
Cambodia at a Cross-Roads:

How Repealing UNTAC Article 63,
Cambodia's Criminal Defamation Law,
Will Lead to a More Vigorous Democracy

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ABSTRACT

Cambodia's current criminal defamation law is an impermissible intrusion of Cambodians' constitutionally guaranteed right to freedom of expression. The law itself is a remnant of the United Nations Transitional Authority in Cambodia. Moreover it is now being used as a tool to silence the government's political opposition through a weak judiciary system, leaving in its wake a democracy afraid to exercise its constitutionally guaranteed rights. This law is an unconstitutional violation for several reasons: first, it violates the right to freedom of expression which is guaranteed in Cambodia's Constitution. Secondly, it is incompatible with Cambodia's human rights obligations under the International Covenant on Civil and Political Rights. Furthermore, it violates customary international law. This comment proposes that the Cambodian Parliament pass new a new civil defamation law which denies legal standing to the government. Legal standing should be denied to the government to safeguard against the potential abuse of any civil defamation law.

INTRODUCTION

A blanket is spread underneath a large Banyan tree. An older man sits in the middle of a crowd, a typical Khmer scarf wrapped around his neck. The crowd is gathered around him, listening anxiously to the words coming from his mouth. He speaks quickly, in an almost agitated manner, as he does when he speaks about political issues in his country. He is explaining to his audience the benefits of a multi-party democratic system, the advantages of a free market of political thought. The audience listens raptly. They are villagers and farmers, some traveling great distances to hear Kem Sokha speak. This man is becoming known in the countryside for these open discussions.

This scene is repeated throughout the countryside in Cambodia. Kem Sokha hosts these functions, which he describes as public forums, approximately once a week. One specific afternoon, an audience asks him about his recent arrest and detention. He has been charged with criminal defamation. The charges stem from the words on a banner which hung above a booth sponsored by his organization, the Cambodian Center for Human Rights (CCHR), at an International Human Rights Day event. One farmer talks about his desire to exercise his freedom of speech, another woman expresses her fear of political repercussions. Few are willing to give their names. This latest scene, as described in a recent New York Times article,¹ is characteristic of CCHR's public forums. Kem Sokha, president and founder of CCHR, is one of the most outspoken critics of the government in Cambodia. Evidence of this is the prime minister's recent threat against those attending public forums, where he claimed he did not know what would happen to the people who chose to attend.²

Kem Sokha was charged with criminal defamation on two separate occasions in 2005. The first time, in March of 2005, Prince Norodom Ranariddh filed charges on the grounds that Kem Sokha defamed him on a radio program by making allegations that he was bribed to join the prime minister Hun Sen's party. The charges were not pursued following a statement by Kem Sokha in open court which emphasized the need for public opinion and the constitutional provisions which support freedom of expression.³ Kem Sokha was arrested on December 31, 2005, on further criminal defamation charges. This time, the charges involved the alleged defamation of the prime minister. Kem Sokha was held in prison for almost three weeks. During that time, international criticism was mounting against the prime minister for his role in the arrest. The international community called for his release. The prime minister released Kem

Sokha on bail after those three weeks but the charges still stand as the prime minister claims he cannot stop the judicial machinery now that it has instituted charges.

Kem Sokha risks his freedom and his life in raising questions about Cambodia's democratic processes. These two sets of defamation charges illustrate the current regime's fear because raising these questions threatens the current regime, making Kem Sokha a target. He is never without one of his ten bodyguards, a constant reminder of the danger of his work in a country where political assassinations still occur. Cambodia is currently at a crossroads because its future is so uncertain. If Cambodia comes out of this era as an emerging democracy, it will be because of the courage of Cambodians like Kem Sokha or Dr. Kek Galabru, head of the human rights organization LICADHO, who choose to fight the status quo. Freedom of expression is a vital human right, nowhere is it more obvious than here. Repressive acts that are made public, like the recent arrest of Kem Sokha, produce a chilling effect of an unknown magnitude. When people see the consequences of voicing any kind of an opinion contrary to the government, they will not dare do so themselves. As one older woman recently commented at a public forum, "You talk about democracy, but how much of a right do the people of Cambodia have to speak out? If we speak out, will we be arrested like Kem Sokha?"⁴ The chilling effects are much more pervasive in a country like Cambodia where the current generation remembers the terrors and repression when Angkar, a term which refers to the Khmer Rouge government, ruled.⁵

Criminal defamation laws greatly impede the goals of a vigorous democracy as a democracy is dependent upon an engaged and educated populace. There is a pressing need for a civil defamation law in Cambodia that adequately protects Cambodians' rights of free expression while still respecting the rights of an individual to his or her reputation. This comment proposes

that the proper way to strike a balance between these two competing interests is to abolish the criminal penalties for defamation and deny standing to the government in civil defamation suits.

This comment analyzes a current Cambodian law, UNTAC Article 63. This law provides for criminal punishment if the defendant is convicted of defaming another Cambodian. A transitional body, not by the Cambodian government, wrote the law and it should be repealed as it is an unconstitutional violation of Article 41 of the Cambodian Constitution. Additionally, UNTAC Article 63 violates Cambodia's treaty obligations under the International Covenant on Civil and Political Rights (ICCPR). Furthermore, criminal defamation laws are inconsistent with customary international law. Multi-lateral treaties and customary international law are indicative of a country's obligations to its citizens in protecting their rights. UNTAC Article 63 is inconsistent with these two guides.

BACKGROUND

Cambodian History

In order to fully understand the context of this comment, it is crucial to be familiar with a small portion of Cambodia's history to be able to analyze the severe implications of a law criminalizing defamatory statements in such a fragile democracy. With the legacy of the once-mighty Khmer Empire that ruled the entire region, Cambodia has recently been plagued by death and the destruction of its country.

The Khmer Empire once extended over present-day Cambodia, Myanmar, Thailand, Laos, Cambodia, and Vietnam.⁶ Angkor Wat, the most grandiose of the temples at Angkor, was built by Suryavarman II who ruled in the early twelfth century.⁷ Today Angkor is regarded as one of the modern day mysteries of the world. Its majestic presence serves as a reminder of the prominence of the Khmer Empire and the greatness of the Khmer people. Cambodians still refer

to themselves as the Khmer people, in reference to this magnificent history that remains a source of Khmer pride today. French colonization came to Indochina in the eighteenth and nineteenth centuries. After France colonized present-day southern Vietnam, Cambodia became a French protectorate in 1864.⁸

In 1941, Prince Norodom Sihanouk, then eighteen years old, was installed by the French as King of Cambodia. After the Japanese occupation during World War II, public resentment of the French presence grew because Cambodians,⁹ like those in many other colonized countries in Southeast Asia, no longer saw the French as a superior form of government since they were unable to prevent the Japanese from occupying the country.¹⁰ Sihanouk successfully persuaded France to grant Cambodia independence in 1953. People began to think of Sihanouk as the “Father of Cambodian Independence.”¹¹ This period, during Sihanouk’s reign, represents the only relative tranquility the current generation of Cambodians have experienced.¹²

Cambodia’s political instability began initially with Lon Nol’s bloodless coup d’etat in 1970 which wrested power from Prince Sihanouk.¹³ Lon Nol, as one American military adviser related, was a “nuts and bolts” man,¹⁴ more concerned with the daily operations of his military than the country’s future. As Lon Nol stated, he did not bother himself with keeping track of the financial affairs of state.¹⁵ These are interesting words for the prime minister of a country at war, a country dependent upon foreign American military aid for its survival.

Lon Nol was backed by the United States because the U.S. wanted a friendly government in power in Cambodia. The United States was then entrenched in its war in neighboring Vietnam against the North Vietnamese. A Cambodian government that was understanding of U.S. interests in the region was extremely important to the American administration. Adding to U.S. concern, King Sihanouk had previously been supporting the North Vietnamese during the

Vietnam War while claiming to be neutral. Sihanouk believed that his country's survival depended upon this purported neutrality and covert support for the North Vietnamese because he believed they would eventually beat the softer Americans.¹⁶ Prince Sihanouk had been allowing weapons to be imported from China to the coast, to Sihanoukville, and transported over the Cambodian border in return for arms for his own military.¹⁷ Additionally, Vietcong had been hiding in Cambodian enclaves, just over the southern Cambodian-Vietnamese border. As a result, the United States government began bombing the Cambodian border in 1969.¹⁸

The country was soon immersed in a civil war between Lon Nol's U.S. backed government and the Khmer Rouge, who were seeking to convert Cambodia into a Communist state. The movement was led by French educated Cambodians who viewed Communism as a self-sufficient solution for Cambodia.¹⁹ Many Cambodians did not know much about the Khmer Rouge but supported this new government in the hopes that it would bring peace.²⁰ The American bombings of civilian targets along the Cambodian border created a deep mistrust of anything American,²¹ and as a result many villagers supported the Khmer Rouge.

The war culminated on April 17, 1975 when Khmer Rouge forces entered the capital, Phnom Penh, and Lon Nol fled to the United States.²² The new Communist government soon implemented its plan to agriculturalize the country at a rapid speed. Young soldiers marched the people from the cities to the countryside where they then forced them to work in the fields and perform other agricultural tasks.²³ Pol Pot declared that the "insidious 'bourgeois' ideas, preferences, and attitudes ... that had to be destroyed before socialism could be achieved."²⁴ Many city dwellers, mostly the educated upper-class, were killed because they were viewed by the Khmer Rouge as "internal class enemies,"²⁵ contaminated by the West. 1.7 million Cambodians were murdered during the Khmer Rouge period, the killing fields are a testament to

this murderous legacy.²⁶ Their bodies were piled on top of one another in enormous mass graves, stacks of sun bleached skulls became the world's image of Cambodia. Before long, Pol Pot's brutal regime began to turn inward as the revolution was not creating the immediate results Pol Pot expected.²⁷ Loyal party members were soon questioned and tortured at the infamous prison, Tuol Sleng also known as S-21.²⁸

During the Khmer Rouge period, Cambodia was also embroiled in a border struggle with Vietnam. The border has long been a point of contention between the two countries. In late 1977, the Vietnamese attacked a few settlements along the frontier to spur border negotiations with the Khmer Rouge government. However, "it was as if they had poked a beehive with a stick,"²⁹ and Cambodia's leaders "began preparing for a holy war."³⁰ These actions led to the Vietnamese invasion in 1979.

With the arrival of the Vietnamese, Pol Pot and loyal members of his Khmer Rouge government fled into the mountains on the Cambodian-Thai border.³¹ Pol Pot stayed in the mountains until his death in 1998 and factions of the Khmer Rouge still remain there.³² Cambodia was soon christened the People's Republic of Kampuchea (PRK), a satellite of the Vietnamese government in Hanoi.³³ One of the emerging political powers during this time period was Hun Sen, who is now the current prime minister of Cambodia.³⁴ He initially began as a zone commander in the Khmer Rouge, but later defected to Vietnam when the internal purges began.³⁵ Vietnam continued to exercise control over Cambodia until its forces withdrew in 1989 because of its own lack of funding after the fall of the Soviet Union.³⁶

The Agreements on a Comprehensive Political Settlement of the Cambodia Conflict³⁷ ("The Paris Agreements") laid the framework for a new democratic Cambodia. Many states participated in the Agreements,³⁸ a non-exhaustive list includes Australia, China, France,

Singapore, Thailand, the Union of Soviet Socialist Republics, the United Kingdom, the United States and Vietnam.³⁹ It was an era of immense hope as the United Nations came to Cambodia to help launch this new democratic government.

The United Nations Transitional Authority in Cambodia (UNTAC) faced a difficult challenge: to democratize a country after almost thirty years of civil war coupled with foreign rule. UNTAC was ultimately ineffective in demilitarizing the country, many Khmer Rouge soldiers continued to control parts of the country.⁴⁰ UNTAC decided to focus its energy on organizing a free election for the country rather than demilitarizing the country as it saw demilitarization as an impossible task.⁴¹ UNTAC backed off its broad democratization mandate in favor of free elections. However it is clear that elections are only one indicia of a political democracy, as one author succinctly described the three basic requirements for a democracy to truly exist:

A democracy must meet three basic procedural criteria: (1) Competitive elections must be the route to forming governments. There must be competitive popular elections for the legislature ... Fraud and coercion may not determine the outcome of democratic elections. Elections must offer the possibility of alternation in power... (2) There must be broad adult citizenship ... this has meant nearly universal citizenship ... (3) Democracies must protect minority rights and must ensure respect for basic civil liberties: freedom of the press, freedom of speech, the right to habeas corpus, etc. This dimension is important because a regime can hold competitive elections with broad participation, yet in the absence of guarantees of civil liberties, it is not fully democratic.⁴²

Cambodia still struggles today to have competitive elections. The second requirement of universal citizenship is largely satisfied in Cambodia as citizenship derives from birth, descent from a Cambodian parent, naturalization or marriage to a Cambodian citizen.⁴³ However considerable change must be effectuated to enforce the basic civil liberties accorded to Cambodians. The director of Human Rights Watch in Southeast Asia, a prominent human rights

organization that monitors the situation in Cambodia, recently stated that he believes Hun Sen is effectively running Cambodia as an authoritarian government.⁴⁴

In addition to the contested elections, another legacy of the UNTAC era is the body of law it instituted. UNTAC faced a difficult task, one it was not prepared for. It needed to create a new body of law during the transitional period as the decade-old PRK law was insufficient. Criminal law during the PRK period consisted of Law-Decree #2, “Crimes Against the Revolution,” which was a list of prohibited acts.⁴⁵ UNTAC was unprepared to create a new body of laws in Cambodia in order to implement its human rights mandate.⁴⁶ This remains an on-going problem with UN peacekeeping missions. One suggestion entails the creation of off-the-shelf “justice packages” by the United Nations with pre-written laws reflecting the UN’s human rights mandates. Once established, these packages would be ready for application and could then be tweaked as necessary according to each country.⁴⁷ UN peacekeeping missions have implemented laws like Article 63 that do not conform to the treaties advanced by the United Nations. The UNTAC process was “time consuming and resulted in an incomplete set of laws.”⁴⁸ Article 63, most likely drawn from Cambodia’s pre-UNTAC law that was based on Vietnamese counterrevolutionary crimes,⁴⁹ is inconsistent with the ICCPR because it protects the rights of freedom of expression.⁵⁰

Article 63 of the UNTAC code lays out Cambodia’s criminal defamation law. Cambodia’s basic requirements include a bad faith allegation or imputation of a given fact which harms the honor or reputation of an individual. The person need not be explicitly named but his identity must be made evident from the defamatory action. Article 63 mandates punishment by imprisonment of eight days to one year, a fine of one million to ten million riels (approximately U.S. \$250 to U.S. \$2,500) or both.⁵¹ An individual may register a complaint with the appropriate

prosecutor and petition the court to file a criminal defamation charge against the defendant. This may be done in addition to, not in lieu of, any civil action the individual brings against the defendant, further punishing the alleged defamer.

In the 1993 elections, newly organized parties clambered onto the scene to take part in the historic elections. Parties included the Party of Democratic Kampuchea (PDK), the Cambodian People's Party (CPP), Front Uni National pour un Cambodge Indépendant, Neutre, Pacifique et Coopératif⁵² (FUNCINPEC), which translates from French as The National United Front for an Independent, Neutral, Peaceful and Cooperative Cambodia, the Buddhist Liberal Democratic Party (BLDP) and the Liberal Democratic Party (LDP).⁵³ From this initial group, the CPP and FUNCINPEC represent two of the three main political parties today. Many candidates from the CPP were former Khmer Rouge soldiers and/or officials in the Vietnamese-backed government of the 1980s. FUNCINPEC represented the royalists. The period before the elections was marred by violence and intimidation, with CPP perpetrating the majority of the violence.⁵⁴ Ultimately, a testament to the freedom of these elections, FUNCINPEC won the elections, taking 45.2 percent of the vote while the CPP received 38.6 percent, BLDP 3.7 percent, the LDP 1.3 percent and the Molinka 1.3 percent.

What transpired next explains much of the current state of Cambodia: the CPP refused to accept the results of the election, and the king, a powerful political figure whom Cambodians respect, did not press the issue. As a result, power was shared between FUNCINPEC and the CPP with two prime ministers in what was intended to be a post for one, the winner of the election.⁵⁵ There was a feeling of utter hopelessness that passed over the country, a feeling that nothing was going to change.⁵⁶ At that point, many Cambodians disengaged from the political process because the CPP retained power even though they had lost the election. The democratic

process did not achieve what UNTAC had advertised: free elections. This failure left a devastating legacy on the country. A democracy is dependent upon an engaged and educated populace. If one's vote in U.N. monitored elections affects no change, then one must question whether subsequent elections make a difference. The United Nations' peacekeeping mission ultimately had little impact upon the political landscape within Cambodia since the CPP, a party of ex-Khmer Rouge cadres and Vietnamese officials, is still the dominant power in Cambodian politics. It has won the past series of elections by sowing fear in the local people.⁵⁷ One particular fear the CPP plays upon is a fear of returning to a state of civil war by threatening violence if they do not win an election. This fear of a civil war led King Sihanouk to allow the CPP to share the prime minister position.⁵⁸ Following the 1993 elections, the 1998 elections and the 2003 elections suffered from similar problems of intimidation.

In a move to consolidate his power, Hun Sen orchestrated a coup d'état in 1997 against his co-prime minister through "a systematic campaign of intimidation, torture and summary executions."⁵⁹ The same year, a grenade was thrown into a peaceful demonstration in downtown Phnom Penh organized by the SRP—the main opposition party. At least sixteen people died and 150 more were injured. Evidence linked Hun Sen's bodyguards with the attack.⁶⁰ This willingness to resort to violence promised Hun Sen's success in the 1998 elections.

The 2003 elections, however, were not a landslide for the CPP as the 1998 elections had been. These elections painted similar troubling themes of impunity, intimidation, gift distribution and vote-buying.⁶¹ The CPP received 47.4 percent of the vote, FUNCINPEC about 20 percent and the SRP about 20 percent.⁶² The SRP is a newer political party that encompasses most of the opposition to the CPP. The Cambodian Constitution requires a two-thirds parliamentary majority. This was not possible without an alliance between two of the three

parties. The SRP initially formed an alliance with FUNCINPEC, which they called the Alliance of Democrats (AD).⁶³ The parties' agreement included broad democratic mandates as well as mandated the ouster of Hun Sen. At the last minute, FUNCINPEC dropped SRP and aligned with the CPP. It was a move that made many suspicious. Rumors flew that Prince Ranariddh, who had made the decision without informing his royalist party, had been, among other things, bribed with a helicopter by the prime minister.⁶⁴ As a result of this political wrangling, the Cambodian government came to a standstill for almost a year.

The Current Situation

The events following the 1993 elections underscore the fragile state of Cambodian democracy today. It is within this environment of political repression that timorous Cambodians take their first steps towards asserting their constitutionally guaranteed rights.⁶⁵ It is crucial that the current UNTAC criminal defamation law be abolished in light of Cambodia's purported dedication to the goals of democracy as seen in its Constitution. The Cambodian Constitution is a beautifully written document but it remains just that, a document, rather than truly reflects the contours of the government and the limits upon its power. The current government, with Hun Sen as prime minister, uses the cloth of the Constitution to legitimize its actions to the outside world while daily life in Cambodia remains stagnant.

The murder of Chea Vichea, a prominent labor activist and president of the Free Trade Union of Workers of the Kingdom of Cambodia (FTUWKC), in 2004 is indicative of the current era of fear as this may have been the work of the government to silence its opposition.⁶⁶ Although many decried the situation, this frightening tactic ultimately proved effective as membership in the union plummeted.⁶⁷ Following the public outcry over the murder of Chea Vichea, the government has refined its tools of oppression. It now utilizes its weak judiciary to

convict opposition members on trumped up charges, with criminal defamation charges among the most common.⁶⁸ Commentators believe that Cambodia's courts are being used to suppress political opposition.⁶⁹

The Judiciary

Cambodia's judiciary, as the final arbiter of any UNTAC Article 63 charges, seemingly sits in a unique place to judge the merit of claims brought by the government. This is not the case in Cambodia though because the judiciary has not attained any independence from the executive branch of the government and remains a highly political office.⁷⁰ Judges follow party directives in making decisions rather than coming to a decision based upon their own legal training,⁷¹ education is minimal as is training. Corruption is rampant.⁷² The Asian Development bank, in an October 2000 report, stated that "the Cambodian judiciary does not yet meet acceptable standards in terms of independence, capability, and integrity."⁷³ There is little to indicate that anything has changed since this report in 2000. Most Cambodians view the judiciary as an extension of the CPP.

Cambodians see little use for the judiciary in their daily lives. If a problem arises in the village, the aggrieved will approach the village chief or the local party representative asking them to resolve the problem rather than turning to the courts.⁷⁴ The King, the National Assembly and the Prime Minister are frequently petitioned by the rich and poor alike to intervene on behalf of the supplicant.⁷⁵ Again, the history of Cambodia teaches a valuable lesson— Cambodia has traditionally been a village-based society where the village chief resolves disputes. During Sihanouk's reign, a legal system based upon the French system was emerging but any hope at a transition from this feudal structure to a legal system was suspended when the Khmer Rouge took power. Lawyers were one of the main targets of the search for "internal class enemies."

After the Khmer Rouge period, there were ten legally trained people remaining in the country.⁷⁶ This utter destruction of the previous legal system created staggering challenges for the introduction of a competent, independent judiciary today.

The Ministry of Justice has been a hot political issue since the 1993 elections. CPP officials insisted upon control of the judiciary for fear that there would be an investigation of the pre-election murders.⁷⁷ This control exerted by the Minister of Justice, who historically has had a close relationship with the prime minister, over the judiciary has seriously hampered any reform efforts. Most judges have a high school education at best. Party control over the judiciary is a reality in Cambodia and “until the judiciary is released from party control, reform will be impossible.”⁷⁸ Judges know that they must follow party directives in their rulings or risk the consequences of doing so.⁷⁹

The judicial experience underscores a greater issue in Cambodia: ignorance. The Khmer Rouge government valued ignorance, in fact it enabled survival because anyone with an education was a target.⁸⁰ This history leaves substantial obstacles in teaching the power of education and knowledge. Kem Sokha’s public forums in the provinces are designed to educate rural Cambodians of their rights in this new democracy.

The issues with the judiciary run deep. The lack of independence of the judiciary from the executive is troubling. It is especially ominous when the executive is the plaintiff charging an individual with criminal defamation. When the government wields this control over the judiciary, the judiciary cannot be impartial as it must be. In order to prevent this bias, the government must be denied the legal standing to bring any defamation suit, criminal or civil. The law must be structured to prevent this potential abuse of power. The government, a transitory body, does not have the same interest in reputation as an individual does.

Freedom of Expression

Three theories behind free speech illuminate its importance: (1) John Stuart Mill's theory that truth can only be judged in light of a competitive market;⁸¹ (2) the theory that free speech is an integral aspect of self-fulfillment and self-expression that otherwise inhibits the growth of an individual;⁸² and (3) the theory that free speech is essential for citizen participation in a democracy.⁸³ All three of these theories emphasize the power of free speech as well as illustrate why freedom of expression is considered a basic human right.

In analyzing the theory that free expression is critical in a democracy, freedom of political expression is vital because a democracy depends up on an educated electorate.⁸⁴ In order to cast an educated vote, the people must be aware of what their government is doing. This is one of the reasons why transparency within a government is so important. Vigorous public debate is an integral aspect to an educated populace. Criminal defamation laws have a profound chilling effect on public discourse because people fear the repercussions of expressing their opinion. All truths are not exposed.

The basic premise within a democratic society is that freedom of expression may only be restricted when it is necessary for the state to protect an individual's reputation.⁸⁵ Greater freedom of expression must be granted when that expression involves statements about public officials or the government. Significant weight must be afforded to the state interest in public discourse because it is vital to a functioning democracy.⁸⁶ Likewise, the state does have an interest in protecting the rights of the individual. Any restrictions on freedom of expression can only be justified if it can be convincingly established that it is absolutely necessary in a democratic society. A restriction cannot be justified if there is a less restrictive means for protecting the legitimate reputation interest. Nor can it be justified if disproportionate damage is

done to the freedom of expression in protecting the individual's reputation.⁸⁷ Similarly, criminal defamation laws disproportionately damage free speech because the punishment is so extreme. Penal detention is an inappropriate remedy because the benefits of protecting this state interest cannot outweigh the harm to freedom of expression. It is even more pressing in a country like Cambodia where the government is abusing the criminal defamation laws. The critical balancing test between these competing state interests, the interest in free expression and the interest in protecting an individual's reputation, is not being respected. As a result, this criminal defamation law violates the freedom of Cambodian citizens to express their opinions.

Defamation law is often used as a tool to silence opposition critics by political bodies and public figures.⁸⁸ It is imperative for courts to monitor the use of defamation laws to ensure that they do not improperly restrict the freedom of expression because defamation laws cannot be justified when their purpose is to prevent the legitimate criticism of public officials⁸⁹. A 2003 report on the state of Cambodia's political system noted, "[w]hile political parties are allowed to function in Cambodia, nevertheless, they are subject to systematic harassment and intimidation."⁹⁰ This harassment and intimidation is pursued in the government's abuse of criminal defamation charges.

It appears that this is currently happening in Cambodia. This past year alone, many high profile critics of the government were charged with criminal defamation. In October, radio journalist Mom Sonando was arrested on charges of criminal defamation and incitement, as was the president of the Cambodian Independent Teachers Association, Rong Chhum.⁹¹ In December, Sam Rainsy, leader of the Sam Rainsy Party, was convicted, in absentia, of criminal defamation.⁹² Another SRP parliamentarian, Chea Poch, fled the country with Sam Rainsy after their parliamentary immunity was stripped. Chea Poch has been charged with criminal

defamation for allegedly accusing the leader of the FUNCINPEC party, Prince Ranariddh, of joining the 2003 coalition government with the CPP in exchange for U.S. \$30 million from the prime minister Hun Sen.⁹³ Hang Sakhorn, editor of a Cambodian newspaper, the Ponleu Sarnaki, was arrested in Kompong Speu on December 2, 2005 on charges of criminal defamation.⁹⁴ On December 31, 2005, Kem Sokha, “one of the country’s most prominent and outspoken human rights figures”⁹⁵ and president of CCHR, was arrested on charges of criminal defamation. The very same day Yeng Virak, director of the Community Education Legal Center (CELC) was arrested on the same charges. Five days later, on January 4, 2006, Pa Nguon Teang, director of CCHR’s radio program Voice of Democracy, was also arrested on the same charges.⁹⁶ This long list is only a sample of the arrests that have taken place and only includes prominent persons. If these well-known citizens can be arrested and held, even with the world’s condemnation, an ordinary citizen without any connections must undoubtedly be afraid to publicly voice his opinion for fear of reprisal. The government is using Article 63, the criminal defamation law, to pursue its own political agenda rather than protect the reputational rights of its citizens which is an abuse of the law.

Defamation

Defamation is a public statement that injures the reputation of another.⁹⁷ The prima facie requirements vary depending upon the country’s individual law but all involve the publication or dissemination of the defamatory statement to a third party either negligently or intentionally.⁹⁸ Additionally, the statement must pertain to this particular individual and it must be a statement that a reasonable person would find defamatory.⁹⁹

Cambodia’s defamation law mandates a criminal punishment which is satisfied by jail time, a fine or both.¹⁰⁰ To be found guilty of criminal defamation, there must be a bad faith

allegation of a fact which harms the honor or reputation of an individual where the individual's identity need not be explicitly stated but can be discerned from the situation.¹⁰¹ Article 63 additionally defines defamation as any allegation or imputation against a public figure that the alleged defamer knows to be false and distributes with a malicious intent.¹⁰²

The legality of the UNTAC provision will be analyzed from several perspectives: the Cambodian Constitution, the treaties Cambodia has signed, as well as customary international law. When analyzing the legality of a domestic law, one should first analyze the provision under the country's constitution and then under international standards. Cambodia's Constitution guarantees freedom of expression— so long as it does not violate the rights of others.¹⁰³ Article 63 is also in violation of international standards because it (1) violates international treaties and (2) violates international custom because many countries are decriminalizing their defamation laws.¹⁰⁴ International courts have found that criminal defamation laws violate freedom of expression because they mandate a punishment disproportionate to the crime.¹⁰⁵ Additionally, criminal defamation laws are not a proper remedy because it is the damage done to the individual's reputation that must be repaired. The focus should be on the victim's restitution.¹⁰⁶

Cambodia's Constitution

The Constitution of the Kingdom of Cambodia was adopted September 21, 1993 by the Constitutional Assembly in Phnom Penh. It establishes the structure of the government and guarantees specific human rights to its citizens. The preamble proclaims that its goal is to “restore Cambodia into an ‘Island of Peace’ based on a multi-party liberal democratic regime guaranteeing human rights.”¹⁰⁷ Similarly, Article 31 of the Cambodian Constitution recognizes and respects the human rights of the United Nations Charter, the Universal Declaration of Human Rights as well as the covenants and conventions related to human rights.

The Cambodian Constitution recognizes in Article 41 the rights of Khmer citizens to the freedom of expression. However “no one shall exercise this right to infringe upon the rights of others, to effect the good traditions of society or violate public law and order and national security.”¹⁰⁸ Cambodia’s Constitution does not grant its citizens an unqualified right to freedom of speech like the United States Constitution does. Cambodia’s Constitution qualifies this right like many other countries’ constitutions that do not have such an unqualified right.¹⁰⁹ Case law demonstrates the balancing act between the need for freedom of expression and the rights of the individual for recourse when defamation occurs.¹¹⁰ It is essential that this balance be applied appropriately. The law cannot be abused by the government as a method for eradicating Khmer citizens’ rights to freedom of expression. Furthermore, Article 150 of the Cambodian Constitution stipulates that the Constitution is the supreme law of the land and that all laws must be in strict conformity with the Constitution. Cambodia’s Constitution requires that all Khmer laws, in order to conform to the Constitution, respect the rights of freedom of expression under Article 41 by balancing that right with the rights of other citizens, namely the rights of citizens to protect their reputations from defamatory statements.

Sources of International Law

International law is an important guide in analyzing whether a domestic law violates the human rights of the country’s citizens because it represents international standards. These standards are reflected in multi-lateral treaties, customary international law, general principles of law as well as decisions by international judicial bodies and academic work.

Article 38 of the International Court of Justice (ICJ) defines sources of international law.¹¹¹ First, the court is to apply international conventions, recognized by the contesting states; second, the court is to apply international custom, evidenced by the a general practice being

accepted as law; third, the court is to look at general principles of law recognized by civil nations, and, lastly, the court is to turn to previous judicial decisions and scholarly works as subsidiary means for determining the law.¹¹² These sources of law are reflective for international scholars evaluating the legality of national laws.

Treaties

Defamation law chills free speech as it discourages public statements against another individual.¹¹³ Article 19 of the International Covenant on Civil and Political Rights mandates that, “Everyone shall have the right to hold opinions without interference and 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.”¹¹⁴ This right, however, is subject to certain restrictions, but only those that are required to “respect the rights and reputations of others”¹¹⁵ and “for the protection of national security or of public order, or of public health or morals.”¹¹⁶ The ICCPR’s limitations are reflected in legal systems worldwide—specifically, in civil defamation laws, where malicious untrue statements are not tolerated but public discourse is promoted.

Problems of enforceability arise with human rights treaties because states have little incentive to abide by treaties they ratify. The Optional Protocol to the ICCPR¹¹⁷ (“First Optional Protocol”) creates an enforcement mechanism by allowing individuals to bring claims against their own government to the United Nations Human Rights Committee (UNHRC) in Geneva. Any claims brought to the UNHRC must arise out of the state’s violation of rights guaranteed by the ICCPR. Thus, within the context of Cambodia’s criminal defamation laws, an individual could bring a claim against the state of Cambodia if the state were violating his or her right to freedom of expression which is preserved by Article 19 of the ICCPR.

International Practice

International practice is an important barometer of customary international law. It demonstrates the norms as well as different approaches depending on the structure of a state's constitution with the differing rights constitutions guarantee.

The United States Constitution provides an unabridged right to the freedom of speech in its First Amendment. In *New York Times v. Sullivan*, the United States Supreme Court held that in order to protect constitutional guarantees of freedom of speech, an individual cannot sue for defamation for statements made about his public duties in a public role unless the statement was made with actual malice.¹¹⁸ The Court defined actual malice as knowledge that the statement was false or with reckless disregard for the truth.¹¹⁹ This actual malice standard is one of the most stringent standards because it places a very high burden on the plaintiff when the defendant was speaking about an issue of public concern.¹²⁰ However, many other countries that do not have this unabridged right to freedom of speech, like the European Convention for the Protection of Human Rights and Fundamental Freedoms,¹²¹ have subscribed to the balancing test described within this comment as a guide to analyzing the legality of defamation laws.

Criminal defamation is contrary to international human rights law as adjudicated in major human rights institutions like the ECHR and the Inter-American Court. The ECHR has held that this inquiry focuses on whether this state interference of free expression was proportionate to the legitimate aim of protecting an individual's reputation in *Lingens v. Austria*.¹²² The court reaffirmed this holding in *Castells v. Spain*. In *Lingens*, a journalist alleged in a magazine article that the head of the state socialist party had been involved in accommodating Nazis. The journalist was subsequently convicted of criminal defamation.¹²³ The defendant in *Castells* was

a senator who alleged that the Spanish government had murdered many Basque separatists.¹²⁴ He was eventually found guilty of criminal defamation.

The Inter-American Court of Human Rights recently addressed this issue. In July of 2004, the Inter-American Court reversed a criminal sentence against a journalist for a Costa Rican paper, *La Nación*.¹²⁵ The reporter, Mauricio Herrera Ulloa, cited European papers alleging the corruption of a Costa Rican diplomat. A Costa Rican court convicted him of criminal defamation.

A Paraguayan criminal defamation conviction of former presidential candidate Ricardo Canese was also reversed by the Inter-American Court in August of that same year.¹²⁶ Canese made statements to the press questioning connections between his opponent and the country's former dictator. Canese was convicted of criminal defamation; he was sentenced to four months in prison and fined US \$7,500.¹²⁷ The court reversed the conviction because it impermissibly violated his rights under the American Convention of Human Rights.

Furthermore, there is a growing international trend toward denying the government legal standing in civil defamation cases. The UN Committee on Human Rights stated called for the abolition of standing for the government, finding it a deplorable offense.¹²⁸ Recent examples include decisions by the English House of Lords,¹²⁹ the Indian Supreme Court,¹³⁰ the Supreme Court of South Africa,¹³¹ and the Supreme Court of Zimbabwe.¹³² These courts have articulated three main rationales for the denial of standing to governmental bodies: (1) the importance of vigorous public discourse and the chilling effect of defamation suits; (2) defamation laws are to protect reputational interests and governments by their nature cannot have a reputation because a government is not a person; and (3) it is an inappropriate use of taxpayer money to allow the government to use that money to repress the taxpayers' right to freedom of expression.¹³³ This is

a very creative solution as it satisfies several very important concerns: it allows civil defamation suits as recourse to damage done to one's reputation while protecting public debate, a primary concern with freedom of expression issues and preventing governmental abuse of defamation laws.

LEGAL PROBLEM

The United Nations Transitory Authority in Cambodia (UNTAC) instituted a number of laws that were designed to be transitory, much like the authority itself. Cambodia's current laws read like a patchwork quilt: some new laws have been passed by the legislature that should overrule the UNTAC laws while other UNTAC laws remain good law today. The result is a dizzying confusion for anyone trying to adhere to Cambodian law in any arena from land laws to criminal procedure.

Criminal defamation laws like Article 63 dangerously inhibit public discourse. Penal detention is not an appropriate remedy for damage to one's reputation. Civil defamation laws adequately ensure the state's interest in protecting the reputational rights of its citizens. A democracy's survival is predicated upon this freedom of expression and the ability of individuals to criticize their own government when they have legitimate reasons to do so. A criminal defamation law is a dangerous weapon that can be improperly pointed by a government at its opponents. This abuse of the criminal defamation law hinders the road to democracy.

ANALYSIS

The Cambodian Constitution guarantees the right to freedom of expression. UNTAC Article 63 improperly violates that right. In order to effectuate this right to freedom of expression, the UNTAC law of criminal defamation must be abolished.

The Cambodian Constitution has a separate provision mandating that all laws must be in strict conformity with the constitution, further emphasizing the importance of the constitutional *kram* (the Khmer word for laws promulgated by the Parliament). Article 63 was written before the Cambodian Constitution was created. The UNTAC law, by criminalizing defamation, is incompatible with the Cambodian Constitution's guarantees of free expression. Article 31 of the Cambodian Constitution requires that the rights of the individual to free speech be balanced with the rights of others, as one cannot be accommodated by violating another. However, the criminal punishment of one who defames another tips this scale, it impermissibly encumbers one's freedom of expression. There cannot be freedom of expression when a speaker can be jailed for voicing his opinion. A balance must be found to ensure that Khmer citizens are free to comment on the actions of the government without being taken to jail without bail as many recently have been. A civil defamation law is the only way that a defamation law can respect the rights guaranteed in Article 41 of the Cambodian Constitution.

Treaties

The Government of Cambodia acceded to the ICCPR on May 26, 1992.¹³⁴ Cambodia made no reservations to the treaty.¹³⁵ As a result of Cambodia's accession, Cambodia is bound by the treaty and accordingly is required to perform its obligations in good faith.¹³⁶ The ICCPR guarantees the right to freedom of expression. The Cambodian government has the obligation to respect that in addition to its own obligation to do so under its own Constitution. If Cambodia does not fulfill that obligation, it will be in violation of the treaty.¹³⁷

The first optional protocol provides a strong incentive for countries to abide by the obligations agreed to in the treaty because it allows individuals to bring claims to the UNHRC when they have exhausted all available domestic remedies. However states are only bound if

they specifically sign the optional protocol. Cambodia signed the optional protocol on September 27, 2004.¹³⁸ By signing this protocol, Cambodian individuals may now bring claims to the UNHRC alleging violations of the ICCPR by its government after they have exhausted all domestic remedies or when the individual's access to that remedy has been unreasonably prolonged.¹³⁹ The ability of this external body to be able to judge Cambodian laws and decisions by its judiciary should provide strong encouragement for the government to ensure its laws are in accord with the ICCPR.

Cambodia has an obligation to protect the freedom of expression of its citizens and may only restrict that right in order to protect legitimate reputational interests. Though the government argues to the contrary, protecting Cambodia's political interests is not within this scope. Criminal defamation laws are disproportionately punitive and accordingly violate the ICCPR's mandate that freedom of expression be protected. Defamation laws are only acceptable where they are the least restrictive means necessary to protect the reputational interests of individuals, not governments. A civil defamation law is the only way to achieve that balance.

Customary International Law

The international system has no central lawmaking body, as a result one must turn to customary international law or general practice that is accepted as law. Customary international law demonstrates the typical way states resolve a problem. There is no analogy to this in domestic systems. Elements of customary international law include state practice and *opinio juris*.¹⁴⁰ Showing state practice requires demonstrating what states generally do, how states have responded. *Opinio juris* is the obligation a state feels to behave in a certain way, that a state believes a certain response would be the correct legal response.¹⁴¹ It usually arises from consistent state practices in response to a certain issue.

Customary international law in the human rights field is slightly different. The nature of human rights violations mandates this difference. This is because states generally do not bring claims against other states for internal human rights violations unless it affects their own nationals.¹⁴² In looking for practice and *opinio juris* one must turn to the international forums that deal with human rights concerns.¹⁴³ It is in these forums that the issues are argued and debated, it is here where the issues are resolved. By evaluating the position these forums have taken, one can assess whether the right has become part of customary international law.¹⁴⁴

Application of Customary International Law to Defamation Laws

Freedom of expression is a right recognized by the ICCPR, a treaty which binds 155 parties.¹⁴⁵ Article 19 is now considered part of customary international law.¹⁴⁶ In analyzing defamation laws, a balancing test best incorporates the competing rights to freedom of expression as well as the rights of an individual to protect his or her reputation.¹⁴⁷ Widespread inclusion in national law and a general recognition of its international significance is one indication that a certain approach has become customary international law.¹⁴⁸

The ECHR adopted the balancing test in *Lingens*. It continued to use this balancing test in subsequent cases, such as *Castells*. In *Lingens*, the ECHR emphasized that greater deference must be afforded to freedom of expression when the speech concerns political controversy.¹⁴⁹ The court held that any interference with one's freedom of expression by the state in the name of protecting individual reputation must be proportionately necessary in a democratic society.¹⁵⁰ Defamation laws must reflect a balance between the right to freedom of expression and the right to reputation. The court stressed that freedom of expression "constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment."¹⁵¹ A state cannot impose unduly harsh penalties as it violates

one's right to freedom of expression.¹⁵² The ECHR, however, has been unwilling to reject all criminal defamations, viewing it as an issue of state sovereignty. Nonetheless, using the ECHR's own test, criminal defamation laws will generally fail the *Lingens* test as unnecessary in a democratic society where there is a high premium on public discourse.

The Inter-American Court has also found criminal defamation laws to impermissibly restrict freedom of expression. In reaching its decision in *Herrera Ulloa*, the Inter-American Court focused on the need for public debate rather than the protection of public officials.¹⁵³ The Court mandated that Costa Rica amend its domestic defamation laws to conform with the American Convention on Human Rights' guarantee of freedom of expression.¹⁵⁴ The Inter-American Court clearly embraced the importance of freedom of expression in its ruling on this case of first impression.

In *Canese*, the Inter-American Court held that the defendant's criminal defamation conviction violated the rights embodied in Articles 13 (Right to Freedom of Thought and Expression) and that the state of Paraguay failed to comply with the obligation established in Article 1(1) (Obligation to Respect Rights).¹⁵⁵ The Court additionally commented that Paraguay's criminal defamation law violated international law.¹⁵⁶

In sum, these cases, augmented by scholarly work on the topic, demonstrate the contemporary international view that criminal defamation laws are incompatible with a qualified right of freedom of expression. Criminal defamation is too extreme of a punishment and upsets the balance between this interest in freedom of expression and the state's interest in protecting an individual's reputation.

PROPOSAL

The Cambodian Parliament must pass a new defamation law that reflects the rights enshrined in Cambodia's Constitution. The criminal defamation law must be repealed. This new law must be a civil defamation law in order to conform with Cambodia's obligations under the international treaties it has ratified and conforms to customary international law. In order to protect Khmer citizens' rights to freedom of expression, it is vital to strike a proper balance between freedom of expression and to the right to protect one's reputation by establishing a recourse for those who have been unfairly defamed. Criminal defamation laws therefore have no place in a democracy because they burden the right to freedom of expression too heavily. Additionally, a civil defamation law must not allow the government to have standing to bring a suit in order to prevent the abuse of civil defamation laws.¹⁵⁷ This is especially important in Cambodia where the judiciary is not independent and functions as an arm of the executive.

If Cambodia's defamation laws do not change, individuals who have been convicted under Article 63 can bring a claim to the UNHRC after exhausting all domestic remedies. Following conviction at the trial court level, the defendant would need to pursue an appeal. If the higher courts either refuse to take the case on appeal or there is an unreasonable delay in issuing a decision, the defendant can then appeal his conviction to the UNHRC under the First Optional Protocol to the ICCPR.¹⁵⁸ This is an extreme legal remedy because it requires one to go beyond the Cambodian legal system and petition an international forum to accept the case.

The Constitutional Council interprets the constitutionality of laws. If the Council somehow finds this law to be constitutional, while the author of this comment proposes it is unconstitutional in light of the guarantees established in Article 41, an individual could bring a claim to the UNHRC alleging that Article 63 violates Cambodia's treaty obligations. The

UNHRC would then have to accept the case and issue a decision on the legality of Article 63 under the ICCPR.

CONCLUSION

Criminal defamation laws have no place in a country that guarantees freedom of expression. UNTAC Article 63 was designed to be a transitional law yet it remains part of Cambodia's current laws. It must be abolished, as Article 150 of the Cambodian Constitution requires the abolition of any unconstitutional restriction on human rights. Cambodians like Kem Sokha have felt its effects as has Cambodian society in a country where freedom of speech is already so repressed that people only discuss politics with their families and closest friends in the privacy of one's home. The purpose of this comment is to draw attention to the gap between Cambodia's Constitution, its treaty obligations under the ICCPR, customary international law, and UNTAC Article 63. A new constitutional law must be passed and that law must be a civil defamation law given Article 41's guarantee of freedom of expression. Furthermore, to safeguard against potential abuses of the civil law and encourage public discourse, the law must deny standing to the government in defamation suits.

¹ Seth Mydans, *Haunted by Past Horrors, Cambodians Speak Out*, N.Y. TIMES, Jan. 30, 2006 at A3 [hereinafter Mydans, *Past Horrors*].

² Pin Sisovann, *PM Warns of Critical Forums of Public Retaliation*, THE CAMBODIA DAILY, June 14, 2005, available at http://www.cambodiapolitics.org/news/cambodia_daily/june_05/14_cd2.pdf.

³ Testimony of Mr. Kem Sokha During the Court Appearance before Phnom Penh Court Judge Mr. Thoung Ol On Defamation Case Filed by FUNCINPEC Party (Mar. 14, 2005), available at <http://cchr-cambodia.org/PR-031405.htm>.

⁴ Mydans, *Past Horrors*, *supra* note 1.

⁵ The Khmer Rouge began as a political group, their name refers to them as Red or Communist Cambodians. Pol Pot was the group's infamous leader. His government, known to the Cambodian people as Angkar, ruled the country for four years. During that time, Pol Pot attempted to agriculturize the country as the first step in his plan to bring about a Communist state. See DAVID P. CHANDLER, BROTHER NUMBER ONE: A POLITICAL BIOGRAPHY OF POL POT 66 (1999) [hereinafter CHANDLER, BROTHER NUMBER ONE].

⁶ HENRY KAMM, CAMBODIA: REPORT FROM A STRICKEN LAND 19 (1998).

⁷ *Id.*

⁸ *Id.* at xiv.

⁹ CHANDLER, BROTHER NUMBER ONE, *supra* note 5, at 18.

¹⁰ Steins Tenneson & Hans Antlov, *Asia in Theories of Nationalism and National Identity*, in ASIAN FORMS OF THE NATION (Steins Tenneson & Hans Antlov eds., 1998).

¹¹ Steve Heder & Judy Ledgerwood, *Politics of Violence: An Introduction*, in PROPAGANDA, POLITICS, AND VIOLENCE IN CAMBODIA: DEMOCRATIC TRANSITION UNDER UNITED NATIONS PEACE-KEEPING 3, 5 (Steven Heder & Judy Ledgerwood eds., 1996).

¹² KAMM, *supra* note 6, at 40.

¹³ CHANDLER, BROTHER NUMBER ONE, *supra* note 5, at 84.

¹⁴ KAMM, *supra* note 6, at 97.

¹⁵ *Id.* at 98.

¹⁶ *Id.* at 29.

¹⁷ *Id.* at 33.

¹⁸ *Id.* at 34.

¹⁹ Pol Pot was the leader of this movement, he became known to the world as one of its most brutal revolutionaries, killing hundreds of thousands of his own people in pursuit of his ultimate utopia.

²⁰ CHANDLER, BROTHER NUMBER ONE, *supra* note 5, at 1.

²¹ BEN KIERNAN, THE POL POT REGIME: RACE, POWER, AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE, 1975 – 1979 22 (2nd ed. 2002).

²² *Id.* at 31.

²³ CHANDLER, BROTHER NUMBER ONE, *supra* note 5, at 1.

²⁴ DAVID CHANDLER, VOICES FROM S-21: TERROR AND HISTORY IN POL POT’S SECRET PRISON 44 (1999) [hereinafter CHANDLER, VOICES FROM S-21].

²⁵ *Id.*

²⁶ GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE 279 (1999).

²⁷ CHANDLER, VOICES FROM S-21, *supra* note 24, at 54.

²⁸ *Id.*

²⁹ CHANDLER, BROTHER NUMBER ONE, *supra* note 5, at 143.

³⁰ *Id.*

³¹ *Id.* at 157.

³² *Id.* at 186.

³³ *Id.* at 157.

³⁴ *Id.* at 455.

³⁵ KIERNAN, *supra* note 21, at 210.

³⁶ KAMM, *supra* note 6, at 202.

³⁷ The Agreements on a Comprehensive Political Settlement of the Cambodia Conflict, U.N. Doc. A/46/608, S/23177 (Oct. 23, 1991) [hereinafter The Paris Agreements], *available at* [http://documents-dds-ny.un.org/doc/ UNDOC/GEN/N91/361/63/img/N9136163.pdf?OpenElement](http://documents-dds-ny.un.org/doc/UNDOC/GEN/N91/361/63/img/N9136163.pdf?OpenElement) (access limited to those with UN Doc. subscription service), *also available at* http://www.usip.org/library/pa/cambodia/agree_comppol_10231991_toc.html.

³⁸ A young Cambodian-American attorney related to the author of this comment that she views the Paris Agreements as a sort of apology to Cambodia for failing to intervene at any point of Cambodia's beleaguered history. Reinforcing her belief, Jonathon Ladd, a political-military counselor of the American Embassy sent to Cambodia by Nixon in 1970 later related that "I can't help a sad feeling that Cambodia is a little country that we have used and for which we must now bear a moral responsibility." KAMM, *supra* note 6, at 104.

³⁹ The Paris Agreements, *supra* note 37.

⁴⁰ Raoul Marc Jennar, *The 1993 UNTAC Elections in the Prospect of the '98 Cambodian Elections*, in NATIONAL ELECTIONS: CAMBODIA'S EXPERIENCES & EXPECTATIONS 40, 45 (KAO KIM HOURN & NORBERT VON HOFMANN eds., 1998).

⁴¹ Steve Heder, *The Resumption of Armed Struggle by the Party of Democratic Kampuchea: Evidence from National Army of Democratic Kampuchea "Self-Demobilizers"*, in PROPAGANDA, POLITICS, AND VIOLENCE IN CAMBODIA: DEMOCRATIC TRANSITION UNDER UNITED NATIONS PEACE-KEEPING 73, 74 (Steven Heder & Judy Ledgerwood eds., 1996). The PDK would only demobilize if UNTAC implemented the Paris Agreements in a way that would have expelled all Vietnamese persons from the country and would have undermined the State of Cambodia's authority. UNTAC was unwilling to accept these demands.

⁴² Scott Mainwaring, *Transitions to Democracy and Democratic Consolidation: Theoretical and Comparative Issues*, in ISSUES IN DEMOCRATIC CONSOLIDATION: THE NEW SOUTH AMERICAN DEMOCRACIES IN COMPARATIVE PERSPECTIVE 297-298 (Scott Mainwaring, Guillermo O'Donnell & J. Samuel Valenzuela eds., 1992).

⁴³ Decree No. 913-NS, of November 20, 1954, and Law No. 904-NS, dated September 27, 1954, govern citizenship in Cambodia. UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, INVESTIGATIONS SERVICES, CITIZENSHIP LAWS OF THE WORLD 44 (2001) *available at* <http://multiplecitizenship.com/documents/IS-01.pdf>.

⁴⁴ Human Rights Watch, *Cambodia: Hun Sen Systematically Silences Critics*, Jan. 4, 2006, <http://hrw.org/english/docs/2006/01/04/cambod12360.htm>

⁴⁵ Brad Adams, *Cambodia's Judiciary: Up to the Task?*, in BRINGING THE KHMER ROUGE TO JUSTICE: PROSECUTING MASS VIOLENCE BEFORE THE CAMBODIAN COURTS 137 (Jaya Ramji & Beth Van Schaack eds., 2005).

⁴⁶ Mark Plunkett, *Reestablishing Law and Order in Peace-Maintenance*, in *THE POLITICS OF PEACE-MAINTENANCE* 61, 67 (Jarat Chopra ed., 1998) (quoting Australian foreign affairs minister Gareth Evans).

⁴⁷ *Id.* at 68.

⁴⁸ Megan A. Fairlie, Article, *Affirming Brahimi: East Timor Makes the Case for a Model Criminal Code*, 18 AM. U. INT'L L. REV. 1059, 1098 (2003).

⁴⁹ Adams, *supra* note 45.

⁵⁰ Article 28 of the UNTAC Criminal Law also guarantees that “No one may be prosecuted for political opinion, religious convictions, or membership in a race or ethnic group.” This seeming irony reflects the problems with UN peacekeeping laws as they appear to be inconsistent with one another. Placing a criminal defamation law into the hands of a fledgling democracy while also declaring that there may be no prosecutions based on opinion seems to be an impossible task. Had UNTAC really wanted to proscribe prosecutions based on opinion, it should have created a more appropriate defamation law in light of the country’s situation. Provisions dated Sept. 10, 1992 Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period art. 28 (1992) [hereinafter UNTAC Provisional Law], <http://www.scu.edu/law/FacWebPage/VanSchaack/September%2010,%201992%20Criminal%20Law.htm>.

⁵¹ *Id.* at art. 63

⁵² Adams, *supra* note 45, at 169.

⁵³ Judy Ledgerwood, *Patterns of CPP Political Repression and Violence During the UNTAC Period*, in *PROPAGANDA, POLITICS, AND VIOLENCE IN CAMBODIA: DEMOCRATIC TRANSITION UNDER UNITED NATIONS PEACE-KEEPING* 114, 116 (Steven Heder & Judy Ledgerwood eds., 1996).

⁵⁴ *Id.* at 119.

⁵⁵ KAMM, *supra* note 6, at 39.

⁵⁶ Interview with Than Bopha, in Phnom Penh, Cambodia (July, 2005); Interview with Theary Seng, in Phnom Penh, Cambodia (July, 2005); Interview with Danilo Caspe, Investigation Division Director, Cambodian Center for Human Rights, in Phnom Penh, Cambodia (July, 2005); Interview with Sem Chao Sok, Investigator, Cambodian Center for Human Rights, in Phnom Penh, Cambodia (July, 2005).

⁵⁷ Speaker from audience, Public Forum on Democracy, sponsored by Cambodian Center for Human Rights (July 13, 2005). Speaker referring to new highway from Phnom Penh to Siem Reap, completed just before the 2003 elections.

⁵⁸ KAMM, *supra* note 6, at xxiii.

⁵⁹ CTR. FOR INT’L DEV. & CONFLICT MGMT., POLITY IV COUNTRY REPORT 2003: CAMBODIA (2004), <http://www.cidcm.umd.edu/inscr/polity/Cam1.htm> [hereinafter POLITY IV REPORT].

⁶⁰ HUMAN RIGHTS WATCH, CAMBODIA: AFTERMATH OF THE COUP 8 (1997).

⁶¹ HUMAN RIGHTS WATCH, DON’T BITE THE HAND THAT FEEDS YOU: COERCION, THREATS, AND VOTE-BUYING IN CAMBODIA’S NATIONAL ELECTIONS 2 – 3 (2003).

⁶² Duncan McCargo, *Cambodia: Getting Away with Authoritarianism?*, 16 JOURNAL OF DEMOCRACY 98 (2005).

⁶³ *Id.* at 107.

⁶⁴ *Id.* at 108.

⁶⁵ Mydans, *Past Horrors*, *supra* note 1.

⁶⁶ OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, FIELD OFFICE QUARTERLY REPORT, THIRD QUARTER OF 2005 1 (2005), http://cambodia.ohchr.org/report_subject.aspx

⁶⁷ Interview with Chea Mony, President of the Free Trade Union of Workers of the Kingdom of Cambodia (FTUWKC), in Phnom Penh, Cambodia (July 21, 2005).

⁶⁸ *See* International Federation of Journalists, IFJ Protests Over Criminal Defamation Ruling Against Cambodian Journalist, <http://www.ifj.org/default.asp?index=3353&Language=EN> (last visited Jan. 26, 2005) for information on a Cambodian journalist convicted Feb. 2005 of criminal defamation related to a story published concerning foreign minister’s previous involvement with Khmer Rouge; *See also* CAMBODIAN CENTER FOR HUMAN RIGHTS, QUARTERLY REPORT 8 (2005) for a summary of the charges against Cheam Channy, an opposition member of the SRP, who was convicted in August 2005 of conspiring against government by creating a secret army. Channy was royally pardoned by the King of Cambodia on Feb. 6, 2006. This royal pardon diminishes the emergency of the situation but does not eradicate it. The pardon enforces this system that is based on royal patronage rather than a rule of law.

⁶⁹ Human Rights Watch, *Cambodia: Courts Used to Muzzle Political Opponents, Politically Motivated Prosecution of Sam Rainsy Should Be Abandoned*, Dec. 20, 2005, <http://hrw.org/english/docs/2005/12/20/cambod12336.htm>. Comments of U.S. Representative James Leach, *Lawmaker Concerned by Threats to Basic Freedoms in Cambodia*, Oct. 31, 2005, <http://usinfo.state.gov/dhr/Archive/2005/Nov/01-33504.html?chanlid=humanrights>.

⁷⁰ Adams, *supra* note 45, at 127.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 128.

⁷⁴ *Id.* at 131.

⁷⁵ *Id.* at 162.

⁷⁶ Adams, *supra* note 45, at 139.

⁷⁷ *Id.* at 150.

⁷⁸ *Id.* at 158.

⁷⁹ *See Id.* at 159. Political supervisors regularly impart instructions about how cases should be handled, especially with high profile political cases.

⁸⁰ KAMM, *supra* note 6, 133.

⁸¹ ERIC BARENDT, FREEDOM OF SPEECH 8 (1987).

⁸² *Id.* at 14.

⁸³ *Id.* at 20.

⁸⁴ *Id.*

⁸⁵ ARTICLE 19, DEFINING DEFAMATION: PRINCIPLES ON FREEDOM OF EXPRESSION AND PROTECTION OF REPUTATION 1 (2000) [hereinafter DEFINING DEFAMATION], *available at* <http://www.article19.org/pdfs/standards/definingdefamation.pdf> (2000); *Accord* Lingens v. Austria, 8 Eur. Ct. H.R. 407, para. 40 (1986).

⁸⁶ DEFINING DEFAMATION, *supra* note 85, at 13.

⁸⁷ *Id.* at 4.

⁸⁸ Bonnie Docherty, Note, *Defamation Law: Positive Jurisprudence*, 13 HARV. HUM. RTS. J. 263 (2000). Ms. Docherty interned with Article 19, the International Centre Against Censorship.

⁸⁹ *Id.* at 5.

⁹⁰ POLITY IV REPORT, *supra* note 59.

⁹¹ Frontline, *Cambodian Human Rights Defender Cannot Return Home*, Nov. 10, 2005, <http://www.frontlinedefenders.org/news/2149>.

⁹² Human Rights Watch, *Cambodia: Courts Used to Muzzle Political Opponents, Politically Motivated Prosecution of Sam Rainsy Should Be Abandoned*, Dec. 20, 2005, <http://hrw.org/english/docs/2005/12/20/cambod12336.htm>.

⁹³ *Id.*

⁹⁴ International Federation of Journalists, *Newspaper Editor Arrested for Defamation in Cambodia*, Dec. 8, 2005 <http://www.ifj-asia.org/page/cambodia051208.html>.

⁹⁵ Seth Mydans, *Cambodian Leader Cracks Down in Bid to Solidify Power*, N.Y. TIMES, Jan. 9, 2006, at A3.

⁹⁶ *Id.*

⁹⁷ Docherty, *supra* note 88, at 264.

⁹⁸ MARC A. FRANKLIN & ROBERT L. RABIN, TORT LAW AND ALTERNATIVES: CASES AND MATERIALS 952 – 953 (7th ed. 2001).

⁹⁹ *Id.*

¹⁰⁰ UNTAC Provisional Law, *supra* note 50, at art. 63.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Constitution of the Kingdom of Cambodia art. 41, *available at* <http://www.embassy.org/cambodia/cambodia/constitu.htm>.

¹⁰⁴ Bosnia-Herzegovina, Ukraine, Georgia, Ghana, Togo, Central African Republic, Argentina and Peru are a few examples. ARTICLE 19, CONCERNS OVER THE RETENTION OF CRIMINAL DEFAMATION IN SOUTHEAST EUROPE 3 (2000) [hereinafter RETENTION IN SOUTHEAST EUROPE], *available at* <http://www.article19.org/pdfs/submissions/south-east-europe-defamation-report.pdf>.

¹⁰⁵ Lingens, 8 Eur. Ct. H.R. at para. 47. *Accord* Theophanous v. The Herald and Weekly Times (1994) 182 C.L.R. 104 29 – 30 (Austl.).

¹⁰⁶ DEFINING DEFAMATION, *supra* note 85, at 15.

¹⁰⁷ Constitution of the Kingdom of Cambodia preamble, *available at* <http://www.embassy.org/cambodia/cambodia/constitu.htm>.

¹⁰⁸ *Id.* at art. 41.

¹⁰⁹ ARTICLE 19, FREEDOM OF EXPRESSION AND THE NEW IRAQI CONSTITUTION 12 - 13 (2000) [hereinafter IRAQI CONSTITUTION], *available at* <http://www.article19.org/pdfs/analysis/iraq-constitution-background-2005.pdf>.

¹¹⁰ Docherty, *supra* note 88, at 264.

¹¹¹ Statute of the International Court of Justice art. 38, June 26, 1945, T.S. 993, 3 Bevens 1179.

¹¹² HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 58 (2nd ed. 2000).

¹¹³ DEFINING DEFAMATION, *supra* note 85, at 8.

¹¹⁴ International Covenant on Civil and Political Rights art. 19, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 302; 6 I.L.M. 383.

¹¹⁸ *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964).

¹¹⁹ *Id.*

¹²⁰ *See generally* Kyu Ho Youm, Article, *Impact on Freedom of the Press Abroad*, 22 COMM. LAWYER 12 (2004).

¹²¹ European Convention for the Protection of Human Rights and Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

¹²² *Lingens v. Austria*, 8 Eur. Ct. H.R. 407, para. 40 (1986).

¹²³ *Id.* at para. 8 - 19.

¹²⁴ *Castells v. Spain*, 14 Eur. Ct. H.R. 445, para. 7 (1992).

¹²⁵ *Herrera Ulloa v. Costa Rica*, (Merits), Inter-Am. Ct. H.R., Judgment of July 2, 2004, (ser. C) No. 107, ¶ 3 *available at* http://www.corteidh.or.cr/seriecpdf/seriec_107_esp.pdf in Spanish;

summary of case in English *available at* page 18, para. 5,
http://www.corteidh.or.cr/public_ing/info_04_ing.pdf [hereinafter Herrera Ulloa Case].

¹²⁶ Ricardo Canese v. Paraguay, (Merits), Inter-Am. Court H.R., Judgment of Aug. 31, 2004, (ser. C) No. 111, ¶ 106
available at http://www.corteidh.or.cr/seriecpdf/seriec_111_esp.pdf in Spanish; summary of case in English *available at* page 21, para. 3, http://www.corteidh.or.cr/public_ing/info_04_ing.pdf [hereinafter Canese Case].

¹²⁷ *Id* at ¶ 69.

¹²⁸ U.N. CCPR, Int'l Covenant on Civil and Political Rights, *Concluding Observations of the Human Rights Committee: Mexico*, U.N. Doc. CCPR/C/79/Add. 109 at para.14 (July 27, 1999)
available at
<http://www.unhchr.ch/tbs/doc.nsf/0/0e2948ff2993e8b1802567c2005282b0?OpenDocument>.

¹²⁹ Derbyshire County Council v. Times Newspapers Ltd., (1993) [1993] A.C. 534. (H.L.) (England).

¹³⁰ *Rajgopal v. State of Tamil Nadu*, (1994) 6 Supreme Court Cases 632, 650.

¹³¹ *Die Spoorbond v. South African Railways* 1946 A.D. 999 (S. Afr.), cited in Docherty, *supra* note 88, at 268.

¹³² Posts & Telecomm.s Corp. v. Modus Publ'n (Private) Ltd., (2) ZLR 492 (S), Judgment No. S.C. 199/97 at 9 (1997) (Zimb.), cited in ARTICLE 19, INT'L AND COMPARATIVE DEFAMATION STANDARDS 7 (2004), *available at* <http://www.article19.org/pdfs/analysis/defamation-standards.pdf>.

¹³³ Docherty, *supra* note 88, at 268.

¹³⁴ The United Nations, *Multi-lateral Treaties Deposited with the Secretary General – Treaty I – V—6*,
<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty6.asp#N2> (last visited Jan. 30, 2006).

¹³⁵ *Id.*

¹³⁶ Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

¹³⁷ STEINER & ALSTON, *supra* note 112, at 107.

¹³⁸ The United Nations, *Multi-lateral Treaties Deposited with the Secretary General – Treaty I – V—7*,

<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty7.asp> (last visited Jan. 30, 2006).

¹³⁹ Optional Protocol to the International Covenant on Civil and Political Rights art. 5(2)(b), Dec. 16, 1966, 999 U.N.T.S. 302; 6 I.L.M. 383..

¹⁴⁰ STEINER & ALSTON, *supra* note 112, at 70.

¹⁴¹ *Id.* at 69.

¹⁴² OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 336 (1991).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ The United Nations, *Multi-lateral Treaties Deposited with the Secretary General – Treaty I – V—6*,
<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty6.asp#N2> (last visited Jan. 30, 2006).

¹⁴⁶ IRAQI CONSTITUTION, *supra* note 109, at 10.

¹⁴⁷ *See* RETENTION IN SOUTHEAST EUROPE, *supra* note 104. *See also* DEFINING DEFAMATION, *supra* note 85, at 3.

¹⁴⁸ SCHACHTER, *supra* note 142, at 340.

¹⁴⁹ Lingens, 8 Eur. Ct. H.R. at para. 42.

¹⁵⁰ *Id.* at para. 35.

¹⁵¹ *Id.* at para. 41.

¹⁵² *Id.*

¹⁵³ Press Release, Open Society Justice Initiative, Inter-American Court Quashes Journalist's Libel Conviction: Judgment Sets Important Precedent in Favor of Political Speech (Aug. 13, 2004) (on file with author), *available at*
http://www.justiceinitiative.org/db/resource2?res_id=102157.

¹⁵⁴ Herrera Ulloa Case, *supra* note 125 at ¶ 188(g)(2), page 18, para. 5.

¹⁵⁵ Canese Case, *supra* note 126 at ¶ 95, page 21, para. 3.

¹⁵⁶ IFEX: International Court Ruling Strikes Blow Against Criminal Defamation, <http://www.ifex.org/en/content/view/full/61725/?PHPSESSID=bcd32b32f928c5538be96b848f5d3f9f> (last visited Jan. 27, 2006).

¹⁵⁷ Docherty, *supra* note 88, at 268.

¹⁵⁸ For a Model Complaint Form to submit to UNHRC, *see* SCOTT N. CARLSON & GREGORY GISVOLD, PRACTICAL GUIDE TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 247 (2003).