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Cambodian Center for Human Rights

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Legal Analysis

OF THE PROSECUTION OF FOUR MOTHER NATURE ACTIVISTS

THE CAMBODIAN CENTER FOR HUMAN RIGHTS (“CCHR”)

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

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LEGAL ANALYSIS OF THE PROSECUTION OF FOUR MOTHER NATURE ACTIVISTS

1. INTRODUCTION AND EXECUTIVE SUMMARY

1. On 17 August 2015, Mr. San Mala, Mr. Try Sovikea and Mr. Sim Somnang (the “detained charged persons”) were arrested and charged under Article 424 of the Criminal Code of the Kingdom of Cambodia (the “Penal Code”) with threatening to destroy property followed by an order. They have been detained since their arrest in Koh Kong’s provincial prison. On 05 February 2016, it became public that Mr. Alejandro Gonzalez-Davidson had been charged under Article 29 of the Penal Code with being an accomplice to the same offense. All four of the charged persons are activists of the environmental NGO Mother Nature. On 13 May 2016 the Koh Kong Provincial Court made a decision to split the case into two parts, with Mr. Alejandro Gonzalez-Davidson being tried separately from the detained charged persons. The trial date for the detained charged persons has been set for 27 June 2016 at the Koh Kong Provincial Court. As of yet, no trial date has been set for Mr. Alejandro Gonzalez-Davidson.
2. Ahead of the trial, this Legal Analysis aims to examine whether the charging of the four charged persons, along with the lengthy pre-trial detention of the three detainees, is reasonable and sufficiently supported by the available evidence. This Legal Analysis: (1) Provides factual context and background for the case; (2) Introduces the facts of the case, the charges against all four charged persons, the detention of three of the charged persons, and the enforced exile of Alejandro Gonzalez-Davidson from Cambodia; (3) Provides an overview of the applicable domestic law and binding international human rights standards; (4) Conducts an analysis of the charges and applies the law to the reported facts; (5) Explores a number of related legal issues, including Alejandro Gonzalez-Davidson’s right to be present at his trial, and the legality of the prolonged pre-trial detention of the other three detainees, and (6) Concludes that the prolonged pre-trial detention of the three activists is arbitrary, the accessory offense is inappropriate in relation to Alejandro Gonzalez-Davidson, and the charge against the three detained charged persons is unfounded due to the lack of evidence against those charged.
3. The facts outlined in this Legal Analysis have been collected from legal sources to which CCHR has access, as well as interviews with Alejandro Gonzalez-Davidson (who relayed information to CCHR), a prison visit with the three activists currently in detention, interviews with numerous witnesses who were present at the relevant protests, and media monitoring. The names of witnesses have not been revealed, in order to protect their privacy and security.

2. CONTEXT

Mother Nature

4. Mother Nature, the organization with which all four charged persons are associated, is a grassroots NGO formed in 2012 in order to campaign against the widespread destruction of

Cambodia's natural resources, particularly in Koh Kong province. The group is community-led and mostly consists of Cambodian environmental and human rights activists who all share the same passion for protecting Cambodia's natural beauty, ensuring the use of Cambodia's natural resources is sustainable, and safeguarding the livelihoods of local communities. At every stage of Mother Nature's activism a number of fundamental principles, which are clearly outlined on its website,¹ are emphasized, including that all forms of activism must be "peaceful". All activists are clearly instructed to ensure that all demonstrations are entirely peaceful and to immediately end activities if there is the danger of events becoming violent. The group's frequent social media posts suggest that Mother Nature is based on a deep-rooted love for Cambodia's natural environment.

5. Mother Nature's first campaign began in November 2012 and focused on challenging plans to construct a hydroelectric dam in the Areng Valley in Koh Kong province, which would have devastated the local environment and displaced approximately one and a half thousand indigenous Chong people from their ancestral lands. This campaign has resulted in the plans being delayed until at least 2018 when the Royal Government of Cambodia ("RGC") apparently accepted it would have resulted in major damage to the natural environment, stating "*The Royal Government will not develop the hydropower dam in the Areng area if the studies show that the losses stemming from this development are huge compared with the economic and other advantages*".² The campaign consisted of a series of peaceful direct actions and public advocacy, which gained a considerable amount of popular attention and support across Cambodia. There have never been any allegations, in relation to this or other previous Mother Nature campaigns, that Mother Nature or the individuals charged in this case have instigated violent protests, or committed similar offenses in the past.

Sand Dredging in Koh Kong province

6. The campaign against sand dredging in Koh Kong province to which the present charges relate started around Koh Srolav in April 2015 and was expanded to Andoung Teuk district in late July 2015, which is where the incident leading to the present charges is alleged to have taken place. The commercial mining of sand in Koh Kong's estuaries for export, typically for construction and land reclamation purposes, most likely in Singapore,³ commenced in early 2008. It has continued ever since.
7. The legal framework governing the practice of sand dredging is designed to ensure that the rights of affected communities are respected along with the grant of any dredging license. While Article 59 of the Constitution of the Kingdom of Cambodia⁴ (the "Constitution") provides that the State has a responsibility to protect the environment, in practice it is the

¹ Mother Nature Website <http://bit.ly/28IDOCp>

² Zsombor Peter and Khuon Narim, 'Hun Sen Defends Proposed Areng Valley Dam', *The Cambodia Daily*, 4 February 2015. Available at: <http://bit.ly/287rHTJ>

³ Global Witness, 'Shifting Sand: How Singapore's demand for Cambodian sand threatens ecosystems and undermines good governance' (May 2010) <http://bit.ly/1UBoNZz>; Lindsay Murdoch, 'Sand wars: Singapore's growth comes at the environmental expense of its neighbours', *The Sydney Morning Herald*, (26 February 2016) <http://bit.ly/1oPAiPT>.

⁴ Constitution of the Kingdom of Cambodia (1993) Article 59.

Law on Environmental Protection and Natural Resource Management⁵ (the “Environment Law”) that provides specific protections for the environment and Cambodia’s natural resources. Article 8 of the Environment Law explicitly states that Cambodia’s natural resources, including sand, shall be conserved, managed and used “*in a rational and sustainable manner.*”⁶ Chapter III of the Environment Law, ‘Environmental Impact Assessment’, states that an environmental impact assessment (“EIA”) must be conducted for “*every project and activity, private or public,*” and for “*existing and in-process activities that have not yet been assessed for environmental impact.*”⁷ The procedure for conducting EIAs is outlined by Chapter III of the Environment Law, Sub-Decree No. 72 on Environmental Impact Assessment (“Sub-Decree No. 72”), and related regulations. EIAs should be reviewed and evaluated by the Ministry of Environment (“MoE”) before being submitted to the RGC for a decision.⁸ Further, Sub-Decree No. 72 requires that an EIA be conducted for all projects involving activities listed in an attached annex, which includes mining,⁹ although the Sub-Decree includes an exemption for projects deemed as “*special case[s]... approved by the Royal Government.*”¹⁰ While public participation is “*encouraged*” by the laws governing the EIA procedure, no concrete requirements are stipulated. In addition, there are no requirements for the disclosure of information.¹¹

8. In May 2009 Prime Minister Hun Sen announced a ban on the export of dredged sand, pending environmental studies, which he reaffirmed in July that same year.¹² Despite the ban, a report published just a year later by Global Witness, a prominent international environmental and human rights NGO, exposed how not only had the ban been completely flouted, but that sand exports from Cambodia’s coastline had actually increased.¹³
9. The impact of sand dredging on the natural environment and on the livelihoods of the local communities has been extensively investigated by Global Witness, which published two highly critical reports in 2009¹⁴ and 2010.¹⁵ The International Union for Conservation of Nature (“IUCN”), a long-standing global environmental network of scientists, NGO and government members, which has worked with the government of Cambodia through certain environmental preservation programs,¹⁶ has also reported on the damages from sand

⁵ The Environment Law (1996)

⁶ Ibid, Article 8

⁷ Ibid, Article 6

⁸ Ibid, Articles 6 & 7

⁹ Sub-Decree on Environmental Impact Assessment Process, No. 72, ANRK.BK, (11 August 1999), Annex VI

<http://bit.ly/1W6ovu4>

¹⁰ Ibid, Article 2

¹¹ PACT, ‘Mekong EIA Briefing: Environmental Impact Assessment Comparative Analysis’ (2015) <http://bit.ly/25bSrab>

¹² Vong Sekheng, ‘Hun Sen again calls for sand export ban, study of impacts’, *Phnom Penh Post*, (02 July 2009)

<http://bit.ly/1T0TUKu>

¹³ Global Witness, ‘Shifting Sand: How Singapore’s demand for Cambodian sand threatens ecosystems and undermines good governance’ (May 2010) <http://bit.ly/1QGodSC>

¹⁴ Global Witness, ‘Country for Sale: How Cambodia’s elite has captured the country’s extractive industries’, February 2009 Available at: <https://www.globalwitness.org/en/reports/country-sale/>

¹⁵ Global Witness, ‘Shifting Sand: How Singapore’s demand for Cambodian sand threatens ecosystems and undermines good governance’, May 2010. Available at <http://bit.ly/1UBoNZz>

¹⁶ See <http://www.iucn.org/countries/cambodia>

dredging.¹⁷ These expert reports, Mother Nature's own investigations and the first-hand experiences of the local communities all reveal the extensive damage caused by sand dredging in this region. Some of the most significant impacts include the depletion of fish stocks, which affects both the natural environment and the livelihoods of local communities. Relatedly, dredging barges are reported to regularly cause damage to local communities' fishing equipment, further impacting on their livelihoods. Additionally, sand dredging has also been widely linked to the loss of land arising from the removal of mangroves and its consequential increased erosion. IUCN's findings show catches having reduced by as much as seventy to ninety percent. As well as suffering these extensive harms, the local communities do not enjoy any of the economic benefits of the sand dredging as jobs are invariably given to migrants from other areas of Cambodia or overseas and the profits of the operations are taken by a small number of large corporations. Third, the mass removal of huge quantities of sand from Koh Kong's estuaries is an entirely unsustainable exploitation of Cambodia's rich natural resources which provides little to no benefit to Cambodians, as the sand is used for export and there is no publicly available information on the amount of royalties or license fees received by the RGC.

10. It is understood that Direct Access, one of two main companies which have conducted sand dredging in the affected area, possessed a permit from the Ministry of Mines and Energy, though details of the permit are unclear in terms of geographical scope. However there are reports alleging that the company has been dredging to a greater depth than permitted and outside the specified geographical area in violation of the conditions of the permits. The Ministry of Mines and Energy and Direct Access both deny they have violated the terms of the permits. Moreover, despite a legal obligation to conduct an Environmental Impact Assessment under the Law on Environmental Protection and Natural Resource Management, no such assessment has ever been published and the local communities insist that no official inspection has ever been held in the area. The Ministry of Mines and Energy has never made any hydrological reports public before granting any sand dredging licenses. This makes it impossible for affected communities, civil society and even law enforcement officers themselves to know whether the companies in receipt of licenses have complied with the law or not. Although this issue has repeatedly been raised by civil society and at least one member of the National Assembly, these vital reports remain shrouded in secrecy.
11. Mother Nature's campaign against sand dredging in Koh Kong has involved its activists empowering the local communities to take peaceful direct action to protest against the harmful and allegedly illegal sand dredging in Koh Kong's estuaries. The campaigns have been thoroughly centered on the local communities and it is the communities themselves who decide what action to take. Mother Nature activists aim to organize the protests so that any action taken by the local communities is as effective as possible and at all times peaceful, in accordance with Mother Nature's fundamental principles.

¹⁷ Brian Kastl, Kong Kimsreng, Sun Kong, Supanuth Chuerattanakul, Ney Prohorsarith & Oul Ran, 'Study of Coastal Mangrove Forest Devastation and Channel Sedimentation: Community-based Solutions Koh Kong Province, Cambodia', IUCN.

12. Mother Nature has also engaged with governmental institutions in order to raise awareness of the harm caused by sand dredging in the region. On 25 June 2015, three Mother Nature activists, Sorn Chandara, Doem Kundy and Chek Nitra, were arrested while attempting to deliver a petition against sand dredging to the National Assembly in Phnom Penh. The sand dredging issue has gained the support of the Cambodian National Rescue Party (“CNRP”) lawmaker, Son Chhay, who, on 03 August 2015, sent a letter to Prime Minister Hun Sen asking the Prime Minister to “disclose information regarding the sand mining” and intervene against the “wide scale and destructive” practice.¹⁸

The charged persons: San Mala, Try Sovikea, Sim Somnang and Alejandro Gonzalez-Davidson

13. All four charged persons are key figures within Mother Nature. San Mala, aged 24, and Sim Somnang, aged 29 are Cambodian citizens and co-founders of Mother Nature. Try Sovikea, aged 26, is a Cambodian citizen and Mother Nature activist. The fourth charged person is Alejandro Gonzalez-Davidson, aged 35, a Spanish citizen who is a co-founder and the Director of Mother Nature.
14. Mr. Gonzalez-Davidson is currently effectively in exile from Cambodia after he was deported on 23 February 2015 after his visa extension was refused, presumably as a result of his activism against the construction of the Chhay Areng hydropower dam in Koh Kong.¹⁹ Mr Gonzalez-Davidson has repeatedly been denied permission to enter Cambodia and the Ministry of Foreign Affairs and International Cooperation issued an urgent internal memo on 08 April 2016 instructing all border officials to deny Mr. Gonzalez-Davidson entry into the country.
15. This intervention occurred in spite of a summons and arrest warrant being issued for Mr. Gonzalez-Davidson for the present charges. According to Article 520 of the Penal Code, entitled ‘Refusal to Enforce the Court Decision’, any public official who disobeys a court order – such as an arrest warrant or summons – is committing a crime and may be liable to spend two to five years in prison. The inconsistency of the positions taken by different actors within the RGC is therefore preventing Mr. Gonzalez-Davidson from responding to the summons.

3. THE FACTS OF THE CASE

Sim Somnang, Try Sovikea and Sun Mala

16. The alleged facts that form the basis of the present charges are highly ambiguous, raising serious concerns as to their legal basis, and in particular the lengthy pre-trial detention of the three detained Mother Nature activists.

¹⁸ Aun Pheap and Chris Mueller, ‘Lawmaker, NGO Want Gov’t to Probe Dredging’, *The Cambodia Daily*, 04 August 2015. Available at: <http://bit.ly/28lqjEs>

¹⁹ Tat Oudom, May Titthara, Daniel Pye and Griff Tapper, ‘Defiant Activist Deported’ *The Phnom Penh Post*, 23 February 2015. Available at <http://bit.ly/1Rh7gUF>

17. The main incidents to which the charges relate allegedly occurred during a campaign carried out between 26 and 28 July 2015. Eight Mother Nature activists worked alongside the local community in Andoung Teuk in a protest against ongoing sand dredging; however, not all of these activists were present on every day of the protest. Between 60 and 150 members of the local community joined the protest over the three days. On 26 July, the group, at this time closer to 60 people, gathered in the morning at Andoung Teuk bridge and then used between 5 and 10 small fishing boats to travel along the river towards the dredging barges. This was repeated in a similar fashion on 27 and 28 July 2015, although the size of the group varied on different dates. Their purpose was to hold a protest and to call for an end to the sand dredging being conducted by Direct Access. The group repeatedly called on the workers on the sand dredging barges to stop dredging and to leave the area. Repeatedly, over the course of the three days, members of the group boarded the sand dredging barges in order to request that the workers on the boat stop the sand dredging operations. There is no suggestion that the protestors caused any damage to the barges or the dredging equipment. There are, however, suggestions that certain protestors may have threatened to damage the barges unless they left the area. However, these reports are vague and there are several inconsistencies in the relevant evidence, which are presented below.
18. These events took place along an estuary measuring approximately 20km long, involving 10 large sand dredging barges and many more small fishing boats used by the local community. These circumstances make it extremely difficult to establish any certainty regarding the actions and words of specific individuals on specific days and at specific locations. Adding to this difficulty is the lack of specificity and the inconsistency throughout the witness statements.
19. The protesters were split into small groups and spread across different places along the estuary; in effect, many small protests were happening in different locations at the same time. None of the witnesses stipulate where the alleged crimes are meant to have happened; on which barge, what day and what time.
20. Between 30 July and 17 August, the Ministry of Mines and Energy repeatedly claimed in conversations with Mother Nature activists and the local community that the dredging was lawful, in accordance with valid permits held by Direct Access and that relevant Environmental Impact Assessments (“EIAs”) had been conducted. However, no EIA has ever been publicly released or shown to the affected communities, despite requests from CNRP lawmaker, Son Chhay²⁰ and the local community, who insist that no studies had ever been held.
21. Following a period of inactivity on the part of the dredging barges, on 12 August Direct Access resumed sand dredging activities in Andoung Teuk estuary amid a significantly increased police presence, sparking further protests from the local community. There are some suggestions that the charges may relate to this protest, even though Try Sovikea, one of the detained charged persons, was not present on this date. On 14 August, the police

²⁰ Aun Pheap and Chris Mueller, ‘Lawmaker, NGO Want Gov’t to Probe Dredging’, *The Cambodia Daily*, 04 August 2015. Available at: <http://bit.ly/28lqjEs>

issued a summons for San Mala, Try Sovikea and Yoen Dinith, to answer questions. The three decided not to comply as they feared they would be arrested or made to make incriminating statements, as has previously occurred in similar cases.²¹ At the same time, large numbers of military police officers and a delegation from the Ministry of Mines and Energy arrived in Andoung Teuk, led by Secretary of State Tith Dina, in order to inspect the situation. On 15 August, two of the summoned activists, San Mala and Try Sovikea, chained themselves to Andoung Teuk bridge, calling on the police to come and arrest them. They posted a picture of themselves to Mother Nature's Facebook page in order to emphasise their compliance with the authorities' wishes, and to draw attention to the authorities' suppression of protests against sand dredging in the area.

22. On 17 August, San Mala, Try Sovikea and Sim Somnang were arrested. San Mala and Try Sovikea were arrested in Andoung Teuk while Sim Somnang was arrested in Ta Meak village. They were charged with "*threatening to destroy property followed by an order*" under Article 424 of the Penal Code. They have been held in Koh Kong provincial prison since, meaning, as of the time of writing in June 2016, they have been held in pre-trial detention for ten months. It later emerged that the complaint was brought by an employee of Direct Access. The complaint also demanded US\$100,000 in compensation.

Alejandro Gonzalez-Davidson

23. Despite Alejandro Gonzalez-Davidson being deported and banned from re-entering Cambodia on 23 February 2015, half a year before the alleged incident, it emerged on 05 February 2016 that he had been charged in the present case as an accomplice under Article 29 of the Penal Code. Mr. Gonzalez-Davidson has made a number of public pleas to be allowed to return to Cambodia in order to defend himself in a Cambodian court. These efforts have included Mr. Gonzalez-Davidson applying for an e-Visa, which was granted and later revoked by the Ministry of Foreign Affairs. Mr. Gonzalez-Davidson also previously attempted to have a letter delivered to the Minister of Interior requesting that he be granted a visa; however, ministry administrative staff declined to accept the letter. A joint statement by 22 civil society organizations has also called on the RGC to give Mr. Gonzalez-Davidson permission to be able to defend himself in person, in accordance with his right to a fair trial.²² However, the RGC and the Ministry of Interior have made it clear they have no intention of allowing Mr. Gonzalez-Davidson to re-enter the country.

4. THE LAW

24. The legal issues raised by this case concern the criminal offense of threatening to destroy property followed by an order; criminal liability as an accomplice to an offense; the required standard of proof to support a conviction for a criminal offense; the rights to freedom of expression, assembly and association; the right to not be arbitrarily detained; and the right

²¹ For example, see: CCHR, 'Conditional Release of Human Rights Defenders Violates Fundamental Freedoms of Expression and Assembly', February 2014. Available at: <http://bit.ly/1QRhpHx>

²² CCHR, 'Joint Statement: CSOs declare support for Mother Nature and condemn crackdown against the organization', 14 February 2016. Available at <http://bit.ly/28loITA>

to a fair trial including the right to defend oneself in person. The applicable law relevant to these issues will be outlined below.

Offense of threatening to destroy property accompanied by an order

25. Article 424 of the Penal Code defines the offense of “*threats to commit destruction accompanied by an order*” as

“The threat, by any means whatsoever, to commit destruction, deterioration or damage is punishable by an imprisonment from 1 (one) year to 2 (two) years and a fine from 2,000,000 (two million) Riels to 4,000,000 (four million) Riels if the threat was accompanied by an order to perform or not to perform any thing.”²³

26. This definition can be broken down into a number of elements which must be established for a person to be convicted of this offense: (1) The defendant must make an actual threat. By analogy with the identical provision in Article 222-18 of the French Penal Code, this must be a positive statement and cannot be a mere omission or insufficiently clear; (2) The threat must specifically and clearly state that the defendant will act to commit destruction, deterioration or damage of the property; and (3) The potential carrying out of the threat must be characterized as a direct consequence of the recipient refusing to obey an order made by the defendant. The crucial requirement in all of these elements is that the threat must be very specific and must clearly relate to the destruction of property, and be characterized as a direct consequence of refusing to obey an order.

Criminal liability as an accomplice to an offense

27. Article 29 of the Penal Code defines an “*accomplice*” as

*“Described as an accomplice is the person who **intentionally facilitates the attempt or the realization of a felony** or a misdemeanor by providing his/her help or assistance.*

The accomplice of a felony or a misdemeanor receives the same punishments as the perpetrator.”²⁴

This definition can also be broken down into a number of elements: (1) there must be actual action(s) by the defendant that provides help or assistance; (2) the accomplice must have acted to assist the principal with the intention to assist the principal to commit a criminal act and with actual foresight that they might do so; (3) a criminal act must have been committed by the principal(s) in order for accomplice liability to arise.

Standard of proof for a criminal offense

²³ The Penal Code, Article 424

²⁴ The Penal Code, Article 29

28. The standard of proof determines the certainty with which the prosecution must prove the elements of an offence. In Cambodia, for a person to be convicted of a criminal offense, all elements of the offense must be proved with substantive evidence beyond any doubt. Article 38 of the Constitution establishes the required standard of proof to convict a person of a criminal offense:

“Any case of doubt, it shall be resolved in favor of the accused. The accused shall be considered innocent until the court has judged finally on the case.”²⁵

This is a demanding threshold for the prosecution to meet, and is more stringent than the “beyond reasonable doubt” standard usually applied in common law jurisdictions. Furthermore, according to Article 127 of the Code of Criminal Procedure, it is incumbent upon the trial judge to consider both inculpatory and exculpatory evidence, meaning that all evidence which goes to the innocence of the accused must be given equal weight to any evidence of guilt.

Burden of proof for a criminal offense

29. The burden of proof determines which party to the proceedings has the burden of proving their case. In a criminal case, the evidential burden is on the prosecution – the prosecution must provide evidence to prove all elements of the alleged offence to the required standard of proof. This is an essential component of the right to be considered innocent until proven guilty. In a criminal case there is no burden on the accused to prove that the charges against them are false. If the evidence is too weak to prove all elements of the case, the Court must dismiss the charges, regardless of whether the accused has presented any evidence.

30. The right to be considered innocent until proven guilty is enshrined in international law – through Article 11(1) of the Universal Declaration of Human Rights (“UDHR”) and Article 14(2) of the International Covenant on Civil and Political Rights (“ICCPR”) to which Cambodia acceded in 1992. These rights are incorporated into Cambodian national law pursuant to Article 31 of the Constitution, as recognised by a decision of the Constitutional Council dated 10 July 2007.²⁶ At the regional level, the right to be presumed innocent is recognised in Article 20(1) of the ASEAN Human Rights Declaration. The presumption of innocence is also provided for explicitly in Article 38(7) of the Constitution, as quoted at paragraph 29, *supra*.

Right to liberty and the right to not be arbitrarily detained

31. The right to liberty is strongly protected under Cambodian and international human rights law. At the regional level, this right is recognised in Article 12 of the ASEAN Human Rights Declaration. Article 9 of the ICCPR states:

²⁵ The Constitution, Article 38

²⁶ Constitutional Council of the Kingdom of Cambodia, Decision No. 092/003/2007, (10 July 2007)

“1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

....

*“3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and **shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody**, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.”*

32. The rights to not be arbitrarily detained and to a strong justification for the imposition of pre-trial detention are also both strongly protected in Cambodian law. Article 38 of the Constitution declares:

“The prosecution, arrest, or detention of any person shall not be done except in accordance with the law.”²⁷

33. Although it is sometimes necessary to impose pre-trial detention in order assist in the proper administration of justice and to protect victims and witnesses, the excessive use of pre-trial detention unduly restricts the right to liberty and the presumption of innocence. Article 205 of the Code of Criminal Procedure outlines the conditions for justified pre-trial detention:

“Pre-trial detention may be imposed when the detention is necessary to:

- 1. stop the offense or prevent the offense from happening again;*
- 2. prevent any interferences on witnesses or victims or prevent any collusion between the accused person and the accomplice;*
- 3. maintain evidence or material leads;*
- 4. ensure the accused is kept for the court to decide according to its procedures;*
- 5. protect the security of the accused;*
- 6. maintain public order to avoid any chaos caused by the offense.”²⁸*

As indicated by these limited circumstances, pre-trial detention is to be used as a last resort; judges should start from the presumption that the accused individual should be released until the trial, or should consider judicial supervision (placing conditions on the individual's liberty until the trial), before they consider pre-trial detention. Only if judicial supervision would not be able to adequately address all concerns and it is determined to be an objective necessity, should pre-trial detention be considered as a last resort. Liberty of the accused should always be the default option, rather than detention.

²⁷ The Constitution, Article 38

²⁸ Code of Criminal Procedure, Article 205

34. However, Cambodia continues to have a very high rate of pre-trial detention. In 2012 for instance, in 70% of the trials monitored by CCHR, the charged persons had been held in pre-trial detention.²⁹ In a promising development, judges have been required, since March 2014, to provide detailed reasoning for denying an accused person bail, in a move made by the Justice Minister designed to reduce the number of people in pre-trial detention.³⁰ However, despite this stricter requirement, the problem seems to have become worse. Government statistics say that individuals in pre-trial detention in Cambodian prisons rose from 24% to 30% of the total prison population over the latter half of 2014.³¹ However external observers put the percentage as high as 63.6%, the highest in Southeast Asia.³² The widespread and apparently punitive imposition of pre-trial detention is even more common in respect of human rights defenders, severely affecting the presumption of innocence.

Trial in absentia

35. The right to a fair trial under international and domestic law includes the right for an accused person to be tried in person.

36. Article 38 of the Constitution declares:

“Every citizen shall enjoy the right to defense through judicial recourse.”³³

Article 300 of the Code of Criminal Procedure declares,

“An accused person shall appear during hearing of the court directly.”³⁴

Article 14 of the ICCPR, to which Cambodia acceded in 1992 and which is directly applicable in Cambodian law,³⁵ declares:

“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality ... to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing.”³⁶

37. General Comment No. 13 of the United Nations Human Rights Committee further clarifies Article 14 of the ICCPR, stating:

“When exceptionally for justified reasons trials in absentia are held, strict observance of the rights of the defense is all the more necessary.”³⁷

²⁹ CCHR Report, ‘Fifth Bi-annual Report: Fair Trial Rights in Cambodia’, November 2012 <http://bit.ly/1NPhuV4>

³⁰ Lauren Crothers, ‘Judges Required to Explain Reasons Behind Pre-Trial Detention’, *The Cambodia Daily*, 26 March 2014 <http://bit.ly/1VJXsRI>

³¹ Alice Cuddy and Chhay Channayda ‘Pre-trial lockup rules flouted’, *The Phnom Penh Post*, 29 May 2015 <http://bit.ly/1QDBfDm>

³² Ibid

³³ The Constitution, Article 38

³⁴ Code of Criminal Procedure, Article 300

³⁵ Constitutional Council of the Kingdom of Cambodia, Decision No. 092/003/2007, (10 July 2007)

³⁶ ICCPR, Article 14

38. Article 361 “Judgment Deemed as Non-Default” and 362 “Default Judgment” of the Code of Criminal Procedure loosely govern trials in absentia in Cambodia.

Article 361 states:

*“If the accused does not appear for trial, but had knowledge of his citation or summons, the judgment shall be deemed to be a non-default judgment as far as he is concerned. The accused shall be notified by writ of notification of the so deemed non-default judgment, which is subject to appeal. **In case the accused was absent but provided the court with reasons for his absence which the court accepts as proper, the trial may be adjourned to another date to be specified by the court.**”*

Article 362 states:

“If the accused does not appear for trial and there is no proof that he had knowledge of his citation or summons, a default judgment shall be issued in his absence. The accused shall be notified by writ of notification of the default judgment...”

Freedom of expression and assembly

39. More broadly, given the context in which the facts in the present case took place, the charges brought against the individuals engage their human rights to freedom of expression and assembly. The use of criminal charges and detention to deter and punish persons engaged in legitimate acts of peaceful protest amounts to an unjustified restriction of these fundamental freedoms.
40. The rights to freedom of expression and assembly are strongly protected in both Cambodian and international law. Article 41 of the Constitution protects:

“Freedom of expression, press, publication and assembly” although this right cannot be exercised “to infringe upon the rights of others, to effect the good traditions of the society, to violate public law and order and national security.”³⁸

As stated above at paragraph 31, international human rights standards are directly applicable within the Cambodian legal system under Article 31 of the Constitution. Articles 19 and 21 of the ICCPR respectively guarantee the rights to freedom of expression and peaceful assembly. At the regional level, these rights are recognised in Articles 23 and 24 of the ASEAN Human Rights Declaration.

5. ANALYSIS OF THE APPLICATION OF THE LAW TO THE FACTS

Threats to destroy property accompanied by an order (Article 424 of the Penal Code)

³⁷ UN Human Rights Committee General Comment No. 13 CCPR/GEC/4721/E (1984)

³⁸ The Constitution, Article 41.

41. The three detained charged persons charged with this offense strongly deny all responsibility. Specifically they deny that they made any threat to destroy the dredging barges or any other property. On the contrary, they insist their actions were entirely peaceful and that they were making every effort to placate the gathered crowd. Upon application of the law concerning the elements required for this criminal offense, and the burden of proof for a criminal conviction, a number of weaknesses with this charge become apparent.

Inconsistencies and weaknesses in the available evidence

42. The only evidence on which the prosecution bases the charges is a number of witness statements. However, there are significant inconsistencies and weaknesses in the evidence available to prove this offence, which cast considerable doubt on its credibility. The small number of witnesses who claim to have been present at the relevant protests have not provided any evidence of threats specifically being issued by the charged persons. Other witnesses whose statements are being relied upon were not even present at the time of the protests, seriously undermining the reliability of this evidence.

43. A number of witness statements refer to protests both between 26 and 28 July 2015 and also on 12 August 2015. However, it is important to note that there is strong factual evidence that not all of the three detained charged persons were present on 12 August. In Try Sovikea's statement he explains that he was not even in the Andoung Teuk area on 12 August because he had medical problems and had therefore travelled to Koh Kong city. Therefore, it is important to be clear that any factual evidence relating to the events on 12 August cannot be used to support the charges against at least one of the detained charged persons. Rather, the evidence must relate to events between 26 and 28 July, though it should also be noted that on 28 July, another of the charged persons, Sim Somnang, was not present. On the morning of 28 July, Sim Somnang left Andoung Teuk to go to Koh Kong city, meaning that on 28 July only two of the charged persons were present. Both Try Sovikea and Sim Somnang's absences are confirmed by Facebook messages between them and Alejandro Gonzalez-Davidson.³⁹

44. Two witnesses state that they do not remember the date on which the events they describe are alleged to have taken place, and mention dates (12 August and 28 July) when not all three charged persons were present.

Lack of substantive evidence that the charged persons made any threats to destroy property

45. Even if the credibility of the witness evidence is accepted for the sake of argument, there is a lack of any substantive evidence in those statements that the detained charged persons committed the offense, according to the specific requirements of the offense defined by the law and according to the legal burden of proof required for a criminal conviction. As discussed above, for the charged persons to be convicted of this offense, it must be

³⁹ See Annex 1, Screenshots 1 and 2.

established that: (1) they all made an actual threat which was sufficiently clear and specific; (2) the threat clearly stated that the accused would cause some damage to property; and (3) the threat must have been accompanied by a specific and clear warning to the recipient to perform or not to perform a specified action. In the present case, the detained charged persons are accused of making a threat (to burn the dredging barges) accompanied by an order (to stop dredging and leave the estuary). In order to convict the charged persons of this offence, there must be no doubt whatsoever that each of the three charged persons made an actual threat to damage the barges, and that this was accompanied by an order for the staff of the barges to leave the estuary. A general suggestion that some unidentifiable individuals within the large group may have made some such threat is completely insufficient to hold the three detained charged persons criminally liable.

46. One matter which is corroborated by almost all of the available witness statements is that between 26 and 28 July, the group consisting of members of the local community and a small number of Mother Nature activists travelled towards the dredging barges using small boats and called on the workers to stop sand dredging and to leave the area. Almost all of the witness statements support this. However, only a few refer to abusive language or threats by any members of the group, and none refer to such language being used by the detained charged persons.⁴⁰ This is one of the very few points of consistency across the available evidence. The statement by one witness, a district official, explains the general events between 26 and 28 July and he makes no reference to any threats or the use any abusive language. A second witness also explains events between 26 and 28 July and again makes no reference to any threats or abusive language.
47. Even if certain witness statements suggest that threats to damage the barges may have been made by some people in the group, the evidence is all very general in nature, and crucially **none of them claim that any of the detained charged persons themselves made any threats to damage the barges, but instead refer to a large and vague group.** None of the available evidence provides any basis to identify the detained charged persons beyond any doubt, as required by law. As noted above, the events between 26 and 28 July took place over several days, across a significant geographical area and involved a large group of up to 150 people widely dispersed across several small fishing boats of 10-15 people each. Therefore, the statements by a witness, who is an employee of Direct Access, which claim the group used offensive language, and by another witness which claims that "*all of the group*" of some 150 people made threats to burn the barges, cannot provide a basis for the charges made against the detained activists, or Mr. Gonzalez-Davidson. It cannot be determined from these vague statements what threats were made, if any, and by whom.
48. One witness, who works for the Department of Mines and Energy for Koh Kong, makes very similar claims to another witness, stating that a 'group' made threats and used abusive language. This witness also claims that the police were unable to intervene to stop the protestors, when in fact there was a sufficiently large police presence among the peaceful activists, but they chose to navigate around the barges in a boat and take pictures. The

⁴⁰ Introductory submission regarding 26-28 July, witness statements, and statements by San Mala, Sim Somnang and Try Sovikea

knowledge of this witness of the facts is also highly questionable, as he was not present at the scene.

49. The existence of a language barrier between the detained charged persons, who can only speak Khmer, and the Vietnamese workers on the barges, who could not speak Khmer, casts doubt on the ability of the barge workers to provide reliable evidence as to the content of any statements made by the detained charged persons, and whether they contained threats and/or orders.
50. Furthermore, the prosecution case itself does not claim any threats were made between 26 and 28 July, but claims threats were made on 12 August. **Not all of the charged persons were present on this date.** Further, prosecution alleges no specifics as to what the threats were, which individuals actually made them, or exactly when they were made.
51. There is therefore a total lack of any clear and detailed factual information that could provide the basis for a conviction under Article 424 of the Penal Code, which specifically requires certainty beyond doubt of the guilt of the charged persons. None of the witness statements include specific details showing that any of the three detained charged persons actually made threats to damage the barges themselves.
52. There is evidence that the workers on the barges wanted to make it appear as if the protestors had acted illegally, and may have been supported by the authorities in these efforts. Any evidence provided by witnesses with links to these groups should therefore be treated with considerable caution. One incident, recorded on camera by Mother Nature activists, consists of a Vietnamese worker on one of the barges tying himself up with ropes in order to blame this on the protestors. The police were filming the incident, but did nothing to intervene. Furthermore, on 30 July, a protest had to be called off when Mother Nature activists were informed that a group of villagers who had arrived to join contained soldiers in civilian clothing who had been sent to disrupt the protest and provoke confrontation with the authorities.⁴¹

Exculpatory evidence that the detained charged persons' actions were entirely peaceful and they tried to calm the situation

53. Not only is there no specific evidence that the detained charged persons actually made any threats, but, on the contrary, there is considerable exculpatory evidence that they actually made a concerted effort to calm the situation and promote non-violence. The available evidence suggests the three detained charged persons were committed to non-violent direct action. Further, the detained charged persons were massively outnumbered by the large group of up to 150 frustrated and concerned members of the local community over whom they had no control, and whose livelihoods and environment have been impacted enormously by the various harmful effects of sand dredging.

⁴¹ Aun Pheap, 'Anti-Dredging Protests in Koh Kong Called Off', *The Cambodia Daily*. 30 July 2015 <http://bit.ly/28IDTve>

54. Not only is non-violence one of the fundamental principles of Mother Nature as a movement,⁴² but also there is evidence of Facebook messages between the Mother Nature activists which emphasize and agree on the importance of non-violence. This Facebook correspondence includes San Mala and Sim Samnang clearly agreeing to keep all activity peaceful.⁴³ A number of witnesses who were present at the protests have clearly stated that the Mother Nature activists acted to calm the gathered community members and urge non-violence. CCHR has interviewed witnesses who were present at the protests, and each of them clearly state that the three detained activists acted to calm the situation and urge non-violence on the part of the gathered community members.
55. The three detained charged persons insist that their actions were entirely peaceful. They all insist that they did not use any abusive language, nor did they make any threats to damage the barges or equipment, and they did not damage the barges in any way when they boarded them. Try Sovikea explains that he persuaded the protestors from the local community to return home at the end of each day and he made efforts to calm the situation when things became heated. In his statement, Sim Somnang is adamant that he did not hear any of the other protestors make any threats to damage or burn the barges.
56. In a video recorded by Mr. San Mala on 12 August,⁴⁴ he explains that the sand dredging company had hired a group of villagers from Botum Sakor district to “*cause violence and confrontation*” but that the **activists were “trying [their] best to do whatever it takes to avoid violence taking place and [to] keep things quiet and under control”**. The video shows villagers sitting peacefully on a boat behind Mr. San Mala. In an audio message from Try Sovikea – who was passing on information gathered from San Mala on the same day – he says that villagers had been hired to try to stop the protestors’ activities, but that the Mother Nature activists acted to maintain peaceful behavior and prevent violence.⁴⁵

Accomplice liability (Article 29 of the Penal Code)

57. First, in the absence of a criminal act or attempted criminal act, accomplice liability cannot arise. As shown above, the criminal charges against the three detained charged persons are subject to serious flaws.
58. In any case, Alejandro Gonzalez-Davidson strongly denies any liability as an accomplice to the charge brought against the other three charged persons. Mr. Gonzalez-Davidson insists that he did not take any action to facilitate the commission of the alleged offense; rather he actually sent messages to the activists involved in the protest emphasizing the importance of remaining peaceful. Applying the law regarding the specific requirements for accomplice liability and the standard of proof for a criminal conviction, it appears unjustifiable to impose accomplice liability on Mr. Gonzalez-Davidson.

⁴² Refer to part 1

⁴³ See Annex 1, Screenshots 3 and 4.

⁴⁴ See Annex 2 for video and English transcript.

⁴⁵ See Annex 3 for audio and English transcript.

Accomplice liability must be based on an actual action

59. First, the law is clear that accomplice liability must relate to an actual action by the defendant. This can either be a “provocation” of a continuous nature which is supported by a threat or incentive; or it can be an “instigation” or an instruction which must be a very specific instruction to commit a specific criminal action; or it can be direct help or assistance which enables the principal to commit the offense. The available evidence does not show any such action at all. Mr. Gonzalez-Davidson’s **general** role as an active leader of Mother Nature is entirely insufficient in order to establish accomplice liability for the commission of a **specific** criminal offense.
60. The present charges appear to suggest that Mr. Gonzalez-Davidson could be treated as an accomplice simply by virtue of being a Director of Mother Nature, and as the person who administers the stipend of Mother Nature activists. This arrangement would have to be classed as a “provocation” of a continuous nature with a threat or incentive and which leads the principal to pursue criminal conduct. In other words, Mother Nature would need to have an expressly criminal purpose for this connection to be valid. On the contrary, non-violence is a fundamental principle of Mother Nature and as a result non-violence is emphasized at every stage of Mother Nature’s advocacy.
61. Alternatively, it may be claimed that Mr. Gonzalez-Davidson gave a specific instruction to the detained charged persons to make threats to damage the barges. However, there is a total absence of any such evidence, and no suggestion that this occurred in the available evidence. There is the same complete lack of evidence regarding Mr. Gonzalez-Davidson providing any direct help or assistance to the detained charged persons which enabled them to commit the alleged offense. On the contrary, Facebook messages from the time of the protests clearly indicate that Mr. Gonzalez-Davidson emphasized the importance of non-violence, replying to a colleague’s statement that he was keeping the protests nonviolent with a reminder that this principle forms one of their key roles as activists.⁴⁶

Accomplice must intend to facilitate a criminal offense

62. Second, the accomplice must have acted to assist the principal with the intention to assist the principal to commit a criminal offense and with actual foresight that they might do so. It is crucial that the accomplice acts “knowingly” that they are facilitating a criminal offense and not just helping the principal in some lawful matter. There is a complete lack of any evidence which would suggest Mr. Gonzalez-Davidson acted with the specific intention to facilitate the commission of a criminal offense. On the contrary, there is considerable evidence that Mr. Gonzalez-Davidson made several efforts to ensure Mother Nature’s campaign remained at all times peaceful and that none of the Mother Nature activists could be held responsible for breaking the law. Even though Mr. Gonzalez-Davidson was outside of the country, he had an important role in emphasizing the importance of lawful and non-violent protests through social media communication with the activists. A screenshot from

⁴⁶ See Screenshot 3 in Annex 1.

the Facebook profile of Alejandro Gonzalez-Davidson shows a group message entitled 'Sand Dredging' and the messages are dated at just before 3pm on 12 August 2015.⁴⁷ **In these messages to the detained charged persons, Mr. Gonzalez-Davidson clearly states that keeping the demonstration non-violent is an essential duty of the Mother Nature activists.** One activist who was present at the demonstration responded by reassuring Mr. Gonzalez-Davidson, saying, "*Now I try to keep nonviolence*".⁴⁸ This evidence clearly indicates that Mr. Gonzalez-Davidson's only intention vis-à-vis this protest was to ensure it remained non-violent.

There must actually have been a criminal offense

63. Crucially, if it cannot be established that a criminal offense was committed by the detained charged persons, then it is impossible for Mr. Gonzalez-Davidson to be found liable as an accomplice. As clearly outlined above, there is a serious lack of evidence supporting a conviction of the three detained charged persons.

6. RELATED LEGAL ISSUES

64. Besides the specific charges brought against the four charged persons, related legal issues have arisen, specifically: the legality of the prolonged pre-trial detention of the three detained charged persons; and the impact of Mr. Gonzalez-Davidson's continued exile from Cambodia on his right to a fair trial.

Prolonged pre-trial detention

65. After being arrested and charged in Koh Kong on 17 August 2015, San Mala, Try Sovikea and Sim Somnang have been continuously held in pre-trial detention in Koh Kong provincial prison. On 31 August 2015, the provincial court refused their bail applications amid significant protests against their continued detention.⁴⁹ At the time of writing, they have been held in pre-trial detention for ten months.
66. To impose pre-trial detention in this situation, where there is no evidence that the three detained charged persons actually made any threats, constitutes an arbitrary deprivation of their liberty. Detention must only ever be a last resort based on necessity. In fact, none of the grounds for pre-trial imprisonment provided in the Code of Criminal Procedure have been satisfied:⁵⁰
- a) *Preventing the offence from happening again:* Under such intense scrutiny from authorities, and being so well known in the community for their activism, it is very unlikely the detained charged persons would engage in any illegal activity. Moreover,

⁴⁷ See Screenshot 4 in Annex 1.

⁴⁸ Facebook messages emphasizing non-violence

⁴⁹ Aun Pheap, 'Court Denies Bail to Activists as More Protestors Head to Koh Kong', *The Cambodia Daily*, 01 September 2015. Available at <http://bit.ly/1KZ2AuC>

⁵⁰ Article 205 Code of Criminal Procedure

any fears that the detained charged persons would commit the alleged offence again could be addressed by imposing appropriate bail conditions and judicial supervision.

- b) *Prevent harassment of witnesses or victims*: No evidence was presented to suggest any of the detained activists would harass witnesses or alleged victims. Considering the power imbalance between the activists and the company, the potential for such harassment appears especially unlikely. Several witnesses, too, hold positions of influence in politics and administration.
- c) *Preserve evidence*: There is no material evidence, aside from witness statements, of the alleged crimes.
- d) *Guarantee the presence of the accused*: Given that two of the detained charged persons submitted themselves for arrest, their flight risk is minimal. Furthermore, all three could easily be subjected to travel restrictions while on bail.
- e) *Protect the security of the accused*: There seems to be little risk from the facts and surrounding context that the detained charged persons would be harmed during the period preceding trial. No evidence of such a risk was presented before the investigating judge.
- f) *Preserve public order*: There is no evidence that the release of the three detained charged persons would be likely to disturb public order. Indeed, this ground should not be applicable to the detention of the three detained charged persons, as past experience in Cambodia has shown that the imprisonment of environmental and community activists causes, rather than prevents, public disorder.

67. Based on an evaluation of the relevant legal provisions, it appears clear that there is no justification for the lengthy pre-trial detention of San Mala, Try Sovikea and Sim Somnang. Whilst the court does have the authority to send suspects to detention before trial, this should only be exercised in exceptional circumstances. None of the relevant criteria are applicable in this case.

68. As well as contravening domestic law, the extended pre-trial detention of the detained charged persons also violates international human rights standards, which are directly applicable in Cambodian law.⁵¹ As demonstrated above, the pre-trial detention lacks a justifiable legal basis, and therefore can be considered both arbitrary and unlawful,⁵² which is prohibited under Article 9 of the ICCPR.

69. In any case, even if pre-trial detention were to be considered justified in this case, the excessive length of time for which the detained charged persons have now been detained without being brought to trial would amount to a violation of Articles 9(3) and 14(3)(d) ICCPR, which provide that persons detained on a criminal charge are entitled to be tried within a reasonable time and without undue delay. As it is, the prolonged nature of their arbitrary detention constitutes a further violation of their internationally guaranteed human rights.

Fair trial rights

⁵¹ Constitutional Council of the Kingdom of Cambodia, Decision No. 092/003/2007 (10 July 2007)

⁵² UN General Comment No. 35, CCPR/C/GC/35, (16 December 2014), [11]

70. Alejandro Gonzalez-Davidson is currently in forced exile from Cambodia, having been effectively deported, reportedly on the orders of Prime Minister Hun Sen, in February 2015.⁵³ It is widely believed that Mr. Gonzalez-Davidson's deportation was a direct retaliation for his long-standing environmental activism against the construction of the Chhay Areng hydropower dam in Koh Kong province.
71. Since being charged on 05 February 2016, Mr. Gonzalez-Davidson has demanded that his right to defend himself in person be respected,⁵⁴ as guaranteed under Article 38 of the Constitution of the Kingdom of Cambodia and Article 14 of the ICCPR. The requirement for an accused person to appear in person before the court is additionally demanded under Article 300 of the Cambodian Code of Criminal Procedure. Articles 361 and 362 of the Cambodian Code of Criminal Procedure clearly outline that a trial *in absentia* should only occur in instances where the charged person cannot be located or refuses to appear before the court. In contrast, Mr. Gonzalez-Davidson has repeatedly expressed his desire to be allowed to face trial in Cambodia, in accordance with his fair trial rights. He continues to be prevented from entering the country, however, in spite of a summons and arrest warrant being issued against him.
72. Mr. Gonzalez-Davidson's demand for his right to be present at his trial has been supported by Cambodian civil society, with 22 NGOs calling for his fair trial rights to be respected on 14 February 2016.⁵⁵ Despite these requests, on 11 April 2016 the RGC and the Ministry of Interior cancelled an e-Visa issued to Mr. Gonzalez-Davidson, for which he had applied online, saying he had been granted it due to a "*technical error*" and was in fact blacklisted.⁵⁶ According to Article 520 of the Penal Code, entitled 'Refusal to Enforce the Court Decision', any public official who disobeys a court order – such as an arrest warrant or summons – is committing a crime and may be liable to spend two to four years in prison. In order for this provision to be complied with in the present case, Cambodian immigration officials would be obliged to allow him to enter the country in order for him to comply with his summons and arrest warrant.
73. The right to be present at trial is a fundamental element of the right to a fair trial, as protected under Article 14 (3)(d) of the ICCPR and Article 38 of the Cambodian Constitution. While Cambodia does have provision for trials *in absentia*, this provision only exists for cases wherein the accused person cannot be brought to trial due to the inability of the relevant authorities to locate / arrest him or her, which are defined in Articles 361 and 362 of the Code of Criminal Procedure.

⁵³ Tat Oudom, May Titthara, Daniel Pye and Griff Tapper, 'Defiant Activist Deported' *The Phnom Penh Post*, 23 February 2015. <http://bit.ly/1Rh7gUF>

⁵⁴ Alejandro Gonzalez-Davidson (in Reader's Letter): 'It's time for me to return' *Phnom Penh Post*, 5 February 2016.

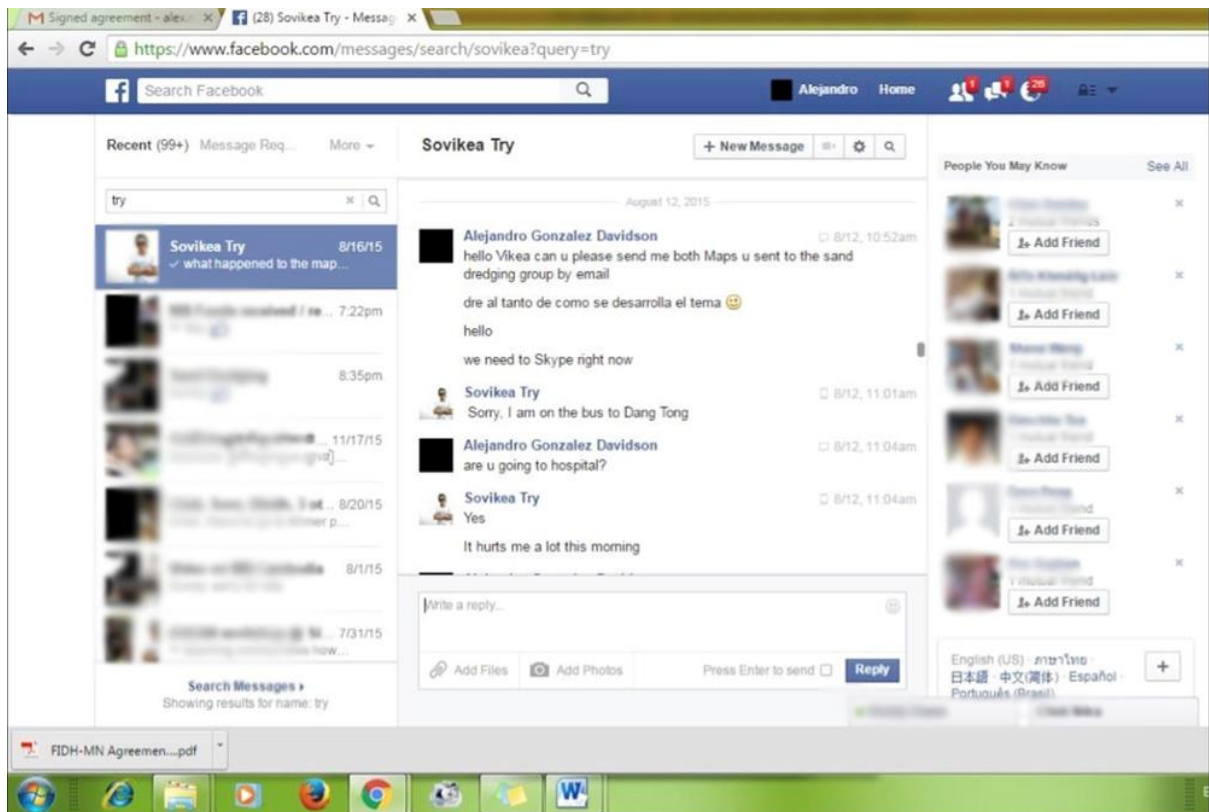
⁵⁵ Joint Statement 'CSOs declare support for Mother Nature and condemn crackdown against the organization', 14 February 2016 <http://bit.ly/28INNuk>

⁵⁶ Aun Pheap and Alex Willemys, 'Ministry Cancels Visa for Deported Spanish Activist' *The Cambodia Daily*, 11 April 2016, <http://bit.ly/28INS1a>

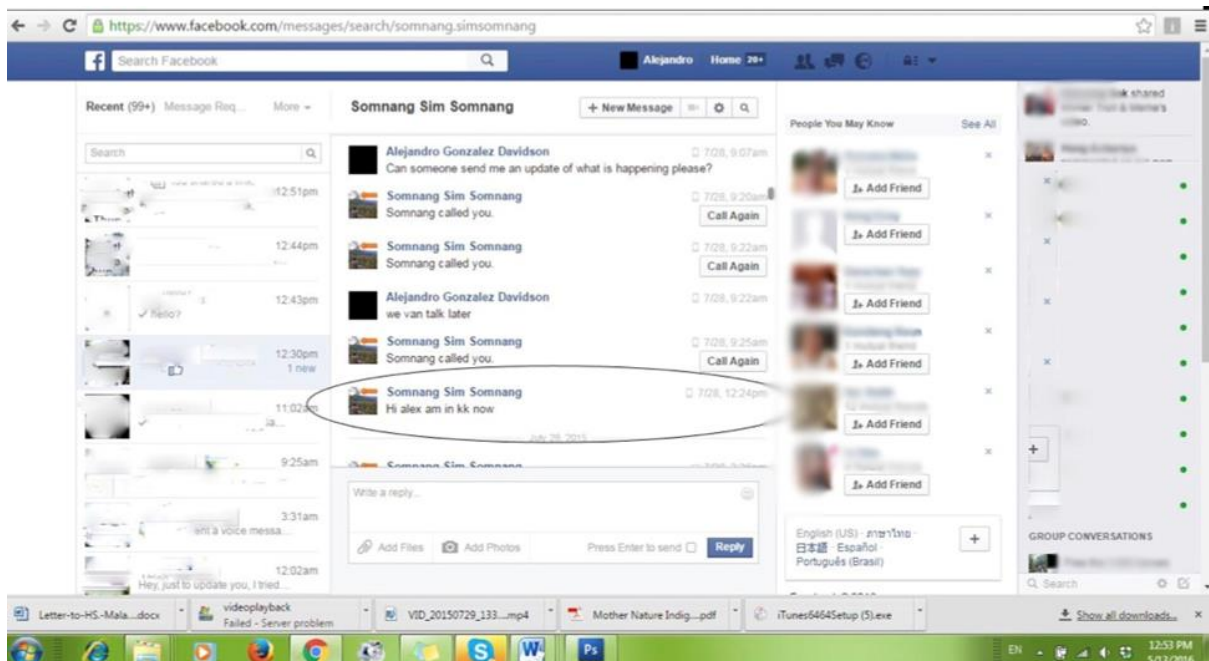
7. CONCLUSION

74. There is a distinct lack of evidence to support the charges against all four charged persons in this case, something which would struggle to satisfy the burden of proof laid out in Article 38 of the Constitution. In the case of the three detained charged persons, there is a lack of well-supported factual evidence to be able to show that they, rather than undefined members of a large group, made any threats to destroy or damage property. On the contrary, evidence points to their behavior being entirely peaceful, and actively promoting non-violence among the gathered community members, which when read in accordance with Article 38 of the Constitution, would suggest the burden would not be met and the presumption of innocence would demand an acquittal of all four charged persons.
75. Additionally, irrespective of the merits of the present charges, the prolonged pre-trial detention of Try Sovikea, San Mala and Sim Somnang must be seen as arbitrary and illegal, in violation of their rights to liberty and a fair trial under Articles 9 and 14 of the ICCPR and Article 38 of the Cambodian Constitution, while failing to fulfill the objective standard of necessity for pre-trial detention outlined under Article 205 of the Code of Criminal Procedure.
76. The accomplice charges against Alejandro Gonzalez-Davidson are similarly unfounded in reliable evidence and unsupported by the law. There was no actual action by Mr. Gonzalez-Davidson on which to base the charges, and there is no evidence that he provided, knowingly or otherwise, any help or assistance to the detained charged persons in committing the alleged offenses. Furthermore, the lack of evidence for the charges against the detained charged persons likely means that the accomplice charge against Mr. Gonzalez-Davidson could not be supported. The forced exile from Cambodia of Mr. Gonzalez Davidson is also in violation of his right to a fair trial – the right to be tried in person. There is no lawful justification in this case for a trial *in absentia*. Conducting a trial *in absentia* in these circumstances would violate Article 14 of the ICCPR as well as Article 38 of the Cambodian Constitution, and be inconsistent with Articles 361 and 362 of the Cambodian Code of Criminal Procedure.
77. Based on the analysis of the charges, evidence and applicable laws it must be concluded that if the detained charged persons receive a fair and independent trial, they must be cleared of all charges and released, and the charges against Mr. Gonzalez-Davidson be dropped in light of the lack of criminal activity. If he is to be tried, Mr. Gonzalez-Davidson must be allowed entry to Cambodia to be guaranteed his fundamental right to be present at his trial, where if it is fair and independent, he must also be cleared of the charge against him.
78. More broadly, the unjustified prosecution of these four individuals and detention of three of them as a result of their acts of peaceful protest represent a clear breach of their rights to freedom of expression and assembly. Their conviction, in light of the weaknesses outlined above, would constitute a further serious violation of these rights and risk having a chilling effect on their future exercise within Cambodia.

ANNEX 1 – Facebook Correspondence (Screenshots)

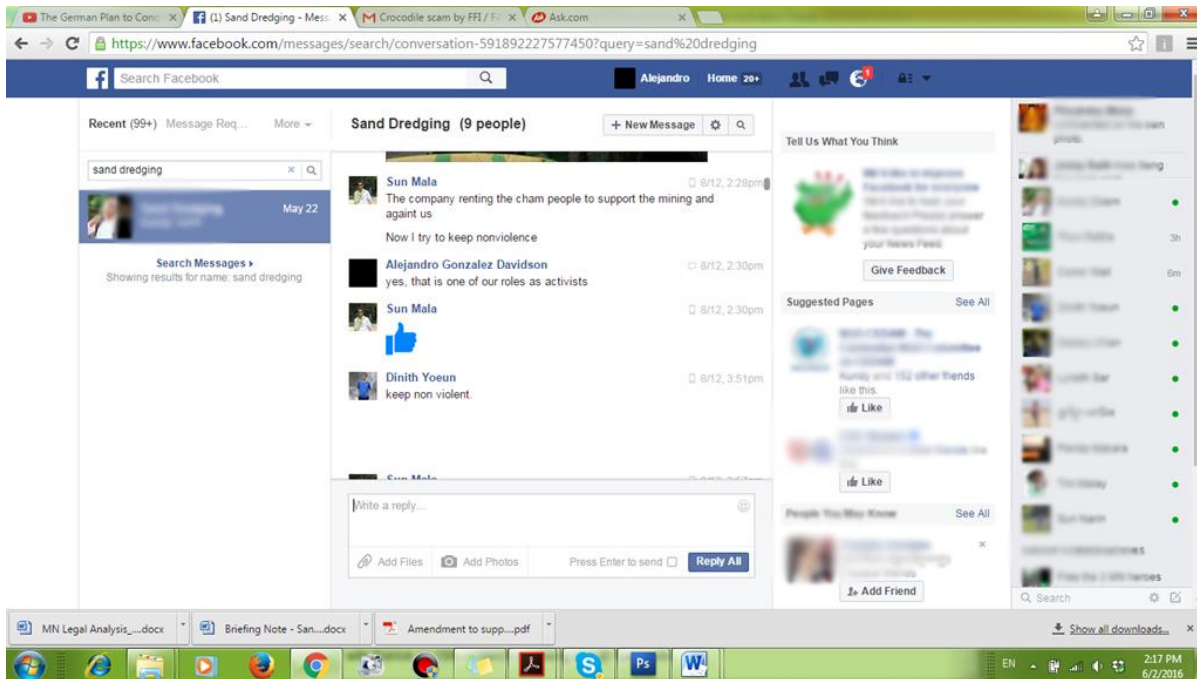


Screenshot 1 - Try Sovikea confirms he is going to Daun Tong (local word for Koh Kong) on 12 August 2015.

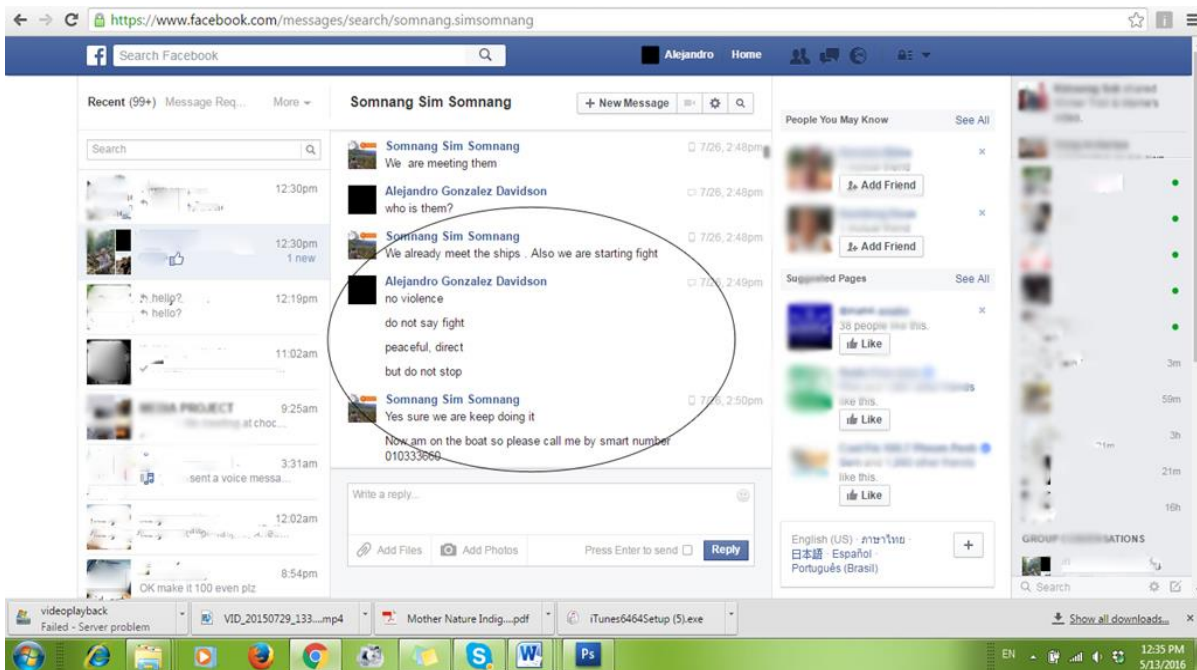


Screenshot 2 - Messages showing that Sim Somnang had left the Andoung Teuk area before protests started on 28 July 2015.

ANNEX 1 (Cont.)



Screenshot 3 – Alex Gonzalez-Davidson messaging activists and emphasising the importance of non-violence.



Screenshot 4 - Alex Gonzalez-Davidson communicating with Sim Somnang about non-violence

ANNEX 2 – Video taken by San Mala on 12 August

The video file is available on request from CCHR, and can be found on Mother Nature's YouTube channel [here](#).

Video Transcript:

Hello to all Cambodians. Today, 12 August 2015, villagers from Botum Skaor district, Andoung Teuk commune have gathered to chase out the company mining for sand in Botum Sakor district one more time, as the company has resumed its mining operations and has not respected our agreement that they would not resume mining unless an inspection team from the Ministry of Mines and Energy came down to conduct new assessments. At this moment, the company has started implementing a new strategy; well actually it is not new, as we have seen it done in all other places. They have hired a group of more than 10 villagers from Andoung Teuk commune, Botum Sakor district, in order for them to protect the company and cause violence and confrontation between villagers. However, us activists are trying our best to do whatever it takes in order to avoid violence taking place and to keep things quiet/under control. We continue being committed to chasing out these companies in order for them to return where they came from. Please see the images of the villagers. Kindly share this video, thanks.

ANNEX 3 – Video of Audio Message from Try Sovikea on 12 August

The video file is available on request from CCHR, and can be found on Mother Nature's YouTube channel [here](#)

Transcript:

(San) Mala just called to tell me that 10 villagers from the Muslim village have been hired as laborers in the barges were stopping [protesters] from climbing onto the cranes. But us (activists) managed to climb and stopping violence from taking place.