



Legal Analysis of the Charging and Sentencing of Cambodian Land Rights Activist Yorm Bopha (Criminal Case Number 1560)

1. Introduction

On 27 December 2012, Yorm Bopha (the “Defendant”), land rights activist from the Boeng Kak area of Phnom Penh, was found guilty of “*intentional violence with aggravating circumstances*” under Article 218 of the Cambodian Criminal Code 2009 (the “Penal Code”) and was sentenced to three years in prison.¹ The charge against the Defendant is based on allegations that she was involved in the assault of two motorbike taxi drivers (the “Alleged Victims”) on 7 August 2012.²

The Defendant and her husband, Lous Sakhorn, were apprehended and detained on the morning of 4 September 2012 by plain-clothed police officers. The Defendant was brought to Prey Sar prison shortly afterwards, where she was held in pre-trial detention. Her husband was allowed to return home. The Defendant was not informed of the reason for her arrest or of the related offenses until one to two hours after her arrest when she met with the investigating judge. One day after the Defendant’s arrest, another prominent land activist – Tim Sakmony – was arrested and charged with “*making a false declaration*”³ to secure an apartment after she was evicted from her home at Borei Keila in Phnom Penh. Tim Sakmony was held in pre-trial detention and tried on 26 December 2012, the same day as the Defendant. Although she was found guilty, Tim Sakmony’s sentence was suspended and she was released from prison.⁴ Both Tim Sakmony and the Defendant were called “Prisoners of Conscience” by Amnesty International during their pre-trial detention and the Defendant remains a prisoner of conscience, according to Amnesty International, due to her continued incarceration.⁵

The Defendant was tried alongside Lous Sakhorn and her two brothers, who were tried *in absentia*. All four were found guilty of the same charge – the Defendant and Lous Sakhorn

¹ Records of CCHR’s trial monitor

² *ibid*

³ Shane Worrell and Khouth Sophak Chakrya, “Courts tools in fight against dissent” *The Phnom Penh Post* (9 September 2012) <<http://www.phnompenhpost.com/2012090758561/National/courts-tools-in-fight-against-dissent-ngos.html>>

⁴ May Titthara, Khouth Sophak Chakrya and Shane Worrell, “One of two land activists freed” *The Phnom Penh Post* (28 December 2012) <<http://www.phnompenhpost.com/2012122760506/National/one-of-two-boeung-kak-land-activists-freed.html>>

⁵ Amnesty International, “Convictions of activists in Cambodia demonstrates dire state of justice” (News) (27 December 2013) <<http://www.amnesty.org/en/news/convictions-activists-cambodia-demonstrates-dire-state-justice-2012-12-27>>

allegedly having planned the assault and Yorm Kanloang and Yorm Seth having allegedly carried it out on their instructions.

2. Executive Summary

This Legal Analysis: (1) provides a factual background to the arrest, charging and sentencing of the Defendant as well as to the alleged offense; (2) conducts a step-by-step analysis of the charges and applies the law to the facts as they have been reported, arguing that the law has been incorrectly applied in light of the evidence available; (3) examines the judicial process both at the pre-trial and trial stages, and finds that the Defendant's right to a fair trial was breached in numerous fundamental ways; (4) provides an overview of the fundamental human rights that have been compromised by the charges, namely the rights to freedom of expression and freedom of assembly (as well as the non-binding right to defend human rights); and (5) concludes that the sentencing of the Defendant represents a gross miscarriage of justice, and that all charges against her should therefore be dropped by the Court of Appeal.

The Legal Analysis is made available to (1) the Court of Appeal to assist in its handling of the appeal hearing, (2) the Defendant and her legal counsel to use as a reference point in the formulation of the appeal case, and (3) to any other parties for advocacy purposes. It should be noted that this Legal Analysis aims to take a completely objective stance, analyzing all relevant law and facts critically – as a court should do.

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

3. The Facts

The Defendant

The Defendant is a 29-year-old mother of one who has been actively involved in her community's struggle against forced eviction related to a high profile land conflict at Boeng Kak that has raged since 2007. When thirteen of her fellow activists (the "Boeng Kak 13") were arrested, charged, convicted and imprisoned on 24 May 2012 as a result of a peaceful land rights demonstration, the Defendant emerged at the forefront of a campaign for their release.⁶

As a result of her visibility at protests calling for the release of the Boeng Kak 13 and her outspokenness in the media, the authorities began to target the Defendant and she was

⁶ Free the 15, "Human Rights Defender Yorm Bopha" (Briefing Note) (December 2012) <<http://www.licadho-cambodia.org/reports.php?perm=173>>

allegedly verbally threatened and intimidated.⁷ She said that she was told repeatedly by police that she was “on the blacklist” and that she “would be in trouble soon”.⁸

On the morning of 4 September 2012 the Defendant and Lous Sakhorn left their home when they received a telephone call from a local police official who told them that they needed to renew their identification cards for voting. When they left their home at approximately 8.20am they were bundled into a car by plain-clothed policemen.⁹ The Defendant reported that she was forced to thumbprint several documents and then was brought directly to Prey Sar prison, without being informed of the reasons for her arrest or the allegations against her.¹⁰ Both the Defendant and Lous Sakhorn were eventually charged with “*intentional violence with aggravating circumstances*” relating to an alleged violent assault against the Alleged Victims (the “Alleged Assault”) that they had supposedly planned. The Defendant was placed directly in pre-trial detention while her husband was released on bail. The Defendant and her husband were tried on 26 December 2012, alongside the Defendant’s two brothers – Yorm Kamhong and Yorm Seth – who were purportedly instructed by the Defendant to attack the Alleged Victims, despite the fact that the brothers have not lived in the area for several years. The two brothers were not present at the trial but were each sentenced *in absentia* to three years in prison and a warrant for their arrest has been issued. The Defendant and the three other accused were also ordered to pay compensation of 30,000,000 Riels (7,500USD) to each of the two Alleged Victims.¹¹

Since her arrest on 4 September 2012, her fellow Boeng Kak activists, NGO workers and national and international human rights advocates have heavily criticized the charge against the Defendant and have called for her release. The Boeng Kak activists have staged several protests against her imprisonment. Notably, on 13 March 2013, a group of peaceful protesters from the Boeng Kak community went to the Ministry of Justice to demand the release of the Defendant. When nobody from the Ministry responded, the protesters moved to outside the Prime Minister’s house. The protesters were surrounded by a group of approximately 200 police and military police, who were then joined by a group of about 100 security guards from a nearby park. The protest turned violent when security forces lost control and began physically attacking the crowd. Six of the protesters were seriously injured. Amongst the six seriously injured were Lous Sakhorn, who was set upon by around ten security guards and had several of his teeth knocked out and his leg severely beaten, Nhok Sophat, who had her arm broken and her elbow dislocated, and Nget Khun, a woman in her seventies, who was knocked unconscious.¹²

⁷ ibid

⁸ Various civil society groups, “End Legal Persecution – Release Yorm Bopha” (Statement) (Phnom Penh, 27 December 2012) <<http://freethe15.wordpress.com/2012/12/27/joint-cso-statement-legal-persecution-of-land-rights-activists-must-end-yorm-bopha-should-be-released-immediately-and-unconditionally/>>

⁹ CCHR, “Boeng Kak Activist Arrested and Charged by Phnom Penh Municipal Court” (Alert) (5 September 2012) <http://www.cchrcambodia.org/index_old.php?url=media/media.php&p=alert_detail.php&alid=26&id=5>

¹⁰ The Defendant, interviewed from prison.

¹¹ Summary of the verdict

¹² CCHR, “Yet More Brutality, Yet More Shame on Cambodia” (Press Release) (14 March 2013) <http://www.cchrcambodia.org/index_old.php?url=media/media.php&p=press_detail.php&prid=369&id=5>

Motorbike taxi drivers in Phnom Penh have also been holding protests surrounding the case, usually in response to the support given to the Defendant by local NGOs. Some of the taxi drivers who participated in these protests were allegedly paid to do so, although this claim has been denied by the president of the Cambodia for Confederation Development Association, which supports the Alleged Victims.¹³

The Defendant filed an appeal in January 2013 and is currently awaiting her appeal hearing, which has been scheduled for 5 June 2013. The Defendant had her second appeal for bail denied by the Supreme Court on 27 March 2013 on the grounds that she has been found guilty of the charges against her and that, although she said she had a heart condition that needed regular treatment, no evidence of illness had been produced.

The Alleged Assault

The Alleged Assault took place at approximately 7pm on the evening of 7 August 2012, when the Alleged Victims – cousins Nget Chet and Vath Thaiseng – were drinking rice wine in front of a drink shop located at 5, Street 86, Phum 2 Village, Srah Chork Commune, Dun Penh District, Phnom Penh. The Alleged Victims claimed that they were set upon by two attackers – one wielding an axe and the other brandishing a screwdriver.

The Defendant states that she had been out exercising and was on her way home when she stopped to talk to her husband and a neighbor of theirs – Phan Chunreth – about 15 meters from the scene of the Alleged Assault. When the fighting broke out at the drink shop the Defendant and her husband went to see what was happening. They stood outside the drink shop but stated that they did not enter.

The Defendant's brothers – Yorm Kanloang and Yorm Seth – reportedly carried out the violence against the Alleged Victims because they were suspected of stealing the Defendant's car mirror. One of the Alleged Victims claimed that he had lived near the house of the two brothers for three years and had never before had an argument. The Defendant's car mirror had been stolen around one month previous to the Alleged Assault and the Defendant had filed a complaint to the police. She claimed that she had no idea who had stolen the mirror, nor had she ever seen the Alleged Victims before. Many other people living in the area had also had their car mirrors stolen around the same time.

One of the Alleged Victims – Vath Thaiseng – was apparently stabbed four times with a screwdriver and the other – Nget Chet – allegedly received head injuries causing damaged nerves and memory loss when he was attacked with an axe.¹⁴

4. Charges and Evidence

¹³ May Titthara and Shane Worrell, "Motodops protest at CCHR" *The Phnom Penh Post* (11 January 2013) <<http://www.phnompenhpost.com/2013011160743/National/motodops-protest-at-cchr.html>>

¹⁴ Shane Worrell and Phak Seangly, "Boeung Kak motodop returns to work" *The Phnom Penh Post* (5 October 2012) <<http://www.phnompenhpost.com/2012100559128/National/boeung-kak-motodop-returns-to-work.html>>

The Trial of the Defendant and the three other accused, held at Phnom Penh Municipal Court on 26 December 2012, lasted approximately five hours. There were four witnesses present – three for the Prosecution and one for the Defense. The Defendant and her husband – the two accused present – were first to give their accounts of the Alleged Assault. The court then heard from the Alleged Victims and the four witnesses. The charges against the Defendant and the evidence presented to support these charges will be examined in this section.

The Defendant was charged with “*intentional violence with aggravating circumstances*” as laid out under Article 218 of the Penal Code. Article 218, “Aggravating Circumstances” states:

“Intentional acts of violence shall be punishable by imprisonment from two to five years and a fine from four million to ten million Riels if they are committed:

- 1) with premeditation;*
- 2) with the use of or threat to use a weapon;*
- 3) by several persons acting as perpetrators, co-perpetrators, instigators or accomplices.”*

Intentional violence is not defined in the Penal Code therefore, for the purpose of this Legal Analysis, an Oxford dictionary definition of *violence* will be used:

“Behavior involving physical force intended to hurt, damage or kill someone or something”¹⁵

According to witness statements and accounts of the accused and Alleged Victims, the acts of violence took place on 7 August 2012 at a drink shop near the home of the Defendant and consisted of the use of physical force intended to hurt the Alleged Victims. The Alleged Victims sustained injury as a result and had to seek medical treatment. Photographic evidence of the injuries sustained, as well as hospital records, was contained in the case file. According to hospital records and all accounts of events given by witnesses and parties to the case, the injury caused was intentional – as a result of a skirmish, and not as a result of an accident. According to Prosecution witnesses and to the Alleged Victims, weapons were used in the Alleged Assault – a screwdriver and an axe – which would again suggest that the injury was intentional and not the result of an accident.

Having established that intentional acts of violence took place, in order to determine whether the *aggravating circumstances* apply, it must now be examined whether the intentional acts of violence were 1) premeditated, 2) carried out with the use of or threat to use weapons, or 3) carried out by several persons acting as perpetrators, co-perpetrators, instigators or accomplices.

¹⁵ Oxford dictionaries online: <<http://oxforddictionaries.com/definition/english/violence?q=violence>>

4.1 As for the first element – premeditation – is defined under Article 78 of the Penal Code as “*the intent, formed prior to the act, to commit an offence.*” The perpetrators allegedly had weapons, which might suggest that they had come to the scene prepared and therefore that their acts were premeditated. However, the weapons were readily available tools – a screwdriver and an axe – and therefore could have easily been acquired at the scene, without premeditation. Also, the fact that the alleged perpetrators – Yorm Bopha’s brothers – were not present to be questioned, makes it very difficult to establish beyond reasonable doubt that the acts were premeditated by them, or that they even carried the acts out in the first instance.

As for the Defendant, the Prosecution argued that she and Lous Sakhorn had planned the Alleged Assault and then turned up at the scene to witness it take place. According to the Alleged Victims, the Defendant told her brothers to attack them, saying that they stole her car mirror. However, the Alleged Victims had been drinking rice wine for several hours prior to the event and they themselves admit that they were drunk and that their memories of the Alleged Assault are hazy. In addition, inconsistencies in the accounts of the Alleged Victims cast significant doubt over their reliability. For example, Vath Thaiseng claims that Yorm Kanloang stabbed him with a screwdriver and Yorm Seth attacked Nget Chet with an axe. However, Nget Chet claimed that it was Yorm Kanloang who attacked him, and not Yorm Seth. Despite the fact that the Alleged Victims had been drinking for several hours and that it was dark at the time of the Alleged Assault, they were both suspiciously precise in their description of the screwdriver apparently used as a weapon, making sure to point out that the handle of the screwdriver was blue. It is also extremely important to note that the Alleged Victims are civil parties to the case and stood to benefit from compensation if the Defendant was found guilty. The Cambodian Criminal Procedure Code (the “CCPC”) states unequivocally under Article 312 that civil parties cannot stand as witnesses. Nevertheless, in this case, the testimony of the Alleged Victims was the main source of evidence to convict the Defendant, her husband and brothers. The Alleged Victims were present in the court room the whole time, could listen to all the testimonies of other witnesses and one another and were not required to take an oath.

The three Prosecution witnesses did not claim to have heard the Defendant give *direct* instructions to her brothers to attack the Alleged Victims and in any case, inconsistencies in their testimony cast doubt over its reliability. The first witness, Vath Sarath, said that the Defendant accused the Alleged Victims of stealing her car mirror and that she had helped to free her brother, Yorm Kanloang, when Vath Sarath caught him. However, the testimonies of Vath Thaiseng and the second witness Al Saing Heun, do not corroborate Vath Sarath’s assertion that he had caught Yorm Kanloang. Vath Thaiseng claimed that Al Saing Heun captured Yorm Kanloang and Al Saing Heun, although he said that he captured one of the brothers, testified that it was Yorm Seth. It should also be noted that Vath Sarath is the father of Vath Thaiseng and the uncle of Nget Chet. The third witness for the Prosecution, An Sivmey, said that the motor taxi driver Al Saing Heun had captured one of the perpetrators before Vath Sarath even arrived on the scene. This does not corroborate with Al Saing Heun’s testimony, in which he stated that he had followed Vath Sarath to the scene.

Despite the lack of concrete, reliable evidence, the Prosecution nevertheless argued that, seeing as the Defendant had her car mirror stolen, that the alleged perpetrators were related to her and that she was at the scene of the crime, she must have planned the Alleged Assault. The Defendant on the other hand testified that on the evening of 7 August, she had just returned from exercising when she met her husband and her neighbor, Phan Chunreth, and she stopped to converse. When they heard a commotion the Defendant and her husband went to see what was happening. They stood outside the drink shop where the Alleged Assault was taking place. Phan Chunreth, the only witness for the Defence, corroborated this account, confirming that it was only after the Alleged Assault had begun that the Defendant went to see what was happening. It should be emphasized at this point that it is reasonable for the Defendant, on hearing a commotion, to go and observe what is happening. The fact that the Defendant was at the scene of the Alleged Assault and that she was allegedly related to the perpetrators (which is yet to be implicitly proven) does not mean that she conspired to start the fight. It should also be emphasized that the Defendant stated that she did not know the Alleged Victims and that although she had her mirror stolen, so had many others in the community, and she had no idea who was responsible.

Considering the heavy reliance of the Prosecution on inconsistent testimony, primarily from the Alleged Victims who had not taken an oath to tell the truth about the incident, it has therefore not been sufficiently proven that the Defendant premeditated the Alleged Assault. Article 38 of the Constitution of the Kingdom of Cambodia (the "Constitution") states that cases in which there is any doubt shall be resolved in favor of the accused.

4.2 The second element relates to the use of or threat to use weapons to carry out the acts of intentional violence. We will not address the element of threatening the use of weapons seeing as the evidence established that weapons were used. According to Prosecution witness testimony and the statements of the Alleged Victims, two weapons were used by Yorm Kanloang and Yorm Seth – a screwdriver and an axe. However, as seen above, there are some discrepancies between the testimonies of the witnesses and the Alleged Victims, affecting their reliability as evidence. It is therefore difficult to rely on this testimony as comprehensive proof of the use of such weapons. In addition, physical evidence – such as the weapons allegedly used – was not collected from the scene of the crime as there was no immediate investigation by the police or courts into the Alleged Assault. It is thus difficult to verify that these particular weapons were used by the alleged perpetrators – Yorm Kanloang and Yorm Seth – however, judging by the nature of the injuries suffered by the Alleged Victims, it is likely that some sort of weapon(s) were used. As for the Defendant, if weapons were indeed used or threatened, in order for this element to apply to her, it is necessary to prove that she was an instigator or accomplice to the crime under element three.

4. 3(a) All of the witnesses, the Alleged Victims and the Defendant agree that the Defendant was not a direct perpetrator of the violence. The third element of the charge however specifies that the Defendant could have been an *instigator* or an *accomplice* to the acts of intentional violence and would as a result receive the same penalty as the direct perpetrators or co-perpetrators.

An instigator is defined under Article 28 of the Penal Code as follows:

An instigator of a felony or a misdemeanor shall be any person who:

- 1) gives instructions or order to commit a felony or misdemeanor;*
- 2) provokes the commission of a felony or misdemeanor by means of a gift, promise, threat, instigation, persuasion or abuse of authority or power.*

Article 28 goes on to say that an instigator is only punishable if the felony was committed or attempted and that an instigator of a felony or misdemeanor “*shall incur the same penalties as the perpetrator*”.

According to the Alleged Victims, the Defendant instructed her brothers to attack them because of accusations that they had stolen her car mirror. None of the four witnesses testified to having heard the Defendant directly instruct her brothers to attack the Alleged Victims. Phan Chunreth, the neighbor of Yorm Bopha and Lous Sakhorn at the time, said that after the fight, an unidentified man came by her home to where the Defendant and her husband were once again standing and claimed that the Defendant and her husband were responsible for the Alleged Assault. When she asked the man why he said this, there was no reply.

Despite the fact that witness Vath Sarath testified that he brought the Alleged Victims to make a complaint to the police on the night that they were injured, it was only weeks after the Alleged Assault that the Defendant and Lous Sakhorn were apprehended by the police and formally accused. This is problematic as it leaves scope for collusion between the Alleged Victims and the Prosecution witnesses. It is extremely important that investigations are not delayed as allowing a significant amount of time to pass between the offense and the investigation ends up disadvantaging both the Prosecution and the Defense. As seen above for example, due to the delayed investigation, no physical evidence could be recovered from the scene, which makes it difficult for the Prosecutor to put forward a strong case.

Testimony of the Alleged Victims is the only evidence to support the allegation that the Defendant directly instructed her brothers to attack them. The Alleged Victims were drunk at the time of the Alleged Assault, having been drinking since around 4pm in the afternoon and their accounts of the Alleged Assault were inconsistent, as seen above. The evidence presented therefore leaves scope for substantial doubt that the Defendant instigated the Alleged Assault.

4. 3(b) The only potential role remaining that the Defendant could have played in the Alleged Assault is that of *accomplice*. Article 29 of the Penal Code defines an accomplice as follows:

“An accomplice shall be any person who knowingly, by aiding or abetting, facilitates an attempt to commit a felony or a misdemeanor, or its commission.”

Article 29 specifies that an accomplice may only be punishable if the felony or misdemeanor was committed or attempted. It also states that an accomplice to a felony or a misdemeanor shall incur the same penalties as the perpetrator.

Based on accounts of the Prosecution witnesses and the Alleged Victims, the Defendant helped to free one of her brothers when he was captured by one of the witnesses at the scene. The Defendant denies helping to free her brother and said that she was not even inside the house where the Alleged Assault took place. In addition, helping to free someone *after* the Alleged Assault should not reasonably be considered as facilitating or aiding and abetting the Alleged Assault, given that it had already taken place.

Considering the fact that the only evidence to suggest that the Defendant aided one of the perpetrators is based on testimony of the Alleged Victims and the Prosecution witnesses, whose statements were seen above to be unreliable, the evidence does not prove beyond reasonable doubt that the Defendant was an accomplice to the felony. In addition, all allegations against the Defendant are based on the presumption that her brothers were the direct perpetrators. Although analysis of their case is beyond the remit of this Legal Analysis, it should be noted that no concrete evidence was produced to convict the two men and the fact that they were not present at court in order to defend themselves casts more doubt over the conviction of the Defendant. The charges may have been broken down and analyzed above as if Yorm Seth and Yorm Kanloang had perpetrated the acts of intentional violence, however, this does not mean that CCHR believes Yorm Seth or Yorm Kanloang were in any way involved in the Alleged Assault. In fact, no reliable evidence was presented to show that they were even in the area at the time of the Alleged Assault. In addition, the Defendant did not recognize the Alleged Victims or any of the witnesses for the Prosecution, even though she is extremely active in her community and knows most people through collecting signatures for petitions or demonstrating against land rights abuses.

To conclude; it has already been confirmed above that the Defendant was not a direct perpetrator, therefore seeing as there is not sufficient evidence to prove that she was either an instigator or an accomplice, it cannot be legitimately argued that she committed the offense of intentional violence with aggravating circumstances.

5. Fair Trial Rights

The right to a fair trial is upheld by the Universal Declaration of Human Rights (the “UDHR”) and the International Covenant on Civil and Political Rights (the “ICCPR”), the latter of which is incorporated into Cambodian law by virtue of being ratified by Cambodia in 1992 (please see the section on Fundamental Freedoms below). 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 her 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 clear from the above that an independent and impartial judiciary is essential in the upholding of fair trial rights. In the present case however, the fact that the Defendant was a prominent activist and was threatened multiple times before her arrest, the lack of sufficient evidence to warrant a conviction, and precedent set by other legal cases taken against Human Rights Defenders (“HRDs”),¹⁶ have led to the belief that the executive branch has played a crucial role throughout the procedure and that its interference in judicial affairs may have influenced the outcome of the trial. Previous to her arrest, the Defendant had been threatened, harassed and intimidated¹⁷ on multiple occasions and, at the height of the campaign to release the Boeng Kak 13, police were also seen singling her out during the protests.¹⁸ It is also crucial to note that on 19 March 2013, several days before the Defendant’s second request for bail, Prime Minister Hun Sen referred to the Defendant’s case as a “*simple case of her beating someone up*”,¹⁹ denying any relation between her detention and her public activities as a HRD. Such public commentary on judicial matters by the head of government when the case has not yet been concluded and the Defendant is awaiting her appeal hearing, is bound to affect the fairness of the process and raises serious concerns regarding the independence of the tribunal and the Defendant’s right to a fair trial, particularly regarding the presumption of innocence. Comments such as the one made by Prosecutor Seng Bunkheang during the Defendant’s second appeal for bail, in which he referred to the Defendant as a “*special case*”²⁰ also point to the case’s political nature and

¹⁶ CCHR, “Legal Analysis of the Charging and Sentencing of 13 Boeung Kak Community Representatives on 24 May 2012 (criminal case number 1576/24-05-2012)” (Legal Analysis) (11 June 2012) http://www.cchrcambodia.org/index_old.php?url=media/media.php&p=alert_detail.php&alid=22&id=5; CCHR, “Legal Analysis of the Charging and Sentencing of Cambodian Journalist and Human Rights Defender Mam Sonando (Criminal Case Number 2207)” (Legal Analysis) (3 March 2013) http://www.cchrcambodia.org/index_old.php?url=media/media.php&p=analysis_detail.php&anid=33&id=5

¹⁷ The Defendant from prison

¹⁸ Free the 15, “Yorn Bopha” <<http://freethe15.wordpress.com/meet-bopha/>>

¹⁹ Human Rights Watch, “Cambodia: Supreme Court keeps activist jailed” (March 29 2013) <http://www.hrw.org/news/2013/03/29/cambodia-supreme-court-keeps-activist-jailed>.

²⁰ “Activist Yorn Bopha denied bail”, *The Phnom Penh Post* (28 March 2013) <http://www.phnompenhpost.com/2013032864750/National/activist-yorn-bopha-denied-bail.html>>

call into question her equality before the courts as specified under Article 14(1) of the ICCPR above.

Article 14 encompasses a number of additional elements that, on a close examination of the circumstances and facts, were not upheld in the Defendant's case. Most fundamentally, for a hearing to be *fair*, all of a person's fair trial rights must be respected. As will be shown below, at least one of the Defendant's *specific* fair trial rights were violated (in addition to doubts regarding the impartiality of the tribunal), meaning that she cannot be said to have received a completely fair trial.

Article 14(2) of the ICCPR states:

"Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."

It is clear from Section 4 above that there was a lack of convincing evidence to support the charges against the Defendant, and yet she was found guilty, which suggests that her right to be presumed innocent was not upheld. In addition, the fact that the Defendant was held in pre-trial detention despite the lack of adequate justification²¹ and the fact that she was tried wearing a prison uniform, suggest that the Defendant was denied the right to be presumed innocent until proven guilty from the moment that she was charged. While in pre-trial detention, the Defendant's status of non-convicted person was not recognized by the authorities who failed to guarantee her right to be segregated from convicted persons and be subject to separate treatment, as stipulated under Article 10(2)(a) of the ICCPR. Indeed, since her incarceration the Defendant was kept in the same space as convicted prisoners.

It is also worth analyzing the facts of the case relating to both the *pre-trial* and trial stages, by looking at the various elements of Article 14(3) of the ICCPR 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 her 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 Human Rights Committee).²² Furthermore, Article 48 of the CCPC states that the Prosecutor shall promptly inform the person in question about the charge and the type of offense he/she is being accused of. When the Defendant was

²¹ Article 203 of the Cambodian Criminal Procedure Code specifies that pre-trial detention should be employed only in exceptional circumstances, not as a rule. Article 205 lists the reasons for holding an accused in pre-trial detention and none of these apply to the Defendant.

²² UN HRC, Communication No. 248/1987, *G. Campbell v. Jamaica*, p. 246, para 6.3.

apprehended, she was bundled into an unlicensed car by plain-clothed police officers and told to thumbprint several documents without being told why she had been arrested or detained. It was several hours later before she met with the investigating judge and was told of the charges against her. She was then brought straight to Prey Sar prison.

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

Human Rights Committee General Comment no. 13, paragraph 9, states: “*The accused must have adequate time and facilities for the preparation of her defense and to communicate with counsel of her 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 her case, as well as the opportunity to engage and communicate with counsel.*” In this case the Defendant had sufficient time to prepare her defense with the legal counsel of her choosing.

(c) To be tried without undue delay;

The Defendant was tried almost four months after she was detained; this could be considered reasonable timing. Regarding the appeal procedure, it took over four months for the Court of Appeal to set a date for the Defendant’s hearing, which will be held on 5 June 2013, five months after she filed for appeal.

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

While the Defendant was present at the trial, and was allowed to choose her own legal counsel, the same cannot be said for her two brothers who were accused and tried alongside her *in absentia*. While discussion of the case of these accused men is technically beyond the scope of this Legal Analysis, it is important to consider this point from an evidential perspective: It is unfortunate that the other accused were not present to defend themselves as her brothers’ defense could have assisted in the Defendant’s case.

As for the final three guarantees provided under Article 14(3) of ICCPR – *(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on her behalf under the same conditions as witnesses against him; (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in the court and (g) Not to be compelled to testify against himself or to confess guilt* – no substantial violations of these provisions were observed at the trial or pre-trial stages.

Based on the above analysis it seems that most of the Defendant's procedural rights stipulated under Article 14(3) of the ICCPR were respected, however arguably the most important guarantees of a fair trial – the right to be tried by an impartial tribunal and to be presumed innocent until proven guilty – were violated in this case.

5. Fundamental Freedoms

Considering (1) the lack of sufficient evidence linking the Defendant to the crime (as demonstrated in the Charges and Evidence section above), (2) the involvement of the Defendant in the high profile Boeng Kak struggle and her role as a spokesperson for the community, (3) the fact that the Defendant was threatened verbally by the authorities before her arrest, (4) the use of the judiciary in the past to silence Boeng Kak and other land rights activists, and (5) the fact that Lous Sakhorn's sentence was suspended whereas the Defendant's was upheld, it is widely believed by local and international organizations, that the Defendant was targeted as a result of exercising her fundamental rights to **freedom of expression** and **assembly**. These fundamental freedoms are protected under both domestic and international law as set out below.

Article 41 of the Constitution states that all citizens shall have the right to freedom of expression and assembly. Additionally, Article 35 of the Constitution provides Khmer citizens with the right to *"speak and participate actively in the political, economic, social and cultural life of the nation"*. Article 31 states that Cambodia shall recognize and respect the UDHR and the covenants and conventions related to human rights, which includes the ICCPR. The ICCPR is also directly incorporated into Cambodian domestic law by virtue of ratification by Cambodia in 1992, with such incorporation confirmed by a decision of the Constitutional Council dated 10 July 2007, which stated that *"international conventions that Cambodia has recognized"* form part of Cambodian law.²³ Article 19 of both the UDHR and the ICCPR provide for the right to freedom of expression for everyone, while Article 20 of the UDHR and Article 21 of the ICCPR protect the right to freedom of assembly.

It is also widely believed that the charges against the Defendant are linked to her activities as a HRD and exercising her right to defend human rights – which encompasses the rights described above. In her role as leader and spokesperson of her community during the protests against the Boeng Kak evictions and the imprisonment of the Boeng Kak 13, the Defendant exercised her right to defend human rights. She protected the right of her community to adequate housing, as recognized under Article 11 of the international Covenant on Economic, Social and Cultural rights ("ICESCR"), ratified by Cambodia in 1992.²⁴ Furthermore, in calling for the release of the Boeng Kak 13, she was acting in defense of their rights to participate in the political life of their nation, as protected under Article 35 of the Constitution and Article 25 of the ICCPR; and to free expression and assembly, as protected under Article 41 of the Constitution and Article 19 and 21 respectively of the

²³ Constitutional Council of the Kingdom of Cambodia, Decision No. 092/003/2007, 10 July 2007.

²⁴ Article 11 of the ICESCR states: *"The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions"*.

ICCPR.²⁵ The UN Declaration on Human Rights Defenders (the “Declaration”) was adopted by the UN General Assembly in 1998. Although it is not a legally binding instrument, it is based upon a series of rights and principles contained in other international instruments, such as the ICCPR, that are binding. 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 HRDs worldwide can point to as protection for their human rights activities.²⁶

Judicial harassment of HRDs in Cambodia is common and in this case, although the charges do not directly relate to the Defendant’s activism, the lack of evidence to warrant a conviction has led to the widespread belief that the Defendant’s work as a HRD was the true reason that the authorities pursued the case. In fact, accusing a HRD/activist of an offense unrelated to his/her work as a HRD is a cunning way in which to target HRDs and alienate them from their national and international supporters. The Defendant’s imprisonment as a result of exercising her legal rights therefore amounts to arbitrary detention, in violation of her right to liberty, upheld under Article 9 of the ICCPR.

7. Conclusion

The aim of this Legal Analysis is to provide an objective analysis of the charges against the Defendant based on the evidence produced in court and the circumstances surrounding the case. The case presented by the Prosecution was weak. The witness statements were inconsistent and the testimonies of the Alleged Victims could not be trusted based on the fact that they had been drinking for several hours before the Alleged Assault, they were allowed to remain in the courtroom to hear all the other witnesses testify, and they were not required to take an oath. The Defendant herself claimed not to know any of the prosecution witnesses who testified against her, nor did she know the Alleged Victims. This is difficult to understand seeing as the Alleged Victims claimed to have lived near her and her brothers for several years. In addition, the Defendant’s brothers – Yorm Seth and Yorm Kanloang – are known to have left the area and to have moved elsewhere. It is therefore unlikely that they were at the scene of the crime. The fact that the whole case against the Defendant hinges on the alleged guilt of her two brothers is also problematic seeing as they were not present in court in order to be questioned or to defend themselves. It is correct that the Defendant had had her car mirror stolen, as had many people in the area, but she had reported this incident to the police and she had no suspects in mind.

²⁵ See CCHR’s Legal Analysis of the Charging and Sentencing of 13 Boeung Kak Community Representatives on 24 May 2012 (criminal case number 1576/24-05-2012) at http://www.cchrcambodia.org/index_old.php?url=media/media.php&p=analysis_detail.php&anid=19&id=5

²⁶ Furthermore, recently, on 21 March 2013 the Human Rights Council, during its 22nd session, adopted by consensus a landmark resolution on the protection of human rights defenders which calls upon States to ensure “that human rights defenders can perform their important role in the context of peaceful protests, in accordance with national legislation consistent with the Charter of the United Nations and international human rights law” (Article 6) and to ensure that “the promotion and the protection of human rights are not criminalized, and that human rights defenders are not prevented from enjoying universal human rights owing to their work” (Article 11(a)). “Protecting Human Rights Defenders” (21 March 2013), Norway permanent delegation in Geneva, <http://www.norway-geneva.org/PageFiles/648963/A%20HRC%2022%20L%2013%20FINAL%20VERSION.pdf>

Considering the background of the case – the fact that the Defendant was threatened as a result of her activism and told by police that she “*would be in trouble soon*”; the manner in which the Defendant was apprehended by police (lured from her home and then bundled into a car without being told why); cases of other HRDs facing judicial harassment (Tim Sakmony for example) – as well as the suspension of Lous Sakhorn’s sentence and the lack of evidence presented to warrant the Defendant’s conviction, it appears that other forces outside of the law were at work on some level in this case. Based on pure legal standards, this case should have been dismissed by a court of law. In looking at the details of the case, from an evidential as well as a fair trial perspective, it becomes apparent that the Defendant has been targeted through the use of a corrupt judiciary, not because she is guilty of assault, but because she was not afraid to exercise her rights to free expression and assembly, as well as her related right to defend human rights.

All things considered objectively, it is thus necessary to conclude that the Court of First Instance could not have been satisfied beyond doubt that the Defendant was guilty of intentional violence, and that the guilty verdict against her is not sound. The Court of Appeal should therefore hear the Defendant’s case as a matter of urgency and should reach a decision on the basis of evidence and law alone, free from outside influence. Based on the analysis of the charges and evidence above, if the Defendant receives a fair and independent trial at the Court of Appeal, then her guilty verdict will be overturned.

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