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LEGAL ANALYSIS: The Case of the Kingdom of Cambodia v. Mu Sochua



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CAMBODIAN CENTER FOR HUMAN RIGHTS

LEGAL ANALYSIS:

THE CASE OF THE KINGDOM OF CAMBODIA V. MU SOCHUA

A Report by the Cambodian Center for Human Rights (CCHR)
May 2010



Cambodian Center for Human Rights (CCHR)

The CCHR is a non-political, independent, non-governmental organization that works to promote and protect democracy and respect for human rights throughout Cambodia.

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LEGAL ANALYSIS OF THE CASE OF KINGDOM OF CAMBODIA v. MU SOCHUA

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. The purpose of this paper is to provide an analysis of the factual and legal issues relevant to the appeal to the Supreme Court filed by Mu Sochua (the “Applicant”) of the decision of the Phnom Penh Municipal Court dated 4 August 2009, and the decision of the Appeal Court dated 28 October 2009. This paper is written by the Cambodian Center for Human Rights (“CCHR”), a non-political, independent, non-governmental organisation that works to promote and protect democracy and respect for human rights - primarily civil and political rights - throughout the Kingdom of Cambodia. The paper will be made available on the CCHR website www.cchrcambodia.org and Cambodian Human Rights Portal www.sithi.org.
2. The paper sets out the relevant facts of the case; provides an analysis of the law under which the Applicant was convicted by the Phnom Penh Municipal Court; analyses the grounds for the appeal, namely that the Prosecution failed to prove all elements of the alleged offence, and failed to prove each of these elements to the required standard; and considers the right of the Applicant to refer certain matters to the Constitutional Council.

II. THE FACTS

April 4 Speech by the Complainant

3. This litigation stems from a speech made by the complainant in this case, the Prime Minister of Cambodia, Hun Sen (the “Complainant”), in Kampot Province, Cambodia on Saturday 4 April, 2009 (the “April 4 Speech”). The speech was widely broadcast on television and radio in Cambodia and its details were published in local newspapers and online.¹ The section of the speech pertinent to these proceedings is reproduced below in translation:

“Those opposition people do not have anything other than using the people as their tools to attack the government. And in Kampot, there is a cheung klang who is a woman that I do not need to mention her name because there are other women like Mrs. Som Kim Sour, who is also a cheung klang. This woman is not strong in building anything, but strong in making trouble, creating one trouble after another, strong in inciting trouble, even during the election campaign she rushed to hug someone and accused that person of unbuttoning her blouse. It is really absurd. She is really good at taking legal action against someone. Even she didn’t get invited to a conference, she still go to that meeting. One day, when I

¹ See for example, *Reactions on disputes between Prime Minister Hun Sen and Mrs. Mu Sochua*, Radio Free Asia, 27 April 2009, available online at <http://www.rfa.org/khmer/indepth/pm-sochua-lawsuits-04272009223145.html>

was leaving the conference, I was informed that she was trying to get into the conference even when she was not invited. This is what we called the opposition people who have thick faces, even if we chop them with a machete 100 times, it won't cut through their faces. Their females are the same as their males and their leaders as well as the subordinates are all the same.”²

4. It seems apparent that the woman who the Claimant declined to name in the April 4 Speech was the Applicant in these proceedings, Mu Sochua. The Applicant is a member of the Sam Rainsy Party (the “SRP”), the largest opposition party represented in the National Assembly, and was elected in the 2008 General election to represent constituents in Kampot province. The applicant also maintains a home in Kampot Province. The events alluded to correspond with unique and well-publicised incidents in which the Applicant was involved.

Relevant past incidents

5. On 30 June 2008, during campaigning for the 2008 National Assembly elections, the Applicant was involved in an altercation with a military official. The Applicant sought to photograph a state vehicle that was allegedly being used illegally to support the campaigning activities of the Cambodian People’s Party (the “CPP”). The Applicant became involved in a struggle with the military official, who was attempting to prevent photography of the state vehicle. During the struggle, the Applicants blouse was torn open. The Applicant later filed a lawsuit against the official, alleging physical assault.³
6. On 5 February 2009, the Applicant was barred from attending the Third Cambodian Economic Forum when bodyguards prevented her from entering the event. The Forum, “Increasing Cambodia's Competitiveness for Growth and Poverty Reduction in the Face of Global Economic Crisis”, was organized by the Cambodian Supreme National Economic Authority and attended by members of the CPP and international donors The German Ambassador unsuccessfully attempted to assist the Applicant to gain entry to the forum.⁴

Interpretation of the April 4 Speech

7. It is clear that comments made during the April 4 Speech were made in reference to the Applicant. The Complainant spoke of opposition figures, and specifically referred to a female opposition figure in Kampot. There are no other female opposition politicians representing Kampot. The Complainant also referred to unique and well-publicised events in which the Applicant was involved. The conclusion that the unnamed person referred to in the April 4 Speech was the Applicant is supported by the failure of the

² Ibid.

³ See for example, *Mu Sochua Lawsuit Against PM Pushed Back*, Cambodia Daily, 15 June 2009. See also, *Mu Sochua: anticipating jail*, Global Post, 6 March 2010.

⁴ *SRP MP Mu Sochua barred from economic forum, German ambassador boycotted the forum: Hun Sen's discrimination policy*, Phnom Penh Post, 6 February 2009.

Complainant to clarify the comments made, or to specify to whom he was referring, despite repeated opportunities presented by the Applicant and opposition members through formal requests.

The Applicant's response to the April 4 Speech

8. On 23 April 2009, the Applicant announced at a press conference at SRP Headquarters that she would file a defamation suit against the Complainant, alleging that remarks made during the April 4 Speech were defamatory.⁵ The Applicant cited specific passages of the April 4 Speech as defamatory. The unnamed person, identifiable as the Applicant, was alleged to have "*rushed to hug someone and accused that person of unbuttoning her blouse.*" The Applicant alleged that this statement implied that she has deliberately exposed herself during the incident of 30 June 2008. The Applicant also objected to the use of the term *cheung klang*, which translates as "strong leg", "gangster" or "unruly person". It is considered by some to be particularly offensive when used to refer to women. In this context, that is, combined with the subsequent comments referred to above, this term could also be interpreted as an allegation of sexual promiscuity. The Applicant stated that the Complainant had clearly identified her by reference to her position as an opposition lawmaker, her gender, her electorate, and two unique and well-publicised incidents in which she was involved. The Applicant stated that the Complainant "must take responsibility for his words and answer in front of parliament" and requested that the Complainant clarify to whom he was referring in the April 4 Speech.⁶
9. The Applicant stated that she respected the Complainant as the head of the Government but wanted him to be held responsible for his insults. The Applicant announced that she would seek 500 Riel in symbolic damages. The Applicant explained her motivations as follows: "I respect Samdech Hun Sen. I still remember Samdech's words from when I was Minister of Women's Affairs. Samdech always glorified women and said they should be in political affairs...Samdech's statement, which said that I am a 'strong leg' female, could be translated many different ways...Samdech stated in public that I was a skilled troublemaker and that I ran to embrace a man and lost a button on my shirt on purpose. This is defamation on me as a Khmer woman."⁷

Subsequent events

10. On 24 April 2009, Mr. Om Yentieng, one of the Complainant's advisers and president of the Cambodian Human Rights Committee, reported that the government lawyers would

⁵ See for example, *Mu Sochua To Sue Premier For Defamation*, Cambodia Daily, 24 April 2009. See also, *Hun Sen and Mu Sochua fighting each other about a blouse issue*, Cambodia Soir, 23 April 2009.

⁶ *Mass Demonstration Warned: Rong Chhun*, Phnom Penh Post, 16 June 2009.

⁷ *SRP lawmaker to sue Hun Sen*, Phnom Penh Post, 24 April 2009.

countersue the Applicant and that CPP members would meet to suspend her immunity if the court found that there was a case to answer.⁸

11. On 27 April 2009, the Applicant filed a lawsuit against the Complainant alleging defamation and seeking 500 riel in symbolic compensation.⁹ The Complainant filed a countersuit claiming that the Applicant had defamed him by claiming his comments referred to her.¹⁰
12. On 29 April 2009, Prime Minister Hun Sen said in a speech that lifting the Applicant's parliamentary immunity would be "easier than peeling a banana" and "as easy as ABC."¹¹ The comments were made prior to the investigation of either lawsuit.
13. On 7 May 2009, the Phnom Penh Municipal Court first heard arguments from the Applicant's lawyer, Mr. Kong Sam Onn. Mr. Kong Sam Onn presented prosecutor Hing Bun Chea with evidence detailing every aspect of the Applicant's case, including a transcript of the Complainant's April 4 Speech, and documents pertaining to the altercation with the military official in which the Applicant alleged the official tore a button from her blouse. The Applicant's lawyer requested that the court ask the National Assembly to vote on whether to lift the Complainant's parliamentary immunity.¹²
14. On 25 May 2009, Mr. Kong Sam Onn faced an investigatory panel of the Cambodian Bar Association as a result of a complaint filed by the Complainant's lawyer, Mr. Ky Tech, which accused Mr. Kong Sam Onn of violating professional codes of ethics by speaking publicly about the intended lawsuit.¹³ Mr. Ky Tech alleged in his complaint that Mr. Kong Sam Onn violated Bar Association rules by asserting during the April 23 press conference that Hun Sen defamed the Applicant. The Bar Association meeting was postponed after it failed to achieve a quorum. On the date the defamation complaint was filed against the Applicant, a defamation suit was also filed against Mr. Kong Sam Onn, for asserting in the press conference of 23 April that the Complainant had defamed his client.¹⁴
15. On June 1 2009, Mr. Kong Sam Onn appeared before a Bar Association investigation panel for the second time. The meeting was again postponed after Mr. Kong Sam Onn requested that the Bar replace one of the inspection panel members – lawyer Mr. Hen

⁸ *Counter-attack on Mu Sochua [-CPP MPs are using any excuse to lift opposition MP's immunity]*, Cambodia Soir, 25 April 2009.

⁹ *Mu Sochua's official lawsuit against Hun Sen*, DAP News, 27 April 2009.

¹⁰ *PM, Mu Sochua Sue Each Other For Defamation*, Cambodia Daily, 28 April 2009.

¹¹ *Prime Minister Sues Mu Sochua's Attorney*, Cambodia Daily, 30 April 2009.

¹² *Defamation suits heard in PP court*, Phnom Penh Post, 8 May 2009.

¹³ *No show by Bar panel members stalls probe into opposition lawyer*, Phnom Penh Post, 26 May 2009.

¹⁴ *The use and abuse of defamation and disinformation lawsuits dangerously undermine constitutional freedoms of opinions and expression*, United Nations Office of the High Commissioner for Human Rights, 16 June 2009.

Voun – because he was closely involved with the lawyer of the Complainant, Mr. Ky Tech.¹⁵

16. On June 5 2009, Mr. Kong Sam Onn appeared for questioning before the Bar Association panel for the third time.¹⁶ The meeting went ahead as scheduled, despite the attendance of only three panelists. Mr. Hem Voun was removed, and another panelist failed to appear due to health reasons. Mr. Kong Sam Onn was accused by the panelists of defaming the Complainant, who cited the press conference of April 23, in which he was quoted as saying that the April 4 Speech by the Complainant was “cowardly” if it referred to Mu Sochua.¹⁷
17. On 10 June 2009, the Phnom Penh Municipal Court dismissed the Applicant’s case against the Complainant, saying it was groundless.¹⁸ Deputy Prosecutor Mr. Hing Bun Chea explained in a three-page statement that since the Complainant’s comments did not refer to the Applicant by name, and the Complainant did not intend to insult any individual with his comments, the suit was not valid. The court moved ahead, however, with the Complainant’s countersuit, asking the National Assembly to lift the Applicant’s immunity so that it might proceed with questioning.¹⁹ Mr. Sok Roeun, Deputy Prosecutor of the Phnom Penh Municipal Court, wrote a letter to the President of the National Assembly to request the suspension of the Applicant’s parliamentary immunity.
18. On 11 June 2009, the Applicant criticised a court decision allowing the Complainant to appear at the Council of Ministers to answer questions relating to the case, arguing that the Council had no legal jurisdiction in the case and that “[t]he court does not belong to the Council of Ministers If a poor person or I am forced to go to the court, the Prime Minister must go to the court as well.”²⁰ Deputy Prosecutor Mr. Hing Bun Chea said that the court had summoned Prime Minister Hun Sen to the Municipal Court, but the procedure had been moved to the Council of Ministers following a request from his attorney, Mr. Ky Tech, for security reasons. Mr. Ky Tech said that the appearance of the Complainant’s bodyguards at the court could have led the public to believe that the court could not reach an independent ruling.²¹
19. On 12 June 2009, the National Assembly Permanent Committee received a request for the temporary suspension of the Applicant’s parliamentary immunity from the Phnom Penh Municipal Court.²²

¹⁵ *SRP lawmaker questioned for four hours by court prosecutor in Hun Sen’s defamation suit*, Phnom Penh Post, 4 June 2009.

¹⁶ *SRP attorney skeptical of Bar Association’s neutrality*, Phnom Penh Post, 8 June 2009.

¹⁷ *Ibid.*

¹⁸ *Mu Sochua’s lawsuit rejected*, Phnom Penh Post, 11 June 2009.

¹⁹ *Suspension of Lawmaker’s Immunity*, Voice of America Khmer, 12 June 2009.

²⁰ *Mu Sochua’s lawsuit rejected*, Phnom Penh Post, 11 June 2009.

²¹ *Ibid.*

²² *Mu Sochua’s Immunity Up for Discussion*, Cambodia Daily, 13-14 June 2009.

20. On 15 June 2009, the National Assembly's Permanent Committee met to consider the request to lift the parliamentary immunity of the Applicant.²³ They announced that the National Assembly would decide whether to adopt the committee's recommendations by a two-thirds majority vote on 22 June 2009.
21. On 18 June 2009, the Complainant made a speech before graduates of the Royal School of Administration in Phnom Penh.²⁴ During the graduation ceremony the complainant stated, "Lifting immunity is easy. Restoring it, in some cases, is not so easy... So [Mu Sochua] will not be a parliamentarian forever; her party must replace her with a new person."
22. On 22 June 2009, the National Assembly voted to strip the parliamentary immunity of the Applicant.²⁵ National and international observers – including foreign diplomats – were refused access to the National Assembly to observe the vote.²⁶ Twenty SRP lawmakers walked out in protest before the vote.²⁷ Ninety of the 91 lawmakers present approved the suspension of the Applicant's parliamentary immunity.
23. On or around June 30 2009, Mr. Kong Sam Onn, was found to have violated Articles 4, 6, and 15 of the Bar Association rules and was summoned to face the disciplinary council on July 7 2009.²⁸
24. On 6 July 2009, Mr. Kong Sam Onn resigned his position as attorney for the Applicant and formally defected to the CPP. The Complainant's lawyer, Mr. Ky Tech, dismissed the suggestion that the government had put any pressure on Mr. Kong Sam Onn to resign, saying that Mr. Kong Sam Onn had written a letter of apology to the Prime Minister after realising that he had made a mistake.
25. On 7 July 2009, Mr. Kong Sam Onn was due to face the disciplinary council of the Bar Association, but did not appear.²⁹ The Complainant was quoted as saying, "I ordered my lawyer to drop my complaints against Kong Sam Onn. He wrote to apologise to me and offered to join the CPP." Mr. Ky Tech withdrew the Bar complaint against Mr. Kong Sam Onn.
26. On 8 July, 2009, Mr. Ky Tech withdrew the defamation case against Mr. Kong Sam Onn from the Phnom Penh Municipal Court.

²³ *MP's immunity debate opens*, Phnom Penh Post, 16 June 2009.

²⁴ Cambodia, Case No. CMBD/47 – Mu Sochua, Resolution adopted by consensus by the Inter-Parliamentary Governing Council at its 185th session, Geneva, 21 October 2009.

²⁵ *MPs stripped of legal shield*, Phnom Penh Post, 23 June 2009.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Lawyers skirmish over who should be called to disciplinary council*, Phnom Penh Post, 30 June 2009.

²⁹ *Embattled attorney quits SRP*, Phnom Penh Post, 8 July 2009.

27. On 24 July 2009, the Phnom Penh Municipal Court heard the case against the Applicant.³⁰ The Complainant did not appear in Court, and no testimony was presented from any witness. As evidence, the prosecution relied on a video of the April 23 press conference and letters from international organisations condemning the April 4 Speech made by the Complainant. A letter of apology written by Mr. Kong Sam Onn to the Complainant was also read.
28. On 4 August 2009, Phnom Penh Municipal Court found the Applicant guilty of defamation under Article 63 of the Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period (the "UNTAC Criminal Law").³¹ The Court stated that the Applicant has defamed the Complainant by: (i) holding a press conference to announce that she would file a defamation lawsuit against the Prime Minister, (ii) informing the Inter-Parliamentary Union and the Global Fund for Women of the matter, (iii) affirming that the Prime Minister's words against her "affected all Khmer women and women all over the world."³² The Court held that all of these acts showed that the Applicant had acted in bad faith, with the intention of defaming the Complainant worldwide and sullyng his reputation and dignity. The Applicant was ordered to pay 16.5 million riel (around US\$4000) in compensation. The Applicant appealed this decision.
29. On 28 October 2009, the Appeal Court upheld the conviction handed down by the Phnom Penh Municipal Court.³³ Earlier in the month the Appeal Court also rejected an appeal by the Applicant to overturn the June decision to throw out her original defamation proceedings.
30. On 10 November 2009, the Applicant filed an appeal to the Supreme Court against the conviction handed down by the Municipal Court and upheld by the Appeal Court.³⁴
31. In late March 2010, it was announced that the Supreme Court would hear the appeal on 7 April 2010.³⁵ On April 7 2010, the Supreme Court postponed the hearing of the appeal as the Applicant was out of the country and not due to return until later that month.³⁶ It was subsequently announced that the hearing would take place on 2 June 2010.³⁷

III. THE LAW

32. The Applicant was charged with, and convicted of defamation under Article 63 of the UNTAC Criminal Law. The relevant provisions of the Article are set out below:

³⁰ *Mu Sochua Stands Trial for Defamation*, Cambodia Daily, 25-26 July 2009.

³¹ *Mu Sochua Convicted, Fined \$4,100*, Cambodia Daily, 5 August 2009.

³² Cambodia, Case No. CMBD/47 – Mu Sochua, Resolution adopted by consensus by the Inter-Parliamentary Governing Council at its 185th session, Geneva, 21 October 2009.

³³ *Mu Sochua Defamation Conviction Upheld by Appeals Court*, Cambodia Daily, 29 October 2009.

³⁴ *Mu Sochua Appeals Defamation Conviction*, Cambodian Daily, 11 November 2009.

³⁵ *Hearing in Mu Sochua's case to take place on 7 April*, everyday.com.kh, 24 March 2010

³⁶ *Supreme Court delays Mu Sochua's hearing*, DAP news, 7 April 2010.

³⁷ *Court orders Mu Sochua to appear June 2*, Phnom Penh Post, 14 May 2010.

Article 63: Defamation and Libel

1. Any bad faith allegation or imputation of a given fact which harms the honor or reputation of an individual is a defamation. The original publication or reproduction of the allegation or imputation is punishable, even if it refers to a person who is not explicitly named but whose identity is made evident from the defamatory speech, shout, threat, writing, printing, sign, poster, or audiovisual dissemination. Any allegation or imputation against a public figure which the author, the journalist, publisher, editor, or producer knows to be false and nevertheless distributes, publishes, writes or circulates with malicious intent is also a defamation.

2. Any insult, contemptuous remark or abusive language which does not claim to impute fact constitutes libel.

33. The drafting of Article 63(1) creates some ambiguity as to the exact elements of the offence of defamation. However, it seems that the offence of defamation requires at least three basic elements to be proven by the prosecution. The first element is that the accused person must have made an allegation or an imputation of a given fact. The second element is that the allegation or imputation must have been made in bad faith. Bad faith is a legal concept that implies dishonest or malicious intentions. Article 63(1) subsequently states that defamation includes an allegation or imputation against a public figure that is knowingly false and distributed with malicious intent. For the purposes of this analysis the concepts of bad faith, dishonesty, and malicious intent will be grouped together as one element summarised by reference to “bad faith”. The third element is that the allegation or imputation of fact must have harmed the honour or reputation of an individual.

Standard of proof

34. The standard of proof determines the certainty with which the prosecution must prove the elements of the offence that are set out above. Article 321 of the Code of Criminal Procedure of the Kingdom of Cambodia states that the Court “has to consider the value of the evidence submitted for its examination, following the judge’s intimate conviction.” This statement is qualified by Article 38(6) of the Constitution of the Kingdom of Cambodia (the “Constitution”), which provides that: “Any case of doubt shall be resolved in favour of the accused.” The practical implication of Article 38(6) is that a case must be dismissed if there exists an element of doubt as to whether one or more of the elements of the offence have been proven.

Burden of proof

35. The burden of proof determines which party to the proceedings has the burden of proving their case. In a criminal case, the evidential burden is on the prosecution – the prosecution must provide evidence to prove all elements of the alleged offence to the

required standard of proof. In a criminal case there is no burden on the accused to prove that the charges against them are false. If the evidence is too weak to prove all elements of the case, the Court must dismiss the charges, regardless of whether the accused has presented any evidence.

36. The right to be considered innocent until proven guilty is enshrined in international law – through Article 11(1) of the Universal Declaration of Human Rights (“UDHR”) and Article 14(2) of the International Covenant on Civil and Political Rights (“ICCPR”). These rights are incorporated into Cambodian national law pursuant to Article 31 of the Constitution, as recognised by a decision of the Constitutional Council dated 10 July 2007.³⁸ The presumption of innocence is also provided for in Article 38(7) of the Constitution, which states: “The accused shall be considered innocent until the court has judged finally on the case.”

IV. ASSESSING THE GROUNDS FOR APPEAL

37. On 10 November 2009, the Applicant appealed to the Supreme Court against the decisions of the Phnom Penh Municipal Court, dated 4 August, and the Appeal Court, dated 28 August 2009. The grounds for appeal were that the lower courts had failed to correctly apply Article 63 of the UNTAC Criminal law and had failed to recognise the breach of fundamental constitutional rights, including the right to a fair trial.
38. In order to prove the offence alleged, the Prosecution, and the lawyer for the Complainant, were required to prove the elements of the offence of defamation, set out above in paragraph 35.

Allegation or imputation of fact

39. The first element that the prosecution was required to prove was that the Applicant made an allegation or imputation of fact. The prosecution relied on video evidence of the April 24 press conference, and particularly focused on a comment by the Applicant that the Complainant’s derogatory language “affected all Khmer women and women all over the world.”³⁹
40. The prosecution also relied upon alleged communication between the Applicant and an international organization, the Global Fund for Women (the “GFW”). The GFW is a nonprofit grant-making foundation that advances women’s human rights worldwide. The prosecution claimed that the Applicant had incited this and other international organisations. A letter from the GFW dated 13 April 2009 was read as evidence that

³⁸ Constitutional Council, Decision No. 092/003/2007 dated July 10, 2007.

³⁹ Cambodia, Case No. CMBD/47 – Mu Sochua, Resolution adopted by consensus by the Inter-Parliamentary Governing Council at its 185th session, Geneva, 21 October 2009.

defamatory statements had been made, although it remained unclear from the letter what statements the Applicant had made that were defamatory.

41. The Applicant was seemingly within her constitutional rights to denounce alleged breaches of the law by the Complainant. Article 39 of the Constitution of the Kingdom of Cambodia (the “Constitution”) states:

Khmer citizens shall have the right to denounce, make complaints or file claims against any breach of the law by state and social organs or by members of such organs committed during the course of their duties. The settlement of complaints and claims shall be the competence of the courts.

The Applicant was clearly of the opinion that the Complainant had breached Article 63 of the UNTAC Criminal law by making defamatory statements. It is also arguable that the Complainant’s comments breached constitutional prohibitions on discrimination against women (Article 45(1)) and obscenity that affects the reputation of women (Article 46(1)).

42. Article 41 of the Constitution also guarantees freedom of expression for all Khmer citizens.

Harms the honor or reputation of an individual

43. The second element the prosecution was required to prove was that the reputation of the Complainant was harmed or damaged by an allegation or imputation of fact. The Complainant had been interviewed about his complaint but did not appear at the hearing and no evidence relating to the interview was produced in court.

44. The Complainant’s lawyer argued that as a public figure, the Complainant required more protection against defamation than ordinary citizens. Such an argument is at odds with international law, particularly the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights (the “Siracusa Principles”)⁴⁰, adopted by the United Nations Human Rights Committee on 28 September 1984. Principle 37 of the Siracusa Principles states: *A limitation to a human right based upon the reputation of others shall not be used to protect the state and its officials from public opinion or criticism.*

Made in bad faith

45. The final element that the prosecution was required to prove was that the alleged allegation or imputation of fact was made by the Applicant in bad faith. As described in

⁴⁰ UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4, available at: <http://www.unhcr.org/refworld/docid/4672bc122.html>

paragraph 35 above, bad faith is a legal concept that generally implies dishonesty or malicious intent. Such an interpretation is supported by subsequent reference in Article 63(1) of the UNTAC Criminal Law to allegations or imputations that were knowingly false and distributed with malicious intent.

46. The Applicant is a well-known advocate of women rights as recognised by a passage in the April 13 letter of the GFW:

Mu Sochua is an internationally recognized leader who has inspired women and girls in Cambodia and around the world. Her dedication to advancing women's rights and the public welfare is demonstrated by her long career in public service as the former minister of women's and veteran's affairs of Cambodia, and her current role as a member of parliament and former secretary-general of the Sam Rainsy party. She is also the founder of Khemara, the first local development organization for women in Cambodia. Mu Sochua's courage, vision and leadership have been internationally recognized with the Vital Voices Annual Leadership Award and the Haas International award. She is also a nominee for the 1,000 Women for Nobel Peace Prize.⁴¹

It seems unlikely that a figure who has worked so hard to promote the rights of women would claim that such rights had been violated even though she did not actually believe that they had.

47. In fact, the Applicant's actions seemed to imply the exact opposite to a bad faith allegation. The Applicant was careful to qualify her allegation by explaining that she respected the Complainant and acknowledging his positive attitude towards women in the past. These comments are recorded above in paragraph 10. Though the Applicant prefaced her comments by emphasising her respect for the Complainant she also noted that she genuinely believed that the comments were defamatory.
48. The Complainant's lawyer argued that the fact that the Applicant sought only 500 riel in compensation evidenced the lack of any actual harm to her honour or reputation from the April 4 Speech. This, it was implied, was evidence that the lawsuit was not genuine and was motivated by "bad intentions". On the contrary it seems that the Applicant again sought to make it clear that she was not motivated by financial or political gain, but rather by a desire to discourage the use of derogatory language to refer to women in Cambodia.
49. The Complainant's lawyer also argued that the Applicant's communication with international organisations was evidence of an intention to damage the Complainant's reputation abroad. In response to this argument, the Inter-Parliamentary Union stated in a resolution adopted 1 April 2010:

⁴¹ Global Fund for Women, Letter to President of the National Assembly of Cambodia, Heng Samrin, April 13, 2009.

[The IPU] Cannot accept under any circumstances that a letter to the IPU, whether publicized or not, should be used as an argument against Ms. Mu Sochua, particularly since the IPU has put in place a procedure designed to examine such communications.

50. The Applicant's decision to contact international organisations must be seen in the context of Cambodia's political climate. Opposition politicians and other critics of the government have been prosecuted in the courts for expressing opinion. The Applicant must have been conscious of her vulnerability to such measures and, in a country where the lack of independence in the courts has repeatedly been cited as an obstacle to the recognition of fundamental rights, it is understandable that the Applicant would wish to bring international attention to such litigation.
51. The tendency of the CPP to respond aggressively to criticism is evidenced by the campaign of persecution subsequently launched against Mr. Kong Som Onn and by the Complainant's boasts that stripping the Applicant's parliamentary immunity would be "as easy as ABC". The remarks by the Complainant on 18 June 2009, quoted above in paragraph 23, suggest that the Complainant has sought to use his party's National Assembly majority to ensure that the Applicant will be unable to return to her position as an elected representative.
52. The proposition that a group or an individual's communication with international organisations in order to bring attention to alleged breaches of human rights can be used as evidence of malicious intent if such communication is judged to have harmed the reputation of government officials is absolutely repugnant and a violation of fundamental human rights and freedoms recognised in the Cambodian Constitution and international law. Such a principle would also seemingly undermine the entire system of international human rights law.
53. Any citizen must be free to contact international organisations to raise concerns about their human rights. The Constitution guarantees the freedom of expression of all Khmer citizens (Article 41). The UDHR, which Article 31 of the Constitution states shall be recognised and respected in Cambodia, also states that everyone has the right to freedom of opinion and expression and that this right includes freedom to hold opinions and *to seek, receive and impart information and ideas through any media and regardless of frontiers*.

The offence was not proven

54. The conclusion of the Phnom Penh Municipal Court to convict the Applicant seems to have been based on a wrongful application of the law and a failure to consider the individual elements of the offence of defamation under Article 63 of the UNTAC Criminal Law. An analysis of the facts of the case and evidence presented leads to the conclusion

that the prosecution failed to prove all elements of the offence. The prosecution failed to show that any allegation or imputation of fact led to harm to the honour or reputation of the Complainant. Most detrimental to the prosecution case, there was a failure to produce credible evidence that attested to the Applicant's bad faith when making any alleged allegation or imputation of fact.

55. The Phnom Penh Municipal Court seems to have failed to consider both the standard of proof required and the burden of proof in deciding this case. It is difficult to see how an independent and impartial court could have concluded that all elements of the offence had been proven. As stated in paragraph 37 above, Article 38(6) of the Constitution provides that "Any case of doubt shall be resolved in favour of the accused." In this case it is difficult to look at the facts of the case and evidence presented and conclude that major doubts did not exist as to whether the elements of the offence had been proven, particularly the bad faith element.

V. CONSTITUTIONAL COUNCIL

56. The litigation between the Applicant and the Complainant raises a number of questions relating to the fundamental Constitutional rights of the Applicant. Article 19(1) of the Law on the Organization and Functioning of the Constitutional Council states that any person who is involved in a suit at court may request that the Constitutional Council consider the constitutionality of any provisions of a law or any decision of a state institution that the person affirms has affected his or her fundamental rights or freedoms. The case which is the subject of the current appeal by the Applicant raises a number of constitutional issues.

The right to freedom of expression and the right to denounce public officials for breaching the law

57. Article 41 of the Constitution states that all Khmer citizens have the right to freedom of expression, press, publication and assembly. The UDHR, which Article 31 of the Constitution states shall be recognised and respected in Cambodia, states also that everyone has the right to freedom of opinion and expression and that this right includes freedom to hold opinions and *to seek, receive and impart information and ideas through any media and regardless of frontiers*. Though Article 41 of the Constitution states: *No one shall exercise this right to infringe upon the rights of others*, Principle 37 of the Siracusa Principles states: *A limitation to a human right based upon the reputation of others shall not be used to protect the state and its officials from public opinion or criticism*. The purpose of Principle 37 is to ensure that state officials do not use defamation laws to silence legitimate criticism and debate, a practice common in Cambodia.
58. By contacting international organisations for support and advice, the Applicant was exercising a fundamental human right to impart information across frontiers. The

Court's acceptance of the prosecution argument that this could be used as evidence of malicious intent was in breach of the Applicant's constitutional right to freedom of expression.

59. Furthermore, Article 39 of the Constitution guarantees the right of Khmer citizens to denounce public officials for a breach of the law committed during the course of their duties. According to Article 39, the settlement of such complaints and claims shall be the competence of the courts.
60. In the case under appeal, the Applicant sought to exercise her Article 39 right by denouncing comments that she perceived to amount to defamation law and a breach of Articles 45 and 46 of the Constitution, which prohibit discrimination against women and obscenity that affects the reputation of woman respectively. These comments were made by the Complainant, the Prime Minister, during the course of his duties. The Applicant utilised her right under Article 39 of the Constitution and denounced a perceived breach of law by a public official.
61. The Applicant was denied the full exercise of her right under Article 39 when, on 10 June 2009, her lawsuit was dismissed as groundless by the Phnom Penh Municipal Court, despite the submission of substantial evidence, referred to in 16 above.
62. In publicly announcing that she was seeking the intervention of the courts, the Applicant was exercising her right to freedom of expression under Article 41 of the Constitution and declaring that she was exercising a constitutional right under Article 39. Just as the media has the right to publish stories about such complaints, the Applicant had the right to discuss the issue in public. Announcing the exercise of constitutional rights cannot be a defamatory act.

Equality before the law

63. Article 31 of the Constitution provides that everyone shall be equal before the law. The right to equality before the law is also guaranteed by Article 14 of the ICCPR. The complaint by the Applicant against the Complainant was dismissed without any witnesses being called and without a full hearing. Rather than dismissing the complaint by the Applicant, the courts ought to have considered the merits of the complaint and the evidence in support of it in determining whether it satisfied the legal test set down for defamation set down in Article 63 of the UNTAC Criminal Law. In this regard, it is important to recall that Article 63 provides that comments made against unnamed individuals may still constitute defamation so long as their identity is made clear in the context of the speech. That the Applicant's case should be dismissed and the case under appeal brought to trial on the basis of weak evidence establishes that the Applicant has not been treated equally before the law. The fact that the Applicant was convicted at trial, and the fact that that conviction was upheld on appeal, only serves to underline

the inequality between the Applicant and the Complainant throughout these proceedings and those relating to the Applicant's complaint against the Complainant.

Right to legal assistance of one's own choosing

64. Article 128 of the Constitution provides that the judiciary shall protect the rights and freedoms of the citizens. The rights and freedoms of the citizens include, pursuant to Article 31 of the Constitution, the "human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women's and children's rights". All Khmer citizens are therefore guaranteed by 31 of the Constitution, the right to a fair trial as per Article 14 of the ICCPR. The right to a fair trial as per Article 14 of the ICCPR is comprised of a number of rights including *the right to legal assistance of one's own choosing*.
65. Article 14(3)(d) of the ICCPR provides that in the determination of any criminal charge against him, *everyone shall be entitled, as a minimum and in full equality, to the right to defend himself in person or through legal assistance of his own choosing*. In the instant case, the Applicant has defended herself throughout the legal process since her lawyer Mr. Kong Sam Onn withdrew from the case as a result of threats of disciplinary and legal action against him. The Applicant has therefore been denied the right to a lawyer of her own choosing in violation of her right to a fair trial under Article 14 of the ICCPR and Article 31 of the Constitution.
66. The Applicant raised this point at first instance though the court rejected it. Though it is not the duty of the court to provide legal assistance, it is the duty of the court to uphold the rights of all citizens. The Complainant's lawyer argued that there are hundreds of lawyers in Cambodia from which the Applicant could have chosen a lawyer. However, the cynical targeting of the lawyer of the Applicant's choosing, Mr. Kong Sam Onn, by the Complainant and his lawyer was likely to remove any element of genuine choice due to the intimidation resulting from such aggressive behavior.

Right to a trial by an independent tribunal

67. Article 128 of the Constitution provides that the judiciary shall be an independent power and shall guarantee and uphold impartiality. Similarly, Article 14 of the ICCPR provides that everyone is entitled to a hearing by an independent and impartial tribunal. The Complainant in the instant case is the Prime Minister, the head of the Council of Ministers, the executive branch of government. The case has been characterised by inequality between the Applicant and the Complainant before the law and has involved a number of violations of the rights of the Applicant. In these circumstances, questions necessarily arise as to the independence of the judges and the courts that have participated in these proceedings to date.

Discrimination against Women

68. Article 45 of the Constitution prohibits discrimination against woman whereas Article 46 provides that obscenity that affects woman shall be prohibited. In the instant case, the question of whether the comments made by the Complainant in reference to the Applicant and Mrs. Som Kim Sour violated these principles of the Constitution should be considered by the Constitutional Council. The fact that the courts have never considered this question in a full hearing also raises the question of whether the judiciary has failed in its obligation, as per Article 128 of the Constitution, to uphold the rights and freedoms of Khmer citizens.

Cambodian Center for Human Rights
30th May, 2010
Phnom Penh
Kingdom of Cambodia