



Legal Analysis of the Charging and Detention of Ven Vorn

16 February 2016

Executive Summary

On 07 October 2015, indigenous community leader and land rights activist Mr. Ven Vorn was arrested and sent to Koh Kong provincial prison, where he has been detained in pre-trial detention ever since. His trial is due to begin on 17 February 2016.

Ahead of his trial, this Legal Analysis aims to examine whether the charges laid against Ven Vorn are reasonable, and whether his continued pre-trial detention is justified. This Legal Analysis: (1) provides context for the arrest and charging of Ven Vorn; (2) gives a factual background to the arrest, charging and imprisonment of Ven Vorn; (3) provides an overview of the domestic laws and fundamental human rights relevant to the charges, namely the rights to freedom of expression and freedom from arbitrary detention (as well as the non-binding right to protect indigenous land and culture); (4) conducts an 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, and that Ven Vorn's rights have been breached in numerous ways; and finally (5) concludes that Ven Vorn's pre-trial detention is both arbitrary and illegal, and that the Ven Vorn must be found not guilty if he receives a fair trial, taking the facts of the case and all applicable laws into account.

This Legal Analysis is made available to the Koh Kong Provincial Court of First Instance to assist in its handling of the trial; Ven Vorn and his legal counsel to use as a reference point in the formulation of the defense; and to any other parties for advocacy purposes.

This Legal Analysis is published 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 the Kingdom of Cambodia ("Cambodia").

1. Context

Indigenous land rights under threat

Land and natural resources in Cambodia are highly sought after as attractive opportunities for local and international business alike. A loose legal framework makes obtaining rights to extract resources relatively easy, and stepping outside of legal requirements comes with few serious consequences. Particularly vulnerable and losing their ancestral lands at an alarming rate are Cambodia's indigenous communities, who generally inhabit resource-rich areas of the country.

Cambodia is home to as many as 190,000 indigenous people, representing approximately 1.4 percent of Cambodia's population.¹ Traditionally, indigenous people in Cambodia sustain their livelihoods through cultivating forested land, utilizing a technique known as shifting cultivation or rotational agriculture.² They also hunt wild animals and gather forest by-products including fruit, honey, flowers, fungus and resin. In addition, Cambodia's indigenous communities' beliefs, traditions, and identities are closely tied to the land. The land, and especially the forest, carries major spiritual significance as a link to their ancestors and natural spirits. Relationships with these ancestors and spirits form a key part of the communities' cultural identity and spirituality. Thus, the prioritization of large-scale infrastructure developments and the lease of land concessions in the areas where indigenous peoples have traditionally inhabited threaten indigenous communities' livelihoods, cultures and identities.

Given the importance of land for their survival, indigenous communities are highly motivated to protect their land and way of life. As detailed in a report³ recently released by CCHR, indigenous communities face numerous obstacles when attempting to formally protect their lands by registering their land under collective land titles ("CLTs"). They must compete with powerful commercial interests whilst completing a complex and lengthy registration process. Of particular note is the fact that protective interim measures, which provide tenure security for indigenous communities attempting to register their land, are not applied until the final stage of the process; this can be years after they have begun the process. Ultimately this means that indigenous communities such as the Chorng people in the Areng Valley are left to defend their ancestral lands themselves from outside interests for up to several years before they can gain land tenure security. At the time of writing, the Chorng community in the Areng Valley community has yet to complete the first stage of three in the CLT process.

Judicial Harassment of Land Rights Activists and Human Rights Defenders

In the face of widespread land rights violations, affected community members throughout the country are increasingly taking action to defend and demand their rights. Land rights activists who attempt to protect their land face serious risks as the Royal Government of Cambodia (the "RGC") increasingly seeks to suppress their activities. Throughout 2015 there were numerous cases of unfounded arrests and convictions of affected community members and land rights activists. For example, on 04 January 2016 Vong Sokhengly, a community representative from Preah Vihear province was detained without charge for questioning and, according to the Provincial Deputy Governor, "*education*", in regards to his protest activities.⁴ He had been protesting two land disputes in the province. Police attempted to force him to sign a letter promising to stop his protests, before public pressure forced his release.⁵ Furthermore, on 28 September 2015, three

¹ NGO Forum on Cambodia, 'Indigenous Peoples in Cambodia' (April 2006) <http://bit.ly/21tZ1rr>

² Also referred to as swidden agriculture. This is a form of rotational agriculture in which land is cleared for cultivation, usually by cutting and burning vegetation, and then cultivated for a short period of time, before being abandoned for a new area until its fertility has been naturally restored.

³ CCHR, 'Access to Collective Land Titles for Indigenous Communities in Cambodia' (Report) (February 2016) <http://bit.ly/1Pa69mz>

⁴ CCHR, 'Arrest of Vong Sokhengly typical of continued police intimidation' (Fact sheet) (January 2016) <http://bit.ly/1Q8kzXP>

⁵ Ibid

community activists in Svay Rieng province were each sentenced to five years imprisonment under Article 97 of the Law on Forestry for felling a small number of trees in a contested area of land. The three community members have a history of activism regarding the contested land, which they claim the Forestry Administration has encroached upon since 2008.⁶ Widespread illegal logging perpetrated by businesses and powerful actors remains largely unchecked, yet it is not unusual in Cambodia for community activists to be found guilty of the practice for chopping down a small number of trees to sustain their livelihoods.

The crackdown on such activism has been especially felt in Koh Kong province, where the environmental grassroots NGO Mother Nature has been the target of an aggressive campaign of repression. Mother Nature aims to protect the systematic destruction of Koh Kong's natural resources, and has been involved in the campaign to protect the Areng Valley and the indigenous Chornng community from the proposed hydropower dam project, in addition to leading a campaign against sand dredging. As a result of Mother Nature's activism, several activists and community members affiliated with the organization have been targeted, arrested and detained. On 23 February 2015 the co-founder of Mother Nature, Alex Gonzalez-Davidson, was detained and deported following the decision of the Ministry of Interior not to renew his visa. This was done following an explicit warning by the RGC that he should stop his activism or be deported.⁷ On 26 June 2015, three activists were detained whilst trying to deliver a petition to the National Assembly to protest sand dredging in Koh Kong. On 17 August 2015 three more Mother Nature activists, San Mala, Try Sovikea and Sim Somnang, were imprisoned after failing to appear for questioning at the district police station in connection with their involvement in peaceful, non-violent protests against sand dredging.⁸ They remain in detention and no court date has yet been set.⁹

The aforementioned incidents of the suppression of activists in 2015 are just a few examples of many. As a broad trend this targeted persecution of activists and protestors attempting to defend their land reveals an attitude of intolerance towards the right to freedom of expression by the RGC. These and other arrests actively discourage others from attempting to advocate for their land rights, thereby restricting the democratic space in Cambodia.

Ven Vorn, the Chornng people and the campaign for their ancestral lands

The Areng Valley in the Thma Bang District, Koh Kong province, is a region of high biodiversity, and the home of a number of endangered species of wildlife. It forms part of the Central Cardamom Protected Forest, and is inhabited by approximately 1,500 people, most of who belong to the Chornng indigenous group. Ven Vorn is a key representative of this community. The Chornng community have inhabited the Areng Valley since time immemorial. Many however, were displaced during clashes between the Khmer Rouge and troops affiliated with the People's Republic of

⁶ Sen David, 'Villagers get five years for '3 trees'', *The Phnom Penh Post*, 30 September 2015 <http://bit.ly/1OFj6Cd>

⁷ Tat Oudom, May Titthara, Daniel Pye and Griff Tapper, 'Defiant activist deported', *The Phnom Penh Post*, 23 February 2015 <http://bit.ly/1Rh7gUF>

⁸ CCHR, 'Special Edition – Mother Nature Activists Targeted Again' (CCHR Case Study Series) (January 2016) <http://bit.ly/1PLWhRw>

⁹ Aun Pheap, 'Mother Nature NGO Activists Questioned Again Before Trial', *The Cambodia Daily*, 05 November 2015 <http://bit.ly/1JXrBME>

Kampuchea in 1979 before returning in 1998. Community members have letters issued by their local Sangkat (Commune) Chief recognizing their possession of the land, but none of them have official land titles. Moreover, Participatory Land Use Planning was conducted in all three communes, which involves informal recognition of current land use and planning for future land use. This is evidence that indigenous land-use exists in the area.

In 2006, China Southern Power Grid began conducting feasibility studies in support of the construction of a 108-megawatt hydropower dam in the area, but in 2010 reportedly cancelled their investment plans citing heavy social and environmental impacts should the project go ahead. The China Guodian Corporation then reportedly adopted the project and conducted further surveys in November 2012, but pulled out in December 2013 claiming the dam was not economically viable. In January 2014, Sinohydro took over the project.

In early 2014, with the assistance of a Cambodian law firm that offers pro-bono assistance, the community began preparations for the first stage of the CLT process, however the firm's budgetary constraints have paralyzed this process and the community is yet to gain formal recognition of identity from the Ministry of Rural Development. More recently the community's prospects at gaining formal identity recognition have increased however, as the Office of the High Commissioner for Human Rights has expressed an interest in supporting the communities in this stage of the CLT process. The community wants the RGC to accelerate the CLT process, and cancel the dam project, which will not only ruin their livelihoods, but also threatens their existence as an indigenous group. As one community representative surmised: *"When we are evicted from here, everything regarding our identity will disappear. Our culture and tradition relies on this land. We will become ordinary Khmer people, we will no longer be Chorng."*¹⁰

In response to the risk posed by this major project, local communities began a campaign to express their opposition. If built, local indigenous communities say that the dam's reservoir would flood approximately 10,000 hectares of land in the area, submerging their ancestral lands, sacred forests and burial sites and causing wide-ranging environmental destruction. The area is home to at least 30 globally threatened animal species.¹¹ In March 2014, local community members and activists set up a roadblock to prevent Sinohydro staff from reaching the site of the proposed dam. Mother Nature also joined the blockade. On 15 September 2014, the roadblock was dispersed after the community prevented a group of government officials from visiting the area. A number of activists were arrested but were released the same evening.

Despite ongoing protest, there has been no resolution of the proposed dam issue. Activists and politicians have repeatedly sought assurances from the RGC that the Sinohydro dam will not go ahead, but to date no guarantee has been forthcoming. On 24 February 2015 Prime Minister Hun Sen himself broached the subject of the Areng Valley dam, seeming to both condemn it as unfeasible and order community members to accept ongoing studies of the area; *"Study it more clearly; and I think even if we study it clearly until 2018, we cannot develop it. And in my opinion, I*

¹⁰ CCHR Report, 'Access to Collective Land Titles for Indigenous Communities in Cambodia' <http://bit.ly/1Pa69mz>

¹¹ Hul Reaksmey and Zsombor Peter, 'With Activist in Limbo, Students Hope Tourists Can Stop Dam', *The Cambodia Daily*, 16 February 2015 <http://bit.ly/1SGjqW>

want to leave it for the next generation.”¹² Whilst this was an apparent effort to quell community outrage at the proposal, the lack of any concrete undertaking meant that it did not convince local activists to abandon their efforts.

On 19 May 2015, in a letter sent to Prime Minister Hun Sen, six Cambodian National Rescue Party (“CNRP”) lawmakers called for the proposed hydropower dam project in the Areng Valley to be scrapped. In response to their letter, Prime Minister Hun Sen wrote on 02 June 2015 that, “*it is the same case about which the Royal Government has twice provided answers at the National Assembly*” but declined to assuage concerns with any concrete promise.¹³ More recently, in January 2016 the Minister of Mines and Energy Suy Sem, declared at a conference, “*Until 2020, there will be no construction of hydropower dams.*” In the face of this repeated lack of commitment and clarity, it is not surprising that the community continues to campaign for the protection of the Areng Valley.

2. The Facts

Ven Vorn is a community representative from Thma Bang District in Koh Kong province in Cambodia. An environmental activist, Ven Vorn has been actively involved in the campaign to preserve the Areng Valley area in Koh Kong in the face of the proposed construction of a hydropower dam project proposed by Chinese firm Sinohydro (Cambodia) United Ltd. (“Sinohydro”). CCHR’s Land Reform Project has previously profiled the Chornng community in Areng Valley, featuring Ven Vorn and the campaign to save the Areng Valley, as part of its *Land Activist Profile* series.¹⁴

As a result of his continued activism, Ven Vorn has been the subject of numerous judicial actions prior to his latest arrest. On 02 March 2015, Ven Vorn was served with a court summons for unspecified, “*forest crimes*”,¹⁵ however, the hearing was delayed and a new summons was issued in late March for 03 April 2015.¹⁶ On 03 April, the authorities questioned Ven Vorn for allegedly using protected forest timbers to construct a community center, however he was released later that day. In September 2015 he was again arrested whilst petitioning for the release of three Mother Nature activists (an environmental NGO), who were arrested for campaigning against sand dredging activities, also in Koh Kong province. In this instance the authorities arrested and questioned 17 people in total, including human rights monitors. The group was later released that day.¹⁷

On 07 October 2015, Ven Vorn was arrested at approximately 12.20pm and sent to Koh Kong provincial prison following the decision of Investigating Judge Mr. Min Makara, who had questioned Ven Vorn that morning regarding the aforementioned alleged acquisition of illegally logged timber. He has been charged with “*harvesting timber products and/or non-timber forest products without a*

¹² May Titthara, “Don’t talk about Areng”, *The Phnom Penh Post*, 25 February 2015 <http://bit.ly/1ZLQdPI>

¹³ Khoun Narim, ‘PM Rebuffs Calls for Areng to Serve as Eco-Tour Site’, *The Cambodia Daily*, 04 June 2015 <http://bit.ly/1P7gosQ>

¹⁴ CCHR Land Activist profile, ‘Areng Valley: Indigenous People’s Land Threatened by Hydroelectric Dam’ (2015) <http://bit.ly/1GvNUBJ>

¹⁵ May Titthara and Daniel Pye, ‘Activist summoned over alleged crimes’, *The Phnom Penh Post*, 02 March 2015 <http://bit.ly/1Wq3wj5>

¹⁶ May Titthara and Alice Cuddy, ‘Areng Valley dam activist summonsed’, *The Phnom Penh Post*, 27 March 2015 <http://bit.ly/1JW1LrZ>

¹⁷ May Titthara and Alice Cuddy, ‘Koh Kong crackdown’, *The Phnom Penh Post*, 03 September 2015 <http://bit.ly/1UoqNVx>

permit” (Article 98 of the Law on Forestry) and “*destruction of evidence*” (Article 533 of the Criminal Code). Both charges relate to the construction of a small community center completed in early 2015, intended as a place for visitors to learn about the area, and a meeting place for community members and local activists. To construct the visitor center, the group of activists had purchased approximately 10 cubic meters of timber at a cost of \$1,500, which the authorities claim was acquired by the vendor through illegal logging.¹⁸ Ven Vorn had previously been brought into questioning regarding the construction of the community center on 03 April 2015, but was released later that same day.

Ven Vorn maintains that he purchased the timber from local community members, and that his community has the right by law¹⁹ as an indigenous community to harvest timber. At the time of writing Ven Vorn remains in prison. His prosecution is set to begin 17 February 2016.²⁰

The Observatory for the Protection of Human Rights Defenders has criticized the arbitrary detention of Ven Vorn as a penalty for “*his legitimate human rights activities*” and has called for his immediate and unconditional release.²¹

3. The Law

There are many international human rights norms and domestic laws relevant in consideration of this case. The rights to freedom of expression and association are immediately evident, as it was Ven Vorn’s identity as a land rights activist that first brought him to the attention of the authorities. However the right to freedom from arbitrary detention is also clearly applicable, considering Ven Vorn’s lengthy pre-trial detention. Furthermore, indigenous rights are also a key consideration, as they inform the fight for rights in the Areng Valley and must be upheld in the face of a restrictive political environment.

It is important to note that international human rights protection is incorporated into Cambodian law by Article 31 of the Constitution of the Kingdom of Cambodia (the “Constitution”), which states that Cambodia shall recognize and respect the Universal Declaration of Human Rights (the “UDHR”) and the covenants and conventions related to human rights. Thus, international human rights standards are directly applicable within the Cambodian legal system, as reaffirmed by a decision made by the Constitutional Council in 2007.²²

International Civil and Political Rights

The UDHR is the fundamental statement of human rights as they apply in Cambodia. Several rights protected by the UDHR are directly applicable to this case. Article 9 of the UDHR protects individuals

¹⁸ Khoun Narim, ‘Areng Valley Activist Denies Illegal Logging Allegations’, *The Cambodia Daily*, 03 March 2015 <http://bit.ly/1RAM9Ne>

¹⁹ Law on Forestry, NS/RKM/0802/016, (30 July 2002), Article 40 <http://bit.ly/1tbrB3i>

²⁰ Pech Sotheary, ‘NGOs seek access to jailed Koh Kong activists’, *The Phnom Penh Post*, 01 February 2016 <http://bit.ly/1PRJoY5>

²¹ OMCT & FIDH, ‘Cambodia: Arbitrary detention and judicial harassment of Mr Ven Vorn’ Urgent Appeal – The Observatory (09 October 2015) <http://bit.ly/1Qe9pjg>

²² Constitutional Council of the Kingdom of Cambodia, Decision No. 092/003/2007, 10 July 2007

from “*arbitrary arrest, detention or exile*”, while Article 10 gives individuals the right to a “*fair and public hearing by an independent and impartial tribunal*”. Furthermore, Article 19 protects the right to freedom of “*opinion and expression*”, and Article 20 protects the “*right to freedom of peaceful assembly and association*”.

The International Covenant on Civil and Political Rights (“ICCPR”), ratified by Cambodia in 1992, expands on these rights. Freedom from arbitrary arrest is detailed in Article 9 of the ICCPR, which elucidates the right to a fair trial, providing for the prompt occurrence of fair and independent proceedings. It assures that “*No one shall be subjected to arbitrary arrest or detention*” by guaranteeing that all detention is done according to law.²³ It requires all individuals arrested to appear “*promptly before a judge or other officer authorized by law to exercise judicial power*” – this means that individuals cannot be detained for long periods without a judicial hearing. In terms of the trial itself, this must occur within “*a reasonable time*”.²⁴

Of particular importance for the present case, the ICCPR states, “*It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.*”²⁵ Those who are detained and believe that this is done unjustly also have the right to “*take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.*”²⁶

Thus all arrests are to follow legal procedure, and the vast majority of accused persons should not be detained before trial. A fair trial must then be carried out for all charges, and there must be an opportunity for appeal. All of these obligations necessitate the consideration in the present case as to what extent Cambodian criminal procedure was followed, and whether this satisfied fair trial rights requirements. These rights are incredibly important to activists in Cambodia, who as previously mentioned often face targeted persecution from the RGC.

Domestic Civil and Political rights

The Constitution reinforces Cambodia’s human rights obligations under the UN instruments mentioned above, as well as providing its own protections. Article 38 of the Constitution reinforces the protection against arbitrary arrest; “*[t]he prosecution, arrest, or detention of any person shall not be done except in accordance with the law.*”²⁷ Article 41 of the Constitution protects every Cambodian’s right to freedom of assembly; “*Khmer citizens shall have freedom of expression, press, publication and assembly.*”²⁸ This additional protection further emphasizes the importance of international standards when interpreting Cambodian law. The Constitution gives the Constitutional Council, the courts and the parliament the authority to interpret laws, with the Constitutional

²³ ICCPR, Article 9

²⁴ Ibid

²⁵ Ibid

²⁶ ICCPR, Article 9

²⁷ Constitution of Cambodia, article 38

²⁸ Constitution of Cambodia, article 41

Council being the highest authority on the constitutionality of a law, although they cannot hear appeals on judicial cases.

Ven Vorn is entitled to fair trial rights for any suspected crime for which he is accused. These rights are protected under the Constitution, the Criminal Code and the 2007 Code of Criminal Procedure (“CCPC”). The CCPC provides rules for treatment of defendants in the justice system, and codifies the role and responsibility of judges and other legal actors.

One of the responsibilities of the judicial system is to prevent unlawful imprisonment and unjust pre-trial detention, by protecting the right to the presumption of innocence. This right is a fundamental legal principle and a right that is protected under both international and Cambodian law.²⁹ Detaining an individual before trial may be in contravention of the right to be presumed innocent, depending on the justification for doing so. Whilst it is sometimes necessary for the courts to impose pre-trial detention in order to assist in the proper administration of justice and to protect victims and witnesses, the excessive use of pre-trial detention undermines the right of the accused to be presumed innocent until convicted by an impartial and competent tribunal. Pre-trial or provisional detention should only be used in a very limited number of circumstances as per Article 205 of the Code of Criminal Procedure:

“Provisional detention may be ordered when it is necessary to:

- 1. Stop the offense or prevent the offense from happening again;*
- 2. Prevent any harassment of witnesses or victims or prevent any collusion between the charged person and accomplices;*
- 3. Preserve evidence or exhibits;*
- 4. Guarantee the presence of the charged person during the proceedings against him;*
- 5. Protect the security of the charged person;*
- 6. Preserve public order from any trouble caused by the offense.”³⁰*
- 7.*

As indicated by these limited circumstances, pre-trial detention is to be used as a last resort; judges should presume to release the accused individual until the trial, or should consider judicial supervision (placing conditions on the individual’s liberty until the trial) before they consider pre-trial detention. Only if judicial supervision would not be able to adequately address all concerns should pre-trial detention be considered.

However, historically Cambodia has had a very high rate of pre-trial detention. In 2012 for instance, in 70% of the trials monitored by CCHR, the defendants had been held in pre-trial detention.³¹ In a promising development, judges have been required, since March 2014, to provide detailed reasoning for denying an accused person bail, in a move by the Justice Minister designed to reduce the number of people in pre-trial detention.³² However, despite this stricter requirement, the problem seems to have become worse. Government statistics say that individuals in pre-trial

²⁹ United Nations Universal Declaration of Human Rights (“UDHR”), article 11(2); Constitution of the Kingdom of Cambodia, article 38

³⁰ Code of Criminal Procedure of Cambodia, 2007, article 205

³¹ CCHR Report, ‘Fifth Bi-annual Report: Fair Trial Rights in Cambodia’, November 2012 <http://bit.ly/1NPhuV4>

³² Lauren Crothers, ‘Judges Required to Explain Reasons Behind Pre-Trial Detention’, *The Cambodia Daily*, 26 March 2014 <http://bit.ly/1VJXsRI>

detention in Cambodian prisons rose from 24% to 30% of the total prison population over the latter half of 2014.³³ However external observers put the percentage as high as 63.6%, the highest in Southeast Asia.³⁴

International Indigenous Rights

As for indigenous rights, there are a number of persuasive statements in international law protecting indigenous peoples. Cambodia voted in favor of the UN Declaration on the Rights of Indigenous Peoples (“UNDRIP”) when it was adopted in 2007, describing indigenous rights and reminding states of their obligations to protect indigenous cultures. UNDRIP provides, in Article 5, the right to protect their indigenous identity and institutions:

“Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.”

This article is important as it recognizes and validates indigenous authorities and social structures. It encourages states to respect the integrity of their indigenous people groups, and those groups’ attempts to preserve their own culture.

Additionally, Article 25 of UNDRIP also endorses and specifically recognizes indigenous communities’ unique relationship to the land:

“Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.”

This article emphasizes the traditional and spiritual connection that indigenous communities have to their land, and gives them the right to strengthen this relationship. It also emphasizes the responsibility that communities have to future generations. Both of these are key motivations for indigenous people in Cambodia fighting for their land rights, including in the present case. While as a General Assembly Declaration UNDRIP is not legally binding, it does *“represent the dynamic development of international legal norms and reflect the commitment of states to move in certain directions, abiding by certain principles.”*³⁵

The Charges against Ven Vorn

Ven Vorn was charged under Article 98 of the Law on Forestry and Article 533 of the Criminal Code. Article 98 sanctions those who *“Harvest Forest Products & By-products without a permit”*.³⁶

³³ Alice Cuddy and Chhay Channayda ‘Pre-trial lockup rules flouted’, *The Phnom Penh Post*, 29 May 2015 <http://bit.ly/1QDBfDm>

³⁴ Ibid

³⁵ UN Permanent Forum on Indigenous Issues, ‘Frequently Asked Questions: Declaration on the Rights of Indigenous Peoples’ <http://bit.ly/1QNk9Wg>

³⁶ Law on Forestry, NS/RKM/0802/016, (30 July 2002), Article 98 <http://bit.ly/1tbrB3i>

Individuals guilty under this offence are “subject to one (1) to five (5) years in prison and a fine of ten (10) million to one hundred (100) million Riel, and confiscation of all evidence as state property”.³⁷ Article 533 of the Criminal Code refers to “disappearing evidence” for the purpose of hindering investigation of a crime. Specifically it involves moving “any object at a scene of felony or misdemeanor”. It is “punishable by an imprisonment from 1 (one) year to 3 (three) years and a fine from 2,000,000 (two million) Riels to 6,000,000 (six million) Riels.”³⁸ These charges will be examined to determine whether they can be fairly applied to Ven Vorn. The relevant human rights will also be examined, to verify whether the charges are being used in conflict with Mr Vorn’s rights.

4. Analysis of the Facts and Law

First charge: Harvesting Forest Products without a Permit

Ven Vorn maintains that his activism is the main cause of his arrest, and that the charges brought against him are unfounded. On review of the facts and law, this argument appears reasonable based on a number of elements. The first of these is the fact that Ven Vorn maintains he did not obtain the logs himself, but rather he bought them from members of his community. If this is correct, the charge laid against him is not applicable. Secondly, the methods by which the timber was obtained, and the reasons for which it was obtained were legal. Whether Ven Vorn or another community member obtained the timber, both are entitled to do so as indigenous people under domestic law and international convention. Lastly, his case fits the trend of judicial harassment of land rights activists that has been prevalent in 2015 and more specifically as part of a crackdown on advocacy in the Areng Valley.

Ven Vorn denies that he himself cut the logs used in the construction of the community center. Unless there is evidence to suggest that he did cut the logs (without approaching the question of the legality of this activity), the charge of harvesting forest products without a permit is completely unfounded. This is because the language of the Criminal Code, as mentioned above, requires the individual themselves to have cut the timber; possession of (allegedly) illegally obtained forest products alone is not sufficient.³⁹ Ven Vorn was not apprehended in the act of cutting this timber, but only after the community center had already been built. It appears there is no evidence supporting this charge, apart from the presence of the actual timber itself. The only investigation carried out in this case seems to be the questioning of Ven Vorn. As such, there is very little to attach the elements of this charge to Ven Vorn himself. Not only does this mean that allegations that he cut the timber are likely to be false, it also prevents him from being charged under this article if he had obtained illegally sourced timber from others. The requirement that the accused cut the timber themselves means that, even if the vendor/s from whom Ven Vorn had purchased the timber had acquired the wood illegally, the present charge is still not appropriate because it cannot be sufficiently connected to Ven Vorn. To presume that Ven Vorn committed the offence without evidence is an affront to the presumption of innocence, a fundamental human right to which all Cambodians are entitled under Article 38 of the Constitution. Additionally, Ven Vorn asserts that

³⁷ Criminal Code of Cambodia, 2009, article 533.

³⁸ Ibid

³⁹ Law on Forestry, NS/RKM/0802/016, (30 July 2002), Article 98 <http://bit.ly/1tbrB3i>

even if he did cut the timber he has, as will be discussed below, rights as an indigenous person to do so and as such would not require a permit.

Ven Vorn also asserts the right of his community to cut wood from the forest for use in traditional construction activities. Therefore, whether it is held that he or his fellow indigenous community members cut the timber, neither is liable to prosecution under the law. This practice is not only permitted by law, but is also recognized for its traditional significance. This right is in fact protected in Article 40 of the Law on Forestry, which gives indigenous communities the right to harvest timber *“to build houses, stables for animals, fences and to make agricultural instruments”*.⁴⁰ This article is intended to *“recognize and ensure their traditional user rights for the purpose of traditional customs, beliefs, religions and living”*. These protections amount to a recognition of pre-existing indigenous ownership of traditional lands. This law clearly intends to protect the right of indigenous peoples to protect their ways of life. The construction of a community center can properly be considered as a use of forestry products for *“traditional...living”*.

This point is especially strong since UNDRIP recognizes the right of indigenous peoples to strengthen their relationship to the land, as stated in Article 25. Although non-binding, the UNDRIP should be considered by judges in relevant cases such as this. This means the indigenous rights to self-preservation and protection of culture should inform the interpretation and application of domestic law and other international instruments. Ven Vorn was constructing the community center to not only protect indigenous culture, but his local environment. By ensuring that visitors and local people have a place to learn about indigenous culture, Ven Vorn was doing exactly as envisioned under UNDRIP.

Second Charge: Disturbing Evidence

As for the charge of disturbing evidence, this seems equally inappropriate. As previously mentioned, Ven Vorn was questioned on 03 April 2015 in regards to these charges, but no further action was taken at the time. It was not until 07 October 2015 that he was arrested regarding the construction of the community center. If the evidence referred to is the timber used in the construction of the community center, the construction was completed on 03 March 2015⁴¹ and remains in existence at the present time. If the center was not yet completed at the commencement of the investigation, the timber could easily have been confiscated. If there was such a strong suspicion of wrongdoing at that time as to call Ven Vorn for questioning, it seems reasonable to expect that the authorities would have confiscated or otherwise protected the evidence in question. To not arrest Ven Vorn, nor confiscate the evidence as soon as ‘suspicions’ arose, suggests that the authorities did not consider this to be a crime, or the logging to be illegal. Again, there appear to be no reasonable evidential grounds for this charge.

Furthermore, Article 533 of the Criminal Code, which Ven Vorn has been charged under, requires the suspect to have tampered with the evidence for the *“purpose of creating obstacles to finding*

⁴⁰ Ibid, Article 40

⁴¹ Khoun Narim, ‘Areng Valley Activist Denies Illegal Logging Allegations’, *The Cambodia Daily*, 03 March 2015 <http://bit.ly/1RAM9Ne>

facts". However, there is no evidence to support this statement. The timber that is the subject of the charges remains clearly evident in the existing community center; it has not been disturbed or taken away. As for Ven Vorn's intent, he has shown no evidence of intending to inhibit the course of justice. He has appeared for questioning when required, and there is no evidence of him otherwise taking any action to frustrate investigations.

Pre-trial Detention

To impose pre-trial detention in this situation, where there is no evidence that Ven Vorn in fact obtained the timber illegally, or that he tampered with evidence, constitutes an arbitrary deprivation of Ven Vorn's liberty. In fact, none of the grounds for pre-trial imprisonment provided in the CCPC are reasonably applicable:⁴²

1. *Preventing the offence from happening again*: under such intense scrutiny from authorities, and being so well-known in the community for his activism, it is very unlikely that Mr Vorn would engage in any illegal activity. Moreover, any fears that Ven Vorn would commit the alleged offence again could be addressed by imposing appropriate bail conditions and judicial supervision.
2. *Prevent harassment of witnesses or victims*: there are no victims in this alleged offence, and also apparently no witnesses.
3. *Preserve evidence*: it seems unlikely that the evidence, which has already been used in the construction of the community center, is in need of further preservation; Ven Vorn purchased this timber in order to build the center, and showed no intention to damage or destroy it.
4. *Guarantee the presence of the accused*: given that Ven Vorn willingly presented himself before the investigating judge for questioning, in full knowledge that he risked arrest, the likelihood of him not appearing at trial is greatly diminished. Moreover, his record of community leadership and activism makes it unlikely that he would have forsaken his community if faced with imprisonment.
5. *Protect the security of the accused*: there seems to be little risk from the facts and surrounding context that Ven Vorn would be harmed in the time preceding his trial. As a community representative fighting for the land rights of his people, he is a key part of his community and so most likely not at risk of violence from within the community.
6. *Preserve public order*: this ground should not be applicable to Ven Vorn's detention, as past experience has shown that the imprisonment of environmental and community activists causes, rather than prevents, public disorder. This is evidenced by the protests and related arrests which occurred outside the Koh Kong Provincial Court of First Instance in September 2015.

As well as contravening domestic law, Ven Vorn's detention also violates international human rights standards which are directly applicable in Cambodian law. As demonstrated above, the pre-trial detention lacks a justifiable legal basis, and therefore can be considered both arbitrary and unlawful,⁴³ which is prohibited under the ICCPR.⁴⁴

⁴² Code of Criminal Procedure, 2007, article 205

⁴³ UN General Comment No. 35, CCPR/C/GC/35, (16 December 2014), [11]

Based on an evaluation of the relevant legal provisions, it appears clear that there is no justification for the lengthy pre-trial detention of Ven Vorn. Whilst the court does have the authority to send suspects to detention before trial, this should only be exercised in exceptional circumstances; none of the relevant criteria are applicable in this case.

5. Conclusion

The charges laid against environmental activist Ven Vorn are completely lacking in an evidential basis, leading to the conclusion that the law has been either entirely misinterpreted or willfully misapplied to Ven Vorn. These charges have no reasonable justification under Cambodian law, and violate Ven Vorn's rights under the Cambodian Constitution and international human rights law.

Furthermore, whether Ven Vorn committed the alleged offences or not, an analysis of the facts of this case and all applicable laws leads to the conclusion that Ven Vorn's pretrial detention is both arbitrary and illegal, in violation of his right to liberty and his fair trial rights. A combination of the charges laid against Ven Vorn and his lengthy pre-trial detention suggests possible political motivations behind this case. Based on the analysis of the charges and evidence above, if Ven Vorn receives a fair and independent trial, he must be cleared of all charges and released.

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⁴⁴ ICCPR, Article 9