Legal Analysis of the Charging and Sentencing of 13 Boeung Kak Community Representatives on 24 May 2012 (criminal case number 1576/24-05-2012)

1. Introduction

On 24 May 2012, 13 female representatives of the evicted communities at Boeung Kak were charged, tried, sentenced and imprisoned over the course of a single day.[1] The women are: Tep Vanny, Heng Mom, Chheng Leap, Kong Chantha, Tol Sreypov, Phann Chhunreth, Pov Sophea, Soung Sakmai, Chan Navy, Tho Davy, Ngoun Kimleang, Song Sreyleap and Nget Khun.[2] They were charged at the Phnom Penh Municipal Court under Article 504 of the Penal Code 2009 (Aggravating Circumstances (Obstruction of Public Official)) and Article 34 of the Land Law 2001 (Illegal Occupation of Land) (the "Charges").[3] Under Article 504 of the Penal Code 2009 and Article 259 of the Land Law 2001, seven women were sentenced to two years and six months in prison, five to two years (with six months' suspended sentence), and 72-year-old Nget Khun to a year (with a year and six months' suspended sentence).[4] Throughout the course of this Legal Analysis, the 13 Boeung Kak women will be referred to as the "Defendants".

Later, also on 24 May 2012, two more protestors – Ly Chanary (female) and Sao Saroeun (male) (the "Detainees") – were arrested and charged with the same offenses,[5] but, as of 11 June 2012, are still being kept in unlawful pre-trial detention. While the Charges also apply to the Detainees, the fact that (1) they have not yet been tried (one section of this Legal Analysis discusses fair trial rights), (2) they were arrested not on 22 May 2012 with the Defendants but on 24 May 2012 when coming to court as witnesses to give evidence in defense of the Defendants (their testimonies were refused by the presiding judge)[6], and (3) they were among the 18 families asking to re-build their homes rather than acting as human rights defenders (please see the Facts and Human Rights Defenders sections below), means that the legality of the Charges in relation to the Detainees and their unlawful pre-trial detention are not discussed in this Legal Analysis.

The Defendants were charged in relation to their involvement in events at Boeung Kak on 22

[1] 'Boeung Kak women jailed after three-hour trial' *The Phnom Penh Post* (Phnom Penh 25 May 2012).
[2] *Id*. and the CCHR Field Report (please see the Facts section below).
[3] 'Municipal Court Sentences 13 Boeng Kak Protesters to Jail' *The Cambodia Daily* (Phnom Penh 25 May 2012) and the CCHR Field Report (please see the Facts section below).
[4] *Id*.
[5] 'Boeung Kak women visited by MPs' *The Phnom Penh Post* (Phnom Penh 5 June 2012).
[6] 'Boeung Kak women jailed after three-hour trial' *The Phnom Penh Post* (Phnom Penh 25 May 2012).

May 2012, when they were protesting in support of a family (the "Family") who were attempting to rebuild their home – destroyed by the developing company, Shukaku Inc. (the "Company") in 2010.[7] The Company is owned by Senator Lao Meng Khin of the governing Cambodian People's Party, and was granted a 99-year lease over the lake and its surroundings in 2007 in order to fill the lake in with sand and build a luxury development complex on the site.[8]

This Legal Analysis is written by the Cambodian Center for Human Rights ("CCHR"). CCHR is a leading non-aligned, independent, non-governmental organization that works to promote and protect democracy and respect for human rights – primarily civil and political rights – in the Kingdom of Cambodia ("Cambodia"). This Legal Analysis is available at www.cchrcambodia.org and www.sithi.org.

2. Executive Summary

This Legal Analysis: (1) provides an overview of the fundamental human rights that have been compromised by the Charges,[9] namely the rights to freedom of expression and freedom of assembly (as well as the right to defend human rights); (2) conducts a step-by-step analysis of the Charges, examining each of them in turn and applying the law to the facts as they have been reported, and finds that, for the most part, the law has been incorrectly applied to the facts; (3) examines the judicial process both at the pre-trial and trial stages, and discovers that the Defendants' rights to a fair trial have been breached in numerous fundamental ways; and (4) concludes that the sentencing of the Defendants represents a gross miscarriage of justice and that there are therefore clear, solid and substantial grounds for appeal. This Legal Analysis is available to the Defendants and their legal counsel to use as a basis for a judicial appeal, or to any other parties for advocacy purposes. Under Article 382 of the Criminal Procedure Code 2007 (the "CPC"), the Defendants have one month to appeal their sentences, *i.e.*, before 24 June 2012.

3. Facts

This Youtube video clip[10] of events on 22 May 2012 will serve both as a source for background information and as evidence for the analysis of the Charges below. Furthermore, CCHR had a documentation officer present at Village 1 in the Boeung Kak area on 22 May 2012, who composed a field report after the event (the "CCHR Field Report"), as well as a trial monitor present inside the courtroom at the trial on 24 May 2012. These sources – in addition to media reports – form the factual and evidential basis for this Legal Analysis.

In 2010, 18 families from Village 1 were forcibly evicted from their homes, which were then

[7] *Id*.
[8] 'Municipal Court Sentences 13 Boeng Kak Protesters to Jail' *The Cambodia Daily* (Phnom Penh 25 May 2012).
[9] With the exception of the Defendants' land and housing rights and rights to fair and proper compensation, which relate to the forced evictions rather than to the Charges.
[10] Posted by The Cambodian League for the Promotion and Defense of Human Rights (LICADHO) Canada.

demolished. A press conference was held in the Village 1 area following the omission of these families' names from the shared entitlement to 12.44 hectares[11] set aside by a sub-decree signed by Prime Minister Hun Sen on 11 August 2011.[12] On 21 May 2012, the 18 families submitted a letter to local authorities asking permission for their homes to be re-built, yet received no approval.[13]

On the morning of 22 May 2012, having received no support or engagement from the authorities, around a hundred Boeung Kak residents began protesting in the Village 1 area and demanding the re-construction of the houses of the 18 families from Village 1.[14] One of the 18 families – the Family – then set about trying to physically re-build their home.[15] A joint force of around 200 hundred armed police and military police, plus around 20 private security guards hired by the Company, tried to thwart the villagers' attempts to re-build the house by physically preventing them from doing so, confiscating wood and construction materials.[16]

At about 11.00am, the confrontation between the villagers and the authorities intensified,[17] as some 20 or 30 protestors began singing[18] and cursing the authorities, in particular Sok Sambath, Daun Penh Governor, whom they accused of stealing their land for the benefit of the Company.[19] In addition, protestors tried to find a policeman who had beaten female protestors on a previous occasion.[20] In response, the authorities and private security agents arrested two female protestors at about 11.30am and pushed them into an awaiting police truck.[21] A further 11 protestors were apprehended on the same day, all of them women.[22] They were then detained at the Phnom Penh police station for two days before being charged on 24 May 2012.[23]

4. Law

Fundamental Freedoms

In gathering in the Village 1 area by Boeung Kak, and in voicing their disapproval of government and corporate activities that have negatively impacted upon local communities, the Defendants were exercising their rights to freedom of assembly and expression, respectively. Both fundamental freedoms are protected under both Cambodian and international law.

[11] The CCHR Field Report.
[12] Sub-decree No. 183 S.E., dated 11 August 2011, on Facilitation of Boeung Kak Development's Surface Area.
[13] The CCHR Field Report.
[14] *Id*.
[15] *Id*.
[16] *Id*.
[17] *Id*.
[18] 'Bringing down the house: Thirteen arrests greet symbolic B Kak gesture' *The Phnom Penh Post* (Phnom Penh 23 May 2012).
[19] The CCHR Field Report.
[20] *Id*.
[21] *Id*.
[22] *Id*.
[23] 'Municipal Court Sentences 13 Boeung Kak Protesters to Jail' *The Cambodia Daily* (Phnom Penh 25 May 2012).

With regard to Cambodian law, Article 41 of the Constitution of the Kingdom of Cambodia (the "Constitution") states that all citizens shall have freedom of expression and assembly. Furthermore, Article 35 provides that all Khmer citizens shall have the right to participate actively in the political life of the nation.

As for international law, Article 31 states that Cambodia shall recognize and respect the Universal Declaration of Human Rights (the "UDHR") and the covenants and conventions related to human rights, thereby incorporating the UDHR and the International Covenant on Civil and Political Rights (the "ICCPR") into domestic law.[24] Article 19 of both the UDHR and the ICCPR, the latter of which Cambodia acceded to and ratified in 1992, provide for the right to freedom of expression of everyone, while Article 20 of the UDHR and Article 21 of the ICCPR provide for the right to freedom of assembly.

There are, however, certain restrictions to both fundamental freedoms, and it is the duty of this Legal Analysis to examine whether the facts of this case fall within those exceptions. For example, Article 19 of the ICCPR restricts the right to freedom of expression on grounds of the "*respect of the rights or reputations of others*" and the "*protection of national security or of public order (*ordre public*), or of public health or morals*", to the extent that the restrictions are "*provided by law*" and are "*necessary*"[25]. Limitations on the right to freedom of assembly under Article 21 of the ICCPR are almost identical ("*in conformity with the law*" and "*necessary in a democratic society*"). Moreover, Article 20 of the ICCPR – further limitations on the right to freedom of expression under Article 19 of the ICCPR – prohibits the right to freedom of expression if it represents "*propaganda for war*" or "*advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*".

While it would be stretching it to claim that the actions of the Defendants threatened national security or public health or morals, or represented war propaganda or advocacy of national, racial or religious hatred, there is an argument that their actions affected public order and/or compromised the rights or reputations of others, *i.e.*, the Company and/or the city authorities.

Specifically in relation to public order, it should be argued that the Defendants' protests were only in danger of threatening public order as a result of the heavy-handed and disproportionate tactics of the law enforcement agencies and public officials, and were exacerbated by the continuing refusal of the authorities to find a solution to the long-running land eviction crisis at Boeung Kak. This limitation, based on public order, cannot therefore be validly and justifiably applied to the Defendants' rights to freedom of expression and assembly.

[24] In a decision by the Cambodian Constitutional Council, dated 10 July 2007, it was confirmed that all human rights instruments to which Cambodia has acceded form part of the Constitution. Please see decision no. 092/003/2007.
[25] Emphasis added.

And as regards compromising the rights or reputations of others, according to the United Nations ("UN") Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR (the "Siracusa Principles")[26] – published by the UN Human Rights Committee ("HRC") as interpretation of the relevant ICCPR provisions – "*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*" (Principle 37). This Principle seems to anticipate precisely the kind of situation in which the Defendants have found themselves: they are being punished for exercising their rights to freedom of expression and assembly through their protests against their government, local authorities and public officials – whom they consider ultimately responsible for the violation of their land and housing rights. Therefore, neither can this limitation, based on compromising the rights or reputations of others, be validly used to restrict the Defendants' rights to freedom of expression and assembly.

In any event, it is difficult to argue that any restrictions on the Defendants' rights to gather and protest would be "provided by law" and "necessary". The Siracusa Principles again lend some clarification: "provided by law" means "*provided for by national law of general application which is consistent with the Covenant and is in force at the time the limitation is applied*" (Principle 15). Furthermore, according to Principle 16, "[l]*aws imposing limitations on the exercise of human rights shall not be arbitrary or unreasonable*". It is arguable that applicable domestic legislation such as the Penal Code 2009 – or, as with the Law on Peaceful Assembly 2009 (otherwise known as the "Demonstration Law"), its implementation (please see the discussion below) – is not consistent with the aim of the ICCPR to protect these fundamental freedoms, and is arbitrary and unreasonable in that there is no discernible reason to limit fundamental freedoms in Cambodia beyond international standards. In other words, the presumption should always be in favor of the fundamental freedom rather than the limitation. Finally, according to Principle 18, "[a]*dequate safeguards and effective remedies shall be provided by law against illegal or abusive imposition or application of limitations on human rights*". Such safeguards and remedies are not provided by either the Penal Code 2009 or the Demonstration Law (please see more below).

The Demonstration Law, which regulates all demonstrations and peaceful assemblies in Cambodia, merits some further discussion in light of the "provided by law" limitation to the right to freedom of assembly (and expression) set out in the ICCPR. Article 2 states its purpose to be "*to assure freedom of expression of all Khmer citizens through peaceful demonstration*". The Ministry of Interior Implementation Guide on the Demonstration Law (the "Implementation Guide") explains that "*the right to demonstrate must be allowed to the maximum extent possible*" and that "*restrictions on free expression and demonstration must therefore be as limited as possible, and only those restrictions necessary in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others*". These objectives and guidelines are in accordance with the provisions of the ICCPR.

[26] Annex, UN Doc E/CN.4/1984/4 (1984).

However, Article 5 of the Demonstration Law provides that "*any group of individuals who wishes to organize a peaceful demonstration at any public venue shall notify the competent municipal or provincial territorial authorities in charge of that place in writing*". Article 7 then provides that the notification letter shall be filed with the municipality five days in advance of the day on which the demonstration is to be held. However, while the UN HRC has held that notification requirements for demonstrations are compatible with the permissible limitations on the right to freedom of assembly,[27] the right to freedom of assembly entails a right to hold demonstrations in cases when no notification has been given.[28] Furthermore, while Article 20 of the Demonstration Law provides for the dispersal of demonstrations held in cases when no notification has been provided, it does confer discretion on the authorities to disperse such demonstrations, stating that "*competent authorities <u>may</u> take actions to cease such a demonstration*".[29] Moreover, the Implementation Guide states that "*if the demonstration was not notified, but is peaceful and does not disturb public order, competent territorial authorities may allow the demonstration to proceed*".[30] It also states that "*even though a demonstration is peaceful, competent authorities may stop the demonstration if no notification was submitted. However, the competent authorities may show flexibility and allow such a demonstration to continue if it is peaceful (example: spontaneous demonstrations).*"[31] In the current case, while the Defendants did not provide notification to the Phnom Penh Municipality as required under the Demonstration Law, both the Implementation Guide and applicable international case law indicates that the protest on 22 May 2012 – as a peaceful protest – was protected by the right to freedom of assembly.

As regards the other element of the limitation to the right to freedom of assembly prescribed by the ICCPR, again the Siracusa Principles are helpful in interpreting the requirement that any restriction be "necessary in a democratic society". Principle 20 states that "[t]*he expression 'in a democratic society' shall be interpreted as imposing a further restriction on the limitation clauses it qualifies*", while Principle 21 states that "[t]*he burden is upon a state imposing limitations so qualified to demonstrate that the limitations do not impair the democratic functioning of the society*". Any restrictions imposed on the Defendants' right to freedom of assembly in this case would indeed impair their ability to participate democratically in Cambodian society (as per the Constitution). The same analysis can be applied to their right to freedom of expression.

There do not seem to be any valid and legal reason why limitations or restrictions should be

[27] *Kivenmaa v. Finland*, (412/90), §9.2, HRC.
[28] *Oya Ataman v. Turkey,* European Court of Human Rights, Application No. 74552/01, judgment of 5 December 2006, para. 39; Report of the Special Representative of the UN Secretary General on the situation of human rights defenders to the General Assembly, 13 August 2007, A/62/225, para. 44; and Report of the Special Representative of the UN Secretary General on the situation of human rights defenders to the General Assembly, 5 September 2006, A/61/312, para. 97 (ANNEX 31).
[29] Emphasis added.
[30] Implementation Guide on the Law on Peaceful Demonstration, Ministry of Interior, § 3.6.7 [alternative].
[31] *Id*.

applied to the Defendants' rights to freedom of expression and assembly. The Defendants participated peacefully in a protest, which is protected under domestic and international law. Furthermore, the violent dispersal of the protest and the subsequent arrests of the Defendants represented a disproportionate response on the part of the authorities, which was in violation of the Defendants' rights to these fundamental freedoms. Consequently, quite apart from the injustice (or otherwise) of the Charges and the sentencing of the Defendants, the deprivation of their liberty was arbitrary, and does not represent a valid and legal restriction on their fundamental freedoms as anticipated and prescribed by the ICCPR.

Right to Defend Human Rights

In gathering and protesting in support of the families of Village 1, the Defendants were also exercising their right to defend human rights. The UN Declaration on Human Rights Defenders (the "Declaration"), adopted by the UN General Assembly in 1998 – although not a legally binding instrument – is based upon a series of rights and principles contained in other international instruments that are binding, such as the ICCPR. States are increasingly considering adopting the Declaration as national legislation, although Cambodia has not done so. Even so, its force is persuasive, and something that human rights defenders all round the world can point to as protection for their human rights activities.

In this case, the Defendants were defending the human rights of their communities and, in particular, those of the residents of Village 1, whose houses had been demolished in 2010. It is beyond the scope of this Legal Analysis to examine in detail the particular rights that the Defendants were defending, but suffice it to say that such rights are land and housing rights, and the right to fair and just compensation, which have been severely violated over the course of the unfolding of the Boeung Kak saga since the granting of the lease to the Company in 2007. The Declaration lends added weight in support of the Defendants' actions on 22 May 2012, and casts further doubt over the legality of the actions of the enforcement agencies and public officials in arresting, charging and sentencing the Defendants.

5. The Charges

Article 504 of the 2009 Penal Code: Aggravating Circumstances (Obstruction of Public Official)

Article 504 of the 2009 Penal Code sets out the sanctions and conditions applicable to a charge of "aggravating circumstances (obstruction of public official)" as follows:

> "*Obstruction of public officials shall be punishable by imprisonment from six months to one year and a fine from one million to two million Riels where it was committed:*

1. *by several perpetrators, instigators or accomplices;*
2. *by armed perpetrator.*"[32]

The first limb is easily satisfied, since the Defendants were clearly acting together as a group when they were arrested on 22 May 2012, as can be seen from the video clip mentioned above. However, the second limb is more problematic. CCHR interprets "armed" to mean "carrying a weapon". Article 81 defines a weapon as:

> "*any object designed to kill or wound. […] any other item liable to be dangerous to persons if:*
>
> 1. *it was used to kill, wound or threaten; or*
> 2. *it was intended to be used to kill, wound or threaten.*"

Article 488 and following indicate that weapons are construed to include: guns, ammunition, explosives, chemical and biological weapons. There is no evidence from either the video clip or any other available video evidence or credible reports that the Defendants were carrying anything that fits this definition of a weapon, namely anything that can be used to kill, wound or threaten. There is no evidence from the video clip, for example, that they were carrying any of the construction materials that were being used to re-build the home in Village 1. All the Defendants were carrying was a megaphone and bottles of water. While they can be seen throwing some of the water out of the bottles in the direction of the authorities, there is no other evidence of their throwing anything else, and there is no way that a small quantity of water from plastic bottles of water can kill, wound or threaten. Other than that, all the Defendants were doing was singing, shouting, cursing, and waving their arms. The Defendants should therefore not have been found guilty of "aggravating circumstances (obstruction of public official)" under Article 504.

More importantly, however, in order for the Defendants to be guilty of this charge, it has to be proven that they were responsible for obstructing public officials. Under Article 503:

> "*Obstruction consists of violent resistance against a public official acting in the discharge of his or her office for the enforcement of laws, orders from a public authority or judicial decisions.*"

While the Defendants can perhaps be said to have been resisting public officials – albeit with some justification as a result of the infringement of their rights (please see the section on Fundamental Freedoms above) – such resistance cannot be said to be violent. While violence is not defined in the Penal Code 2009, it is defined by the World Health Organization as the

[32] Khmer-English translation by Bunleng Cheung.

"*intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community, that either results in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment or deprivation*".[33] Absolutely no such harm was suffered by the public officials, and there is no likelihood at all that armed men would feel that any such outcome were likely at the hands of unarmed women, whom they vastly outnumbered.

The other issue as regards establishing that the Defendants' actions constituted obstructing public officials concerns whether those officials were discharging their duties and enforcing laws and orders of public authorities or court decisions. There is no evidence that the public officials were enforcing any court decision on 22 May 2012, although no court order is required for such action. Certainly, however, they were enforcing the orders of public authorities, since they are law enforcement agents and someone must be paying their wages – though there is more than an indication that Cambodian law enforcement agencies are doing the bidding of private companies as well as of the State, although such a discussion is beyond the scope of this Legal Analysis. There is also an issue with whether all of the authorities present were in fact "public officials acting in the discharge of his or her office". While the majority were police, many were military police, whose role is to police the police rather than civilians. Furthermore, 20 or so were private security guards hired by the Company, who are certainly not public officials and should not be engaged at all in law enforcement. Again, however, a detailed discussion about the roles of the various law enforcement agencies and the intrusion of private security agencies into the public sphere are beyond the scope of this Legal Analysis.

The key element, though, in satisfying the charge of obstructing public officials is that the public officials would need to have been enforcing the law. What the Defendants were doing was exercising their rights to the fundamental freedoms of assembly and expression, which are protected under Cambodian and international law (please see the section on Fundamental Freedoms above) – as well as their right to defend human rights – and there is no basis in law for the authorities' preventing them from exercising these rights in these circumstances. The law, in fact, was very much on the side of the Defendants. There is no way then that the authorities can be said to have been enforcing the law and, as a result, the Defendants cannot be guilty of "obstruction of public official" under Article 503, let alone of "aggravating circumstances (obstruction of public official)" under Article 504.

Article 34 of the Land Law 2001: Illegal Occupation of Land

The Defendants were also charged under Article 34 of the Land Law 2001, which states:

> "*After this law comes into force, any new occupant without title to an immovable*

[33] http://www.who.int/topics/violence/en/ [last accessed 11 June 2012].

property belonging to public bodies or private persons shall be considered as an illegal occupant and shall be subject to the penalties provided in Article 259 of this law."

Therefore, in order to convict someone as an illegal occupant under Article 34, four separate elements need to be satisfied:

1. The person must be an occupant of immovable property, that is, he or she must be occupying immovable property, *i.e.*, land.
2. The person must have commenced his or her occupation (*i.e.*, be a new occupant) after the Land Law 2001 came into force (30 August 2001).
3. The person must be without title, which does not necessarily mean that he or she needs to hold an official cadastral title of ownership issued by the State (through the Cadastral Administration of the Ministry of Land Management Urban Planning and Construction). Indeed, a person may hold lesser forms of valid title (or rights to land), such as legal possession that satisfies the tests of "extraordinary acquisitive possession" (explained below).
4. The land in question must belong to public bodies or private persons, that is, it must be owned by public bodies or private persons (again, this requirement need not require a cadastral title of ownership, simply that the public body or private person in question must have an ownership or title claim that is stronger than that of the occupant).

The uniformity of the Charges would suggest that they relate to the presence of the Defendants at the protest site in Village 1 on 24 May 2012, as opposed to any deemed unlawful occupation of the land on which the Defendants had been living. The fact that Charges were handed down to some Defendants who were among those allocated titles on 11 August 2011 – which implies that their occupation of the land was deemed lawful – supports this assumption, in other words, that the Defendants were all deemed to be occupying a piece of land that they did not own, *i.e.*, the site of the protest in the Village 1 area.

CCHR considers that the first element of Article 34 is not met in this case. The Defendants were not "occupying" the land, but were merely temporarily present on it. It is CCHR's view that "illegal occupation" in the context of Article 34 (which would make a person an "illegal occupant") must be something that is – and is intended to be – more than temporary and transitory and which instead has a permanent or persistent character. It must, in other words, entail a degree of attempting to use or control the land.

By way of further interpretive analysis, Article 34 is contained in the title and chapter of the Land Law 2001 that addresses acquisition of ownership through "extraordinary acquisitive possession", which suggests that the occupation under discussion is in the nature of occupation or possession with a view to obtaining or claiming ownership through possession. Article 38, for example, sets out what conditions must be met to establish legal occupancy. Furthermore, the

third element of Article 34 (which requires that the person on the land not have title) reinforces the interpretation that occupancy relates to ownership. In other words, Article 34 is dealing with who is claiming ownership rights to land, not simply who may be on it at any point in time. Furthermore, Article 248, which sets out the types of actions constituting infringements on ownership and the applicable penal offenses, specifically refers to the improper or illegal beginning of occupation as distinct from other types of infringements on ownership, which again suggests that such occupation must necessarily have a permanent or persistent character.

Article 34 should not be used as a catch-all for anyone on land without permission, since there are other legal provisions in Cambodian law under which people can be prosecuted for specific acts carried out on land without permission.[34] It is CCHR's view, therefore, that Article 34 specifically addresses occupation leading to titles of ownership, and that all the Defendants were doing was protesting in support of the Family rather than intending to secure permanent possession of the land for themselves.[35]

As for the second element of Article 34, on the assumption that the Charges relate to the events of 22 May 2012, this element is satisfied – namely the Defendants entered onto the land after 30 August 2001 – since none of the Defendants lived on the land where the protests and arrests took place.

The third element requires that the Defendants be without title to the land. CCHR understands that none of the Defendants who were charged was actually personally claiming title to the land. On a simplistic analysis, therefore, this element is satisfied. However, it is not illegal *per se* to be on land that one does not have title to – one may be there as an invitee or a tenant of someone who does have title. It is not known whether the Family themselves have rights that would constitute "title" to the land in question (although it is known that the Detainees have documentary evidence of their claims to ownership of their land, so the Family might do too). In order for the Family to have "title", they would need to meet the criteria for "extraordinary acquisitive possession" set out in Articles 30 and 31 of the Land Law 2001. In other words, the Family would need to have commenced occupation prior to 30 August 2001 (or have acquired their possessory rights through purchase or inheritance from someone who themselves commenced occupation prior to 30 August 2001), and their possession (and their predecessors' if acquired since 2001) would need to meet the criteria for lawful possession set out in Articles 30, 31 and 38 of the Land Law 2001. In the event that the Family were deemed to have legal title, even though the Defendants themselves may not have title, their presence would be lawful as it would derive from someone who had title. Satisfying this element therefore depends on proving that the Family had no valid legal claim to title (please see below).

[34] For example, Article 299 of the Penal Code 2009 covers breaking into a residence, which forms part of the chapter on infringements against the person.

[35] Note that there is always the argument that the Defendants were acting as agents for the Family, but that then would require an analysis of Article 34 from the perspective of the Family (*i.e.*, were the Family occupying, did the Family's occupation commence prior to 2001, are the Family without title, *etc.*).

The fourth element, requiring that the land belong to public bodies or private persons, again appears to be satisfied on a superficial level: CCHR understands that a cadastral title has been created for the area in question that confirms that the land is "state private land", *i.e.*, that it belongs to the State. However, if the cadastral title was issued without proper investigation into the rights and land tenure of the Family, and without completing the legal requirements regarding sporadic or systematic registration, then it might be the case that the cadastral title of ownership produced is invalid or capable of being defeated by the Family's proper title (please see below), meaning that the land in question does not in fact belong to the State.

According to the above analysis, the claim of the Family to the area of land in question looks to be decisive in determining whether the last two elements of Article 34 are satisfied. Without going into a detailed analysis of individual cases, it is possible to establish the following: different residents in the Boeung Kak area occupied the land on which they lived for varying periods of time, therefore it is reasonable to assume that some residents may have better claims to land rights or title than others. This is because those who occupied land before the Land Law 2001 came into force (30 August 2001) may have "extraordinary acquisitive possession" claims to the land under Articles 30 and 31 of the Land Law 2001 that would entitle them to cadastral titles of ownership.[36] Any extraordinary acquisitive possession claims that are capable of being perfected and secured in a cadastral title of ownership should defeat any entitlement or rights by the State to ownership of the land.[37] [38] This means that despite having never received proper recognition from the State in the form of official cadastral titles of ownership to the land, to the extent that residents have a valid claim over the land – generally by having occupied the land since before 2001 – a cadastral title of ownership should not have been issued in the name of the State,[39] with the result that the lease granted to the Company was invalid and illegal.[40] In turn, that means that the fourth element of the Article 34 charge would not be met if the Family could prove such valid legal title. Alternatively, if the Family moved into the Boeung Kak area after the Land Law 2001 came into force, then they are unlikely to have a valid claim to the land (*i.e.*, unless they purchased or inherited the land as per footnote 36), the land is likely to belong to a public body (*i.e.*, the State), and the fourth element of the Article 34 charges would be satisfied.

[36] This is also true for those who commenced occupation after 2001, but who purchased or inherited rights of possession from someone whose occupation commenced prior to 2001. The Land Law 2001 confirms that legal possession is a right *in rem* which is capable of being sold and inherited. This is true even if the possessor does not hold any document evidencing their possessory title, although some possessors may hold documents evidencing possession which are validated or acknowledged by local authorities.

[37] Article 12 of the Land Law 2001.

[38] The exception being expropriation carried out in accordance with the Expropriation Law 2010 (which allows the State to acquire compulsorily private land for public works upon payment of compensation in advance).

[39] Or local authority or whichever body it was issued to.

[40] On this analysis, the legality of the lease is largely irrelevant, as Article 34 turns on the ownership of the land – be it the Family or the State. As the lease is only valid insofar as the State's ownership of the land is valid, CCHR has not considered other elements that may make the lease invalid at law (for example, the lack of proper consultation with residents, the inadequate compensation and resettlement facilities, and other breaches of the residents' land and housing rights).

In summary: the first element of a charge under Article 34 is not satisfied in this instance (the Defendants were not occupants); the second element is satisfied; the third element may on a simplistic reading also be satisfied, however, on a sensible reading, it is unclear from the facts available whether it is or not; and it is similarly unclear from the facts available whether the fourth element is satisfied.

Even if there is a valid argument for charging the Defendants for illegally occupying the specific plot of land in Village 1 on which the Family was trying to re-build its house, the court should give a full and transparent breakdown as to why the Defendants were found guilty under Article 34, analyzing the law and facts in their entirety, as this Legal Analysis aims to do. That is the one of the principal objectives of the courts, namely to try to arrive at truth and justice in an objective fashion – rather than merely outlining relevant charges – and that can only be done by a proper analysis of the law and the facts.

Article 259 of the Land Law 2001: Sanctions

Article 259 states that anyone who infringes against public property shall be fined from five million riel to 50 million riel and/or imprisoned from one to five years. The perpetrator must also vacate the public property immediately, has no right to continue his/her possession of the state public property, and has no entitlement to any indemnity for works or improvements that he/she made on the property. However, if a person was in possession of state public property before the Land Law 2001 came into force – and has documents proving and attesting clearly that he/she bought the property from another person – he/she can request that the competent authority implement the legal rules against the person who illegally sold state public property in order to recover his/her damages caused by such act.

Article 259 only refers to state public land. On a reading of Article 259 alone then, the Article 259 sanctions should not apply to the land around the edge of Boeung Kak, which has been classified as state private land (subject to any claims that any residents may have). (There is a strong case, incidentally, for arguing that Boeung Kak lake itself should never have been re-classified as state private land[41] as it falls into one of the categories of property that can be defined as state public land under Article 15 of the Land Law 2001, *i.e.*, it is a natural lake, and would still have held a "public interest use" under Article 16 of the Land Law 2001.) Despite this specific stipulation in Article 259, Article 34 itself explicitly refers to applicable sanctions under Article 259. Therefore, despite the fact that the land in question might be state private land, the sentences handed down are in fact permissible for a breach of Article 34 of the Land Law 2001, albeit these two articles should be reconciled for the sake of clarity.

[41] As it was by Sub-decree No. 71 S.E., dated 20 July 2010 ("on the transfer of Boeung Kak development zone from the state's public properties to state's private properties").

6. Fair Trial Rights

The right to a fair trial is recognized by international instruments which Cambodia ratified in 1992, and which are incorporated into Cambodian law by virtue of Article 31 of the Constitution (please see the above section on Fundamental Freedoms). Article 38 of the Constitution itself states:

> "*Every citizen shall enjoy the right to defense through judicial recourse.*"

Article 10 of the UDHR states:

> "*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.*"

Article 14(1) of the ICCPR states:

> "*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.*"

It is worth analyzing the facts of the case relating to both the pre-trial and the trial stages, by looking at the various elements of Article 14(3) in turn: "*In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:*

> *(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;*
>
> Article 9(2) of the ICCPR states that "*anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him*", so that the individual arrested can "*request a prompt decision on the lawfulness of his or her detention by a competent judicial authority*" (according to the HRC)[42]. Furthermore, Article 48 of the CPC states that the Prosecutor shall promptly inform the person in question about the charge and the type of offense. While an absence of arrest warrants could perhaps be justified by the judicial authorities by virtue of the argument that the Defendants were arrested *in flagrante delicto*, they should still have been informed of the Charges during or immediately after their arrests. The Defendants were reportedly not told anything of the nature and cause of the Charges at

[42] UN HRC, Communication No. 248/1987, *G. Campbell v. Jamaica*, p. 246, para 6.3.

the time of their arrests, in fact, they were not formally charged until the day of the trial, two days later. They were simply taken away, held in pre-trial detention for two days, then taken straight to court, tried, sentenced and sent to jail, without ever being presented with proper arrest warrants and told the reason for their arrests. They were therefore unable to challenge the lawfulness of their detention before a competent judicial authority.

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

The Defendants were certainly not given adequate time to prepare their defense. They had a matter of an hour at most between being taken from pre-trial detention to the Phnom Penh Municipal Court and the start of the trial, which is nothing like enough time for them and their counsel to prepare a defense against charges which carry such heavy jail sentences. In the HRC case *Smith vs. Jamaica,*[43] the conclusion was that "*giving a newly appointed attorney four hours to confer with the accused and prepare the case was deemed by the HRC to be inadequate time to prepare the case*". Counsel for the Defendants asked to delay the trial precisely due to the lack of time to prepare a defense, but the request was refused by the presiding judge.[44] The reason given by the presiding judge was that the proceedings were to be conducted by way of immediate appearance under Article 47 of the CPC. While it may be possible in this case to satisfy all necessary criteria under Article 47,[45] there are nevertheless detailed procedures for immediate appearance at both the pre-trial stage and the trial stage that must be followed, as set out by Articles 48 and 304, respectively, of the CPC. In particular: "*the court shall inform the accused that he is entitled to have a period of time to prepare his defense. If the accused requests such time or if the court finds that the case may not be tried immediately, the trial shall be adjourned to another trial date.*" If the prescribed procedures are not followed, the immediate appearance procedure will be deemed void. Indeed, Articles 48 and 304 both state explicitly that if the complexity of the facts necessitates further investigation, the court shall send the case back to the Royal Prosecutor in order to open a judicial/preliminary investigation (as appropriate).

It is clear, then, that the immediate appearance procedure is not intended to over-ride any defendant's fair trial rights, such as the right to have adequate time to prepare a proper defense, and should not be used to do so. HRC general comment no. 13, para. 9

[43] 31 March 1993 (CCPR/C/47/D/282/1988).

[44] Two different cases of jurisprudence have emerged at the HRC: *Douglas, Gentles and Kerr vs. Jamaica*, 19 October 1993 (A/49/40) and *Sawyers and McLean vs. Jamaica*, 11 April 1991 (A/46/40), concluding that "*if an accused believes that the time allowed to prepare defense has been inadequate, it is clear from the jurisprudence that the accused should request the national court to adjourn the proceedings on the grounds of insufficient time to prepare*".

[45] Article 47 can be invoked if: (i) the offense is flagrant in accordance with Articles 86 (Definition of Flagrant Felony or Misdemeanor) and 88 (Flagrant Felony or Misdemeanor); (ii) the offense carries a jail sentence of one to five years; (iii) the accused is of legal age; and (iv) there are substantial facts to be tried.

states: "*the accused must have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing. What is 'adequate time' depends on the circumstances of each case, but the facilities must include access to documents and other evidence which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel.*"

(c) To be tried without undue delay;

This provision is unproblematic, given that the Defendants were tried so quickly that they were not even able to prepare a proper defense.

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing;

While the Defendants were initially able to avail themselves of lawyers provided by LICADHO, these lawyers were then forced to abandon their defense due to the unfair, unreasonable and illegal restrictions imposed upon the lawyers (please see (e) below). This situation means that the Defendants were denied their right to proper legal representation – another reason why the trial should have been delayed.

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

As regards witnesses, four witnesses who were called by defense counsel to assist the defense's case were barred from entering the court on the grounds that they should have been called when the defendants were in pre-trial detention – hence the inability of the defense counsel to prepare a proper defense case as discussed at (d) above – and two of them were even then detained and held in pre-trial detention themselves. Such a refusal is also a breach of Cambodian domestic law, namely Article 298 of the CPC, which states that "*the accused and the civil party may summons witnesses who have not been summonsed by the Prosecutor*", and is yet another reason why the trial should have been delayed. Under Article 327 of the CPC, the presiding judge can object to hearing witnesses, but only if their statements are not "*conducive to ascertaining the truth*", which is not supported by the fact that the witnesses were present at the time of the protests and arrests.

Furthermore, other procedural irregularities were observed as regards the trial of the Defendants, such as:

1. A breach of the right to public hearings in Article 10 of the UDHR, Article 14(1) of the ICCPR and Article 316 of the CPC. International jurisprudence states that information

should be made available to the public regarding the date and venue of a trial as a component of the right to public hearings, together with the requirement to make available adequate facilities for public attendance.[46] In this case, while the trial was open to the public, no notice of the trial was posted on the public notice board outside the courtroom.

2. The judge failed to explain either the Defendants' right not to answer or answer questions or their right to appeal (rather than simply informing them of these rights), both of which domestic and international trial monitors generally consider to be important components of a fair trial.

Finally, it should be noted that judicial deliberation before the pronouncement of the judgment only took 25 minutes. Any interested party should consider both the controversial nature of the case, and the severity of the sanctions. This lack of deliberation time indicates that the presiding judge failed to consider properly and fully all of the facts and legal points involved in this case. While not a legal requirement in itself, this fact qualitatively reflects what the rest of this section proves analytically: that the fair trial rights of the Defendants were breached in a number of serious and fundamental ways, both at the pre-trial and the trial stage, in violation of national and international law.

7. Conclusion

The sentencing of the Defendants on 24 May 2012 represents a gross miscarriage of justice. From a careful analysis of the facts and an application of the relevant law to those facts, it is clear that not only were the Charges seriously flawed in terms of the application of the law to the facts, but also the entire judicial procedure was a flagrant breach of the Defendants' fair trial rights – both at the pre-trial and the trial stages – as protected under domestic and international law. The overwhelming conclusion, therefore, is that the Defendants should not have been found guilty of the Charges. The fact that they were arrested, charged and sentenced at all is a severe violation of their fundamental rights to freedom of expression and assembly, as well as their right to liberty. In light of these conclusions, there are clear, solid and substantial grounds for an appeal. If the sentences are left to stand, they represent nothing less than a brazen attempt at judicial intimidation – at the expense of innocent lives – and a further stain on Cambodia's reputation.

The Cambodian Center for Human Rights (CCHR)
Phnom Penh, Cambodia
11 June 2012

[46] UN HRC, Communication No. 215/1986, *Van Meurs v. The Netherlands*, para. 62.