

Human Trafficking Trials in Cambodia

A Report by the Cambodian Center for Human Rights
July 2010



Supported by

The Asia Foundation

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About the Cambodian Center for Human Rights

This report, ‘Human Trafficking Trials in Cambodia’ (the “Report”) is an output of the Cambodian Trial Monitoring Project (the “Project”), a project implemented by the Cambodian Center for Human Rights (the “CCHR”). The CCHR’s vision is of a non-violent Kingdom of Cambodia (“Cambodia”) in which people enjoy their fundamental human rights, are treated equally, are empowered to participate in democracy and share the benefits of Cambodia’s development. The CCHR desires rule of law rather than impunity; strong institutions rather than strong men; and a pluralistic society in which variety is harnessed and celebrated rather than ignored or punished. The CCHR’s logo shows a white bird flying out of a circle of blue sky - this symbolizes Cambodia’s claim for freedom. To realize its vision, the CCHR works to promote and protect democracy and respect for human rights - primarily civil and political rights - throughout Cambodia. For more information, please visit www.cchrcambodia.org.

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EXECUTIVE SUMMARY

Chapter 1 of the Report acts as an introduction by providing background to human trafficking and criminal trials in Cambodia. The focus of this chapter is on recent legal developments aimed at increasing the rate of successful prosecutions for human trafficking offenders in Cambodia, including the introduction of the Law on the Suppression of Human Trafficking and Sexual Exploitation 2008 (the “LHTSE”). This chapter further sets out the purposes of the Report: to assess the handling of trials involving offences under the LHTSE (“LHTSE trials” hereinafter) in the Cambodian judicial system, and to use the findings as a basis for dialogue with the judiciary and other relevant stakeholders.

Chapter 2 sets out the methodology of the Report and the Project. It outlines the timeframe and location of the trial monitoring; the resources and infrastructure that were developed during the reporting period to support the Project; and the training undertaken by the CCHR trial monitors (the “Trial Monitors”) in preparation for the Project.

Chapter 3 includes the substantive analysis, providing the ‘raw’ data collected by the trial monitors with regard to the treatment of LHTSE trials by the courts and an analysis of this data in light of domestic and international legal provisions relating to human trafficking and fair trial and victim rights.

During the reporting period of 10 August to 31 December 2009 (the “Reporting Period”), the CCHR monitored 18 LHTSE trials (three of which were delayed and heard outside the Reporting Period), and 199 other trials (“non-LHTSE trials” hereinafter) in Cambodia. This chapter analyzes a number of broad areas for concern.

The first issue is the gender specific nature of human trafficking and sexual exploitation¹ and the extent to which the legal system handles such cases in a gender-sensitive manner. The proportion of female lawyers representing victims of offenses under the LHTSE suggests that some efforts have been made towards gender-sensitivity, albeit possibly by NGOs working within this field. However, a number of trials involved instances where the presiding judge failed to address sensitive issues in a suitable manner. The gender implications of these examples are evident.

The second, and related, issue identified for analysis was the right of the victim not to be subject to criminalization for acts related to the human trafficking. This right includes not only the right to be protected from criminal prosecution, but also the right not to be re-victimized by the criminal justice system. The data and case studies recorded a number of instances where statements by the judge or the legal process itself may contribute to an abuse of the victim’s rights in this regard.

This chapter goes on to assess the difficult balance between the right of the accused to a public hearing and the rights of the victims to confidentiality and protection. The data from the CCHR trial monitoring reveals that neither the rights of the accused nor the rights of the victim in this regard are adequately protected. Public notice of trials was rarely posted, yet at the same time, there are inadequate measures in place to protect the victim’s privacy both before and during trial.

¹ United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons* (Vienna, Austria: Global Initiative to Fight Human Trafficking, 2009).

Due to the high proportion of juvenile victims in LHTSE-related offenses, the treatment of juveniles within the judicial process was given particular attention. The data collected by the Trial Monitors in relation to juvenile accused in the non-LHTSE trials monitored was assessed in order to give an indication as to the judicial treatment of children within the judicial system in any capacity. The data revealed that the courts have little understanding of issues relating to juvenile victim protection.

Another major concern addressed within this chapter is the frequency of delay in proceedings. Undue delay of trials is not only a violation of the rights of the accused, but can have negative psychological impacts on the victim, as well as increasing the opportunities for intimidation of the victim prior to testifying. Furthermore, the prevalence of pre-trial detention emerged as a matter in urgent need of reform. In a number of cases the period of pre-trial detention was not only a violation of the rights of the accused, but was so excessive as to be illegal under Cambodian law. Whilst detention may be necessary for the protection of victims, the rights of victims must not negate the rights of the accused to a fair trial, a fundamental component of the rule of law. In such trials, therefore, delay must be addressed in order to maximize the extent to which the rights of both parties are upheld.

Finally, the extent to which the LHTSE – a relatively new law – is correctly applied, explained and understood is discussed. In order to gain a deeper understanding of this issue, the extent to which the charge is explained by the judge is contrasted between LHTSE and non-LHTSE trials. The contrast between the data collected by the Trial Monitors revealed that the proportion of trials in which the circumstances and details of the charge were explained was significantly less in LHTSE trials. When viewed in light of the case studies, it is apparent that there are shortcomings in Cambodia’s judicial system with regards to understanding and application of the LHTSE.

Chapter 4 goes on to set out a number of recommendations aimed at both the judiciary and relevant government ministries and institutions. These recommendations attempt to combat the substantial weaknesses in the judicial system’s adherence to human rights standards for victims of human trafficking and sexual exploitation and its shortcomings in relation to Cambodia’s international obligations to guarantee fair trial rights. They broadly seek to ensure that all relevant bodies: receive the requisite training and are suitably educated in the human rights issues they may encounter; apply the required fair trial standards and provide protection for all parties involved in court proceedings; establish and foster effective cooperative and collaborative relationships with state institutions and civil society organizations, and generally uphold relevant international human rights standards.

All of the findings of the Report are explained with reference to specific case studies of trafficking and sexual exploitation cases monitored during the Reporting Period. This Report will be shared with the judiciary and other relevant stakeholders.

DEFINITIONS

“ALRC”	Asian Legal Resource Centre
“ACTS”	Cambodia Against Child Trafficking Networks
“ASEAN”	Association of South East Asian Nations
“BPJC”	Bangalore Principles of Judicial Conduct
“CAT”	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
“CCHR”	Cambodian Center for Human Rights
“CCP”	Code of Criminal Procedure of the Kingdom of Cambodia
“CESCR”	Committee on Economic, Social and Cultural Rights
“CDP”	Cambodian Defenders Project
“Checklist Guidance”	Comprehensive guidance notes to help CCHR trial monitors understand each question in the Checklist
“Checklist”	The checklist used by CCHR trial monitors to record trial data when monitoring trials
“CLJR”	Council for Legal and Judicial Reform
“Code of Conduct”	A document outlining the obligations of non-interference, objectivity and confidentiality to which CCHR trial monitors are bound
“COMMIT”	The Coordinated Mekong Ministerial Initiative against Trafficking
“Constitution”	The Constitution of the Kingdom of Cambodia
“Database”	The database in which CCHR trial monitors store trial data recorded on checklists
“ECPAT”	End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes
“EWMI”	East West Management Institute
“HRC”	Human Rights Council
“ICC”	International Criminal Court
“ICCPR”	International Covenant on Civil and Political Rights
“ICJ”	International Commission of Jurists
“IJM”	International Justice Mission
“ILO”	International Labor Organization
“Kandal Court”	Kandal Provincial Court of First Instance
“LHTSE”	Law on the Suppression of Human Trafficking and Sexual Exploitation, 2008
“Memorandum”	The Memorandum of Understanding on Cooperation Against Trafficking in Persons in the Greater Mekong Sub-Region, October 29, 2004
“Minimum Standards”	Policy and Minimum Standards for Protection of the Rights of Victim of Human Trafficking
“MLAT”	Treaty on Mutual Legal Assistance in Criminal Matters Among Like Minded ASEAN Member Countries, 2004
“Model Court Project”	A collaborative project aiming to improve the fairness and efficiency of trials in four courts – Phnom Penh, Kandal, Kompong Cham, and Banteay Meanchey – with the aim of providing a positive model for the court system throughout Cambodia
“Model Court Standards”	A set of court standards for fairness and efficiency compiled in conjunction

	with the Cambodian Model Court Project
“MOJ”	Ministry of Justice
“National Committee”	National Committee to Lead the Suppression of Human Trafficking, Smuggling, Labor Exploitation and Sexual Exploitation in Women and Children (S.T.S.L.S)
“NGO”	Non-Governmental Organization
“OSCE”	Organization for Security and Cooperation in Europe
“Palermo Convention”	The 2000 United Nations Convention against Transnational Organized Crime
“Phnom Penh Court”	Phnom Penh Municipal Court of First Instance
“PRAJ”	Cambodian Program on Rights and Justice
“Protocol”	Supplement to the Palermo Convention: Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children
“Report”	This report on Human Trafficking Trials in Cambodia
“RAJP”	Royal Academy for Judicial Professions
“RGC”	Royal Government of Cambodia
“SCM”	Supreme Council of Magistracy
“SISHA”	South East Asia Investigations into Social and Humanitarian Activities
“TAF”	The Asia Foundation
“Project” or “TMP”	Trial Monitoring Project
“Trial Monitors”	CCHR trial monitors
“UDHR”	Universal Declaration of Human Rights
“UN”	United Nations
“UNBPRL”	United Nations Basic Principles on the Role of Lawyers
“UNBPIJ”	United Nations Basic Principles on the Independence of the Judiciary
“UNODC”	United Nations Office on Drugs and Crime
“UNTAC”	United Nations Transitional Authority in Cambodia
“UNTAC Law”	Provisions relating to the Judiciary and Criminal Law and Procedure applicable in Cambodia during the Transitional Period, 1992
“USAID”	United States Agency for International Development

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1. INTRODUCTION

The right to a fair trial has its foundations in the need to protect citizens against abuse of State power. It is primarily concerned with the rights of the accused in criminal proceedings. It is now recognized that in order to combat human trafficking, a multinational and multidisciplinary cooperative approach is necessary. Successful prosecution of human trafficking offenders requires greater awareness of human trafficking and related offenses, fairer trials and detailed understanding of victims' rights, as well as judicial collaboration with police and victim assistance agencies. The challenge for the judicial system in Cambodia is to ensure that both victim protection and the rights of the accused are simultaneously upheld. This Report aims to highlight particular victim considerations and fair trial rights that may present the greatest challenges in this difficult area, in order to assist the Cambodian law enforcement agencies and the judiciary in the handling of human trafficking and sexual exploitation cases.

Human Trafficking in Cambodia

Cambodia has long been under the spotlight in relation to human trafficking. The United States Trafficking in Persons Report 2009 places Cambodia in Tier 2 Watch List² in terms of world standards in relation to human trafficking.³ Tier 1 countries are those that fully comply with the relevant standards. The ratings of other countries in the region – Malaysia (Tier 3), Thailand (Tier 2) and Myanmar/Burma (Tier 3) – demonstrate South East Asia's vulnerability to human trafficking and sexual exploitation.⁴ Studies show that Cambodia remains a source, destination and transit country for human trafficking in the South East Asian region.⁵ The Royal Government of Cambodia (the "RGC"), in cooperation with prominent Non-governmental Organizations ("NGOs") and Inter-governmental Organizations ("IGOs"), has demonstrated its willingness to tackle the problem of human trafficking and must be commended for its efforts. Cambodia has signed the United Nations ("UN") Convention against Transnational Organized Crime 2000 (the "Palermo Convention") and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children⁶ (the "Protocol"). Moreover, Cambodia has demonstrated its commitment to the International Labor Organization (the "ILO") treaties on human trafficking related matters: in 2005 the RGC ratified ILO Convention No. 182 on the elimination of the worst forms of child labor, making it

In order to protect victims, the interpretative notes for the *travaux préparatoires* (preparatory work) to The Palermo Protocol state that the provisions on consent should not be interpreted as imposing any restriction on the right of accused persons to a full defense and to the presumption of innocence.

Further, they should not be interpreted as placing the burden of proof on the victim.

They further indicate that "as in any criminal case, the burden of proof is on the State or public prosecutor."

Thus the Protocol does not seek to transform the relationship between the accused and the prosecution in criminal matters. It seeks only to add a new criminal offense as regards trafficking. (ILO, 2005)

² Tier placements are based on the United States Trafficking and Violence Protection Act ("TVPA"), available online at: <http://www.state.gov/g/tip/rls/tiprpt/2009/123132.htm>

The Tiers:

Tier 1: Countries whose governments fully comply with the Trafficking Victims Protection Act's (TVPA) minimum standards

Tier 2: Countries whose governments do not fully comply with the TVPA's minimum standards, but are making significant efforts to bring themselves into compliance with those standards AND:

a) The absolute number of victims of severe forms of trafficking is very significant or is significantly increasing; or
b) There is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year; or
c) The determination that a country is making significant efforts to bring themselves into compliance with minimum standards was based on commitments by the country to take additional future steps over the next year

Tier 3: Countries whose governments do not fully comply with the minimum standards and are not making significant efforts to do so

³ United States Department of State, *Trafficking in Persons Report 2009 - Cambodia*, 16 June 2009, available at:

<http://www.unhcr.org/refworld/docid/4a4214c82d.html>

⁴ Ibid.

⁵ United Nations Office on Drugs and Crime, *supra* note 1.

⁶ Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime, GA Res. 55/25 (LV) 2000

obligated to address labor exploitation and trafficking. Cambodia was the first country in the Greater Mekong Sub-region⁷ to have ratified all eight ILO ‘Core’ Conventions.⁸ Cambodia signed memoranda of understanding to combat human trafficking with Thailand and Vietnam in 2003 and 2005 respectively. The Memorandum of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Sub-Region (the “Memorandum”) was signed in 2004 by Myanmar, Cambodia, China, Thailand and Laos PDR as part of the Coordinated Mekong Ministerial Initiative Against Trafficking (the “COMMIT”). The Memorandum committed the governments to a response to human trafficking that meets international standards, and specifically highlights the need for governments to work together with NGOs and IGOs to counter human trafficking. In addition, there is a planned memorandum of understanding between Cambodia and Malaysia. Whilst the memoranda of understanding are not binding, Cambodia has signed the 2004 Treaty on Mutual Legal Assistance in Criminal Matters Among Like-Minded ASEAN Member Countries (the “MLAT”),⁹ a binding multilateral treaty, which improves working relationships between security and law enforcement agencies in ten ASEAN countries to enhance the regional response to transnational crime. The MLAT establishes procedures for requesting and providing assistance in the collection of evidence for criminal investigations and proceedings. Whilst certain commentators argue that these foregoing agreements are of little effect until more concrete steps are taken to tackle trafficking, they have given rise to a system of information sharing that enables cooperation between the signature states for the arrest of perpetrators.¹⁰

Together with primary international human rights instruments to which Cambodia is party, the international instruments which are of particular relevance for the purposes of this Report include: the UN Protocol on Human Trafficking, read together with the Palermo Convention;¹¹ the UN Convention on the Rights of the Child; and the Convention on the Elimination of All Forms of Discrimination Against Women. The international legal framework is supported by numerous secondary sources, which play an important role in clarifying the law. Guidelines, recommendations, resolutions and declarations related to these international instruments have been issued by the UN General Assembly; the Office of the Special Representative and Coordinator for Combating Trafficking in Human Beings; and the ILO. These mechanisms, whilst not creating legally binding obligations, are influential in the interpretation and application of the laws with which they are concerned. As discussed below, such documents carry significant weight in Cambodia due to the objectives stated in key domestic law. Specifically, the UN High Commissioner for Human Rights Principles and Guidelines on Human Rights and Trafficking¹² and the International Framework for Action to Implement the Trafficking in Persons Protocol recently adopted by the UN Office for Drugs and Crime (the “UNODC”) offer essential instructions on the purpose and implementation strategies for the instruments making up the international legal regime that relates to human trafficking.

⁷ The Greater Mekong Sub-region comprises Cambodia, the People's Republic of China, Lao People's Democratic Republic, Myanmar, Thailand, and Vietnam.

⁸ The Core Conventions of the ILO are as follows; Convention 29 - Forced Labor Convention, 1930; Convention 87 - Freedom of Association and Protection of the Right to Organize Convention, 1948; Convention 98 - Right to Organize and Collective Bargaining Convention, 1949; Convention 100 - Equal Remuneration Convention, 1951; Convention 105 - Abolition of Forced Labor Convention, 1957; Convention 111 - Discrimination (Employment and Occupation) Convention, 1958; Convention 138 - Minimum Age Convention, 1973; Convention 182 - Worst Forms of Child Labor Convention, 1999. For the purposes of human trafficking, Conventions 138 and 182 are of particular import.

⁹ Available at : <http://www.aseansec.org/17363.pdf>

¹⁰ Casajole Collins “Implementing new Law proves Onerous”, available online at: <http://www.aplecambodia.org/detailheadlins.php?id=72>

¹¹ Signed by Cambodia 11 Nov 2001 and ratified 2 July 2007

¹² Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1 (2002)

The principal Cambodian domestic legislation governing human trafficking is the Law on the Suppression of Human Trafficking and Sexual Exploitation 2008 (the “LHTSE”). The LHTSE has attempted to clarify the concept of trafficking in persons in line with the definition set down by the Protocol. As the title suggests, the LHTSE is not limited to human trafficking alone, it intends to cover offenses relating to both human trafficking and sexual exploitation. These offenses, whilst not mutually exclusive, are not identical and therefore a correct and detailed understanding of the law is imperative. It also provides for prosecution by Cambodian courts of human trafficking and sexual exploitation offenses committed abroad if the perpetrator or victim is Khmer.¹³ Additional domestic instruments include the Code of Criminal Procedure (“CCP”),¹⁴ the Minimum Standards for Protection of the Rights of Victims of Human Trafficking (the “Minimum Standards”)¹⁵ and the Penal Code of the Kingdom of Cambodia, 2009 (the “Penal Code”).¹⁶ At the time of going to print, the provisions relating to criminal offenses within the Penal Code were not in force; they are expected to come into force in November 2010 and are likely to cause some confusion as to which law is applicable to human trafficking cases.

Importantly, Cambodia’s commitment to international standards, policies and instruments is firmly entrenched in Article 1 of the LHTSE, ensuring that the interpretation and application of the LHTSE reflects the Protocol: Article 1: *“The objective of this law is to suppress the acts of human trafficking and sexual exploitation in order to protect the rights and dignity of human beings, to improve the health and welfare of citizens, to preserve and enhance good national customs, and to implement the UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, or other international instruments or agreements with regard to human trafficking that the Kingdom of Cambodia has ratified or signed.”* Similar affirmations with regards to international human rights instruments are made in the Minimum Standards.¹⁷ This is important for the purposes of this Report, and judicial application of the law in Cambodia, as it entrenches the international legal regime as a primary source of reference when discussing the legal framework in Cambodia to tackle human trafficking.

Further efforts to combat human trafficking in Cambodia were seen when, in 2009, the RGC established the National Committee to Lead the Suppression of Human Trafficking, Smuggling, Labor Exploitation and Sexual Exploitation in Women and Children (the “National Committee”).¹⁸ The National Committee is composed of six working groups including the following: Prevention Working Group; Protection, Rehabilitation, Reintegration, and Repatriation Working Group; Law Enforcement Working Group; Judiciary Affairs Working Group; International Cooperation Working Group; and Child Affairs Working Group.¹⁹ It is invested with the duty to take actions to rescue, protect and uphold better quality of services of rehabilitation, reintegration and

ELEMENTS OF HUMAN TRAFFICKING UNDER INTERNATIONAL AND DOMESTIC LAW

The act (what is done): Recruitment, transportation, transfer, harboring or receipt of persons

The means (how it is done): Threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments or benefits to a person in control of the victim

The purpose (why it is done): The purpose is exploitation, which includes exploiting the prostitution of others, sexual exploitation, forced labor, slavery or similar practices, and the removal of organs. To ascertain whether a particular circumstance constitutes trafficking in persons, consider the definition of trafficking in the Trafficking in Persons Protocol and the constituent elements of the offense, as defined by the relevant domestic legislation.

¹³ www.aplecambodia.org

¹⁴ The Code of Criminal Procedure of the Kingdom of Cambodia was promulgated on August 10, 2007.

¹⁵ Ministry of Social Affairs, Veterans and Youth Rehabilitation of the Kingdom of Cambodia, *Policy and Minimum Standards for Protection of the Rights of Victim of Human Trafficking*, 2009.

¹⁶ The Penal Code of the Kingdom of Cambodia, 2009.

¹⁷ Introduction: *Policy and Minimum Standards for Protection of the Rights of Victim of Human Trafficking* Adopted by Ministry of Social Affairs, Veterans and Youth Rehabilitation Kingdom of Cambodia, 2009

¹⁸ Sub Decree on Establishment of National Committee to Lead the Suppression of Human Trafficking, Smuggling, Labor Exploitation and Sexual Exploitation in Women and Children (S.T.S.L.S) Number: 162..ANKR/BK

¹⁹ Sub Decree on Establishment of National Committee to Lead the Suppression of Human Trafficking, Smuggling, Labor Exploitation and Sexual Exploitation in Women and Children (S.T.S.L.S) Number: 162..ANKR/BK Article 6

repatriation of victims especially women and children; and eradicate impunity by encouraging investigation and prosecution of ring leaders and offenders in relation to human trafficking, smuggling, labor exploitation and sexual exploitation in women and children.²⁰

However, the United States Department of State Report recorded that the number of people convicted for human trafficking offenses in Cambodia has fallen dramatically from 52 in 2007-08 to 12 in 2008-09.²¹ Regrettably, this dramatic fall in conviction rates may have less to do with an actual reduction in human trafficking activity or an increased success of preventative measures, and more to do with both the judiciary and police force struggling to implement and apply the new law. The introduction of the new law alone has not been very effective in combating human trafficking;²² any law needs time to take effect and be understood by the broader public. This lack of progress also suggests a deeper, more inherent problem with the judicial system and law enforcement and therefore a deeper look at the justice system as a whole is required in order to discover such shortcomings and formulate effective reform strategies to address them. Law enforcement officials in Cambodia have recognized the problem, however, the difficulties in accessing reliable information on the subject continues to be a major hindrance.²³ This Report takes a deeper look at the judicial system in order to discover the shortcomings afflicting human trafficking trials.

The Judicial System in Cambodia

Cambodia has a civil law system with trials conducted on an inquisitorial basis.²⁴ There are courts of first instance throughout Cambodia and an Appellate Court and Supreme Court located in Phnom Penh. The Constitution of the Kingdom of Cambodia (the “Constitution”) guarantees the independence of the judiciary as well as the right to a fair trial.²⁵ International law and other national legislation also guarantee fair trial rights.

The Constitution provides in Article 31: “*The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women’s and children’s rights.*” The Universal Declaration of Human Rights (the “UDHR”) was adopted by the UN General Assembly and proclaims a common standard of respect for rights and freedoms to be achieved for all people and all nations. Article 10 states: “*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.*”²⁶ Article 11 of the UDHR elaborates on fair trial rights.²⁷ Much of the UDHR is regarded as having acquired legal force as customary international law²⁸ and it is binding on Cambodia pursuant to Article 31 of the Constitution.²⁹

Article 31 of the Constitution also refers to “*covenants and conventions related to human rights, women’s and children’s*

²⁰ Sub Decree on Establishment of National Committee to Lead the Suppression of Human Trafficking, Smuggling, Labor Exploitation and Sexual Exploitation in Women and Children (S.T.S.L.S) Number: 162..ANKR/BK

²¹ United States Department of State, *Trafficking in Persons Report 2009 – Cambodia*, 16 June 2009. Available at: <http://www.unhcr.org/refworld/docid/4a4214c82d.html>

²² Ibid.

²³ Police Brigadier General Ten Borany, of the Interior Ministry’s anti human trafficking and juvenile protection unit; Quoted in the ‘Cambodia Daily’, July 7, 2009; Casajole Collins, Op. Cit.

²⁴ Asian Human Rights Commission, *The State of Human Rights in Eleven Asian Nations – 2007* (Hong Kong: Asian Human Rights Commission, 2007), p 60.

²⁵ Articles 128 – 132 of the Constitution.

²⁶ Universal Declaration of Human Rights, Paris, 10 December 1948.

²⁷ For example: the right to be presumed innocent until proven guilty and the prohibition against retrospective penal legislation.

²⁸ Antônio Augusto Cançado Trindade, *Universal Declaration of Human Rights*, United Nations Audiovisual Library of International Law, 2008, p2. Available at: http://untreaty.un.org/cod/avl/pdf/ha/udhr/udhr_e.pdf

²⁹ Article 31 of the Constitution states: “The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the... Universal Declaration of Human Rights”.

rights,” which includes the International Covenant on Civil and Political Rights (the “ICCPR”) to which Cambodia acceded in 1992.³⁰ According to a decision of the Cambodian Constitutional Council dated July 10, 2007, all international conventions that Cambodia has recognized form part of Cambodian law.³¹ The provisions of the ICCPR expand on the fair trial rights in the UDHR. Article 14(1) states: “*All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.*”³² The remainder of Article 14 elaborates on fair trial rights. Further guidance on interpreting Article 14 can be found in the non-binding UN Basic Principles of the Independence of the Judiciary (the “UNBPIJ”);³³ the UN Basic Principles of the Role of Lawyers (the “UNBPLR”);³⁴ the Bangalore Principles of Judicial Conduct (2002), which were adopted by the Judicial Group on Strengthening Judicial Integrity, including members of the judiciary from both the common law and civil law systems (the “BPJC”); and UN Human Rights Committee General Comment No. 32.³⁵ The authoritative statements and declarations made by the UN Special Rapporteur on the Independence of Judges and Lawyers are also relevant; whilst international jurisprudence in the courts of the three regional human rights instruments (in Europe, Africa and the Americas) has also emphasized the overriding importance of fair trial rights.

Currently, Cambodia is not bound by any relevant regional instruments that address fair trial rights. There is a possibility that an Association of South East Asian Nations (“ASEAN”) human rights instrument will follow the establishment of the new ASEAN Intergovernmental Commission on Human Rights. The Terms of Reference for this body refer to international human rights instruments.³⁶

The right to a fair trial is provided for in the domestic law of Cambodia; Article 31 of the Constitution provides: “*Every Khmer citizen shall be equal before the law...*”, whereas Article 128 provides: “*The Judicial power shall be an independent power. The Judiciary shall guarantee and uphold impartiality and protect the rights and freedoms of the citizens.*” Other national law elaborates further on these guarantees. The CCP was promulgated on August 10, 2007 and stipulates the procedure to be followed in criminal cases, including by the judiciary. Book Five – ‘Judgments’ – is the most relevant part of the CCP for the purposes of this Report. Of relevance also is the Code of Ethics for Judges and Prosecutors (the “CEJP”), which is binding on judges and prosecutors in Cambodia and was adopted by the Supreme Council of Magistracy (the “SCM”) – the body responsible for regulating and disciplining judges – on February 5, 2007.

The CCHR also recognizes the Standards and Criteria for the Cambodian Model Court Project (the “Model Court Standards”). The Model Court Project is a collaboration between the RGC and a number of international donors. It seeks to improve the fairness and efficiency of trials in four courts – Phnom Penh Municipal Court of First Instance (the “Phnom Penh Court”), Kandal Provincial Court of First Instance (the “Kandal Court”), Kompong Cham Provincial Court of First Instance and Banteay Meanchey Provincial Court of First Instance – with the aim of providing a positive model for the court system throughout Cambodia. The Model Court Standards are a set of international and national standards for fairness and efficiency against which the four courts are measured.

³⁰ Office of the United Nations High Commissioner for Human Rights, Cambodia Country Office, *International Covenant on Civil and Political Rights and its Optional Protocols* (Phnom Penh: OHCHR, Cambodia Country Office, October 2009), p10.

³¹ Constitutional Council, Decision No. 092/003/2007 dated July 10, 2007.

³² The International Covenant on Civil and Political Rights was adopted by the General Assembly on 16 December 1966 and came into force on 23 March 1976.

³³ United Nations, Basic Principles on the Independence of the Judiciary, 1985.

³⁴ United Nations, Basic Principles on the Role of Lawyers, 1990.

³⁵ United Nations Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, 23 August 2007. Available at: <http://www.unhcr.org/refworld/type,GENERAL,,,478b2b2f2,0.html>

³⁶ ASEAN Secretariat, *ASEAN Intergovernmental Commission on Human Rights (Terms of Reference)*, (Jakarta: ASEAN Secretariat, October 2009), Article 1.6.

Audience and Purpose

The purpose of this Report is to assist the relevant Cambodian institutions and agencies, including the judiciary and law enforcement agencies, in their handling of LHTSE cases by: providing data on human trafficking trials in Cambodia; providing an analysis of this data so as to highlight positive developments and concerns; and making a series of recommendations so as to foster progress in this area.

The information presented in the Report serves as a reference from which to implement reform within the judicial system of Cambodia, and other rule of law agencies, in the context of human trafficking, and will be shared with the intended audience of the Report. It is hoped that the Report will inform and encourage dialogue between the RGC, the judiciary and other stakeholders to address the challenges highlighted.

2. METHODOLOGY

The Project is implemented by the CCHR as part of its Research and Policy Program. The Project is implemented and the Report written following the methodology set out in this chapter. It is hoped that this methodology can be shared and discussed with other organizations seeking to monitor trials – including those dealing with human trafficking and related issues – in Cambodia, so as to enable increased collaboration in this field and facilitate constructive dialogue between all stakeholders seeking the successful prosecution of trafficking offenders. Throughout the course of the Project the CCHR has sought to identify judicial practices that may be directly or inadvertently contributing to the failures of the legal system to successfully prosecute offenses under the LHTSE.

Timeframe and Location

The period of monitoring described in this Report ran from 10 August, 2009 to 31 December, 2009 during which time the CCHR monitored a total of 18 LHTSE trials (of which three began but were delayed and heard outside the Reporting Period) as well as 199 non-LHTSE trials as part of the wider Trial Monitoring Project. Due to the rarity of human trafficking cases before Cambodian Courts, as well as the relatively short reporting period, the 18 trials referred to the CCHR by partner organizations dealt with matters which fell under the LHTSE and therefore included both human trafficking and sexual exploitation cases.

The 199 non-LHTSE trials were monitored in the Phnom Penh Court and the Kandal Court during the Reporting Period. The 18 LHTSE trials, including the three that were delayed, were monitored in a number of courts, including the Phnom Penh Court, the Sihanouk Provincial Court, the Koh Kong Provincial Court, the Battambang Provincial Court, the Siem Reap Provincial Court, the Banteay Meanchey Provincial Court and the Svay Rieng Provincial Court.

For non-LHTSE trials, the Phnom Penh Court was selected for the purposes of the Project because, as the court of the capital city and the largest and most populated urban area in Cambodia, its activities are more wide ranging, its conduct is more widely reported and its influence is greater than other first instance courts in Cambodia. The Kandal Court was selected for its proximity to Phnom Penh, the large number of judges presiding there and the availability of three court rooms for trial monitoring. Importantly, both the Phnom Penh Court and the Kandal Court are ‘Model Courts,’ two of four courts that are the focus of the Model Court Project.

A CCHR report titled *Fair Trial Rights in Cambodia*³⁷ provides a more thorough overview of data obtained from the non-LHTSE trials monitored as part of the wider Project. It is available on the CCHR website: www.cchrcambodia.org. There is some overlap between this report, *Human Trafficking Trials in Cambodia*, and *Fair Trial Rights in Cambodia*.

³⁷ The Cambodian Center for Human Rights, *Fair Trial Rights in Cambodia – Bi-annual Report* (Phnom Penh: CCHR, July 2010).

Focus of the Trial Monitoring

Certain fair trial rights were given priority due to their particular relevance within Cambodia. In order to determine which rights trials would be considered, the CCHR relied on external resources such as reports and studies on fair trial rights in the Cambodian context and on the Cambodian judicial system.³⁸ Neither positive nor negative inferences should be made from the omission of other fair trial rights within this Report.

Infrastructure

In order to effectively and efficiently record relevant trial data, the CCHR designed a trial monitoring checklist (the “Checklist”) for use in court by the Trial Monitors. The Checklist is tailor-made for the Cambodian context and includes approximately 50 questions, the answers to which indicate whether fair trial rights have been adhered to (please see Annex I). The development of the Checklist involved a pilot study whereby the Trial Monitors initially used a more comprehensive checklist with 148 questions.³⁹ It was found that such an extensive checklist was too cumbersome and would therefore be impractical for use by the Trial Monitors. The Checklist now used is based on the results of our pilot study, and is a more effective Cambodia-specific document that addresses fair trial rights in a manner which is practicable for everyday use by our Trial Monitors. The CCHR has also developed two one-page annexes to the checklist for use in trials involving juveniles, and human trafficking trials.

With consideration as to the brevity of the revised Checklist, the CCHR compiled comprehensive guidance notes to help Trial Monitors understand each checklist question (the “Checklist Guidance”). This Checklist Guidance is vital for ensuring comprehensive understanding of each question and serves to ensure consistency amongst Trial Monitors, present and future. Another tool, which outlines the relevant national and international law underpinning each question in the Checklist – “the Law Bank” – was provided to the Trial Monitors to ensure that they are clear as to which laws are relevant to the fair trial rights in question.

The CCHR is committed to the basic international principles applicable to trial monitoring⁴⁰ and has devised a code of conduct for our monitors, outlining the obligations of non-interference, objectivity and confidentiality to which our Trial Monitors are bound (the “Code of Conduct”).

Personnel and Training

The Project team is currently comprised of four Trial Monitors with legal qualifications, expertise and experience. As noted above, the Trial Monitors undertake to strictly adhere to the Code of Conduct.

³⁸ For example: International Commission of Jurists, ICJ’s Comments on the Initial Report of Cambodia on the implementation of the International Covenant on Economic, Social and Cultural Rights (Geneva: International Commission of Jurists, April 2009); Richard Blue and Robert Underwood, Evaluation of the Program on Rights and Justice (“PRAJ”): Final Report (Washington DC: United States Agency for International Development (USAID), January 2008); NGO Working Group, Parallel Report on Cambodia 2009, (Phnom Penh: NGO Working Group, April 2009).

³⁹ The original checklist also included annexes for cases involving torture; cases involving a juvenile accused; and human trafficking related cases. The total number of questions was 219.

⁴⁰ See: Amnesty International, *Amnesty International Fair Trial Manual* (London: Amnesty International Publications, 1998), AI Index POL 30/02/98; Jelena Pejic and Vanessa Lesnie, *What is a Fair Trial: A Basic Guide to Legal Standards and Practice* (New York: Lawyers Committee for Human Rights, 2000); Organization for Security and Co-operation in Europe (OSCE)/ Office for Democratic Institutions and Human Rights (ODIHR), *Trial Monitoring: A Reference Manual for Practitioners* (Poland: OSCE/ODIHR, 2008); Bárbara Oliveira and Linda Besharaty-Movaed, *International Commission of Jurists Trial Observation Manual* (Geneva: International Commission of Jurists, 2002).

Before the monitoring of trials began, the Trial Monitors participated in a thorough practical and theoretical training program that included training on:

- Trial monitoring and the use of the Checklist;
- The Code of Conduct and the importance of impartiality, non-interference; confidentiality and professionalism;
- Fair trial standards in international and Cambodian law;
- The Model Court Standards;
- The LHTSE (training provided by TAF); and
- Internal training on the use of the human trafficking checklist.

Trial Monitoring Procedure

For the purposes of monitoring the non-LHTSE trials, two Trial Monitors are assigned to Phnom Penh Court and two are assigned to Kandal Court, enabling the Trial Monitors to become familiar with the court to which they are assigned and to build relationships with judges and court staff therein. The usual practice of two Trial Monitors being present at each trial further ensures consistency and reliability of results. The subject of the trials monitored, other than those specifically relating to the LHTSE, was random. The CCHR decided to monitor these trials based on court schedules in order to produce objective data and an arbitrary sample of trials. For the purposes of monitoring trials relating to human trafficking and sexual exploitation, the CCHR was notified of scheduled trials relating to the LHTSE through the collaboration and cooperation of other organizations. In these circumstances, two of the Trial Monitors monitor LHTSE trials at the applicable court.

Due to the sensitive nature of the LHTSE trials, the monitoring of these trials required significant persistence and effort on the part of the Trial Monitors insofar as gaining access to both the trials themselves and the additional information required.

For each trial attended, data is recorded directly on the Checklist or recorded in writing and later transferred to the checklist. The information gathered at non-LHTSE trials was limited to the trial process itself and therefore no additional interviews or dialogue took place, with the exception of efforts made to record verdicts that were handed down after the trial. For LHTSE trials, further information was provided by organizations with the expertise to work directly with victims of human trafficking. In this respect, the relatively short time period, together with the scarcity of LHTSE trials, meant that general trends could not be analyzed but rather individual cases assessed, and compared to the analysis of judicial practices in other trials monitored.

Collaboration with other organizations

The Project has benefited from the expertise of NGOs in Cambodia working to combat human trafficking. The Project design therefore seeks to engender, encourage and facilitate collaboration and cooperation in combating human trafficking in Cambodia. To this end, measures were taken throughout the Reporting Period to facilitate extensive dialogue with partner organizations and other stakeholders. During the Reporting Period the CCHR worked alongside a number of partner organizations, sharing information on trafficking cases. The following are some of the organizations that worked with the CCHR during the Reporting Period:

- International Justice Mission (“IJM”);
- Action Pour Les Enfants (“APLE”);
- Cambodia Against Child Trafficking Networks (“Cambodia ACTS”);
- The Cambodian Defenders Project (“CDP”); and
- South East Asia Investigations into Social and Humanitarian Activities (“SISHA”)

Case Files

In order to gain a full understanding of the context in and the background against which the LHTSE trials monitored are conducted, the CCHR Trial Monitors compile case files for each LHTSE case. Through the cooperation and collaboration with partner organizations set out above, the CCHR built case files containing data on pre-trial background information for 15 of the 18 LHTSE trials. For six of these 15 case files, case studies have been produced. The data collected using the checklists for the human trafficking cases are complemented by the case reports in order to provide a holistic overview of each trafficking case. After consultation with the partner NGOs with expertise in human trafficking, it was decided that the creation of an information-sharing form would be the most effective means of collating information between the CCHR and partner organizations and for respecting the principle of confidentiality. The information-sharing form requires both the organization providing the information, as well as the recipient organization, to be recorded in writing, thus safeguarding against arbitrary or third party use of the information provided. Further, the decision as to whether to provide details as to the identity of the victim is optional within this process. The development of this form was finalized towards the end of the Reporting Period and is already proving an effective method of sharing and storing information.

Database

After each trial the data from the Checklist is entered into the CCHR Trial Monitoring Database (the “Database”).⁴¹ The Database reflects the questions within the Checklist and was constructed using Microsoft Visual Basic. In addition to storing the data extracted from the checklists, the Database is designed to analyze the stored data, for example, flagging pre-trial detention periods that exceed statutory limits. As the Project proceeds, the Database will be developed further. Over time, the Database will contain an extensive catalogue of data and become an invaluable resource for the CCHR and other organizations working to promote fair trials in Cambodia. To the extent possible given confidentiality requirements, case studies of LHTSE trials will also be accessible on the CCHR Database.

⁴¹ The Database is to be made available online for public access on the CCHR website: www.cchrcambodia.org

3. DATA AND ANALYSIS

This chapter presents both the independent data recorded by the Trial Monitors, for use in objective research, as well as analysis of this data, highlighting issues that are of particular concern.

Human trafficking has proven to be very difficult to prosecute. In some cases, such as where the offense involves solicitation of prostitution or cross-border transfer, the first indicator of the incidence of trafficking will often be the criminal activity that the victim has been trafficked to undertake. Whilst in Cambodia, in the majority of cases the work of the trafficking victim has not itself been illegal,⁴² the victims are nonetheless often reluctant to become involved in the prosecution of the perpetrators for fear of ramifications. Under Cambodian law, victim testimony is not required in order to prosecute human trafficking offenders.⁴³ Yet, the elements of the crime of trafficking are extremely hard to prove without evidence given by the victim,⁴⁴ thus prosecution of human trafficking offenders is largely reliant upon victim testimony. It is therefore pertinent that the rights of victims are at the forefront of legal reform or initiatives aimed at prosecuting the perpetrators of human trafficking and sexual exploitation.

The international community has recognized the importance of collaborative and concerted efforts to address the rights of victims in criminal proceedings. In 1985 the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power⁴⁵ was adopted by the General Assembly, giving rights to victims in judicial proceedings including: informing them of the nature of the proceedings; providing them with the opportunity to have their views and concerns heard, as well as the provision of assistance where necessary. Article 6(2)(b) of the Protocol states: *“Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate trials ...[a]ssistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defense.”*⁴⁶ Therein lies the difficult balance between respecting the rights of the accused and those of the victim that the analysis within this chapter addresses.⁴⁷

⁴² NGO Joint Statistics Project Database Report on Trafficking and Rape in Cambodia 2007-2008: <http://www.cambosastra.org/wp-content/uploads/2009/11/NGO-Joint-StatisticsDatabase-Report-on-Trafficking-and-Rape-in-Cambodia-2007-2008-English.pdf> page 48

⁴³ In some jurisdictions victims are required to give testimony in court: see UNODC, Anti-human trafficking manual for criminal justice practitioners Module 11: Victims' needs in criminal justice proceedings in trafficking in persons cases UNITED NATIONS New York, 2009

⁴⁴ International Organization for Migration, The IOM Handbook on Direct Assistance for Victims of Trafficking, 2007

⁴⁵ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res. 40/34 (XL) 1985.

⁴⁶ Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime, GA Res. 55/25 (LV) 2000, Art. 6(2).

⁴⁷ The primary international instruments relating to victims within the criminal justice system, applicable to acid-attack victims are:

Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power 1985 (General Assembly resolution 40/34)

Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Economic and Social Council resolution 1989/57)

Plan of Action for the Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Economic and Social Council resolution 1998/21)

Guidelines on Justice Matters Involving Child Victims and Witnesses of Crime (Economic and Social Council resolution 2005/20)

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations on International Human Rights Law and Serious Violations of International Humanitarian Law (General Assembly resolution 60/147)

Nations Convention against Transnational Organized Crime (General Assembly resolution 55/25, Article 25)

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime (General Assembly res. 55/25, Articles 6-8)

Convention Against Corruption (General Assembly resolution 58/4, Article 32)

The Convention on the Rights of The Child, (General Assembly Resolution 44/25, 1989, Article 19)

Model Strategies and Practical Measures on the Elimination of Violence Against Women in the Field of Crime Prevention and Criminal Justice, (Annex to General Assembly resolution 52/86, 1997.

Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (Annex to ECOSOC resolution 2002/12 of 24 July, 2002)

DATA

During the Reporting Period, the Trial Monitors monitored 18 LHTSE trials throughout Cambodia, of which three have been postponed, as well as 199 non-LHTSE trials in total in the Phnom Penh Court and Kandal Court. This section of the Report sets out some of the ‘raw’ data collected by the Trial Monitors, providing clarification about the data where required. The data from non-LHTSE trials included in this chapter was chosen by the Trial Monitors as being particularly pertinent vis-à-vis concerns with the way in which human trafficking trials are handled by the Cambodian judiciary. It is hoped that the information presented in this chapter will be used by other organizations promoting victim and fair trial rights, and seeking to combat human trafficking in Cambodia. The checklist questions were designed to provide the most systematic and objective responses as possible. Therefore, where appropriate, the answers were limited to: yes (Y); no (N); not applicable (N/A); and information unavailable (I/U).

Article 46 of the Penal Code of the Kingdom of Cambodia 2009 states: An offence considered as a felony in the case where the maximum of the penalty for prison term imposed is: 1. a life imprisonment; 2. an imprisonment for a period of more than 5 (five) years and less than or equal to 30 (thirty) years. The punishment for a prison term may be accompanied by a fine.

Article 47 of the Penal Code of the Kingdom of Cambodia 2009 provides: An offence considered as a misdemeanor is in the case where the maximum of the punishment for a prison term imposed upon is more than 6 (six) days and less than or equal to 5 (five) years. The punishment for a prison term may be accompanied by a fine.

FIGURE 1: NUMBER OF NON-LHTSE TRIALS MONITORED

Court Monitored	Number of Trials	Felony	Misdemeanor
Phnom Penh Capital Court	142	84	58
Kandal Provincial Court	57	21	36
Total	199	105	94

FIGURE 2: NUMBER OF LHTSE TRIALS MONITORED

LHTSE cases monitored	Trial results presented	Felony	Misdemeanor
18	15	11	4

Figure 1 above shows the number, location and type of non-LHTSE criminal trials monitored. As noted above, the non-LHTSE trials were chosen for monitoring on the basis of court schedule alone, with no consideration given to the subject matter of the hearing. The trials monitored therefore represented an arbitrary cross section of cases before the courts.

Figure 2 above offers a summary of the LHTSE trials monitored during the Reporting Period. The discrepancy between the total number of trials and the trial results presented is reflective of the fact that several cases were delayed, three of which are still pending at the time of writing this report.

FIGURE 3: VERDICTS IN LHTSE TRIALS

Verdicts in LHTSE trials	Total	Misdemeanor	Felony
Guilty	9	1	8
Not Guilty	2	0	2
Re-investigated	3	3	0
Information Unavailable	1	0	1

The verdicts in cases tried under the LHTSE are represented in Figure 3. The number of cases where a guilty verdict was handed down is relatively high in the cases monitored. Furthermore, the results of the LHTSE trials monitored suggest that defendants in felony cases were more likely to be found guilty than those in cases involving misdemeanors and that a large proportion of misdemeanors were sent back for re-investigation.

ANALYSIS

The issues analyzed in the present report were selected based on their applicability within Cambodia in light of international recommendations and principles relevant to both the rights of the victim and prosecution of human trafficking offenders. Gender sensitivity, non-criminalization, confidentiality and safety of the victim are necessary to ensure respect for the rights of the victims, and further, adherence to these principles may lead to a more effective legal response.

The remaining issues chosen for analysis were of particular concern to the Trial Monitors during this Reporting Period, and were considered to be of particular relevance to LHTSE trials. These issues are as follows: The right to a public hearing insofar as it has the potential to conflict with the victim's right to confidentiality; the rights of juveniles, in any capacity, within the criminal justice system; unreasonable delays of proceedings; and finally, the extent to which the LHTSE was understood, explained and applied correctly.

Neither positive nor negative inferences should be made from the omission of other issues relevant to the prosecution of human trafficking and sexual exploitation offenders, and the rights of victims of these crimes.

The Trial Monitors built case files for each of the LHTSE trials monitored. For five of those case files, the Trial Monitors developed cases studies. The Case studies are used as illustrations for the issues below; however, many of the cases address more than one issue.

(i) Gender sensitivity

DATA

The statistics from reported trafficking cases show that the majority of trafficking victims are girls or young women.⁴⁸ Recent global statistics indicate that globally female victims represent between 80 and 84% of all victims detected.⁴⁹ In the LHTSE trials monitored during the Reporting Period there were 36 female victims and 7 male victims. As such, it is recognized as a gender-related, although not gender-specific, crime. Furthermore, in many cases the crime was perpetrated by or involved the complicity of an individual whom the victim trusted⁵⁰ leading to a general distrust of authority amongst the victims. Gender sensitivity is therefore an important consideration in LHTSE trials. Examples of gender-sensitive approaches can include the provision of female interpreters and other court personnel, particularly where there was a sexual element to the offense.⁵¹

⁴⁸ Men and boys can also be victims of sex trafficking. However they are most likely under-represented in global statistics. While statistics often highlight sexually exploited women and girls as the greatest percentage of human trafficking victims, men are often unrecognized as possible victims: Fact sheet: Trafficking for the purpose of sexual exploitation www.donttradelives.com.au World Vision

⁴⁹ UNODC Global Report on Trafficking in Persons "Human Trafficking: A crime that shames us all" UN GIFT, Feb 2009

⁵⁰ NGO joint database, op.cit.

⁵¹ UNODC Toolkit op. cit

FIGURE 4: GENDER OF VICTIM IN LHTSE TRIALS

Number of LHTSE trials involving female victims	Total number of female victims	Number of LHTSE trials involving male victims	Total number of male victims
12	36	3	7

FIGURE 5: GENDER SENSITIVITY

Gender sensitivity LHTSE trials		
	Y	N
6(a) Are any of the court officials female?	6	9
6(b) Was the victim represented by a female lawyer?	11	4

FIGURE 6: VERDICTS IN LHTSE TRIALS WHERE THE VICTIM WAS REPRESENTED BY A FEMALE LAWYER

Verdict	Guilty	Not Guilty	Re-investigated	IU
Victim represented by Female Lawyer	8	0	3	0
Victim represented by a Male Lawyer	1	2	0	1

Figure 6 may suggest that victims represented by female lawyers lead to a greater number of prosecutions. This data, however, does not provide conclusive evidence that there is a correlation between the gender of the victim's lawyer and conviction, particularly due to the fact that the sample size included a far greater number of female lawyers. Nevertheless, these results may add weight to the notion that gender-sensitive legal representation is important insofar as it increases the likelihood of victims being willing to testify at court, and indeed may contribute to the quality of such testimony.

ANALYSIS

International standards and principles relating to human trafficking recognize the relationship between trafficking in persons and gender. Through the “failure to protect and promote women’s civil, political, economic and social rights, governments create situations in which trafficking flourishes.”⁵² Guideline number 1.4 of the UN Guidelines on human rights and human trafficking recommends that states consider “[t]aking particular care to ensure that the issue of gender-based discrimination is addressed systematically when anti-trafficking measures are proposed with a view to ensuring that such measures are not applied in a discriminatory manner.” Additionally, the UNODC International Framework for Action⁵³ sets out in its guiding principles the need for a gender sensitive approach, paying particular attention to “the similarities and differences in the trafficking experience of women and men.”⁵⁴ The approach should aim to empower “potential and actual victims to access information and remedies, and to claim their human rights. It includes ensuring that anti-trafficking strategies address gender-based discrimination and violence, and promote gender equality and the realization of human rights for both women and men.”⁵⁵

In Cambodia, the mandate of the National Committee⁵⁶ is explicitly gender specific: to lead the suppression of human trafficking, smuggling, labor exploitation and sexual exploitation in women and children. It would therefore be expected to pay particular attention to ensuring that approaches are sensitive towards women and children. The Minimum Standards⁵⁷ also make reference to the need for a gender sensitive approach to victims.

⁵² Radhika Coomaraswamy, former UN Special Rapporteur on Violence Against Women quoted in United States Trafficking in Persons Report 2009

⁵³ UNODC, International Framework for Action to Implement the Trafficking in Persons Protocol, New York (2009)

⁵⁴ Ibid., Section IV, p. 8

⁵⁵ UNIFEM, Trafficking in Persons: a Gender and Rights Perspective, 2002. http://www.unifem.org/attachments/products/traffkit_eng.pdf

⁵⁶ Sub Decree on Establishment of National Committee to Lead the Suppression of Human Trafficking, Smuggling, Labor Exploitation and Sexual Exploitation in Women and Children (S.T.S.L.S) Number: 162..ANKR/BK

⁵⁷ Policy and Minimum standards for Protection of the Rights of Victim of Human trafficking Adopted by Ministry of Social Affairs, Veterans and Youth Rehabilitation Kingdom of Cambodia, 2009

The example selected for CCHR monitoring of gender sensitive practices was the gender of the victim's lawyer. It is potentially very positive that in eleven LHTSE trials the victim was represented by a female lawyer, eight of which resulted in a guilty verdict. However, the reasoning behind this may not necessarily be reflective of gender sensitive planning, particularly as several of these cases also involved male victims.

Unfortunately, in two of the LHTSE trials monitored, the judge failed to handle sensitive topics in a suitable manner. In the course of one of these trials (discussed in more detail as Case Study One) the judge asked a young victim whether she experienced "*thrill and hurt*" during the violent sexual abuse committed against her. The other instance involved the judge asking the victim questions related to her work as a prostitute. Whilst the gender implications of such remarks are beyond the scope of the Report, they appear to be representative of gender-related stereotypes that violate the rights of the victim in this regard.

(ii) Non-criminalization of victims

DATA

One of the unique challenges of prosecuting human trafficking offenders is the reluctance of victims to report the crime to authorities for fear of criminal prosecution themselves. It is essential that victims not only feel able to give evidence without the fear of prosecution, but also that the issues they bring to court are handled in an appropriate manner, thus avoiding re-victimization by the justice system itself.

The offenses outlined in the LHTSE include, for example selling, buying or exchanging another human being for the purposes of pornography,⁵⁸ solicitation, management or procurement of prostitution,⁵⁹ or removal for cross-border transfer.⁶⁰ Where the accused has committed one of these offenses, it may also serve to implicate the victim in illegal activity. Whilst in Cambodia in the majority of cases the work of the trafficking victim has not itself been illegal,⁶¹ the victims are nonetheless often reluctant to become involved in the prosecution of the perpetrators for fear of ramifications in Cambodia or abroad for such acts. As victim testimony may be essential to successful prosecution in LHTSE cases, it is essential that victims are not subjected to prosecution for crimes committed in relation to the actions of their perpetrator.

Due to the reality that the fear of prosecution may prevent cases going to court at all, the data from trial monitoring will not necessarily be of probative value in relation to this issue. Nevertheless, this is an inherently judicial issue that may be contributing (directly or indirectly) to the low number of prosecutions under the LHTSE.

The general treatment of victims by the criminal justice system would necessarily contribute to the victims' reluctance to report offenses for fear of prosecution, or of involvement in the legal process itself. For our purposes, limited indications can be gleaned from the general treatment of victims of trafficking; the misapplication of laws; and the extent to which international guidelines are referenced during the proceedings in LHTSE cases. Some examples are presented in Figure 8.

⁵⁸ LHTSE Chapter V

⁵⁹ LHTSE Chapter IV

⁶⁰ LHTSE Article 11

⁶¹ NGO Joint Statistics Project Database Report on Trafficking and Rape in Cambodia 2007-2008: <http://www.cambosatra.org/wp-content/uploads/2009/11/NGO-Joint-StatisticsDatabase-Report-on-Trafficking-and-Rape-in-Cambodia-2007-2008-English.pdf> page 48

ANALYSIS

The principle of non-criminalization for victims of human trafficking should be distinguished from the right against self-incrimination. Immunity for victims of human trafficking from prosecution for crimes related to that trafficking is crucial to efforts to prosecute offenders. The Protocol does not expressly forbid prosecution of victims for crimes related to the trafficking. Nevertheless, in keeping with the principle that trafficked persons are treated as victims of crime, there are a number of non-binding instruments which encourage States to prevent trafficked persons from being prosecuted for their illegal entry into or residence in their jurisdiction. Such principles are consistent with recognition of the human rights abuses to which trafficked persons are subjected. The UNODC Framework for Action to Implement the Protocol states that in order to improve prosecution efforts, the priority should lie in defining crimes that will achieve the conviction of human trafficking offenders, rather than the crimes associated with the human trafficking.⁶²

International recommendations and guidelines relating to human trafficking emphasize that States should not prosecute or punish trafficked persons for trafficking-related offenses: “An essential element of protection of victims of trafficking and their rights must be that States do not prosecute or punish trafficked persons for trafficking-related offenses such as holding false passports or working without authorization, even if they agreed to hold false documents or to work without authorization. Whether prostitution is legal or not, States should not prosecute persons for being trafficked into sexual exploitation, even if the person originally agreed to work in the sex industry. Without this approach, victim assistance and support programmes are rendered ineffective and meaningless.”⁶³ This recommendation insists that States refrain from criminalizing these acts where they are a direct result of the trafficking itself, irrespective of whether the victim initially agreed to related acts voluntarily.⁶⁴ The UNODC Toolkit to Combat Trafficking in Persons states: “Given the victims’ existing fears for their personal safety and of reprisals by the traffickers, the added fear of prosecution and punishment can only further prevent victims from seeking protection, assistance and justice.”⁶⁵ In relation to juveniles, this right has been unequivocally reaffirmed by the international community.⁶⁶

Article 26(3) of the Palermo Convention, ‘Measures to enhance cooperation with law enforcement authorities,’ provides: “Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offense covered by this Convention.”

UNODC Framework for Action article 1 (a) Develop or strengthen national legal frameworks so that they are comprehensive and in compliance with the United Nations Trafficking Protocol and ensure their implementation in line with the Protocol and other international standards, prioritizing the rights of victims [including] i. Ensure that trafficking in persons is a criminal offense as defined in the United Nations Trafficking Protocol and prioritize the prosecution of trafficking in persons rather than related offenses. ii. Ensure criminalization of crimes related to trafficking in persons, such as corruption, money laundering, obstruction of justice and participation in an organized criminal group.

⁶² Article 1(a)(ii)

⁶³ UNODC, Toolkit to Combat Trafficking in Persons, Global Programme against Trafficking in Human Beings, New York (2008), p 253.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ See for example, International Framework for Action to Implement the Trafficking in Persons Protocol.

The threat of prosecution not only restricts the trafficking victim's access to justice and protection, it exacerbates the problem by decreasing the likelihood that they will report the crime to authorities, and practically rules out the possibility of their voluntary testimony before the courts.

Cambodian law does not directly address the issue of victim immunity from prosecution. However, with reference to the objective of the LHTSE, specified in Article 1, the law should be interpreted in light of international guidelines and recommendations referring to the Protocol.

Additionally, where the trafficking itself does not negate criminal liability, the general principle stated in Article 26 of the Palermo Convention provides for measures to enhance cooperation with law enforcement authorities. In accordance with Article 26(3) of the Palermo Convention, each State Party is required to consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offense covered by the Convention.

A further, and closely related, concern is that victims may be reluctant to be involved in the court process for fear of re-victimization by the legal system itself. It has been acknowledged that in order to implement the Protocol, States should “*establish and ensure implementation of judicial procedures to avoid the re-victimization of trafficked persons, in particular children, during the judicial process.*”⁶⁷ International standards relevant to the rights of victims reiterate that “*the whole process of criminal investigation [...] [s]econdary victimization through the process of criminal justice may occur because of difficulties in balancing the rights of the victim against the rights of the accused or the offender.*”⁶⁸ In this respect, essential to encouraging voluntary testimony is the suitable handling of sensitive issues by the courts. Given the nature of these issues, inappropriate conduct will likely discourage potential victims from coming forward and giving evidence, as well denying them the respect and fair treatment they deserve. Whilst the data indicates that the majority of judges approached sensitive issues in a suitable manner, there were two instances in which this was not the case (see Question 4(d) in Figure 8). In both instances, the judge's questioning of the victim was totally inappropriate, questioning one 8 year-old victim as to the length of time she had worked as a prostitute and the amount of times she had had sex with customers. In the other documented case, the judge went so far as to question whether or not a six year-old victim had gained a “thrill” from the forcible insertion of the accused's hand into her vagina.

Whilst the CCHR trial monitoring data does not reveal information as to the prosecution of victims following human trafficking trials, it is clear that these legal ambiguities should be addressed in order for Cambodia to not only secure an increased number of human trafficking prosecutions, but also to enhance the capacity of the judiciary to respect human rights of victims affected by human trafficking and sexual exploitation. Further, the need for judiciary and legal professionals who directly interact with victims of LHTSE to properly understand the importance of not re-victimizing victims within the legal process is highlighted by these examples.

Article 1: The objective of this law is to suppress the acts of human trafficking and sexual exploitation in order to protect the rights and dignity of human beings, to improve the health and welfare of citizens, to preserve and enhance good national customs, and to implement the UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, or other international instruments or agreements with regard to human trafficking that the Kingdom of Cambodia has ratified or signed.

⁶⁷ UNODC International Framework for Action to Implement the Trafficking in Persons Protocol.

⁶⁸ Handbook on Justice for Victims on the application of the Declaration of Basic Principles of Justice for Victims and Abuse of Power, UNODC 1999.

(iii) Right to a public hearing

DATA

Everyone has the right to be tried in public except in certain exceptional situations.⁶⁹ A public hearing generally requires the following minimum requirements: the hearing should – as a rule – be conducted orally and in public;⁷⁰ judgments should be made in public⁷¹ and should be available to the public after they are delivered.⁷² Additional factors that contribute to the accessibility of trials by the public include the provision in a public place of information detailing the dates and venues of hearings and the provision of adequate facilities to enable public attendance at trials.⁷³

FIGURE 7: RIGHT TO A PUBLIC HEARING

The Right to a Public hearing	Non-LHTSE trials			LHTSE Trials		
	Y	N	N/A	Y	N	N/A
Question 2: Fair Trial Checklist						
2(a) Notice of the hearing was posted on a public board?	5	194	0	6	9	0
2(b) Members of the public were obstructed from entering or dismissed from the court room?	0	199	0	0	15	0

ANALYSIS

“...it is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”⁷⁴

Article 10 of the UDHR provides that everyone is entitled to a fair and public hearing in the determination of any criminal charges against them. This right is echoed in Article 14 (1) of the ICCPR which reaffirms that everyone shall be entitled to a public hearing, except in certain exceptional circumstances. This right is considered one of the fundamental rights inherent in securing a fair trial.⁷⁵

Article 129 of the Constitution confirms that trials are to be conducted in the name of Khmer citizens – the administration of justice should serve the community, including victims, first and foremost – and that trials are to be conducted in accordance with legal procedures and laws in force. The law governing procedure in criminal cases is the CCP. Article 316 states that trial hearings shall be conducted in public. The court may order a complete or partial in-camera hearing if it considers that a public hearing will cause significant damage to public order or morality, but a written explanation of such a decision must be included alongside the judgment on the merits of the case. Article 317 states that in all cases the judgment must be announced in a public session.

The rationale for the importance attached to this right is that it protects litigants against miscarriages of justice occurring in secret, without public scrutiny, and thereby operates as a check against arbitrary use of power on the part of the State. In addition to this, public hearings serve to maintain public confidence in the courts as a legitimate and preferable means of resolving disputes. In relation to human trafficking specifically, one of the major difficulties with the fight against human trafficking globally is the lack of reliable information⁷⁶ on the

⁶⁹ Article 10 of the UDHR; Article 14(1) of the ICCPR; Article 316 of the CCP.

⁷⁰ Article 316 of the CCP.

⁷¹ Article 317 of the CCP.

⁷² Article 14(1) of the ICCPR.

⁷³ United Nations Human Rights Committee, Communication No. 215/1986, *Van Meurs v. The Netherlands*, Para. 6.2. Cited in United Nations Human Rights Committee, “General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial”, 23 August 2007, p8, Para 28. Available at: <http://www.unhcr.org/refworld/type,GENERAL,,,478b2b2f2,0.html>

⁷⁴ Lord Hewart from *Rex v Sussex Justices; Ex parte McCarthy*.

⁷⁵ CCP Article 316 UNTAC Art 23 Const. 129 ICCPR 14 UDHR10.

⁷⁶ UN GIFT web site: <http://www.ungift.org>; and UNODC Global Report

subject; it is therefore essential that these trials be accessible to organizations and researchers, and that notification of such trials is available in order to assist in the collection of information worldwide.

In 194 of 199 of the non-LHTSE cases monitored, details about the time and venue of the trial were not posted on a public notice board. Of the 15 LHTSE trials monitored during the reporting period, notice was not publicly posted in 9 cases. Further information is required in order to properly assess these findings, suffice to say that the trial monitors found it extremely difficult to obtain information on the scheduling of human trafficking trials. Given that trials falling under the LHTSE will often fall under the permissible exceptions in the ICCPR, the disproportionate number of LHTSE cases which provided notice of the hearing on a public notice board suggests that insufficient consideration is being given to the issues.

(iv) Confidentiality and safety of the victim

DATA

The right to a public hearing is not absolute: there are certain permissible exceptions to the general rule.⁷⁷ The exceptional circumstances justifying derogation from upholding the right to a public hearing are often applicable to cases under the LHTSE. Confidentiality in human trafficking trials is essential due to the explicit nature of the charge and/or the safety of the victim.⁷⁸ Cases involving juveniles have long been recognized as a situation whereby the right to a public hearing is neither applicable nor desirable. As many victims of offenses under the LHTSE are children, this necessarily has a bearing upon the issues in consideration when analyzing whether these cases are held in public or otherwise.

FIGURE 8: CONFIDENTIALITY AND SAFETY FOR THE VICTIM

Confidentiality and safety for victims in LHTSE trials	Y	N
Question 4: Human Trafficking Checklist		
4(b) Was there anything to suggest the victim had had contact (directly or indirectly) with the accused between arrest and trial?	4	11
4(c) Did the lawyer of the victim request that the victim's identity be kept confidential (i.e. did they request a closed hearing or the use of a screen)?	4	11
4(d) Did the judge approach sensitive topics in a suitable manner?	13	2
7(a) Was there anything to suggest the witness had been intimidated by the accused?	2	13

Figure 8 above suggests that the victims' right to confidentiality and protection is not given adequate consideration. The data shows that in very few of the human trafficking cases monitored, measures were taken to protect the victim's confidentiality by using a screen or audio facilities for example. On at least one of these occasions the screen was transparent and therefore completely ineffective. In 11 LHTSE trials the lawyer for the victim failed to request that the identity of the victim be kept confidential.

In a further 4 trials there was evidence to suggest that the victim had contact with the accused after arrest and before the hearing. Whilst these 4 trials resulted in a guilty verdict, it remains a matter of concern due to the reality that such contact has the potential to endanger both the safety of the victim, as well as the likelihood that they are willing to testify at trial.

⁷⁷ ICCPR Article 14(1); Article 129 Constitution

⁷⁸ *Policy and Minimum Standards for Protection of the Rights of Victim of Human Trafficking* Adopted by Ministry of Social Affairs, Veterans and Youth Rehabilitation Kingdom of Cambodia, 2009 Article 6 (2) Right to Privacy and Confidentiality

FIGURE 9: VERDICTS WHERE THE IDENTITY OF THE VICTIM WAS CONCEALED

Verdict	Guilty	Not Guilty	I/U	N/A ⁷⁹
Where the lawyer for the victim requested the identity to remain confidential	4	0	0	0
Where the lawyer did not request the identity of the victim to be confidential	5	2	1	3

The data presented above in relation to confidentiality (Figure 9) is specifically relevant insofar as protection of the victims' identity may be crucial to their safety. It is also worth noting whether the witness was present in the court room (Figure 10) prior to their testimony. This data is relevant to a number of fair trial rights reasons, largely related to maximizing the right of the accused to a fair and unbiased hearing. For our purposes, given that witnesses in LHTSE trials are frequently victims, it is significant in relation to their right to confidentiality.

FIGURE 10: WITNESSES

Witnesses	Other trials			LHTSE Trials		
	Y	N	N/A	Y	N	N/A
Question 11: Fair Trial Checklist						
11(c) Were the witnesses present in the courtroom before they were questioned?	10	48	141	4	2	9

⁷⁹ In this instance N/A refers to those cases sent back to the Investigating Judge

ANALYSIS

Confidentiality

The right to a public hearing is not absolute. Article 14(1) of the ICCPR states: *“The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children [emphasis added].”*⁸⁰

The social and cultural values in Cambodia will impact upon what falls within these exceptions. These exceptions are critical to human trafficking cases due to the sensitive nature of such cases. Insofar as human trafficking and sexual exploitation cases are concerned, the ICCPR exception in circumstances when the interests of the private lives of the parties so requires is important. The CCP surprisingly does not specifically include this ground for derogation. Whilst its omission is noteworthy given the obvious intention to reflect the international instruments within the CCP, in the absence of legislation to the contrary, the judiciary is obliged to interpret legislation with the presumption that Cambodia intends to honor its international obligations, therefore this exception is applicable.

Due to the sensitive nature of human trafficking cases,⁸¹ the right to a public hearing may come into conflict with the need to keep the identity of the victim confidential, for reasons relating to both the privacy and safety of the victim. Allowing inappropriate public access to a hearing may place the victim at risk and affect their willingness to cooperate. In human trafficking cases, the victims are often related to the accused and can feel intimidated by being at court at the same time as the accused. Human trafficking cases are often of a sexual nature, making sensitivity to the area of confidentiality – where the victims have been traumatized by sexual violence – particularly important. Article 6 of the Protocol requires that States protect the privacy and identity of victims in appropriate cases to the greatest extent possible under domestic law. This intention is reflected in Article 6(3) and Article 11 of the Minimum Standards.⁸² Additionally, Article 49 of the LHTSE states that newspapers and other mass media shall be prohibited from publishing information disclosing the identity of the victims.

Confidentiality of the Victim

Art 316 CCP and Art 23 UNTAC state that the victim or the victim’s lawyer may request a closed hearing.

Art 49 LSHTSE states that newspapers and other mass media shall be prohibited from publishing information disclosing the identity of the victims.

Art 6(1) UN Protocol provides that the State shall protect the privacy and identity of victims of trafficking

Art 8 CEJP states that the Judge will behave in a compassionate manner. Art 6(2) UN Protocol states that the State shall ensure that the Victim is able to have their views and concerns presented in Court

⁸⁰ ICCPR Article 14(1)

⁸¹ Protocol: Article 6.

⁸² *Policy and Minimum standards for Protection of the Rights of Victim of Human trafficking* Adopted by Ministry of Social Affairs, Veterans and Youth Rehabilitation Kingdom of Cambodia, 2009 Art 6(3) and Art 11

However, it is important to emphasize that the right to a public hearing and the right to confidentiality for the victim are not mutually exclusive. It is relatively simple to protect the identity of the victim whilst maintaining the hearing as open to the public in order to protect the rights of the accused to a fair trial. There are a number of available avenues – such as the use of court screens – for achieving this balance. The results of the CCHR monitoring reveal that inadequate attention is being given to both rights. The trials monitored were rarely posted on public notice boards, and, in fact, a disproportionate number were posted for the LHTSE trials. The data shows that in very few of the LHTSE trials monitored, measures were taken to protect the victim's confidentiality by using a screen or audio facilities for example. On at least one of these occasions the screen was transparent and therefore completely ineffective.

Three of the trials in which the identity of the victim was not requested to be confidential were ordered to be re-investigated, and in two more cases, the verdict was not guilty. On the other hand, in all cases where the victim's lawyer asked for the identity of the victim to be kept confidential, there was a guilty verdict. These results suggest that the strength of the testimony of the victim is increased when their identity is concealed.

Safety of the Victim

The safety of the victim is also an important concern in human trafficking trials. Article 25, paragraph 1, of the Palermo Convention requires each State party to “*take appropriate measures within its means to provide assistance and protection to victims of offenses covered by this Convention, in particular in cases of threat of retaliation or intimidation.*”⁸³ The physical safety of victims and witnesses is further protected under Article 6(5)⁸⁴ of the Protocol, as well as the tool 5.13⁸⁵ on the implementation of the Protocol. Similarly, Article 6(1) of the Minimum Standards⁸⁶ provides for the safety and protection of victims. Further, international standards relating to the victims of violent crimes⁸⁷ reiterate the need for special procedures in relation to victims as witnesses.

TOOL 5.13 Witness protection during and after the prosecution and trial:

After a successful investigation, witnesses become particularly vulnerable to corruption, threats and intimidation during the prosecution and the trial. A number of measures must be taken at this stage to ensure that the case is successfully prosecuted and the trial process is not compromised. Some measures, such as video testimonies or the exclusion of the general public from a hearing, aim to protect the witness's identity, privacy and dignity. Other measures, for example witness concealment or allowing witnesses to remain anonymous, aim at protecting their physical security.

GUIDELINE 5: RECOMMENDED GUIDELINES ON HUMAN RIGHTS AND HUMAN TRAFFICKING

States should ensure that trafficked persons are effectively protected from harm, threats or intimidation by traffickers and associated persons. To this end, there should be no public disclosure of the identity of trafficking victims and their privacy should be respected and protected to the extent possible, while taking into account the right of any accused person to a fair trial. Trafficked persons should be given full warning, in advance, of the difficulties inherent in protecting identities and should not be given false or unrealistic expectations regarding the capacities of law enforcement agencies in this regard

⁸³ Article 25, paragraph 1, of the Organized Crime Convention

⁸⁴ Also see United Nations High Commissioner for Human Rights to the Economic and Social Council, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1 (2002) Guidelines: Guideline 6: Protection and support for trafficked persons

⁸⁵ *Toolkit to Combat Trafficking in Persons*, United Nations Office of Drugs and Crime, New York 2008

⁸⁶ *Policy and Minimum standards for Protection of the Rights of Victim of Human trafficking* Adopted by Ministry of Social Affairs, Veterans and Youth Rehabilitation Kingdom of Cambodia, 2009 Art 6(1)

⁸⁷ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power Adopted by the General Assembly in resolution 40/34 of 29 November 1985: Article 6 requires States to take such measures as (c) Providing proper assistance to victims throughout the legal process; (d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation.

As mentioned above (see Figure 8), the fact that four of the cases suggested that the victim had contact with the accused after arrest and before the hearing is particularly concerning, despite the fact that these cases resulted in guilty verdicts. Another concern was that in two of the trials monitored, the Trial Monitors observed that there was something to suggest the victim had been intimidated by the accused.

Privacy and Children

Juveniles are entitled to additional protective measures when involved in the civil or criminal justice system, whether as accused or witness as discussed in detail below, however it is important to mention that there are specifically defined confidentiality requirements. One of the exceptions to the right to a public hearing under Article 14 of the ICCPR provides that trials involving juveniles should be closed to the public and press.⁸⁸

International legal standards require particular measures be taken with respect to the confidentiality and privacy of children. Article 26 of the Guidelines on Justice Matters involving Child Victims and Witnesses of Crime⁸⁹ affirms that child victims and witnesses should have their privacy protected as a matter of primary importance. Article 27 and 28 go on to state that information relating to a child's involvement in the justice process should be protected. Article 27 states *"This can be achieved through maintaining confidentiality and restricting disclosure of information that may lead to identification of a child who is a victim or witness in the justice process [...] Measures should be taken to protect children from undue exposure to the public by, for example, excluding the public and the media from the courtroom during the child's testimony, where permitted by national law."*⁹⁰ The model guidelines for children specific practices, as referenced in the UNODC Toolkit to Combat Trafficking in Persons include, for example: allowing a videotaped statement of the child's evidence; the use of closed-circuit television; and alternative arrangements for giving evidence, such as screens.⁹¹

CASE STUDY 1

Case Study 1

The hearing took place at Svay Rieng Provincial Court of First Instance. The case concerned a 19 year old Cambodian male, who performed a sexual act on a minor and then paid her 500 Riel in an attempt to conceal the crime. The victim was a six year old Cambodian female. The accused was charged with an offense under Article 43 of the LHTSE: "Indecency against Minors under Fifteen Years." He was sentenced to two years imprisonment and ordered to pay 4,000,000 Riel (≈\$1000USD) in compensation to the victim.

The main concern in this case was confidentiality. There was evidence to suggest that there was contact between the victim and the accused between arrest and trial; however the exact details were not available to the Trial Monitors. The lawyer for the victim did not request that the identity of the victim to be kept confidential. A further concern was that the judge did not approach sensitive topics in a suitable manner, asking the six year old victim unsuitable questions regarding the crime.

⁸⁸ Article 14(1) of the ICCPR.

⁸⁹ Guidelines on Justice Matters involving Child Victims and Witnesses of Crime Adopted by the Economic and Social Council in its resolution 2005/20 of 22 July 2005

⁹⁰ Guidelines on Justice Matters involving Child Victims and Witnesses, op. Cit. Article 27

⁹¹ UNODC, Toolkit to Combat Trafficking in Persons, Global Programme against Trafficking in Human Beings, New York (2008), p 242.

(v) Juveniles and the justice system

DATA

The previous discussion touched on the rights of juveniles insofar as their privacy is concerned,⁹² but the protection of juveniles within the court process goes further than confidentiality alone. Juveniles are entitled to particular rights when they participate in proceedings in any capacity; whether as an accused, victim or witness. Whilst no juveniles were charged with offenses under the LHTSE in the cases monitored by the CCHR, the treatment of juveniles within the court room in any capacity is of critical importance for human trafficking cases due to the fact that a considerable number of human trafficking cases involve juveniles as victims.

FIGURE 11: JUVENILE VICTIMS IN LHTSE TRIALS

Juvenile Victims LHTSE trials	
Number of Trials involving juvenile Victims	Number of trials involving no juvenile victims
14	1

Figures 12 and 13 outline the data collected from non-LHTSE cases involving juvenile accused in the Phnom Penh Capital Court and the Kandal Provincial Court as part of the wider Trial Monitoring Project during the Reporting Period.

FIGURE 12: JUVENILE ACCUSED DATA

Juvenile Accused in Phnom Penh Capital Court and Kandal Provincial Court		
Number of Trials involving juvenile Accused	Felony	Misdemeanor
26	16	10

FIGURE 13: TREATMENT OF JUVENILE ACCUSED IN PHNOM PENH AND KANDAL COURTS

Fair Trial Checklist Q2. Right to a Public Hearing	Yes	No	N/A
2(a) Was notice of the hearing posted on a public notice board, outside the courtroom?	0	26	0
2(b) Are the public obstructed from entering into or dismissed from the courtroom?	0	26	0
Juvenile Checklist Q4. Trial			
4(b) Was there anything to suggest that the juvenile wanted their parents present at the trial?	0	26	0
4(c) Was there a screen to protect the juvenile from testifying in public?	0	26	0

Whilst the results displayed in Figure 13 do not suggest that the right to privacy of juvenile accused is being violated in Cambodian courts, no definitive conclusions or correlations can be drawn when it is considered that notice of the hearing was not posted in the majority of non-LHTSE trials monitored. Further, in nine of the LHTSE cases (which largely involve juvenile victims) public notice of the trial was posted.

ANALYSIS

The CCHR Juvenile Checklist is designed specifically to monitor the treatment of juveniles as accused persons in the criminal justice system due to their position of exceptional vulnerability. In so doing, the Juvenile Checklist offers an insight to whether the Cambodian courts exercise special protective measures for children before the courts. As previously mentioned, whilst no juveniles were charged with trafficking or sexual exploitation offenses in the cases monitored by the CCHR, juveniles are entitled to additional and particular rights within the legal process, irrespective of whether their participation is that of an accused person, a witness or a victim.⁹³

⁹² Article 14(1) of the ICCPR.

⁹³ The Fair Trial provisions in the ICCPR reiterate that "In the case of juvenile persons, the procedure shall [] take account of their age and the desirability of promoting their rehabilitation." ⁹³ Other international instruments include: The CRC articles 37 and 40; the United Nations Standard Minimum Rules

UNICEF has found that, in the Mekong sub-region of Southeast Asia, approximately 30% of sex workers are between 12-17 years old.⁹⁴ Consequently, children are frequently the victims of human trafficking⁹⁵ and therefore likely to play a role in criminal trials as either victims or witnesses. Within the LHTSE trials monitored, all but one involved juvenile victim(s).

Children are of course entitled to all the fair trial guarantees and rights which apply to adults, and to some additional special protection. The Human Rights Committee has stated that "[j]uveniles are to enjoy at least the same guarantees and protection as are accorded to adults under Article 14 [of the ICCPR]."⁹⁶ International human rights standards have recognized that particular and unique power imbalances are at play when dealing with juveniles in the justice system, in any capacity whether as accused, victims or witnesses. The UN Guidelines on Justice Matters involving Child Victims and Witnesses of Crime⁹⁷ require that measures are taken in this context, including "child-sensitive procedures, including interview rooms designed for children, interdisciplinary services for child victims integrated in the same location, modified court environments that take child witnesses into consideration."⁹⁸ The model guidelines for children specific practices, as referenced in the UNODC Toolkit to Combat Trafficking in Persons⁹⁹ include, among other examples: allowing for the presence of a support person or advocate while the child is giving evidence; use of an intermediary to assist child witnesses to give evidence; and reducing the formality of the courtroom by measures such as removing advocates' robes. The UN High Commissioner For Human Rights Principles and Guidelines on Human Rights and Trafficking,¹⁰⁰ Guideline 8 provides for special treatment of juveniles at all stages of the legal process.

The National Committee¹⁰¹ itself is specifically concerned with juveniles, as suggested by its title – "to lead the suppression of human trafficking, smuggling, labor exploitation and sexual exploitation in women and children" – and therefore would be expected to pay particular attention to ensuring that approaches are consciously sensitive towards juveniles within the justice system in this context.

The Court's treatment of juvenile accused generally was specifically monitored in 26 of the non-LHTSE trials. This data revealed no clear evidence that the court possesses a deep understanding of issues relating to juvenile justice.

Case Studies 1 (above) and 2 (below) are indicative of a failure on the part of those judges to adopt a child sensitive approach.

CASE STUDY 2

Case Study 2

The hearing took place at Phnom Penh Municipal Court. The accused was a 51 year old British male who forced the victim, an 11 year old Cambodian female, to perform five separate sexual acts over the course of one day and

for the Administration of Juvenile Justice⁹³; United Nations Rules for the Protection of Juveniles Deprived of their liberty⁹³; and the relevant provisions on the Protocol itself in relation to Human Trafficking.

⁹⁴ United Nations Children's Fund (UNICEF) (2009) *Child*, available online at http://www.unicef.org/protection/index_exploitation.html

⁹⁵ See for example End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes.

⁹⁶ Human Rights Committee General Comment 13, Para 16.

⁹⁷ UN ECOSOC, Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime, Res. 2005/20, 22 July 2005.

⁹⁸ Ibid. Article 31

⁹⁹ UNODC, Toolkit to Combat Trafficking in Persons, Global Programme against Trafficking in Human Beings, New York (2008)

¹⁰⁰ United Nations High Commissioner For Human Rights Principles and Guidelines on Human Rights and Trafficking; E/2002/68/Add.1 (2002).

¹⁰¹ Sub Decree on Establishment of National Committee to Lead the Suppression of Human Trafficking, Smuggling, Labor Exploitation and Sexual Exploitation in Women and Children (S.T.S.L.S) Number: 162..ANKR/BK

then gave her \$10 USD in return. The accused was charged under Article 43 of the LHTSE: “Indecency against Minors under Fifteen Years.” The accused was found guilty and imprisoned for one year.

During the trial the judges left the court room, and in one incident the judge left for half an hour. In addition to this the judges also answered their telephones. These actions on the part of the judges open them to questions regarding their impartiality. The accused’s lawyer asked his questions in what was perceived to be a loud, possibly intimidating voice; in sharp contrast to the way in which he was asking questions to his own client. The translation of the questions and answers were poor, to the detriment of the accused whose answers subsequently seemed to be inconsistent.

(vi) Right to be heard without undue delay and pre-trial detention

DATA

Following an arrest, accused persons should be tried within a reasonable time. What is unreasonable is defined in Cambodian law.¹⁰² Undue delay violates the rights of the accused, as well as those of the victim. In human trafficking cases delay has unique effects on the victim due to, among other factors, the psychological impact of testifying against a perpetrator and the potential for the accused to intimidate the victim. There were three instances of delay in the LHTSE trials monitored during the Reporting Period; two of these cases are still to come to trial at the time of writing. Figure 14 below refers to the trials monitored by the CCHR, and outlines delays in those cases before they eventually went ahead.

FIGURE 14: TRIALS DELAYED PRIOR TO THE MONITORING PERIOD

LHTSE trials				Yes	No
Question 1: Human Trafficking Checklist					
1(a) Has the trial been previously delayed?				3	12
Date	Court	Delay	Reason		
08/2009	Battambang Provincial Court	2 delays	(i) Offender was sick (ii) Offender had no legal representation		
12/2009	Phnom Penh Court of First Instance	1 delay	Absence of defense lawyer		
11/ 2009	Siem Reap Provincial Court	1 delay	Reason unknown		

Figure 15 below outlines the details of two of the LHTSE trials which were repeatedly delayed during the Reporting Period. The two cases – being conducted at the Sihanouk Provincial Court and the Phnom Penh Court respectively – are yet to be completed. The case before the Sihanouk Provincial Court has been delayed on five occasions. As explained in Figures 14 and 15, these delays have mostly been the result of the failure of judges and lawyers to attend.

FIGURE 15: LHTSE TRIALS DELAYED DURING THE CCHR TRIAL MONITORING PERIOD

Date	Court	Offense	Reason
Case Delay 1: Sihanouk Provincial Court			
09/2009	Sihanouk Provincial Court	1 st delay	Two of three judges were absent as they attended the funeral of their relatives.

¹⁰² Article 38 of the Constitution; Articles 204-208 and 215-217 of CCP

			Lawyers were not informed in advance.
09/2009	Sihanouk Provincial Court	2 nd delay	The person who takes care of the victims in the rehabilitation centre was busy with their duties and could not bring victims to court. The judges were busy with their duties as well.
11/2009	Sihanouk Provincial Court	3 rd delay	Two judges attended training in Vietnam. Lawyers were not informed in advance. The presiding judge did not know the judge had left for Vietnam
12/2009	Sihanouk Provincial Court	4 th delay	One of three judges was absent.
01/2010	Sihanouk Provincial Court	5 th delay	Prosecutor was absent.
Case delay 2: Phnom Penh Municipal Court			
11/2009	Phnom Penh Court of First Instance	Delayed	Unknown
12/2009	Phnom Penh Court of First Instance	Article 34 of LHTSE	Victim was absent.

FIGURE 16: PRE-TRIAL DETENTION

Pre-trial detention	Non-LHTSE trials			LHTSE trials		
	Y	N	I/U	Y	N	NA
Question 3 Fair Trial Checklist						
3(b) Was there pre-trial detention?	176	7	16	12	0	3

ANALYSIS

Following an arrest, accused persons should be tried within a reasonable time.¹⁰³ The right to be tried without undue delay is provided in Article 14(3)(c) of the ICCPR. This right is primarily rooted in the need to protect accused from the state delaying proceedings and thereby circumventing the need for a fair hearing. Unreasonable delay can thwart justice, particularly in cases involving pre-trial detention, but also where there is no detention, the rights of an accused pending trial are often restricted insofar as freedom of movement and the right to meaningful employment, both of which have social and emotional consequences for the accused awaiting trial.

Delays within judicial institutions globally are unfortunately the norm rather than the exception. Undue delay in judicial proceedings may be the result of a number of factors including: lack of adequate scheduling and filing systems; lack of adequate infrastructure and facilities; lack of training; and lack of independence. In many situations it may be a combination of factors. It is important to note that there are competing factors within delay including the right to adequate time to prepare a defense. Factors in deciding what is ‘reasonable’ include the complexity of the case and the conduct of the accused.¹⁰⁴

The CCHR also emphasizes the particular effects undue delay has on the victims of human trafficking and sexual exploitation. International standards for victims of violent crimes or abuse of power emphasize the need to avoid unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.¹⁰⁵ The opportunities for intimidation of the victim are increased, as are the psychological effects of waiting for trial.

¹⁰³ The Constitution of Cambodia Article 38; ICCPR Arts 9(3) and 14(3)(c); Principle 17 of the Basic Principles on the Independence of Judiciary; and Principal 27 of the Basic Principles on the Role of Lawyers.. Cambodian Law prescribes the limits for pre-trial detention CCP Arts. 208-214

¹⁰⁴ The accused is not obliged to cooperate in criminal proceedings or to renounce any procedural rights.[Yagci and Sargin v. Turkey, (6/1994/453/533-534), 8 June 1995.]

¹⁰⁵ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power Adopted by the General Assembly in resolution 40/34 of 29 November 1985, Article 6(e)

The UNODC Victims and Witnesses Criminal Justice Assessment Toolkit¹⁰⁶ provides that the responsiveness of the justice system to the needs of victims (and witnesses) should be facilitated by “*informing victims of their role and the progress in their case...taking measures to reduce the inconvenience associated with the process, to protect them and avoid unnecessary delays.*” The Toolkit goes on to reiterate that “*Judges can provide essential protection to victims. They can take measures to ensure expeditious trials and to avoid unnecessary delays.*”¹⁰⁷

Furthermore, delays necessarily reduce the likelihood that the victim is willing to testify at trial. Not only is there a greater potential for intimidation of the witness, but the cost of, *inter alia*, transportation to and from the court is often a significant barrier to witness and victim participation.

The data from the CCHR monitoring exposed a serious problem in this area. Three cases had been delayed prior to the CCHR monitoring, and a further two cases were repeatedly delayed during the Reporting Period (see Figure 14). Hearings were delayed without reason or with an inadequate reason – the delays observed by CCHR were largely the result of the failure of judges and lawyers to attend.

Pre-Trial Detention

The difficulty in balancing the rights of the accused and the rights of the victim in LHTSE trials arises once again in relation to pre-trial detention, thus giving weight to the importance attached to preventing delay in such cases. The rights to freedom of movement and to be free from arbitrary arrest or detention protect individuals from arbitrary state interference with personal freedom. Where an individual is charged with an offense, the state has a duty to bring the matter to trial as soon as possible in order to set out evidence against the accused, allow the accused to address the evidence and present their own, and to determine guilt or innocence. The rights to be free from arbitrary detention and to be tried without undue delay are enshrined in international law and specific legal restrictions in relation to pre-trial detention are set out in Cambodian law. Article 9(3) of the ICCPR provides that anyone who is arrested or detained on a criminal charge must be brought promptly before a judge or other judicial power and is entitled to trial within a reasonable time or to release. Article 9(3) further notes that “*(i)t shall not be the general rule that persons awaiting trial shall be detained in custody.*”¹⁰⁸

Article 38 of the Constitution requires that no person shall be detained unless the detention is in accordance with the law. Article 203 of the CCP sets out the general rule: “*In principle, the charged person shall remain at liberty. Exceptionally, the charged person may be provisionally detained under the conditions stated in this section.*” Article 204 outlines that provisional detention may be ordered only in cases where the minimum punishment is one year or more of imprisonment. Articles 208 and 209 of the CCP set out the legal duration of provisional detention for both felonies and misdemeanors. For an adult charged with a felony, provisional detention may not exceed six months. However, following this period the investigating judge may extend provisional detention for a further six months with an order expressly stating proper reasons. This may only occur twice. For an adult charged with a misdemeanor, provisional detention may not exceed four months. The investigating judge may extend this period by a further two months on one occasion by an order stating express and proper reasons. However, the duration of the detention may not exceed half of the minimum sentence set by law for the charged misdemeanor. Article 249 also provides for additional detention of four months at the discretion of the investigating judge upon

¹⁰⁶ UNODC Cross-Cutting Issues Victims and Witnesses Criminal Justice Assessment Toolkit UNITED NATIONS New York, 2006

¹⁰⁷ UNODC Cross-Cutting Issues Victims and Witnesses Criminal Justice Assessment Toolkit UNITED NATIONS New York, 2006 4.1.

¹⁰⁸ Also see: Article 9 UDHR and Article 9(1) ICCPR on the right to liberty. Principle 38 of the UNBPIJ states: “A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial”

conclusion of the investigation and in anticipation of a trial. The general principle being that detention before trial should be avoided to the greatest extent possible.¹⁰⁹

The data collected by the Trial Monitors in relation to the non-LHTSE trials raises serious concerns for the rights of accused persons in general. In 176 of the 199 non-LHTSE trials monitored the accused was detained in pre-trial detention. Similarly, in 13 out of the 15 LHTSE trials the accused was held in detention prior to the trial. Article 205 of the CCP sets out the legal justifications for provisional detention.¹¹⁰ For the purposes of LHTSE trials, one of these justifications includes the prevention of harassment of witnesses or victims, thus invoking the problems involved in balancing the respective rights of the accused and the victim. Nevertheless, these figures, when viewed in the context of the entire number of trials monitored, suggest that there has been scant regard for Article 203 of the CCP, which creates a presumption against pre-trial detention.

Furthermore, in eight of the non-LHTSE trials the duration of detention exceeded the maximum legal limits for provisional detention proscribed in Articles 208 and 209 of the CCP (in combination with Article 249). The excessive – and illegal – pre-trial detention of a number of individuals is a clear violation of Article 9(3) of the ICCPR, which requires those charged with an offense to be tried without undue delay.

The discussion above in relation to delay and the effect it can have on the rights of the victim is revisited here in the context of the rights of the accused. Delay of proceedings is intricately connected to whether pre-trial detention violates domestic and international law. It is important to mention, however, that this is yet another area where there is a potential conflict between rights; the absence of pre-trial detention may impact on, *inter alia*, the protection of the victim from intimidation.

In this context, it is important to ensure that the rights of the victim do not negate the rights of the accused. Unreasonable pre-trial detention has the potential to violate some of the most fundamental human rights of the accused. The CCHR emphasizes that addressing the delays in court proceedings is the best way to uphold the rights of the accused and maintain the rights of the victim to protection where necessary.

In Case Study 3 the trial has been delayed on five occasions to date. As of the time of writing this case is still pending.

CASE STUDY 3

Case Study 3

This case was scheduled to be heard in Sihanouk Ville and concerned 5 female victims, aged between 15 and 18 years old. The accused was charged under Article 14 LHTSE: “The Act of Selling, Buying or Exchanging of Human Being.”

This trial was delayed on the following separate occasions:

1. The case was first delayed when two of the three judges were absent from the court as they went to a funeral. It was discovered that none of the lawyers had been informed about this.
2. The second delay concerned the rehabilitation center where the victims were currently living – the

¹⁰⁹ UN ECOSOC, Guidelines for Action on Children in the Criminal Justice System, Res. 1997/30, 21 July 1997

¹¹⁰ Provisional detention may be ordered to: stop the offense or prevent it from occurring again; prevent harassment of witnesses or victims or collusion with accomplices; preserve evidence or exhibits; guarantee the presence of the charged person during proceedings against them; protect the security of the charged person; or preserve public order from any trouble caused by the offense.

center could not bring the victims to the court that day as they had prior commitments. It was also confirmed that the judges were busy as well; however a substantive reason was not provided.

3. The third delay involved two of the judges training in Vietnam. Again the lawyers were not informed that they would be absent from court. On this occasion, it was discovered that the charge had been changed from Article 14 to Article 15 of the LHTSE “The Act of Selling, Buying or Exchanging of Human Being with Purpose.”

4. The fourth delay occurred when one of the three judges was working on another case. On this occasion the accused was present in trial for the first time. Up to this point the accused had been in pre-trial detention for 20 months.

This case is still pending however, and at this point, the victims are still willing to testify, despite the lengthy delay. This may be as a result of NGO involvement in these particular cases, as the cost of travel to and from court can otherwise prohibit victims from testifying where there has been repeated delay.

(vii) Application of the law and the right to understand the charge

DATA

FIGURE 17: APPLICATION OF THE LAW IN LHTSE TRIALS

Application of the Law	Y	N
Question 5: Human Trafficking Checklist		
5(a) Was there anything to suggest the Judge was confused about the law regarding human trafficking? (human trafficking checklist)	0	15
5(b) Was there anything to suggest the Judge was confused between the definition of smuggling and trafficking? (human trafficking checklist)	0	15

Although the answers to question five (Figure 17) of the Human Trafficking Checklist for the trials monitored suggest that there has been no confusion on the part of the judges regarding the law(s) relating to human trafficking, a closer analysis of data, read in light of the case studies, paints a different picture.

The data collected from the LHTSE cases was based on the observations of the Trial Monitors. The Checklist Guidance notes used by the monitors requires them to answer yes to questions 5 (a) and 5 (b) where anything was *said* to suggest the Judge may have been confused between the definition of smuggling and the definition of trafficking. Therefore the data, whilst accurate, should not be read so as to conclude that there was, in fact, a correct application of the LHTSE law. Despite the lack of any specific statements from the judges to suggest that they were confused about the law, it is clear that the application of the law has been inconsistent at best and incorrect at worst.

In order to gain a more realistic sense of whether the judge did understand the law, we found it useful to examine whether the law had been explained. It is clear from the majority of Trials in Figure 18 below that informing generally occurs, but explanations are rare. Whilst it may be acceptable to simply inform the accused of the law when it involves commonly understood crimes, for example, theft, it is not sufficient with human trafficking due to the complex legal elements involved. Therefore, the data presented below indicates a violation of the right to

understand the nature of the charge, and, in light of our cases studies, CCHR suggests that it casts doubt on the judiciary's understanding of the LHTSE.

Accused persons have the right to understand the nature of the offense with which they are being charged.¹¹¹ This includes the criminal offense they are alleged to have committed and the facts giving rise to the accusation. This information must be provided to a suspect in a language he or she understands.¹¹²

FIGURE 18: RIGHT TO UNDERSTAND THE NATURE OF THE CHARGE

Right to understand the nature of the charge	Non-LHTSE trials			LHTSE trials		
	Y	N	N/A	Y	N	NA
Question 4: Fair Trial Checklist						
4(a) Did the Judge announce the case to be heard?	196	3	0	12	3	0
4(b) Did the Judge state the charge?	198	1	0	11	4	0
4(c) Did the Judge state the relevant law?	169	30	0	11	4	0
4(d) Did the Judge state the parties involved?	196	3	0	12	3	0
4(e) Did the Judge state the date and place of the alleged crime?	197	2	0	12	3	0
4(f) An interpreter provided when required	0	0	199	6	0	9 ¹¹³

ANALYSIS

Application of the Law

As already established, the LHTSE addresses human trafficking as a unique area of law, moving away from the historical treatment of these crimes as falling within various other areas of law. However, there still appears to be some confusion as to what amounts to the crime of trafficking, despite the legal clarification in the LHTSE.¹¹⁴ As previously mentioned, the LHTSE is not limited to human trafficking offenses, but extends to cases of sexual exploitation, thus potentially further blurring the distinction between the offenses. Law reform alone is not sufficient to produce changes within the court room without complementary efforts to ensure the law itself is understood by those required to apply it.

¹¹¹ Article 14(3)(a) & (f) of the ICCPR; Articles 97 and 325 of the CCP.

¹¹² Article 14(3)(f) of the ICCPR; Article 330 of the CCP.

¹¹³ An interpreter was provided where required in six trials. In one instance, this was provided by a NGO. It is unknown who provided the interpreter in the other five cases.

¹¹⁴ United States Department of State, *Trafficking in Persons Report 2009 - Cambodia*, (16 June 2009).

Human trafficking is, in itself, a complex issue within international law, particularly as it cuts across a wide range of different bodies of law. The definition of human trafficking is inextricably linked to the victim and the circumstances under which the displacement occurred, particularly with adult victims where the specified purpose for the exploitation must be established.¹¹⁵ Furthermore, and unique to human trafficking, is the danger that the victim may be charged with related offenses such as prostitution, migration or labor laws.

One obstacle to creating a workable international definition of trafficking is the fact that various crimes – namely people smuggling – tend to overlap with it. For this reason, the Protocol draws a key distinction between “trafficking” and “smuggling”, defining the latter as “procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party which the person is not a national or a permanent resident.” The definition is intended to distinguish smugglers, whose main occupation is transporting migrants via illegal channels, from traffickers, who combine transportation with exploitation.

Case Study 4 is an example of the confusion about the law and the potential for misapplication.

CASE STUDY 4

Case Study 4

The hearing took place in Koh Kong Province. The victim and the accused were neighbors; the victim was contacted by her husband who told her to go to Thailand. As she couldn’t afford to travel, she was sent 7000 Baht (around \$210) and told that her neighbor, the accused, would help. Both victim and accused were stopped at the Thai port. Evidence from the Prosecutor later proved that it was not the victim’s husband that sent her the money and that she had been tricked in an attempt to lure her into Thailand.

The accused was charged with Human Trafficking under Article 10 of the LHTSE 2008: Unlawful Removal with Purpose: “A person who unlawfully removes another for the purpose of profit making, sexual aggression, production of pornography, marriage against will of the victim, adoption or any form of exploitation shall be punished with imprisonment for 7 years to 15 years.”

The judge acquitted the accused as there was not enough evidence to convict for human trafficking. Whilst the accused was released due to lack of evidence, a more suitable charge may have been smuggling as there was nothing to suggest that the “purpose” element in article 10 was present.

Article 11 of the LHTSE 2008 defines smuggling as Unlawful Removal for Cross-border Transfer: “A person who

Article 10 provides as follows: A person who unlawfully removes another for the purpose of profit making, sexual aggression, production of pornography, marriage against will of the victim, adoption or any form of exploitation shall be punished with imprisonment from 7 years to 15 years.

Article 11 of LHTSE: Unlawful Removal for Cross-border Transfer A person who unlawfully removes another for the purpose of delivering or transferring that person to outside of the Kingdom of Cambodia shall be punished with imprisonment from 7 to 15 years.

A person who unlawfully removes another in a country outside of the Kingdom of Cambodia for the purpose of delivering or transferring that person to another country shall be punished the same as set out in the above-stated paragraph 1.

¹¹⁵ UN Convention against Transnational Organized Crime: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children 2003.

unlawfully removes another for the purpose of delivering or transferring that person to outside of the Kingdom of Cambodia shall be punished with imprisonment from 7 to 15 years.” The Trial Monitors noted that this offense more closely resembles the facts of the case. Had the accused been charged with Article 11 of the LHTSE, a conviction may well have been secured.

Explanation of the charge

Whether the law was correctly understood by the law enforcement agencies or the judiciary is unlikely to be obvious based purely on the statements of the presiding judge in a particular case. Yet, given the abovementioned complexities with the law and the problems in its application, a closer look at related issues such as the extent to which the law and the charge was explained by the courts was considered necessary to ascertain whether the law is being correctly applied.

Article 14(2)(a) of the ICCPR states that the accused should be informed of the charge that he or she is facing. This right is directly linked to the right to an adequate defense. The Human Rights Committee has stated that the information owed to an accused under Article 14(3)(a) of the ICCPR is more detailed than that owed to arrested persons under Article 9(2), which deals with informing the accused of the charge at the time of arrest.¹¹⁶

The contrast between the data collected by the monitors revealed an interesting discrepancy in this context. It is crucial to note that whilst the sample size is much smaller, the results show that the percentage of LHTSE trials in which the indicators suggest a problem vis-à-vis the right to understand the nature of the charge is significantly higher than for non-LHTSE cases.

In three out of 15 of the LHTSE trials the judge did not announce the case to be heard, as opposed to three out of 199 other trials. Similarly, in four out of 15 of the LHTSE trials the judge did not state the charge compared to only one out of 199 in non-LHTSE trials.

Case Study 5 is an example of case in which the judge failed to explain the charge.

CASE STUDY 5

Case Study 5

The hearing took place in the Phnom Penh Court and concerned two separate accused, a Cambodian female aged 46 years and a Cambodian male aged 36 years (husband and wife). Both were charged under Article 27 of the LHTSE: “Aggravated Procurement of Prostitution.”

The husband and wife owned a guesthouse and had had previous contact with the victims. The two victims, both Cambodian females aged 15 years, were taken to the guesthouse, were raped and subsequently agreed to become sex workers. The money that the victims were paid was taken by the accused.

The judge failed to explain the charge and the relevant law at the beginning of the trial, a situation further confused by a change of judge during the hearing. Article 27 was not referred to by the judge until the accused

¹¹⁶ *McLawrence v. Jamaica*, UN Doc. CCPR/C/60/D/702/1996, 29 September 1997, Para. 5.9.

were convicted of the offense. This failure to explain the charge was further compounded, by the prosecuting lawyer suggesting during the hearing that a more appropriate charge may have been brought. It was suggested that the accused should have been charged under either Article 19 of the LHTSE – Receipt of Persons with Purpose – or Article 2 – Procurement with regard to Child Prostitution – rather than Article 27 with which they were actually charged. Neither suggestion was enacted.

Retrospective application of the law

The principle of legality or *nullem crimen sine lege*, the prohibition against retrospective legislation, is also relevant. In one instance there was evidence to suggest that the crime committed by the accused was not a crime at the time that it was committed. As the LHTSE is a relatively new law, there is a danger that examples of retrospective application may be more frequent in the future, particularly when considered in light of the abovementioned data relating to excessive delays.

FIGURE 19: RETROSPECTIVE APPLICATION OF THE LAW

Retrospective application of legislation	LHTSE trials			
	Y	N	Y	N
Q15(a) Was there anything to suggest that the offense was not an offense at the time it was committed?	0	199	1	14

Trial Monitors noted a related concern vis-à-vis the principle of legality or *nullem crimen sine lege*, the prohibition against retrospective legislation, which provides that no one shall be charged with a crime that was not an offense at the time that it was committed. An *ex post facto* law or retroactive law is a law that retroactively changes the legal consequences (or status) of actions committed or relationships that existed prior to the enactment of the law. Article 15(1) of ICCPR provides that “no one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offense was committed. If, subsequent to the commission of the offense, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.” The prohibition against retrospective legislative is also contained in Article 11(2) of the UDHR and Standard 9 of the Model Court Standards.

Case Study 6 is an example of the retrospective application of a law to an act committed before the law came into force.

CASE STUDY 6

Case Study 6

The hearing took place in the Phnom Penh Court. The accused was a Cambodian female, aged between 26-35 years old, who was hired by a market seller to find girls to work in his home.

In 2006, the accused and her sister offered the victims work in Phnom Penh, proposing to pay each girl 100,000 Riel per month and 50,000 Riel for transportation from Kampong Thom Province, in accordance with what the market seller had promised. When the girls arrived in Phnom Penh one of them voiced concerns about being moved to one of the market sellers.

An NGO, concerned that the girls were being sold, informed the police of the situation and the accused was arrested and charged with selling in persons. Further investigation found the remaining girls to be working free from threat and in fact no action of selling in persons had occurred. The complaint was withdrawn and the accused (who had been held in pre-trial detention for seven months) was released.

In 2009, the case was re-opened by the Phnom Penh Municipal Court and the accused was charged under Article 10 of the LHTSE Law 2008: Unlawful Removal with Purpose: *“A person who unlawfully removes another for the purpose of profit making, sexual aggression, production of pornography, marriage against will of the victim, adoption or any form of exploitation shall be punished with imprisonment for 7 years to 15 years.”*

Whilst it remains unclear as to why the case was reopened, at any rate, the alleged offence was committed in 2006, prior to the enactment of the LHTSE in 2008. The LHTSE does not enjoy retrospective application and so its use in this case is in direct violation of the principle of legality, or *nullem crimen sine lege*. Although the charge could have been challenged on these grounds, the defense lawyer failed to do so. Despite this, the accused was found not guilty and was released.

4. RECOMMENDATIONS

Following analysis of the data collected, the CCHR has identified a number of areas where judicial reform may contribute to achieving a higher number of prosecutions of human trafficking offenders, thereby aiding Cambodia in its efforts to combat human trafficking in general. In particular, the trial monitoring data suggests there are substantial weaknesses in the judicial system's adherence to human rights standards for victims of human trafficking and sexual exploitation, as well as certain shortcomings in relation to Cambodia's international obligations to guarantee fair trial rights.

The CCHR's recommendations for addressing these shortcomings in relation to LHTSE trials are set out below.

RECOMMENDATIONS FOR GENDER SENSITIVITY

The RGC should instruct relevant government ministries and/or institutions to:

- Ensure that the Royal Academy for Judicial Professions (the "RAJP") is providing instruction to all judges and court officials on gender sensitivity, requesting external assistance if necessary.
- Ensure that Cambodia's judiciary is cognizant of all gender issues related to trafficking including gender-specific responses to victims of human trafficking.¹¹⁷

RECOMMENDATIONS WITH REGARDS TO NON-CRIMINALIZATION OF VICTIMS

- The judiciary should take note that rules of judicial interpretation require that judges should read the LHTSE in accordance with Cambodia's international human rights obligations and undertakings and the purposes of the Protocol. The judiciary should maintain that the criminalization of victims for offenses related to trafficking is contrary to the purpose of the Protocol and therefore illegal.

RECOMMENDATIONS WITH REGARDS TO PUBLIC HEARING AND VICTIM PROTECTION

The RGC should instruct relevant government ministries and/or institutions to:

- Ensure that the RAJP is providing training – by external advisors or expert NGOs if necessary – to strengthen the knowledge of the judiciary on the rights of victims and their role and status within human trafficking and on respecting confidentiality and protecting witnesses. Existing guidance on ensuring confidentiality and protection should be translated into Khmer if not currently available.
- Guarantee that courts are provided with basic facilities and tools – including screens and audio equipment – to facilitate respect for confidentiality and protection of victims and witnesses. Training must be provided where resources exist for technical alternatives. Courts should create basic signs in Khmer, English and Vietnamese stating that such resources are available upon request and where the interests of justice require and place them outside courtrooms.
- Ensure that Cambodia's judiciary recognizes the interdependence of victim protection and successful prosecution.¹¹⁸
- Work with the judiciary to implement and adhere to a common framework to provide minimum standards of care to victims of human trafficking. In order to achieve this, existing international frameworks of minimum standards can be shared and adopted.¹¹⁹

¹¹⁷ As per the 14 recommendations emerging from the Inter Country Consultative Dialogue, recommendation 3.

¹¹⁸ As per the 14 recommendations emerging from the Inter Country Consultative Dialogue, recommendation 6.

¹¹⁹ As per the 14 recommendations emerging from the Inter Country Consultative Dialogue, recommendation 11.

- Provide leaflets on basic victim and witness rights in trials; as well as the rights of juvenile accused, victims and witnesses in criminal trials.
- Ensure that the courts and other applicable institutions continue to work with the National Committee to establish and foster effective cooperative and collaborative relationships with law enforcement agencies, social welfare departments, immigration authorities and civil society organizations in order to ensure the privacy and safety of the victim is at the forefront of measures to address human trafficking.
- Ensure there is an increase in awareness and training among law enforcement services and other competent authorities on their responsibility to ensure the safety of trafficking victims and ensure that training is being provided to this effect.
- Establish a system whereby law enforcement officials and court staff should work together to ensure the physical protection of the victim and/or witnesses before, during and after judicial proceedings or trials. Measures should be taken to ensure the availability of alternative interview and testimony techniques to assist the witness, such as video link, recorded testimony, closed trials etc.

RECOMMENDATIONS RELATING TO CASES INVOLVING JUVENILE VICTIMS AND/OR WITNESSES

In line with the international recommendations referred to above, the relevant departments of the RGC should ensure that the judiciary implements the following practices when juvenile witnesses or victims are involved in proceedings:

- a) Allowing a videotaped statement of the child's evidence
- b) The use of closed-circuit television
- c) Alternative arrangements for giving evidence, such as screens
- d) Allowing for the presence of a support person or advocate while the child is giving evidence
- e) Use of an intermediary to assist child witnesses to give evidence
- f) Prohibiting the defendant from cross-examining the child victim in person
- g) Objecting to aggressive or improper cross-examination by the defense
- h) Closing the court to the public
- i) A ban on the media
- j) Reducing the formality of the courtroom by measures such as removing advocates' robes

RECOMMENDATIONS TO ADDRESS DELAY AND PRE-TRIAL DETENTION

The RGC should instruct relevant government ministries and/or institutions to:

- Establish an effective system of communication between legal professionals, the court and other relevant bodies to ensure that delays are not caused due to failure on the part of the judge and/or lawyers to attend.
- Issue a strong reminder to investigating judges to ensure that legal limits of pre-trial detention are not exceeded.
- Ensure that the Investigating Chamber and President of the Court of Appeal (see CCP Article 283, 285) and the Inspector-General of the MOJ inspect investigating judges where it is apparent that they have knowingly or recklessly ignored pre-trial detention limits and the Disciplinary Committee of the SCM should use this as the basis for investigating and disciplining such investigating judges.
- Establish a nationwide detention database to monitor pre-trial detention and ensure that it does not exceed statutory limits. The database should ensure that the date of pre-trial detention for each accused is recorded,

that the last legal day of detention is highlighted, that there is systematic review of all detentions and that excessive detention is automatically flagged.

- Give priority hearing to cases where the accused has remained in pre-trial detention for a period approaching the legal limit.
- Ensure that the RAJP provides training to future judges on the pre-trial detention provisions of the CCP and on the practical meaning of the five justifications for pre-trial detention provided for in the CCP: to stop the offense or prevent it from occurring again; to prevent harassment of witnesses or victims or collusion with accomplices; to preserve evidence or exhibits; to guarantee the presence of the charged person during proceedings against them; to protect the security of the charged person; or to preserve public order from any trouble caused by the offense.

RECOMMENDATIONS WITH REGARDS TO APPLICATION OF THE LAW

The RGC should instruct relevant government ministries and/or institutions to:

- Ensure that judges are provided with training, potentially with the assistance of NGOs with expertise on human trafficking, on the correct interpretation and application of the LHTSE.
- Make certain that courts are provided with all up to date laws, requesting the help of the Office of the United Nations High Commissioner for Human Rights in this regard if required.
- Seek agreements with foreign embassies, whereby each embassy/consulate provides assistance in securing translation services for cases involving their nationals.

Cambodian Center for Human Rights

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Phnom Penh

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6. APPENDICES

APPENDIX 1: HUMAN TRAFFICKING CHECKLIST

Human Trafficking Checklist	Yes	No
1(a) Has the trial been previously delayed?	3	12
4(a) Was there anything to suggest the victim is lying about their age?	3	12
4(b) Was there anything to suggest the victim had contact with the accused between arrest and trial?	4	11
4(c) Did the Lawyer of the victim request that the victim's identity be kept confidential (i.e. did they request a closed hearing or the use of a screen)?	4	11
4(d) Did the Judge approach sensitive topics in a suitable manner?	13	2
5(a) Was there anything to suggest the Judge was confused about the law regarding human trafficking?	0	15
5(b) Was there anything to suggest the Judge was confused between the definitions of smuggling and trafficking?	0	15
6(a) Are any of the court officials female?	6	9
6(b) Was the victim represented by a female lawyer?	11	4
7(a) Was there anything to suggest the witness had been intimidated by the accused?	2	13

APPENDIX 2: FAIR TRIAL CHECKLIST

GENERAL INFORMATION			
1(a) Date of Trial:			
1(b) Monitors:			
1(c) Court:	PPC ☐	KPC ☐	OTHER ☐
1(d) Judge:	1st	2nd	3rd
1(e) Clerk:			
1(f) Charge:	Felony ☐		Misdemeanor ☐
	Details ¹²⁰ :		
	Relevant Law:		
1(g) Are any of the accused juveniles?	Yes ☐ If yes please complete Juvenile Annex		No ☐

RIGHT TO A PUBLIC HEARING		N/A ☐
2(a) Was notice of the hearing posted on a public notice board outside the courtroom?	Yes ☐	No ☐
2(b) Were members of the public obstructed from entering or dismissed from the courtroom?	Yes ☐	No ☐ Comment:

RIGHT TO BE TRIED WITHOUT DELAY	
3(a) Date of arrest:	
3(b) Was there pre-trial detention?	Yes ☐ No ☐ I/U ☐
	If yes, did pre-trial detention last until trial?
	Yes ☐ No ☐
	If no, what date did pre-trial detention finish?

RIGHT TO UNDERSTAND NATURE OF CHARGE

¹²⁰ If human trafficking please see Annex II: Human Trafficking Trial

4(a) Did the Judge announce the case to be heard?	Yes ☐	No ☐
4(b) Did the Judge state the charge?	Yes ☐	No ☐
4(c) Did the Judge state the relevant law?	Yes ☐	No ☐
4(d) Did the Judge state the parties involved?	Yes ☐	No ☐
4(e) Did the Judge state the date and location that the alleged offense occurred?	Yes ☐	No ☐
4(f) If required, was an interpreter provided?	Yes ☐	No ☐ N/A ☐
4(g) If required, were provisions made for disabilities?	Yes ☐	No ☐ N/A ☐
	If yes, type of provision?	
	Hearing	Vision Other

EXPLANATION OF RIGHTS

5(a) Did the Judge inform (I) and explain (E) to the accused their right to legal representation or to self defense?	I only ☐	I and E ☐	Neither I nor E ☐
5(b) Did the Judge inform (I) and explain (E) to the accused their right to silence?	I only ☐	I and E ☐	Neither I nor E ☐
5(c) Did the Judge inform (I) and explain (E) to the accused their right not to self incriminate?	I only ☐	I and E ☐	Neither I nor E ☐
5(d) Did the Judge inform (I) and explain (E) to the accused their right to change the judge?	I only ☐	I and E ☐	Neither I nor E ☐
5(e) Did the Judge inform (I) and explain (E) to the accused their right to have the last word?	I only ☐	I and E ☐	Neither I nor E ☐

RIGHT TO ADEQUATE TIME AND FACILITIES TO PREPARE DEFENSE

6(a) Was the issue of adequate time and facilities for preparation raised by the defense?	Comment:
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RIGHT TO LEGAL REPRESENTATION AND TO BE PRESENT AT TRIAL

7(a) Was the accused represented by a lawyer?	Yes ☐	No ☐
7(b) Was there more than one accused?	Yes ☐	No ☐
	If yes, was there a conflict between the statements of the accused?	
	Yes ☐	No ☐

	If yes, were the accused represented by different lawyers? Yes ☐ No ☐
7(c) Was the accused excluded at any stage of the trial?	Yes ☐ No ☐ Comment:

PRESUMPTION OF INNOCENCE

8(a) If the accused was held in pre-trial detention, did they appear before the court in prison uniform?	Yes ☐ No ☐ N/A ☐																						
8(b) Was the accused handcuffed throughout the trial?	Yes ☐ No ☐ If yes, was there a good reason? Yes ☐ No ☐ Comment:																						
8(c) Were statements made by the Judge about the guilt / innocence of the accused before the verdict was delivered?	Yes ☐ No ☐ Comment:																						
8(d) Was there anything to suggest that the judge discriminated against the accused because of their personal characteristics?	<table border="1"> <tr> <td>Yes ☐</td><td>No ☐</td></tr> <tr> <td colspan="2">If yes, which characteristic?</td></tr> <tr> <td>Age</td><td>☐</td></tr> <tr> <td>Gender</td><td>☐</td></tr> <tr> <td>Profession</td><td>☐</td></tr> <tr> <td>Marital Status</td><td>☐</td></tr> <tr> <td>Nationality</td><td>☐</td></tr> <tr> <td>Ethnicity</td><td>☐</td></tr> <tr> <td>Religion</td><td>☐</td></tr> <tr> <td>Family Name</td><td>☐</td></tr> <tr> <td>Other</td><td>☐ Details:</td></tr> </table>	Yes ☐	No ☐	If yes, which characteristic?		Age	☐	Gender	☐	Profession	☐	Marital Status	☐	Nationality	☐	Ethnicity	☐	Religion	☐	Family Name	☐	Other	☐ Details:
Yes ☐	No ☐																						
If yes, which characteristic?																							
Age	☐																						
Gender	☐																						
Profession	☐																						
Marital Status	☐																						
Nationality	☐																						
Ethnicity	☐																						
Religion	☐																						
Family Name	☐																						
Other	☐ Details:																						

INDEPENDENCE / IMPARTIALITY OF THE JUDGE

9(a) Did the Judge play any other role in the court proceedings?	Yes ☐ No ☐ If yes, which party? <table> <tr> <td>P ☐</td> <td>D ☐</td> </tr> <tr> <td>CP ☐</td> <td>IJ ☐</td> </tr> </table>	P ☐	D ☐	CP ☐	IJ ☐
P ☐	D ☐				
CP ☐	IJ ☐				
9(b) Was there anything to suggest that the Judge had an	Yes ☐ No ☐				

interest in the case beyond their usual judicial role?	Comment:	
9(c) Was there anything to suggest that any party spoke to the Judge during deliberation?	Yes ☐ No ☐ If yes, which party? P ☐ D ☐ CP ☐ Comment:	
9(d) Was there anything to suggest that the Judge behaved in an intimidating manner towards any party?	Yes ☐	No ☐
	If yes, which party? P ☐ D ☐ CP ☐ Comment:	
9(e) Was there anything to suggest that the Judge drew an inference of guilt from the silence of the accused?	Yes ☐	No ☐
	Comment:	

EVIDENCE

10(a) Was evidence presented?	Yes ☐ No ☐ If yes, by which party? P ☐ D ☐ CP ☐ If yes, what type of evidence was presented? Physical object: ☐ Documentary: ☐ Witness Testimony: ☐ Confession: ☐	
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	Other: ☐
10(b) Was there anything to suggest that any party was not given the opportunity to present evidence?	Yes ☐ No ☐ If yes, which party? P ☐ D ☐ CP ☐ Comment:

RIGHT TO CALL AND EXAMINE WITNESSES

11(a) Was there anything to suggest that any party was not given the opportunity to summon witnesses?	Yes ☐ No ☐ If yes, which party? P ☐ D ☐ CP ☐ Comment:
11(b) Was there anything to suggest that any party was not given the opportunity to examine witnesses?	Yes ☐ No ☐ N/A ☐ If yes, which party? P ☐ D ☐ CP ☐ Comment:
11(c) Were the witnesses present in the courtroom before they were examined?	Yes ☐ No ☐ N/A ☐

RIGHT TO FULL DISCLOSURE

12(a) Was there anything to suggest that the same evidence was not available to both sides?	Yes ☐ No ☐ If yes, which party did not have the evidence? P ☐ D ☐ CP ☐ Comment:
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RIGHT NOT TO SELF INCRIMINATE

13(a) Was there anything to indicate a confession was extracted from the accused through coercion?	Yes ☐ No ☐ N/A ☐ Comment:
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13(b) Was there anything to indicate a confession was extracted from the accused through torture?	Yes ☐ No ☐ N/A ☐
Comment:	

PROHIBITION AGAINST DOUBLE JEOPARDY

14(a) Was there anything to suggest that the accused has been tried for this offense previously?	Yes ☐ No ☐
Comment:	

PROHIBITION AGAINST RETROSPECTIVE PENAL LEGISLATION

15(a) Was there anything to suggest that the offense was not an offense under national law / international law when it was committed?	Yes ☐ No ☐
Comment:	

VERDICT

I/U ☐

16(a) Date:	
16(b) Was the accused in Pre-trial detention between trial and verdict?	Yes ☐ No ☐ I/U ☐ N/A ☐
16(c) Type:	Guilty ☐ Not Guilty ☐
16(d) Legal Reasoning:	Yes ☐ No ☐ I/U ☐ Please Specify:
16(e) Evidential Reasoning:	Yes ☐ No ☐ I/U ☐

APPENDIX 3: JUVENILE ACCUSED CHECKLIST

AGE	
1(a) Age	<14 ☐ 15-17 ☐
1(b) In the case of an accused juvenile found to be less than 14 years old, did the judge order an immediate acquittal of the case??	Yes ☐ No ☐ N/A ☐ Comment:

RIGHT TO BE TRIED WITHOUT UNDUE DELAY	
2(a) Date of Arrest:	
2(b) Was there pre-trial detention?	Yes ☐ No ☐ I/U ☐ If yes, did pre-trial detention last until trial? Yes ☐ No ☐ If no, what date did pre-trial detention finish?

PRE-TRIAL	
3(a) If held in pre-trial detention, was there anything to suggest that the accused was not separated from other adults?	Yes ☐ No ☐ N/A ☐ Comment:

TRIAL	
4(a) Did the Judge wear less formal clothes?	Yes ☐ No ☐ Comment:
4(b) Was there anything to suggest that the juvenile wanted their parents present at the hearing?	Yes ☐ No ☐ If yes were, the parents present?

	Yes ☐	No ☐
4(c) Was there a screen to protect the juvenile from testifying in public?	Yes ☐	No ☐
	Comment:	
4(d) Was there anything to suggest that the Judge considered imposing a non-custodial sentence before imposing a custodial sentence?	Yes ☐	No ☐
	Comment:	

Preparation and prerequisites

General Duties

Confidentiality

- The monitoring project respects full confidentiality with respect to the release of non-public information.
- Monitors must have a comprehensive understanding of the confidentiality principles in relation to trial monitoring with respect to information obtained at court, as well as operational and organizational information relevant to CCHR.

Prior to Implementation of the Trial Monitoring Project

Preliminary assessments

Trial Monitors must have a thorough understanding of the following prior to court attendance as a Monitor:

- The judicial mechanisms in Cambodia;
- Court hierarchy and corresponding jurisdictions;
- Level of cooperation and/or involvement that is expected from a) Judge; b) Prosecutor C) Defense Counsel and e) Government.

Notification

- The decisions as to who will receive formal and/or informal notification of the Trial Monitoring must be made prior to monitoring the trials and be approved by the Project Coordinator in line with the project objectives;
- If the CCHR notifies the Court of the trial monitoring it must be in accordance with general practices;
- Monitors must record who has been informed and/or consulted prior to, and/or during, the trial. This includes the details and form of the notification;
- Whether a Memorandum of Understanding (“MOU”) has been signed between CCHR and the Ministry of Justice.

Prior to Each trial to be monitored

Preliminary Assessments

The following information is collected prior to each trial, or, where unable to do so, it is noted and the research is conducted after or during the trial:

- Whether there are relevant reports on similar trials in Cambodia;
- Which binding international laws and treaties, if any, pertain to the case;
- What are the domestic laws, substantive and procedural, relevant to the case;
- The relevant Constitutional provisions.

Notification

- Trial Monitors must document in detail any dialogue with a) government; b) Defense Counsel; c) Prosecutor; d) Judge; e) Court Clerk or f) any other relevant party.

Access

- The Trial Monitors must register with the court prior to monitoring and, if a request for documents or access was made, Trial Monitors must keep copies of all official documentation.

During the Trial

General

- Arrive in court ahead of time to allow sufficient time to gain access to the court, locate the courtroom, and find a seat. This should be described in the Report form.
- Monitors must be prepared and able to clearly articulate the legal basis, purposes, and objectives of the program to all court officials and legal actors.

Identification

- Carry the monitor-identification badge at all times, and produce it if requested by court officials.
- If there are concerns about access, carry acknowledgement for local officials of trial monitoring project.

Conduct in court

- Monitors must display professionalism at all times.
- Must possess a high standard of legal knowledge, including international human rights law.
- Monitors must decide where to sit, attempting to secure an appearance of impartiality and to facilitate observation of the trial. The observer should choose to sit in a prominent, neutral location in the courtroom. Maintain polite and composed demeanor with all court officials and parties to a case.
- Wear appropriate clothing.
- Arrive promptly at court.
- Maintain a respectful approach during all interactions with court officials and actors.
- Visibly make extensive notes during hearings based on the CCHR checklist, irrespective of whether the trial is being recorded.
- Monitors must be familiar with and fully understand the checklist and guidelines for trial monitoring.
- Ensure the safety and confidentiality of notes.
- Get a neutral party to give introduction to court (only if staying the entire time) to increase visibility.

Impartiality and non-interference

- Occupy a convenient seat in a courtroom that allows you to observe, hear and follow all aspects of a hearing.

- Do not sit next to either the defense or prosecution.
- Never ask legal actors their opinions on a case or offer advice.
- Avoid interfering during the course of a hearing.
- Never interrupt a trial proceeding or speak with legal actors or participants during the trial.
- Never intervene in a trial or attempt to influence the outcome of trial proceedings in any way.
- At no time express any bias or preference in relation to the parties in a case.
- Do not express any views on the course of a trial either inside or outside a courtroom. When asked specific questions, respond by explaining the role of the monitor and the code of impartiality.
- Trial Monitors should make no public statements.
- Where possible, Trial Monitors should take note of related newspaper articles referring to the trial and be aware of practical observations for future trial monitors.