



IN ABSENTIA: THE RIGHT OF APPEAL & CAMBODIA'S INMATE TRANSPORTATION **CRISIS**

A LICADHO BRIEFING PAPER
February 2010



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CAMBODIAN LEAGUE FOR THE
PROMOTION AND DEFENSE OF HUMAN RIGHTS

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CAMBODIAN LEAGUE FOR THE PROMOTION
AND DEFENCE OF HUMAN RIGHTS

Cambodian League for the Promotion and Defense of Human Rights (LICADHO)

LICADHO is a national Cambodian human rights organization. Since its establishment in 1992, LICADHO has been at the forefront of efforts to protect civil, political, economic and social rights in Cambodia and to promote respect for them by the Cambodian government and institutions. Building on its past achievements, LICADHO continues to be an advocate for the Cambodian people and a monitor of the government through wide ranging human rights programs from its main office in Phnom Penh and 12 provincial offices.

LICADHO pursues its activities through two programs:

Monitoring and Protection Program:

- **Monitoring of State Violations and Women's and Children's Rights:** monitors collect and investigate human rights violations perpetrated by the State and violations made against women and children. Victims are provided assistance through interventions with local authorities and court officials.
- **Paralegal and Legal Representation:** victims are provided legal advice by a paralegal team and, in key cases, legal representation by human rights lawyers.
- **Prison Monitoring:** researchers monitor 18 prisons to assess prison conditions and ensure that pre-trial detainees have access to legal representation.
- **Medical Assistance:** a medical team provides assistance to prisoners and prison officials in 12 prisons, victims of human rights violations and families in resettlement sites.
- **Social Work:** staff conduct needs assessments of victims and their families and provide short-term material and food.

Promotion and Advocacy Program:

- **Training and Information:** advocates raise awareness to specific target groups, support protection networks at the grassroots level and advocate for social and legal changes with women, youths and children.
- **Public Advocacy and Outreach:** human rights cases are compiled into a central electronic database, so that accurate information can be easily accessed and analyzed, and produced into periodic public reports (written, audio and visual).

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Introduction

Over 500 inmates with pending appeals are detained in Cambodia's provinces, some of them hundreds of kilometers away from the nation's only appeals court in Phnom Penh. Due to Cambodia's near total lack of a long-distance inmate transportation network, these inmates are at grave risk of being denied one of the most basic elements of a fair trial: The right to have a conviction and sentence properly reviewed by a higher tribunal¹.

I. Inmates at Risk

As of January 2010, the General Department of Prisons ("GDP") housed a total of 8,235 convicted inmates in the 18 prisons LICADHO monitors. Of these, 5,253 were housed in provincial prisons² and 2,982 in the Phnom Penh area.

LICADHO was able to gather current appeals data from seven prisons outside of Phnom Penh, including CC3. This data sample represents roughly 58 percent of the 5,253 convicted inmates detained in prisons located beyond the Phnom Penh area. All data was reported by prison directors. This data breaks down as follows³:

PRISON	INMATES WITH APPEALS PENDING	TOTAL NO. OF CONVICTED INMATES	APPEALS INMATES AS PERCENTAGE
CC3 (Kg. Cham)	355	1,400	25.4%
Siem Reap	110	1,031	10.7%
Kg. Thom	5	121	4.1%
Sihanoukville	23	114	20.2%
Koh Kong	11	113	9.7%
Kg. Chhnang	21	163	12.9%
Pursat	15	109	13.8%
TOTAL	540	3,051	17.7%

¹ Art. 14(5), International Covenant on Civil and Political Rights ["ICCPR"]; Art. 375, Cambodian Code of Criminal Procedure.

² For purposes of this report, the term "provincial prisons" refers to all prisons outside the Phnom Penh area, including CC3, a national correctional center. The phrase does not include Kandal/Takhmao prison, due to its proximity to Phnom Penh.

³ All data as of Jan. 18-22, except CC3 (October 2009) and Pursat (February 2009).

A sizeable 17.7 percent of inmates from this data sample currently have appeals pending in Phnom Penh. By comparison, Takhmao Prison, on the outskirts of Phnom Penh, reported housing only 9 inmates with pending appeals. This represents only 1.6% of the population of 547 convicted inmates. Both CC2 and PJ reported that they currently house no inmates with appeals pending. CC1, the largest of the Phnom Penh-area prisons, claimed they did not have data available. However, LICADHO prison researchers report that CC1 and PJ do, in fact, house a significant number of inmates with pending appeals⁴.

Thus, of the 1,259 convicted inmates at CC2, PJ, and Takhmao, less than 1 percent have appeals pending. It appears that cell space in the some Phnom Penh area prisons may be allocated based on factors which do not include the inmate's appeal status.

II. Legal Background

Cambodian law states that a detainee pending appeal "shall be transferred without delay by the order of the Prosecutor to the nearest prison or detention center to the seat of the Court of Appeal."⁵ In theory, this transfer should take place after the court notifies the General Prosecutor of the appeal hearing date⁶. In reality, this rarely happens.

The presence of the accused is essential to securing a fair appeal in Cambodia. The Code of Criminal Procedure permits wide-ranging interrogation of the defendant, a reexamination of facts, and – if the court finds the original judgment invalid – a full retrial on the merits⁷.

International law is less specific, but no less stringent regarding the fundamental right of appeal. The International Covenant on Civil and Political Rights ("ICCPR"), which Cambodia ratified in 1992, states that "everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." It also requires the presence of the accused "in the determination of any criminal charge."⁸ Given that a criminal appeal in Cambodia may encompass a full retrial, the ICCPR provision certainly requires that the accused be present.

⁴ CC1's failure to report a specific number highlights yet another problem facing inmates who wish to attend their appeals: Prison officials often do not have accurate information about the status of inmate appeals. They may, for example, only know of appeals that the inmate filed through the prison – and not appeals filed by inmate lawyers or public prosecutors. Thus, the number of appeals is likely underreported.

⁵ Art. 389, Cambodian Code of Criminal Procedure.

⁶ Art. 388, *ibid.*

⁷ Art. 393, 406, *ibid.*

⁸ Art. 14(3)(d), ICCPR.

III. Inmate Transport in Cambodia

Cambodian law requires the transfer of detainees pending appeal “without delay ... to the nearest prison or detention center to the seat of the Court of Appeal.” In reality, this rarely happens for inmates incarcerated in the provinces.

The reason is simple: GDP's long-distance⁹ inmate transport network is nearly nonexistent. Although GDP coordinates occasional mass-movements to ease overcrowding, the responsibility for transferring inmates for appeals falls squarely on individual prisons. Their ability to move inmates – for any reason – is limited. In fact, prison directors interviewed by LICADHO have almost unanimously stated that they have “no means” to transport inmates to their appeals. The lone exception was Pursat provincial prison, which claims to have done “about three” such transfers since 2006. GDP itself issued a statement in September admitting that “there is only one appeal court in Phnom Penh and transport of prisoners ... has been difficult due to lack of resources and lack of transport. General Department of Prison is working with courts to discuss the issues.”¹⁰

In most cases, lack of equipment is not the problem. Many prisons have vehicles suitable for inmate transport, often donated by NGOs and foreign governments. The bigger issue is lack of petrol. One director told LICADHO that the government provides him only 800 liters of petrol per month, which is barely enough to run electricity generators for three hours per day¹¹. This appears to be a common problem in Cambodia's prisons, as many lack connections to the electricity grid, particularly newer institutions in rural areas. Thus, petrol allowances are used exclusively to run generators. In the case of Pursat, the director claimed that petrol for the trip to Phnom Penh was purchased by the Pursat provincial government¹².

Lack of staff is also an issue. A trip to Phnom Penh from a distant province could consume several staff members for two days or more. Most prison directors claim they do not have the surplus of personnel to handle this. And even if staff were available, money is not: There is no budget to pay overtime and expenses, particularly considering that trips to the appeals court, at least in theory, should be regular and frequent.

⁹ Local transport appears to be slightly less problematic. For example, GDP reported in September 2009 that 1,316 inmates had been transported to and from local municipal court trials during the first eight months of 2009. This was out of a pretrial population of roughly 3,800 as of September. See, “Progress Report of General Department of Prisons and Challenges in Prison Management in the First Six Months 2009,” p. 6 (Sept. 2009).

¹⁰ Ibid.

¹¹ The ration must also be used for other forms of inmate transport, such as trips to hospitals and local trial courts. Most prisoners interviewed by LICADHO have reported that they must pay out-of-pocket for these visits as well.

¹² The prison uses its own vehicle to transport inmates to Takhmao, while Takhmao handles transport – including petrol costs – to and from the appeals court.

Finally, even if quick trips to Phnom Penh were feasible, it is not desirable to house inmates with appeals in the provinces. Aside from the obvious cost inefficiencies, the practice of housing these inmates in the provinces puts them at a legal disadvantage for their appeals. Most criminal appeals lawyers are based in Phnom Penh, and given their caseloads and the travel distances involved, it is nearly impossible for them to inmates in the provinces.

Indeed, even though Pursat's efforts to transport inmates to their appeals are commendable, the logistics are not ideal. The director told us that in the past, inmates have been typically brought to Phnom Penh on the day of the appeal hearing, or the day before, and housed at Takhmao prison when necessary. Thus, the inmates were not provided enough time to meet with their lawyers.

IV. The Reality: Appeals in *Absentia*

What effect does GDP's limited inmate transportation system have on the appeals process? As one director told us bluntly, inmates can attend their hearings only "if they pay their own way."

The opportunism by underpaid prison staff is not surprising. The current state of inmate transportation provides fertile ground for corruption, and previous LICADHO research has revealed a widespread practice of demanding bribes for transport to court – even for pre-trial inmates housed in the Phnom Penh area¹³. Securing transportation to an appeal is surely far more expensive, given the distance and logistics involved.

Ultimately, it is doubtful that most provincial inmates can afford to pay the cost of transportation to Phnom Penh. Thus, their hearings go forward *in absentia* and their chance at a fair appeal is lost. While the failure to appear may not ordinarily invalidate an appeal *per se*, the circumstances surrounding these inmates are different. They have no choice in the matter: They are being prevented from appearing.

The GDP's failure to establish a system to ensure inmate attendance at appeals eviscerates the fair trial process. LICADHO believes that immediate action is necessary on several fronts.

¹³ See, e.g., *A LICADHO Report: Prison Conditions in Cambodia, 2002 & 2003*, p. 20. At the time of the report, transport fees to Municipal Court from CC1, CC2, and Bantey Meanchey ranged from \$5 to \$20 USD. Prisoners and family members also reported being asked for money in exchange for influencing court proceedings, securing a trial date and guaranteeing procurement of legal documents, among other things.

V. Recommendations

1. *Short-term: The GDP should not transfer Phnom Penh inmates to the provinces until their appeals are complete*

The first and most obvious step is for GDP to more closely examine inmates' legal status before transferring them to a prison outside the Phnom Penh area. Inmates housed in the Phnom Penh area should not be transferred to the provinces until their appeals are complete. This means initially waiting for the appeals time period to expire, and – in the case of inmates who are actually litigating appeals – waiting for a judgment from the appeals court.

This approach would not entirely solve the problem, as not all inmates are convicted in Phnom Penh. But it is potentially a quick fix to the easier aspect of the issue. If an inmate with a pending appeal is housed at CC1, it makes sense for him to stay there until his appeal is complete.

This approach sounds obvious, but a September 2009 transfer of 100 inmates from CC1 to CC3 included at least three inmates in the midst of the appeals process. LICADHO was involved in each of their cases, and after three months of negotiations finally secured their transfer back to CC1¹⁴.

One potential obstacle to this solution is ensuring regular communication between the Ministries of Interior (“MoI”) and Justice (“MoJ”), specifically the prosecutor’s office. In our interviews, some prison officials suggested that inmates are occasionally transferred because MoJ does not promptly inform MoI of pending appeals.

A second obstacle is, of course, the persistent overcrowding at Phnom Penh area prisons. PJ is at 84 percent of capacity, CC1 is at 173 percent, CC2 is at 251 percent and Takhmao is at 309 percent. While the overcrowding problem is complex and attributable to multiple factors, it is alarming that less than 1 percent of the convicts at three of these prisons have appeals pending. This demonstrates a clear failure to properly prioritize cell space. LICADHO recommends that these prisons immediately begin giving priority space to inmates with appeals pending.

A more long-term approach to reallocation of bed space would require a serious examination of the overcrowding issue and the factors driving it. That subject is beyond the scope of this report, but it bears noting that as of December 2009 33.2 percent of Cambodian inmates are in pretrial status. This includes up to 500 inmates who have

¹⁴ As part of the transfer of the three inmates, CC1 sent 50 inmates to CC3 to “ease overcrowding.” LICADHO has not yet determined how many of the 50 have appeals pending.

been held past the maximum pretrial period prescribed by law. In January 2008, the pretrial population represented only 26.4 percent of all inmates¹⁵. Alternatives to pretrial detention are clearly underutilized.

Further, the overall population in prisons monitored by LICADHO has more than doubled in the last five years, from 5,968 in Dec. 2004 to 12,231 in Dec. 2009. Going back 10 years (pop. 3,501), the population has nearly quadrupled. The growth rate last year was over 15 percent. The courts' failure to utilize prison alternatives such as probation, suspended sentences and parole is clearly straining an already thin budget at GDP.

2. *Long-term: Expand the GDP's inmate transportation network and centralize responsibility for appeals transfers*

The most appropriate solution to the problem is for GDP to expand, staff, and fund its prison transport program to the extent it can handle regular transfer of provincial inmates to their appeals in Phnom Penh¹⁶. Centralizing the system is logical considering Phnom Penh is the sole destination for inmates with appeals. It is also preferable from a financial-planning standpoint, because the number of inmate arrivals in Phnom Penh should remain steady, while transfers from each provincial prison would vary, wreaking havoc on their budgets.

The expansion must address logistical concerns: Bed space for provincial inmates held in Phnom Penh during their appeals; communication between directors regarding inmate classification status and special needs; an effective communication network between Phnom Penh area prisons and the appeals court; and transport to and from court once inmates arrive in Phnom Penh¹⁷.

The system should also be designed to keep inmates in Phnom Penh for a sufficient time period. Inmates will need to meet their lawyers prior in order to properly prepare their cases, as few lawyers in the capital have time to travel to the provinces to meet clients. In some instances, several weeks may be required.

¹⁵ All data drawn limited to the 18 prisons LICADHO monitors.

¹⁶ Of course, yet another option is for the government to construct an appeal court in each province, thus greatly reducing the need for long-distance inmate transportation. Such a project falls under the responsibility of the Ministry of Justice, however, not the General Department of Prisons. Moreover, this would take years, if not a decades, to implement. In the interim, a reliable system of long-distance inmate transportation is still urgently required.

¹⁷ Transport costs could theoretically be minimized if the appeals court were able to reshuffle its docket and focus on appeals concerning inmates at a particular prison each month or each quarter. This may not be feasible, however, due to the court's already sizeable backlog.

This solution faces serious obstacles, namely budget, training, and the delay in developing infrastructure. As such, it should be viewed as a long-term goal.

A final recommendation is that MoI and MoJ improve communication between the prisons and courts. Currently, the true number of inmates with pending appeals is unknown. The prisons should keep detailed records of each inmate's legal status, including pending appeals. Determining case status, for example, should be part of the prisons' regular intake procedures for inmates. The courts, meanwhile, should take greater care in ensuring judgments, summons, and other documents actually reach the prison where the defendant is incarcerated. More accurate information regarding court cases will ensure that an inmate transportation system is used in the most efficient way.

