

INTERNATIONAL BRIDGES TO JUSTICE

STRENGTHENING LEGAL AID IN CAMBODIA'S COURTS OF APPEAL



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Strengthening Legal Aid in Cambodia's Courts of Appeal

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www.ibj.org

Cover artwork by: Tey Tey. Tey is a young artist from Phnom Penh. One of seven children, he developed a love of art from a very young age. His work expresses his connection to Khmer culture and hopes that Cambodians can grow together in solidarity and respect for justice.

"The incredible work done in the
Cambodian Courts of Appeal is a
leading example of innovative, high-
impact access to justice programming.
The judges honor and recognize the
importance of their work in
strengthening the rule of law in
Cambodia."

- David Steuer, Partner, Wilson Sonsini and World
Justice Challenge Judge 2022

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ABOUT INTERNATIONAL BRIDGES TO JUSTICE



Karen Tse in CC2 prison meeting female detainees

OUR STORY

IBJ is a global leader in strengthening justice systems. Our history spans more than 20 years and is the vision of Founder and CEO, Karen Tse.

In 1994, Karen moved to Cambodia to train the country's first core group of public defenders and subsequently served as a United Nations Judicial Mentor. At the time there were no defenders in the country and Cambodia was starting to rebuild its criminal justice system. The people in prison she met did not have a lawyer. They often did not understand why they were in prison.

As Karen trained the first group of 25

public defenders, she began to appreciate the task that lay ahead for Cambodia's justice system. People lost in the prison system were not viewed as important and many were denied their basic rights. Karen decided that this should change and created IBJ to shine a light into the darkest of places.

IBJ was created to provide hope for every human being, regardless of their circumstances, by strengthening criminal justice systems around the world.

Join us as we take you through our journey in Cambodia's criminal justice system.



KEY FINDINGS & RECOMMENDATIONS

KEY FINDINGS

- Fair trial rights in the first instance must be addressed. This will positively impact the caseload in the Courts of Appeal and reduce prison overcrowding.
- The high prevalence of the use of torture in the police stations and a heavy reliance on confessions is perverting the course of justice.
- While not an issue in the current project, previous projects exposed a real risk of innocent people remaining unnecessarily in detention when the prosecution appeals a 'not guilty' verdict.
- Greater resources are needed to support case management and governance processes.
- Delay in processing cases means that justice remains out of reach for most people in conflict with the law and fair trial rights cannot be properly upheld.
- There is a shortage of legal aid lawyers with the necessary advocacy skills to ensure equality before the law.
- A absence of a limitation period for processing appeals cases, means people are serving their whole sentence before their appeal is heard, contravening the right to appeal.
- Women in conflict with the law are subject to bias and discrimination.
- Young people are vulnerable when they are arrested and do not understand their rights.
- The presence of NGO legal aid lawyers in the courtrooms places positive pressure on the system. There is currently only one full time NGO criminal defense lawyer in the country.

RECOMMENDATIONS

- Close the legal loopholes that are adversely impacting fair trial rights.
- Support the promotion of systematic early access to a skilled lawyer.
- Strengthen the role of civil society organisations in the provision of legal aid to promote international best practice.
- Use innovation to reduce the backlog of cases.
- Promote good governance.
- Increase awareness about the presumption of innocence.
- Create a support network for women in the law.

EXECUTIVE SUMMARY

INTERNATIONALLY RECOGNISED AS THE BEST-IN-CLASS ACCESS TO JUSTICE PROJECT FOR STRENGTHENING RULE OF LAW AND BUILDING MORE JUST COMMUNITIES.

People who come into conflict with the law are often very poor, lack the resources to pay for a private lawyer and are unaware of the criminal justice process. International Bridges to Justice (IBJ) has been working in Cambodia since 2005, pioneering change in access to justice, and proving vital legal aid services to marginalized Cambodians.

Cambodia has made huge progress over the past decade to build a state-sponsored legal aid system. Recent efforts by the Ministry of Justice and Bar Association of the Kingdom of Cambodia have seen legal aid lawyers placed in every courthouse around the country and three new Courts of Appeal open. Funding to support the Bar Associations' 378 new legal aid lawyers has risen to US\$640,000.

Like many systems around the world, Cambodia's criminal justice system is under pressure. High caseloads cause delay in people realising justice and a heavy reliance on pre-trial detention has seen the prison population swell to unsustainable levels. There is a disproportionately high percentage of young women and men detained on minor drug related charges. The mental and physical health challenges that arise in prison persist on the outside and perpetuate a cycle of poverty. Strengthening access to justice is the linchpin for reducing poverty and strengthening governance.

This policy paper informs and guides decision-makers, and those with the power to drive change, to transform systems and practices to realise access to justice for all.



Prisoners sitting in Pursat prison on Human Rights Day



IBJ's Appeals Court lawyer

INTRODUCTION

IBJ is grateful to OHCHR-Cambodia for its continued support and the opportunity to increase access to justice in the Courts of Appeal. This current project has provided legal assistance to 61 priority cases of detainees who have been denied access to a lawyer to process their pending appeal. This is the fourth appeals court project in which we have now represented 544 priority appeals cases. This project highlights the challenges in the Courts of Appeal and gaps in access to justice more broadly.

IBJ has now been working in the Courts of Appeal for over a decade. Throughout this period, IBJ has had many successes. In 2012, 10 people who remained in detention pending an appeal had their innocent verdict upheld and were released. In 2014, IBJ's lawyer sought the release of 46 people in detention, 11 who were being excessively detained beyond their sentence. In its report to the UN Human Rights Council, OHCHR-Cambodia declared that, through its partnership with IBJ, most of the backlog of the longest-pending appeal cases had been cleared. In 2016 IBJ's lawyers helped one man who had served his 18-year sentence in prison waiting for his appeal and an additional 19 people who were found innocent at trial. These 19 people had their innocent verdict upheld on appeal.

The current grant supported 61 priority cases. At the end of the grant period, 57 (93%) cases were closed. The priority cases included 29 (47%) cases with a sentence of either 4 or 5 years. Of the cases that went to appeal, 16% received a reduction in sentence of a year or more. But critically 48% had almost served their sentence on appeal and refused any form of intervention.

Prior to 2020, there was only one Court of Appeal in Cambodia. Detainees on appeal would be transferred from provincial prisons to Phnom Penh for their appeal, taking them away from vital support systems. This process was riddled with problems. Prisons often did not have money for gasoline to transfer the detainee to Phnom Penh, so appeals trials proceeded *in absentia*. Moreover, the distance and lack of infrastructure caused case files to go missing. There were huge delays in final judgments reaching provincial prisons and people were left languishing in prison for years, sometimes decades, waiting for their appeal case or long after their sentence had finished. With the opening of three new courts, IBJ has seen improvements.

IBJ has witnessed impressive change and commitment to decentralise access to justice and address the challenges in the Courts of Appeal. IBJ is proud to have worked with the Government to move legal aid lawyers into courthouses, demonstrate best-practice legal defense in a criminal justice setting, and has disseminated rights awareness to over 10 million people throughout the country. However, we know there is still more work to do. We look forward to continued collaboration with the Government as we move together to realise access to justice for all.

This policy paper brings together a decade of work in the Courts of Appeals system. It is intended to inform and guide decision-makers to drive change. It identifies challenges facing Cambodia's Courts of Appeal, recommendations for improving the Courts of Appeal and offers a roadmap for strengthening access to justice in Cambodia.

CASE STUDY: FIRST APPEAL COURT CASE

THE LEGAL LOOPHOLE KEEPING INNOCENT PEOPLE IN PRISON

Makara* was a 19-year-old boy when he was arrested by the police. At the time Makara was finishing school and working as a fisherman, helping his father to provide for his parents and three siblings.

Like many Cambodians, Makara did not understand the role of a lawyer or anything about the criminal justice process. However, a prison guard noticed that Makara was new and recommended that his family contact IBJ.

In 2009, IBJ was operating a permanent office in Pursat province. IBJ was the only permanent provider of legal aid in the area and 60% of the people in prison had been or were being represented by IBJ. The lawyer had spent years building up a relationship with the provincial prison officers, police and court staff. He was a respected part of the local criminal justice system.

IBJ's lawyer successfully defended Makara against a murder charge. The evidence presented by IBJ's lawyer was enough for Makara to be found innocent of all charges. However, as was normal practice at the time, Makara remained behind bars because the prosecution appealed the verdict.

Makara remained behind bars for two more years waiting for his appeal case to be heard. Makara felt betrayed by the justice system. He was stressed because he did not know when this nightmare would end.

In late December 2012, the Appeal Court upheld his innocent verdict.

During his time in detention, he was allowed up to two hours outside of his overcrowded cell - cells so overcrowded they took turns to sleep at night. He was given two very small portions of rice, and sometimes fish. Overcome with helplessness, he accepted his fate and the injustice that was afforded to him.

Makara left prison at 22 years of age. His life is forever changed by a broken justice system.

Since Makara, IBJ's lawyers have defended 36 people on appeal who were found innocent at trial but remained in detention because the prosecution appealed. Article 398 of the *Criminal Procedures Code* places the onus on the prosecution to agree to release a person found innocent at trial. IBJ is advocating for this law to change so that people found innocent at trial must be released into the community to wait for their appeal.



Makara on the day he was released from prison

"My head feels dizzy being a free man. I have never been to Phnom Penh and it is so busy. It is strange to be free and out of my cell. There has been so much change."

METHODOLOGY

THE COURTS OF APPEAL PROJECT TRIAGES HIGH-PRIORITY CASES WHILE OBSERVING CHALLENGES IN ACCESS TO JUSTICE MORE BROADLY

The project targets the backlog of long-standing appeals cases before the Courts of Appeal of Phnom Penh and Battambang.

To process cases, IBJ cooperates with the Bar Association and the Courts of Appeal to provide legal assistance in priority cases before the court. Prior to the most recent grant, IBJ provided legal aid services and case management in 483 priority appeal cases. This current project provides legal assistance to **61 priority cases** of detainees who have been denied access to a lawyer to process their pending appeals.

IBJ provides free legal services including case management, investigations, and advocacy.

The project works with prisoners currently detained in the following six prisons and correctional centers: Correctional Center 1 (CC1), Correctional Center 2 (CC2), and Police Judiciary Prison (PJ) all based in Phnom Penh, as well as the prisons of Battambang, Siem Reap and Kandal.

Goal: To provide legal aid to detainees who have been denied access to a lawyer to process their pending appeals.

Objective: To provide, on a legal aid basis, case management and advocacy services to high priority cases identified by IBJ and OHCHR-Cambodia in which the accused's right of appeal has been frustrated.



Prisoners learning about human rights in Pursat Prison

THE CURRENT ACCESS TO JUSTICE GAPS

OVER ONE THIRD OF THE 38,000 PEOPLE CURRENTLY IN CAMBODIA'S PRISONS ARE HELD IN PRE-TRIAL DETENTION & ANOTHER THIRD ARE WAITING FOR THEIR APPEAL CASE TO BE HEARD

Over the past ten years, IBJ has noticed a positive change within the Courts of Appeal. In 2012, the 81 priority cases included 32 (40%) of people who were being held beyond their initial prison sentence and 10 (51%) who remained behind bars despite an innocent verdict at trial.

Between 2013 and 2014, IBJ processed 222 appeal cases. Only 11 people on the list were held beyond the end of their sentence. The focus was on the challenge with the prevalence of default judgments being issued to close an outstanding appeal. In one case, IBJ successfully processed the case of one man who had his appeal case closed through a default judgment. He had spent 12 years in prison after his default judgment was issued and 6 additional years over his initial sentence.

In the 2016, the scope moved to capture other prisons including Battambang, Siem Reap and Banteay Meanchey. In this project, IBJ sought the release of 19 people who were still in prison because the prosecution appealed (including 7 juveniles who spent one year in an adult detention facility), despite an innocent verdict at trial. Together, these people spent a total of 27 and a half years in prison, innocent. Vigilance and monitoring of this issue is key to avoid gross human rights violations. IBJ is pleased to observe that this current project priority list did not include any similar cases.

We are also encouraged to see the Bar Association working towards building a decentralised legal aid system. In 2021, the Bar Association provided legal aid support to 8,425 people, including 1,453 juveniles, in 5,182 cases. In 2022, the annual budget to provide legal aid has increased to around 2.6 billion riels (US\$640,000). It now has 378 volunteer lawyers registered who receive funding to support legal aid defense. The Bar Association can be applauded for such an impressive effort to prioritise and increase access to justice in Cambodia.

However, the current stipend provided to legal aid lawyers may not cover investigation, evidence gathering and early intervention. Many clients report first meeting their lawyer at the trial stage, 18 months after they are first in detention.

"I am the only legal aid lawyer in the province. Legal aid funding is prioritised for felony and juveniles. Since IBJ closed its office, there is no justice for misdemeanour cases."

- Cambodian lawyer

The early stages of a criminal justice process are the most critical for ensuring due process rights are upheld. Decisions and actions made in the first few days or weeks following an arrest can change the course of someone's life. The data from the project indicates that there is insufficient emphasis placed on the importance of a defense lawyer gathering evidence at first instance. Coupled with a heavy reliance on confessions as the primary source of evidence, justice remains out of reach for most people who come in conflict with the law.

The delay in access to a lawyer further impacts fair trial outcomes. This increases the burden on the Courts of Appeal and strains an overcrowded prison system. IBJ understands the difficulties in prioritising early, systematic legal aid but view it as a cost-effective approach to providing legal aid services.

Pressure on resources means that funding is prioritised for the defense of felony and juvenile cases. This means people who are charged with a misdemeanour have little to no access to justice. Moreover, lawyers often lack the funds to meet with their clients before trial. Pressure is also placed on the police to close cases quickly and a confession is often the sole form of evidence available for a judge to decide a case. When our lawyers present claims of torture at the appeals stage, judges dismiss these allegations due to the lack of evidence.

Confessions made under duress are incredibly difficult to defend. It can take up to seven years for an appeal to come before a court. People without access to a lawyer at trial are often afforded the maximum sentence based on the little evidence provided. The high rate of torture in the police station, the inadmissibility of claims of torture, and the delay in access to a lawyer after arrest, are of primary concern in the appeals cases.

Additionally, the presumption of innocence is not widely respected – both in the community and institutions. IBJ understands there is community pressure on judges to order pre-trial detention. The heavy reliance on pre-trial detention has caused the prison population to reach an unsustainable level.

Over the past five years the prison population has doubled. There is little use of alternative sentencing practices, especially in relation to young females with children. These problems perpetuate the lack of trust in the justice system. However, when fair trial rights are upheld, trust is built within the community and helps communities to feel more secure.

The right to appeal an unfair sentence is often overlooked as a priority for donors. Yet there are around 11,000 people (35%) waiting for their appeal. To address the severe backlog of cases, the Ministry of Justice opened three new Courts of Appeal in Preah Sihanouk, Battambang, and Tboung Khmum. However, IBJ has observed that the onus is on the accused to request a lawyer who then processes the case. Mr Ouk Vandeth has observed that without this request for a lawyer, a judge may not process the case and that this causes people to wait years on appeal.

Cambodia now has the 5th worst prison system in the world in the world in terms of overcrowding.

- prisonstudies.org

It is usual for people to spend 18 months in detention waiting for their trial. By the time an appeal is processed, people are often coming to the end of their initial sentence. In 47% of cases in the current project, people had a sentence of either 4 or 5 years. When they met with IBJ, they no longer wanted to pursue an appeal as they had almost served their sentence. Enforcing time limits on appeal court positively impact people who may have been unfairly sentenced. Of the cases that IBJ did process, 7 received a reduced sentence. Not only does this work towards decreasing the prison overcrowding, but it also supports the right to appeal in the criminal justice system.

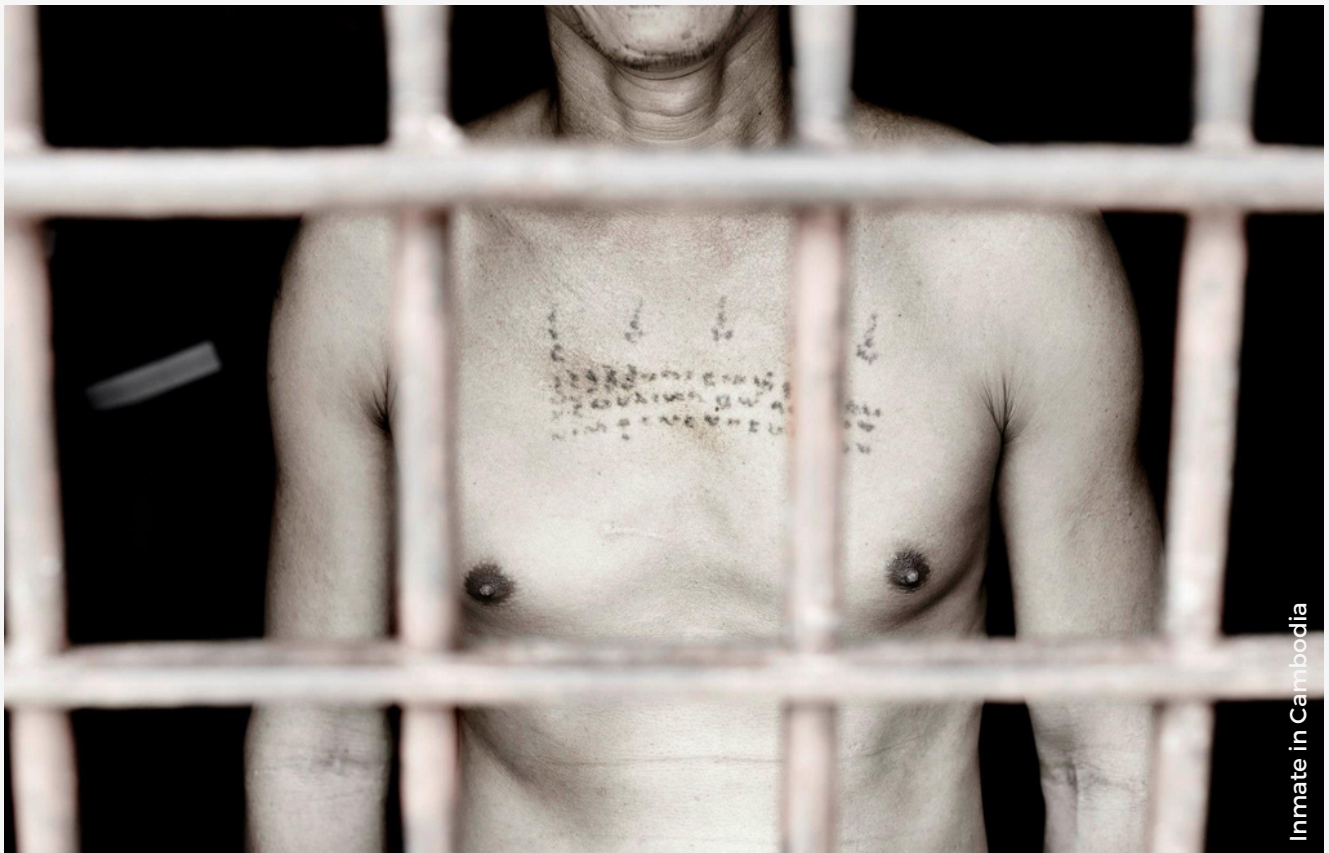
When an appeal is before the court, irrespective of any argument, the judge is reluctant to overturn a previous verdict. However, sentences can be reduced. This is the preferred method to address an error at trial.

We must take this opportunity to strengthen systematic, early access to a defense lawyer in the pre-trial phase and within the appeals court system.



KEY CHALLENGES

MOST PEOPLE WHO COME IN CONFLICT WITH THE LAW EXPERIENCE A VIOLATION OF THEIR RIGHTS.



Inmate in Cambodia

A. TORTURE & FORCED CONFESSIONS ARE PERVERTING THE COURSE OF JUSTICE

Torture is one of the most extreme human rights violations that can occur within the justice system. It is also the cheapest investigative tool available. But torture is an ineffective tool that leads to misinformation and unreliable evidence. A lack of resources, training and command pressure at the local level provide space for torture and forced confessions in Cambodia's justice system.

The right to legal assistance in the early stages of the criminal proceedings protects against misinformation or unreliable evidence in the form of confessions. However, the findings of this project indicate that systematic early access to a lawyer is not a priority in the justice system.

Police should be encouraged to gather 'good' evidence. This will also ease the burden on the Courts of Appeal.

All cases in the project had a lawyer at trial of first instance. Of these cases, 97% were felony cases that required a lawyer. Almost all of the cases on the priority list were allegedly tortured by the police.

A report by the Cambodian Centre for Human Rights shows that torture is increasing and is now estimated to affect 6.7% of all cases.

"Torture happens in the police station. Almost all my clients have been tortured or intimidated. By the time we can intervene, torture is too hard to prove."

- Cambodian lawyer

B. INSUFFICIENT RESOURCES TO MEET THE HIGH CASE LOAD

In 2020, the Ministry of Justice opened three new Courts of Appeal to address the severe backlog of cases. While this has addressed the physical distance required for prisoners on appeal to travel, it has not directly decreased the number of people on appeal.

When IBJ first started its appeals court partnership with OHCHR-Cambodia in 2012, it was reported that there was a backlog of 4,000 cases (at the time 30% of the prison population). While IBJ has cleared the longest serving cases on appeal, our lawyers are consistently seeing people on appeal for up to seven years. These numbers will continue to pose a challenge if judges are required to process cases 'in a reasonable time'.

Mr Ouk Vandeth reports that cases with a lawyer are prioritised and cases without a lawyer do not proceed. Moreover, a person on appeal must request a lawyer. Cambodian Centre for Human Rights reports that 25% of people on appeal are processed without a lawyer but IBJ estimates that this number is misleading. IBJ's believes that people in detention without a lawyer are seldom processed.

The project is providing legal aid in priority felony cases in two of the four Courts of Appeal. There is no additional NGO legal aid support in the new Appeals Courts in Preah Shianouk and Tboung Khmum. IBJ does not have any data available to understand the magnitude of the problem in these two new courts.

C. THERE IS A SIGNIFICANT DELAY IN PROCESSING APPEALS COURT CASES

In accordance with international standards, the determination of a criminal matter should be completed without undue delay. However, the priority cases show a justice system that is struggling with the high number of cases. The high demand in cases, the failure to train police in investigations, the non-use of bail applications and shortage of resources indicate that more needs to be done to support the Bar Association implement and streamline its legal aid program.

In the current project, 34% of cases were detained in 2019. A further 14 cases (24%) have been in the system for over 5 years (the oldest case from 2007). The average sentence is 9 years but the most frequent sentence being handed down is 4.8 years. Therefore, due to the delay in processing cases, in 48% of cases people were coming to the end of their sentence and did not want to create any problems. They had accepted the injustice of their situation.

Moreover, these significant delays impact the lawyers' ability to conduct an appeal. When the lawyers were able to intervene, they faced numerous challenges collecting evidence to support the defense of the appeal. The delay in the first instance, coupled with the significant delay on appeal, makes evidence near impossible. Our lawyers must rely heavily on studying the case files for inconsistencies between the various reports.



Ouk Vandeth, CBJ Country Director

"There is no consistency in processing an appeals case. When we provide legal aid, cases take three months. But without a lawyer cases take four years and others take ten years. We need a law that states a fixed period for an appeal"

- Ouk Vandeth, CBJ Country Director

D. BUILD THE CAPACITY OF DEFENDERS

This project highlights the shortage of skilled legal aid lawyers. There is little evidence in the case files of pressure by legal aid lawyers to challenge confessions and limited use of alternative evidence presented as a defense at trial. Our lawyers' primary argument on appeal is that there is no evidence to prove a crime.

IBJ observes that lawyers are often unprepared and ill-equipped to provide a legal defense. There appears to be an overall lack of understanding around elements of a crime, case defense preparation, defense arguments, evidence gathering and so on. This lack of skill is a big challenge for presenting a good argument on appeal.

IBJ's data indicates that a skilled defense lawyer at trial of first instance, significantly eases the burden on the courts. IBJ collects data more broadly to show that having a legal aid lawyer present significantly improves the right to a fair trial. IBJ's country wide program has provided representation to 12,389 Cambodians in conflict with the law. Of the cases that are closed, our outcomes include approximately 85% of cases successfully mitigated with a fair sentence, 16% of cases dismissed before trial (often due to a lack of evidence) and 10% of cases acquitted. Additionally, 60% of bail applications processed by IBJ's lawyers are approved. If we use the \$1 per prisoner per day figure, a skilled defender may provide an estimated savings of over \$45,000 per 100 people who are processed through Cambodia's justice system per year.

E. POOR GOVERNANCE PROCESSES

The right to an appeal and have your case reviewed is part of Cambodia's criminal justice system. However poor case management, a lack of accountability and limited governance processes see case files and people in detention go missing. This is despite a case database management system designed to overcome these issues. On 9 occasions in this project documents could not be found. A missing file causes an alarm in relation to an unknown release date. Moreover, IBJ's lawyer cannot process an appeal if the cases are old - files, including evidence, are lost.

In one instance, IBJ's lawyer was investigating a juvenile priority case with a life sentence as recorded in the case database (contrary to the law). It took IBJ staff 6 months to locate the file to discover a clerical error had mistakenly assigned a life sentence to the child. This case was a good outcome. But clerical errors and poor governance processes see people lost in the system and human rights violations perpetuate.

Poor governance processes are exacerbated by long delays in obtaining judicial outcomes. This impacts a person's ability to have a resolution within a reasonable timeframe in accordance with international norms and impacts their ability to successfully appeal. According to the United States' 2020 Human Rights Report on Cambodia, there were a recorded 40,000 cases pending trial. While there are reports that 90% of this backlog was cleared within the year, the project did not see a significant drop in the number of people on appeal in detention.



F. WOMEN & THE LAW

Funding for women in incarceration is often overlooked as a priority, yet the rate of women in detention is increasing at a faster rate than men. Women make up around 5% of Cambodia's prison population with 78% being held for minor drug related charges.

Moreover, women are simply not treated in accordance with international standards when in conflict with the law in Cambodia. Food and other basic needs in prison are often inadequate, and the women live in horrendous conditions.

There are also over 100 children living with their mothers in Cambodia's prison system. These children do not have access to educational resources and their ability to develop and thrive is thwarted.

In 2019, a woman who was 8 months pregnant was sentenced to pretrial detention for possessing a small quantity of drugs. Five months later her baby died in prison. In 2021, IBJ's appeals court team successfully advocated for a seven-year sentence reduction on a woman who was also 8 months pregnant when she was arrested and detained. At her trial, the judge

relied on the prosecutor's arguments. However, on appeal our lawyer was able to successfully highlight the inconsistencies between the actual evidence and the prosecutor's charges. Her baby is currently living with her in prison. The significant reduction in her ten-year sentence will see her reunite with her 2 older kids next year and the baby experience life outside of prison for the first time.

The project also notices a bias in sentencing practices in relation to women accused of minor drug related crimes. Women are routinely given harsh and maximum sentences, despite very little evidence against them. In Cambodia, women with children are seldom considered for alternative or diversionary programs.

Greater participation of women in the judiciary and female defenders may work to reverse this trend. Moreover, a better understanding of bias may result in fairer treatment of women in conflict with the law, particularly women with young children. This would not only decrease the number of babies living with their mothers in prison but may lead to a better understanding of alternative sentencing programs.

"Our protection for women and girls cannot stop at the prison gates: at this threshold, they may be rendered invisible, voiceless, & vulnerable to harassment & abuse. Ensuring the representation of a competent lawyer - at all stages of legal proceedings - is a non-negotiable for accused women and girls."

- Karen Tse, CEO and Founder IBJ



IBJ's lawyer advocacy skills training



**"If I remain silent the police beat me. What is my option?
To take the beating?"**

- Question from an awareness training with youth in Siem Reap, Cambodia

G. YOUNG PEOPLE AND THE LAW

Around 40% of all Cambodians are under the age of 18 years. 13% of the children between 5 and 17 are working, predominantly in unpaid agricultural work and are vulnerable to substance abuse, domestic violence, homelessness and in turn, incarceration.

In accordance with international legal norms, detention should be a last resort for children. There is little access to educational or vocational training opportunities inside prison and the spiral of disadvantage perpetuates.

A lack of resources and infrastructure means that many juveniles are required to share overcrowded cells with adults, leaving them vulnerable to exploitation and abuse. If they are sent to a juvenile facility, they are transferred away from vital family support (including supplementary food and health care). A limited understanding around the new

Juvenile Justice law (2016) means that young people are treated the same as adults when in conflict with the law. Despite efforts, the number of children (under 18) in prison has risen from 336 in 2014, to over 1,500. While numbers are difficult, it is estimated represent about 5% of the prison population.

In the current project, IBJ represented 3 juveniles. One was mistakenly recorded as having a life sentence and two were sentenced as adults. A further 40% of people were between the age of 18 and 25 at the time of arrest. Too old for access to free legal aid but young enough to still be in school. Most of these young people were arrested for non-violent, drug related felonies or theft and sentenced to at least four years in prison.

It is noted that the Courts of Appeal are working to reduce the number of juveniles in detention.

CASE STUDY: JUVENILE JUSTICE IN CAMBODIA

OVER 40% OF PEOPLE IN THE CURRENT PROJECT WERE UNDER THE AGE OF 25 WHEN THEY WERE ARRESTED FOR POVERTY RELATED CRIMES

Kosal and Dara were 16 and 17 when they were arrested by the police. They were frightened and confused when they were arrested. They immediately confessed to stealing a motorbike.

As juveniles, Kosal and Dara should have qualified for state-sponsored legal aid. However, because they were unaware, their families struggled to pay for a private lawyer. This financial burden placed the family further into poverty.

Despite paying for a private lawyer, Kosal and Dara's case was not processed in accordance with the rights afforded to juveniles. Cambodian law requires juveniles to be tried within 3 months. However, for Kosal and Dara, a trial was held one year later. At their trial they were sentenced to four years in prison, a year and a half more than prescribed under the sentencing guidelines for juveniles.

They appealed their sentenced and spent the next 2 years waiting for their appeal case to be heard.

Kosal and Dara had a difficult time in prison. They had little access to educational resources and lived in overcrowded quarters.

Two years later, the young boys' case was identified as a priority for the Appeals Court program. It is impossible to know how long the process would have taken without the support of the OHCHR-Cambodia program. The funding allowed IBJ's Courts of Appeal lawyers to intervene and process the long-pending appeals case.

During the appeal, IBJ's lawyer explained to the court that they were juveniles at the time of the offence and that the sentence of four years was more than the law allowed. Because the young men had served 3 years in detention, on appeal the judge reduced the sentence to 3 years. This is justice in Cambodia.

Detention should be a last resort for young people.



Prey Veng Courthouse
Illustration by Elizabeth Visser, IBJ Intern

"A confession is enough for a conviction. Yet most of my clients are afraid of the police. They just say anything. They agree with the police even if it is not true. This becomes very difficult when trying to prepare for a defense or prove that they were actually innocent."

- Cambodian lawyer

RECOMMENDATIONS

IBJ HAS OVER TWO DECADES OF EXPERIENCE IN LAW AND JUSTICE REFORM. ALL OUR EVIDENCE SHOWS THAT SYSTEMATIC, EARLY ACCESS TO A LAWYER PROTECTS AGAINST TORTURE & MOVES TOWARDS MORE FAIR TRIAL RIGHTS.

A. CLOSE THE LEGAL LOOPHOLES THAT ARE AFFECTING FAIR TRIAL RIGHTS

Repeal Article 398 of the CCPC:

IBJ is pleased to see a sharp decline in the practice that keeps innocent people in detention. However, over the course of a decade, IBJ lawyers have intervened in 64 cases (11%) where people have remained behind bars after the prosecution appealed an innocent verdict. The longest case involved a 23-year-old boy who spent 12 years waiting for his appeal to be heard. On appeal, his innocent verdict was upheld. Because the system is broken, an innocent verdict is not usual practice. It follows that a person who is found innocent at trial, should be immediately released from detention to wait for their appeal or have their appeal processed within 14 days. This fundamental principle should be codified into the law to protect human rights violations and innocent people languishing indefinitely in detention.

Amend Article 387 of the CCPC:

People should have the opportunity to appeal and to defend themselves against a criminal matter in a timely matter limited by law. However, under the current law there is no assurance or limitation that an appeal will be heard within a timely manner. Current law states that an appeal case should be processed within a "reasonable time". With the overburden and under resourced court system, cases fall through the cracks. The law should be changed to limit this time for appeal to no more than 3 months. With the average sentence in the priority cases being 4.8 years, there is little role for an appeals court system that fails to hear a case before the expiration of an initial sentence.

Amend Article 98 of the CCPC:

Any delay in access to legal aid is likely to increase the vulnerability of the person in detention and increase the risk of torture. People should be able to meet with a lawyer at the point of arrest. By closing the time (currently 24 hours), the law closes the opportunity for torture to occur.

Bopha was fifteen years old when he was taken off the streets by the police. He was terrified.

At the police station the police began to interrogate him. There was no lawyer or guardian present. They beat him until he admitted to stealing a \$10 motorbike part.

A day later his parents were informed where he was and they called IBJ's lawyer. Four months later Bopha's case was dismissed due to a lack of evidence.

Bopha's story may have been different if he was afforded the rights protected to him under the law.



EXTRACT: CODE OF CRIMINAL PROCEDURE OF THE KINGDOM OF CAMBODIA

Article 98:

After a period of twenty four hours from the beginning of the police custody has expired, the detainee may request to speak with a lawyer or any other person who is selected by the detainee, provided that the selected person is not involved in the same offense. The selected person shall be informed of the request immediately and by all means available. The selected person may enter into the custodial site and talk with the detained person for 30 minutes under conditions guaranteeing the confidentiality of the discussion. Following the discussion, the selected person may make a written note to be placed on the case file.

Article 387:

When the case is received by the Court of Appeal, the President of the Criminal Chamber shall examine whether the case file is up to date and, if so, determine a date for the hearing.

The Court of Appeal shall decide within a reasonable period of time. If an appeal is made against a detention-related decision of the Court of First Instance against the accused, the Court of Appeal shall decide witho

Article 398:

The execution of the judgment shall be suspended until the time limit for appeal has expired.

However, an accused in detention who appeared before the Court of First Instance shall remain in prison during the period in which the Prosecutor can appeal. In case the Royal Prosecutor has appealed against the criminal part of the judgment, the accused shall remain in prison until the Court of Appeal makes its decision.

Where the Court of First Instance had decided to acquit the accused or to sentence the accused to imprisonment equal to or less than the time spent in provisional detention, the Royal Prosecutor may agree to release the accused before the expiration of the time limit for appeal.

The time limit for appeal by the General Prosecutor is not an obstacle to the execution of the judgment during that time period

B. SUPPORT LEGAL AID LAWYERS TO PROMOTE SYSTEMATIC EARLY ACCESS TO A SKILLED LAWYER

The criminal justice system in Cambodia is still relatively new. This means there is a need to support all legal aid lawyers and the Bar Association to deliver legal aid in line with the United Nations Principles and Guidelines on Access to Legal Aid in the Criminal Justice System.

Systematic access to a lawyer at the point of arrest will place positive pressure on the police and judiciary to properly investigate a crime and move away from the heavy reliance on forced confessions. A move towards fair trial rights will also ease the burden on the Courts of Appeal as they struggle to process cases that have miscarriages of justice in the first instance.

It is recommended that the government increase incentives for providing systematic early access to a lawyer. The project understands that there are often delays in paying legal aid lawyers the \$100 stipend of up to 6 months following the completion of a case. This means that lawyers are paying out of pocket for the provision of legal aid and there is little incentive or financial support to properly gather evidence. Staggered payments may address this challenge. IBJ notes that it currently estimates costs for investigation at around \$250-400 per case depending on the evidence required to prepare a proper defense.



Community rights awareness, Takeo province

C. STRENGTHEN THE ROLE OF CIVIL SOCIETY TO PROMOTE INTERNATIONAL BEST PRACTICE

Similarly, appropriate resources should be available to ensure that legal aid lawyers are up to date with the knowledge and skills needed to provide a good defense and uphold ethical standards. In addition to the current continuous legal education program, support should be given to the Bar Association to upskill its legal aid lawyers in accordance with international best practices. This includes knowledge sharing and cross-cultural exchange on trial advocacy skills with leading international criminal defense lawyers. Access to a skilled and competent legal aid lawyer will help build trust within the communities.

The development of training and materials or mentorship opportunities to support lawyers will positively impact accountability in the criminal justice system. It will also have positive socioeconomic effects as the burden on both the courts and the prison system are eased, as well as increase the health of the community.

Further, the establishment of a Legal Aid Partnership Forum would facilitate best practice and information sharing between civil society and the legal aid lawyers from the Bar Association. This Forum would bring together civil society and the Bar Association to build the skills of the new legal aid lawyers. It may also be responsible for the creation of a Professional Code of Conduct for Legal Aid Providers.

Many of the challenges that are evident in the Bar Association's delivery to legal aid (including the challenges with receiving cases late in the proceedings) have been addressed in previous IBJ programs. This Forum could facilitate collaboration and work towards building trust. It would create space for dialogue and policy change, and share learnings, legal strategies and best practices in the Courts of Appeal. Some NGOs and civil society organisations have been operating legal aid services for more than two decades and have valuable insight.

"Our lawyers prioritise systematic early access and that is the most effective way to eliminate torture from society."

- Karen Tse, CEO and Founder IBJ

D. USE INNOVATION TO COLLECT DATA & REDUCE THE BACKLOG OF CASES IN THE COURTS OF APPEAL

Jurisdictions around the world have developed novel and creative approaches to addressing severe case overload and the consequential prison overcrowding. It is recommended that the Ministry of Justice, the Bar Association, and the General Department of Prison establish an Appeals Court Steering Committee to address the 11,000 (30%) of people in detention currently waiting for an appeal (that we are aware of). This may be done in partnership with OHCHR-Cambodia and IBJ. The Steering Committee may review best practice and programs from around the world and tailor an approach appropriate to the Cambodian setting to clear the severe backlog.

It is also acknowledged that there are simply not enough lawyers to meet the high demand to provide early access throughout Cambodia in its current capacity. However, countries such as Malawi and South Africa have successfully used paralegals in police stations to address issues of shortages of lawyers. In New Zealand the Legal Services Agency operates a police detention legal assistance scheme that provides access to a lawyer on the telephone.

IBJ sees value in collecting data and harnessing technology to make the Courts of Appeal more efficient. Data will show where systems need support and identify problematic processes and bottlenecks. Mobile or in-prison special courts may be deployed to adjudicate appeals cases throughout the country (and if effective, pre-trial) and address these bottlenecks. Similar success in other countries such as Ghana has seen pre-trial detention rates drop from 33% to 12%. These novel approaches may work in conjunction with the Appeals Court Steering Committee.

Further examples for streaming processes in the Courts of Appeal include the referral to a legal aid lawyer as an automatic right at the point of the filing of appeal using the iConnectJustice app (or similar) or immediate review of all cases received where the defendant was not present at trial.

Data is key to driving policy change & improving programming. Project data tells us that when there is early systematic access to a lawyer, torture is eliminated from the criminal justice process & cases are processed in a reasonable time.

- Kate Flower, Senior Program Manager, IBJ



E. PROMOTE GOOD GOVERNANCE

Poor governance processes are the single most alarming cause of concern in the appeals court project leaving people in detention for years. It is recommended that proper remuneration for court staff, improvements to the case database including the retraining of staff responsible for the data entry, and better risk management systems for case information when judges, court staff and/or prisoners are transferred to a new post. Better organisation, improved efficiency and adherence to governance processes should reduce the onerous task of locating case files and prisoners and prevent miscarriages of justice in the Courts of Appeal.

A proven and effective way to promote accountability in Courts of Appeal is to place NGO legal aid lawyers in all four courts of appeal to demonstrate international best practice in providing an appeal.

Additionally, empowering people in conflict with the law through rights awareness trainings ensures you are targeting at-risk groups. By empowering them to understand and demand accountability they are able to protect themselves against miscarriages of justice.

Moreover, IBJ sees value in training people within detention facilities (guards and prisoners) in a train-the-train process to further disseminate knowledge. Knowledge around time periods for appeals, rights to a legal aid lawyer and other fair trial rights will promote transparency and accountability. If people know about their rights, they can enforce them. NGOs and civil society may play an important role in awareness raising.

F. INCREASE AWARENESS ABOUT THE PRESUMPTION OF INNOCENCE

Increasing awareness about the presumption of innocence is an important step in addressing the strain on the criminal justice system.

IBJ has been disseminating information about the presumption of innocence for nearly two decades. While it is acknowledged that there has been much change, the presumption of innocence has struggled to gain support within society. This translates into limited use of bail applications and a heavy reliance on pre-trial detention.

Judges report feeling pressured by the community to keep people in prison. Police feel pressured to close a case. This combination results in miscarriages of justice and people needlessly sitting in prison. People and communities suffer with this approach.

An indifference to the presumption of innocence impacts bias in sentencing and maximum sentences often handed down. 12% of IBJ's current cases had sentences of over 20 years for drug-related offences. It is recommended that all levels of society learn about the presumption of innocence, a right that underpins the criminal justice system.

The presumption of innocence should also extend to people who are found innocent at trial. We recommend that the law changes in relation to when a prosecution appeals an 'not guilty' verdict. Ten years ago, it was common for the prosecution to appeal an innocent verdict and for the accused to remain in prison pending the appeal. What followed, was a person who had been found innocent stayed in prison waiting for their appeal case. This was sometimes years or decades.

In the first project, there were 42 cases of acquittal where the prosecution appealed. Over one in four had that acquittal upheld on appeal. In the third project, 19 (100%) people had their innocent verdict upheld on appeal. IBJ has defended 31 people (5.5%) who went years in prison unnecessarily. We have observed a change in behaviour over the ten years. There are no similar cases in our current project. However, we recommend amending the Criminal Procedures Code to better protect against this practice. The onus should never be on the prosecutor to agree to release a person found innocent.



Community rights awareness trainings, Takeo province

F. INCREASE THE ROLE OF WOMEN IN THE LAW

Around 25% of lawyers practising in Cambodia are women. Promoting gender equality and an increase in diversity will enhance the culture of the judicial system. Studies have shown that women are less likely to use excessive force and are less likely to engage in corruption. We recommend creating a support network for women in the law.

IBJ have a successful access to justice project for Women defenders in Africa and Indonesia. These programs report forging stronger partnerships and better collaboration with other networks of defenders which positively impacted their success as lawyers. They also note the positive change as people become more accustomed to seeing women in the courtroom. Women's legal networks are common all around the work including Australia, the United Kingdom and elsewhere. Networking, mentorship and comradery all work to ensure that women feel supported and continue with their legal practice.

Moreover, women in conflict with the law, face discrimination in accessing the required legal aid support and severe challenges reintegrating into society after time spent in prison. They are particularly vulnerable to abuses such as rape and sexual assault while in detention. A lack of support sees the cycle of poverty and crime perpetuated.

While it is beyond the scope of this project, it is recommended that the law change to better address discrimination and outline sentencing policies to take into consideration the needs of pregnant women or women as primary childcare providers.

More women in legal practice and gender sensitivity on international best practice on the treatment of women in accordance with the Bangkok Rules may address the specialized justice needs of women in conflict with the law.



IBJ's lawyer and program coordinator visit a client in prison

CASE STUDY: TEN YEARS WAITING FOR JUSTICE

PRESSURE ON POLICE TO SOLVE MATTERS QUICKLY RESULTS IN WRONGFUL CONVICTIONS. THIS PRESSURE IS BOTH INTERNAL & FROM THE COMMUNITY. WRONGFUL CONVICTIONS HAVE SOCIAL & ECONOMIC COSTS ON COMMUNITIES.

In a small commune situated in Kampong Thom, an elderly man, Veng, and his family were at home, gathered around the television. Three men stormed in and shot the elderly man and assaulted his wife. The elderly man tragically died.

In the next village a young man, Sokem, was arrested by the police for the offence. Sokem did not understand what was happening. He was sent straight to prison. No one informed him of his rights or informed him that he could speak to a lawyer. He had no idea at the time what a lawyer was or how they could help.

Eighteen months later his case came to trial. A lawyer turned up to the trial who had been assigned to his case. Sokem had never met the lawyer and did not understand what he was doing. Bewildered the process went on. Prosecutors presented evidence that was conflicting, witnesses gave confused accounts of the facts, and Sokem was found guilty and sentenced to 15 years in prison.

Having spoken to some prisoners, Sokem filed an appeal. Six years after his sentence, he appeals case was heard. Sokem was not informed of his appeal date and was not transferred to the court for the day of the hearing. The Court of Appeal issued a default judgment in his absence.

In 2014, ten years after his arrest, IBJ received the case as part of the OHCHR-Cambodia funded project. The IBJ lawyer submitted the motion to the Court of Appeal to re-open the case.

In preparation for the new hearing, the IBJ lawyer met with Sokem's family and friends and found out that he had an alibi against the accusation which had already cost him heavily. His friends could testify that at the time of the incident, Sokem was fishing with them in another place, far from the crime scene.

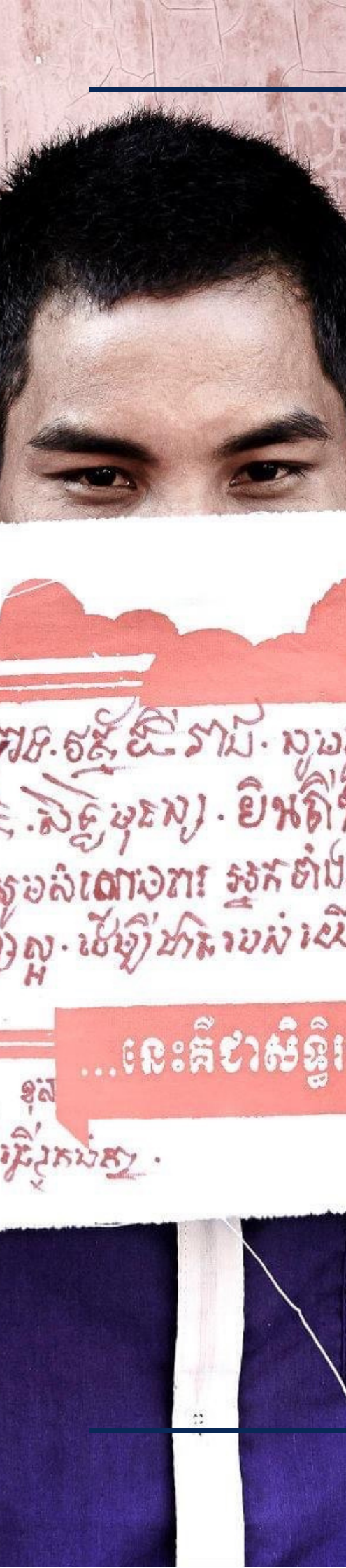
IBJ paid for his transfer to that he could attend the new trial where he was acquitted of all charges.

Sokem went through a very difficult time in prison. His wife and four children could not afford frequent travels to the prison. He is still recovering from this painful experience.



"Our work in the appeals court is so important. It is hard to see people with no hope. We are the only ones helping people find justice."

- CBJ appeals court lawyer



ROADMAP FOR STRENGTHENING ACCESS TO JUSTICE

SHORT TERM

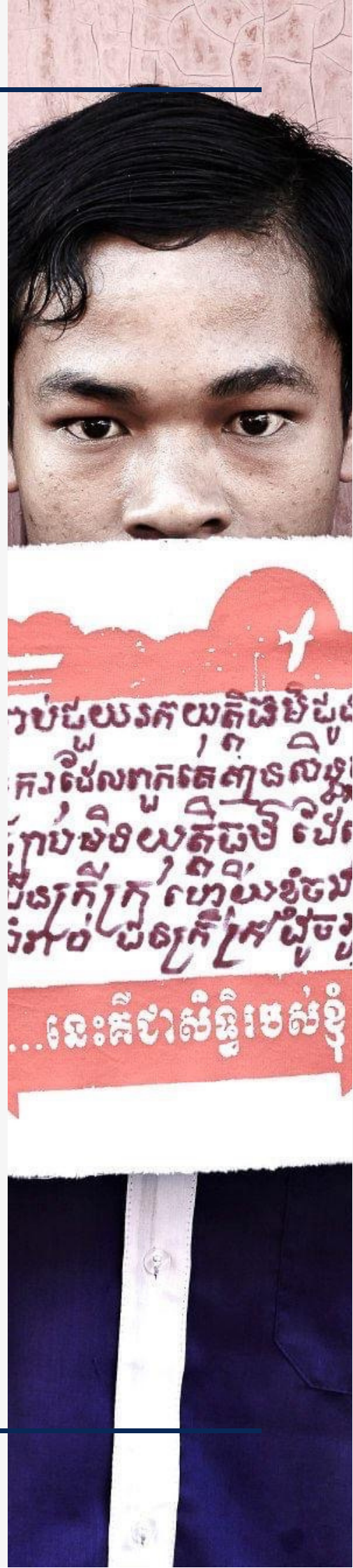
- Process the appeal and release of any person currently in prison that were found innocent at the trial of first instance
- Start the process to repeal current Article 398 and codify laws that better protect people who are found innocent at trial. This includes the rapid processing of any appeal so that they are not unnecessarily detained for years.
- Conduct baseline studies to gather data and measure the economic and social impact in a pilot project of a duty lawyer program in police stations. This would provide valuable insight into the cost-effectiveness of early access while concurrently closing the gap that provides space for torture.
- Monitor cases (both first instance and appeal) where the defendant is not present at trial and default judgments are issued.
- Support NGO legal aid lawyers in all four Courts of Appeal to demonstrate international best practice.
- Address the unmet legal needs of people who have been on appeal for over one years for felony cases or six months for misdemeanour cases.
- Provide training to court staff on governance and accountability processes in the Courts of Appeal and set up a system for simplified file management.
- Set up an Appeals Court Steering Committee to assess cases appropriate for release based on an agreed set of criteria to reduce the severe backlog of cases in appeal.
- Disseminate rights awareness on the appeals court process where it is needed most, in Cambodia's prisons.
- Train all legal aid lawyers on best practices in the appeal court process and distribute materials to help new lawyers navigate the practicalities of the complex appeals court system.
- Create space for judges and communities to come together to unblock the pressures that are causing the prison population to reach unsustainable levels.

MEDIUM TERM

- Increase the stipend provided to lawyers for legal aid and introduce a staggered payment system that supports early access to a lawyer.
- Increase mentorship opportunities for the participation of women in the law (including in the police force).
- Consider diversionary programs for youths (18-25) in detention for minor non-violent drug-related crimes currently on appeal.
- Train prisoners to act as paralegal and disseminate information of fair trial rights and the right to an appeal and the right to a lawyer.
- Utilise IBJ's iConnectJustice app to allow Cambodians to submit their legal issues via a phone and connect directly with a lawyer. IBJ has a current MOU with the Ministry of Justice however this app is underutilised and not linked to the Bar Association legal aid program.
- Create a Legal Aid Partnership Forum to facilitate best practice and information sharing between civil society and the Bar Association.

LONG TERM

- Study the social and economic benefits of systematic early access to a lawyer.
- Create an independent body to monitor and regulate the criminal liability of command responsibility for the use of torture and excessive force.
- Shift the culture that permeates the presumption of guilt and the community pressure on judge to enforce arbitrary pre-trial detention.
- Train justice stakeholders on sentencing bias to support good decision-making processes.
- Provide training to the police on evidence gathering and interview techniques in line with Principles on Effective Interviewing for Investigations and Information Gathering (Méndez Principles).
- Harness technology to make the Courts of Appeal more efficient.
- Make legal aid available to everyone at the point of arrest. Systematic early access to justice will reduce the burden on the prison system and in the Courts of Appeal.



WINNER

**Cambodia
Bridges to
Justice**
Cambodia



World Justice
Project

CAMBODIA BRIDGES TO JUSTICE: ACCESS TO JUSTICE WINNER OF THE 2022 WORLD JUSTICE CHALLENGE

On 2 June 2022, Cambodia Bridges to Justice (CBJ) was awarded the Access to Justice Prize for its important work in Cambodia's Courts of Appeal at the World Justice Forum.

The World Justice Forum is the premier international event for the rule of law. As part of the Forum, the World Justice Challenge is a global competition to identify, recognise and promote good practice and high-impact projects that protect and advance the rule of law. Selected from a pool of 305 applicants from 118 countries, CBJ was invited to showcase its project, Championing Access to Justice: Improving Cambodia's Courts of Appeal system at the Forum. At the Closing Plenary of the World Justice Forum, the winners of the Challenge were announced and CBJ was awarded the prize for Access to Justice.

As the best-in-class initiative for Access to Justice, the award is a powerful recognition of the importance of defending people in the most vulnerable places.

"We work to build trust and strong partnerships with people, the community and justice stakeholders to ensure sustainability and allow the rule of law to really be woven into the fabric of society."

- Kate Flower, Senior Program
Manager, IBJ



DATA: TABLE OF PROJECTS

| Legal aid at the Court of Appeal in Cambodia | | | | | | | | | |
|--|-------------------------------|-------------|---------------|--------------|---|----------------------|-------------------------|-------------------|--------------|
| No. | Project period | Cost | OHCHR Support | No. of cases | Geographic Reach | Excessively detained | Innocent verdict upheld | Default judgement | No case file |
| 1 | October 2012 – September 2013 | US\$43,911 | \$10,000 | 81 | Kampong Chhnang, Kampong Speu, Kampong Thom, Kampot, Prey Veng, Pursat, Stung Treng, Svay Reign, Takeo | 32 | 10 | - | - |
| 2 | 1 June 2014 – 31 May 2015 | US\$120,348 | \$30,000 | 222 | Banteay Meanchey, Battambang, CC3, Kampong Cham, Siem Reap | 11 | 2 | 72 | 27 |
| 3 | 1 June 2016 – 31 May 2017 | US\$97,580 | \$30,000 | 180 | CC1, Banteay Meanchey, Battambang, Kampong Cham, Kampong Chhnang, Kampong Speu, Kampong Thom, Kampot, Kratie, Odor Meanchey, Siem Reap, Takeo | - | 19 | 8 | - |
| 4 | 1 June 2021 – September 2022 | US\$32,526 | \$15,000 | 60 | Battambang, CC1, CC2, Kandal, Phnom Penh, Siem Reap | 0 | 0 | - | 9 |

Target Group for Projects 1, 2 and 3:

- Elderly prisoners.
- Prisoners who have had their appeal pending in excess of 10 years.
- Prisoners who have had their appeal pending in between 7 and 10 years.
- Prisoners who have had their appeal pending in between 5 and 7 years.
- Prisoners whose trial at first instance was heard in absentia.
- Prisoners who were acquitted at first instance but remanded in custody pending an appeal by the prosecutor.
- Prisoners sentenced to prison terms of up to two years and are at risk of overstaying (their sentence might end before their appeal is heard).

Target Group for Project 4

- Prisoners who have had their appeal pending in excess of 2 years.

Thank you to the Cambodia Bridges to Justice team for their fearless efforts. They are leading examples of global justice warriors, many of whom have spent decades changing the landscape of Cambodia's criminal justice system. Particular thanks go to Mr Ouk Vandeth. Vandeth is the Country's leading criminal defense lawyer. He has spent the past three decades working to improve access to justice for the poor. Through his leadership, Cambodia now has a criminal justice system that recognizes the role of a defender in the criminal process.

Produced by: Kate Flower & Laura Du Champ
for International Bridges to Justice

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