

Submitted: 16 February 2017

Criminal Case Number 18 Dated 12 January 2017

Amicus Brief regarding certain criminal charges against Mr. Ny Chakrya

The International Commission of Jurists and Lawyers' Rights Watch Canada have conducted an analysis of relevant national and international law pertaining to the case of Mr. Ny Chakrya. We respectfully offer to the Supreme Court of Cambodia the following submission.

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1. INTRODUCTION

1. On 22 September 2016, Ny Chakrya, a prominent Cambodian human rights defender, was convicted by the Phnom Penh Municipal Court of:
 - i. Defamation (Article 305 of the Cambodian Criminal Code);
 - ii. Acts of Malicious Denunciation (Article 311 of the Cambodian Criminal Code); and
 - iii. Publication of commentaries intended to unlawfully coerce judicial authorities (Article 522 of the Cambodian Criminal Code).
2. The charges arose in the context of statements Ny Chakrya allegedly made (the "alleged statements") at press events in May 2015, concerning alleged victims of human rights violations, while he was employed at the Cambodian Human Rights and Development Association ("ADHOC") as head of the organization's Human Rights section.

3. This Amicus Curiae brief ("Amicus") is submitted by the International Commission of Jurists ("ICJ") and Lawyers' Rights Watch Canada ("LRWC").
4. The ICJ, composed of 60 eminent judges and lawyers from all regions of the world, works to advance respect for the rule of law and the promotion and protection of human rights globally. The ICJ holds consultative status at the Council of Europe, the United Nations and the African Union. The ICJ also cooperates with various bodies of the Organization of American States and the Inter-Parliamentary Union. Established in 1952, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence and accountability of the judiciary and legal profession.
5. LRWC, founded in 2000, is a Canadian organization of lawyers and other human rights defenders who promote the implementation and enforcement of international standards designed to protect the independence and security of human rights defenders around the world. LRWC produces legal analyses of national and international laws and standards relevant to human rights violations against human rights defenders. LRWC has special consultative status at the United Nations (UN) Economic and Social Council (ECOSOC).
6. This Amicus respectfully submits that the offences under Articles 305, 311 and 522 of the Cambodian Criminal Code are either expressed in overly broad language and/or have been applied to criminalize free expression and impose harsh penalties that hinder the exercise of the right to freedom of expression, which Cambodia is bound to protect pursuant to its international legal obligations, including obligations under international human rights treaties to which Cambodia is a party. This Amicus aims to clarify the nature and scope of these international legal obligations relating to the right to freedom of expression.
7. Under the principle of *pacta sunt servanda* and general principles governing the law of treaties, Cambodia is bound to apply, in good faith, those international treaties to which it is a party.¹ Furthermore Cambodia may not rely on provisions of its internal law to justify a failure to meet a treaty obligation.²
8. These treaties include the International Covenant on Civil and Political Rights ("ICCPR")³, an international human rights treaty that requires States Parties to guarantee a range of civil and political rights including, under Article 19, freedom of expression. Cambodia acceded to the ICCPR in 1992.

1 See, e.g., United Nations, 'Vienna Convention on the Law of Treaties', adopted 23 May 1969, Vol. 1155, I-18232, <<http://www.refworld.org/docid/3ae6b3a10.html>> accessed 30 January 2017, (hereafter, "[Vienna Convention on the Law of Treaties](http://www.refworld.org/docid/3ae6b3a10.html)"), Art. 26; Human Rights Committee (the "Committee"), 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', United Nations, adopted 29 March 2004 at the Eightieth session, UN Doc. CCPR/C/21/Rev.1/Add.13, <<http://www.refworld.org/docid/478b26ae2.html>> accessed 30 January 2017, (hereafter, "[General Comment No. 31](http://www.refworld.org/docid/478b26ae2.html)"), para. 3 (The Human Rights Committee is the body of independent experts established by the International Covenant on Civil and Political Rights ("ICCPR") and mandated to monitor States Parties' implementation of the ICCPR. The interpretations of the Committee and other treaty monitoring bodies, including the Committee against Torture, which monitors implementation of the Convention against Torture, are authoritative (including through general comments, recommendations to States Parties following examination of their periodic reports on implementation and jurisprudence).) International Court of Justice, 'Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)', Judgment, 30 November 2010, I.C.J. Reports 2010, commencing on p. 639, paras 66-68, <<http://www.icj-cij.org/docket/files/103/16244.pdf>> accessed 30 January 2017.

2 [Vienna Convention on the Law of Treaties](http://www.refworld.org/docid/3ae6b3a10.html), Art. 27; [General Comment No. 31](http://www.refworld.org/docid/478b26ae2.html), para. 3.

3 United Nations, 'International Covenant on Civil and Political Rights', United Nations General Assembly, adopted 16 December 1966 via resolution 2200A (XXI), entry into force 23 March 1976, <<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>> accessed 30 January 2017, (hereafter, "[ICCPR](http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx)").

9. The responsibility to ensure that the rights contained in the ICCPR are guaranteed and protected is not limited to the executive branch of government, but must also effectively be discharged by the judiciary. In its authoritative General Comment 34 on the nature and scope of freedom of expression under the ICCPR, the Human Rights Committee - the United Nations human rights treaty body responsible for overseeing implementation of the ICCPR - (the "Committee") has affirmed:

The obligation to respect freedoms of opinion and expression is binding on every State party as a whole. All branches of the State (executive, legislative and judicial) and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State party. Such responsibility may also be incurred by a State party under some circumstances in respect of acts of semi-State entities. The obligation also requires States parties to ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression to the extent that these Covenant rights are amenable to application between private persons or entities.⁴

10. In addition to its treaty obligations, Cambodia is bound to respect norms of customary international law and general principles of law recognized by UN member States ("General Principles").⁵

2. BACKGROUND

ADHOC

11. At the time Ny Chakrya made the alleged statements, he was employed at ADHOC as head of the organization's Human Rights section.
12. ADHOC is a Cambodian human rights NGO formed in December 1991 by a group of former political prisoners. Its mission is to "[s]trengthen the capacity of ordinary citizens, enable them to defend their own rights and lobby and advocate for better governance and full respect for human rights that every citizen can practice."⁶ As part of this mission, ADHOC provides legal representation and related support to victims of human rights violations, as well as empowering them.

Arrest and detention of persons subjected to land rights violations

13. The alleged statements concerned a land dispute that began in Siem Reap province in 2014. The company, Community Takhmao Development Agricultural & Industrial Trading Co, "TCIDA"), had cultivated crops on land in the area next to Chup Romdeng village and started clearing plots of land occupied by village residents, affecting 31 families and a total of 90 hectares of land. On 24 April 2014, the provincial authority of Siem Reap

4 Human Rights Committee, 'General Comment No. 34: Article 19: Freedoms of opinion and expression', United Nations, adopted 11-29 July 2011, at the 102nd session, Geneva, UN Doc CCPR/C/GC/34, para. 7, <<http://www.refworld.org/docid/4ed34b562.html>> accessed 30 January 2017, (hereafter, "General Comment No. 34"). See also, General Comment No. 31, paras 4, 8.

5 United Nations, 'Charter of the United Nations', adopted 26 June 1945, San Francisco, entry into force 24 October 1945, <<http://www.un.org/en/sections/un-charter/un-charter-full-text/index.html>> accessed 30 January 2017, (hereafter, "Charter of the United Nations"), Arts 92, 93; United Nations, 'Statute of the International Court of Justice', 18 April 1946, <<http://www.refworld.org/docid/3deb4b9c0.html>> accessed 30 January 2017 (hereafter, "Statute of the ICJ"), Art. 38; Vienna Convention on the Law of Treaties, Art. 27. See also, Karl Zemanek, 'Vienna Convention on the Law of Treaties' Vienna, 23 May 1969, UN Audiovisual Library of International Law, <<http://legal.un.org/avl/ha/vclt/vclt.html>> (which states that Articles 26 and 27 of the Vienna Convention are generally considered to be reflective of customary international law).

6 Cambodian Human Rights and Development Association, 'Category: About ADHOC: Vision and Mission' ADHOC Cambodia, <<http://www.adhoc-cambodia.org/category/about-us/about-adhoc/>> accessed 30 January 2017.

assembled a committee to investigate the conflict area. After investigation, the provincial authority issued a notification in which it declared that TCIDA lacked legal ownership over the requested 419 hectares of land and that it had to discontinue its cultivation of the land. TCIDA disregarded this notification.

- 14.** On 26 December 2014, Mr Likum Khun, President of TCIDA, filed a complaint against the former village chief of Chup Romdeng, Mr Srey Muth, and residents Mr Beourn Sok, Mr Ven Lorn, Mr Soth Doeng, Mr Kleoung Leing, Mr Ty Muth and Mr Sao Reour. He accused those named of trespassing on the company's property and of destroying TCIDA's crops, despite the fact that the provincial authority of Siem Reap had declared that TCIDA did not own the land in question. Upon an order issued on 3 January 2015 by Deputy Prosecutor of the Siem Reap Provincial Court, Mr Sok Keo Bandith, mixed armed forces (police officers, district military forces, soldiers, and military police officers) were sent to the disputed land to arrest the named villagers. While the others escaped arrest, Mr Beourn Sok and Mr Ven Lorn were arrested and detained in prison, where they would remain up to and throughout the trial.
- 15.** On 27 April 2015, the Investigating Judge of the Siem Reap Provincial Court, Mr Ky Rithy, indicted six persons for trial including Mr Beourn Sok and Mr Ven Lorn. Mr Beourn Sok and Mr Ven Lorn were represented by Ms Pouk Yarann, then ADHOC's lawyer. They were found guilty of aggravated criminal damage; Mr Ven Lorn was sentenced to six months imprisonment and Mr Boeurn Sok to eight months imprisonment. In view of the fact that the accused individuals had acted in reliance on the declaration by the provincial authority of Siem Reap as to ownership of the land in question, ADHOC has submitted that these individuals have been subjected to land rights violations and that their prosecution and conviction is unlawful.

Ongoing case against ADHOC staff and Ny Chakrya

- 16.** Ny Chakrya is currently detained at Police Judiciaire prison in Phnom Penh in relation to an ongoing and factually unrelated case against him and four senior staff members of ADHOC. Ny Chakrya was arrested on 28 April 2016 and charged as an accomplice to the bribery of a witness on 2 May 2016. On 21 November 2016, the UN Working Group on Arbitrary Detention adopted an Opinion ruling that his ongoing pre-trial detention is arbitrary.⁷
- 17.** If convicted, he could be sentenced to between five and ten years' imprisonment. In relation to this case, Ny Chakrya has been declared a Prisoner of Conscience by Amnesty International.⁸

Legal harassment of human rights defenders

- 18.** The case to which this Amicus applies, as well as the ongoing investigation and detention of Ny Chakrya and the ADHOC staff referred to above, form part of a wider context of legal harassment of human rights defenders in Cambodia.
- 19.** On 12 May 2016, four UN human rights experts highlighted the increased harassment of civil society and human rights defenders, urging that "[t]he escalation of criminal

7 Human Rights Council Working Group on Arbitrary Detention, 'Opinions adopted by the Working Group on Arbitrary Detention at its seventy-seventh session, 21-25 November 2016: Opinion No. 45/2016 concerning Ny Sokha, Nay Vanda, Yi Soksan, Lim Mony and Ny Chakrya (Cambodia)', United Nations, 13 December 2016, A/HRC/WGAD/2016/45 <http://www.ohchr.org/Documents/Issues/Detention/Opinions/Session77/A-HRC-WGAD-2016-45_en.pdf> accessed 30 January 2017 (hereafter, "Opinion of Working Group on Arbitrary Detention").

8 Colin Meyn, 'Amnesty Mobilizes for Adhoc Five', *The Cambodia Daily* 25 May 2016 <<https://www.cambodiadaily.com/news/amnesty-mobilizes-for-adhoc-five-112985/>> accessed 21 November 2016.

charges, questioning, court proceedings and public statements against them must cease.”⁹ At the 32nd session of the UN Human Rights Council, concluding on 1 July 2016, the UN High Commissioner for Human Rights raised the issue of escalating opposition and civil society member arrests and several States also voiced this concern. Japan highlighted the “considerable narrowing of space for legitimate and normal activities by opposition parties and civil society organisations.” The European Union made calls “to ensure a safe and enabling environment for human rights defenders and civil society.”¹⁰

3. FACTS

- 20.** The alleged statements by Ny Chakrya were made on 12 May 2015 during an ADHOC press conference at its Siem Reap office. Ny Chakrya and Ms Pouk Yarann made statements condemning the arrest and detention of Mr Beourn Sok and Mr Ven Lorn as arbitrary and alleging that the Siem Reap Provincial Court lacked independence. In relation to the latter, Ny Chakrya announced that he planned to file a complaint to the Supreme Council of Magistracy commencing disciplinary proceedings against the deputy prosecutor and Investigating Judge of the Siem Reap Provincial Court with the Supreme Council of Magistracy.
- 21.** On 15 May 2015, the Prosecution Office of the Siem Reap Provincial Court issued a public statement accusing Ny Chakrya and Ms Pouk Yarann of “attacking” the prosecution as an institution and the deputy prosecutor as an individual, using “exaggeration.”¹¹ The statement accused both individuals of disseminating “false news” and “information of an insulting character,”¹² and declared that the statements made during the press conference were intended to pressure the court and interfere with the conduct of a judicial investigation.
- 22.** On 20 May 2015, Ny Chakrya lodged the aforementioned complaint with the Supreme Council of Magistracy in order to initiate disciplinary proceedings against the two court officials. To date, the Supreme Council of Magistracy has not responded to the complaint.
- 23.** After a second press conference on 20 May 2015 at ADHOC’s headquarters in Phnom Penh, it was reported in the media that Ny Chakrya had suggested, in general terms, that it was right to expose suspected judicial bias in cases where it exists, and that in such a situation, actual bias could only be determined legally after a complaint was lodged.¹³
- 24.** On 29 May 2015, the Investigating Judge of the Siem Reap Provincial Court, Mr Ky Rithy, and the Deputy Prosecutor of the Siem Reap Provincial Court, Mr Sok Keo Bandith, filed a complaint against Ny Chakrya with the Deputy Prosecutor of the Phnom Penh Municipal Court, Mr Seang Sok. Following this, Ny Chakrya was summoned to appear on 13 July 2015 before Mr Seang Sok. The complaint alleged that Ny Chakrya had committed three offences:
 - i. Defamation (Article 305 of the Cambodian Criminal Code);
 - ii. Acts of Malicious Denunciation (Article 311 of the Cambodian Criminal Code); and

9 United Nations, ‘UN rights experts urge Cambodia to stop attacks against civil society and human rights defenders’, United Nations Office of the High Commissioner for Human Rights, 12 May 2016, Geneva <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19954&LangID=E>> accessed 17 November 2016.

10 FIDH: Worldwide Movement for Human Rights, ‘UN Human Rights Council puts Cambodia on notice’, 4 July 2016 <<https://www.fidh.org/en/region/asia/cambodia/un-human-rights-council-puts-cambodia-on-notice>> accessed 17 November 2016.

11 Human Rights Watch, ‘Cambodia: Drop Prosecution of Rights Defender’, 29 July 2015, <<https://www.hrw.org/news/2015/07/29/cambodia-drop-prosecution-rights-defender>> accessed 21 November 2016.

12 *Ibid.*

13 *Ibid.*

- iii. Publication of commentaries intended to unlawfully coerce judicial authorities (Article 522 of the Cambodian Criminal Code).
- 25.** On 14 July 2015, the General Prosecutor of the Appeals Court issued a letter to the Ministry of Justice, ordering the conduct of effective investigations into the allegations made by Ny Chakrya. It also requested the Investigating Judge to suspend proceedings against Ny Chakrya for the time of such an investigation. This request was disregarded by the Phnom Penh Municipal Court.
- 26.** On 18 July 2015, Mr Seang Sok filed an introductory submission to the Investigating Judge of the Phnom Penh Municipal Court. The Investigating Judge issued Ny Chakrya with a summons on 28 September 2015 for Ny Chakrya to appear for questioning on 21 October at 9am. The summons was delivered not to Ny Chakrya but to his wife who was at home at the time. Because the summons was not fingerprinted or signed by Ny Chakrya, it had not fulfilled the requirements of the Cambodian Criminal Procedural Code and therefore could not operate to compel the appearance of Ny Chakrya.¹⁴ When Ny Chakrya did not attend, the Investigating Judge, without apparent legal basis, told *The Cambodia Daily* that he would order the arrest of Ny Chakrya.¹⁵
- 27.** On 14 March 2016, Ny Chakrya was again summoned to appear before the Investigating Judge of the Phnom Penh Municipal Court for questioning. On 6 April 2016, Ny Chakrya attended a closed meeting with the Investigating Judge. The Investigating Judge subsequently charged Ny Chakrya on 31 May 2016 with the three offences listed above. Although Ms Pouk Yarann was named in the public statement issued by the Deputy Prosecutor and Investigating Judge of the Siem Reap Provincial Court on 15 July 2015, she was not charged with any offences but was instead questioned by the Cambodian Bar Association in her capacity as an attorney.
- 28.** The trial of Ny Chakrya commenced on 18 July 2016. Twenty minutes into the hearing, Ny Chakrya's lawyer announced the submission of a complaint to the Court of Appeal, requesting a change in the trial judge on the grounds that the proceedings were biased. The trial judge adjourned the trial pending a decision from the Court of Appeal. On 16 August 2016 the Court of Appeal dismissed the request to change the trial judge.
- 29.** On 22 September 2016, Ny Chakrya was found guilty on all three charges and sentenced to six month's imprisonment and fined six million riels. He appealed the conviction.
- 30.** On 6 December 2016, the Court of Appeal heard Ny Chakrya's appeal. On 14 December 2016, the Court of Appeal upheld the conviction for all three offences in a very brief session that was concluded prior to Ny Chakrya's arrival at the court. On 23 December 2016 the Court of Appeal released the legal reasoning behind its verdict, which upheld the decision of the Phnom Penh Municipal Court.
- 31.** On 9 January 2017, Ny Charkya's legal team submitted an appeal to the Supreme Court, challenging the decision of both the Phnom Penh Municipal Court and the Court of Appeal.

14 Kingdom of Cambodia, 'Criminal Procedure Code of Kingdom of Cambodia' Ministry of Justice, 2007 <<https://www.oecd.org/site/adboecdanti-corruptioninitiative/46814242.pdf>> accessed 30 January 2017, (hereafter, "Cambodian Criminal Procedure Code") Art. 239.

15 Kang Sothear and Taylor O'Connell, 'International Organization Condemns 'Harassment' of Rights Worker' *The Cambodia Daily*, 14 October 2015 <<https://www.cambodiadaily.com/news/international-organization-condemns-harassment-of-rights-worker-97165/>> accessed 27 January 2017. See also Mech Dara and Taylor O'Connell, 'Adhoc Rights Worker Fails to Appear for Questioning' *The Cambodia Daily*, 22 October 2015 <<https://www.cambodiadaily.com/news/adhoc-rights-worker-fails-to-appear-for-questioning-97878/>> accessed 27 January 2017.

4. APPLICABLE HUMAN RIGHTS LAW

32. Under Article 31 of the Constitution of the Kingdom of Cambodia (the "Constitution"), Cambodia's international human rights obligations are directly applicable in Cambodian law.¹⁶ The direct applicability of these international legal provisions was recognized by a decision of the Constitutional Council of the Kingdom of Cambodia dated 10 July 2007.¹⁷

Freedom of expression

33. One of the first resolutions of the UN General Assembly, adopted in its first session in 1946, declared that the freedom of information, which includes freedom to impart and receive information, "is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated."¹⁸

34. On 10 December 1948, the UN General Assembly adopted the Universal Declaration of Human Rights ("UDHR") which states in Article 19:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

35. The ICCPR guarantees rights to freedom of opinion, expression and information, and obliges Cambodia to respect and ensure to all individuals under its jurisdiction the enjoyment of these rights. Article 19 of the ICCPR provides:

1. Everyone shall have the right to freedom of opinion.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.

36. The Committee has emphasized in its General Comment No. 34, a document that sets out an authoritative explanation of the full meaning of States' obligations under Article 19 of the ICCPR, that Article 19 "includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others" including "discussion of human rights."¹⁹

37. As a State party to the ICCPR, Cambodia has an international legal obligation to ensure that all people within Cambodia enjoy the rights protected by the treaty, including freedom of expression. Article 2 provides:

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion political or other opinion, national or social origin, property, birth or other status.

16 Kingdom of Cambodia, '*Constitution of the Kingdom of Cambodia*', Constituent Assembly, adopted 21 September 1993, second plenary session, Phnom Penh <<http://www.wipo.int/edocs/lexdocs/laws/en/kh/kh009en.pdf>> accessed 30 January 2017, (hereafter, "*Cambodian Constitution*"), Art. 31.

17 Kingdom of Cambodia, '*The Constitutional Council*', The Constitutional Council, 10 July 2007, Decision No. 092/003/2007 CC.D, <<http://www.ccc.gov.kh/english/decision/2007/dec%2092.pdf>> accessed 18 November 2016.

18 United Nations, '*Calling of an International Conference on Freedom of Information*', United Nations General Assembly, Resolution 59(I), 14 December 1946, <<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/033/10/IMG/NR003310.pdf?OpenElement>> accessed 30 January 2017, preamble.

19 [General Comment No. 34](#), para. 11.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

38. While in certain circumstances, a State may restrict the right to freedom of expression, any such restrictions must be strictly limited in accordance with ICCPR. Article 19(3) in this respect provides:

The exercise of the rights provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

39. It is clear from the plain language of Article 19 that, to be lawful, any measure or act that restricts or limits the exercise of freedom of expression (including criminal sanctions) must fulfil the general principle of legality²⁰ and meet the conditions of necessity and proportionality.

40. The Committee has clarified the operative implications of Article 19(3), explaining that any such restriction on freedom of expression must meet a strict three-part test:²¹

- a) The restriction imposed must be provided by law, which is clear and accessible to everyone.²² In particular, the law must be “formulated with sufficient precision to enable an individual to regulate his or her conduct” (emphasis added)²³; and
- b) The restriction “must be proven as necessary and legitimate to protect the rights or reputation of others; national security or public order, public health or morals” (emphasis added);²⁴ and
- c) The restriction “must be proven as the least restrictive and proportionate means to achieve one of the legitimate aims set out in Article 19(3)” (emphasis added).²⁵

41. The restriction on freedom of expression contemplated in Article 19(3) (“for the respect of rights and reputations of others”) may be engaged in justifying laws and other measures on defamation. Such measures, however, must be strictly subject to the test set out by the Committee, as noted in paragraph 41.

42. The Committee affirmed in 2005 that criminal sanctions are not appropriate in cases of defamation, stating that: “the use of criminal rather than civil penalties ... constitutes a disproportionate means of protecting the reputation of others.”²⁶ The Committee, in

20 See *infra*, para. 51(a) (for an explanation of the general principle of legality).

21 [General Comment No. 34](#), paras 30-36.

22 Human Rights Council, ‘*Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue*’, United Nations, Twentieth session, 04 June 2012, UN Doc. A/HRC/20/17, <<http://www.refworld.org/docid/5008134b2.html>> accessed 30 January 2017, para. 64.

23 General Comment No. 34, para. 25.

24 *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, supra note 22, para. 81.

25 *Ibid*, para. 81.

26 Human Rights Committee, ‘*Rafael Marques de Morais v. Angola*, Communication No. 1128/2002,

General Comment 34, called on States parties to decriminalize defamation and stressed that “imprisonment is never an appropriate penalty” for defamation.²⁷

43. The UN Special Rapporteur on freedom of opinion and expression (the “Special Rapporteur”)²⁸ has expressed concern about the potential for criminal defamation laws to be abused, especially where issues affecting the public interest are involved. The Special Rapporteur wrote in 1999 that: “Sanctions for defamation should not be so large as to exert a chilling effect on freedom of opinion and expression and the right to seek, receive and impart information; penal sanctions, in particular imprisonment, should never be applied” (emphasis added).²⁹

44. In a 2016 report, the Special Rapporteur highlighted criminal laws that prohibit criticism of public officials, stating that “[t]he punishment of criticism of a Government or government officials is censorship of the kind that directly undermines public engagement and debate and runs counter to the object and purpose of the ICCPR and the letter of Article 19 thereof.”³⁰ The Special Rapporteur noted that the right to freedom of expression includes special protection of the right to criticize public officials, which “enables public debate, accountability and engagement by individuals in national self-governance.”³¹ Thus, criminal punishment of the criticism of public officials contravenes legally binding international standards that are fundamental to the object and purpose of the ICCPR. The Special Rapporteur interprets the term “public official” to include members of the judiciary.³² Under the principle of *pacta sunt servanda*, Cambodia is bound to apply in good faith the provisions of the ICCPR, with “good faith” being understood as including compliance with the object and purpose of a treaty to which the state is a party.³³

45. The right to the freedom of expression is specifically guaranteed by Article 41 of the Constitution:

Khmer citizens shall have freedom of expression, press, publication and assembly. No one shall exercise this right to infringe upon the rights of others, to affect the good traditions of the society, to violate public law and order and national security.

UN Doc CCPR/C/83/D/1128/2002 (2005), United Nations Human Rights Committee, eighty-third session, 14 March – 01 April 2005 <<https://www1.umn.edu/humanrts/undocs/1128-2002.html>> accessed 30 January 2017, paras 3.9, 6.8.

²⁷ [General Comment No. 34](#), para 47.

²⁸ Human Rights Council, ‘*Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue*’, United Nations Human Rights Council, twentieth session, 04 June 2012, UN Doc. A/HRC/20/17, <<http://www.refworld.org/docid/5008134b2.html>> accessed 30 January 2017, para. 64.

²⁹ Commission on Human Rights, ‘*Report of the Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, Mr. Adib Hussain*’ United Nations Economic and Social Council, fifty-fifth session, 29 January 1999, UN Doc. E/CN.4/1999/64, <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G99/107/66/PDF/G9910766.pdf?OpenElement>> accessed 30 January 2017, para. 28(h).

³⁰ United Nations, ‘*Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*’, United Nations General Assembly, seventy-first session, 06 September 2016, UN Doc. A/71/373 <http://www.un.org/ga/search/view_doc.asp?symbol=A/71/373> accessed 30 January 2017, para. 29.

³¹ *Ibid*, para 29.

³² *Ibid*, para 30.

³³ *Gabčíkovo-Nagymaros Project, Hungary v Slovakia*, International Court of Justice Judgment, Merits, ICJ GL No 92, [1997] <<http://www.icj-cij.org/docket/files/92/7375.pdf>> accessed 30 January 2017, para. 142.

Duty to protect human rights defenders

- 46.** Human rights defenders, like all persons, are entitled to the full protection of the ICCPR and other international human rights instruments. Of particular importance to the protection of human rights defenders are the guarantees of the right to privacy (Article 17); freedom of opinion and expression, including the right to seek, receive and impart information (Article 19); freedom of peaceful assembly (Article 21); freedom of association (Article 22); the right to take part in the conduct of public affairs (Article 25); and the right to non-discrimination and equal protection of the law (Article 26).
- 47.** In order to better protect these and other rights as they pertain to human rights defenders, States have adopted a number of international human rights instruments recognizing the special role of human rights defenders in the promotion, protection and implementation of international human rights.
- 48.** In particular, the UN Declaration on the right and responsibility of individuals, groups and organs of society to promote and protect universally recognized human rights and fundamental freedoms (the "Declaration on Human Rights Defenders")³⁴ affirms the right individuals and groups to engage in human rights education and advocacy and the corresponding State duties to ensure the protection of human rights defenders. The Declaration on Human Rights Defenders articulates standards enshrined in binding international law, including the ICCPR, the UDHR and the Charter of the United Nations. The Declaration on Human Rights Defenders, adopted in 1999 by consensus of the General Assembly, represents a unanimous commitment by all UN Member States to its implementation. The Declaration affirms, among other things, that:

Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels" (Article 1, emphasis added);

[...]

The State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, *de facto* or *de jure* adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration" (Article 12.2, emphasis added).

5. INTERNATIONAL HUMAN RIGHTS LAW ANALYSIS OF ARTICLES 305, 311 AND 522 OF THE CAMBODIAN CRIMINAL CODE

Acts of defamation (Article 305)

- 49.** Article 305 of the Cambodian Criminal Code defines the offence of defamation as:

Article 305: Definition of defamation

"Defamation" shall mean any allegation or charge made in bad faith, which tends to injure the honour or reputation of a person or an institution.

Defamation shall be punishable by a fine from one hundred thousand to ten million Riels if it is committed by any of the following means:

- (1) any words whatsoever uttered in a public place or in a public meeting;

³⁴ United Nations, 'Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms', United Nations General Assembly, resolution 54/144, fifty-third session, 08 March 1999, UN Doc. A/RES/53/144, <<http://www.refworld.org/docid/3b00f54c14.html>> accessed 30 January 2017.

- (2) written documents or pictures of any type released or displayed to the public;
- (3) any audio-visual communication intended for the public.

50. The offence of defamation as set out in Cambodia's Criminal Code (Article 305) contravenes Cambodia's international human rights law obligation to ensure and protect the freedom of expression, as it:

- a) Is vague and overbroad, in contravention of the three-part test concerning Article 19(3) of ICCPR, requiring clarity of the law. Specifically, Article 305 states that "any allegation or charge made in bad faith" is to be characterized as defamatory if it "tends to injure the honour or reputation of a person or an institution". The terms "honour" and "reputation" are capable of wide, unrestricted and subjective interpretations. Such vague and broad charges render impossible both an objective definition of the actions that constitute the crime (the *actus reus*) and an effective defence. Such vagueness violates the principle of legality, which is a general principle of international law that "it must be possible for an individual to know, before hand, whether his acts are lawful or liable to punishment."³⁵ The Special Rapporteur, in his 2016 report, stated that it is not sufficient to formally enact a law; rather, to be consistent with Article 19(3), the law "must also be formulated with sufficient precision to enable both the individual and those charged with its execution to regulate conduct accordingly and be made accessible to the public."³⁶
- b) Imposes disproportionately harsh sanctions by applying criminal sanctions when civil remedies are sufficient.³⁷ The Committee's General Comment No. 34 calls on States to decriminalize defamation and emphasizes that "the application of the criminal law should only be countenanced in the most serious of cases."³⁸ In 2006, Cambodia took the positive step of amending its defamation laws to remove custodial sentencing.³⁹ However, the coupling of defamation offences with other offences that criminalize free speech, and which carry custodial sentences, severely undermines the 2006 criminal law amendments. Under international human rights law, imprisonment is never justified as a punishment for defamation.⁴⁰
- c) Inappropriately represses and criminalizes the legitimate work of human rights

35 Permanent Court of International Justice, '*Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*' Advisory Opinion, 4 December 1935, 1935 P.C.I.J. (ser. A/B) No. 65 (Dec. 4) <http://www.worldcourts.com/pcij/eng/decisions/1935.12.04_danzig.htm> accessed 30 January 2017, p. 57.

36 United Nations, '*Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*', United Nations General Assembly, seventy-first session, 06 September 2016, UN Doc. A/71/373 <http://www.un.org/ga/search/view_doc.asp?symbol=A/71/373> accessed 30 January 2017, paras 13-14.

37 Commission on Human Rights, '*Report of the Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, Mr. Adib Hussain*' United Nations Economic and Social Council, fifty-fifth session, 29 January 1999, UN Doc. E/CN.4/1999/64, <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G99/107/66/PDF/G9910766.pdf?OpenElement>> accessed 30 January 2017, para. 28.

38 [General Comment No. 34](#), para 47.

39 FIDH: Worldwide Movement for Human Rights, '*The human rights situation in Cambodia*', 26 June 2007 <<https://www.fidh.org/en/region/asia/cambodia/The-human-rights-situation-in>> accessed 30 January 2017 (which describes how, on 26 May 2006, Article 63 of the transitional criminal law ("UNTAC Law") was amended to remove the custodial sentence for criminal defamation).

40 [General Comment No. 34](#), para 47; Commission on Human Rights, '*Report of the Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, Mr. Adib Hussain*' United Nations Economic and Social Council, fifty-fifth session, 29 January 1999, UN Doc. E/CN.4/1999/64, <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G99/107/66/PDF/G9910766.pdf?OpenElement>> accessed 30 January 2017, para. 28(h).

defenders to inform the public and advocate for protection of human rights.⁴¹ The overly broad and vague wording of Article 305 allows for the unfettered and arbitrary targeting of individuals and organizations working under an internationally protected mandate to raise awareness on public interest issues. The Special Rapporteur on freedom of opinion and expression has previously stated that “it is critical to raise the public conscience to ensure that criminal laws are not used (or abused) to stifle public awareness and suppress discussion of matters of general or specific interest”.⁴²

- d) Fails to explicitly establish truth and a reasonable effort to ascertain the truth as defences in accordance with international standards. The Special Rapporteur has also stated that: “To require truth in the context of publications relating to matters of public interest is excessive; it should be sufficient if reasonable efforts have been made to ascertain the truth.”⁴³

Acts of malicious denunciation (Articles 311 and 312)

51. Articles 311 and 312 of the Cambodian Criminal Code defines the offence of malicious denunciation as:

Article 311: Definition of malicious denunciation

“Malicious denunciation” is a denunciation of a fact, which is known to be false and liable to cause criminal or disciplinary sanctions, if it is sent to:

- a competent authority to take action, including judges, judicial police officers, or an employer; or
- any person having the power to refer it to the competent authority.

Article 312: Applicable penalty and conditions for prosecution

Malicious denunciation shall be punishable by imprisonment from one month to one year and a fine from one hundred thousand to two million Riels.

52. It is submitted that the offence of acts of malicious denunciation under Articles 311 and 312 could be used to criminalize free expression and that the offence, when used in this way, contravenes Cambodia’s international human rights obligations, because:

- a) It imposes disproportionately harsh sanctions by applying criminal penalties when civil remedies are sufficient, for the same reasons set out in para 50(b) above;
- b) Imposition of a custodial penalty upon conviction of the offence is contrary to international human rights law, which provides that imprisonment is never an appropriate penalty, for the same reasons set out in para 50(b) above;
- c) The offence is in conflict with the right to freedom of expression, which provides special protection to the right to criticize public officials, as set out in paragraph 45 above.

Publication of commentaries intended to unlawfully coerce judicial authorities (Article 522)

53. The offence of “publication of commentaries intended to unlawfully coerce judicial authorities” is defined as:

Article 522: Publication of commentaries intended to unlawfully coerce judicial authorities

41 *Ibid*, para. 28.

42 *Ibid*, para. 28(h).

43 *Ibid*, para. 28(d).

The publication, prior to the pronouncement of a final judicial decision, of commentaries intending to put pressure on the court seized of the complaint, in order to influence its judicial decision shall be punishable by imprisonment from one month to six months, and a fine from one hundred thousand to one million Riels.

- 54.** Similar to the analysis of “acts of malicious denunciation,” above, it is submitted that the offence of “publication of any commentaries to put pressure on jurisdiction” could be used to criminalize free expression.
- 55.** Discussion and criticism of judicial processes are considered protected speech under international human rights law, as set out above in paragraph 45. Considering Cambodia’s ranking in 2016 of 112 out of 113 globally for respect for rule of law,⁴⁴ frank and open discussion on judicial processes is especially important. As such, it is submitted that the offence of “publication of commentaries intended to unlawfully coerce judicial authorities” contravenes Cambodia’s international human rights obligations when used to criminalize free expression, because:
- a) Article 522 is vague and overbroad, in contradiction of the three-part test concerning Article 19(3) of the ICCPR that requires the law to be clear, for the same reasons set out in para 51(a) above. “Putting pressure”, within the meaning of Article 522, can be interpreted widely, such that it is impossible for a person to know, before hand, whether the statements are lawful or liable to punishment.
 - b) It imposes disproportionately harsh sanctions by applying criminal sanctions when civil remedies are sufficient, for the same reasons set out in para 50(b) above.
 - c) The offence is in conflict with the right to freedom of expression, which provides special protection to the right to criticize public officials, as set out in para 45 above.
 - d) The offence not only breaches the requirement of proportionality in terms of its sanctions, but in terms of the activity it prohibits. The wording of the offence violates the three-part test which requires that it must be proven as the least restrictive and proportionate means to achieve the purported aim when balanced against the right. This is especially the case when considering the “high value placed on expression directed towards matters of politics, governance and public life.”⁴⁵ The wording of this offence does not indicate any kind of threshold for the kind of commentaries that fall within the scope of the offence, rendering all forms of independent and lawful legal analysis susceptible to internationally unlawful prosecution.

6. CONCLUSION / SUBMISSIONS

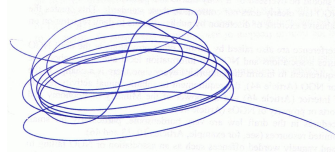
- 56.** It is respectfully submitted that to ensure adherence with Cambodia’s international human rights obligations, Cambodia’s Criminal Code must be interpreted consistently with international human rights law, including the ICCPR, and the principles as summarized above. It is incumbent on all branches of government, including the judiciary, to ensure respect for these obligations.
- 57.** Criminal sanctions for defamation – and other offences that are used to criminalize free expression – are to be avoided, as they contravene international human rights law guarantees of the right to freedom of expression. In particular, no form of imprisonment

44 Cristina Maza, ‘Cambodia worst in region for rule of law: report’, *The Phnom Penh Post*, 20 October 2016 <<http://www.phnompenhpost.com/national/cambodia-worst-region-rule-law-report>> accessed 30 January 2017; World Justice Project, *WJP Rule of Law Index 2016*, available at <http://worldjusticeproject.org/rule-of-law-index>.

45 United Nations, ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression’, United Nations General Assembly, seventy-first session, 06 September 2016, UN Doc A/71/373, <http://www.un.org/ga/search/view_doc.asp?symbol=A/71/373> accessed 30 January 2017, para. 33.

or detention is permissible under the ICCPR in cases of criminal defamation or other offences that criminalize free expression. In such cases, civil remedies are the proportionate means to achieve the lawful aim of protection of reputations from damaging statements that are false. Civil actions against defamation and any other measures that may chill or otherwise restrict or limit the exercise of freedom of expression must be proportionate and strictly necessary to protect the reputation of others.

58. Laws restricting freedom of expression must not be interpreted or applied to prevent or punish the exercise of the right of human rights defenders to protect the public interest by informing the public about possible human rights violations and advocating for improved protection of internationally protected rights.



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