

Mandates of the Working Group on Arbitrary Detention; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur on the independence of judges and lawyers; and the Special Rapporteur on the situation of human rights in Cambodia

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Excellency,

We have the honour to address you in our capacity as Working Group on Arbitrary Detention; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the situation of human rights defenders; Special Rapporteur on the independence of judges and lawyers; and Special Rapporteur on the situation of human rights in Cambodia, pursuant to Human Rights Council resolutions 33/30, 34/18, 34/5, 26/7 and 36/32.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received raising concerns relating to specific individuals and media outlets that may unnecessarily and disproportionately restrict the right to freedom of expression, including the arrest, detention and conviction of individuals based on the misuse of the law, which is incompatible with Cambodia's obligations under international human rights law.

According to the information received:

The case of Ms. Sam Sokha

On 25 January 2018, Ms. Sam Sokha, while in Thailand, was sentenced and convicted in absentia by a court in Cambodia to two years' imprisonment and a fine of 5 million riels on charges of 'incitement to discriminate' and insult (articles 494, 496 and 502 of the Criminal Code), for posting a video on Facebook of her throwing a sandal at a ruling party billboard in Preah Sihanoukville Province. She was deported from Thailand on 08 February 2018, and subsequently arrested and taken to prison in Cambodia. Upon her arrest, she was informed by the police of the charges against her, but was not shown any court documents. She was also not informed about her right to legal assistance. On 20 February 2018, her family submitted an opposition motion requesting for a retrial, since she had been tried in absentia. On 22 February 2018, a legal aid NGO accepted to provide her defense, as domestic legislation does not guarantee a legal aid lawyer in cases of misdemeanors. Her trial is scheduled for 1 March 2018, although her lawyer requested a delay in order to have adequate time to prepare her defense.

The case of Mr. Yeang Sothearin and Mr. Uon Chhin

Mr. Yeang Sothearin and Mr. Uon Chhin, journalists, were arrested on 14 November 2017, on charges of ‘conspiracy with a foreign power’ under article 443 of the Criminal Code, for allegedly setting up a studio for Radio Free Asia. After being questioned by local authorities on 14 November, in the presence of their lawyer, they were detained at the Phnom Penh Municipal Police Headquarters, where they remained until 18 November. Between 16 and 18 November, they were questioned at the Phnom Penh Municipal Court by the Deputy Prosecutor. On 18 November, they were presented before the Investigating Judge and sent to pre-trial detention. Their requests for bail were rejected by the Phnom Penh Municipal Court (4 December) and the Court of Appeal (26 December), with the reasoning that they were at risk of leaving the country and that they could hamper the investigation. The appeal at the Supreme Court is pending. It was also reported on 28 February that the police had found “pornographic” photos and videos in Mr. Chhin’s possession which were subsequently leaked to the press, in violation of his right to privacy, and which were not related to the charges against him.

The case of Mr. Kim Sok

Mr. Kim Sok was convicted on 10 August 2017 and sentenced to 18 months in prison on charges of ‘defamation’ and ‘incitement to commit felony’ under articles 305, 494 and 495 of the Criminal Code, after the Prime Minister accused him of implying that the ruling Cambodian People’s Party was responsible for the murder of political analyst Kem Ley in July 2016. In his intervention on a radio roundtable, he had said that Mr. Kem Ley had been killed under the Cambodia People’s Party (CPP) Government. The Court of Appeal upheld the Phnom Penh Municipal Court’s verdict on 17 November 2017. The appeal is pending before the Supreme Court.

A separate complaint was filed at the Phnom Penh Municipal Court against Mr. Sok in February 2017. The case is pending with the Prosecutor and no charges have been filed. Mr. Sok has allegedly been intimidated by unknown people in prison for failing to join the ruling party.

The case of Mr. Kuch Veng

Following interrogation by the Investigating Judge, Mr. Kuch Veng, a community land and forestry activist, was charged on 17 May 2016 with ‘defamation’, ‘incitement to commit a felony’, and ‘discrediting judicial decisions’ under articles 305, 495 and 523 of the Criminal Code after he spoke out in 2012 and

2013 about the eviction of families from State-owned land and after publicly criticizing a sentence handed down in 2015 against one of the protesters related to the eviction. He had been previously summoned on 12 February, but he had asked for a postponement. He was placed under judicial supervision on 12 February 2018 and has access to a lawyer.

The case of [REDACTED]

[REDACTED] was convicted on 11 January 2018 to one-year imprisonment and a fine of one million riels for ‘incitement to commit a felony’ under articles 494 and 495 of the Criminal Code, for making Facebook posts allegedly linking the Prime Minister with the murder of political analyst Mr. Kem Ley. [REDACTED] was not shown an arrest warrant during [REDACTED] arrest on 10 July 2017, and was formally charged on 13 July 2017. [REDACTED] did not have access to a lawyer during the trial, as the Cambodian Code of Criminal Procedure establishes that a hearing may not proceed without a lawyer in cases of felony, but does not guarantee the right to a lawyer for misdemeanors.

The case of Mr. Hun Vannak and Mr. Dem Kundy

Mr. Hun Vannak and Mr. Dem Kundy, environmental rights defenders and members of Mother Nature, were convicted on 25 January 2018 on charges of ‘incitement to commit a felony’ and ‘violation of privacy (recording of a person’s image)’ under articles 495 and 302 of the Criminal Code. The convictions related to the taking photos of two large vessels belonging to a Senator and prominent businessman that they suspected were ready to carry silica sand for illegal export. During their arrest in September 2017, the police did not explain the charges against them, only informing them that the photos they were taking were an infringement on the rights of an individual’s private image. The police did not provide an arrest warrant, alleging that they had committed a flagrant crime. After spending one night at the provincial police commissariat, they were sent to the prosecution office attached to the Koh Kong Court of First Instance, where they were interrogated. It was not until they were taken to the investigating judge later that day for interrogation that the charges against them were clearly explained. They had access to a lawyer one week after their arrest. They were released on 13 February 2018 after serving their suspended sentence. They were the subject of communication AL/KHM/3/2017. Other members of Mother Nature were the subject of communication AL/KHM 2/2016.

Case of Mr. Chhun Sithy

On 24 October 2017, Mr. Chhun Sithy, elected commune councilor of Pailin province from the former Cambodia National Rescue Party (CNRP), was arrested

without an arrest warrant. He was reportedly informed by the police that he was being arrested based on “an order from their boss”. He was questioned by the prosecutor in relation to his comments on social media, who indicated that he has been arrested while committing a flagrant crime. According to a video clip posted on his Facebook account, Mr. Sithy had allegedly replied to a comment made by the Prime Minister in October 2017, appealing to all CNRP elected persons to defect to the CPP in order to maintain their positions. In the video, he mentioned that he was not working for money but for change for his country. On 26 October, the Investigating Judge issued a pre-trial order to detain Mr. Sithy under charges of incitement to commit felony and insulting public officials, under articles 495 and 502 of the Criminal Code. He only had access to his lawyer after he was questioned by the Investigating Judge. His trial took place on 27 February 2018, with a verdict expected on 20 March.

The case of Mr. Um Sam An

Mr. Um Sam An, member of the National Assembly from the former Cambodia National Rescue Party, was convicted on 10 October 2016 to two years imprisonment and a fine of four million riels for ‘incitement to commit a felony’ and ‘incitement to discrimination’ under articles 495 and 496 of the Criminal Code, after making posts on Facebook criticizing the Government’s demarcation of the border with Vietnam. During the arrest in April 2016, he was not informed of the charges against him, and no warrant was produced. He was reportedly informed by the Provincial Police that they were only following orders. He had access to a lawyer 24 hours after his arrest, as established in the Cambodian legislation. Though the posts were made in 2015, the National Assembly did not follow the required parliamentary procedure to remove his immunity, following the Phnom Penh Court’s allegation that he had been arrested “in flagrante delicto”. The Court of Appeal upheld his conviction on 23 December 2016 and the Supreme Court upheld the conviction on 9 February 2018.

Case of Mr. Lu Lay Sreng

Mr. Lu Lay Sreng, a former Deputy Prime Minister and a former National United Front for an Independent, Neutral, Peaceful and Cooperative Cambodia (FUNCINPEC) official, was charged for defamation, under article 305 of the Criminal Code, for comments he made in a private phone conversation on 21 October 2017. The phone call was secretly recorded and disseminated on Facebook without his knowledge. The comments were critical of the Prime Minister, the King and FUNCINPEC. It was reported that the Prime Minister and the FUNCINPEC president filed the complaints at the court against him. Following the presentation of the complaint, the Minister of Justice filed a motion to the court asking it to take “urgent action”. He was convicted in absentia by the

Phnom Penh Municipal Court on 25 January 2018 and ordered to pay 500 million riel in damages, plus a court fine of eight million riel. There was no defense lawyer present at the trial.

Blocking and suspension of media

On 4 September 2017, the newspaper *Cambodia Daily*, was forced to close following USD 6.3 million tax bill. Shortly thereafter, access to *Cambodia Daily's* online website was blocked without official notification. The *Cambodia Daily* was subject of communication UA/KHM/4/2017.

On 4 February 2018, documents confirmed that the authorities had ordered internet service providers (ISPs) to block access to the website of *Cambodia Daily*. The blocking order came from the head of the Tax Department who in a letter of 5 September 2017, asked the Ministry of Posts and Telecommunications to order ISPs to block the *Cambodia Daily's* IP address, Facebook page and Twitter account, primarily to “prevent the *Cambodia Daily* from making an excuse for why they were shut down from publishing, and secondly, to prevent them from continuing to operate online”.

Case of Ms. Deborah Krisher-Steele

On 4 September 2017, a complaint from the Representative of the General Department of Taxation of the Ministry of Finance was filed before the Phnom Penh Municipal Court for public defamation under article 305 of the Criminal Code against Ms. Deborah Krisher-Steele, deputy publisher of the former *Cambodia Daily*. Her trial is set for 22 March 2017, although she has not been officially informed of the charges against her, and she has not received any summons to the Court. The case relates Ms. Krisher-Steele's public complaints about alleged leaks to the media by the General Department of Taxation of confidential communications in relation to the *Cambodia Daily's* review of the newspaper's tax obligations that should have been private.

Case of Aun Pheap and Zsombor Peter

On 22 May 2017, two journalists from the *Cambodia Daily*, Aun Pheap and Zsombor Peter were briefly detained and released the same day by the Police in Ratanakiri province, for conducting interviews with citizens in relation to the June 2017 commune elections. They were accused of breaching the electoral law that impedes anyone from carrying out electoral polls during the political campaign. The case was settled by the Pate Commune Election Committee.

On 28 June 2017, the Ratanakiri Provincial Court Prosecutor issued a summons for questioning on 20 July. The two reporters were first called to appear to the court on 27 June, but they did not appear as they had not been notified. On 28 August 2017, an investigating order was sent by the Prosecutor to the Investigating Judge. Their defense lawyer was only notified of the charges on 5 October 2017, when they were formally charged with incitement to commit a felony, under article 495 of the Criminal Code. The charges were filed after a complaint was filed by three individuals in relation to the interviews carried out by the journalists regarding commune elections. No date has been set for their trial.

Without expressing at this stage an opinion on the facts of the case and on whether the detention of above-mentioned individuals is arbitrary or not, we would like to appeal to your Excellency's Government to take all necessary measures to guarantee their right not to be deprived arbitrarily of his liberty and to fair proceedings before an independent and impartial tribunal, in accordance with articles 9 and 10 of the Universal Declaration of Human Rights (UDHR) and articles 9 and 14 of the International Covenant on Civil and Political Rights (ICCPR), which your country has acceded to on 26 May 1992.

Furthermore, we are particularly concerned at the criminalization of freedom of expression through the application of provisions in the Criminal Code on 'violation of privacy (recording of a person's image)', 'defamation', 'conspiracy with a foreign power', 'incitement to commit a felony', 'incitement to discriminate', 'insult', and 'discrediting judicial decisions' in relation to the alleged acts. We are further concerned that the above-mentioned cases may create an atmosphere of fear and intimidation that could negatively affect the right to freedom of expression of others, leading to self-censorship and the stymieing of creative and responsible public debate on issues of public interest. This could be particularly serious in light of the upcoming national elections on 29 July 2018.

Article 19 of the International Covenant on Civil and Political Rights (ICCPR), acceded by Cambodia 26 May 1992, provides in 19(2) that "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice".

Restrictions on freedom of expression must be strictly limited and meet the high threshold set out in article 19(3) of the ICCPR. They must be provided by law, and be necessary to achieve a legitimate purpose, namely the protection of national security, public order, public health or morals. The restrictions must be proportional in the sense that they must be appropriate to achieve their protective function; and the restriction must be provided by law.

In its General Comment No. 34 on Freedoms of opinion and expression (CCPR/C/GC/34), the Human Rights Committee stated that States parties to the ICCPR are required to guarantee the right to freedom of expression, including inter alia 'political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism', subject only to admissible restrictions referred to above as well as the prohibition of propaganda for hatred and incitement to hatred, violence and discrimination.

Article 20(2) of the ICCPR provides that "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law". As interpreted by the Human Rights Committee, Article 20(2) of the ICCPR must be read in light of article 19(3) such that restrictions under the former must also comply with restrictions under the latter. On the basis of the information referred to above, it is unclear first how the alleged incitement complies with the criteria of necessity, proportionality and legality and second, how those acts could potentially substantiate a claim of discrimination on any of the recognized bases of race, religion or nationality.

In relation to charges of 'defamation' and 'insult', the Human Rights Committee has indicated that the harassment, intimidation or stigmatization of a person, including arrest, detention, trial or imprisonment for reasons of the opinions they may hold and express, constitutes a violation of article 19. 'Thus, the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties, albeit public figures may also benefit from the provisions of the Covenant. Moreover, all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition (CCPR/C/GC/34).

Defamation laws must be crafted with care so that they comply with the three criteria of necessity, proportionality and legality and 'so that they do not serve, in practice, to stifle freedom of expression'. The Human Rights Committee has stated that '[a]ll such laws, in particular penal defamation laws, should include such defences as the defence of truth, and they should not be applied with regard to those forms of expression that are not, of their nature, subject to verification'. In relation to comments about public figures, the Human Rights Committee has stated that 'a public interest in the subject matter of the criticism should be recognized as a defence' and 'care should be taken by States parties to avoid excessively punitive measures and penalties' (CCPR/C/GC/34). On the information available, the acts referred to above raise questions of whether the imposition of restrictions on acts such as throwing a shoe at a political poster, is necessary or appropriate to protect public order.

Moreover, the imposition of criminal penalties in relation to the acts referred to above raises further questions in relation to compliance with article 19. The Human Rights Committee has indicated that States parties should 'consider the decriminalization of defamation' and the 'application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty'.

The charging of individuals and journalists with 'conspiracy with a foreign power' also raises concerns as the provision is vague and constitutes unnecessary and disproportionate restriction on freedom of expression. The Human Rights Committee has highlighted that '[e]xtreme care must be taken by States parties to ensure that treason laws and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise, are crafted and applied in a manner that conforms to the strict requirements of paragraph 3'. The Committee notes that 'to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others for having disseminated such information' is not compatible with article 19.

We would also indicate our concern at provisions criminalizing the 'discrediting of judicial decisions' and their application. In particular, this raises questions whether such a restriction is necessary to protect national security or public order. On the contrary, and in keeping with the imperatives of public order and the public interest in promoting a transparent and effective judiciary, decisions of courts should be written and reasoned and open to public scrutiny. Further, court decisions should also be subject to academic debate and analysis as a means to study the law and its impact and improve its application.

Moreover, the trials of the above-mentioned individuals appear to have been conducted in contravention of the right to due process and a fair trial, in particular the principle of equality of arms and the right to have adequate time and facilities for the preparation of one's defence including access to appropriate information, as enshrined in article 14 of the ICCPR, as well as the Basic Principles on the Role of Lawyers. We would like to appeal to your Excellency's Government to take all necessary measures to guarantee the right of individuals in detention not to be deprived arbitrarily of their liberty and to fair proceedings before an independent and impartial tribunal, in accordance with articles 9 and 10 of the Universal Declaration of Human Rights (UDHR) and articles 9 and 14 of the ICCPR.

In relation to restrictions on websites such as that of the Cambodia Daily, the Human Rights Committee has stated that '[a]ny restriction on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible

with paragraph 3 [of article 19]'. Permissible restrictions generally should be content-specific; generic bans on the operation of certain sites and systems are not compatible with paragraph 3. It is also inconsistent with paragraph 3 to prohibit a site or an information dissemination system from publishing material solely on the basis that it may be critical of the government or the political social system espoused by the government'.

In the context of the lead up to the national elections on 29 July 2018, it is also relevant to highlight the potential impact of these acts on the right to take part in the conduct of public affairs. In its General Comment No. 25 related to participation in the conduct of public affairs and the right to vote (CCPR/C/21/Rev.1/Add.7), the Human Rights Committee established that '[i]n order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.' It requires the full enjoyment and respect for the rights and freedoms to 'engage in political activity individually or through political parties and other organizations to debate public affairs, to hold peaceful demonstrations and meetings, to criticize and oppose, to publish political material, to campaign for election and to advertise political ideas.'

With regard to Mr. Um Sam An, concern is expressed that procedural guarantees, including parliamentary immunity, provided for under the laws and Constitution of the Kingdom of Cambodia, were waived as a result of the application of the procedure applicable in case of flagrante delicto. Considering "an offence is flagrant if the accused is apprehended either during the commission of the crime or immediately after the commission of the crime", or is found in 'hot pursuit' or with relevant evidence "shortly after a misdemeanor or felony has been committed", the flagrante delicto procedure does not appear to apply to the circumstances of Mr. Um Sam An's arrest, in Cambodia, in 2016, for Facebook posts from 2015 - this would result in his arrest and detention in denial of his parliamentary immunity, to be arbitrary.

As does for Mr. Hun Vannak and Mr. Dem Kundy, both environmental rights defenders, we would like to remind your Excellency's government of the fundamental principles set forth in articles 1 and 2 of the UN Declaration on Human Rights Defenders, which provide for the right to promote and to strive for the protection and realization of human rights and fundamental freedoms.

In conclusion, we wish to refer to the concluding observations of the Human Rights Committee to the Royal Kingdom of Cambodia in relation to its implementation of article 19 of the International Covenant on Civil and Political Rights in 2015. The Committee recommended that the Government '...ensure that everyone can freely exercise his or her right to freedom of expression and association, in accordance with

articles 19 and 22 of the Covenant and the Committee's general comment No. 34 (2011) on freedoms of opinion and expression.'

The Committee also recommended that Cambodia refrain from prosecuting journalists, human rights defenders and other civil society actors as a means of deterring or discouraging them from freely expressing their opinions; consider decriminalizing defamation and bring any other relevant provisions of the Criminal Code into line with article 19 of the Covenant; and review its current and pending legislation, including the draft laws on cybercrimes and on associations and NGOs, to avoid the use of vague terminology and overly broad restrictions, to ensure that any restrictions on the exercise of freedom of expression and association comply with the strict requirements of articles 19 (3) and 22 of the Covenant.

The full texts of the human rights instruments and standards recalled above are available on www.ohchr.org or can be provided upon request.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and any comment you may have on the above-mentioned allegations.
2. Please provide further details about the legal basis for arrests and detentions of above-mentioned individuals, and how these measures are compatible with international norms and standards as stipulated in the ICCPR.

The response will be made available in a report to be presented to the Human Rights Council for its consideration.

While awaiting a reply, we urge that all necessary interim measures be taken to halt any infringements of the right to freedom of expression and prevent their reoccurrence and, in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

We intend publicly to express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that we have been in contact with Your Excellency's Government to clarify the issues in question.

We would like to inform your Excellency's Government that after having transmitted an urgent appeal to the Government, the Working Group on Arbitrary Detention may transmit the case through its regular procedure in order to render an opinion on whether the deprivation of liberty was arbitrary or not. Such urgent appeals in no way prejudge any opinion the Working Group may render. Your Excellency's Government is required to respond separately for the urgent appeal procedure and the regular procedure.

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.

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