

## I. INTRODUCTION

1. This legal analysis is written by the Cambodian Center for Human Rights (“CCHR”), a non-political, independent, non-governmental organization (“NGO”) that works to promote and protect democracy and respect for human rights – primarily civil and political rights – throughout the Kingdom of Cambodia (“Cambodia”). This legal analysis is also available on the CCHR website<sup>1</sup> and the CCHR hosted Cambodian Human Rights Portal.<sup>2</sup>
2. This legal analysis considers the charges of (i) incitement to discrimination, (ii) wrongful damage to property, (iii) forgery of a public document, and (iv) disinformation brought against Sam Rainsy (the “Defendant”), leader of the opposition Sam Rainsy Party (the “SRP”), in 2010, which resulted in his conviction on all four charges. For the purposes of this analysis, the four charges are divided into two sets: the incitement to discrimination and wrongful damage to property charges arose from events that took place on 25 October 2009 (the “25 October Charges”), while the forgery of a public document and disinformation charges arose from events that took place on 15 February 2010 (the “15 February Charges”). The analysis also considers the removal of the Defendant’s parliamentary immunity and examines the fairness of the respective proceedings which resulted in his conviction on all four charges.

### The 25 October Charges

3. On 25 October 2009 the Defendant traveled to Svay Rieng province’s Chantrea district and led a traditional Buddhist procession (Kathen) to Ang Romdenh pagoda in Koh Kban Kandal village, Samraong commune. It is alleged that the Defendant heard complaints from two villagers, Meas Srey and Prum Chea (the “Villagers”), that the Vietnamese authorities had placed wooden border markers on their land, and, after condemning these alleged encroachments, joined the Villagers in uprooting the wooden markers that constituted border post number 185 on the newly delineated Cambodia-Vietnam frontier, before taking them back to Phnom Penh (the “25 October Incident”).<sup>3 4</sup>
4. On 27 January 2010 the Defendant was convicted by the Svay Rieng Provincial Court for the 25 October Charges.

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<sup>1</sup> <http://www.cchrcambodia.org>

<sup>2</sup> <http://www.sithi.org>

<sup>3</sup> James O’Toole and Meas Sokchea, ‘Sam Rainsy raps “kangaroo court”’, *The Phnom Penh Post*, 24 September 2010.

<sup>4</sup> ‘Vietnam condemns act hindering border demarcation with Cambodia’, *Vietnam News Agency*, 31 October 2009.

5. An appeal case was heard on 5 October 2010 at the Court of Appeal in relation to the 25 October Charges, with the original verdict upheld on 13 October 2010. A final appeal case is due to be heard at the Supreme Court on 23 February 2011.

### The 15 February Charges

6. The 15 February Charges follow the Defendant's dissemination of maps on 15 February 2010 during a video press conference to his supporters at the SRP headquarters in Phnom Penh. The maps purported to show "unprecedented evidence" of Vietnamese border incursions. The maps indicated that the Cambodia-Vietnam border posts in Svay Rieng province's Chantrea district had been moved up to 500 meters inside Cambodian territory.<sup>5</sup>
7. Convictions for the 15 February Charges were handed down by the Phnom Penh Capital Court of First Instance on 23 September 2010.
8. An appeal by the Defendant against the 15 February Charges is pending.

## **II. LEGAL PROCEEDINGS**

9. According to the Speaker of the National Assembly, on 28 October 2009 the prosecutor of the Svay Rieng Provincial Court submitted a request to the Minister of Justice to have the Defendant's parliamentary immunity lifted. The Minister of Justice then forwarded the request to the Speaker of the National Assembly on the same day, seeking the lifting of the Defendant's parliamentary immunity in order to prosecute him on the 25 October Charges.<sup>6</sup>
10. On 12 November 2009 the Standing Committee of the National Assembly decided to submit the matter to the full session of the National Assembly for "consideration and adoption" of the request for the lifting of the Defendant's parliamentary immunity. On the same day, 64 members of the National Assembly requested a closed-door session for this purpose.<sup>7</sup>
11. On 16 November 2009 the Speaker of the National Assembly requested that the National Assembly pass the motion to lift the Defendant's parliamentary immunity by a show of hands.<sup>8</sup>

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<sup>5</sup> Meas Sokchea and Sebastian Strangio, 'Rainsy trial ready to proceed', *The Phnom Penh Post*, 8 September 2010.

<sup>6</sup> Inter-Parliamentary Union, Committee on the Human Rights of Parliamentarians, *Case No. CMBD/01 – Sam Rainsy – Cambodia*, 18-21 January 2010, available at [http://www.samrainsyparty.org/archives/achieve\\_2010/February/D-Rainsy-128-E.pdf](http://www.samrainsyparty.org/archives/achieve_2010/February/D-Rainsy-128-E.pdf).

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

12. On 16 November 2009 a majority of opposition members of the National Assembly boycotted the session after Cambodian People's Party ("CPP") parliamentarians refused to delay plans to vote on the stripping of the Defendant's parliamentary immunity and the remaining members all voted in favor of the motion (87 out of 87 votes). The Defendant's parliamentary immunity was lifted as a result of the vote.<sup>9</sup>
13. On 23 November 2009 the Svay Rieng Provincial Court prosecutor charged the Defendant with incitement to discrimination and wrongful damage to property under Articles 52 and 61 of the UNTAC Code respectively.<sup>10</sup>
14. On 17 December 2009 the Defendant was summoned to appear at the Svay Rieng Provincial Court for questioning in connection with the 25 October Incident.<sup>11</sup>
15. On 21 December 2009 eight people, including the Defendant, were summoned to appear in the Svay Rieng Provincial Court for questioning in connection with the 25 October Incident.<sup>12</sup> The Defendant refused to attend and remained in France instead,<sup>13</sup> where he has been since the beginning of November 2009.<sup>14</sup>
16. On 22 December 2009 the Svay Rieng Provincial Court questioned two commune officials in connection with the 25 October Incident. One of them said that he was questioned for about two hours, and that questions focused on his interactions with the Defendant and the Defendant's meetings with the Villagers who joined him in removing the border posts.<sup>15</sup>
17. On 28 December 2009 the Svay Rieng Provincial Court denied a request to delay hearings against the Defendant in relation to the 25 October Charges.<sup>16</sup>
18. On 31 December 2009 the Svay Rieng Provincial Court issued an arrest warrant for the Defendant in connection with the 25 October Charges.<sup>17</sup>
19. On 4 January 2010 Prime Minister Hun Sen stated publicly that there would be no pardon for the Defendant in the event that he were to be convicted by the Svay Rieng Provincial Court.<sup>18</sup>

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<sup>9</sup> *Ibid.*

<sup>10</sup> Meas Sokchea and Sebastian Strangio, 'Sam Rainsy sentenced in absentia', *The Phnom Penh Post*, 27 January 2010.

<sup>11</sup> Meas Sokchea, 'Sam Rainsy called to court over border spat', *The Phnom Penh Post*, 18 December 2009.

<sup>12</sup> Meas Sokchea, 'Eight to appear in Svay Rieng court over SRP removal of border marker' *The Phnom Penh Post*, 22 December 2009.

<sup>13</sup> Sok Serey, *Radio Free Asia*, 17 December 2009.

<sup>14</sup> Mao Sotheany, *Radio Free Asia*, 3 November 2009.

<sup>15</sup> Meas Sokchea, 'Court grills officials over border stunt' *The Phnom Penh Post*, 23 December 2009.

<sup>16</sup> Meas Sokchea, 'Court refuses to delay Sam Rainsy hearing' *The Phnom Penh Post*, 29 December 2009.

<sup>17</sup> Meas Sokchea, 'Opposition leader repudiates "political" charges against him', *The Phnom Penh Post*, 1 January 2010.

<sup>18</sup> Meas Sokchea and Sebastian Strangio, 'Sam Rainsy sentenced in absentia', *supra* note 10.

20. On 10 January 2010 the Svay Rieng Provincial Court summoned the Defendant to appear in court on 27 January 2010 to face the 25 October Charges (along with the Villagers, who were charged with wrongful damage to property).<sup>19</sup>
21. On 27 January 2010 the Defendant and the other defendants were convicted of the 25 October Charges. The Defendant was sentenced to two years in prison in respect of both charges taken together; the Villagers both received one-year terms for wrongful damage to property; the Villagers and the Defendant were ordered to pay joint fines and legal costs amounting to 55 million riels – 50 million riels as compensation to “civil parties” and five million riels as a fine to the state; and the Defendant was ordered to pay an additional eight million riels in compensation to district authorities.<sup>20 21</sup> The Defendant’s fines and compensation were amalgamated in respect of both charges taken together.
22. On 16 February 2010 certain SRP parliamentarians wrote to the National Assembly requesting information about the placement of border posts 184, 185, 186 and 187 on the Cambodia-Vietnam border. According to Article 96 of the Constitution of the Kingdom of Cambodia (the “Constitution”), the SRP said, the government is obliged to respond within seven days to any written question from a parliamentarian.<sup>22</sup>
23. On 22 February 2010 chief border negotiator Var Kimhong threatened the Defendant with charges of falsifying public documents in connection with the dissemination of the maps on 15 February 2010 and the alleged border issue with Vietnam.<sup>23</sup>
24. On 24 February 2010, following the Defendant’s dissemination of maps on 15 February 2010 purporting to show “unprecedented evidence” of Vietnamese border incursions, Prime Minister Hun Sen accused the Defendant of falsifying public documents and said that he would not be able to return to Cambodia for the National Assembly election in 2013.<sup>24</sup>
25. On 3 March 2010 the Defendant was summoned to appear in court on 9 March 2010 to answer questions relating to the 15 February Charges, which were filed by prosecution lawyers the previous month.<sup>25</sup>

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<sup>19</sup> Meas Sokchea, ‘Trial date set in Rainsy case’, *The Phnom Penh Post*, 11 January 2010.

<sup>20</sup> Meas Sokchea and Sebastian Strangio, ‘Sam Rainsy sentenced in absentia’, *The Phnom Penh Post*, 27 January 2010.

<sup>21</sup> Meas Sokchea, ‘Sam Rainsy conviction upheld’, *The Phnom Penh Post*, 13 October 2010.

<sup>22</sup> Sebastian Strangio, ‘SRP seeks data on border markers’, *The Phnom Penh Post*, 17 February 2010.

<sup>23</sup> Meas Sokchea, ‘PM says Sam Rainsy will miss 2013 polls’, *The Phnom Penh Post*, 25 February 2010.

<sup>24</sup> *Ibid.*

<sup>25</sup> Ly Meng Huor, *Radio France Internationale*, 3 March 2010.

26. On 9 March 2010 the Phnom Penh Capital Court of First Instance rejected a request from the Defendant's lawyer to delay the scheduled questioning of the Defendant, who had been summoned to appear pending the 15 February Charges.<sup>26</sup>
27. After opening investigations into the 15 February Charges on 11 March 2010, the Phnom Penh Capital Court of First Instance formally charged the Defendant on 14 March 2010.<sup>27</sup>
28. On 5 April 2010 the Phnom Penh Capital Court of First Instance summoned the Defendant to appear on 20 April 2010 to answer the 15 February Charges, threatening to issue an arrest warrant if he were to fail to appear.<sup>28</sup>
29. On 20 April 2010 the Defendant's lawyer asked the Phnom Penh Capital Court of First Instance to form a committee to investigate the placement of border posts in Svay Rieng province's Chantrea district; and, on 28 April 2010, the Defendant's lawyer said that a new border committee had to be established if the Phnom Penh Capital Court of First Instance intended to prosecute his client on disinformation charges. He argued that if his request were not followed and a new committee appointed, the Defendant must be acquitted.<sup>29</sup>
30. On 19 May 2010 the Phnom Penh Capital Court of First Instance rejected a request to form a bipartisan committee to review claims of Vietnamese border encroachment, but it agreed to order a prosecution lawyer to provide more specific details concerning the location of the contentious border posts.<sup>30</sup>
31. On 6 June 2010 the Court of Appeal postponed an appeal hearing in relation to the 25 October Charges after both the lawyer for the Defendant and the lawyer for the Villagers walked out of the courtroom.<sup>31</sup>
32. On 8 June 2010 the Court of Appeal upheld a ruling rejecting a request by the Defendant's lawyer to form an independent, bipartisan committee to investigate claims of Vietnamese border encroachment.<sup>32</sup>
33. On 8 July 2010 the Court of Appeal summoned the Defendant and the Villagers to a hearing scheduled for 9 August 2010.<sup>33</sup>
34. On 5 August 2010 a lawyer for the Defendant said that he would boycott an appeal

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<sup>26</sup> Meas Sokchea, 'Hearing on Sam Rainsy to proceed as planned', *The Phnom Penh Post*, 10 March 2010.

<sup>27</sup> Vong Sokheng, 'Court opens probe of new Sam Rainsy case', *The Phnom Penh Post*, 12 March 2010.

<sup>28</sup> Meas Sokchea, 'Sam Rainsy called for questioning', *The Phnom Penh Post*, 6 April 2010.

<sup>29</sup> Meas Sokchea, 'Sam Rainsy lawyer asks for border post committee', *The Phnom Penh Post*, 21 April 2010.

<sup>30</sup> Meas Sokchea, 'Sam Rainsy wins one loses one at Municipal Court', *The Phnom Penh Post*, 20 May 2010.

<sup>31</sup> Meas Sokchea, 'Sam Rainsy Hearing Delayed', *The Phnom Penh Post*, 10 August 2010.

<sup>32</sup> Meas Sokchea, 'Court rejects request for border panel', *The Phnom Penh Post*, 9 June 2010.

<sup>33</sup> Meas Sokchea, 'Court calls Svay Rieng villagers to testify', *The Phnom Penh Post*, 9 July 2010.

hearing scheduled for the following week if the Villagers were not able to attend.<sup>34</sup>

35. On 9 August 2010 the Court of Appeal postponed a hearing in relation to the 25 October Charges<sup>35</sup> because the Villagers' lawyer was out of the country.<sup>36</sup>
36. On 23 September 2010 the Phnom Penh Capital Court of First Instance convicted the Defendant on the 15 February Charges of forging public documents and disinformation and sentenced him to ten years in prison in respect of both charges taken together. He was also ordered to pay 5 million riels in fines and 60 million riels in compensation to the state since, according to the court, he had "seriously affected" the reputation of the Royal Government of Cambodia (the "RGC").<sup>37</sup>
37. On 5 October 2010 the Defendant's appeal against the convictions for the 25 October Charges was heard in the Court of Appeal. Five witnesses were called and other witnesses had their statements read in court, but all witness statements were identical to those submitted in the court of first instance on 27 January 2010.<sup>38</sup>
38. On 13 October 2010 the convictions for the 25 October Charges were upheld on appeal.<sup>39</sup>

### III. THE CHARGES

39. While the Penal Code is now in force, at the time of the events that resulted in both the 25 October Charges and the 15 February Charges, the 1992 United Nations Transitional Authority in Cambodia, Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia During the Transitional Period Code (the "UNTAC Code") was still in force. The Defendant was therefore charged, and convicted of, the following charges under the UNTAC Code:

#### The 25 October Charges

- a) Incitement to discrimination under Article 61:

*"1. Any person who, by one of the means listed in Article 59 [Incitement Leading to the Commission of a Felony], provokes national, racial, or religious hatred that constitutes incitement to discrimination, hostility*

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<sup>34</sup> Meas Sokchea, 'Sam Rainsy's lawyer threatens to boycott Appeal Court hearing', *The Phnom Penh Post*, 6 August 2010.

<sup>35</sup> Meas Sokchea, 'Sam Rainsy Hearing Delayed', *The Phnom Penh Post*, 10 August 2010.

<sup>36</sup> 'Cambodian court postpones appeal hearing for opposition leader', *Earth Times*, 9 August 2010.

<sup>37</sup> Meas Sokchea and James O'Toole, 'Sam Rainsy gets ten years', *The Phnom Penh Post*, 23 September 2010.

<sup>38</sup> Meas Sokchea, 'Appeal of Sam Rainsy case heard', *The Phnom Penh Post*, 5 October 2010.

<sup>39</sup> Meas Sokchea, 'Sam Rainsy conviction upheld', *The Phnom Penh Post*, 13 October 2010.

*or violence shall be punished by imprisonment of one month to one year, a fine of one million to ten million Riels, or both. [...]*

b) Wrongful damage to property under Article 52:

*“Any person who intentionally damages or attempts to damage the property of another is guilty of the misdemeanor of wrongful damage to property and shall be liable to a term of imprisonment of one to three years. If the damage is minor or the property of little value the imprisonment shall be reduced to two months to one year. Wrongful damage to cultural property belonging to the Cambodian national heritage is covered by Article 44 [Offences Concerning Cultural Property].”*

The 15 February Charges

c) Forgery of a public document under Article 49:

*“Any elected official, civil servant, military personnel, or official agent of any of the four Cambodian parties<sup>40</sup> to the Paris Agreement<sup>41</sup> or of any registered political party who, while performing official duties or tasks related to such duties, commits a forgery, either by false signature, or by alteration of a deed, writing or signature, or by impersonation, or by false entry into a registry or other public deed after its execution or closing, and any person who knowingly makes use of the same, is guilty of forgery of a public document and shall be liable to a term of imprisonment of five to fifteen years.”*

d) Disinformation under Article 62:

*“The director or other party responsible for a publication or other means of communication who took the decision to publish, distribute or reproduce by any means information which is false, fabricated, falsified or untruthfully attributed to a third person and did so in bad faith and with malicious intent, provided that the publication, distribution or reproduction has disturbed or is likely to disturb the public peace, shall be liable to a punishment of six months to three years in prison, a fine of one million to ten million Riels, or both.”*

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<sup>40</sup> (i) The Cambodian government’s Kampuchean People’s Revolutionary Armed Forces, (ii) Prince Norodom Sihanouk’s FUNCINPEC party, (iii) the Party of Democratic Kampuchea (also known as the “Khmer Rouge”), and (iv) the Khmer People’s National Liberation Front.

<sup>41</sup> The Agreement on a Comprehensive Political Settlement of the Cambodian Conflict, signed on 23 October 1991 at the 1991 Paris Conference, giving the United Nations full authority to supervise a ceasefire, repatriate the displaced Cambodians along the border with Thailand, disarm and demobilise the factional armies, and prepare Cambodia for free and fair elections.

#### IV. THE RIGHT TO FREEDOM OF EXPRESSION

##### *Right to freedom of expression*

40. The right to freedom of expression is enshrined in Cambodia under international and domestic law. Articles 19 in both the Universal Declaration for Human Rights (the “UDHR”) and the International Covenant on Civil and Political Rights (the “ICCPR”) provide for the right to freedom of expression. Article 19 of the UDHR provides as follows:

*“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.”*

41. The UDHR is a resolution adopted by the UN General Assembly that proclaims a common standard of respect for rights and freedoms to be achieved for all people and all nations. Much of the UDHR is regarded as having acquired legal force as customary international law.<sup>42</sup>

42. Article 19 of the ICCPR, which Cambodia ratified on 26 May 1992, provides for the right to freedom of expression in the following terms:

*“Everyone shall have the right to hold opinions without interference. (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.”*

43. Both the UDHR and the ICCPR are binding on Cambodia pursuant to Article 31 of the Constitution, which states: “[t]he Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women's and children's rights [...]” Furthermore, the binding nature of the UDHR and the ICCPR is clarified by a decision of the Cambodian Constitutional Council dated 10 July 2007 which says that all international conventions that Cambodia has recognized form part of Cambodian law.<sup>43</sup>

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<sup>42</sup> Antônio Augusto Cançado Trindade, *Universal Declaration of Human Rights*, United Nations Audio-visual Library of International Law, 2008, p. 2, available at [http://untreaty.un.org/cod/avl/pdf/ha/udhr/udhr\\_e.pdf](http://untreaty.un.org/cod/avl/pdf/ha/udhr/udhr_e.pdf).

<sup>43</sup> Constitutional Council of the Kingdom of Cambodia, *Decision No. 092/003/2007*, 10 July 2007.



44. The right to freedom of expression is also expressly guaranteed by Article 41(1) of the Constitution in the following terms: “*Khmer citizens shall have freedom of expression, press, publication and assembly*”.

### *Limitations*

45. The right to freedom of expression is not absolute, rather certain limitations exist in both international and domestic law preventing its exercise. The UDHR provides that any limitations to the right to freedom of expression, or any right for that matter, shall be “*determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society*”.<sup>44</sup>
46. The ICCPR provides that limitations to the right to freedom of expression must be “*provided by law and [...] necessary*” to ensure “[...] *respect of the rights or reputations of others*” or “[...] *the protection of national security or of public order (‘ordre public’), or of public health or morals*”.<sup>45</sup>
47. Notwithstanding variations in domestic laws protecting the right to freedom of expression, a degree of consistency has developed over time giving rise to a three-part test in international law to determine the legitimacy, or otherwise, of a limitation on the right to freedom of expression. In order for a limitation to be legitimate, it must abide by the following three conditions:
1. The interference must be provided for by law. To satisfy this requirement, the limitation must be “*formulated with sufficient precision to enable the citizen to regulate his conduct*”.<sup>46</sup>
  2. The interference must be in furtherance of a legitimate aim. No other aims beyond those provided for in the international treaties are legitimate for the purposes of limiting the right to freedom of expression.
  3. The restriction must be necessary to secure one of those aims. This requirement applies a proportionality test whereby the limitation must be proportionate in order to achieve a “*pressing social need*”.<sup>47</sup>
48. The United Nations Human Rights Committee guidance on the limitations to the right to freedom of expression provides that limitations to freedom of expression are

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<sup>44</sup> United Nations General Assembly, *Universal Declaration of Human Rights*, Resolution 217A (III), UN Doc. A/810, art. 29, 10 December 1948.

<sup>45</sup> United Nations General Assembly, *International Covenant on Civil and Political Rights*, UN Doc. A/6316, 16, December 1966.

<sup>46</sup> *The Sunday Times v. United Kingdom*, European Court of Human Rights, 26 April 1979, Application No. 6538/74, 2 EHRR 245, para. 49.

<sup>47</sup> *Lingens v. Austria*, European Court of Human Rights, 8 July 1986, Application No. 9815/82, 8 EHRR 407, paras. 39-40

only permissible where such expression threatens to jeopardize another right contained in the ICCPR.<sup>48</sup>

49. Although Article 41 of the Constitution provides that the right to freedom of expression shall not be exercised “*to infringe the rights of others, to affect the good traditions of the society, to violate public law and order and national security*”, the Siracusa Principles – a uniform interpretation of limitations on the rights promulgated in the ICCPR widely accepted as the international standard – state that “[a] limitation to a human right based upon the reputation of others shall not be used to protect the state and its officials from public opinion or criticism”.<sup>49</sup> This limitation is to ensure that state officials do not use defamation laws to silence legitimate criticism and debate, a common practice in contemporary Cambodia. In this regard, it is worthy of note that the Constitution expressly provides, in Article 39, for the right to “*denounce, make complaints, or file claims against any breach of law by the state or social organs or by members of such organs committed during the course of their duties*”.
50. According to Article XIX, the leading international organization devoted to promoting and protecting the right to freedom of expression, “international law imposes one clear positive duty upon states as far as restrictions of freedom of expression is concerned”,<sup>50</sup> namely the prohibition on war propaganda and hate speech contained in Article 20 of the ICCPR which is formulated as follows:

*“Any propaganda for war shall be prohibited by law. (2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”*
51. Article XIX characterizes Article 20 as “the only duty that States must abide by, as far as restricting freedom of expression is concerned”, but notes that there is no agreed definition of war propaganda or hate speech in international law and that there exists marked differences in the approaches of regional and national formulations and interpretations.
52. While CCHR is a staunch defender of freedom of expression, it also believes in the fundamental right of all human beings to be treated with dignity and equality, free from discrimination on grounds of race, sex, language or religion. In this respect, both Article 20 of the ICCPR and Article 61 of the UNTAC Code prohibit the

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<sup>48</sup> UN Human Rights Committee, *General Comment 31: Nature of the Legal Obligation Imposed on State Parties to the Covenant*, 26 May 2004. Cf. European Court of Human Rights, Application No. 23559/94, *Ceylan v. Turkey*, 8 July 1999.

<sup>49</sup> UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, available at <http://www.unhcr.org/refworld/docid/4672bc122.html>.

<sup>50</sup> Dr Agnes Callamard, Speech at Expert Meeting on the Links Between Articles 19 and 20 of the ICCPR: Freedom of Expression and Advocacy of Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence, 2-3 October 2008, Geneva, Switzerland.

promotion of racial hatred that constitutes incitement to discrimination, hostility or violence.

## V. LEGAL ANALYSIS OF GROUNDS FOR CONVICTIONS

53. The following paragraphs provide an analysis of whether the elements of each of individual charges were established by the Svay Rieng Provincial Court and the Phnom Penh Capital Court of First Instance respectively, and whether each charge was supported by sufficient evidence.

### The 25 October Charges

#### *Incitement to discrimination (Article 61)*

54. In order for a person to be convicted under Article 61(1), (i) that person must have provoked national, racial, or religious hatred; (ii) that hatred must constitute incitement to discrimination, hostility or violence; and (iii) the person must have used one of the means listed in Article 59 [Incitement Leading to the Commission of a Felony]. Article 59 comprises the following means: “[...] speech, shouts or threats made in a public place or meeting, [...] writings, publications, drawings, engravings, paintings, emblems, films or any other mode of writing, speech, or film that is sold, distributed, offered for sale or displayed in a public place or meeting, [...] signs or posters displayed in public, or [...] any other means of audiovisual communication”.
55. For historical and political reasons that are beyond the scope of this legal analysis, there is a significant degree of existing bad feeling towards Vietnam in Cambodia, and particularly in the border areas.<sup>51</sup> In leading protests against the alleged border incursions, the Defendant was feasibly stirring those feelings up and provoking national and/or racial anti-Vietnamese hatred. From video clips taken of the protests, it is clear that the Defendant uses the term “Yuon” (“Do not let Yuons take Khmer land!”<sup>52</sup>), although, due to editing of the video clip, there is some doubt as to whether the Defendant is using the term himself, or whether he is quoting someone else, perhaps one of the Villagers, as he does elsewhere in the same video clip. The term “Yuon” is a term that refers to the Vietnamese people and is considered by many – including many Vietnamese themselves – to be derogatory, although there is some debate on this front.<sup>53</sup> “Yuon” is the historical term used by the Khmer people to refer to the Vietnamese people, with the result that many Khmer people are not aware that it can be offensive nor do they consider it to carry the racist overtones that other expressions do. Furthermore, there is no evidence from this video clip (or

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<sup>51</sup> Irwin Loy, ‘Cambodia’s courts deal blow to opposition’, *Asia Times Online*, 25 September 2010.

<sup>52</sup> ‘Vietnamese are grabbing Khmer villagers rice field’, *YouTube*, available at <http://www.youtube.com/watch?v=wBLL05C1Del>.

<sup>53</sup> Kenneth T. So and Sophal Ear, ‘Yuon: What’s in a xenonym?’, *The Phnom Penh Post*, February 2010.

any others available online)<sup>54</sup> that the Defendant was trying to incite national or racial hatred; rather he may have simply been guilty of falling short of true political correctness. While it could be argued that, rather than focusing purely on the legal aspects of land ownership, the Defendant politicized the issue and presented it as a national issue regarding Vietnam and its people (aided and abetted by the RGC), such behavior does not necessarily constitute provoking national or racial hatred.

56. The second limb of Article 61 requires that the hatred must constitute incitement to discrimination, hostility or violence. There is no evidence from the available video clips mentioned in paragraph 55 above that any anti-Vietnamese hatred stirred up or given voice resulted in anything remotely approaching either hostility or violence. As regards discrimination, *i.e.*, “the unjust or prejudicial treatment of different categories of people, especially on the grounds of race, age or sex”,<sup>55</sup> it could feasibly be argued that the Villagers were behaving unjustly or prejudicially towards Vietnamese people, namely re-locating the border posts on the grounds that the aggressors were Vietnamese rather than that the original incursions were illegal, and that the Defendant exploited this prejudice on the part of the Villagers in order to make a political point; however, it could equally be argued that the Villagers were merely defending their lawfully owned land, and that any national or racial hatred provoked was incidental to rather than the motivation for their actions. Questions therefore necessarily arise as to whether the Defendant’s actions satisfied the second limb of Article 61.
57. With regard to the third limb of Article 61, there is no doubt that the Defendant was speaking in a public place, and was therefore using one of the means listed in Article 59. Given that the Defendant also issued various press releases on the subject, as well as posting a succession of claims and announcements on the SRP website, it is clear that the Defendant triggered this third limb.
58. If, therefore, it can be proven that the Defendant triggered the first and second limbs of Article 61, *i.e.*, that anti-Vietnamese hatred was stirred up and that that hatred constituted incitement to discrimination, then there would indeed be grounds on which to convict the Defendant under Article 61. However, as discussed above, it remains unclear whether the Defendant satisfied these two limbs and, in the absence of additional evidence, it can only be concluded that the elements of this offence have not been fully established.
59. Furthermore, the Defendant’s comments are protected by the right to freedom of expression as outlined above. Both as an individual and in his role as member of the National Assembly and leader of the SRP, the Defendant should be able to voice his

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<sup>54</sup> ‘Mr. Sam Rainsy visiting Svay Rieng border on October 25, 2009’, *YouTube*, available at <http://www.youtube.com/watch?v=ZO7DqIfdDMI> and ‘SRP Kathen religious procession and ceremony in Svay Rieng province October 25, 2009’, *YouTube*, available at <http://www.youtube.com/watch?v=1qnlYJtnSVg>.

<sup>55</sup> *Oxford Dictionaries*, available at <http://oxforddictionaries.com/?attempted=true>.

opinions, even if controversial or discredited, without censorship, intimidation or sanctions. The Defendant's comments, while not perhaps politically correct, were legitimately grounded in the right to freedom of expression under international and domestic law. It is important to remember that insulting or distasteful speech is protected by international and domestic standards on the right to freedom of expression in the same way as any other type of speech or expression. Furthermore, the Defendant's moving of the wooden border poles could also be considered a voicing of opinions, a physical manifestation of his right to freedom of expression.

60. As set out above, regarding the limitations to the right to freedom of expression, there does exist a threshold beyond which comments or other expressions of opinion would be deemed unacceptable; however, no evidence was provided to the effect that the Defendant's actions that led to the 25 October Charges constituted violence or impacted in any negative way upon the rights of ethnic Vietnamese people living in Cambodia or of any other group. The Defendant's comments cannot be deemed a call to war or violence; rather they represented an attempt both to comment upon an issue of national importance, *i.e.*, that the Vietnamese authorities had allegedly been encroaching upon Cambodian territory in the context of the attempted settling of the long-disputed Cambodia-Vietnam border, and to defend land which he considered rightfully to belong to the Villagers. While the Defendant could have chosen more political correct language, it is difficult to argue that the Defendant's actions on 25 October 2009 triggered the Article 20 limitation discussed at paragraph 50 above. In other words, his words fell short of war propaganda or hate speech – which means that they should be protected under the freedom of expression provisions of Cambodian and international law and should not be subject to sanction.

*Wrongful damage to property (Article 52)*

61. In order for a person to be convicted of wrongful damage to property under Article 52: (i) that person must have damaged or attempted to damage property; (ii) that property must belong to another; and (iii) such damage or attempt to damage must have been intentional. The UNTAC Code does not contain definitions of “damage” or “property”, so everyday common-sense interpretations of both words will have to be employed when applying Article 52.
62. It is hard to argue that the Defendant has not triggered the second limb of Article 52, since the border poles do not belong to the Defendant but rather to the authorities, whether Cambodian or Vietnamese, or both. There is also no doubt that the Defendant moved the poles intentionally, so, if the first limb can be proven, then the third would follow without complication.
63. “Damage” is defined as: “physical harm that impairs the value, usefulness, or normal function of something”.<sup>56</sup> It is likely that the law will generally be interpreted

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<sup>56</sup> *Ibid.*

widely, with temporary as well as permanent harm constituting “damage”. It is really a question of fact, although there is no evidence to suggest that the Defendant impaired the value, usefulness or normal function of the border poles; rather, he just uprooted them and moved them off the land that allegedly belongs to the Villagers. However, if actual physical damage can be proven, then the first limb of Article 52 would be triggered.

64. As for whether any potential damage was unlawful or “wrongful”, it is a valid defense against such a charge if the damage in question is caused either in an attempt at self-defense or with a lawful excuse, which includes an attempt to protect one’s own or another’s property in the event that the person in question believed that the need for protection was immediate and that the methods used were reasonable. A lawful excuse with respect to this charge would be that the land belonged to the Villagers – this claim was never disproven in court – in which case the Defendant clearly had the consent of the Villagers and was merely removing illegally placed border posts from their land.
65. The defense applies even if the person erroneously believed the property to be his or hers (or another’s), *i.e.*, the belief must be honestly held rather than necessarily correctly held. So even if the land had been proven not to belong legally to the Villagers, if the Defendant can establish that he honestly believed the land to belong to the Villagers, he cannot be found guilty of this charge, as he lacked the necessary mental element required to trigger a conviction under Article 52. Therefore the question of ownership of the land may, insofar as this charge is concerned, be immaterial if the Defendant honestly believed that the land belonged to the Villagers.

### The 15 February Charges

#### *Forgery of a public document (Article 49)*

66. In order for a person to be convicted under Article 49, (i) that person must be either an elected official, a civil servant, military personnel, an official agent of any of the four Cambodian parties to the Paris Agreement<sup>57</sup> or of any registered political party; (ii) that person must have committed a forgery; (iii) that forgery must have been by way of either false signature, alteration of a deed, writing or signature, impersonation, or false entry into a registry or other public deed after its execution or closing; and (iv) the forgery must have been committed while the person was performing official duties or tasks related to such duties. It is also worth noting that any person who knowingly makes use of any forged public document is guilty of forgery of a public document.
67. The Defendant is an agent of the SRP and an elected official, being an elected representative and member of the National Assembly, and therefore satisfies the first limb of Article 49.

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<sup>57</sup> Supra note 41.

68. Jumping to the fourth limb, the alleged forgery was committed during the performance of official duties, as the Defendant was carrying out his role as leader of the main opposition party of Cambodia, namely questioning government actions and policy by disseminating maps purporting to show that the Cambodia-Vietnam border posts had been moved inside Cambodian territory. This means that the fourth limb can be proven without difficulty.
69. It is less clear, however, whether the second and third limbs were triggered, *i.e.*, whether the Defendant committed forgery and how that forgery was effected. Forgery is defined as: “the action of forging a copy or imitation of a document, signature, banknote, or work of art”.<sup>58</sup> At no stage in proceedings was it proven that the Defendant forged the maps, and on that basis the grounds for his conviction are necessarily suspect.
70. The prosecution alleges that none of the maps that the Defendant disseminated are official United Nations (“UN”) maps, because the Defendant’s maps have grids, whereas UN maps do not. Yet, despite the fact that statements were read in court, and a slideshow presentation about the maps shown, no further evidence was submitted. Furthermore, the Defendant’s lawyer asked if he could take the official UN maps to compare them with the Defendant’s maps, but his request was refused.
71. The Defendant, on the other hand, claims that his maps are consistent with French SGI 1952 1/100,000 maps deposited at the UN by the RGC under then-Prince Norodom Sihanouk in March 1964, and that, as regards the international frontier, the United States (the “US”) Army 1966 1/50,000 maps corroborated the French-drawn maps.<sup>59</sup> The photographs taken on 14 January 2010 would seem to support the Defendant’s case. Furthermore, in a statement broadcast on 28 January 2010 on Radio Free Asia, government representative and Border Committee chief Var Kim Hong admitted that the maps used by the Defendant in his presentation to expose border encroachment by Vietnam were the “correct maps.”<sup>60</sup> Whether the maps are correct or not is really beside the point as far as the allegations of forgery are concerned (in contrast to the charges for disinformation where this factor is key): one can equally forge a correct copy of a document or a false one; however, the fact that the maps would appear to reflect internationally recognized boundaries adds weight to the Defendant’s claims that the maps are genuine.

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<sup>58</sup> Oxford Dictionaries, *supra* note 53.

<sup>59</sup> SRP Members of Parliament, *Defense of Cambodia’s Territorial Integrity Moves a Step Forward*, 24 January 2010, available at [http://www.samrainsyparty.org/archives/achieve\\_2010/January/Defense%20of%20Cambodia.htm](http://www.samrainsyparty.org/archives/achieve_2010/January/Defense%20of%20Cambodia.htm).

<sup>60</sup> SRP Members of Parliament, *Government admits mistake on border post location*, 29 January 2010, available at [http://www.samrainsyparty.org/archives/achieve\\_2010/January/Government%20admits%20mistake%20on%20border%20post%20location.htm](http://www.samrainsyparty.org/archives/achieve_2010/January/Government%20admits%20mistake%20on%20border%20post%20location.htm).

72. Furthermore, the Defendant claims that the maps disseminated on 15 February 2010 were not public documents, arguing that for a document to be deemed public, it must be recognized by public officials and the law. The maps disseminated over the Internet, the Defendant argues, did not receive recognition from public officials, nor from the law, and are therefore not valid public documents.<sup>61</sup> This is a shrewd argument that would seem to trap the prosecution with its own logic: because the RGC does not recognize the maps as being genuine, then they cannot be considered “public documents”. In other words, even if the maps were proven to be forgeries, they would not be forgeries of public documents. Again, the basis of the Defendant’s conviction on this charge is therefore questionable.

### *Disinformation (Article 62)*

73. In order for a person to be convicted under Article 62, (i) the person must be a director or other party responsible for a publication or other means of communication; (ii) the person must have taken the decision to publish, distribute or reproduce information by any means; (iii) that information must have been either false, fabricated, falsified or untruthfully attributed to a third person; (iv) the publication, distribution or reproduction must have been in bad faith and with malicious intent; and (v) the publication, distribution or reproduction must have disturbed or be likely to disturb the public peace.

74. As leader of Cambodia’s main opposition party, the SRP, which has its own website and various other means of communicating with the public, it can easily be argued that the Defendant is a “party responsible for [...] other means of communication”, thereby satisfying the first limb of Article 62. The maps were disseminated by way of an official SRP publication. In the same vein, the Defendant clearly took the decision to publish the information, thereby satisfying the second limb.

75. The maps that the Defendant disseminated need to be proven by the prosecution to be false or fabricated for the third limb to be satisfied. Thus far no evidence has been produced to suggest that this is the case, although, equally, if the Defendant had proven that his maps reflected an internationally accepted or previously established border between Cambodia and Vietnam, his defense would be stronger. It is interesting, though, that the alleged Vietnamese border incursions seem to have been reversed at a later date, suggesting that the Defendant might well have been accurate in his claims: on 7 April 2010 the Defendant proclaimed a “big victory” for Cambodia, citing court documents that he claimed showed that the RGC shared his view that demarcation efforts along the Cambodia-Vietnam border had been carried out illegally.<sup>62</sup> The evidence of the photographs taken on 14 January 2010 and

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<sup>61</sup> Pech Bandol, ‘Court delayed the sentencing of opposition leader Sam Rainsy to 23 September 2010’, *Free Press Magazine Online*, 8 September 2010.

<sup>62</sup> Sam Rainsy, ‘Big Victory for Cambodia Regarding Border Issue’, 7 April 2010, available at [http://www.samrainsyparty.org/archives/achieve\\_2010/April/BIG%20VICTORY%20FOR%20CAMBODIA%20REGARDING%20BORDER%20ISSUE.htm](http://www.samrainsyparty.org/archives/achieve_2010/April/BIG%20VICTORY%20FOR%20CAMBODIA%20REGARDING%20BORDER%20ISSUE.htm).



published on the SRP website suggests that the authorities (allegedly Vietnamese and Cambodian<sup>63</sup>) realized that the Defendant's claims were correct and tried to move the border posts at a later stage. Furthermore, these photographs showed evidence that border posts other than number 185 had been removed.<sup>64</sup> The SRP website also claims that border post number 185 was replaced immediately after the Defendant and the Villagers moved it, but then removed once again by authorities on 16 November 2010.<sup>65</sup> If the Defendant is proven to be right in his claims, *i.e.*, if the maps are correct, regardless of whether they are forgeries or not, then there is no conceivable grounds for his conviction on this charge.

76. As to whether the dissemination of the maps was in bad faith or with malicious intent, again, it needs to be proven that the Defendant's actions in disseminating the maps were motivated by something less honest than a desire both to prove that his claims, whether correct or not, were accurate, and to justify his actions on 25 October 2009. With such a political case, it is possible to see political motivations on both sides: on 23 September 2010 the President of the Judges' Panel said that the Defendant's actions were motivated by a desire to discredit the RGC. Such a motivation is perfectly feasible, given the animosity and history between the SRP and the CPP-controlled RGC, but it needs to be proven that the Defendant's motives were disingenuous to satisfy the fourth limb of Article 62. In the circumstances no such proof has been provided.
77. As for the fifth limb, the dissemination of the maps needs to have disturbed or have been likely to disturb the public peace. This limb is sufficiently vague in its drafting for it to be meaningless in the circumstances: all that the Defendant was doing was supporting his claims. There is no evidence that the public peace was disturbed at all, especially as the maps were disseminated in an online communication with the Defendant's own party, the SRP, so this limb has also not been established.
78. There is too much uncertainty surrounding the facts of the Cambodia-Vietnam border issue, the maps that the Defendant disseminated in support of his claims, and his motives for doing so, for there to be any reasonable grounds for a conviction under Article 62. In the event that the appropriate supporting evidence had been marshaled and submitted to the court – and, most importantly, that the maps had been shown to be false – there may have been a remote possibility that a conviction could have been justifiably handed down; but, on the facts, there is nothing to suggest that the Defendant is guilty of this charge.
79. Even if the Defendant was not right with regards to the alleged land incursions and the maps, he is still entitled under the international and domestic freedom of

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<sup>63</sup> Sam Rainsy Party, 'Photos of Border Posts #184, #185, #186 and #187 in Samraong Commune, Chantrea District, Svay Rieng Province', available at [http://www.samrainsyparty.org/archives/achieve\\_2010/Border%20posts/Border%20posts.pdf](http://www.samrainsyparty.org/archives/achieve_2010/Border%20posts/Border%20posts.pdf).

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

expressions provisions to say what he wants, as long as any statements avoid triggering the Article 20 limitation, in other words they must fall short of war propaganda or hate speech, as discussed at paragraph 50 above. There is no feasible way that the Defendant's dissemination of the maps – a manifestation of his right to freedom of expression – could be seen as trying to incite war, violence, hostility or discrimination. His actions on 15 February 2010 should also, therefore, be protected under the international and domestic freedom of expressions provisions.

80. Such arguments regarding the right to freedom of expression apply independently of those relating to the lifting of the Defendant's parliamentary immunity discussed below, *i.e.*, the Defendant has a right to freedom of expression as a citizen of Cambodia aside from in his capacity as leader of Cambodia's main opposition party or as a member of the legislature. All Cambodians should be free to discuss issues of national importance such as the finalization of contentious national borders, and any such debate must be transparent. Indeed, the Constitution expressly protects in Article 35, the right of all Cambodian citizens to actively engage in the political, social, economic and cultural life of the nation. Furthermore, the RGC should not be able to resort to heavy-handed state power to settle disputes or stifle debate.

## **VI. PARLIAMENTARY IMMUNITY**

81. In pursuing his course of action with respect to the events that led to both the 25 October Charges and the 15 February Charges, the Defendant was also exercising his rights as an elected representative of the National Assembly and as leader of Cambodia's main opposition party. He is under an obligation to his party and to the people of Cambodia as a whole to voice political opinions and criticisms of governmental and/or national policy in order to strengthen the position of Cambodia as a progressive liberal democratic nation.
82. On 16 November 2009 the Defendant had his parliamentary immunity lifted, enabling him to be prosecuted for the 25 October Charges. This was the second time in 2009 that the Defendant had had his parliamentary immunity lifted (not to mention previous instances in other years), the first time being on 26 February 2009 in relation to a defamation charge relating to accusations by the Defendant of corruption on the part of Prime Minister Hun Sen.
83. The purpose of parliamentary immunity is to safeguard the independence and integrity of parliament by ensuring that its members can exercise their mandate without obstruction from any quarter.<sup>66</sup> Parliamentary immunity, certainly as regards defamation and similar charges, is of the utmost importance in any democracy, and the lifting of any parliamentarian's immunity for any defamatory offences should only occur in the most exceptional circumstances. Parliamentary

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<sup>66</sup> Inter-Parliamentary Union, Committee on the Human Rights of Parliamentarians, '*Case No. CMBD/01 – Sam Rainsy – Cambodia*', *supra* note 6.

immunity should not be lifted to stifle freedom of expression on the part of parliamentarians, who, in exercising such a right, are performing two vital roles: not only as part of the legislature overseeing the executive and thereby acting as a constitutional check and balance on the government, but also as an effective member of an opposition party, an essential role in a healthy and functioning democracy. They should be able to carry out these two roles without fear of reprisals. If parliamentary immunity can be lifted in such circumstances, the whole point of such immunity is undermined.

84. The Constitution stipulates that: “[t]he deputies shall enjoy parliamentary immunity.”<sup>67</sup> Furthermore: “[n]o assembly member shall be prosecuted, detained or arrested because of opinions expressed during the exercise of his (or her) duties.”<sup>68</sup> The Cambodian position on parliamentary immunity seems to be in line with the position on parliamentary immunity in other jurisdictions, in that it clearly applies to all acts that constitute the expression of opinions. Since it is clear that the Defendant was acting in pursuance of his duties as a member of the National Assembly and as leader of the opposition, drawing attention to and expressing his opinion upon issues of national concern – the subject of border encroachment – the acts which gave rise to the four charges should be seen as flagrantly political acts and physical and symbolic manifestations of the right to freedom of expression. The Defendant’s actions on 25 October 2009 and his subsequent dissemination of maps should therefore be viewed as being covered by his parliamentary immunity.
85. Additional concerns arise as to the procedure through which the Defendant’s parliamentary immunity was removed. Article 80(3) of the Constitution proceeds to set out the process that should be followed if parliamentary immunity is to be lifted:

*“The accusation, arrest, or detention of a member of [the National] Assembly shall be made only with the permission of the [National] Assembly or by the Standing Committee of the [National] Assembly between sessions, except in case of flagrante delicto. In that case, the competent authority shall immediately report to the [National] Assembly or to the Standing Committee for decision.”*

86. Articles 80(4) and (5) state:

*“[t]he decision made by the Standing Committee of the [National] Assembly shall be submitted to the [National] Assembly at its next full session for approval by a two-thirds majority vote of the [National] Assembly members” and “[i]n any case, detention or prosecution of a deputy shall be suspended by a three-quarters majority vote of the [National] Assembly members.”*

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<sup>67</sup> The Constitution of the Kingdom of Cambodia (trans.) art. 80(1).

<sup>68</sup> The Constitution of the Kingdom of Cambodia (trans.) art. 80(2).

87. If the Standing Committee of the National Assembly exercises its right under Article 80(3) to take such a decision (because the National Assembly is between sessions), then the subsequent step prescribed by Article 80(4) must also be taken. The Defendant argues, however, that this subsequent step should have been taken since the opposition members of the National Assembly were not in favor of the measures and were not present when the decision to lift the Defendant's parliamentary immunity was taken. The counter-argument to this claim is that the opposition members walked out of the National Assembly, rendering the process redundant. Even so, the decision was taken without a transparent and public discussion in the National Assembly as to the merits of the arguments for and against the proposed measures. Election monitoring NGO Comfrel has stated that the stripping of the Defendant's parliamentary immunity on 26 February 2009 was both controversial and politically motivated.<sup>69</sup> In the circumstances, questions therefore necessarily arise as to procedure through which Defendant's parliamentary immunity was lifted.
88. If parliamentary immunity can be lifted so easily and without due process, such measures contravene both Cambodian law as set out in Article 80 of the Constitution and international norms and conventions. Parliamentary immunity should not be lifted as a matter of routine: rather it should follow the proper procedure and should not be "as easy as ABC".<sup>70</sup> As the RGC points out, Cambodia is not unique in lifting parliamentary immunity;<sup>71</sup> however, the frequency of such measures, the abuse of process and ease with which the measures are taken, and the nature of the charges (*e.g.*, defamation or disinformation) which often trigger such measures do distinguish Cambodia from the other countries which (on rare occasions) have to resort to lifting parliamentary immunity.

## VII. THE RIGHT TO A FAIR TRIAL

### *Constitutional council*

89. Article 19(1) of the Law on the Organization and Functioning of the Constitutional Council states that any person who is involved in a suit at court may request that the Constitutional Council consider the constitutionality of any provisions of a law or any decision of a state institution that the person affirms has affected his or her fundamental rights or freedoms. The legal proceedings related to the 25 October Charges and the 15 February Charges (set out at section II above) raise a number of issues relating to the fundamental constitutional rights of the Defendant, most notably those that can be broadly grouped under the right to a fair trial.

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<sup>69</sup> Vong Sokheng, 'Comfrel criticises CPP over Rainsy', *The Phnom Penh Post*, 19 March 2009.

<sup>70</sup> Hun Sen speech, 29 April 2009, in relation to the lifting of Mu Sochua's parliamentary immunity.

<sup>71</sup> The Royal Embassy of Cambodia to Australia and New Zealand's website, '*Lifting of Parliamentary Immunity from three members Sam Rainsy Party*', February 2005, available at <http://www.embassyofcambodia.org.nz/cambodiainfocus.htm>.

90. It is worth noting at this point that the Defendant's absence may have an effect on some of these constitutional rights, such as the right to a public hearing, discussed at paragraphs 98 and 99 below. Indeed, with respect to both the 25 October Charges and the 15 February Charges, by trying the Defendant *in absentia*, the court in theory denied him his rights to be tried in his own presence, in violation of internationally recognized minimum standards of fairness as encapsulated by Article 14(3)(d) of the ICCPR. However, a balance needs to be struck as regards trials *in absentia*: in this instance, the Defendant was clearly aware of the charges against him, and refused to return to Cambodia to face them, saying that: "[t]he court in Cambodia is just a political tool for the ruling party to crack down on the opposition. I will let this politically subservient court prosecute me *in absentia* because its verdict is known in advance."<sup>72</sup> At that point, the Defendant can be considered to have waived his rights to defend himself and to be tried in his own presence under Article 14(3)(d) of the ICCPR.<sup>73</sup>

#### *The right to be tried by an independent tribunal*

91. Article 10 of the UDHR states: "*Everyone is entitled in full equality to a [...] hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.*"<sup>74</sup> Article 31 of the Constitution, by incorporating the UDHR into Cambodian law, therefore guarantees all Cambodian citizens the right to a trial by an independent tribunal in accordance with Article 10 of the UDHR.
92. As well as referring to the UDHR, Article 31 of the Constitution refers to "*covenants and conventions related to human rights [...]*", which includes the ICCPR, to which Cambodia acceded in 1992.<sup>75</sup> The provisions of the ICCPR expand on the fair trial rights in the UDHR, with Article 14(1) stating:

*"All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a [...] hearing by a competent, independent and impartial tribunal established by law."*<sup>76</sup>

93. Furthermore, Article 128 of the Constitution provides that the judiciary shall be an independent power and shall guarantee and uphold impartiality as well as protect the rights and freedoms of the citizens, which include the rights stipulated in Article

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<sup>72</sup> 'Cambodia issues Sam Rainsy arrest warrant', *BBC News*, 1 January 2010.

<sup>73</sup> Wayne Jordash and Tim Parker, 'Trials *in Absentia* at the Special Tribunal for Lebanon: Incompatibility with International Human Rights Law', *Journal of International Criminal Justice*, 2010, pp. 1-8.

<sup>74</sup> Universal Declaration of Human Rights, art. 10, *supra* note 44.

<sup>75</sup> Geneva Academy of International Humanitarian Law and Human Rights, *Cambodia*, available at [http://www.adh-geneva.ch/RULAC/international\\_treaties.php?id\\_state=40Office](http://www.adh-geneva.ch/RULAC/international_treaties.php?id_state=40Office).

<sup>76</sup> International Covenant on Civil and Political Rights, art. 14(1), *supra* note 45.

31 of the Constitution and, therefore, the rights established by the UDHR and the ICCPR.

94. There is evidence to suggest that the convictions of the Defendant were somewhat of a foregone conclusion – which also has implications for the presumption of innocence as discussed at paragraphs 90 to 93 below – as well as being politically motivated: Prime Minister Hun Sen said before the Defendant’s conviction on 27 January 2010 for the 25 October Charges: “[t]his time I would like to declare [...] there is no [pardon]. After the court convicts, let it be.”<sup>77</sup> Furthermore, a few weeks later, Hun Sen said: “[t]his time, the court sentenced him to jail – no pardon this time. In the next election, there will be opposition parties, but this person will not be there.”<sup>78</sup>
95. Furthermore, according to Human Rights Watch, the lawyer for the Villagers claimed that there was a heavy police presence both to intimidate the defense counsel and to influence the court’s ruling.<sup>79</sup> Such heavy-handed tactics, coupled with explicit political motivations for convicting the Defendant, raise the question of government manipulation of the courts and the judiciary to serve its own purposes. Such abuse of the courts, and of the right to be tried by an independent tribunal, is unfortunately part of a clear trend in contemporary Cambodia, whereby might is right and the rule of law non-existent. In the circumstances, it is recommended that the Constitutional Council consider the independence of the tribunal that convicted the Defendant and the Villagers on 27 January 2010.

#### *Presumption of innocence*

96. Article 11(1) of the UDHR provides for the right to be presumed innocent until proven guilty: “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law [...]”<sup>80</sup> Article 14(2) of the ICCPR also provides for the same right: “[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”
97. The presumption of innocence is also provided for in Article 38(7) of the Constitution, which states that “[t]he accused shall be considered innocent until the court has judged finally on the case.” Article 38(6) of the Constitution provides that “[a]ny case of doubt shall be resolved in favour of the accused.” In Cambodia, as in other civil law jurisdictions, the investigating judge is responsible both for working with the prosecution and the judiciary police and for submitting evidence against the accused, and it is the role of the prosecution lawyers to provide the legal characterization of the facts presented by the investigating judge. The court then has

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<sup>77</sup> Meas Sokchea, ‘PM dismisses possible pardon for Sam Rainsy over VN border charges’, *The Phnom Penh Post*, 6 January 2010.

<sup>78</sup> Meas Sokchea, ‘PM says Sam Rainsy will miss 2013 polls’, *The Phnom Penh Post*, 25 February 2010.

<sup>79</sup> Human Rights Watch, *Cambodia: Opposition Leader Sam Rainsy’s Trial Farce*, 28 January 2010, available at <http://www.hrw.org/en/news/2010/01/28/cambodia-opposition-leader-sam-rainsy-s-trial-farce>.

<sup>80</sup> Universal Declaration of Human Rights, art. 11(1), *supra* note 44.

to “consider the value of the evidence submitted for its examination, following the judge’s intimate conviction”.<sup>81</sup>

98. There is therefore no legal burden on the accused to prove that the charges against him or her are false: if the evidence is too weak to prove all elements of the case, the court should dismiss the charges, regardless of whether the accused has presented any evidence in defense. However, notwithstanding the constitutional presumption of innocence, Cambodian protocol with respect to criminal trials may in practice diverge from these assumptions, the result being that the accused is obliged to make his or her case as much as he or she is obliged to answer the prosecution case. These considerations exist independently of any concerns about the independence of the Cambodian courts or their manipulation by the executive in the pursuit of its own political objectives.
99. As mentioned at paragraph 88 above, Prime Minister Hun Sen’s comments in advance of the Defendant’s trial for the first set of charges, the 25 October Charges, raise concerns that the convictions were a foregone conclusion, and that a presumption of guilt rather than a presumption of innocence colored these proceedings in direct contravention of international conventions – the UDHR and the ICCPR – as well as the Constitution. The fact that the Defendant was convicted of each charge, despite a failure to establish each element of each charge, serves to confirm these suspicions.

#### *Right to equality of arms*

100. The right to a fair trial under Article 14 of the ICCPR also includes the right to equality of arms, in other words, the right to have the same access to witnesses as the prosecution. Article 14(3)(e) provides that: “[i]n the determination of any criminal charge against him, everyone shall be entitled to [...] examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.” Moreover, Article 319 of Criminal Procedure Code provides that defense lawyers can examine the case file in the court clerk’s office before the hearing and may be authorized by the court president to copy documents in the case file. As noted above, the Defendant’s lawyer asked for access to the maps, but was denied by the court. This fact in itself suggests that the Defendant’s right to equality of arms was not respected or observed.
101. As regards the 25 October Charges, the lawyer for the Villagers said that the court refused to consider defense evidence<sup>82</sup> – apparently the only evidence considered in court were prosecution witnesses and certain selected witness statements – which indicates that the trial process was seriously flawed. For example, certain YouTube videos of the 25 October Incident that are freely available online were apparently

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<sup>81</sup> The Code of Criminal Procedure of the Kingdom of Cambodia, art. 321.

<sup>82</sup> Human Rights Watch, ‘Cambodia: Opposition Leader Sam Rainsy’s Trial a Farce’, supra note 71.

not submitted or considered.<sup>83</sup> If these claims are true, there are grounds to conclude that the Defendant's right to equality of arms has been violated.

102. The Defendant appealed the decision of the Court of First Instance in relation to the 25 October Charges – the appeal case was heard on 5 October 2010 with the verdict given on 13 October 2010 – allegedly on the grounds of an error of law, *i.e.*, the legal nature of the facts was incorrectly characterized in the court of first instance. Article 401 of the Criminal Code says that: “[t]he Court of Appeal may alter the legal qualification of the facts adopted by the Court of First Instance, but may not add any new element that was not submitted to the Court of First Instance to decide upon.”<sup>84</sup> The Defendant also appealed on the grounds that the 25 October Charges were politically motivated.
103. However, no evidence was submitted in the Court of Appeal to support an argument that the decision of the Court of First Instance was based on a fair and accurate legal interpretation of the facts. Additional witnesses were called in the appeal hearing. While does means that the Appeal hearing was not just a re-run of the original trial, no further evidence was allowed to be submitted to the court and all witness statements were identical to those submitted in the Court of First Instance on 27 January 2010. This considerations raise further concerns about whether equality of arms was guaranteed throughout proceedings.

#### *Right to a public hearing*

104. Article 10 of the UDHR provides for the right to a public trial: “Everyone is entitled in full equality to a fair and public hearing [...] in the determination of his rights and obligations and of any criminal charge against him.”<sup>85</sup> Article 11(1) of the UDHR develops this point: “Everyone charged with a penal offence has the right to [...] a public trial at which he has had all the guarantees necessary for his defense.”<sup>86</sup>
105. According to Human Rights Watch, the lawyer for the Villagers claimed that the trial for the 25 October Charges was closed to journalists, human rights organizations and the general public<sup>87</sup> – people and entities who would have been in a position to confirm whether the courts were fulfilling their role as a “competent, independent and impartial tribunal”. As a result, questions necessarily arise as to the independence of the judge and the court that participated in these proceedings, as highlighted at paragraphs 88 and 89 above. Given the absence of the Defendant, this requirement is arguably even more important so as to ensure the necessary degree of oversight of the judicial process. However, these claims suggest that the

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<sup>83</sup> ‘SRP Kathen religious procession and ceremony in Svay Rieng province October 25, 2009’, *supra* note 52.

<sup>84</sup> Code of Criminal Procedure of the Kingdom of Cambodia (September 2008) (trans.) art. 401.

<sup>85</sup> Universal Declaration of Human Rights, art.10, *supra* note 44.

<sup>86</sup> *Ibid*, art. 11(1).

<sup>87</sup> Human Rights Watch, ‘Cambodia: Opposition Leader Sam Rainsy’s Trial a Farce’, *supra* note 71.



Defendant's right to a public hearing – his right even if tried *in absentia* – has been breached.

## VIII. CONCLUSION

106. **There are significant grounds to argue that the Defendant has been wrongly convicted on all four charges on the basis that insufficient evidence has been submitted to establish the elements of each charge. Moreover, the manner in which the proceedings have been conducted throughout raise significant concerns as to whether the Defendant's fair trial rights have been observed, an issue that should be considered by the Constitutional Council. Most importantly, the lifting of the Defendant's parliamentary immunity to facilitate criminal proceedings for expressions of opinion made in the execution of his official duties and the violations of his fair trial rights, suggest that both the legislature and judiciary have been manipulated for political ends, namely to ensure the criminal conviction of the leader of the main opposition party and perhaps even to preclude his standing in the next general election in 2013.**

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