



**Complaint to the Senate of Cambodia First Commission on Human Rights, Reception of Complaints  
and Investigation Regarding the Criminalization of Defamation**  
**February 2014**

[The Cambodian Center for Human Rights](#) (“CCHR”) wishes to draw the attention of the First Commission of the Senate of Cambodia on Human Rights, Reception of Complaints and Investigation (the “Commission”) to a matter of grave importance in relation to the protection and the promotion of human rights in the Kingdom of Cambodia (“Cambodia”), in particular with regards to the right to freedom of expression. We ask the Commission to give due consideration to the following complaint regarding the unconstitutionality of the criminalization of defamation and public insult, and to take all appropriate action within its competence to promote the decriminalization of defamation and public insult in accordance with the following submissions and recommendations.

This Complaint is written by CCHR, a non-aligned, independent, non-governmental organization (“NGO”) that works to promote and protect democracy and respect for human rights – primarily civil and political rights – throughout Cambodia.

**Introduction**

In accordance with the principles proclaimed in the Charter of the United Nations (the “UN”), as elaborated in the Universal Declaration of Human Rights (the “UDHR”), recognition of the equal and inalienable rights of all human beings is an essential foundation for freedom, justice and peace. Amongst these inalienable rights is the right to freedom of expression, including free and open debate regarding matters of public interest, which is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights and democracy.

Article 19 of both the UDHR and the International Covenant on Civil and Political Rights (the “ICCPR”) and Articles 31, 35 and 41 of the Constitution of the Kingdom of Cambodia (the “Constitution”) uphold the right to freedom of expression. Decision No.092/003/2007CCD of the Cambodian Constitutional Council dated 10 July 2007 reaffirms that the UDHR and international human rights covenants ratified by Cambodia are applicable in Cambodian courts, thereby affording further protection to freedom of expression under Cambodian law.

The right to freedom of expression is not absolute. Certain restrictions on the right are permitted if necessary for the protection of national security or of public order (*ordre public*), or of public health or morals, or for the respect of the rights and reputations of others. However, restrictions on the right are only legitimate in exceptional circumstances and they must be strictly proportionate to the legitimate aim.

While defamation provisions contained in the Cambodian Criminal Code 2009 (the “Penal Code”) may be seen as necessary in order to protect reputations, it is widely considered that the criminalization of defamation is disproportionate to this aim. In recent years, there has been a concerted effort by international bodies working to promote and protect human rights to decriminalize defamation. However, despite a commitment by Cambodian Prime Minister Hun Sen in February 2006 to decriminalize defamation, it is still an offense under the Penal Code and the defamation provisions do not comply with requirements set out by the UN Human Rights Committee (the body that oversees the implementation of the ICCPR).

An independent and impartial judiciary is necessary to safeguard the rule of law, including freedom of expression. Due to the lack of such an institution in Cambodia, defamation provisions are regularly misused to illegally stifle free expression. The provisions unduly restrict debate on matters of public concern, which is contrary to Cambodia’s obligations under Article 19 of the ICCPR.

This complaint demonstrates that the criminalization of defamation and other related offenses is contrary to Cambodia’s obligations under Article 19 of the ICCPR and, in turn, violates Cambodia’s obligations to all citizens under the Constitution. The criminal offense of defamation and all other related criminal provisions that stifle freedom of expression in Cambodia are thus unconstitutional and must be reviewed, amended or repealed and ultimately decriminalized so as to comply with international human rights standards and with the Constitution

### **Section One: States’ Obligations Under the Right to Freedom of Expression**

1. Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person.<sup>1</sup>
  - a. Freedom of opinion and freedom of expression are essential for any society.<sup>2</sup>
  - b. Freedom of opinion and freedom of expression are the foundation stones for every free and democratic society.<sup>3</sup>
2. Freedom of opinion is contained within the broader right to freedom of expression, with freedom of expression providing the vehicle for the exchange and development of opinions.<sup>4</sup>
3. Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.<sup>5</sup> The right to freedom of expression is the cornerstone of a functioning democracy. Without the right to seek and impart information, to hold opinions and to engage in debate, citizens cannot meaningfully participate in the political life of their nation.

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<sup>1</sup> UN Human Rights Committee General Comment No. 34 (2011), paragraph 2.

<sup>2</sup> Communication No. 1173/2003, *Benhadji v Algeria*, views adopted on 20 July 2007; Communication No. 628/1995, *Park v Republic of Korea*, views adopted on 5 July 1996.

<sup>3</sup> UN Human Rights Committee General Comment No. 34 (2011), paragraph 2.

<sup>4</sup> *Ibid*, paragraph 2.

<sup>5</sup> *Ibid*, paragraph 3.

4. Freedom of expression is also an important guarantor of other rights and fundamental freedoms; for example, allowing a citizen to voice dissatisfaction and seek redress when their other rights are violated. Without the ability to express views openly and without fear, genuine and effective pluralistic democratic governance is impossible. Freedom of expression is also closely linked and indispensable to other fundamental freedoms recognized by international law, such as freedom of assembly and association.

5. The obligation to respect the rights to freedom of opinion and expression under Article 19 of the ICCPR is binding on every state party to the ICCPR. This obligation and responsibility to respect the rights to freedom of opinion and freedom of expression extends to the functions of:

- a. All branches of the state (executive, legislative and judicial);
- b. Other public or governmental authorities, at whatever level (national, regional or local);<sup>6</sup> and
- c. In some circumstances, to the acts of semi-state entities.<sup>7</sup>

6. The ICCPR also requires state parties to ensure that, as far as possible, persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression between private persons or entities.<sup>8</sup>

7. State parties to the ICCPR are required to ensure that the rights contained in Article 19 of the ICCPR are reflected and adhered to via the domestic laws of the state.<sup>9</sup> The right to freedom of expression as protected under the ICCPR imposes on a state party a negative and a positive obligation. The state party is obliged to:

- a. Refrain from violating the right to freedom of expression; and also to
- b. Ensure that the conditions exist for an individual to fully enjoy their rights.<sup>10</sup>

8. The ICCPR recognizes that the right to freedom of expression is not an absolute right and the ICCPR makes provisions for restricting the right in exceptional circumstances in order to protect the rights and reputations of others. However, because of the fundamental nature of freedom of expression, the necessity for the right to be given full effect to ensure the development of both the individual and of democratic society and the role freedom of expression plays as a guarantor for the enjoyment of other fundamental freedoms, any restriction on the right to freedom of expression must conform to a rigorous set of international norms. As noted in the introduction above, paragraph three of Article 19 of the ICCPR states that freedom of expression may be subject to restrictions that are provided for by law where:

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<sup>6</sup> UN Human Rights Committee General Comment No. 31 (2004) setting out the nature of the general legal obligation imposed on states party to the ICCPR, paragraph 4, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III.

<sup>7</sup> Communication No. 61/1979, *Hertzberg et al. v. Finland*, views adopted on 2 April 1982.

<sup>8</sup> UN Human Rights Committee General Comment No. 31 (2004), paragraph 8; Communication No. 633/1995, *Gauthier v. Canada*, views adopted on 7 April 1999.

<sup>9</sup> UN Human Rights Committee General Comment No. 34 (2011), paragraph 8.

<sup>10</sup> ICCPR Article 2; UN Human Rights Committee General Comment No.31 (2004).

- a. It is necessary to ensure respect of the rights and reputations of others,<sup>11</sup>or
- b. It is necessary for the protection of national security or of public order, or of health or morals.<sup>12</sup>

9. In order to ensure continuous and effective protection of the rights contained in Article 19 of the ICCPR, a state party purporting to restrict in law the right to freedom of expression for one of the two permitted purposes above, the burden is on the state party to demonstrate that:

- a. The law restricting the right to freedom of expression is necessary, and
- b. The measures adopted are proportionate to the aim of ensuring respect of the rights and freedoms of others or to protect national security, public order, public health or morals.<sup>13</sup>

Where a state party restricts the right to freedom of expression with the aim of protecting reputation, the onus is on the state party to demonstrate that the restriction is in accordance with the law, necessary and proportionate. As part of fulfilling its obligation to demonstrate lawfulness, necessity and proportionality, it is necessary for the state party to monitor and control how the law restricting the right to freedom of expression works in practice. The positive obligation on a state party to ensure that the conditions exist for the individual to fully enjoy the full right to freedom of expression requires the state party to ensure that the restriction aimed at protecting reputation does not, in practice, serve to restrict the fundamental freedom recognized by Article 19 of the ICCPR. To this end, the law must be sufficiently precise to prevent a breach of Article 19 and it must be applied by the judiciary in such a way that the right to freedom of expression is protected.

## **Section Two: Criminalization of Defamation under International Law**

10. Defamation laws must be drafted with care to ensure that they comply with paragraph three of Article 19 of the ICCPR, and that they do not serve, in practice, to stifle the right to freedom of expression.<sup>14</sup> In addition to this care at the drafting stage, the state party must ensure and continuously monitor the operation of defamation law in practice. For a state party to comply with its obligations under the ICCPR, the state party must engage in a dynamic process of ensuring that the law pertaining to defamation remains necessary and proportionate to the aim of protecting reputation. Particular care needs to be given by the state party as to how the judiciary interprets and applies the law. According to the UN Human Rights Committee:

- a. All laws relating to defamation, in particular penal defamation laws, should include such defenses as the defense of truth.<sup>15</sup>
- b. Defamation laws should not be applied with regard to those forms of expression that are not, by their nature, subject to verification, such as pure opinion or estimation.<sup>16</sup> The courts must keep this in mind when dealing with defamation complaints.

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<sup>11</sup> ICCPR Article 19(3)(a).

<sup>12</sup> Ibid, Article 19(3)(b).

<sup>13</sup> UN Human Rights Committee General Comment No.31 (2004).

<sup>14</sup> UN Human Rights Committee General Comment No.34 (2011).

<sup>15</sup> UN Human Rights Committee Concluding Observations on the United Kingdom of Great Britain and Northern Ireland, CCPR/C/GBR/CO/6.

<sup>16</sup> Ibid.

- c. At least with regard to comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice.<sup>17</sup>
- d. A public interest in the subject matter of the criticism should be recognized as a defense of what may otherwise be considered as defamatory expression.<sup>18</sup>
- e. Care should be taken to avoid excessively punitive measures and penalties in defamation cases. Reasonable limits should be placed on the requirement for a defendant to reimburse the expenses of the successful party.<sup>19</sup>

11. According to the UN Human Rights Committee, all state parties to the ICCPR should consider the decriminalization of defamation.<sup>20</sup> In any case where defamation continues to be criminalized:

- a. The application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty.<sup>21</sup>
- b. It is impermissible for a state party to indict a person for criminal defamation but then not to proceed to trial expeditiously.<sup>22</sup>
- c. There is a requirement for the state party to demonstrate why defamation needs to be an offense under the Penal Code and why the Civil Code cannot provide the necessary and proportionate protection of an individual's reputation.
- d. If a state party does continue to criminalize defamation, then the drafting of the article of the Penal Code must comply with minimum standards required by international law: as a minimum, the person indicted for defamation is entitled to be acquitted if the allegedly defamatory statement is true, if the statement was made without malice, or is made in relation to a subject where criticism is in the public interest.

12. The penalization of a media outlet, publishers or journalists solely for being critical of the government or the political social system espoused by the government can never be considered to be a necessary restriction of freedom of expression.<sup>23</sup>

13. Even when the Penal Code is not used to directly indict journalists and media outlets, a state party must recognize that the criminalization of defamation may still act to restrict legitimate criticism of a government or political system by imposing "self-censorship" on journalists, opposition political parties and members of civil society. It must be recognized that if a journalist considers the possibility of being indicted for defamation and as a result alters or limits criticism of the government then the Penal Code cannot be in accordance with Article 19 of the ICCPR:

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<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> UN Human Rights Committee Concluding Observations on Italy, CCPR/C/ITA/CO/5; UN Human Rights Committee Concluding Observations on the Former Yugoslav Republic of Macedonia, CCPR/C/MKD/CO/2.

<sup>21</sup> Communication No. 909/2000, *Kankanamge v. Sri Lanka*, views adopted on 27 July 2004.

<sup>22</sup> Ibid.

<sup>23</sup> UN Human Rights Committee Concluding Observations on Peru, CCPR/CO/70/PER.

*“The threat of criminal sanctions of any kind for reporting can have a chilling effect on investigative journalism.”<sup>24</sup>*

14. The scope of the right to freedom of expression embraces even expression that may be regarded as deeply offensive.<sup>25</sup>

15. 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.<sup>26</sup> This must be reflected in any defamation law.

- a. The limits of acceptable criticism are wider as regards politicians than as regards private individuals.<sup>27</sup>
- b. Politicians must tolerate harsh words as well as harsh criticism.<sup>28</sup>
- c. This margin of criticism applies to all public officials and not just politicians.

16. Public bodies should not be permitted to bring defamation charges against an individual or organization. The rationale against public bodies being able to bring a suit for defamation, whether as a criminal or civil action, rests ultimately on the real and serious risk this presents to the right to freedom of expression. Public bodies cannot be seen as having a “reputation” as they lack any emotional or financial interest in preventing damage to their good name. It can also be considered improper to spend public money on defamation suits.

17. Article 19 (a leading international NGO working to uphold freedom of expression, free access to information and free media) has published suggested measures for the drafting of defamation offenses where a state party has chosen as an interim measure to continue to criminalize defamation.<sup>29</sup> These guidelines represent minimum standards that are to be applied to comply with international law and include the following provisions:

- a. No one should be convicted for criminal defamation unless the party claiming to be defamed shows that all the elements of the offense are established beyond all reasonable doubt.
- b. The offense shall not be made out unless it is proved that:
  - i. The impugned statements are false (defense of truth); and
  - ii. They were made with actual knowledge of falsity or recklessness as to whether or not they were false; and
  - iii. They were made with the specific intention of causing harm to the party claiming to be defamed.
- c. Public authorities, including the police and the prosecution, should take no part in the initiation of criminal defamation cases, regardless of the status of the party claiming to be defamed, even if he or she is a senior public official.

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<sup>24</sup> Dunja Mijatovic, Organization for Security and Co-operation in Europe representative on Freedom of the Media, 16 September 2013, available at: <http://www.osce.org/fom/104992>.

<sup>25</sup> Ibid.

<sup>26</sup> UN Human Rights Committee General Comment No.34 (2011).

<sup>27</sup> *Lingens v Austria* (1986) 8 EHRR 407.

<sup>28</sup> *Heider v Austria* Application 25060/94 (1994) European Commission on Human Rights First Chamber.

<sup>29</sup> <http://www.article19.org/pages/en/criminal-defamation.html>.

- d. Prison sentences, suspension of the right to express oneself through any particular form of media, to practice a particular profession, excessive fines or costs or other harsh sanctions should never be available, no matter how egregious or blatant the defamatory statement.

### **Section Three: Applicability of International Law Relating to Criminal Defamation in Cambodia**

18. Cambodia is a state party to the ICCPR.<sup>30</sup> The Constitution recognizes and undertakes to respect the human rights contained in the UN Charter, the UDHR and other international covenants and conventions.<sup>31</sup> The Cambodian Constitutional Council has also specifically recognized the provisions of the ICCPR as being part of Cambodian law.<sup>32</sup>

19. The Constitution also independently upholds the right of all Khmer citizens to freedom of expression and a free press.<sup>33</sup> In addition, the Constitution enshrines the rights of Khmer citizens to “actively participate in political life.”<sup>34</sup>

20. The Royal Government of Cambodia (the “RGC”) has repeatedly recognized the need to reform the law on defamation and has even stated an intention to decriminalize defamation entirely. On 14 February 2006 while in Kandal province, Prime Minister Hun Sen announced that defamation would be decriminalized.<sup>35</sup> In May 2006, the law was amended to remove the sanction of immediate imprisonment for defamation. However, under Article 525 of the Cambodian Criminal Procedure Code (the “Criminal Procedure Code”), the penalty for non-payment of a fine is imprisonment.

21. Unfortunately, when it came into effect on 30 November 2010, the new Penal Code failed to decriminalize defamation. The relevant provision of the UN Transitional Authority in Cambodia Penal Code 1992 (the “UNTAC Penal Code”)<sup>36</sup> was replaced by Article 305 of the new and current Penal Code and defamation continued to be a criminal offense rather than a matter to be dealt with by the civil courts. The adoption of a new Penal Code would have been an ideal opportunity for the RGC to reiterate its commitment to freedom of expression through decriminalizing defamation.

22. The definition of defamation under Article 305 of the Penal Code does not reform the previous definition of defamation under Article 63 of the UNTAC Penal Code. In many ways the definition of defamation is now broader and more open to interpretation. The definition (below) in Article 305 fails to meet the requirements of international law:

*“Defamation shall mean any allegation or charge made in bad faith which tends to injure the honor or reputation of a person or an institution.”*

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<sup>30</sup> Signed 17 Oct 1980, ratified 26 May 1992.

<sup>31</sup> Article 31 of the Constitution.

<sup>32</sup> Decision of the Cambodian Constitutional Council No. 092/003/2007 CC.D 10 July 2007.

<sup>33</sup> Article 41 of the Constitution.

<sup>34</sup> Ibid, Article 35.

<sup>35</sup> Ellen Nakashima, ‘Cambodia moves towards openness’, The Washington Post (10 March 2006), available at:

<http://www.washingtonpost.com/wp-dyn/content/article/2006/03/09/AR2006030902149.html>.

<sup>36</sup> Article 63 of the UNTAC Code.

It is immediately apparent that the Penal Code widened the scope of defamation so that institutions could be defamed as well as individuals (the UNTAC Penal Code specified individuals). For the reasons set out above in paragraph 16 of Section Two, public bodies, which would by definition be included in the term “institution,” have no emotional or financial interest in preserving their reputation and should not be included in the definition.

It is also clear that Article 305 lowers the threshold at which defamation charges can be instigated. Whereas under the UNTAC Penal Code definition of defamation, the allegation or imputation would have to *actually* harm reputation or honor, Article 305 sets a lower bar in that the imputation need only to *tend* to harm reputation or honor.

23. Amongst the many recommendations relating to the right to freedom of expression in the report of the working group of the UN Universal Periodic Review (“UPR”) to the RGC; recommendation 46(e) reads:

*“[D]efine the scope of defamation and disinformation charges to ensure that these do not impinge on freedom of expression and give clear guidance to judicial officials so that these provisions do not result in a large number of cases where the charges are disproportionate.”<sup>37</sup>*

The RGC acknowledged the deficiencies of Article 305 by accepting the recommendation relating to defamation (and all recommendations by the UPR working group) but has failed to act upon it.<sup>38</sup>

24. As explained in paragraph 18 above, Cambodia is a state party to the ICCPR and Article 31 of the Constitution and the ruling of the Cambodian Constitutional Council in 2007 taken together create an obligation on the RGC to interpret and apply all domestic legislation in accordance with the ICCPR. General Comment No.34 (2011) and other observations of the UN Human Rights Committee (as discussed in detail in section one above) are therefore binding authoritative guidance on how the right to freedom of expression should be interpreted. Where the Article 305 of the Penal Code is not in accordance with General Comment No.34, then Cambodia is in breach of its obligations under the ICCPR. The principle breaches of the ICCPR in relation to Article 305 of the Penal Code are:

- a. The RGC has failed to demonstrate the necessity to criminalize defamation and the fact that reputation cannot be protected by means short of criminalization, for example, under Article 743, 744 and 757 of the Civil Code which provides the opportunity for a defamation case plaintiff to seek remedies in civil courts.;
- b. Article 305 is not drafted with sufficient precision and clarity to prevent a breach of the right to freedom of expression;
- c. The scope of defamation is defined too widely and applies to institutions as well as individuals;
- d. The threshold for the commencement of criminal proceedings for defamation is too low; Article 305 does not require the complainant to show actual harm, merely a tendency to harm;

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<sup>37</sup> UN Human Rights Committee Report of the Working Group, 4 January 2010, available at: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/KHSession6.aspx>.

<sup>38</sup> Details of recommendations made to Cambodia and accepted are available at: [www.upr-info.org/IMG/pdf/Recommendations\\_to\\_Cambodia\\_2009.pdf](http://www.upr-info.org/IMG/pdf/Recommendations_to_Cambodia_2009.pdf).



- e. Article 305 is not reserved only for the most serious cases of defamation;
- f. Article 305 does not contain the defenses of truth and public interest; and
- g. Article 305 fails to differentiate between assertion of facts and expression of opinion.

25. It follows that since the Cambodian Constitutional Council has ruled that the ICCPR is part of domestic law, and because of the breaches of the ICCPR set out above, there is a conflict of laws between Article 19 of the ICCPR and Article 305 of the Penal Code. This conflict of laws needs to be resolved in order to respect the certainty principle that underpins any credible and competent judicial system.

26. Article 41 of the Constitution recognizes the right of Khmer citizens to freedom of expression. While it is accepted that Article 41 is not an absolute right and can be limited for one of the express purposes set out, because of the status of the Constitution as “supreme law,”<sup>39</sup> it is a necessary condition that any restrictions on Article 41 must also be in accordance with the Constitution. For the reasons set out above, Article 305 of the Penal Code is in legal conflict with Article 19 of the ICCPR. The conflict of laws is to be resolved by reference to the status of the ICCPR in the Constitution. As Article 31 of the Constitution enshrines “recognition and respect” for the ICCPR, it follows that because of the position of the ICCPR within the Constitution, that Article 305 of the Penal Code must be, as far as possible, interpreted and applied to give effect (“recognition and respect”) to Article 19 of the ICCPR and where there is a direct conflict between Article 19 of the ICCPR and Article 305 of the Penal Code, the conflicting parts of the Penal Code must be dis-applied. It is therefore the legal conclusion that where Article 305 is not in accordance with the ICCPR in its entirety, to apply Article 305 of the Penal Code would amount to a breach of Article 41 of the Constitution.

27. Even without the strictly legalistic approach to interpreting Article 41 of the Constitution in accordance with the ICCPR, the RGC has committed itself publically before the community of nations to giving full effect to the right to freedom of expression contained in Article 19 of the ICCPR. From ratification of the ICCPR, to the drafting of Article 31 of the Constitution, the RGC has consistently recognised that Article 19 is the standard to be adopted in international law. The continuing criminalization of defamation, especially in the present terms of Article 305 of the Penal Code, which are clearly in conflict with the binding interpretation of Article 19, represents a failure by the RGC to give effect in domestic law to the commitments it has made to the international community.

#### **Section Four: Operation of the Criminal Law of Defamation and Public Insult (Articles 305 to 310 of the Penal Code)**

28. In order to give effect to the positive obligation to create the conditions in Cambodia for Khmer citizens to properly exercise and enjoy the right to freedom of expression, it is necessary for the RGC to continuously monitor and review how Article 305 of the Penal Code operates in practice. The RGC must be able to fulfill the requirement to demonstrate that the continuing criminalization of defamation remains in accordance with law, is necessary and proportionate, and does not in practice operate to restrict the right to freedom of expression.

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<sup>39</sup> Constitution of the Kingdom of Cambodia, Article 150

29. General oversight of how the judiciary interprets and applies the law of defamation is of particular importance, but the RGC must also ensure that prosecutors only bring actions for defamation in the most serious of cases and that once a defamation charge is brought, it proceeds to trial expeditiously. Cases of defamation in recent years have demonstrated that the judiciary is inconsistent with its interpretation and application of the law of defamation. This is particularly evident in instances of ignoring that allegedly defamatory statements under Article 305 of the Penal Code must have been made in “bad faith.” Prosecutors have also brought charges against or conducted interrogations of suspects in cases where any tendency to damage honor or reputation is slight. Several cases of alleged defamation have taken many months, if not years, to be resolved, often involving repeated questioning and court hearings, interfering with the work of journalists and human rights defenders and placing the suspect or defendant under enormous stress.

30. The 2011 case of Sam Chankea demonstrates all these points.<sup>40</sup> In 2009, Sam Chankea gave a statement to Radio Free Asia referring to a land dispute between local villagers and KDC International, which is owned by Chea Kheng, the wife of the Minister for Industry, Mines and Energy Suy Sem. The translation of his remarks reads:

*“What the company has done is an act of violation since the court has yet to rule on the merits of the case. Therefore, the company should suspend the activity and await the ruling on the merits of the case.”*

31. On the basis of these remarks, he was investigated, tried and ultimately convicted. The remarks are clearly a statement of opinion rather than fact and show no basis for a finding of “bad faith.” It is difficult to see how these remarks would “tend to injure the honor and reputation” of a company such as KDC International. At the very least, it could hardly be described on any objective analysis as a serious case of defamation. Despite this, the court proceedings lasted until January 2011 and involved frequent appearances at court either for questioning or hearing. He was eventually fined one million Riels and ordered to pay compensation of three million Riels. This case alone demonstrates that human rights defenders will have to seriously consider their own position before deciding if they can act for others.<sup>41</sup>

32. The removal of imprisonment as a sentencing option following a conviction for defamation has not removed the possibility of imprisonment as an outcome in a defamation case. Defamation is punishable by a fine from one hundred thousand to ten million Riels.<sup>42</sup> However, non-payment of fines is an imprisonable offense under the Code of Criminal Procedure.<sup>43</sup> A fine of between five and ten million Riels could be punished by imprisonment of six months.<sup>44</sup> As a consequence, imprisonment is a real possible outcome for a conviction for defamation.

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<sup>40</sup> May Titthara, ‘Civil society urges review of defamation’, The Phnom Penh Post (27 January 2011), available at: <http://www.phnompenhpost.com/national/civil-society-urges-review-defamation>.

<sup>41</sup> Cambodian League for the Promotion and Defense of Human Rights (“LICADHO”), Joint Statement (27 January 2011), available at: <http://www.licadho-cambodia.org/pressrelease.php?perm=237>.

<sup>42</sup> Article 305 of the Penal Code.

<sup>43</sup> Article 525 of the Code of Criminal Procedure.

<sup>44</sup> Ibid, Article 530.

33. The removal of imprisonment as a direct penalty for defamation means that it is now classified as a “petty offense.” As a consequence, state legal representation is only available in a case where the defendant is a minor. This provision results in the removal of *equality of arms* where the defendant is left either to pay for their own legal representation or is unable to have the representation of their choice whilst the person claiming to be defamed has the charge of defamation pursued by the Royal Prosecutor.

34. In the case of defamation or insult to members of the RGC, public officials and any citizen engaged in public duties on behalf of the RGC, the Royal Prosecutor may instigate proceedings following a complaint from the institution the allegedly defamed person belongs to. In the case of private individuals, prosecution will only be initiated following a complaint from the individual alleging to have been defamed.<sup>45</sup> The effect is that public officials and members of the RGC have preferential treatment in law relating to defamation allegations and instigation of criminal proceedings is more likely in cases involving public officials.

35. Another key factor allowing the criminal law of defamation to operate as a tool of the RGC to suppress opposition and criticism is the lack of an independent judiciary. Three key pieces of legislation aimed at creating an independent judiciary (Regulation on the Status of Judges and Prosecutors, Law on the Organization of the Court and Reform of the Supreme Council of Magistracy) have yet to be adopted.<sup>46</sup> As a consequence, judges and prosecutors continue to have close links to the RGC and many remain members, advisors to and active supporters of the ruling Cambodian People’s Party (“CPP”).

36. Article 305 of the Penal Code is one of many criminal provisions that act to restrict the right to freedom of expression. Some of the restrictions on the right to freedom of expression contained in the UNTAC Penal Code, such as Article 62 (disinformation) remain in force and have been used to harass opposition, human rights defenders and the media.<sup>47</sup> Other Articles of the Penal Code contain provisions to limit freedom of expression; Article 307 (public insult), Article 311 (malicious denunciation), Article 502 (insult of a public official or holder of a publicly elected office), and Article 523 (discrediting a judicial decision). In a similar way to Article 305, the provisions of these other laws are drafted without sufficient clarity, leaving their interpretation open to prosecutors and the courts. This wide judicial discretion to interpret the law, in any nation’s legal system, results in different judges applying and interpreting the law in different ways.

37. The Press Law is typical of the imprecise way in which legislation restricting freedom of expression has been drafted to allow a wide margin of interpretation to the judiciary. Article 11 of the Press Law imposes a restriction on any publication that “may affect the public order by inciting directly one or more persons to commit violence;” Article 12 restricts any publication that “may cause harm to national security or political stability;” and Article 13 a similar restriction on material “which affects the good custom of society.” Just as Article 305 of the Penal Code allows a court to interpret what

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<sup>45</sup> Article 309 of the Penal Code.

<sup>46</sup> Surya P. Subedi, Report of the UN Special Rapporteur on Human Rights in Cambodia, 5 August 2013.

<sup>47</sup> For example the prison sentence for LICADHO employee Leang Sokchouen convicted of disinformation under Article 62 of the UNTAC Penal Code in 2010. See the LICADHO press release for more details, available at: <http://www.licadho-cambodia.org/pressrelease.php?perm=226>.

“tends to injure honor or reputation” so the phrases in the Press Law allowing a court to rule on what “may” affect public order, political stability or good custom of society allow the prosecutor and judges far too wide a margin of appreciation to interpret whether an offense has been committed.

Where there is such a wide margin of judicial discretion, imprecise drafting and almost indefinable concepts the principle of legal certainty is inevitably breached. When the absence of legal certainty is combined with the absence of judicial independence and a poor record of the separation of powers in Cambodia, Article 305 of the Penal Code and other provisions of the law that restrict the right to freedom of expression inevitably operate in a way that is inconsistent with the guarantees in Article 41 of the Constitution and with the RGC’s obligations under Article 19 of the ICCPR.

### **Section Five: Case Studies**

A small selection of prominent defamation cases demonstrates the trends described in Section Four:<sup>48</sup>

#### Dam Sith<sup>49</sup>

The editor in chief of the Khmer language newspaper *Moneaksekar Khmer* was arrested on 8 June 2008 in relation to an article published in April 2008 quoting Sam Rainsy’s accusations that Hor Namhong, the then-CPP Foreign Minister, had links to the Khmer Rouge. Dam Sith was held for over a week in prison on pre-trial detention before being released on bail. He was charged with disinformation and defamation under Article 63 of the UNTAC Penal Code.

Dam Sith was charged with a criminal offense of defamation despite the alternative (and more appropriate) non-criminal offenses of the Press Law. Although Article 305 of the Penal Code has superseded Article 62 of the UNTAC Penal Code, it is an example of how journalists, editors and the media are not protected by the Press Law as prosecutors and courts still have the option of charging journalists with criminal offenses of defamation or disinformation.

The criminal law of defamation was clearly used against Dam Sith because the RGC would not tolerate criticism. Dam Sith published an article in good faith, accurately quoting Sam Rainsy. The case demonstrates how the continuing criminalization of defamation is being used to restrict the right to freedom of expression. Hor Namhong, as a senior member of the RGC, had the public position to counter Sam Rainsy’s accusations that Dam Sith had merely reported. As a senior member of the RGC, the then Foreign Minister would have had extensive opportunities through the CPP-controlled media to publish his own version of events. Hor Namhong could have contacted Dam Sith and asked for his publication to carry his response to Sam Rainsy’s accusations. Instead, Hor Namhong resorted to the criminal law and filed a complaint that was enthusiastically pursued by the police, the Royal Prosecutor and the Courts.

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<sup>48</sup> Details for Case Studies are taken from CCHR,

‘An overview of Cambodian laws relating to freedom of expression and a summary of recent case examples to show how laws are used and abused to stifle dissent’ (Briefing Note) (October 2012), available at: [http://www.cchrcambodia.org/index\\_old.php?url=media/media.php&p=analysis\\_detail.php&anid=23&id=5](http://www.cchrcambodia.org/index_old.php?url=media/media.php&p=analysis_detail.php&anid=23&id=5). Additional sources as referenced.

<sup>49</sup> Cheang Sokha, ‘Opposition newspaper editor freed from jail pending defamation trial’, The Phnom Penh Post (16 June 2008), available at: <http://www.phnompenhpost.com/national/opposition-newspaper-editor-freed-jail-pending-defamation-trial>.

### Mu Sochua

Mu Sochua, a leading Sam Rainsy Party (“SRP”) opposition parliamentarian, was successfully prosecuted for defamation by Prime Minister Hun Sen after having her parliamentary immunity controversially lifted. On 27 April 2009, Mu Sochua filed a lawsuit against the Prime Minister alleging defamation under Article 63 of the UNTAC Penal Code in response to a speech given by Hun Sen in which he referred to an unnamed female opposition parliamentarian. Mu Sochua was easily identifiable in the context of the statement as “cheung klang,” a derogatory term that implies that someone is a gangster or (especially when used in reference to a woman) a prostitute.

After Hun Sen refused to retract his comments, Mu Sochua filed a lawsuit seeking 500 Riels in symbolic compensation. The Prime Minister responded by filing a countersuit claiming that Mu Sochua had defamed him with comments that alleged that the derogatory language of the Prime Minister affected all Khmer women. A defamation suit was also threatened against Mu Sochua’s lawyer, forcing him to drop the case and thus depriving her of her choice in legal representation. On 10 June 2009, the Phnom Penh Municipal Court of First Instance dismissed the case against the Prime Minister, saying that it was groundless. Prosecutor Hing Bun Chea explained in a statement that, since the Prime Minister’s comments did not refer to Mu Sochua by name, and that the Prime Minister did not intend to insult any individual with his comments, the lawsuit was not valid.

Such reasoning is a clear misapplication of Article 63 of the UNTAC Penal Code that specifically allows for defamation even when the defamed person is not explicitly named. Such a clear and deliberate misinterpretation of the law relating to Mu Sochua’s claim, whilst allowing a wide margin of interpretation for Prime Minister Hun Sen, clearly shows how the law is used, interpreted and applied in favor of members of the RGC and to the detriment of any opposition.

The threat of a defamation case against Mu Sochua’s lawyer also demonstrates how the threat of criminal proceedings acts as a tool to control dissent and opposition. The threat against her lawyer left Mu Sochua without legal representation of her choice, without a legal aid lawyer as defamation is a petty offense and in a situation of inequality of arms against a case actively pursued by the Royal Prosecutor and with the involvement of Ky Tech, a government lawyer who acted for Prime Minister Hun Sen in the proceedings as a civil party.

Mu Sochua’s case also clearly demonstrates how defamation cases can ultimately result in imprisonment following conviction. Mu Sochua’s sentence consisted of fines and compensation totaling 16.5 million Riels. It was only because the court ordered the fine to be deducted directly from her salary as a member of the National Assembly (although the court never explained how it had the power to do so) that Mu Sochua avoided imprisonment.<sup>50</sup>

### Kevin Doyle and Noun Vannrith

The editor in chief of *The Cambodia Daily* and one of the newspaper’s journalists were found guilty of defamation in 2009 and fined US\$1,000 each. They were convicted of defamation under Article 10 of the Press Law for publishing an article referring to criticisms – attributed to SRP National Assembly

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<sup>50</sup> Men Kimseng, ‘Mu Sochua seeks reform of the judiciary after lawsuit’, Voice of America (25 August 2010), available at: <http://www.voacambodia.com/content/mu-sochua-seeks-reform-of-judiciary-after-lawsuit-101466449/1359000.html>.

member Ho Vann – against military officers in relation to the value of certificates awarded to the Cambodian army by a Vietnamese military school. Ho Vann, who was also charged, argued that he had been misquoted and that *The Cambodia Daily* had issued a clarification. Ho Vann was in fact found not guilty but the journalists were convicted of defamation in spite of their clarification.

Although not a case under Article 305 of the Penal Code, this case illustrates how the RGC uses defamation actions to silence its critics. There can be no element of “bad faith” in the publication of the article in *The Cambodia Daily*; at most it was a misquote that was shortly after clarified in the same newspaper. It is therefore difficult to conclude that any person’s honor or reputation was in fact damaged. The case also illustrates how the law of defamation is used by institutions, in this case the Royal Cambodian Armed Forces, to punish even the slightest criticism.

#### Sim Samnang<sup>51</sup>

Sim Samnang, a journalist for the Khmer language newspaper *Koh Santepheap*, wrote an article in February 2010 where he quoted witnesses who had described how a traffic police officer in Siem Reap had fired his pistol to intimidate a driver who had been stopped for not wearing a seatbelt. Despite quoting the sources accurately and writing a second article six days later that quoted the police department’s denial of the accusation, Sim Samnang was summoned to court to answer questions on allegations of defamation and disinformation.

The two articles written by Sim Samnang did not name the officer who allegedly intimidated the driver by firing a shot. The complaint did not ultimately result in a court case but the continuing criminalization of defamation shows the inherent dangers in a situation where an institution that is itself part of the justice system, the traffic police, can use Article 305 of the Penal Code to make a complaint that is then actioned by another part of the justice system, the judicial police. Being summoned to answer questions for an article that quotes witnesses and where the police response to the allegation was published in the same newspaper clearly demonstrates that Article 305 of the Penal Code is being used to intimidate journalists from reporting anything negative about the authorities.

#### Phel Phearun

On 24 January 2013, schoolteacher Phel Phearun was stopped by the police and his motorcycle confiscated. He later posted on Facebook details of what had happened to him and expressed concerns over his treatment by the police. Phel Phearun was summoned by the Chamkarmorn Police to answer questions in connection with an alleged defamation case arising from his Facebook post.

This case is believed to be the first time an ordinary Khmer citizen’s comments on a social networking site has led to the police investigating alleged defamation. Worryingly, it represents an extension of the RGC’s attempts to suppress criticism into the sphere of the new media. The case demonstrates that criticism, even at a low level and based on a factual account of events, will not be tolerated. Being summoned to answer questions by the police would undoubtedly have caused Phel Phearun distress and worry. It was clearly an attempt by the police to make an example of Phel Phearun and discourage

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<sup>51</sup> Rann Reuy, ‘SReap police accuse journalist of defamation’, *The Phnom Penh Post* (2 April 2010), available at: <http://www.phnompenhpost.com/national/sreap-police-accuse-journalist-defamation>.

other ordinary Khmer citizens from expressing their views and opinions of the RGC and the public bodies it controls online.

It is yet another example of why extending the definition of defamation in Article 305 of the Penal Code to include the protection of the “honor and reputation” of institutions and lowering the threshold to statements that merely “tend” to damage reputation places the legislation in breach of Article 19 of the ICCPR.

### **Section Six: Summary Submissions and Recommendations**

38. Based on the principles and analysis above, CCHR concludes with the following summary submissions and asks the Commission to accept the following recommendations.

#### **Submissions on the criminalization of defamation**

1. The right to freedom of opinion and the right to freedom of expression are inalienable fundamental rights indispensable to the development of every Khmer citizen and are essential for the development of society in Cambodia. They are the foundation stones of a free and democratic country and are essential for the fulfillment of the policies of liberal democracy and pluralism and to the recognition and respect for human rights envisaged by the Constitution.
2. The right to freedom of opinion and the right to freedom of expression are enshrined in Article 41 of the Constitution. Articles 19 of both the UDHR and the ICCPR are part of Cambodian law by virtue of Article 31 of the Constitution and by the Decision of the Cambodian Constitutional Council of 10 July 2007.
3. As Cambodia is a state party to the ICCPR, the declarations, conclusions and comments of the UN Human Rights Committee are binding authoritative guidance as to how the right to freedom of opinion and expression are to be interpreted and applied in Cambodian law.
4. Article 19 of the ICCPR permits a limitation on the right to freedom of expression in order that the rights and reputations of others are respected. However, where a limitation is placed on the right to freedom of expression, it is necessary for the state party to be able to show that the restriction is:
  - a. provided for by law;
  - b. necessary;
  - c. proportionate; and
  - d. does not, in practice, serve to stifle freedom of expression.
5. The criminal offense of defamation in Cambodia, in Article 305 of the penal code, is neither a necessary nor proportionate restriction on the right to freedom of expression and in practice serves to stifle legitimate opposition, proper criticism and the freedom of individuals and the media, as recent cases demonstrate.

6. Article 305 of the Penal Code is unconstitutional as it creates a conflict of laws with Article 19 of the ICCPR, which is “recognized and respected” by the Constitution. Article 305 of the Penal Code also breaches the guarantee in Article 41 of the Constitution of every Khmer citizen’s right to freedom of expression and the Article 35 right to actively participate in the political, economic, social and cultural life of the nation.
7. The RGC must apply UN Human Rights Committee General Comment No.34 (2011) and give consideration to decriminalizing defamation. However, it would be preferable if the RGC implemented its own stated aim of decriminalizing defamation and Article 305 of the Criminal Code was repealed.
8. The use of fines as a sanction for defamation and public insult (up to 10 million Riels) with provisions for incarceration for non-payment of fines means in practice that despite the Penal Code replacing the UNTAC Penal Code, imprisonment remains a possible outcome following a criminal conviction for defamation.
9. As an *interim* alternative to decriminalization, the Penal Code should be amended to provide greater precision and, to minimize the potential for misuse. As such, public authorities, including the police and prosecution, should take no part in the initiation of criminal defamation, regardless of the status of the party claiming to be defamed.
10. Article 305 of the Penal Code is one of a number of measures that are designed to restrict freedom of expression. The UN UPR noted that the definition of defamation needed revising and the RGC accepted that recommendation. Any review of Article 305 for its constitutionality needs to acknowledge that other provisions of the Penal code that restrict freedom of expression similarly lack clarity, definition and are open to wide interpretation and therefore abuse.
11. The interpretation and application of Article 305 by the courts clearly demonstrates that in practice the criminal offense of defamation acts to restrict the right to freedom of expression in a way that is inconsistent with the obligations of the RGC both under the Constitution and under international law. In part this is a function of the lack of clarity and precision in the drafting of Article 305 and the failure to include defenses required by international legal standards, in part it is because the definition of defamation is far too wide and the threshold for initiating a prosecution far too low.
12. In addition to the problems with the drafting of Article 305, the absence of an independent judiciary and often politically-motivated prosecutors result in prosecutions that barely even meet the present standards required by Article 305 of the Penal Code. Prosecutions are begun and convictions found in situations where the alleged defamatory statement is clearly an expression of opinion, not fact; barely even tends to injure honor or reputation and where there is a clear absence of bad faith.



**13.** The conflict between Article 305 of the Penal Code and Article 19 of the ICCPR, both of which are constituent parts of Cambodian domestic law, clearly violates the principle of legal certainty and gives a wide margin to judicial authorities with links to the RGC to apply the law to meet political ends.

**14.** The authoritative interpretation of Article 19 of the ICCPR by the UN Human Rights Committee recommends that defamation not be a criminal offense precisely because of the risk that criminal defamation provisions of a state party's penal code will in practice operate to restrict the right to freedom of expression.

**15.** In failing to decriminalize defamation and by drafting Article 305 of the Penal Code

- a. with too wide a scope for judicial interpretation and application;
- b. with too wide a definition of who and what can be defamed;
- c. with too low a threshold for commencing investigation and prosecution;
- d. without defenses of the truth or public interest; and
- e. in a legal system that places a defendant at an unfair advantage against a complaint of defamation by the state or state body;

Cambodia has already created the conditions where freedom of expression is at risk from any law that would be necessary and proportionate to protect an individual's reputation and is therefore in breach of Article 19 of the ICCPR and of the Constitution

**16.** The risk posed by the continuing criminalization of defamation and the flawed manner in which Article 305 of the Penal Code is drafted is realized in the way in which the police, prosecutors and the courts interpret and apply the law on defamation to suppress criticism and dissent. The suppression does not only take the form of punishing and harassing those that have already expressed opposition but serves to prevent Khmer citizens exercising their rights, as expressed in the Constitution, to freedom of expression and actively participating in the political, economic, social and cultural life of their country.

For all of the above reasons, Article 305 of the Penal Code is unconstitutional and must be repealed.

#### **Recommendations regarding the criminalization of defamation**

CCHR recommends that the Commission should:

**In accordance with Article 141 of the Constitution, petition the Cambodian Constitutional Council to review the constitutionality of Articles 305 to 310 of the Penal Code;**

- 1. Coordinate with the RGC and the National Assembly to decriminalize defamation and repeal or amend Article 305 of the Penal Code and any law that fails to meet the standards of the Constitution and international standards related to the right to freedom of expression;**

- 2. As an interim measure, recommend to the RGC to limit the application of the offense of defamation to only the most serious cases against individuals, not institutions, and coordinate with the RGC and the National Assembly to amend the relevant provisions of the Penal code to clear up the vague terminology that is open to wide interpretation and therefore misuse and provide the defenses required to be compliant with international legal standards;**
- 3. Review the operation of the current criminal law on defamation and take all necessary action to prevent the Penal Code being misused to stifle legitimate freedom of expression, including issuing clear direction to Royal Prosecutors that the criminal law should only be used in the most serious cases and not to protect the RGC from opposition or criticism; and**
- 4. Take all necessary steps to prevent public bodies from wasting national resources and occupying valuable court time by bringing actions for defamation, either through criminal complaints or through civil actions.**