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Cambodian Center for Human Rights

Legal Analysis of the Criminal Case Against Ex-Bavet Governor Chhouk Bandith and Police Chief Sar Chantha Arising from the Shooting of Kaoway Factory Workers on 20 February 2012

1. Introduction

On 25 June 2013, Chhouk Bandith, ex-Bavet City Governor (the “Defendant”), was found guilty of “*causing involuntary bodily harm*” (the “Charges”) under Article 236 of the Cambodian Criminal Code 2009 (the “Penal Code”), sentenced in absentia to 18 months imprisonment and ordered to pay a total of 38 million Riels¹ (approximately US\$9,500) in compensation.² The Charges against the Defendant were based on allegations that he fired a gun into a crowd of demonstrators at the Kaoway Sports Limited garment factory (the “Kaoway Factory”), on the 20 February 2012 (the “Shooting”), causing serious injury to three workers: Keo Nea, 19, Bun Chenda, 21, and Nuth Sokhon, 23 (the “Victims”).³

Despite compelling evidence, including his own admissions of producing a gun when he went to confront the factory workers, the Defendant initially had the Charges against him dropped by the Svay Rieng Provincial Court,⁴ and it was only after the Cambodian Court of Appeal ordered the case to proceed to trial that he was convicted of “*causing involuntary bodily harm.*” The Defendant voluntarily absented himself from the trial that led to his conviction and he is yet to serve any of his sentence, or pay the Victims any of the compensation due, as he continues to evade the authorities.⁵

The Defendant was charged alongside Sar Chantha (the “Co-Defendant”), the Svay Rieng Penal Police Chief, who was acquitted of “*causing involuntary bodily harm*” but convicted of “*illegal use of a weapon*” contrary to Article 20 of the Law on Control of Weapons and Ammunitions and sentenced to six months’ imprisonment and fined one million Riels (approximately US\$250).⁶

Even though the authorities have failed to apprehend the Defendant, he was granted permission to file an appeal against his conviction and sentence.⁷ The decision of the Svay Rieng Provincial Court was also appealed by the Co-Defendant and by the Victims as Civil Parties. On 31 October 2013, the

¹ 20 million Riel to Bun Chenda, 10 million Riel to Nuth Sokhon and 8 million Riel to Keo Nea.

² So Chiu, Samean Yun and Joshua Lipes, ‘Former Cambodian Governor Get 18 Months in Shooting Case’ *Radio Free Asia* (25 June 2013) <www.rfa.org/english/news/cambodia/verdict-06252013165812.html>

³ Cambodian Human Rights and Development Association (“ADHOC”), ‘Cambodian Civil Society Concerned at Appeal Court’s Decision to Reinvestigate Charges Against Chhouk Bandith at Provincial Court’ (4 March 2013) <www.adhoc-cambodia.org/?p=3058>

⁴ May Titthara and Abby Seiff, ‘Chhouk Bandith Charges Dropped’ *The Phnom Penh Post* (19 December 2012)

⁵ Vann Vicha, Samean Yun and Rachel Vandenbrink, ‘Convicted Cambodia Ex-Governor on the Run’ *Radio Free Asia* (3 July 2013) <www.rfa.org/english/news/cambodia/chhouk-bandith-07032013190621.html>

⁶ ADHOC, ‘Statement: Chhouk Bandith Sentence Means Little if he Remains at Large’ (25 June 2013) <www.adhoc-cambodia.org/?p=3727>

⁷ Mary Titthara, ‘Bandith Appeals While on the Lam’ *The Phnom Penh Post* (22 July 2013)

Court of Appeal heard the appeal (the “Appeal”) of both Defendants and the Civil Parties and yet again the Defendant chose not to appear before the courts. Despite his non-appearance, the Defendant was represented at the Appeal and, through his lawyer, asserted that he was not responsible for the Shooting and sought to shift the blame onto others present at the Kaoway Factory on the morning of 20 February 2012.⁸

On 4 November 2013, the Court of Appeal gave its ruling and upheld the conviction of the Defendant for “*causing involuntary bodily harm*” and the conviction of the Co-Defendant for “*illegal use of a weapon*.” Tang Sunlay, the Presiding Judge of the Court of Appeal, stated that the reason for upholding a verdict of “causing unintentional injury” was because the Defendant did not know the Victims and had not previously had any dispute with them. However, it is widely believed that the Charges against the Defendant do not reflect the seriousness of the Shooting⁹ and the reluctance to properly prosecute and the continuing failure to apprehend the Defendant demonstrate the authorities’ lack of impartiality when dealing with those with close associations to the Royal Government of Cambodia (the “RGC”).

2. Executive Summary

This Legal Analysis: (1) provides a factual background to the arrest, charging and sentencing of the Defendant and Co-Defendant; (2) conducts a step-by-step analysis of the Charges and applies the law to the facts as they have been reported, arguing that the law has been incorrectly applied in light of the evidence available; (3) examines the judicial process both at the pre-trial, trial and appeal stages, and finds that breaches of the international norms prevailing over judicial hearings were violated and; (4) provides an overview of the fundamental human rights violated by the Defendant, namely the Victims’ rights to freedom of expression and freedom of assembly, and (5) concludes that the overly-lenient charging and sentencing of the Defendant represents a gross miscarriage of justice.

This Legal Analysis is written by [the Cambodian Center for Human Rights](#) (“CCHR”), a leading, non-aligned, independent non-profit organization (“NGO”) that works to promote and protect democracy and respect for human rights – primarily civil and political rights – in Cambodia.

The evidence and details of the trial proceedings at the Svay Rieng Provincial Court have been obtained from a legal source consulted by CCHR that wishes to remain anonymous. The details of the proceedings at the Cambodian Court of Appeal come from the CCHR’s own trial monitoring team.

3. The Facts

The Kaoway Factory Strikes

The Manhattan Special Economic Zone in Svay Rieng (the “SEZ”), in which the Kaoway Factory is located, is made up of four garment factories at which strikes had persistently occurred in the week

⁸ Khy Sovuthy, ‘Bundith Still a No-Show 20 Months After Garment workers Shot’ *The Cambodia Daily* (1 November 2013) <www.cambodiadaily.com/news/bundith-still-a-no-show-20-months-after-garment-workers-shot-46453/>.

⁹ So Chivi, Samean Yun and Joshua Lipes, ‘Former Cambodian Governor Gets 18 Months in Shooting Case’ *Radio Free Asia* (25 June 2013) <www.rfa.org/english/news/cambodia/verdict-06252013165812.html> .

leading up to the Shooting. The workers had been demanding improvements to working conditions, a 50-cent per day increase in wages for the provision of food and \$10 extra per month to cover transportation costs.¹⁰ Demands for better working conditions had also been made of the Defendant by the workers of the Kaoway Factory, though strikes had not been organized. The strikes that had occurred in the SEZ however involved thousands of workers and had not all been without violence or incident. During strike-related protests from 17 February 2012 onwards at the Sheko, Kingmaker and Bestway factories (all of which are based within the SEZ), police used tear gas and batons against workers who had allegedly thrown projectiles and caused damage to commercial property in the area. Eventually police, including the Co-Defendant, were drafted to the SEZ for the duration of the strikes but were instructed not to use live ammunition against the workers.

The Shooting

On the morning of 20 February 2012, the Victims arrived for work at the Kaoway Factory at around 7.20am and entered the premises. Unusually, they found police guarding the site, and were informed that the Defendant intended to close the Kaoway Factory that day, purportedly to avoid protests at the factory. The Victims and other workers who had arrived at the factory for their day's shift were asked to leave. However, the Kaoway Factory workers continued to arrive, many of them wishing to speak to the Defendant to discuss their demands. Consequently, groups of workers amassed both to the northeast of the complex at the Kaoway Factory's back gates, and at the restrooms located just inside the gates in the north. It was at this latter location that the Victims decided to remain. While the crowd was generally peaceful, some workers threw projectiles at the three factory buildings, causing the police commander at the scene to notify the Defendant at around 7.55am.

The Defendant was driven from his residence nearby to the scene by a fellow official of the RGC, and arrived at the back gates of the Kaoway Factory around 8.00am. He got out of his vehicle and spoke briefly with the police before apparently noticing a group of workers attempting to destroy three video cameras that were placed on top of one of the Kaoway Factory buildings. Apparently in order to stop the workers, the Defendant made his way through the crowd at the back gates into the Kaoway Factory complex, shouting at the workers to desist. As the Defendant made his way towards the workers, he was in possession of a gun. Prosecution witnesses gave evidence that the Defendant had brought the gun with him from home. The Defendant admitted possession of a gun, but the gun he had the morning of the Shooting has never been recovered and the Defendant claims he "cannot remember" to whom he gave the gun. On getting within meters of the building with the video cameras on it, the Defendant turned to face the workers, raised his gun and, according to eye witnesses, fired it at least twice, directly towards the crowd hitting the three Victims. Two of the victims were not part of the crowd and were standing by the washroom just inside the factory perimeter.

The three Victims were each seriously injured, and one, Bun Chenda, was left in a critical condition with a gunshot wound to the chest.¹¹ Eye-witnesses later testified that the Defendant had

¹⁰ ADHOC, 'Cambodian Civil Society Concerned at Appeal Court's Decision to Reinvestigate Charges Against Chhouk Bandith at Provincial Court' (4 March 2013) <<http://www.adhoc-cambodia.org/?p=3058>>.

¹¹ ADHOC, 'Cambodian Civil Society Concerned at Appeal Court's Decision to Reinvestigate Charges Against Chhouk Bandith at Provincial Court' (4 March 2013).

attempted to continue firing the weapon into the crowd, but that a technical problem with the gun prevented him from doing so.

After firing the weapon, the Defendant fled the scene, reportedly with the aid of the police, heading away from the restrooms and the back gates, and down an alleyway between two of the buildings in the Kaoway Factory complex and out of the front gates in the south. The Defendant then ran into the farmland to the west of the SEZ, pursued by a group of workers. At some point during his flight from the scene of the Shooting, the Defendant, gave the gun to one of the police officers aiding his escape. The testimony of those eye witnesses who stated that the Defendant had been prevented from continuing to fire into the crowd was supported by the account of a police witness who was handed the gun by the Defendant as he fled, and who gave evidence of a fault with the Defendant's weapon. The Defendant eventually managed to evade the workers pursuing him, although how he managed to do so remains unclear. Following the Shooting, the workers that had massed at the northern and north-eastern points of the Kaoway Factory reacted violently, destroying parts of the Kaoway Factory and setting light to a fire engine that had arrived to put out another blaze that had been started.

The Co-Defendant

At the time of the Shooting, petty violence had arisen during strikes that were being held at the Kingmaker and Sheko Factories, located on the opposite side of the SEZ to the Kaoway Factory, to the east.

It is unclear precisely how the Co-Defendant is linked to the Defendant or how he became implicated in the Shooting at the Kaoway Factory. A large number of eyewitnesses reported that the Co-Defendant was part of the police presence at the factories on the other side of the SEZ at the relevant time. Clearly the prosecution case at the trial before the Svay Rieng Provincial Court was that the Co-Defendant was responsible for shooting Nuth Sakhorn while the Defendant was responsible for shooting the other two Victims.¹²

The Co-Defendant did however have a firearm at home that had been reportedly given to him by a close acquaintance, a military policeman. The Co-Defendant did not have a letter of permission to possess that weapon and the day following the Shooting, he was asked by his police commander to bring the gun into the police station, where it was then confiscated. The Co-Defendant's conviction for "illegal use of a weapon" is related to the possession of that weapon without official permission and it does not appear to be the case that it was alleged that he had that weapon, or indeed used it, while on duty at the SEZ on the morning of 20 February 2012.

4. The Charges and Evidence

The Investigation

The Defendant was quickly identified by the Ministry of the Interior as the "sole suspect" in the Shooting. It was reported that the police were in possession of footage from the video cameras on

¹² May Titthara and Kevin Ponniah, 'Bandith Trial ends with Prosecutor Accusing Two' *Phnom Penh Post* (17 June 2013) <www.phnompenhpost.com/national/bandith-trial-ends-prosecutor-accusing-two>.

top of the Kaoway Factory buildings that had recorded the incident, although this footage, if it existed, was not used during the Trial or the Appeal.¹³ Despite the police report, the statement from the Ministry of the Interior and extensive coverage of the Shooting by the media both in Cambodia and abroad, in part due to the Kaoway Factory's association with international sportswear manufacturer Puma, the Svay Rieng Provincial authorities were clearly reluctant to act, citing a "lack of faith" in the police report.¹⁴ In the first week of March 2012, however, the Defendant was suspended from his position as governor of Bavet and finally a summons was issued for him to attend court for questioning. On 15 March 2012, Hing Bun Chea, the Svay Rieng Provincial Prosecutor, announced that the Defendant had been questioned and had confessed to shooting the three women but given reasons for his actions. Despite this confession, and despite complaints from the Victims that members of the Bavet Town Council had tried to bribe them not to press charges and forced them into hiding, the Prosecutor did not seek pre-trial detention.¹⁵

Public pressure overcame the Provincial Prosecutor's obvious reluctance to bring a case against the Defendant and the Charges were eventually laid against him on 19 April 2012. Concerns remained that the Svay Rieng Provincial Court would refrain from holding the Defendant to account for the shooting. These concerns were fueled both by the Court's refusal to take the case forward – indeed the case had bounced back between the Prosecutor and Investigating Judge for months¹⁶ – and by the Court's apparent search for a scapegoat through its decision to charge the Co-Defendant. It was during this stage where both the Victims and the Defendant were re-summonsed to "clarify" their evidence, that the Defendant retracted his earlier confession and asserted he had only produced the weapon and pointed it in the air, denying that he had fired any shots.

In August 2012, the Co-Defendant was quietly charged with "*causing unintentional bodily harm*" to the three Victims and on the 19 December 2012 the concerns that the Provincial Court was not investigating the Shooting impartially were confirmed when the Charges against the Defendant were dropped. No explanation was given for the Court's decision to drop charges against the Defendant or bring them against the Co-Defendant.¹⁷

Following a public outcry both in the media and from civil society,¹⁸ the Court of Appeal decided to receive the Defendant's case from the Svay Rieng Provincial Court on 2 January 2013, paving the way for a re-investigation.¹⁹ On 4 March 2013, after two days of closed evidentiary hearings which the Defendant attended,²⁰ the Investigation Chamber of the Court of Appeal re-charged the Defendant

¹³ 'Choukk Bandith Suspended from Position as Governor of Bavet' *Koh Santepheap* (10 March 2012) <<http://khmerization.blogspot.com/2012/03/chhouk-bandith-suspended-from-position.html>>.

¹⁴ May Titthara and David Boyle, 'Shooting Suspect a Governor No More' *Phnom Penh Post* (9 March 2012) <www.phnompenhpost.com/national/shooting-suspect-governor-no-more>.

¹⁵ Chhay Channyda and David Boyle, 'Factory Shooter "Confesses"' *Phnom Penh Post* (16 March 2012) <www.phnompenhpost.com/national/factory-shooter-%e2%80%98confesses%e2%80%99>.

¹⁶ See May Titthara, 'Summons Still Pending in Puma Shooting' *Phnom Penh Post* (24 April 2012) <www.phnompenhpost.com/national/summons-still-pending-puma-shooting> and May Titthara, 'Bavet Town Shooting Victims Summonsed Again' *Phnom Penh Post* (15 May 2012) <www.phnompenhpost.com/national/bavet-town-shooting-victims-summonsed-again>.

¹⁷ May Titthara and Abby Seiff, 'Chhouk Bandith Charges Dropped' *Phnom Penh Post* (19 December 2012)

¹⁸ *ibid*

¹⁹ Cheang Sokha, 'Chhouk Bandith Files Head to Appeal Court' *Phnom Penh Post* (2 January 2013)

²⁰ May Titthara, 'Bandith Hearing Concludes' *Phnom Penh Post* (1 March 2013) <www.phnompenhpost.com/national/bandith-hearing-concludes>.

in accordance with the initial Charges.²¹ The case was then remitted back to the Svay Rieng Provincial Court for trial. Still there was no call for the Defendant's pre-trial detention.

The Trial

Despite the ruling by the Court of Appeal, the Provincial Court still delayed bringing the case against the Defendant to trial.²² A trial date was originally set for May 2013 but by that time the Defendant had gone into hiding and when the May date arrived, his lawyers submitted they had other commitments and instead of proceeding *in absentia*, Judge Leang Saur at the Provincial Court allowed an adjournment.²³

The trial of the Defendant and Co-Defendant was eventually held at the Svay Rieng Provincial Court between 15 and 17 June 2013. The Defendant was still absent but was represented. His lawyers submitted that he had decided not to attend because of a technical deficiency with the summons. There were a large number of witnesses present: 19 for the Prosecution of the Defendant and three in his Defense, with an additional eight witnesses for the Prosecution of the Co-Defendant, and 25 in his Defense.

On 25 June 2013, the Provincial Court announced its verdicts. The Defendant was convicted of "*causing unintentional bodily harm*" and sentenced to 18 months imprisonment and ordered to pay a total of 38 million Riel to the three Victims. The Co-Defendant was acquitted of "*causing unintentional bodily harm*" but was found guilty of "*using an illegal weapon*", sentenced to 6 months imprisonment and fined 1 million Riel. Finally, the Provincial Court ordered the arrest of and detention of the Defendant.²⁴

Following the sentencing, reports were heard of the Defendant hiding out in Ratanakkiri or Mondulhiri provinces.²⁵ Serious concerns were raised about the willingness of the authorities to arrest the Defendant and see him serve the sentence imposed or pay any of the compensation due to the Victims.

The Evidence at Trial

The Trial almost exclusively focused on who had fired the shots that injured the Victims. Much of the evidence of the Defendant's actions was undisputed, save for the key issue of whether he had actually pulled the trigger of the gun he produced and confronted the Kaoway Factory workers with.

The lawyers for the Defendant relied on his own account given to the Investigating Judge the previous year in which the Defendant accepted that he had produced the gun and pointed it in the air but denied firing any shots. The Defendant's account further asserted that he had not heard any

²¹ Cambodian League for the Promotion and Defense of Human rights ("LICADHO"), 'Appeals Court Cements Lesser Charge Against Bandith, Orders Trial' (4 March 2013) <www.licadho-cambodia.org/flashnews.php?perm=15>

²² May Titthara, 'Round 2 in Bandith Case Locked for May' *Phnom Penh Post* (25 April 2013) <www.phnompenhpost.com/national/round-2-bandith-case-locked-may>.

²³ May Titthara, 'Bandith No-Shows Trial' *Phnom Penh Post* (22 May 2013) <www.phnompenhpost.com/national/bandith-no-shows-trial>.

²⁴ So Chiui, Samean Yun and Joshua Lipes, 'Former Cambodian Governor Get 18 Months in Shooting Case' *Radio Free Asia* (25 June 2013) <www.rfa.org/english/news/cambodia/verdict-06252013165812.html>

²⁵ Vann Vicha, Samean Yun and Rachel Vandenbrink, 'Convicted Cambodia Ex-Governor on the Run' *Radio Free Asia* (3 July 2013) <www.rfa.org/english/news/cambodia/chhouk-bandith-07032013190621.html>.

shots before he ran away and neither was he aware of anyone being injured. Incredibly, he was not able to account for where the gun had been given to after he fled nor indeed why he had felt the need to flee the scene. He said that the gun could not fire due to a technical fault and so he had given it to someone else (whom he couldn't remember) and he had only produced the gun because he didn't want the workers to throw stones at him.

The deliberate absence of the Defendant meant that he did not have to face questions as to his apparent lack of memory over where the gun went to or properly account for why he had decided to run away if, at that time he did so, according to him, no shots had been fired and no one had been injured. The absence of the gun after the event is important as the weapon itself would have been important physical evidence in the case with the potential of showing whether the Defendant had fired the weapon or not. The apparent memory loss as to where the weapon ended up after he fled is perhaps more consistent with a deliberate disposing of the weapon used in the offence and an attempt to conceal evidence. He also did not have to face any questions over the apparent contradiction between his reported confession to shooting the victims given to the Provincial Prosecutor in March 2012 and his subsequent denial of firing any shots given to the Investigating Judge.

The accounts given by eye witnesses provided compelling evidence that the Shooting was a deliberate act by the Defendant. The Court heard and accepted that the Victims were in hospital for several weeks²⁶ as a result of gunshot wounds, and according to 25 witness testimonies before the Court, three of whom subsequently gave oral testimony at Trial, it was only the Defendant who brandished a weapon in the vicinity of the Kaoway Factory at the time at which the injuries were inflicted.

The Court heard that the Defendant, on being contacted by the police on duty at the Kaoway Factory, left his residence with the firearm. On arrival at the Kaoway Factory, he then proceeded to take the firearm from his vehicle and talk with police at the back gates, before approaching and shouting at workers throwing stones at the cameras located within the Kaoway Factory, still with the gun on his person. The Defendant, as a senior local government official, would have been aware of orders given to the police not to use live ammunition against the strikers. The situation was that he had deliberately armed himself, entered the factory where there was already a police presence to provide protection to life and property, approached and shouted at the workers and then decided to produce and fire his gun.

Witnesses testified that the Defendant raised the firearm, aimed it towards the group of workers at a time when the Victims were standing out of the way of trouble and discharged the weapon two or three times before the weapon jammed and he could no longer fire on the crowd. Evidence from police officers at the scene was that once the weapon jammed, he gave it to his colleague, Chea Sina, in order to fix the technical fault. He then ran away.

²⁶ Bun Chenda was still recovering from upper chest injuries in hospital nearly two weeks after the attack, So Chiui, Samean Yun and Joshua Lipes, 'Workers Sue in Shooting Case' *Radio Free Asia* (13 March 2013) <www.rfa.org/english/news/cambodia/lawsuit-03132012170105.html>

As for the Co-Defendant, the Svay Rieng Provincial Court had available all the evidence that went to proving that the Defendant was the sole person responsible for the Shooting and in addition had the evidence of no less than eight other witnesses testifying that the Co-Defendant had been policing the Kingmaker and Sheko factory complex on the other side of the SEZ at the time of the Shooting.

The one witness willing to testify for the Co-Defendant's perpetration of the Shooting changed their testimony no less than three times. Initially the witness claimed in their statement to the police to have merely seen the Co-Defendant walking out of the back gates of the Kaoway factory. However, in later statements given to the Investigating judge and Prosecution, the witness claimed to have seen the Co-Defendant firing the weapon at different times.

Given the thoroughly unreliable and self-contradictory account of a single witness that the Co-Defendant fired on the Kaoway Factory workers, it is difficult to understand why the Co-Defendant ever faced a charge of "*unintentionally causing bodily harm.*" It is even more difficult to understand why the Co-Defendant was implicated when there was so much evidence available to the Prosecutor and the Investigating Judge that only the Defendant was responsible for the Shooting and even substantial evidence to show that the Co-Defendant was at other factories within the SEZ at the time the Victims were injured. It is thus highly likely that the Svay Rieng Provincial Prosecutor and Court sought a scapegoat to take the blame for the Shooting when faced with a situation where a high-ranking official had been implicated in an incident that had attracted substantial media coverage and criticism from civil society and thus where the local authorities needed to be seen as having taken action. It is made even more likely given the charging of the Co-Defendant shortly before dropping all charges against the Defendant. For the Prosecutor at the Trial to persist with the submission that the Co-Defendant was responsible for the shooting of one of the Victims shows the lengths that the Provincial authorities were prepared to go to minimize the culpability of the Defendant.

Analysis of the Charges

Given the evidence of the deliberate actions of the Defendant during the course of the Shooting, this Legal Analysis concludes that the Charges and subsequent convictions for "*causing involuntary bodily harm*" (Article 236 of the Penal Code) in respect of the case against the Defendant were inadequate and improper in law. The evidence available to the Provincial Prosecutor and the Investigating Judge supported, at the very least support, a *prima facie* case of "*intentional violence*" (contrary to Article 217 of the Penal Code, aggravated by the use of a weapon pursuant to Article 218(2) of the Penal Code), and was more than capable of sustaining charges of "*attempted murder*" (Articles 27 and 199 of the Penal Code).

Article 236 of the Penal Code defines the offence of "*causing involuntary bodily harm*" as "*causing an injury to another person ... if it results from:*

- 1) *Negligence, recklessness or carelessness causing a disability to the victim for a period of eight days or more.*
- 2) *Breach of the safety requirement or due diligence imposed by law."*

During the Trial, the actions of the Defendant and the Co-Defendant were, naturally enough, examined only in relation to part 1) above. Without doubt, the level of injuries suffered by the

Victims were sufficient to satisfy the requirements of Article 236(1). The Provincial Court concluded that they were sure that it was the Defendant who had shot all three Victims. The issue that the Provincial Court (and the Cambodian Court of Appeal) failed to address was whether the level of the Charges adequately reflected the Defendant's criminal responsibility.

The real issue for this Legal Analysis therefore is: what was the Defendant's mental state (*mens rea*) at the time of the Shooting? Did the Defendant merely act negligently, recklessly or carelessly? Or, would a competent and impartial court, properly applying the law to the evidence presented at Trial, be capable of concluding to the requisite criminal standard that the Defendant's actions were intentional or willful?

On the Defendant's own account therefore, this was not a situation where he was contending that he was handling the weapon so that it accidentally discharged, or that he was somehow mistaken as to the circumstances that led to him using the gun or that he was unaware of the presence of factory workers in the close vicinity. He denied firing the weapon at all and sought to blame others for the shooting, implying that the Victims must have been injured in the disturbance that had followed his escape when he said shots had been fired. To this extent, therefore, negligence and carelessness should have been immediately discounted. It was a simple matter of fact: did the Defendant shoot the Victims or not?

Neither was it the case that the Defendant asserted that he had fired in the direction of the crowd mistakenly believing that he was acting in lawful self-defense in accordance with Article 33 of the Penal Code.²⁷ Aside from a complete denial of firing the weapon, he appeared to be asserting in his account to the Investigating Judge that he knew the weapon had a fault and he was merely using it for show to prevent the workers throwing stones at him. He did not contend that firing the weapon would have been proportionate to the situation he found himself in nor that he was compelled fire to defend himself or others or property. Any suggestion that Defendant's actions can be justified in law as a response to the actions of the Kaoway Factory workers is negated by the facts presented at the Trial. The most the workers are said to have been doing is trying to damage three CCTV cameras; there was a police presence that the Defendant had spoken to on his way in and who had been specifically posted to the SEZ to deal with industrial unrest; and the evidence was that the Defendant had verbally confronted the workers before turning and firing on them. To this end, the use of the weapon had no justification. It was not proportionate to the damage being caused to the cameras and the Defendant was not compelled to act as he had gone over and confronted the worker and the police were present to preserve life and property.

If the evidence provided by numerous witnesses was accepted by the Court as sufficient to be sure to the criminal standard that the Defendant did in fact fire the weapon and did cause the injuries to the Victims, it is difficult to see how the Court could have reached a conclusion that the acts of the Defendant were not deliberate.

²⁷ Art. 33 "A person who commits an offense in self-defence shall not be criminally responsible." Self-defense must meet the following conditions: i) the offense was compelled by the necessity to defend oneself or others or to defend property against an unjustified attack; ii) the offense and the assault must occur at the same time; and iii) the means used in self defense were not disproportionate to the seriousness of the assault."

As a matter of law, it is reasonably foreseeable, and would have been obvious to the Defendant that deliberately and repeatedly firing a lethal weapon directly into a crowd of people would result in death or, at the very least, serious injury. The inevitable conclusion is that the evidence at Trial is legally, factually and morally inconsistent with the Court's finding that the Defendant acted negligently, recklessly or carelessly.

"Murder" is defined in Article 199 of the Penal Code as "...the willful killing of another person with or without a weapon...". Further assistance as to the required mental element (*mens rea*) of murder can be found in Article 224 of the Penal Code, where "intentional violence" that results in death is dealt with. Article 224 sets out:

"Intentional acts of violence shall be punishable by imprisonment from seven to fifteen years if, without intent to kill, they cause the death of the victim."

It therefore follows that "willful killing" requires a specific intent by the accused person to cause the death of another person. Intentional violence resulting in death is not a sufficient legal basis for a conviction for murder.

Given that the Victims survived the Shooting, which for the reasons set out above was clearly a deliberate act of violence, it is necessary to consider whether the evidence available to the Court is capable of amounting to "attempted murder." Article 27 of the Penal Code defines an Attempt; it is made out where the Court is satisfied to the required standard that the following conditions are met:

- "1) The perpetrator has started to commit the offence; that is, he or she has committed acts which lead directly to the commission of the offence.*
- 2) The perpetrator did not stop his or her acts voluntarily, but was interrupted solely by circumstances beyond his or her control."*

In the Defendant's case, an offence of "attempted murder" would be made out if, firstly, the Defendant had formed the requisite mental element for the offence, namely a specific intent to kill another, and secondly, that the conditions in Article 27 are satisfied.

In relation to the first part, whether the Defendant had a specific intention to kill another person, the evidence before the Court was that the Defendant had deliberately armed himself with a lethal weapon, he had taken that lethal weapon into a confrontational situation where the police were already present to protect his physical security and property, he had walked a few meters away from the crowd, turned and produced the weapon before leveling it in the direction of the crowd and firing at least two shots. As a legal principle and as a matter of common sense, a person intends the natural consequences of their actions. The natural consequences of the Defendant's actions were that someone would be killed.

The evidence that the Defendant was prevented by a technical fault from firing more shots into the crowd is important evidence both as further compelling evidence of the Defendant's mental state at

the time of the Shooting and in relation to satisfying the requirements of Article 27 of the Penal Code.

The evidence that the Defendant was intent on firing more rounds but was unable to do so because his weapon jammed further demonstrates that he intended his actions to be fatal. The evidence that he gave the gun to his colleague to try to fix the technical fault and so continue firing further adds to the strength of the evidence that the Defendant was intent on firing more shots into the crowd than he in fact did. As a simple proposition, the more times the weapon is discharged, the greater the likelihood, and the more obvious it becomes, that someone will get killed. It must have been already apparent to the Defendant after the first few shots before his weapon jammed that he was firing into the crowd, contradicting his own version of events that he was merely holding it in the air, but more particularly, it would have been apparent to him that the Victims had been injured. The fact that he intended to carry on firing but was prevented from doing so by the technical fault on his weapon, leads to the inescapable conclusion that he was intending to kill. The common sense conclusion from both the Defendant's failure to explain why he ran and the witnesses' testimony is that he was deliberately shooting into the crowd and only fled once he could no longer fire and the workers could advance towards him.

The evidence of the technical fault is also capable of satisfying both conditions for an attempt under Article 27. The first condition is met as the Defendant had already commenced using lethal force and the fact that his first two or three rounds had not been fatal to the Victims, or anyone else, was sheer chance and not because of any lack of intent on the part of the Defendant. By turning towards the crowd, producing and leveling his weapon and firing repeated shots, the Defendant had gone beyond merely preparatory steps and had commenced the offense itself. The evidence of the Defendant's intention to continue using lethal force but of being prevented from doing so because of a technical fault with the gun satisfies the second condition of Article 27. The Defendant did not stop firing of his own volition but "*solely by circumstances beyond his control*".

Therefore this Legal Analysis concludes that given 1) the strength of the evidence that demonstrates that the Defendant acted intentionally, not negligently, recklessly or carelessly; 2) the seriousness of the harm caused by the Defendant's actions and the inevitable consequences had his weapon not developed a technical fault; and 3) the evidence that supports his intent to kill rather than merely cause really serious harm to the Victims and others in the crowd of Kaoway Factory workers, the appropriate charges against the Defendant should have been "*attempted murder*". Even if the argument that the evidence showed a clear intention on the part of the Defendant to kill, then, at the very least, the Court should have considered charges of "*intentional violence*" aggravated by the use of a weapon.

Appeal Proceedings

Despite the Defendant being unlawfully at large following his conviction and sentence *in absentia*, he was able to file an Appeal and is clearly in contact with his family and defense team, which calls into question whether the authorities are in fact doing all in their power to secure his arrest.²⁸

²⁸ Mary Titthara, 'Bandith Appeals While on the Lam' *The Phnom Penh Post* (22 July 2013).

The Court of Appeal heard the Appeal of the Defendant, Co-Defendant and Civil Parties on 31 October 2013. The Appeal judges (Tang Sunlay, presiding, Blong Samnung and Oum Sarith), like their counterparts at the Svay Rieng Provincial Court, opted to examine who was responsible for the gunshot injuries to the Victims rather than accepting the weight of evidence demonstrating the intentional actions of the Defendant. The Appeal was therefore another missed opportunity to provide true justice for the Victims and to properly reflect the Defendant's criminal behavior with the substitution of more serious charges.

Kay Visal, the lawyer for the Defendant, told the Court of Appeal that his client knew of the Appeal but did not give any further details of the Defendant's current whereabouts. The Defendant's lawyer told the hearing that the ex-governor was not responsible for the Shooting, no-one had seen the Defendant fire any shots and by implication sought to blame either the police officers present or a security guard for the injuries to the Victims. On his client's behalf, Kay Visal sought to rely, as he had at Trial, on the account given to the Investigating Judge in Svay Rieng that the Defendant had not fired any shots and merely brandished a weapon he knew to be faulty to prevent the crowd throwing stones at him.

More than 50 witnesses were summonsed by the Court of Appeal to give evidence at the hearing. While some had not returned the summons to acknowledge receipt of the Court's summons, many others simply did not attend to give their testimonies to the Court of Appeal. The only witnesses who turned up to give live evidence were the Victims themselves, as the Civil Parties, and one military policeman and two local police officers on duty at the Kaoway Factory the morning of the Shooting.

The testimony given by Nuth Sakhorn was typical of the evidence that the Victims themselves could give. She gave evidence that she had been shot in the back as she stood near the washroom inside the Kaoway Factory compound and did not see who had fired at her and the other workers. Nuth Sakhorn initially thought she had been hit by a stone thrown by another worker but was then told it was the Defendant who had been shooting at her and other workers. The questions asked by the Court of Appeal judges suggested that they were more concerned with the actions of the protesting factory workers rather than the actions of the Defendant.

Major Keo Sokhorn told the Appeal judges that he had seen the Defendant holding the gun after the Shooting and had helped the Defendant to escape as the workers started to chase the ex-governor. He testified that the police had not fired the shots but that he had not seen the Defendant shooting either. However, he did confirm the sequence of events was that he heard shots fired, then the Defendant ran and afterwards there were no more sounds of shots being fired. Major Reach Bundith's evidence was that he saw the Defendant walk into what he described as "the mob" and point his gun at the workers but he too claimed not to have seen the shots being fired at that time but again confirmed that no one else had fired any weapon. The witness also confirmed that after the Defendant fled he saw the weapon he had been pointing at the crowd and confirmed that it had developed a technical fault.²⁹

²⁹ Khy Sovuthy, 'Bundith Still a No-Show 20 Months After Garment Workers Shot' *The Cambodia Daily* (1 November 2013).

At the trial before the Svay Rieng Provincial Court, the Court had heard the evidence of the deputy police chief of Prasat Commune, Long Thorn. Long Thorn was one of the witnesses who had been expected to attend but failed to appear. However, his evidence was read to the Court of Appeal who heard that the witness had seen the Defendant point a gun at the workers and pull the trigger and had seen the Victims fall to the ground.³⁰

Although one of the lawyers for the Civil Parties asked the Court of appeal to consider altering the charges against the Defendant to “attempted murder” in his closing submissions, little time was spent by the judges on examining the intentional nature of the Defendant’s actions. The tone of the hearing was best exemplified by the apparent disinterest of the Prosecutor, Em Sophan, whose most extensive contribution to proceedings was to object to the Civil Parties’ lawyer describing the Defendant as the person responsible when the Victims had not actually seen who had fired the shots that had injured them. The Prosecutor, in an extremely brief closing statement, said that this was the Defendants’ and Civil Parties’ Appeal and did not suggest that the Defendant’s actions had been anything more than “*involuntary bodily harm*” despite the evidence that had been available before the Svay Rieng Provincial Court and even before the Court of Appeal.

On 4 November 2013, the Court of Appeal gave its decision in relation to the previous week’s hearing and confirmed the convictions of both the Defendant for “*causing involuntary bodily harm*” and the Co-Defendant’s conviction for “*unlawful use of a weapon*”. The sentences remained unaltered from the sentence, fines and compensation ordered by the Svay Rieng Provincial Court.

Analysis of the Court Proceedings

The conclusion of this Legal Analysis is that both the Svay Rieng Provincial authorities and the Court of Appeal have chosen to ignore the evidence before them that the Defendant deliberately confronted a group of Kaoway Factory workers with a handgun and purposefully aimed and fired repeatedly into the group, seriously injuring the Victims who were in no way posing a threat to him or involving themselves in any form of protest.

The Charges of “*causing involuntary bodily harm*” and the Defendant’s subsequent conviction only resulted from pressure from civil society. It is hard to escape the inference that this is the minimum the prosecution and Courts could get away with when confronted by a situation where the Defendant is close to the RGC but they are faced with public outrage that all charges were initially dropped against the Defendant.

The Svay Rieng Provincial Prosecutor was clearly reluctant to investigate the actions of a local politician with close links to the RGC, ignoring the police report of the incident and even the Defendant’s own confession. The Provincial Prosecutor and Provincial Court engaged in a to and fro process whilst attempting to “clarify” the evidence of the Victims and giving the Defendant enough time to change his account. Obviously, neither the Prosecutor nor the Court wanted to progress the matter and did so reluctantly and only under pressure from the media and civil society.

³⁰ Ibid.

Even when the matter did progress, the Provincial Prosecutor and Investigating Judge attempted to prevent the Defendant ever facing justice. The decision not to seek pre-trial detention, the decision to only charge the Defendant with “*causing involuntary bodily harm*” despite the weight of evidence going to show the deliberate actions of the Defendant, and the inexcusable decision to seek to blame the Co-Defendant for the Shooting and drop the Charges against the Defendant in the face of evidence pointing to the sole responsibility of the Defendant and exonerating the Co-Defendant, all point to a judiciary that is neither impartial or competent.

The Court of Appeal has demonstrated the same lack of impartiality. Despite the 4 March 2013 order that the Svay Rieng Provincial Court try the Defendant, it was the failure at this stage to substitute charges that properly reflected the Defendant’s criminality, namely “*attempted murder*” or “*intentional violence*” that set the tone for the Trial before the Provincial Court in June and the Appeal in November 2013. The charges of “*causing involuntary bodily harm*” were the bare minimum that the Court of Appeal could get away with in the face of the evidence and public outcry at the dropping of the Charges against the Defendant in December 2012. The Svay Rieng Provincial Court, and subsequently the Court of Appeal in November 2013, had no intention of considering the proper charges for the Defendant’s actions.

Although the compensation awarded to the Victims may go part of the way to redressing the pain and suffering and lost earnings they endured, they will see nothing of it until the authorities take proper measures to apprehend the Defendant. Moreover, compensation alone is not sufficient to properly reflect the severity of their injuries or the deliberate criminal actions of the Defendant. The Victims’ medical treatment costs were met by the international sportswear corporation Puma, whose sports footwear is made at the Kaoway Factory, following the international outcry over this incident.³¹ The Defendant has so far avoided any punishment for his actions on 20 February 2012 despite being allowed to have his defense fully considered at the trial before the Svay Rieng Provincial Court and the Court of Appeal and despite his defense in court being substantially different from the account he initially gave as part of the investigation.

5. Trial Procedure and Violations of International Law

Article 7 of the International Covenant on Civil and Political Rights (the “ICCPR”) places an obligation on the RGC as a State Party to protect the dignity and physical and mental integrity of the individual. This obligation extends to protection of the individual from the acts of individuals acting in their official capacity, outside of their official capacity or in a private capacity.

To fulfill its obligations under Article 7 of the ICCPR, it is not sufficient for the RGC to demonstrate that acts of violence against individuals have been criminalized by the provisions of the Penal Code; it must be demonstrated that the RGC provides appropriate redress and ensures that all “*complaints must be investigated promptly and impartially by competent authorities so as to make the remedies effective.*”³²

Article 14(1) of the ICCPR states that:

³¹ Puma Company Statement (20 February 2012) <<http://about.puma.com/puma-covers-medical-treatment-costs-for-injured-employee-of-its-footwear-supplier-kaoway-sports-ltd/>>.

³² UN Human Rights Committee, General Comment No.20.

“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 fair and public hearing by a competent, independent and impartial tribunal established by law.”

However, the favor and leniency with which the Defendant, a high level RGC official, was treated by the Svay Rieng Provincial Court and the Court of Appeal calls into question the Cambodian judiciary’s intention to act in accordance with these international legal provisions.

Everything from 1) the lack of pre-trial detention imposed on the Defendant, 2) the initial dropping of the Charges against him, which were only reinstated as a result of pressure from NGOs and community representatives, 3) the leniency of the Charges themselves despite the seriousness of the allegations against the Defendant, and finally 4) the failure of the Cambodian authorities to actively pursue the arrest of the Defendant, point to a judicial and executive system that has denied the Victims an effective remedy to the serious physical injuries they sustained and has singularly failed to conduct a prompt and impartial investigation into the circumstances of the Shooting. Further that the Court has failed to respect the principle of equality before the law.

This absence of a competent, independent and impartial tribunal is even more apparent when one compares the treatment of the Defendant with the Court’s treatment of individuals who are not high-level RGC officials, such as the Co-Defendant. The charging of the Co-Defendant and the Provincial Prosecutor’s continued insistence that the Co-Defendant was responsible for injuring at least one of the Victims, despite a clear lack of consistent and compelling evidence and in the face of the weight of contrary evidence from other witnesses points to a judiciary that is far from impartial.

In conclusion, the investigation, trial and appeal process violated the rights of the Victims under Article 7 of the ICCPR to have the violence committed against them impartially and promptly investigated and to obtain appropriate redress. The lenient treatment of the Defendant and attempts to use the Co-Defendant as a scapegoat both demonstrate clear violations of Article 14(1).

6. Fundamental Freedoms

In demanding wage increases during the February 2012 protests, the Victims were exercising their rights to **freedom of expression and assembly**, fundamental rights guaranteed to all Cambodian citizens and which respectively permit *inter alia* the criticism of governmental and commercial actions, and the collective expression of dissatisfaction through peaceful protest. The rights to freedom of expression and assembly are upheld under both Cambodian and international law.

Under Cambodian law, Article 41 of the Constitution of the Kingdom of Cambodia 1993 (the “Constitution”) guarantees that *“Khmer citizens shall have freedom of expression...and assembly”*, while Article 2 of the Law on Peaceful Assembly 2009 (also known as the “Demonstration Law”) purports to *“assure freedom of expression [for] all Khmer citizens”*.

Further, Article 35 of the Constitution demands the RGC respect both the United Nations Universal Declaration of Human Rights (the “UDHR”) and any United Nations human rights treaties ratified by

the RGC into domestic law – including the ICCPR. This is bolstered by a decision of the Constitutional Council of Cambodia that declared that all human rights treaties to which Cambodia has acceded form part of domestic law.³³ As a result, Articles 19 and 20 of the UDHR, and Articles 19 and 21 of the ICCPR, which respectively enshrine the rights to freedom of expression and assembly, may be invoked by Cambodian citizens.

The rights to freedom of expression and assembly are not absolute rights and may be curtailed under certain extraordinary circumstances as long as the restrictions are proportionate, provided for by law and necessary in a democratic society.³⁴ As such, the reaction of the authorities to the protests at the Kaoway Factory, which were proven to at times become violent and where the actions of the workers may amount to criminal liability (an aspect of the case which is outside the scope of this Legal Analysis but may be investigated independently), needed to have been proportionate and necessary in order to adhere to Cambodia's obligations under international human rights law. As far as the Defendant was acting on behalf of the state, as the Bavet city governor, shooting indiscriminately into a peaceful crowd, even when violence is occurring from other quarters in the vicinity, can never be a necessary or proportionate means of maintaining order during a public demonstration. Furthermore, despite his position of governor, it was not the Defendant's place to restrain the protesters (but that of the state security forces).

7. Conclusion

The Prosecution was weak, and failed to forcefully present the case against the Defendant, despite the abundance of evidence available. The conviction that was secured and upheld by the Court of Appeal was a result of public pressure rather than the workings of a robust, independent and impartial judiciary. This unwillingness to prosecute a high level RGC official is a sentiment that dominated the entirety of the legal process: from reluctance to investigate and the inadequate Charges to the initial decision of the Court to drop the case in December 2012; from the lack of pre-trial detention to the conviction for an offence that fails to reflect the strength of the evidence and the seriousness of the Defendant's actions and the continuing failure of the authorities to arrest the Defendant all highlight the manifest impunity of high-level RGC officials who violate the Penal Code. In contrast, the Co-Defendant, with little or no credible evidence against him, was enthusiastically prosecuted as a means of drawing attention away from the culpability of the Defendant, and to misguidedly appease public pressure. Moreover, the Prosecutor and judges of the Court of Appeal served only to rubber stamp the decisions made by the Svay Rieng Provincial Court.

Based on the analysis of the evidence above, and if the Defendant had been treated fairly and impartially by the Cambodian prosecutors and judiciary, then the Defendant's case would have been reconsidered with the appropriate charges of "*attempted murder*" or at the very least of "*intentional violence*" aggravated by the use of a weapon. Only on that basis would the Victims of the Shooting receive appropriate redress for the injuries that were caused to them.

The case of Chhouk Bandith is a reminder that Cambodia's justice system is neither free, nor fair. There are two justice systems in Cambodia: one for the political elite and the well-connected, and

³³ Cambodian Constitutional Council in 2007 (092/003/2007).

³⁴ Article 19, Paragraph 3, and Article 21, ICCPR.

one for everyone else. Chhouk Bandith's conviction and sentence seriously underestimates the gravity of his actions, and despite having been convicted, he is still at large, walking free. Meanwhile, activists, journalists and human rights defenders who are regularly incarcerated for doing nothing more than exercising their rights to freedom of speech and assembly, suffer the consequences of an unjust judicial system that perpetuates a culture of impunity.

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