzles-lawyers. The current president, Bun Hon, is himself a former member of the CPP who ‘has spoken out in favour of Hun Sen’s political leadership’.

230 *Ibid.*

Chapter Five: Other Relevant Institutions and Stakeholders

Cambodia suffers from a great number of problems arising, partly from the issues identified in this report, and more specifically from the inability of ordinary members of the public to protect their rights through the judiciary. As well as considering the independence of the judiciary and the contribution of the legal profession, therefore, the IBAHRI delegation also considered the role of institutions and individuals relevant to the judiciary.

This section sets out the delegation's observations on three key parts of Cambodian society, all of them critically affected by the issues already covered in this report. These are:

- individuals affected by the legal uncertainties surrounding land titles, an issue that has become a flashpoint human rights concern in Cambodia in recent years;
- Cambodia's main opposition group, the CNRP, which has placed reform of the judiciary high on its policy agenda; and
- the ECCC, a mixed Cambodian–international tribunal that is technically a part of the Cambodian judiciary but which finds itself in different circumstances to ordinary courts by virtue of the heavy involvement of non-Cambodian actors in every facet of its organisation.

The delegation recognises that there are other issues of equal importance in Cambodia: labour rights in the garment manufacturing industry, the rights of those facing discrimination due to sexual orientation, the rights of women and rights to freedom of expression and assembly, to name only a few. Given constraints on timing and resources, the delegation has chosen to focus on the three areas already outlined, acknowledging that they cannot do justice to the full range of pressing human rights concerns in Cambodia with this report.

5.1 Those disposed by uncertainty in land rights

Land rights have become a critical issue in Cambodia in the past ten years.²³¹ Under the Khmer Rouge, all title to land was abolished on the grounds that private property was contrary to the principles of the Communist revolution.²³² Land titles did not begin to be reinstated until 1992, when Cambodia's first modern land law was passed, permitting individuals to be granted legal title to land in their possession. Land titling was implemented more widely after 2001 (when a second land law was passed).

In 2002, the Cambodian government, funded largely by the World Bank, established the Land Management Administration Project to mark out boundaries and to grant land titles.²³³ That project

²³¹ In examining the issues facing the Boeng Kak community and others affected by land rights disputes, the delegation requested to speak with representatives of land companies that have recently been involved with land disputes in Cambodia, but none granted the delegation an audience during the visit.

²³² See n 1.

²³³ In 2011, the World Bank's assessment of the Land Management and Administration Project was that it was overall 'unsatisfactory' (see World Bank, 'Cambodia: Land Management and Administration Project (English)', available at <http://documents.worldbank.org/curated/en/2011/12/15940646/cambodia-land-management-administration-project>).

progressed slowly and, by 2006, only approximately 15 per cent of land in Cambodia was the subject of legal titles. As of 2013, approximately three million land titles had been issued by the government as a result of a mixture of private and government-led land registration initiatives. At the time of writing, the combination of a high percentage of untitled landowners and an ineffective judicial system has put many communities in Cambodia in a precarious legal situation with respect to the land on which they live.

Government land titling schemes since 2001 have consciously avoided engaging with land titling for plots deemed ‘controversial’ or ‘unclear’, meaning that many communities who would otherwise fulfil all preconditions for being granted title to land have been overlooked and without legal rights simply because their applications were considered difficult to determine.²³⁴

The IBAHRI delegation met with one such community, all but destroyed by this uncertainty in land titles (see box). Reports from residents, former residents, their families and campaigners revealed allegations of corruption, harassment and intimidation on the part of construction companies, and of unfair and biased treatment against campaigners on the part of local authorities and courts.

Whether or not these claims are true, many of those with whom the IBAHRI delegation spoke expressed that, although the law was on their side, they did not have sufficient faith in the judiciary to implement it fairly and so would not seek to enforce their rights through the courts.

The IBAHRI considers this reluctance to go to court for the resolution of complex and gravely important legal issues to reflect extremely negatively on the confidence that the Cambodian public has in its judiciary.

Case study: land titles in the Boeung Kak community²³⁵

In 2006, land resided on by members of the Boeung Kak community was deemed to have ‘unclear status’ and, as such, their applications for titles to the property on which their villages were built being rejected.²³⁶

Once a lakeside municipal in the vicinity of Phnom Penh, Boeung Kak has since become the subject of a long-running and high-profile land dispute between the residents of the area and a construction company called Shikaku Inc – the chair of which is Lao Meng Khin, an influential member of the CPP – who successfully applied for a 99-year lease of land in Boeung Kak from the Cambodian government soon after the Boeung Kak community’s application for land titles was turned down.²³⁷ Shikaku is presently developing Boeung Kak, some of the most expensive real estate in the capital, introducing high-end residential, commercial and office units.

234 Natalie Bugalski and David Pred, ‘Land Titling in Cambodia: Formalising Inequality’, in *Bridges Across Borders Cambodia, A Year in Review* (2009) <http://babcbodia.org/articles/docs/BABC%20-%20Land%20Titling%20in%20Cambodia.pdf>.

235 In examining the issues facing the Boeng Kak community and others affected by land rights disputes, the IBAHRI delegation requested to speak with representatives of land companies that have recently been involved with land disputes in Cambodia, but none granted the delegation an audience during the visit.

236 CCHR, *Cambodia: Land in Conflict, An Overview of the Land Situation* (2013), 18, www.cchrcambodia.org/admin/media/report/report/english/CCHR%20Report%20-%20Cambodia%20Land%20in%20Conflict%20An%20Overview%20of%20the%20Land%20Situation%20ENG.pdf.

237 *Ibid.*

Lao Meng Khin is referred to in Cambodia as an ‘Oknya’, traditionally a word denoting someone akin to an English lord, but now meaning a well-connected tycoon, whose business interests are supported and furthered by the upper echelons of government.²³⁸ Oknya straddle the line between public and private in Cambodia: they benefit greatly from the award of public contracts; however, they are also expected to invest in public projects when the government requests that they do.²³⁹ Allegations have been made that Oknya are responsible for pilfering state funds and a huge, illegal transfer of wealth to political elites.²⁴⁰

On visiting Boeung Kak in April 2015, the IBAHRI delegation met with many of the residents and campaigners who have been directly affected by the events of the past few years in that area. There was, at that time, little sign of the lake that was once the central feature of Boeung Kak,²⁴¹ the vast majority of it having been filled with yellow sand, readied for construction by the Shikaku company. Over the past few years, Shikaku – often with assistance from the municipal authorities – has forced hundreds of members of the Boeung Kak community to leave their homes and begun to construct a large commercial project in the area.²⁴²

Beginning in August 2008, many in the Boeung Kak community and beyond responded to Shikaku’s operations with large protests against the redevelopment and with targeted lobbying of international creditors, including the World Bank. The IBAHRI delegation heard that, during that period, the municipal authority and Shikaku itself took legal action (both civil and criminal) against numerous protesters, many of them women because the community’s strategy had been to put women at the forefront of the protest movement.

According to testimony heard by the delegation,²⁴³ once legal action had been commenced by Shikaku or the authorities, the courts would progress it rapidly so that judgments against protesters imposing fines or prison sentences would be issued within weeks. In stark contrast with the efficiency with which the courts dealt with those complaints, complaints by members of the community (for example about violence against them by Shikaku employees) were ignored by the courts. According to some of the residents of Boeung Kak, the court has yet to take any action with respect to many of the cases filed as long ago as 2009 and 2010.

Other issues plagued the community. According to information given to the IBAHRI delegation,²⁴⁴ the landfill operation resulted in a number of houses that had, until 2008, been inhabited, being submerged under sand. The result was that many families lost all their possessions and livelihoods, and became homeless. Those whose property remained, reported that their neighbourhoods felt as though they were ‘occupied’ by security guards hired by Shikaku, who patrolled the neighbourhoods and set up checkpoints along their roads. Some members of the community alleged that they had been victims of random acts of vandalism or violence, which they interpreted as attempts to intimidate them into leaving the area, or at the very least, into not resisting Shikaku’s plan for it.

238 See n 101, Brinkley (2012), 174–178.

239 *Ibid.*

240 *Ibid.*

241 The word ‘*kak*’ means ‘lake’ in Khmer.

242 Inclusive Development International, ‘Cambodia: Boeung Kak Lake Evictions’, undated, available at www.inclusivedevelopment.net/bkl.

243 IBAHRI meeting with members of the Boeng Kak community, 24 April 2015.

244 IBAHRI meeting with members of the Boeng Kak community, 24 April 2015.

In August 2011, the World Bank suspended lending to the Cambodian government on the basis of its land distribution policies. Faced with the threat of a significant amount of financing being permanently withdrawn, the state finally returned a small portion (12.44 hectares out of a total of more than 133) of the Boeung Kak land to certain residents and granted them land titles to it.²⁴⁵

However, intimidation of campaigners and residents in the Boeung Kak area continued, even after land titles began to be granted. In September 2012, 13 women were arrested after protesting against evictions on charges of belonging to a secessionist movement.²⁴⁶ One prominent campaigner for their release – Yam Bopha – was subsequently also arrested on charges of assaulting a police officer.²⁴⁷ Many of the individuals with whom the delegation spoke expressed the view that all such arrests were carried out in order to intimidate individuals who had campaigned to protect the rights of communities in Boeung Kak.

In late 2013, after increased pressure from the World Bank and the Boeung Kak community, further land titles were granted to the majority of remaining residents whose disputes had not been resolved. Meanwhile, some former residents had accepted cash settlements paid by Shikaku to move to other parts of the country, though the delegation was told that these were not generous and that many of those who moved found they could not sustain a new life elsewhere on the money given to them and subsequently returned to the Boeung Kak area.

In November 2014, seven women from Boeung Kak, some of whom had been arrested in 2012, were again arrested – this time for blocking traffic – after they barricaded a road in protest of government policy in the Boeung Kak area.²⁴⁸ They were sentenced to one year's imprisonment and released by presidential pardon in April 2015, immediately after the grant of a presidential pardon pursuant to a political agreement between the CPP and the CNRP, and a few days before the IBAHRI delegation's visit.²⁴⁹

Today, there are just seven families left of those that lived in Boeung Kak prior to the grant of the lease to Shikaku. They have not received any kind of settlement, either in the form of compensatory payment or a land title. The IBAHRI delegation spoke with members of those families and other stakeholders, including civil rights campaigners, all of whom expressed that, although they were confident the law was on their side, they did not have sufficient faith in the judiciary to implement it fairly. Many expressed the strong view that the courts were likely to be biased in favour of Shikaku and the municipal authorities and were likely to ignore any claims filed by them, rendering their efforts a waste of time. As such, many considered direct community action – in the form of protests and civil disobedience campaigns – to be a more effective means of protecting land rights than legal action through the courts.

245 Khouth Sophak Chakrya, 'Boeung Kak Villagers Closer to Land Titles' (*The Phnom Penh Post*, 7 November 2013), www.phnompenhpost.com/national/boeung-kak-villagers-closer-land-titles-linkfix.

246 'Cambodia: Joint Statement Regarding Detention of Women Land Activists' (HRW, 13 September 2012), www.hrw.org/news/2012/09/13/cambodia-joint-statement-regarding-detention-women-land-activists.

247 *Ibid.*

248 Mech Dara, 'Activists Arrested for Blocking Traffic With Bed' (*The Cambodia Daily*, 11 November 2014), available at www.cambodiadaily.com/news/activists-arrested-for-blocking-traffic-with-bed-72027/.

249 'Cambodian Authorities Free Opposition Party Members, Land Activists' (Radio Free Asia, 13 April 2015), www.rfa.org/english/news/cambodia/authorities-free-cnrp-members-and-land-activists-04132015170750.html.

5.2 The Cambodia National Rescue Party

The CNRP is, at the time of writing, the main opposition party in Cambodia. It is the result of a merger in 2012 between two smaller parties – one headed by high-profile opposition leader Sam Rainsy and the other, the Human Rights Party, headed by another well-known figure, Kem Sokha.²⁵⁰ The CNRP's policy platform is broadly centrist and focuses on the need to tackle the human rights issues facing Cambodia.²⁵¹

OBSERVATIONS OF THE IBAHRI DELEGATION

The delegation met with a member of the CNRP who currently sits in the National Assembly.²⁵² During this meeting, the CNRP acknowledged that there were serious impediments to the separation of powers in Cambodia and that the three new laws had not improved the situation. The CNRP told the delegation that the main problems facing the judiciary were corruption and lack of independence. The delegation was encouraged to hear that the CNRP would be pressing parliament to agree on reforming the three new laws to bring them into line with international standards.²⁵³

Notwithstanding the positive stance taken by the CNRP on reform of the judiciary, the IBAHRI delegation was concerned by frequent reports that the CNRP has engaged in negotiations with the CPP, whereby the CPP has been effectively encouraged by the CNRP to use its influence over the judiciary (including control over the release of prisoners) as a political bargaining tool. In April 2015, for example, ten people were released from prison, five of them members of the CNRP, as part of a political settlement between the CNRP and the CPP to end a stand-off between them.²⁵⁴ The process by which they were released does not appear to have followed any judicial due process, and instead seems to simply coincide with the political settlement. Similar 'settlements' between the CPP and the CNRP, in which members of the CNRP are released in exchange for political concessions by the CPP, have been frequent in Cambodia.²⁵⁵ Such abuse of the judicial process for political ends is entirely at odds with the principle of the separation of powers and should be tackled as soon as possible.

The IBAHRI considers it important that the CNRP continues to champion judicial reform using its political platform. In doing so, IBAHRI urges the CNRP not to exacerbate the issues facing the judiciary by participating in deals with the CPP that require pressure to be put on the judiciary. The IBAHRI encourages the CNRP to play a positive role in promoting and achieving the complete separation of powers in Cambodia.

250 'Opposition Parties Ink Merger' (Radio Free Asia, 17 July 2012), www.rfa.org/english/news/cambodia/merger-07172012160207.html.

251 Stuart White and Cheang Sokha, 'Parties slug it out in rare TV debate' (*The Phnom Penh Post*, 18 July 2013), available at www.phnompenhpost.com/national/parties-slug-it-out-rare-tv-debate.

252 IBAHRI meeting with member of the CNRP, 24 April 2015.

253 IBAHRI meeting with member of the CNRP, 24 April 2015.

254 See n 249, Radio Free Asia (2013).

255 In July 2014, for example, a deal was struck between the CPP and the CNRP, resulting in eight CNRP members being released from prison, see: 'Opposition and ruling party agree to end deadlock', *The Economist*, available at <http://country.eiu.com/article.aspx?articleid=1602048144&Country=Cambodia&topic=Politics&subtopic=Forecast&subsubtopic=Political+stability&u=1&pid=162995600&oid=162995600&uid=1>.

5.3 The Extraordinary Chambers in the Courts of Cambodia

The ECCC is a ‘mixed tribunal’ that sits within the framework of the Cambodian judiciary but which is co-administered by the Cambodian authorities and the international community. International influence over the tribunal is channelled through the UN Assistance to the Khmer Rouge Trials (UNAKRT).²⁵⁶ The ECCC is currently hearing four cases.

RELEVANT PROVISIONS OF CAMBODIAN LAW

According to Article 1 of the law establishing the ECCC (the ‘Law on the ECCC’), the court’s purpose is:

‘to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.’

The staff of the ECCC is a combination of Cambodians, who make up approximately 60 per cent of judicial personnel, and non-Cambodians, who make the remainder of the court. In the trial chamber, for example, three out of five judges are Cambodians, with the remaining two drawn from abroad.²⁵⁷ In the appeals chamber, four out of seven judges are Cambodian, with the remaining three drawn from abroad.²⁵⁸ The Cambodian judges are chosen by the SCM from among a pool of Cambodian judges.²⁵⁹ Foreign judges must be proposed by the Secretary-General of the UN to the government of Cambodia, who then puts the list to the SCM to enable it to make the final decision as to appointments.²⁶⁰ In this way, the SCM is given direct control over the composition of the bench at the ECCC, though it has a great deal more control over the identity of Cambodian judges than of foreign judges.

All other elements of the court are also divided between Cambodian and international staff.

Investigations are always the joint responsibility of a Cambodian and foreign judge.²⁶¹ Judges at the ECCC are assisted by a combination of Cambodian and foreign staff, with the identity of the assistants left entirely to the discretion of the judge in question.²⁶² Indictments are made by two prosecutors, one Cambodian and one foreign, with their appointments controlled by the SCM in the same way as set out above in respect of the judicial bench.²⁶³ Finally, the court’s administrative staff is headed by a Cambodian director and a foreign deputy director.²⁶⁴

²⁵⁶ See n 1.

²⁵⁷ Law on the ECCC, Art 9.

²⁵⁸ Law on the ECCC, Art 9.

²⁵⁹ Law on the ECCC, Art 11.

²⁶⁰ *Ibid.*

²⁶¹ Law on the ECCC, Art 23.

²⁶² Law on the ECCC, Art 13.

²⁶³ Law on the ECCC, Art 18.

²⁶⁴ Law on the ECCC, Art 31.

The legal framework for the ECCC set out above is close to being unique. Certain elements of it are mirrored in, for example, the Special Court for Sierra Leone or the Special Tribunal for Lebanon. None, however, replicates the framework precisely. According to some individuals with whom the IBAHRI delegation spoke, this mixture has, by design, largely shielded the ECCC from the problems faced by the other parts of the judiciary in Cambodia.²⁶⁵ Another view was that the ECCC is not shielded but rather exists in a different position to other courts in Cambodia. This meant that, while some thought, unlike other parts of the Cambodian judiciary, political and financial corruption is not a feature of the ECCC, others expressed the view that the Cambodian judges on the court could be subject to pressure from the government.²⁶⁶

The delegation also heard conflicting reports about court clerks and bailiffs at the ECCC (or their equivalents): on the one hand, it was reported that they have a great deal of integrity and there is no reason to doubt their professionalism, and on the other hand, that there are some instances of staff being obliged to pay part of their salary to their supervisors. One interviewee stated that the UN had in the past instituted a report on corruption in the ECCC but that this was never published. The delegation has been unable to verify the accuracy of this statement.

Of concern to the IBAHRI delegation were allegations that the ECCC was sometimes subject to influence from its donors. The delegation heard that donations from the international community are often withheld until the court announces its verdict and appear to depend on whether the court has delivered the ‘right’ verdict or not.²⁶⁷ The delegation was unable to verify whether donations were indeed withheld but, if true, such actions would undermine the independence of the ECCC greatly and should be addressed by the international community as a matter of urgency.

The delegation also heard reports that the Minister and other members of the executive use indirect influence to block the ECCC from issuing or acting on arrest warrants issued against former members of the Khmer Rouge who are now high-ranking members of the executive. There is some evidence to support this in publicly reported statements. According to HRW, the foreign minister, Hor Namhong, stated that Hun Sen had ‘clearly affirmed’ that no further cases would be allowed to proceed at the ECCC and that ‘successful convictions will finish with case two’.²⁶⁸ On 26 February 2015, Hun Sen publicly warned that the ECCC should not open any new cases, saying that ‘war and chaos could ensue if the court continued to pursue additional cases’.²⁶⁹ The delegation was told by one interviewee that two of the international judges on the ECCC had resigned because of government interference.²⁷⁰

As with the rest of Cambodia’s judicial system, reports that the executive and international community routinely attempt to influence the ECCC – either by blocking its ability to reach suspects or by attempting to influence the outcome of proceedings before it – are of significant concern to

265 IBAHRI telephone interview, 8 June 2015.

266 IBAHRI telephone interview, 9 July 2015.

267 IBAHRI telephone interview, 8 June 2015.

268 ‘Cambodia: Stop Blocking Justice for Khmer Rouge Crimes’ (HRW, 23 March 2015), www.hrw.org/news/2015/03/22/cambodia-stop-blocking-justice-khmer-rouge-crimes.

269 Kuch Naren, ‘Hun Sen Warns Of Civil War If ECCC Goes Beyond ‘Limit’ (*The Cambodia Daily*, 27 February 2015), available at www.cambodiadaily.com/news/hun-sen-warns-of-civil-war-if-eccc-goes-beyond-limit-78757/.

270 IBAHRI telephone interview, 9 July 2015.

the IBAHRI delegation and threaten to undermine the independence and integrity of an institution that has played a key part in beginning to deliver justice to ordinary Cambodians for grave crimes. One interviewee stated that foreign lawyers coming to work with the ECCC feel conflicted: on the one hand, they are contributing to something good, while on the other hand, they feel they are sometimes part of a process that is tainted.²⁷¹ While there is some ambivalence in the statements made to the delegation, the possibility of a corrupted process should be sufficient to prompt an investigation.

²⁷¹ IBAHRI telephone interview, 9 July 2015.

Chapter Six: Conclusions and Recommendations

6.1 To the Cambodian government (including the Ministry of Justice)

While the government of Cambodia is to be commended for committing itself to judicial reform in the Rectangular Strategy, it is apparent that it needs to reassess both the financial support it gives to the judiciary and the approach that some members of the government take to relations between them and the judiciary. Constitutional and legal guarantees of independence have evidently not been matched by sufficient practical guarantees of independence. In practice, the judiciary – far from being self-governing – remains grossly underfunded and suffers from political influence over its functions that greatly impedes its ability to develop.

Accordingly, the IBAHRI recommends that the government of Cambodia (including the MoJ):

- take immediate steps to stop the practice of applying political pressure to the judiciary by members of the government;
- commit to ensuring and safeguarding the separation of powers in Cambodia and to respecting the independence of the judiciary and the bar. Where the law creates a link between the judiciary and the MoJ, the MoJ should not involve itself in anything beyond administrative matters that do not undermine the independence of the judiciary and the bar;
- ensure that basic information about the Cambodian legal system and about people's rights and obligations are taught as a part of the education curriculum. Citizens should be made aware of their legal rights and the means by which they can protect them;
- begin to move away from reliance on foreign aid to support the legal system and to commit to allocating a sufficient portion of the national budget to help improve the legal system and to integrate the rule of law into Cambodian society;
- greatly increase the budget allocated to the legal aid programme conducted through the BAKC and conduct regular audits to ensure that the legal aid programme is effective in ensuring that all those charged with crimes in Cambodia have access to legal advice and representation;
- increase the general budget allocated to the judiciary. Judges and lawyers should have budgets sufficient to allow for adequate salaries, appropriate facilities and sufficient staff to promote and enforce legal rights. Appropriate budget should also be made available for the expansion of the number of courts, judges and lawyers, with the aim of making justice more accessible to all and particularly those outside Phnom Penh;
- continue to build on the human rights and general legal training afforded to law students through undergraduate degree courses. Consider making it compulsory for all law students to take at least one module in human rights law;
- consider introducing a greater degree of cooperation with Association of Southeast Asian Nations

(ASEAN) countries for the provision of legal training and capacity building to lawyers to build on the significant improvements that have taken place in this field over the past few years;

- ensure that women are given the same opportunities to progress in their careers as male counterparts. Attitudes and actions by government employees that are based on discriminatory views should be tackled through training, disciplinary actions and, where appropriate, criminal prosecutions; and
- give support to civil society, NGOs and others to monitor and publicise shortcomings of all branches of the state, including the executive and the judiciary. There should be no unreasonable administrative or other constraints on civil society's activities.

6.2 To the Cambodian government, National Assembly, Senate and His Majesty the King

The IBAHRI delegation welcomes the drive to create a more robust legal framework to govern the activities and actions of the judiciary in Cambodia. However, the delegation has identified serious concerns with the provisions of the new laws that, if left unaddressed, threaten to entrench bad practices that undermine the fundamental principle of the separation of powers and an independent judiciary.

The power given to the Minister of Justice over the Cambodian judiciary is incompatible with the principle that the executive's influence over judicial affairs should be kept as limited as possible.

The IBAHRI recommends that the Cambodian Government, the National Assembly, the Senate and His Majesty the King, as a matter of urgency, and at a minimum, amend the three new laws to ensure that they comply with the principle of the independence of the judiciary. Specifically:

On the Law on the SCM

- amend Article 4 so as to remove the role of the Minister and members of the National Assembly and Senate on the SCM. The SCM should be composed entirely of individuals without ties to either the executive or the legislature;
- amend Articles 8 and 15 so as to create an independent body, with no ties to the executive and the legislature, which oversees the budget and administration of judicial affairs. Although the judicial budget must come from state coffers, once it is paid to the relevant body, it should be administered and controlled exclusively by a body independent of the executive and legislative branches;
- amend Articles 23 and 25 so as to remove the role of the Minister in the disciplinary process, both as a preliminary filter on complaints and as a member of the SCM; and
- amend Article 67 to remove the Minister's power to recommend the retirement of judges on any grounds. Such recommendations should come exclusively from an independent and impartial SCM;

- amend Article 33 to remove the Minister's role on the CPRG and to ensure that the CPRG is an objective body that acts independently of any outside influence;

ON THE LAW ON THE COURTS

- amend Article 11 to remove the Minister's role in the administration of courts and tribunals; and
- amend Article 79 to separate the judiciary's budget from that of the MoJ. The judiciary should receive its own budget as a separate item in the state budget and should not be dependent on the MoJ's budget.

Pending such reform to the three new laws, they should not be applied where they may undermine the independence of the judiciary and result in injustice.

6.3 To the Supreme Council of the Magistracy

As the body ultimately responsible for overseeing the judiciary, the SCM must play a vital role in ensuring the judiciary's independence, professionalism and accountability. The IBAHRI delegation has identified serious concerns in two areas relevant to the SCM. First, executive influence over the SCM, largely through the Minister, is excessive and serves to undermine the SCM's independence. Secondly, the IBAHRI has identified issues in key areas for which the SCM is responsible, including the recruitment, training, disciplining and professionalism of judges.

As the body through which the judiciary theoretically practises self-governance, the SCM does not currently represent a sufficient guarantee of judicial independence – particularly when it comes to resisting pressure from the executive branch. The delegation was concerned by numerous anecdotal reports about the politicisation of disciplinary measures, the selection and promotion of judges based on political connections and the endemic bribe-taking that has come to characterise the Cambodian judiciary, from the very beginning of a judge's career.

Accordingly, the IBAHRI recommends that the SCM:

- take active steps to tackle corruption in the Cambodian judiciary. The SCM should implement a regular system of checks on courts and court staff to ensure that the practices of bribe-taking and political interference are stamped out;
- introduce a system of safeguards when complaints are made against judges and prosecutors to stop the practice of judges taking 'revenge' on complainant lawyers in courts;
- ensure that publicly visible boards setting out fees payable to court staff are published in all courts and that all payments of fees are fully documented and regularly audited;
- ensure that, where disciplinary measures are taken against judges and prosecutors, such measures are transparent and compliant with international standards;
- publish annual reports for all levels of court, which, among other things, provide the public with information regarding the number of cases, the number of judges, the salaries of judicial staff,

and documenting the number and nature of complaints and what action the authorities have taken to deal with those complaints;

- introduce a system of mandatory continuing professional training for judges and prosecutors that gives appropriate education on international human rights standards and professional conduct and ethics;
- contribute to a climate in which female judges and prosecutors are empowered to progress in their careers in the same ways as their male counterparts;
- take steps to begin introducing specialised courts, including juvenile, family and other courts, as soon as possible;
- invest in greater computerisation and systematisation of the court system so that court records, case files, judgments and other documents are easily accessible to court staff, lawyers and, wherever appropriate, the public; and
- permit judges to make public comments without prior authorisation from the SCM or any other body, provided that they do so within the framework established by their professional code of conduct.

6.4 To the Bar Association of the Kingdom of Cambodia

The BAKC, as the body representing the legal profession in Cambodia, should fulfil the role of defending and protecting its members, especially against actions and omissions by the executive that threaten the integrity, independence and viability of the legal profession.

The IBAHRI is very concerned to hear allegations implicating the BAKC in practices that not only fail to support the legal profession in Cambodia but also frequently harm it. It is apparent that the BAKC is not independent of the Cambodian government and is therefore unable to act as a meaningful regulatory body capable of protecting the interests of its members and the general public. This lack of independence is evident in a number of elements of the BAKC's track record, including the manner in which past elections have been run and its reluctance to criticise government actions – including in relation to the three new laws – even when such criticism is demanded by its members.

Moreover, the BAKC's monopoly over legal training and its restrictive policies on the number of lawyers permitted to train at any one time is a major factor in the continuing shortage of defence advocates in Cambodia, particularly in areas outside of Phnom Penh. The IBAHRI urges the BAKC to implement reforms that will allow it to play a constructive role in the Cambodian legal profession.

Accordingly, the IBAHRI recommends that the BAKC:

- commits to the principles of transparency, good governance and the prevention of malpractice in the way in which the BAKC is run and the purposes for which it functions;
- ensure it conducts itself entirely independently of the Cambodian government. The BAKC should be detached from political influence and have no affiliation – either formal or informal – with any political party or politician;

- ensures its support and services are made available equally to all legal professionals in Cambodia without discrimination of any kind;
- ensures that Article 32 of the Law on the Bar is used only for exceptional candidates who have an educational and professional background that justifies affording them exceptional treatment, as stipulated by the provisions of Article 32. Candidates who are not suitably qualified to practise as lawyers or whose ability to adhere to the profession's ethical standards is in question should not be permitted to join the profession using Article 32;
- introduces secret ballots to the voting procedures at the BAKC to lessen the possibility of undue influence being exerted over voters;
- ensures no bribes are paid or accepted by the BAKC and that all admissions to legal education and legal practice are granted on the basis of merit and not on the basis of the identity of the applicant or financial incentive;
- continues to make improvements in legal training and resources (where relevant, in cooperation with the bar associations of other ASEAN countries) to produce skilled and knowledgeable lawyers who are experts in their fields and fully competent members of the judiciary. Legal training should include participation in pro bono activities and the provision of services to disadvantaged communities with a view to nurturing ethical conduct; and
- introduces a system of mandatory continuing professional training for lawyers that gives appropriate education on international human rights standards and professional conduct and ethics.

6.5 To the Cambodia National Rescue Party

The IBAHRI delegation stresses the importance of political support for judicial independence. It is commendable that the CNRP seeks to include judicial independence as part of its policy platform and it should continue to challenge government practice in relation to the judiciary wherever that practice undermines judicial independence. Notwithstanding these policies, the IBAHRI delegation was concerned to have received evidence that the CNRP frequently enters into political deals with the CPP, which involve practices that undermine the independence of the judiciary, including determination of release dates for prisoners through non-judicial means. Such practices exacerbate existing problems with executive influence over the judiciary and must stop.

Accordingly, the IBAHRI recommends that the CNRP:

- end the practice of negotiating with the government for the release of individuals or for charges against individuals to be dropped;
- adopt fundamental judicial reform as a central policy platform for the elections in 2018; and
- challenge the CPP and the government wherever possible to pressure them to grant the judiciary true independence.

6.6 To the non-governmental organisation community in Cambodia and elsewhere

The NGO community plays an important part both in ensuring that there is appropriate monitoring and reporting of threats to judicial independence and in providing much needed support to the Cambodian judiciary through access to justice programmes. The NGO community has taken an admirably strong line against attacks on judicial independence and it should continue to do so, engaging with the UN special procedures and other international bodies to ensure that sufficient attention is given to the issue.

Recent cuts to justice-focused NGOs' budgets and personnel have had a negative impact on the Cambodian judiciary. While NGO assistance on national judicial issues is not a long-term solution to the problems facing the Cambodian justice system, it is an important interim measure that will help to improve, among other things, access to justice for those with limited means, particularly those charged with crimes outside Phnom Penh.

Accordingly, the IBAHRI recommends that the NGO community:

- invite the UN Special Rapporteur on the independence of judges and lawyers to conduct an in-country mission focusing on the issues identified in this and other reports;
- engage more widely with the UN special procedures to give greater visibility to the problems that subsist in the Cambodian judiciary; and
- work with the government of Cambodia to set up and run a robust, internationally monitored programme of legal aid for Cambodian lawyers that will permit effective representation of Cambodians who would otherwise have no access to lawyers.

6.7 To the international community

Cambodia remains a country profoundly influenced and shaped by the international community. The IBAHRI considers that the international community, by applying pressure to the Cambodian government and, at the same time, by assisting it to improve its judiciary, could play a very positive role in supporting a home-grown push for an improved and more independent judiciary.

Accordingly, the IBAHRI recommends that the international community:

- encourage the Cambodian government to refrain from asserting political pressure over Cambodian judges and prosecutors, and instead play a constructive role in the development of a robust and independent judiciary;
- work with the government of Cambodia to set up and run a robust, internationally monitored programme of legal aid for Cambodian lawyers that will permit effective representation of Cambodians who would otherwise have no access to legal assistance;
- refrain from entering into agreements with the Cambodian government predicated on the assumption that the rule of law is strongly adhered to in the country; and
- refrain from making particular outcomes at the ECCC conditions precedent for receiving funding from international donors.

6.8 To the International Bar Association

As noted above, the BAKC currently plays an unconstructive, frequently obstructionist and biased, role in the development of the legal profession in Cambodia. The IBA, as the international representative of bar associations, may well be able to exercise influence over the BAKC and should encourage it, if it wishes to remain a member of the IBA, to reform itself such that it develops into an organisation capable of providing guidance, protection and oversight to the legal profession in Cambodia.

Accordingly, the IBAHRI recommends that the IBA:

- re-examine the grounds on which the BAKC has been granted ongoing membership of the IBA;
- encourage the BAKC to end corrupt and political practices with regards to the ways in which it manages the legal profession and organises itself; and
- encourage the BAKC to play a more robust and independent role in protecting lawyers and the legal process in Cambodia, especially against acts and omissions by the government.

6.9 To the international business community

The investment community is often implicated, whether knowingly or not, in serious human rights abuses in Cambodia. In particular, the delegation is very concerned by reports of international investors refusing to engage with claims to property rights by Cambodians, with the result being that, rather than help Cambodia to develop positively, investments can sometimes become a means by which human rights are abused. International corporations and investors should take great care when investing in Cambodia, to ensure that their investment will have a meaningful, positive impact on the country and that it will not facilitate human rights violations.

Accordingly, the IBAHRI recommends that investors in Cambodia:

- ensure that they have conducted a full human rights impact assessment prior to concluding any investment deals with the government of Cambodia. The IBAHRI urges, in particular, caution and careful examination where investments involve purchases of land.

Annex A

List of organisations and individuals with whom the delegation met during its visit to Cambodia, 21–26 April 2015 and thereafter

- Senior members of the Phnom Penh Court of Appeal, 20 April 2015
- Amnesty International, 20 April 2015
- Legal Aid Cambodia, 20 April 2015
- Cambodian Centre for Human Rights, 20 April 2015
- British Embassy in Phnom Penh, 20 April 2015
- UN OHCHR, 21 April 2015
- Legal Support for Children and Women, 21 April 2015
- Housing Rights Task Force, 21 April 2015
- Ministry of Justice, 22 April 2015
- Raoul Wallenberg Institute, 22 April 2015
- Transparency International, 22 April 2015
- Vice President of the Supreme Court, 22 April 2015
- Bar Association of the Kingdom of Cambodia, 23 April 2015
- Cambodian Human Rights and Development Association (ADHOC), 23 April 2015
- A group of Cambodian lawyers, 23 April 2015
- LICADHO, 24 April 2015
- A member of the CNRP, 24 April 2015
- A group of residents of Boeung Kak, 24 April 2015
- A Cambodian legal assistant involved with land dispute cases, 26 April 2015
- Two legally qualified individuals working at the ECCC, 8 June 2015 and 9 July 2015



The International Bar Association's Human Rights Institute

The **International Bar Association's Human Rights Institute** (IBAHRI) works with the global legal community to promote and protect human rights and the independence of the legal profession worldwide.

What we do

We provide **human rights training** and **technical assistance** for legal practitioners and institutions, building their capacity to effectively promote and protect human rights under a just rule of law.

A leading institution in international **fact-finding**, we produce expert reports with key recommendations, delivering timely and reliable information on human rights and the legal profession.

We support lawyers and judges who are arbitrarily harassed, intimidated or arrested through **advocacy** and **trial monitoring**.

A focus on pertinent human rights issues, including the **abolition of the death penalty**, **poverty** and **LGBTI rights** forms the basis of targeted capacity-building and advocacy projects.

Why we are here

Lawyers and judges play a fundamental role in facilitating access to justice, ensuring accountability of the state and upholding the rule of law. When the legal profession is not able to function independently or effectively, this gives rise to human rights violations, impunity and injustice. As part of the world's leading organisation of international legal practitioners, bar associations and law societies, the IBAHRI is uniquely placed to build the capacities of the legal profession to promote and protect human rights and professional independence worldwide.

History

Established in 1947, the **International Bar Association** (IBA) is the world's leading organisation of international legal practitioners, bar associations and law societies. The IBA influences the development of international law and shapes the future of the legal profession throughout the world. It has a membership of over 55,000 individual lawyers and 206 bar associations and law societies spanning all continents. Grouped into two divisions – the **Legal Practice Division** (LPD) and the **Public and Professional Interest Division** (PPID) – the IBA covers all practice areas and professional interests, providing members with access to leading experts and up-to-date information.

The IBA established its Human Rights Institute in 1995 under the honorary presidency of Nelson Mandela, to promote and protect human rights and the independence of the legal profession under a just rule of law. The IBAHRI is an independent entity within the Public and Professional Interest Division (PPID) of the IBA. IBAHRI projects are funded by the generous support of its members and funding bodies.

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