

## **Role of the Lawyer**



### **A) Introduction:**

For decades Cambodia has been lacking independent, well-trained and self-confident lawyers.

After the end of the Pol Pot regime in 1979 only a few legally trained people survived but almost all of them fled the country to make their livings abroad.

From 1979 until 1993 no legal education was established nor was the profession of being a “lawyer” acknowledged as a free-lance profession. Before the “Bar Association of the Kingdom of Cambodia” was created in 1995 permission to practice as a lawyer had to be requested from the Prosecutor-General who was attached to the Appellate Court. At that time all court officials – in particular high rankings as the Prosecutor-General – were closely affiliated to the ruling party and handpicked by government officials. An independent legal profession could not flourish under such strict communist control.

This fundamentally changed when the Bar Association started operating in 1995<sup>23</sup>. From that time on this non-governmental body decides independently over all its legal practices<sup>24</sup>. Right in 1995 a first group of 38 lawyers were sworn into their profession and became members of the Bar Association<sup>25</sup>. In 1996 the total number of lawyers rose to 54. In 2003 there were 197 lawyers practicing their profession<sup>26</sup>.

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<sup>23</sup> You can find the Internal Rules of the Bar Association under:

<http://www.ifrance.com/cambodialaw/judicial/jud008g.htm>

<sup>24</sup> See Articles 31 – 39 Statute of the Bar which regulate the admission to the legal profession and the legal training. The Statute of the Bar also clearly states in its Articles 1 and 4 that no one may perform as a lawyer if s/he is not a member of the Bar Association. This assures the independence of the Bar from any influence of the government.

<sup>25</sup> For more details on the history of the Cambodian legal profession: “Legal System of Cambodia”, published in 1998 by the Cambodian Legal Resources Development Center (CLRDC), page 150 - 152

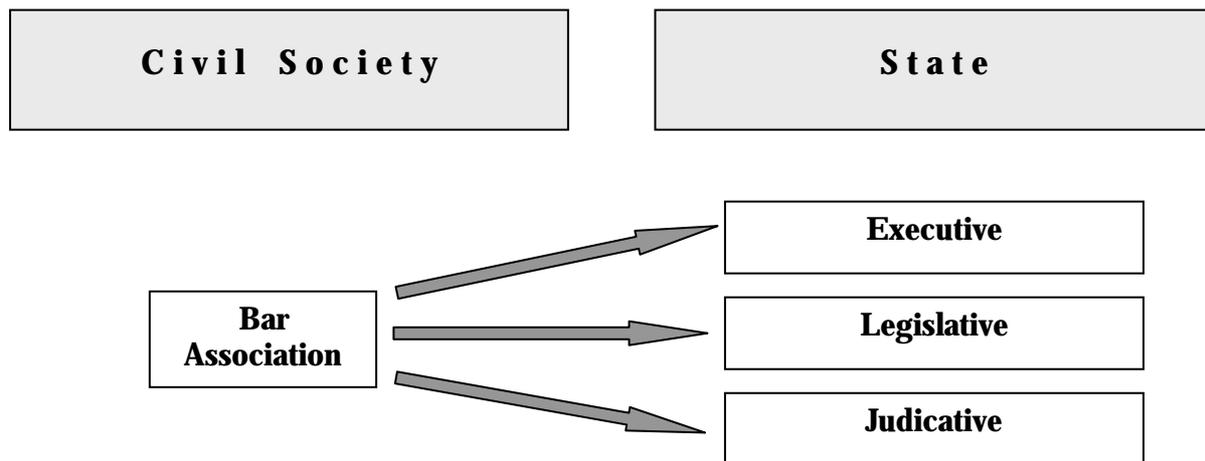
<sup>26</sup> Annual Report of the Cambodian Bar Association 2003 – In the year 2003 the Bar Association had 328 members in total of which 53 were females.



## **B) Safeguards for an Independent Legal Profession:**

It is essential that lawyers can pursue their function without undue restriction or interference because they play a vital role in the fair administration of justice and in the creation of a state of rule of law in general.

Their representing body, the Bar Association, is not part of the state powers (executive, legislative and judicative) but is a part of civil society. It is a non-governmental organization which is protected by a specific law (Law on the Bar) because of its immanent function to support the rule of law and to protect the rights of the citizen.



No rule of law is possible in any country unless lawyers play a major role in using the law, interpreting it, explaining it to the population and also helping to amend it if it does not meet the needs of the people anymore. They must play an active role in all branches of power: in the **legislative process** by providing their daily life experience with the laws to the lawmakers, in the **process of executing the law** by defending the rights of the people and complaining to the authorities in case of breach of law and **in the judicial process** by representing clients before the court and pleading lawfully for their rights.

The lawyer has the **same rank as any judge or any prosecutor**. The same rank must also be reflected for example in the court room setting. This derives from the principle of “equality of arms” which says that both conflict parties must have the same chances and rights.





Example:

It is not compatible with the rights and dignity of a lawyer putting him/her at a shabby little desk in the corner of the court room while judges, prosecutors and even court clerks sit on nicely furnished desks and chairs on a high level above the accused and the lawyer as it is still practiced in many courtrooms in Cambodia<sup>27</sup>.

There is a good example at the Siem Reap Provincial Court where the lawyers' and prosecutors' desks are at equal height.<sup>28</sup>

The following **duties and rights** of lawyers serve as a **system of checks and balances** to grant and secure power to them but at the same time to also prevent them from misusing this power.

They are laid down in the

**“UN Basic Principles on the Role of Lawyers” of 1990**<sup>29</sup>,

in the

**“Statute of the Cambodian Bar”**<sup>30</sup>,

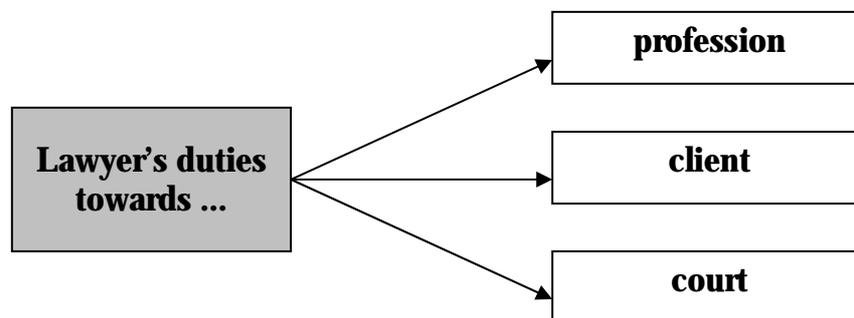
in the

**“Code of Ethics for Lawyers”**<sup>31</sup>

and also in the **procedural laws**.

**D) Duties of the Lawyer**<sup>32</sup>:

In their performance lawyers generally have to consider three major duties: duties to the profession itself, duties to their clients and duties to the courts.



<sup>27</sup> For example at the Provincial Court in Kandal

<sup>28</sup> see “Trial in Cambodia” by Sok Sam Oeun in “Decline of Fair Trial in Asia”, February 2000, page 139

<sup>29</sup> see [www1.umn.edu/humanrts/instree/i3bpri.htm](http://www1.umn.edu/humanrts/instree/i3bpri.htm)

<sup>30</sup> see [http://www.cdpcambodia.org/bar\\_law.asp](http://www.cdpcambodia.org/bar_law.asp)

<sup>31</sup> see [http://www.bigpond.com.kh/Council\\_of\\_Jurists/Judicial/jud002g.htm](http://www.bigpond.com.kh/Council_of_Jurists/Judicial/jud002g.htm)

<sup>32</sup> for details see “Professional Responsibility” by Nick Rine and Ly U Meng (published by “The Community Legal Education Center”, CLEC)



## 1) Duties to the Profession:

A lawyer should maintain the reputation and standing of the profession and should not simply choose this profession because it might bring him/her a high reputation, influence and possibly a good income. A lawyer must firstly observe the high standards of conduct and keep in **mind to serve the public first**.

Article 1 Statute of the Bar:

The legal profession is an independent and autonomous profession involved in serving justice and may only be pursued from within the framework of the Bar Association.

Principle 12 of the Basic Principle on the Role of Lawyers (BPRL):

Lawyers shall at all times maintain the honor and dignity of their profession as essential agents of the administration of justice.

A lawyer can uphold the honor and dignity of his/her profession by:

### **a) strictly avoiding any conflict between her/his professional duty and personal interests:**

The interest of justice must always be put above all other considerations.

#### Examples:

- A lawyer can not mix personal gain, political position or public office with the practice of law. These activities would automatically conflict with her/his professional obligations as a lawyer to serve only the justice and her/his client's interest (see Article 53 and 54 Statute of the Bar).

In transitional societies like Cambodia where the building of democracy is still in process the performance of political functions like being a member of the National Assembly or chairman of a political party should remain incompatible with the performance of the legal profession because the risk of mixing contrary interests is very high and can damage the peoples' interests. So for the public interest the lawyer transitionally and partly renounces to his/her human rights of association and assembly and the freedom of expression. In societies with well working democratic structures the combination of practicing as a lawyer and at the same time as a politician does not cause any problem and is not only allowed but even requested to include the lawyers' expertise into the broad opinion-making process of society.

- When a lawyer already has too much work or when the case presented to him/her is outside his/her area of competence the lawyer should not accept the mandate but should recommend another lawyer.

- A lawyer should only represent one accused in a case with many different accused persons (Article 19 III Code of Ethics for Lawyers) because each of the accused persons has his/her individual defense strategy and interest. The slightest chance of conflict of interest must be avoided even at the cost of the lawyer losing a client and therefore losing an opportunity of income.



**b) co-operating with the Bar Association** which is the professional association of the lawyers and all lawyers have to be member of (Article 4 and Article 8 I Statute of the Bar):

Example:

Lawyers are obliged to strictly follow the prohibition of advertisement, Article 57 Statute of the Bar, because excessive advertisement may mislead people and can affect the dignity of the profession which is not just a trade or a business but a service to justice.

**c) strengthening the rule of law:**

Lawyers should ensure that all persons have access to legal services. They should participate in legal aid programs.

**Legal aid** is not a question of charity but a fundamental human right<sup>33</sup>.

Article 7 UDHR:

All are equal before the law and are entitled without any discrimination to equal protection of the law.

Article 14 III lit (d) sentence 3 ICCPR:

In the determination of any criminal charge against him (the accused), everyone shall be entitled to the following minimum guarantees, in full equality:

(d) ... to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

Therefore governments must provide sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons, Article 3 BPRL. At the moment the national budget of the Cambodian government does not provide institutional and financial support to those who can not protect their rights by themselves. There are only three organizations helping poor and disadvantaged people such as children, ethnic minorities, refugees or handicapped persons to defend their rights before the courts:

- “**Legal Aid of Cambodia**” (LAC), a NGO which was established in December 1995<sup>34</sup>.
- “**Cambodian Defenders Project**” (CDP), also a NGO operating since 1995<sup>35</sup>.
- The **Bar Association of the Kingdom of Cambodia** (Article 29 Statute of the Bar).

<sup>33</sup> see also Article 76 II Nr. 4 of the Law on Criminal Procedure (State of Cambodia, 1993) which provides an automatic appointment of a lawyer in case the accused is charged with a crime (not with a misdemeanor) and can not afford a lawyer.

<sup>34</sup> see <http://www.lac.org.kh/>

<sup>35</sup> see <http://www.cdpcambodia.org>



The government's failure to provide financial support or fulfill other institutional roles does not relieve lawyers or the Bar Association of their professional obligations. The Bar Association must provide equal legal services even to those who are geographically disadvantaged.

**Example:**

The Bar Association is obliged to install public legal centers around the country at their own expenses to address the problem of uneven distribution of lawyers and their concentration in Phnom Penh.

## 2) Duties to the Client:

The lawyer must act in the interest of the client with courage, devotion and the utmost of his/her knowledge and ability according to the law.

S/he does this by<sup>36</sup>:

- a) diligently interviewing the client about the case,
- b) carefully researching the facts and the law on the case,
- c) advising the client of his/her legal rights and obligation and
- d) preparing and presenting the client's claim/defense at trial.

Before doing all this it helps the relationship getting trustful and lasting to sign a written agreement on the costs of the legal representation (Article 68 Statute of the Bar).<sup>37</sup>

The lawyer must establish trust and confidence with the client to defend best the client's interests. The duty of professional confidentiality is explicitly laid down in Article 58 of the Statute of the Bar, Article 7 Code of Ethics for Lawyers and in Principle 22 BPRL.

Article 58 Statute of the Bar:

Lawyers shall maintain absolute confidentiality. Lawyers shall determine by their own conscience and the with the consent of the client what issues to raise in order to defend the interests of the client.

Lawyers may not abuse the confidentiality of the profession and may not be forced to abuse the confidentiality of their professions, even before the court.

The following shall be considered as confidential: consultation, advice, and non-official documents prepared by the lawyer for his or her client, and correspondence sent between the lawyer and his or her client.

<sup>36</sup> also see Article 2 and 3 Statute of the Bar

<sup>37</sup> also see Article 22 I Code of Ethics for Lawyers: "A prior agreement may be concluded determining either a fee schedule or the method of establishing remuneration." Unfortunately there is no "Statute on Attorney's Fees" in Cambodia yet which could help to tackle the temptation of corruption and unbalanced competition among lawyers. One of the most important future tasks for the Bar Association would be to draft such a law.



Article 7 Code of Ethics for Lawyers:

The lawyer is absolutely bound by professional confidentiality. Confidentiality may not be waived by anyone, not even the client. ...

There is no obligation of confidentiality when the lawyer has to respond to a [legal] action by his or her client, within the strict limits necessary for his or her defense.

### 3) Duties to the Court:

The lawyer's primary role is assisting the court to achieve justice according to the law. Therefore the lawyer must never mislead the court or present evidence that s/he knows to be false even if it may be in the client's interest. However, s/he is under no duty to disclose to the courts facts that are not in the client's interest to be disclosed, even if for example these facts indicate the client's guilt. To prove guilt is the prosecutor's task not that of the lawyer!

## II) Rights of the Lawyer:

The following rights are set out in the "Basic Principles on the Role of Lawyers" (BPRL).

### 1) Right to Perform Professional Functions Without Interference:

Principle 16 BPRL:

Governments shall ensure that lawyers are

a) able to perform all of their professional functions without intimidation, harassment or improper interference;

b) are able to travel and to consult with their clients freely both within their own country and abroad; and

(c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

**a)** If a lawyer is treated in an unjust way by a judge s/he can complain to the head of the court (see Article 24 IV Code of Ethics for Lawyers), to the President of the Bar Association or directly to the Supreme Council of Magistracy, who may intervene. The lawyer can even **object the judge** to decide if there are indications of prejudice, manipulation or obstruction (see for example Article 28 Draft Law on Civil Procedure, June 2003 or Articles 476 – 484 Draft Law on Criminal Procedure, 2003). The court may overrule the lawyer's objection but the objection will be on the file's record, which will



help the party when the matter is appealed to the next instance with a new judge who might consider the case in a different way.

Examples of unjust treatments:

- The lawyer is asked for money before being granted the right to inspect the case's files
- The judge is using a confession which was received under means of torture as a proof of guilt (see also Article 24 III UNTAC Criminal Code).
- The judge violates any of the below mentioned rights of a lawyer.

**b)** The practice of the Bar Association to restrict the access to its membership interferes into the human right of lawyers to freely practice their profession (Article 36 I CC).

Examples for undue restrictions:

- The Legal Training Center which issues the so-called “Certificate of Lawyer’s Professional Skill” to become a member of the Bar does not in a transparent way define the conditions to be fulfilled to pass the lawyer’s examination.<sup>38</sup> It also determines the maximum number of lawyers to recruit for the examination. But there is no reason for this limitation having in mind that presently in Cambodia there are not more than 200 lawyers serving 14 million Cambodians.
- The Bar Association interprets Article 32 Nr. 1 Statute of the Bar very narrowly by requiring a two years professional service in a governmental organization. All persons having worked in the legal field in private companies or NGOs are excluded from being a member of the Bar and can therefore not practice as a lawyer.

Refusing access to the Bar Association affects the lawyer’s human right of freedom of profession (Article 36 I CC).

But according to Article 36 I CC the freedom of profession can only be restricted for the purpose to ensure the “ability” to exercise properly a profession or to protect “the needs of the society”. There is no question that the Cambodian society is in need of lawyers as many as it can get. It will take a long time until a “flood of lawyers” will inundate the country.<sup>39</sup>

Only criminal and bankrupt lawyers and such who did not achieve a special amount of credit points in the lawyer’s exam can be restricted in their human right of free profession and can be excluded from the Bar.

## **2) Right to Protection:**

Lawyers have the right to work in a safe environment without fearing threat and coercion.

**Principle 17 BPRL:**

Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.

<sup>38</sup> see Article 9 of the Internal Regulations of the Bar Association of the Kingdom of Cambodia: “The Professional Training Center defines the substance upon which the CAPA (=Certificate of Aptitude in the Legal Profession) shall be based, as well as the modalities of the examination.”

<sup>39</sup> As it is the case in Germany with about 90.000 lawyers for 80 million people.



### 3) Right to Civil And Penal Immunity:

Lawyers defend their clients' interest by using the clients' information before the courts. If these information – whether they are in oral or written form - look authentic, reliable and credible (which in reality in some cases they are not) lawyers can not be charged with criminal offenses like for example fraudulent representation.

Principle 20 BPRL:

Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.

But a lawyer is never allowed to willingly lie on behalf of his/her client to win the case.

### 4) Right to Represent Clients:

The lawyer is **autonomous** and chooses her/his clients **freely**. S/he can reject to represent a case but s/he also can freely choose to do so. S/he can represent any client with the client's consent. The denial to represent a client amounts to a denial of the right to be heard before the court (Article 39 CC). The court can not reject a lawyer to represent a case if the lawyer works with the client's consent. The court is bound by the client's decision. Otherwise the court could illicitly interfere into the human rights of lawyers to exercise their profession (Article 36 I CC).

Principle 19 BPRL:

No court or administrative authority before whom the right to counsel is recognized shall refuse to recognize the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles.

### 5) Right of Access to Client And to Information Required For Defense of Client:

Principle 5 and 7 of the “Basic Principles on the Role of Lawyers” set out the right of an accused person to the assistance of a legal counsel:



Principle 5 BPRL:

Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.

Principle 7 BPRL:

Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer and in any case not later than forty-eight hours from the time of arrest or detention.

Article 10 UNTAC Criminal Code corresponds with Article 39 CC which gives the right to every citizen to be heard before the court:

Article 10 UNTAC Criminal Code:

1. The right to assistance of an attorney or counsel is assured for any person accused of misdemeanor or crime.
2. No one may be detained on Cambodian territory more than 48 hours without access to assistance of a counsel, an attorney, or another representative authorized by the present text, no matter what the alleged offence may be.

**6) Right Not to Be Identified With Client or Client's Cause:**

Principle 18 BPRL:

Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.

The work of a lawyer for a client should not be seen as indicating that the lawyer necessarily sympathizes with, or approves of, the client's beliefs or actions!



## 7) Right to Professional Confidentiality:

Lawyers – like doctors – enjoy a confidential relationship with their clients. Any means of making public the conversations between a lawyer and his/her client is illegal. Secretly made copies of documents or secret recordings of the talks are subject to punishment. No lawyer shall be forced to unveil the content of the communication with his/her client.

Principle 22 BPRL:

Governments shall recognize and respect that all communication and consultation between lawyers and their clients within their professional relationship are confidential.

## 8) Right to Education And Training:

Principle 9 BPRL:

Governments, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law.

In 2002, the Cambodian Bar Association established a “Lawyers Training Centre” (LTC) to provide a bar admission program for the licensing of new lawyers in Cambodia. The school was officially opened in late October 2002 with a first class of 60 students concentrating on contract writing, communication skills, negotiation and mediation, and commercial law<sup>40</sup>.

## 9) Right to Freedom of Expression And Association:

Principle 23 BPRL:

Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession.

<sup>40</sup> For more details see: [www.cba.org/CBA/IDP/NewReports/Cambodia2003.asp](http://www.cba.org/CBA/IDP/NewReports/Cambodia2003.asp)



Lawyers can associate in national (=Cambodian Bar Association) and international organizations to shape the future of the legal profession.

The “International Bar Association” (IBA) for example comprises 16,000 individual lawyers and 180 Bar Associations and Law Societies.<sup>41</sup> In 1927 the “Union Internationale des Avocats” (UIA) was created in Europe to establish international contacts among lawyers all over the world. Today UIA represents nearly two million lawyers and has adopted many charters dealing with the legal profession which are also implemented worldwide.<sup>42</sup>

When lawyers associate it helps them to promote, protect and enforce human rights and the rule of law, and to preserve the independence of the judiciary and the legal profession not only in their countries but worldwide.

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<sup>41</sup> IBA’s Member Organizations cover all continents and include the American Bar Association, the German Federal Bar, the Japan Federation of Bar Associations, the Law Society of Zimbabwe and the Mexican Bar Association. For more details see [www.ibanet.org/](http://www.ibanet.org/)

<sup>42</sup> see [www.uianet.org](http://www.uianet.org)



### Study Question 9

Read Article 54 of the Law on the Bar.

Lawyers given functions in the Royal Government, or given mandates as deputies in the National Assembly, may remain as members of the Bar Association, but shall cease to perform the legal profession until the termination of such function or mandate.

**a)** Which human right (s) is (are) restricted by this article?

Name the human right (s) and quote the relevant article (s) precisely!

**b)** Is the restriction not to be allowed to work as a lawyer when at the same time being a governmental official constitutional or not? Give reasons for your answer!

**c)** Is the restriction not to be allowed to work as a lawyer when at the same time being a member of the National Assembly constitutional or not? Give reasons for your answer!



### Study Question 10

Article 29 of the Law on the Bar stipulates that the Bar Association shall provide funds for legal aid for poor people. Who do you think should be responsible for legal aid for the poor? Give reasons for your answer!



### Study Question 11

Benson Samay, working as a lawyer, was appointed Cambodia's only official notary in 2001 by a sub-decree. The Bar Association expelled him from the Bar. Why do you think he was expelled?



### Study Question 12

Read the following summary of Cambodian Daily's article of 18th December 2002.

Khieu Samphan, who served as the Khmer Rouge's president during the Pol Pot regime, has asked the Human Rights NGO "Cambodian Defenders Project (CDP)" for legal assistance in September 2003 because he is concerned about being



accused of genocide by the upcoming Khmer Rouge Tribunal despite his claim of being innocent that he published in an open letter in 2001.

CDP Director, Soek Sam Oeun, said although CDP promotes the human right to counsel and the presumption of innocence it has not yet decided about this request and named five reasons: a) The KR Tribunal has not yet been set up, b) the CDP as a strong advocate of this tribunal could be in a conflict of interest, c) the costs for legal assistance in this big and long trial could be beyond CDP's budget, d) the UN or the Cambodian Government are responsible for giving legal aid to defendants for this trial and e) he personally would probably not be unbiased as his father was among the Khmer Rouge victims.

The other major Legal Assistance NGO, Legal Aid Cambodia (LAC) is also not sure if it would grant assistance in case it would be also approached by Khieu Samphan for legal help.

Does the former KR president, Khieu Samphan, have a right to get legal aid? Do not just answer with “yes” or “no” but explain your legal view and quote the relevant article of the ICCPR.



### **Study Question 13**

In Cambodia, prosecutors still work closely with the investigation judge in gathering evidence and preparing a criminal case. This sort of mixing up prosecutorial and judicial function violates the Law on Criminal Procedure (1993) as well as the UN “Guidelines on the Role of Prosecutors” (1990).

- a)** Please quote the violated articles exactly!
- b)** Why do you think should the prosecution be separated from the court?
- c)** Read the Law on Criminal Procedure (LoCP 1993) and describe shortly the action a prosecutor must take to bring a criminal case to trial!



### **Study Question 14**

What are the duties of the Court Clerk?