



AMERICAN **BAR** ASSOCIATION

Center for Human Rights



## Cambodia v. Kak Sovannchhay

May 2022

# TRIALWATCH FAIRNESS REPORT

A CLOONEY FOUNDATION **FOR** JUSTICE INITIATIVE

## ABOUT THE AUTHORS:

Staff at the **American Bar Association's (ABA) Center for Human Rights (Center)** helped draft this report. The **ABA** is the world's largest voluntary association of lawyers and legal professionals and the national voice of the legal profession. It accredits law schools, provides continuing legal education, promotes policies and programs supporting the work of lawyers and judges, and works to improve the administration of justice and public understanding of the rule of law's importance, nationally and around the world. The **Center** has monitored trials and provided pro bono assistance to at-risk human rights defenders in over 60 countries, including as an implementing partner for the **TrialWatch** initiative. The Center thanks consultant Morvarid Bagheri for assisting with drafting.

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## ABOUT THE CLOONEY FOUNDATION FOR JUSTICE'S TRIALWATCH INITIATIVE:

The **Clooney Foundation for Justice** (CFJ) advocates for justice through accountability for human rights abuses around the world. **TrialWatch** is an initiative of the Clooney Foundation for Justice. Its mission is to expose injustice, help to free those unjustly detained and promote the rule of law around the world. TrialWatch monitors criminal trials globally against those who are most vulnerable — including journalists, protesters, women, LGBTQ+ persons and minorities — and advocates for the rights of the unfairly convicted. Over time, TrialWatch will use the data it gathers to publish a Global Justice Ranking exposing countries' performance and use it to support advocacy for systemic change.

*The views expressed herein represent the opinions of the authors. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association or any of its entities. Furthermore, nothing in this report should be considered legal advice for specific cases. Additionally, the views expressed in this report are not necessarily those of the Clooney Foundation for Justice.*

# EXECUTIVE SUMMARY



**Alex Conte, a member of the Trial Watch Experts Panel, assigned this trial a grade of D:**

The proceedings against Kak Sovannchhay were, having regard to international standards on the freedom of expression, neither necessary nor proportionate. The authorities did not consider his best interests as a child with disabilities in charging and detaining him, thus rendering the process unfair as a whole. The trial was subsequently characterized by several instances that failed to respect the principle of the equality of arms. Particularly egregious to the fundamental guarantees of the right to a fair trial were the means by which Kak Sovannchhay was tried, under adult criminal justice procedures without any effort to adapt proceedings to provide effective accommodation for his age or disability so as to allow an effective defence. This engaged multiple violations of the CRC, CRPD and ICCPR.

In Cambodia, the criminal prosecution and conviction of Kak Sovannchhay, the autistic child of two opposition activists, violated a range of rights that Cambodia is obligated to protect under both domestic and international law. The American Bar Association Center for Human Rights monitored Sovannchhay's trial on charges of incitement of social disorder and insult of a public official as part of the Clooney Foundation for Justice's TrialWatch initiative. In particular, from the police to the prosecution to the presiding judges, the Cambodian authorities showed little regard for the protections Sovannchhay was due as a child with disabilities, including accommodations in detention and at trial and the promotion of rehabilitation over traditional criminal justice objectives.

Sovannchhay's conviction further shows the lengths to which the Cambodian government will go to silence dissenting voices as well as the urgent need to reform Cambodia's 'incitement' law, which has been a crucial tool in the authorities' crackdown on civil society and which the UN Working Group on Arbitrary Detention recently found was inconsistent with international standards.

In June 2021, a then 16-year-old Sovannchhay was arrested and detained based on a Facebook post and private Telegram voice messages, wherein he criticized the government in response to someone bullying him and calling his father a traitor. Sovannchhay's father, Kak Komphear, is a prominent opposition party leader who has been in prison for over two years and whose trial recently commenced. Sovannchhay was likewise detained pending trial, spending five months in total in prison. His trial consisted of one hearing on September 29, 2021. On November 1, 2021, Sovannchhay was convicted and sentenced to 8 months in prison. He was released soon thereafter given the five months he had already served and the court's suspension of the remaining months of his sentence.

From arrest to conviction, the authorities' handling of Sovannchhay's case stripped him of the protections to which he was entitled as a child with disabilities in conflict with the law, rights Cambodia is obligated to respect as a party to the Convention on the Rights of Persons with Disabilities (CRPD), the Convention on the Rights of a Child (CRC), and the International Covenant on Civil and Political Rights (ICCPR). Among other things, the authorities prosecuted Sovannchhay in the adult criminal justice system as opposed to employing diversion measures geared towards rehabilitation or trying him in a separate juvenile justice system, in violation of the ICCPR and CRC; failed to take his best interests into account in holding him in detention for five months, as is required for both children and individuals with disabilities under the CRC and CRPD; failed to provide him with specialized accommodations, services, or care in prison, as is required for children with disabilities under the CRC and CRPD; and prosecuted him without providing him with reasonable accommodations based on his age and disability so that he could effectively participate in his trial, as is required under the CRC, CRPD, and ICCPR.

Indeed, in its haste to convict, the court actively obstructed the provision of assistance to Sovannchhay by denying the defense's request to call a medical expert who could testify about Sovannchhay's lack of culpability given his developmental delays as well about his fitness to stand trial, including potential accommodations required. Absent any support, Sovannchhay struggled to answer questions in court. Nonetheless, the prosecutor declared that Sovannchhay was not affected by any disability and the court promptly convicted him, wholly ignoring the requirement under the CRC that justice actors prioritize rehabilitation for children who come into conflict with the law. In sum, the authorities' discounting of Sovannchhay's needs as a child with disabilities was in stark contravention to international human rights standards.

Moreover, Sovannchhay's arrest, detention, and conviction for incitement and insult of a public official violated his right to freedom of expression, as guaranteed by the ICCPR. As a threshold matter, the law criminalizing incitement to social disorder is overly vague, affording the authorities wide discretion that is ripe for abuse. Correspondingly, the law criminalizing insult of a public official violates the right to freedom of expression on its face: public officials, including heads of state, are legitimately subject to criticism, and freedom of expression cannot be restricted based on subjective feelings of offensiveness. Consequently, given these laws' inconsistency with freedom of expression standards, the case against Sovannchhay was invalid from the outset.

In addition to the flaws in the laws on their face, the criminal proceedings against Sovannchhay were neither necessary nor proportionate, as required by the right to freedom of expression. In line with necessity and proportionality requirements, only the gravest of speech offenses warrant criminal prosecutions and penalties. The State must further prove that there is an imminent threat posed by the speech at hand in order to proceed with a criminal prosecution. Sovannchhay's private Telegram voice recordings and Facebook picture did not come close to the level of gravity necessary to initiate criminal proceedings.

Moreover, the prosecution did not even attempt to explain the potential threat posed by Sovannchhay's posts, either to social order or to a public official. Instead, the prosecution relied on the court to rubberstamp its vague warnings of unrest, as the court indeed proved more than willing to do.

While Sovannchhay's appeal of his conviction has been rejected, international actors, such as the U.S. government and the European Union, should continue to press the Cambodian government to cease targeting government critics, to amend its incitement legislation, and to uphold the rights of children and persons with disabilities who come into conflict with the law.



## A. POLITICAL AND LEGAL CONTEXT

Cambodia is a constitutional monarchy with an elected parliamentary government. Prime Minister Hun Sen and his ruling Cambodian People's Party (CPP) have been in power since 1985, making him one of the world's longest-serving leaders.<sup>1</sup> The main opposition party, the Cambodia National Rescue Party (CNRP), received 45% of popular vote in the 2013 elections in the face of alleged electoral irregularities.<sup>2</sup>

The contested 2013 election results triggered some of the largest protests in modern Cambodian history.<sup>3</sup> In the 2017 local elections, the CNRP again collected 45% of the vote in the face of "serious electoral irregularities,"<sup>4</sup> soon after which it was dissolved by the Cambodian Supreme Court.<sup>5</sup> As a result, the CPP gained all of the National Assembly seats in the 2018 national elections,<sup>6</sup> turning the country into "a de facto one-party state."<sup>7</sup> As observed by Human Rights Watch, there are "no serious prospects for free and fair elections" for the upcoming national elections in 2023, with prominent CNRP leaders having been detained or having "fled into exile for fear of arbitrary arrest."<sup>8</sup> Sam Rainsy, the acting head of the CNRP, has been in exile in France since 2015, while founder and former CNRP president Kem Sokha is currently under house arrest and on trial for treason.<sup>9</sup>

Notably, since 2018 the country's human rights situation has "dramatically worsened."<sup>10</sup> As described by CIVICUS, "repressive laws and judicial harassment [are systematically] used in Cambodia to restrict civic freedoms, undermine and weaken civil society, and criminalize

<sup>1</sup> Radio Free Asia, "Cambodia's Acting Opposition Chief Sam Rainsy Sentenced to 25 Years For 'Attempted Coup'", March 1, 2021. Available at <https://www.rfa.org/english/news/cambodia/sentenced-03012021173934.html>.

<sup>2</sup> BBC, "Cambodia Profile Timeline", July 20, 2018. Available at <https://www.bbc.com/news/world-asia-pacific-13006828>; The Geopolitics, "Cambodia Doomed to Repeat 2018 Electoral Farce Until Opposition CNRP Reinstated", October 18, 2021. Available at <https://thegeopolitics.com/cambodia-doomed-to-repeat-2018-electoral-farce-until-opposition-cnrp-reinstated/>.

<sup>3</sup> BBC, "Cambodia Profile Timeline", July 20, 2018.

<sup>4</sup> Geopolitics, "Cambodia Doomed to Repeat 2018 Electoral Farce Until Opposition CNRP Reinstated", September 29, 2021. Available at <https://thegeopolitics.com/cambodia-doomed-to-repeat-2018-electoral-farce-until-opposition-cnrp-reinstated/>.

<sup>5</sup> BBC, "Cambodia Profile Timeline", July 20, 2018.

<sup>6</sup> AsiaNews, "Phnom Penh: new law to exclude Hun Sen's opponents", October 15, 2021. Available at <http://www.asianews.it/news-en/Phnom-Penh:-new-law-to-exclude-Hun-Sen's-opponents-54287.html>.

<sup>7</sup> United States Department of State, "Country Reports on Human Rights Practices: Cambodia, 2020", 2021, pg. 1. Available at <https://kh.usembassy.gov/wp-content/uploads/sites/80/CAMBODIA-2020-HUMAN-RIGHTS-REPORT.pdf>.

<sup>8</sup> Human Rights Watch, "UN Rights Body Should Increase Scrutiny of Cambodia's Rights Crackdown", October 7, 2021. Available at <https://www.hrw.org/news/2021/10/07/un-rights-body-should-increase-scrutiny-cambodias-rights-crackdown#/>.

<sup>9</sup> Radio Free Asia, "Cambodia's Acting Opposition Chief Sam Rainsy Sentenced to 25 Years For 'Attempted Coup'", March 1, 2021.

<sup>10</sup> Human Rights Watch, "UN Rights Body Should Increase Scrutiny of Cambodia's Rights Crackdown."



individuals for exercising their rights to freedom of expression, freedom of association, and freedom of peaceful assembly.”<sup>11</sup>

## Restrictions on Political Participation

As discussed above, there are “severe restrictions on political participation” in Cambodia.<sup>12</sup> In the words of Human Rights Watch:

Unlike after previous elections in 2008 and 2013, Prime Minister Hun Sen’s threatening political rhetoric towards dissidents and political opponents has not cooled off ... With the help of its politicized and corrupt judiciary, the Cambodian government [has] stepped up its harassment of former CNRP officials and activists.<sup>13</sup>

In August 2019, acting CNRP president Sam Rainsy announced “that he and other CNRP exiles would return to Cambodia”<sup>14</sup> on November 9 “to lead peaceful pro-democracy protests.”<sup>15</sup> On November 8, however, he was not permitted to board a Thai Airways flight to Bangkok from Paris (from which he was scheduled to fly to Phnom Penh).<sup>16</sup> After Rainsy’s announcement, authorities launched a mass crackdown on the opposition. By March 2021, at least “150 CNRP members and activists” were reported to have been charged with “treason and incitement, mostly for voicing support” for Rainsy’s return.<sup>17</sup>

Among these individuals is Kak Sovannchhay’s father Kak Komphear, who formerly headed the CNRP Phnom Penh executive committee. Komphear had already been convicted *in absentia* (he was in hiding) in early 2019 on charges of “conspiring to insult and incite[ment]” for his alleged participation in a CNRP-led election boycott campaign ahead of the 2018 elections. The government had characterized the campaign as “a coup by the opposition.”<sup>18</sup> Komphear was sentenced to a year and eight months imprisonment.<sup>19</sup>

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<sup>11</sup> CIVICUS, “UN Adopts Resolution on Cambodia”, October 11, 2021. Available at <https://www.civicus.org/index.php/media-resources/news/united-nations/geneva/5336-un-human-rights-council-adopts-resolution-on-cambodia>.

<sup>12</sup> See United States Department of State, “Country Reports on Human Rights Practices: Cambodia, 2020”, 2021, pg. 1.

<sup>13</sup> Human Rights Watch, “Political Prisoners Cambodia”, December 23, 2021. Available at <https://www.hrw.org/video-photos/interactive/2021/12/23/political-prisoners-cambodia>.

<sup>14</sup> *Id.*

<sup>15</sup> Radio Free Asia, “Cambodia’s Acting Opposition Chief Sam Rainsy Sentenced to 25 Years For ‘Attempted Coup’”, March 1, 2021.

<sup>16</sup> Al Jazeera, “Cambodia’s Rainsy ‘Refused Boarding’ Onto Paris-Bangkok Flight”, November 7, 2019. Available at <https://www.aljazeera.com/news/2019/11/7/cambodias-rainsy-refused-boarding-onto-paris-bangkok-flight>.

<sup>17</sup> Radio Free Asia, “Cambodia’s Acting Opposition Chief Sam Rainsy Sentenced to 25 Years For ‘Attempted Coup’”, March 1, 2021.

<sup>18</sup> Human Rights Watch, “Political Prisoners Cambodia (Kak Komphear)”, December 23, 2021; Global Voices, “Cambodia’s ‘Clean Fingers’ Campaign Encourages Voters to Boycott Sham Election”, July 24, 2018. Available at <https://globalvoices.org/2018/07/24/cambodias-clean-finger-campaign-urges-voters-to-boycott-sham-election/>.

<sup>19</sup> Phnom Penh Post, “Ex-CNRP activist arrested over 2019 incitement case”, June 1, 2020. Available at <https://www.phnompenhpost.com/national-politics/ex-cnrp-activist-arrested-over-2019-incitement-case>.

On May 31, 2020, he was tracked down, arrested, and detained in a different case – on charges of “plotting” and incitement in connection with Sam Rainsy’s failed return effort.<sup>20</sup>

On November 17, 2021, the Phnom Penh Municipal Court refused the latest bail request from Komphear and 13 co-defendants, despite their poor health and pleas that “their families [were] suffering [as] their money earners are in prison.”<sup>21</sup> Komphear has now been in detention for almost two years.<sup>22</sup> Notably, Rainsy was sentenced *in absentia* to 25 years imprisonment in March 2021 “for plotting a ‘coup’ as part of his attempt to return home.”<sup>23</sup>

## Constraints on Right to Peaceful Assembly

Over the past several years, Cambodia has increasingly stifled the right to freedom of peaceful assembly. In November 2020, for example, several UN experts, including the Special Rapporteur on the rights of peaceful assembly and association, the Special Rapporteur on the situation of human rights defenders, and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, raised concerns about “tightening restrictions on civil society in Cambodia,” “call[ing] for an immediate end to the systematic detention and criminalization of human rights defenders” protesting against the government.<sup>24</sup>

As part of this crackdown, the authorities have quashed demonstrations by the Friday Wives, a group of women who organized gatherings in support of their detained husbands – including the individuals being prosecuted in Kak Komphear’s ongoing case.<sup>25</sup> The Friday Wives, in which Sovannchhay’s mother, Prum Chantha, is an active participant, are so named because of “their weekly rallies [every Friday] on behalf of their husbands from the banned Cambodia National Rescue Party.”<sup>26</sup>

The police have used force against the Friday Wives during their peaceful demonstrations.<sup>27</sup> In June 2021, for example, police officers “roughly manhandled the

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<sup>20</sup> Human Rights Watch, “Political Prisoners Cambodia (Kak Komphear)”, December 23, 2021; Seattle Times, “Cambodian court denies bail to 14 opposition members”, November 17, 2021. Available at <https://www.seattletimes.com/nation-world/cambodian-court-denies-bail-to-14-opposition-members/>.

<sup>21</sup> See Seattle Times, “Cambodian court denies bail to 14 opposition members”, November 17, 2021.

<sup>22</sup> Id.

<sup>23</sup> Radio Free Asia, “Cambodia’s Acting Opposition Chief Sam Rainsy Sentenced to 25 Years For ‘Attempted Coup’”, March 1, 2021.

<sup>24</sup> United Nations Human Rights Special Procedures, “Cambodia: UN Experts alarmed by civil society crackdown, attacks on defenders”, November 16, 2020. Available at [https://cambodia.ohchr.org/sites/default/files/UN%20experts%20alarmed%20by%20civil%20society%20crackdown,%20attacks%20on%20defenders\\_Final\\_EN.pdf](https://cambodia.ohchr.org/sites/default/files/UN%20experts%20alarmed%20by%20civil%20society%20crackdown,%20attacks%20on%20defenders_Final_EN.pdf).

<sup>25</sup> Radio Free Asia, “Cambodia Police Rough Up ‘Friday Wives’ of Jailed Opposition Politicians”, June 4, 2021. Available at <https://www.rfa.org/english/news/cambodia/friday-wives-06042021182929.html>; Seattle Times, “Cambodian court denies bail to 14 opposition members”, November 17, 2021.

<sup>26</sup> Radio Free Asia, “Cambodia Police Rough Up ‘Friday Wives’ of Jailed Opposition Politicians”, June 4, 2021.

<sup>27</sup> Id.



women as they tried to pry large posters with their husbands' images from their hands," which they were carrying for a protest in front of OHCHR's Cambodia office.<sup>28</sup> UN experts recently noted that they viewed Sovannchhay's "conviction and the conditions imposed on his liberty as a very transparent attempt by the authorities to prevent his mother from demonstrating for the release of her husband."<sup>29</sup>

## Suppression of the Right to Freedom of Expression

Notwithstanding the Cambodian Constitution's guarantee of freedom of expression, the government has increasingly and systematically silenced critics, political opponents, and journalists using vague catch-all charges. In 2019, for example, both the UN Special Rapporteur on Cambodia and the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression expressed concern at "an escalating trend of suppression by the Cambodian Government of dissenting opinions in what appears to be an attempt to intimidate or silence political opinion"<sup>30</sup> and highlighted "the use of criminal law to target free speech, both offline and online."<sup>31</sup>

In 2020, as noted by the U.S. State Department, there were "serious restrictions on free expression, the press, and the internet, including violence and threats of violence, unjustified arrests or prosecutions of journalists, censorship, site blocking, and criminal libel laws."<sup>32</sup> In November 2021, UN experts criticized Cambodia for "weaponis[ing its court system] to silence any form of dissent" and urged "the country to protect freedom of expression,"<sup>33</sup> while HRW reported intensified crackdowns on "independent media outlets, its journalists and critical social media commentators."<sup>34</sup>

## Incitement Charges

As demonstrated by the case against Sovannchhay and the aforementioned charges against his father as well as other CNRP activists, the government frequently deploys the charge of incitement to disturb social order under Articles 494 and 495 of the Criminal Code of the Kingdom of Cambodia (CCKC) against dissenting voices. The provisions make "the direct incitement to commit a felony or to disturb social security" punishable by six to 24

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<sup>28</sup> Id.

<sup>29</sup> See OHCHR, "Cambodia: Stop using courts to persecute people who stand up for human rights—UN experts", November 2, 2021. Available at <https://cambodia.ohchr.org/sites/default/files/newsreleasesource/02112021%20Cambodia%20Press%20Release.pdf>.

<sup>30</sup> United Nations Office of the High Commissioner of Human Rights, "Cambodia: UN Experts Concerned at Government Moves to Silence Political Opponents", June 19, 2019. Available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24711&LangID=E>.

<sup>31</sup> Id.

<sup>32</sup> United States Department of State, "Country Reports on Human Rights Practices: Cambodia, 2020", 2021, pg. 1.

<sup>33</sup> OHCHR, "Cambodia: Stop using courts to persecute people who stand up for human rights—UN experts", November 2, 2021.

<sup>34</sup> Human Rights Watch, "UN Rights Body Should Increase Scrutiny of Cambodia's Rights Crackdown", October 7, 2021.

months imprisonment and a fine of up to four million Riels when the incitement was ineffective<sup>35</sup> and delivered through speech in a public place, through a writing or picture displayed or distributed to the public, or through audio-visual communications to the public.<sup>36</sup>

In the past two years, in addition to Kak Sovannchhay's trial, the American Bar Association's Center for Human Rights has monitored three criminal incitement trials as part of the Clooney Foundation for Justice's TrialWatch initiative.<sup>37</sup> First, in June 2020, activist Kong Raiya was convicted of "incitement to disrupt social order" for advertising the sale of t-shirts commemorating a slain critic of the government on Facebook.<sup>38</sup> In November 2020, journalist Ros Sokhet was also convicted of incitement – and sentenced to 18 months in prison – based on Facebook posts in which he criticized high profile public figures.<sup>39</sup> And in an ongoing trial monitored by the ABA Center for Human Rights as part of TrialWatch, Cambodian-American human rights lawyer Theary Seng, along with 46 co-defendants, is facing charges of incitement and conspiracy to commit treason for her public criticism of the Cambodian government.<sup>40</sup> Most recently, in October 2021, ten political, social and youth activists were sentenced to 20 months in prison on incitement charges.<sup>41</sup>

In December 2021, in response to a petition filed by the Clooney Foundation for Justice and Debevoise & Plimpton LLP, the UN Working Group on Arbitrary Detention concluded that Article 495 violated international human rights standards, stating that the provision "fail[ed] to distinguish between violent acts and peaceful exercise of fundamental freedoms" and urging Cambodia to amend it accordingly.<sup>42</sup>

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<sup>35</sup> Criminal Code of the Kingdom of Cambodia (CCKC), Article 495.

<sup>36</sup> CCKC, Article 494.

<sup>37</sup> For a summary of the troubling common trend in these trials, see Clooney Foundation for Justice, "Cambodia." Available at <https://cfj.org/wp-content/uploads/2021/04/Clooney-Foundation-for-Justice-Cambodia.pdf>.

<sup>38</sup> Arthur Traldi & American Bar Association, "Trial Observation Report: Cambodia v. Kong Raiya", November 20, 2020. Available at [https://www.americanbar.org/groups/human\\_rights/reports/fair\\_trial\\_report\\_cambodia\\_kong\\_raiya/](https://www.americanbar.org/groups/human_rights/reports/fair_trial_report_cambodia_kong_raiya/).

<sup>39</sup> American Bar Association, "Trial Observation Report: Cambodia v. Ros Sokhet", February 16, 2021. Available at [https://www.americanbar.org/groups/human\\_rights/reports/fair\\_trial\\_report\\_cambodia\\_ros\\_sokhet/](https://www.americanbar.org/groups/human_rights/reports/fair_trial_report_cambodia_ros_sokhet/).

<sup>40</sup> American Bar Association, "Trial Observation Report: Cambodia v. Theary Seng", June 25, 2021. Available at [https://www.americanbar.org/content/dam/aba/administrative/human\\_rights/trialwatch/cambodia-theary-seng.pdf](https://www.americanbar.org/content/dam/aba/administrative/human_rights/trialwatch/cambodia-theary-seng.pdf)

<sup>41</sup> LICADHO, "Ten Imprisoned Activists Convicted of Incitement for Their Peaceful Work", October 26, 2021. Available at <https://www.licadho-cambodia.org/flashnews.php?perm=295&wdLOR=c300BCA10-BC87-F54E-A02A-C7D01EDA2B8B>.

<sup>42</sup> United Nations Working Group on Arbitrary Detention, Opinions Adopted by the Working Group on Arbitrary Detention at its Ninety-Second Session, 15–19 November 2021, U.N. Doc. A/HRC/WGAD/2021/75, January 27, 2022, para. 64. Available at [https://www.ohchr.org/sites/default/files/2022-03/A\\_HRC\\_WGAD\\_75\\_2021\\_Cambodia\\_AEV.pdf](https://www.ohchr.org/sites/default/files/2022-03/A_HRC_WGAD_75_2021_Cambodia_AEV.pdf).

## Fair Trial Violations

Cambodian law mandates an independent judiciary and provides defendants the rights to be presumed innocent, to consult with an attorney, to be provided free legal representation, to be promptly informed of charges, to be present at trial, and to appeal a conviction, among other rights.<sup>43</sup> However, due process rights are “poorly upheld”<sup>44</sup> and judicial independence is almost non-existent.<sup>45</sup> In 2014, three judicial reform laws were passed that effectively institutionalized the judiciary and prosecution’s lack of independence from the executive branch.<sup>46</sup>

As such, prosecution evidence is often “considered to be authoritative without effective challenges or judicial scrutiny,” and trial judges regularly admit statements of witnesses who fail to appear for cross-examination.<sup>47</sup> This has resulted in violations of the right to presumption of innocence, with trial judges “simply endors[ing] the results of judicial investigations” and outcomes appearing predetermined.<sup>48</sup> As stated by Freedom House, “[s]ham trials are frequent.”<sup>49</sup>

For example, the aforementioned recent TrialWatch reports on the cases against CNRP youth activist Kong Raiya and journalist Ros Sokhet, both of whom were tried before the Phnom Penh Municipal Court, found that the Court convicted the accused despite, respectively, the prosecution’s patent failure to prove the elements of the crime of incitement.<sup>50</sup>

## Juvenile Justice

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<sup>43</sup> United States Department of State, “Country Reports on Human Rights Practices: Cambodia, 2020”, 2021, pgs. 8-9.

<sup>44</sup> Freedom House, “Freedom in the World Report on Cambodia”, 2021. Available at <https://freedomhouse.org/country/cambodia/freedom-world/2021>.

<sup>45</sup> See id.; International Bar Association, “Justice versus Corruption: Challenges to the independence of the judiciary in Cambodia”, September 17, 2015. Available at [http://ticambodia.org/library/wp-content/files\\_mf/1443694998JusticevcorruptioninCambodiaAug2015.pdf](http://ticambodia.org/library/wp-content/files_mf/1443694998JusticevcorruptioninCambodiaAug2015.pdf);

Licadho, “Unconstitutional Draft Laws on the Judiciary should be Rejected”, June 15, 2014. Available at <https://www.licadho-cambodia.org/pressrelease.php?perm=346>.

<sup>46</sup> International Commission of Jurists, “Misuse of law will do long-term damage to Cambodia”, July 26, 2018. Available at <https://www.icj.org/misuse-of-law-will-do-long-term-damage-to-cambodia/>.

<sup>47</sup> International Commission of Jurists, “Achieving Justice for Gross Human Rights Violations in Cambodia: Baseline Study”, October 2017, pg. 20. Available at <https://www.refworld.org/pdfid/5a212f144.pdf>.

<sup>48</sup> Id.

<sup>49</sup> Freedom House, “Freedom in the World Report on Cambodia”, 2021.

<sup>50</sup> Arthur Traldi & American Bar Association, “Trial Observation Report: Cambodia v. Kong Raiya”, November 20, 2020; American Bar Association, “Trial Observation Report: Cambodia v. Ros Sokhet”, February 16, 2021.

The Cambodia Juvenile Justice Law (CJJL)<sup>51</sup> was passed in 2016 and became effective in 2017. It aims to protect the best interests of children who come into conflict with the law.<sup>52</sup> Notably, Cambodia's duty to abide by the best interests of the child is recognized in its Constitution.<sup>53</sup> The CJJL provides for diversion from the criminal justice system at various stages of legal proceedings for children charged with misdemeanors and petty offenses; for the training of judges, prosecutors, police, and social workers in juvenile justice; for child-friendly interviewing and investigation practices; and for the establishment of Youth Rehabilitation Centers, which could serve as alternatives to detention.<sup>54</sup> It also recognizes the fundamental principle that pre-trial detention should be a measure of last resort, including for children.<sup>55</sup>

Although in June 2021 Deputy Prosecutor Toch Oudom of Cambodia's Kampong Cham province became the first prosecutor to issue a diversion order to keep two child defendants out of the criminal justice system,<sup>56</sup> this sort of intervention has been all too rare. Indeed, the CJJL has yet to be adequately implemented. As of 2021, as documented by international NGO "This Life," few youth rehabilitation centers had been established and children continued to be funneled into the adult prison system.<sup>57</sup>

Also in 2021, the UN Special Rapporteur for Cambodia observed that Cambodia still lacked "juvenile courts" and "dedicated juvenile judges," and that "there [was] no evidence that the [CJJL] [was] being applied in regular proceedings, as illustrated in particular by the number of juveniles ... in detention, including in pretrial detention, often for minor offences."<sup>58</sup> In April 2021, the country reported 1,406 detained juveniles aged 14 to 17, including 46 girls and 640 children in custody at the pretrial stage of proceedings.<sup>59</sup> As documented by This

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<sup>51</sup> Cambodia Juvenile Justice Law (CJJL), adopted in 2016. See also Kingdom of Cambodia Ministry of Justice and Ministry of Social Affairs, Veterans and Youth Rehabilitation, "Juvenile Justice Law Strategic and Operational Plan 2018 – 2020", 2018. Available at [https://www.unicef.org/cambodia/media/456/file/JJLSOP\\_Eng\\_0.PDF%20.pdf](https://www.unicef.org/cambodia/media/456/file/JJLSOP_Eng_0.PDF%20.pdf).

<sup>52</sup> Cambodian Center for Human Rights, "Fair Trial Rights in Cambodia: Monitoring at the Court of Appeal", October 2019, pg. 3. Available at [https://cchrcambodia.org/admin/media/report/report/english/CCHR%20Report%20on%20Fair%20Trial%20Rights\\_%202017-2018\\_ENG.pdf](https://cchrcambodia.org/admin/media/report/report/english/CCHR%20Report%20on%20Fair%20Trial%20Rights_%202017-2018_ENG.pdf).

<sup>53</sup> Constitution of Cambodia, Article 48. See also Constitutional Council of the Kingdom of Cambodia, Decision No. 092/003/2007, July 10, 2007.

<sup>54</sup> See CJJL, Articles 12, 22, 24, 31, 35, 44, 60-71, 76-77; Aekje Teeuwen, "Juvenile Defendants Right to be Tried Within a Reasonable Time in Cambodia: An International Human Rights Analysis", *Journal of Youth Justice*, March 15, 2019, pgs. 52-53; Jenessy Rodriguez, "Cambodia's Juvenile Justice System: Overcoming Challenges to Protect the Rights of Cambodian Youth", *Children's Legal Rights Journal*, 2020.

<sup>55</sup> CJJL, Article 39.

<sup>56</sup> UNICEF, "Diversion: a juvenile justice success story", October 21, 2021. Available at <https://www.unicef.org/cambodia/stories/diversion-juvenile-justice-success-story>.

<sup>57</sup> See This Life, "No Place for a Child", February 2021. Available at [https://issuu.com/this-life-ngo/docs/booklet\\_eng-issuu?fr=sODExNjI5MDgxNDI](https://issuu.com/this-life-ngo/docs/booklet_eng-issuu?fr=sODExNjI5MDgxNDI); Aekje Teeuwen, "Juvenile Defendants Right to be Tried Within a Reasonable Time in Cambodia: An International Human Rights Analysis", *Journal of Youth Justice*, March 15, 2019, pgs. 43, 52.

<sup>58</sup> Human Rights Council, Report of the Special Rapporteur on the situation of human rights in Cambodia, U.N. Doc. A/HRC/48/79, August 3, 2021, para. 57. Available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/210/37/PDF/G2121037.pdf>.

<sup>59</sup> *Id.*

Life, the number of children in prison almost tripled in the three years after the passage of the CJJL.<sup>60</sup>

## The Justice System and Persons with Disabilities

Persons with disabilities in Cambodia “face various barriers when accessing justice and legal aid.”<sup>61</sup> Judicial actors are not trained or “sensitized” to the rights and needs of persons with disabilities. Similarly, there are few lawyers with experience “providing legal services to clients with disabilities.”<sup>62</sup>

For instance, Article 31 of the Criminal Code states that a person who “suffered from [a] mental disorder which suppresses his/her discernment” at the time of an offense is not criminally responsible.<sup>63</sup> However, many lawyers and judges are not aware of this provision – or ignore it. Moreover, there is a shortage of professionals who could “provide the required psychological report ... to the court” in order to meaningfully apply the provision.<sup>64</sup>

Meanwhile, the United Nations Development Program recently found that persons with disabilities in Cambodia “do not have an adequate understanding of their legal rights in the criminal justice system, what the legal process entails, and how to access legal aid.”<sup>65</sup>

Persons with disabilities also face poor conditions in prison. In 2021, the U.S. State Department reported that prisons in Cambodia did not have “adequate facilities for persons with mental and physical disabilities.”<sup>66</sup> The system’s mental health services have been characterized as “virtually nonexistent,” as many prisons “rely[] on ‘health workers’ who receive very basic health training with no mental health component” in lieu of specialized doctors.<sup>67</sup>

Additionally, persons with disabilities are vulnerable to being detained in centers outside of the criminal justice system, which are purportedly aimed at drug addiction treatment and

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<sup>60</sup> This Life, “No Place for a Child”, February 2021, pg. 9.

<sup>61</sup> United Nations Development Program, “Practical Guideline on Legal Aid for Persons with Disabilities in Criminal Justice: Guidance for Persons with Disabilities, Disabled People’s Organizations, and Lawyers in Cambodia”, 2020, pg. 4. Available at <https://drive.google.com/file/d/1ye4ewfmLEAjzoo2gosTxyUGjv8aov4a/view>.

<sup>62</sup> Id. at pg. 4.

<sup>63</sup> Fordham International Law Journal, “Special Report - Mental Health and Human Rights in Cambodia”, 2017, pg. 959. Available at <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2590&context=ilj>. Note: English translations of the Criminal Code translate the relevant provision on criminal liability as when a person at the time of the offense “was suffering from a mental disorder which destroyed his or her capacity to reason.” CCKC, Article 31.

<sup>64</sup> Id. at pgs. 959-960.

<sup>65</sup> United Nations Development Program, “Practical Guideline on Legal Aid for Persons with Disabilities in Criminal Justice: Guidance for Persons with Disabilities, Disabled People’s Organizations, and Lawyers in Cambodia”, 2020, pg. 4.

<sup>66</sup> United States Department of State, “Country Reports on Human Rights Practices: Cambodia, 2020”, 2021, pg. 4.

<sup>67</sup> Fordham International Law Journal, “Special Report - Mental Health and Human Rights in Cambodia”, 2017, pg. 951.



rehabilitation but “in reality ... are instead used to illegally detain drug users and other ‘undesirables,’ such as sex workers, the homeless, and persons with mental disabilities.”<sup>68</sup> Prosecutors and judges have also admitted to sending people deemed not responsible for criminal conduct to these centers due to a lack of specialized mental health care facilities.<sup>69</sup> Conditions in the centers are “notoriously brutal”; persons with disabilities in particular are subject to physical violence, in addition to shackling, chaining, and overcrowding.<sup>70</sup>

Notably, Cambodia has previously criminally convicted children with disabilities.<sup>71</sup> Meas Nun, for example, was arrested in 2013 at the age of 14 or 15 in connection with a violent police crackdown on protests by garment workers.<sup>72</sup> Nun, who had “epilepsy and a ‘minor intellectual disability’” according to his defense lawyer,<sup>73</sup> was charged with aggravated intentional damage to property, aggravated intentional acts of violence, insult, and aggravated obstruction of a public official,<sup>74</sup> which carried a potential sentence of 11 years in prison.<sup>75</sup> There was “no video or other evidence” that Nun had “set fire to any vehicle,” the primary act underlying the charges.<sup>76</sup> Not only was Nun not given proper accommodations as a person with a disability, but the judge was “openly hostile to the ... accused, their defense lawyers, and two exculpatory witnesses,” including by preventing a defense lawyer from introducing “potentially exculpatory video evidence.”<sup>77</sup> Nun was subsequently convicted on all charges and sentenced to six months in prison, with the remainder of his sentence suspended.<sup>78</sup>

## **B. CASE HISTORY**

Kak Sovannchhay, born on November 24, 2004, is the autistic son of two opposition figures. He reportedly did not speak before the age of 7 and was held back three grades due to developmental delays. Sovannchhay, then 16-years old, was arrested and detained on June 24, 2021 for posting a picture of Hun Sen’s family on Facebook with the label “traitors” and criticizing the government in three voice recordings shared in a private Telegram group

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<sup>68</sup> Id. at pg. 952.

<sup>69</sup> Id. at pgs. 953-954.

<sup>70</sup> Id. at pgs. 954-955.

<sup>71</sup> Human Rights Watch, “Cambodia: Steung Meanchey Trial Deeply Flawed”, May 11, 2014. Available at <https://www.hrw.org/news/2014/05/11/cambodia-steung-meanchey-trial-deeply-flawed>. See also Amnesty International, “Criminal Cases Against Human Rights Defenders, and Political and Other Activists in Cambodia”, 2017. Available at <https://www.amnesty.org/en/wp-content/uploads/2021/05/ASA2363392017ENGLISH.pdf>.

<sup>72</sup> Id.

<sup>73</sup> Id.

<sup>74</sup> Amnesty International, “Criminal Cases Against Human Rights Defenders, and Political and Other Activists in Cambodia”, 2017.

<sup>75</sup> The Phnom Penh Post, “Rights Group Slams SL Case”, May 12, 2014. Available at <https://www.phnompenhpost.com/national/rights-group-slams-sl-case>.

<sup>76</sup> Human Rights Watch, “Cambodia: Steung Meanchey Trial Deeply Flawed”, May 11, 2014.

<sup>77</sup> Id.

<sup>78</sup> Amnesty International, “Criminal Cases Against Human Rights Defenders, and Political and Other Activists in Cambodia”, 2017.



in response to other group participants reportedly denouncing his father<sup>79</sup> and calling Sovannchhay the “son of a traitor.”<sup>80</sup> He remained in detention pending trial.<sup>81</sup> On November 1, 2021, Sovannchhay was convicted of intentional incitement to cause social unrest under Articles 494 and 495 of the CCKC, and insult of a public official under Article 502 of the CCKC. He was given a suspended sentence, with credit for time served, and released on November 10, 2021. According to Sovannchhay’s mother, around the time of his arrest Sovannchhay was “dealing with emotional trauma” stemming from his father’s absence and had been defending himself online against “people who had insulted his father as a traitor or rebel.”<sup>82</sup>

In addition to the 2021 criminal proceedings, Sovannchhay was arrested on October 4, 2020 for entering the CNRP headquarters where his father used to work to pick up “party flags [he saw] scattered on the ground” while walking by.<sup>83</sup> The Phnom Penh Municipal Court had seized the headquarters in 2018.<sup>84</sup> Phnom Penh police allegedly punched, slapped, and interrogated Sovannchhay during his arrest and detained him for two days before releasing him without charge,<sup>85</sup> stating that Sovannchhay had been apprehended due to the building being closed and concerns about “losing CNRP’s belongings.”<sup>86</sup> Additionally, Sovannchhay was assaulted in April 2021 by two men on a motorbike who fractured his skull by hitting him with a brick.<sup>87</sup> Sovannchhay’s mother filed a police report but the attackers were never located.<sup>88</sup>

## Arrest

Cambodian “law requires police to obtain a warrant from an investigating judge prior to making an arrest unless police apprehend a suspect while in the act of committing a

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<sup>79</sup> See Seattle Times, “Cambodian court denies bail to 14 opposition members”, November 17, 2021; Phnom Penh Prosecutor’s Office, Introductory Submission, June 25, 2021.

<sup>80</sup> France 24, “Cambodia should release detained autistic teenager, UN experts say”, September 2, 2021. Available at <https://www.france24.com/en/live-news/20210902-cambodia-should-release-detained-autistic-teenager-un-experts-say>.

<sup>81</sup> Phnom Penh Court of First Instance, Order for Provisional Arrest, June 25, 2021.

<sup>82</sup> Voice of Democracy, “Teenager Arrested for Telegram, Audio Messages Insulting Officials”, June 25, 2021. Available at <https://vodenglish.news/teenager-arrested-for-telegram-audio-messages-insulting-officials/>.

<sup>83</sup> Cambodianess, “Son of Former Opposition Member Released After Breaking into CNRP Headquarters”, October 6, 2020. Available at <https://cambodianess.com/article/son-of-former-opposition-member-released-after-breaking-into-cnrp-headquarters>.

<sup>84</sup> *Id.*

<sup>85</sup> OHCHR, “Cambodia: UN experts deeply disturbed by detention of boy with autism for on-line criticism”, September 2, 2021. Available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27423&LangID=E>.

<sup>86</sup> Cambodianess, “Son of Former Opposition Member Released After Breaking into CNRP Headquarters”, October 6, 2020.

<sup>87</sup> OHCHR, “Cambodia: UN experts deeply disturbed by detention of boy with autism for on-line criticism”, September 2, 2021.

<sup>88</sup> Voice of Democracy, “Former CNRP Official’s 16-Year Old Son Attacked With Brick”, April 29, 2021. Available at <https://vodenglish.news/former-cnrp-officials-15-year-old-son-attacked-with-brick/>.

crime.”<sup>89</sup> At 8:30 pm on June 24, 2021, approximately 20 police officers armed with AK-47s surrounded Sovannchhay’s house.<sup>90</sup> Six of these officers reportedly entered the house without a warrant, handcuffed Sovannchhay, and took him away in a car.<sup>91</sup> While inside, three “officers held his mother tightly as she tried to protect him,” and as his terrified 84-year-old grandmother cried hysterically.<sup>92</sup> An officer informed Sovannchhay’s mother that Sovannchhay had been caught “for ‘red-handed’ crimes involving Telegram and audio messages.”<sup>93</sup> The arrest reportedly took place after a Cambodian living in Canada forwarded the aforementioned voice clips to the Cambodian authorities following “an argument on Telegram.”<sup>94</sup> Cambodia’s Anti-Cybercrime Office was tasked with the investigation.<sup>95</sup>

## Charges

On June 25, 2021, prosecutors reported that they “had interrogated and charged” Sovannchhay and were “sending the case to an investigating judge for further questioning.”<sup>96</sup> That day investigating judge San Bunthoeun of the Phnom Penh Municipal Court of First Instance ordered that Sovannchhay be provisionally detained, stating that he was being “investigated and charged with ‘incitement to cause serious harm to public security’” under Articles 494 and 495 of the CCKC, and insult of a public official under Article 502 of the CCKC.<sup>97</sup>

As noted above, Article 494 and Article 495 of the CCKC make “the direct incitement to commit a felony or to disturb social security” punishable by six to 24 months imprisonment. Article 502 of the CCKC criminalizes insulting (defined as “words, gestures, written documents, pictures or objects liable to undermine the dignity of a person”) a public official acting in the discharge of his or her office.

In the provisional detention order, Judge Bunthoeun referenced a June 23 report produced by the Anti-Cybercrime Office, noting that the office had “investigated and found” that Sovannchhay had shared the voice clips on Telegram “with the intent of falsifying, inciting,

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<sup>89</sup> United States Department of State, “Country Reports on Human Rights Practices: Cambodia, 2020”, 2021, pg. 5.

<sup>90</sup> Voice of Democracy, “Teenager Arrested for Telegram, Audio Messages Insulting Officials”, June 25, 2021; BBC, “Cambodia: The Autistic Teenager Jailed Over a Telegram Post”, September 21, 2021. Available at <https://www.bbc.com/news/world-asia-58588022>.

<sup>91</sup> *Id.*

<sup>92</sup> Gofundme, “Help autistic kid unjustly arrested in Cambodia”, July 22, 2021. Available at <https://www.gofundme.com/f/help-autistic-kid-unjustly-arrested-in-cambodia>.

<sup>93</sup> Voice of Democracy, “Updated: Verdict Delayed in Case Against CNRP Activist’s Teenage Son”, October 13, 2021. Available at <https://vodenglish.news/verdict-delayed-in-case-against-cnrp-activists-teenage-son/>.

<sup>94</sup> BBC News, “Cambodia: The Autistic Teenager Jailed Over a Telegram Post”, September 12, 2021.

<sup>95</sup> Phnom Penh Prosecutor’s Office, Introductory Submission, June 25, 2021.

<sup>96</sup> Camboja News, “Former CNRP official’s son arrested on charge of incitement in Telegram chat”, June 25, 2021. Available at <https://cambojanews.com/former-cnrp-officials-son-arrested-on-charge-of-incitement-in-telegram-chat/>.

<sup>97</sup> Phnom Penh Court of First Instance, Order for Provisional Detention, June 25, 2021.

instigating to cause harm to public security,” and that he had had posted edited pictures on Facebook “showing contempt for the leader of the Kingdom of Cambodia.”<sup>98</sup> The Anti-Cybercrime Office’s investigation primarily consisted of the officers confiscating Sovannchhay’s mobile phone and confirming “that indeed said person had sent” the voice clips.<sup>99</sup> The evidence cited in the order for provisional detention included transcripts of two brief voice clips and a photo, as follows:

**June 4 Telegram voice clip** seemingly sent in response to another group participant asking him questions. Sovannchhay says: “we have to claim it back for our fellow Cambodians, remember the history of Oknha SOEUNG Koy, Hero of Kampuchea Kraom, so, we, Cambodians, must fight to drive away, defeat the Vietnamese invaders from Cambodia. That is right and one more thing, the regime of Mr. HUN Sen is not stable.”<sup>100</sup>

**June 23 Telegram voice clip** sent in response to insults. Sovannchhay says: “Why do you not dare curse with me and where are you? Why are you so quiet? I ask. If you dare scold me again, I will hit you on your head. Do not ever dare look down on the Khmer, do not ever dare look down on Cambodia. You give thanks to the damn peace, later you show appreciation to the damn peace, you do it, you want official rank, power, you want to pass it down to your next generation, you have problems making a living, you are trying to make ends meet, open your eyes to see the government, currently, the blind man HUN Sen has governed the country for many years and allowed deforestation, sold mines to foreign countries from 30 to 99 years. It is because of the stupid leader. I dare hit you with shoes, you curse me, come if you dare, motherfucker.”<sup>101</sup>

**June 23 image shared on Facebook**, captioned “the traitor, family of the traitor, children of the traitor.”<sup>102</sup> (Sovannchhay claimed he had copied and pasted the picture from another Facebook page).

Per Cambodian law, once the prosecutor determines there is sufficient evidence to bring charges, he forwards an “introductory submission” (akin to an indictment) to the investigating judge, who upon determining sufficient evidence exists for trial, forwards the case to the presiding court. On July 25, 2021, deputy prosecutor Seng Heang made his introductory submission and requested the continuation of Sovannchhay’s provisional detention.<sup>103</sup> The introductory submission states that enough evidence had been collected to prove Sovannchhay shared the audio clips “with the intent to falsify, incite, instigate to cause harm to the public security” and that in posting the edited Facebook picture he

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<sup>98</sup> Id.

<sup>99</sup> Phnom Penh Court of First Instance, Order for Provisional Detention, June 25, 2021.

<sup>100</sup> Id.

<sup>101</sup> Id.

<sup>102</sup> Id.

<sup>103</sup> Phnom Penh Prosecutor’s Office, Introductory Submission, July 25, 2021.

“showed contempt for the leader of the Kingdom of Cambodia” – nearly identical to the language used by the Anti-Cybercrime Office. The prosecution also added the following Telegram voice clip to the acts underlying the charges:

**June 20 Telegram voice clip** seemingly sent in response to someone asking Sovannchhay questions. He says: “yes, uncle, it is because of criticizing them, the police chief, the supporters of the blind man, Hun Sen, they are all thieves, they steal mobile phones, and something else when they are using drugs. Our society is damned. How are we going to make a living in Cambodia? The roads are closed, now it is so quiet because of Covid. It is just like that, uncle.”<sup>104</sup>

## Detention

Cambodian law requires investigating judges to provide a justification for the imposition of pretrial detention,<sup>105</sup> which under Article 205 of the Criminal Procedure Code of the Kingdom of Cambodia (CPCKC) must be necessary to “stop the offense or prevent the offense from happening again; prevent any harassment of witnesses or victims or prevent any collusion between the charged person and accomplices; preserve evidence or exhibits; guarantee the presence of the charged person during the proceedings against him; [or] protect the security of the charged person.”<sup>106</sup>

As noted above, on June 25 Judge Bunthoeun approved the prosecutor’s request for provisional detention for a maximum period of 45 days “due to the seriousness of the offense, the circumstances of committing the offense, and the extent of the damage resulting from the offense.”<sup>107</sup> No further details on the “circumstances” or “damage” were provided. The detention order enumerates the official justifications under Article 205 as (i) preventing reoccurrence of the offense and (ii) ensuring that Sovannchhay attended further court hearings.<sup>108</sup> According to the order, detention was “the only way to achieve fulfillment of that obligation due to the fact that there are no laws for court supervision which will ensure the effective fulfillment of that obligation.”<sup>109</sup>

On July 15, Judge Bunthoeun denied a July 8 request for provisional release submitted by Sovannchhay’s defense lawyer, Sam Sokong, and his mother, Prum Chantha. The denial stated that “the court was not submitted evidence of reasonable doubt,” and referenced the same criteria mentioned above as to why continued detention was necessary.<sup>110</sup>

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<sup>104</sup> Id.

<sup>105</sup> Criminal Procedure Code of the Kingdom of Cambodia (CPCKC), Article 206.

<sup>106</sup> Id. at Article 205.

<sup>107</sup> Phnom Penh Court of First Instance, Order for Provisional Detention, June 25, 2021.

<sup>108</sup> Id.

<sup>109</sup> Id.

<sup>110</sup> Phnom Penh Court of First Instance, Order Not to Release the Accused, July 15, 2021.

On the basis of the above orders, Sovannchhay was detained in Prey Sar prison from June 24 to November 2021, reportedly without communication with his family or any accommodations accounting for his young age or disability, and initially without access to a lawyer.<sup>111</sup> His mother recounted going to the prison every five days to leave him food, but never being allowed inside.<sup>112</sup>

## **Trial**

In Cambodia's civil law system, judges are finders of fact and law and thus question witnesses at trial. Sovannchhay's trial for charges of 'incitement to commit a felony' under Articles 494 and 495 of the CCKC and 'insulting public officials' under Article 502 was held on September 29, 2021 before the Phnom Penh Municipal Court of First Instance. Presiding judges included Chief Judge Oung Vutha and Consulting Judges Saor Sota and Khun Sona. Deputy prosecutor Hong Kimsan represented the State.

The proceedings began with the judges denying defense lawyer Sokong's request to call several witnesses. The first witness the defense requested to call was a medical expert, who could have testified about Sovannchhay's autism symptoms for the purposes of determining his capacity to stand trial, the accommodations required for his effective participation, and his culpability. The next witnesses the defense requested to call were the police officers who had led the investigation into Sovannchhay's alleged offenses and who had prepared the relevant police reports.

The court's denial of the defense's witness requests was followed by the judges, prosecutor, and defense each questioning the accused; the judges and the defense questioning the accused's mother, Prum Chantha; and the closing remarks of the prosecution and defense.

### ***Testimony relating to medical diagnosis***

The following information comes from the monitor's notes on the September 29 hearing. Sovannchhay testified that he was born on November 24, 2004, was 17 years old, was in the ninth grade, and attended online classes at the American Intercon School (AIS), where he was learning Khmer characters. Notably, Sovannchhay was 16 at the time of trial, not 17. In addition to Sovannchhay's misstatement of his age, several other instances demonstrate that he struggled to understand questions asked of him. These include Sovannchhay telling the prosecutor that he was learning technical skills online, that his lawyer had submitted an autism certificate to the court, and that he had never been jailed before, when in fact he was only learning Khmer characters online, there was never any

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<sup>111</sup> OHCHR, "Cambodia: UN experts deeply disturbed by detention of boy with autism for on-line criticism", September 2, 2021.

<sup>112</sup> France 24, "Cambodia should release detained autistic teenager, UN experts say", September 2, 2021. Available at <https://www.france24.com/en/live-news/20210902-cambodia-should-release-detained-autistic-teenager-un-experts-say>.



autism certificate, as later clarified by his mother, and he indeed had been previously detained by the authorities.

Sovannchhay's mother testified that he spoke little before the age of 7, and that she had enrolled him in school so he could learn to speak by being around other children. She noted that Sovannchhay often kept himself isolated in his room, rarely conversed or connected with others, and had only recently begun using a phone and Telegram because his classes had moved online. She further stated that he was held back three grades due to his developmental delays, and that she often received calls from his teachers regarding his performance in school. This was corroborated by the fact that Sovannchhay was a 16-year-old in the ninth grade. Ninth graders in Cambodia are typically 14 to 15 years old, while those in Sovannchhay's age group are typically in the eleventh or twelfth grades. When asked if he was a smart student, Sovannchhay replied that he "did not take exam."

When asked if he had autism and about its symptoms, Sovannchhay told the prosecutor: "yes and it's like neurological disorders," to which the prosecutor replied: "I think your answer is not correct." Sovannchhay's lawyer later asked if he understood what autism meant, and Sovannchhay replied that it was an "alone illness," and that he did not have friends. His mother further testified that she did not have a medical certificate for his autism diagnosis, though both she and Sovannchhay informed the court that she took him to the hospital for treatment. When asked, Sovannchhay told the judge he could not remember which hospital he went to or how often.

### *Testimony concerning Telegram and Facebook posts*

The following information comes from the monitor's notes on the September 29 hearing. When asked by a judge about his arrest, Sovannchhay recounted that he was "at home watching television and playing on his phone, and insulted Mr. PM for treason on Telegram." He stated that the three voice clips were indeed his recordings, but could not remember the dates they were sent and noted that he had posted them to the group because he was angry.

Sovannchhay further testified that he had never before spoken directly in the Telegram group, which he was invited to by an acquaintance and believed had over 100 members. He stated that group members "were insulting" him, and that he did not know who the group's administrator was. Sovannchhay also testified that he could not cut or edit a photo but had copied the picture from a Facebook page.

### *Closing statements*

The following information comes from the monitor's notes on the September 29 hearing. At closing, the prosecutor declared that Sovannchhay was "rehabilitated" – not affected by any disability – because he could create Facebook and Telegram accounts and had a ninth-grade education. The prosecution further stated that Sovannchhay did not show signs of



autism and had the capacity to understand all questions posed to him at trial. According to the prosecutor, based on Sovannchhay's verbal responses before the judges, Sovannchhay had acknowledged all of the facts set forth in the police report. The prosecutor asserted that those facts showed "an incitement to commit a crime." The prosecutor did not refer to any of the elements of incitement or make any arguments regarding the charge of insult of a public official. He requested that the court punish Sovannchhay in accordance with Articles 494, 495 and 502 of the CCKC.

Defense counsel Sokong requested that all charges be dropped and Sovannchhay be released. He stated that Sovannchhay could not be held culpable due to his autism disorder and cited CCKC Article 31, which provides that "a person who, at the time he or she committed an offence, was suffering from a mental disorder which destroyed his or her capacity to reason shall not be criminally responsible." Counsel further noted Sovannchhay's inability to understand the questions put to him at trial, referencing Sovannchhay and his mother's testimonies, and "what we altogether observed in the court room." Lastly, counsel stated that the prosecution had not proved the elements of the crimes charged.

## **Judgment**

The verdict was due to be released on October 13 but was postponed<sup>113</sup> to November 1. On November 1, Sovannchhay was convicted of all charges and sentenced to eight months in prison, with 4.5 months for time served and 3.5 months suspended. He was released on November 10, 2021. Sovannchhay appealed the conviction, which was upheld on March 14, 2022.

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<sup>113</sup> Voice of Democracy, "Updated: Verdict Delayed in Case Against CNRP Activist's Teenage Son", October 13, 2021.

# METHODOLOGY



## A. THE MONITORING PHASE

As part of the Clooney Foundation for Justice’s TrialWatch initiative, the American Bar Association Center for Human Rights deployed a monitor to Kak Sovannchhay’s trial, which was held before the Phnom Penh Municipal Court of First Instance. The monitor spoke Khmer and was able to follow the proceedings. The monitor did not experience any impediments in entering the courtroom and was present for the entirety of the trial, which consisted of a hearing on September 29, 2021, with a verdict delivered on November 1, 2021.

## B. The ASSESSMENT PHASE

To evaluate the trial’s fairness and arrive at a grade, TrialWatch Expert Alex Conte reviewed an analysis of the political and legal context in Cambodia and Sovannchhay’s prosecution, as prepared by ABA CHR staff, Conte concluded:

The charges against Kak Sovannchhay were, having regard to international standards on the freedom of expression, neither necessary nor proportionate. The authorities did not consider his best interests as a child with disabilities in charging and detaining him, thus rendering the process unfair as a whole. The trial was subsequently characterised by several instances that failed to respect the principle of the equality of arms. Particularly egregious to the fundamental guarantees of the right to a fair trial were the means by which Kak Sovannchhay was tried, under adult criminal justice procedures without any effort to adapt proceedings to provide effective accommodation for his age or disability so as to allow an effective defence. This engaged multiple violations of the CRC, CRPD and ICCPR.



## A. APPLICABLE LAWS AND STANDARDS

This report's analysis applies international human rights laws and standards to the facts outlined above. In particular, this report draws upon laws and standards set forth under the International Covenant on Civil and Political Rights (ICCPR), which Cambodia signed on October 17, 1980, and ratified on May 26, 1992; the Convention on the Rights of the Child (CRC), which Cambodia ratified on October 15, 1992; and the Convention on the Rights of Persons with Disabilities (CRPD), which Cambodia signed on October 1, 2007, and ratified on December 20, 2012. The analysis also draws upon jurisprudence from the UN Human Rights Committee (HRC), the UN Committee on the Rights of the Child (CRC Committee), and the UN Committee on the Rights of Persons with Disabilities (CRPD Committee), which are tasked with interpreting and monitoring implementation of the ICCPR, CRC, and CRPD, respectively.

The analysis further draws upon commentary from UN Special Procedures, including the Working Group on Arbitrary Detention and the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion. Additionally, the analysis draws upon international standards, rules, and guidelines relevant to the present case, including the UN Rules for the Protection of Juveniles Deprived of Liberty (Havana Rules) and the UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules).

## B. INVESTIGATION AND PRETRIAL VIOLATIONS

### **Rights of Children with Disabilities in Conflict with the Law**

Despite passing a juvenile justice law, the CJJL, Cambodia has yet to adequately establish the procedures, authorities, and institutions needed for its implementation. Similarly, systems responsive to the needs of individuals with disabilities are few and far between. As will be discussed in this section, the authorities failed to treat Sovannchhay in a manner that respected his legal status as both a child and a person with disabilities.

#### *Capacity for culpability*

As a 16-year-old with developmental delays, Sovannchhay did not meet the requirements of chargeability under the CRC and should have been excluded from the criminal justice system. Article 1 of the CRC provides that “a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.” States should establish a minimum age of criminal responsibility below which children are presumed not to have the capacity to “infringe the penal law,”<sup>114</sup> and may not

<sup>114</sup> CRC, Article 40(3)(a).

be deprived of their liberty.<sup>115</sup> Children under this minimum age are to be deemed unable to understand the precise nature of their actions or to behave accordingly, and should be excluded from the sphere of criminal punishment.<sup>116</sup> Similarly, children with autism spectrum disorders or developmental delays<sup>117</sup> should be excluded from the child (and adult) justice systems, “even if they have reached the minimum age of criminal responsibility,” according to the CRC Committee.<sup>118</sup> Namely, they “should be dealt with as much as possible without resorting to formal/legal procedures.”<sup>119</sup>

In Cambodia, anyone under the age of 18 is considered to be a “minor,”<sup>120</sup> but courts can charge, detain, and penalize children above the age of 14<sup>121</sup> “if warranted by the circumstances of the offence or the character of the minor.”<sup>122</sup> While 14 is “the most common minimum age of criminal responsibility internationally,” the CRC Committee has commended States that have a higher minimum age of 15 or 16, as “developmental and neuroscience evidence indicates that adolescent brains continue to mature even beyond the teenage years, affecting certain kinds of decision-making.”<sup>123</sup>

Sovannchhay was 16 years old at the time of his alleged commission of an offence. As a threshold matter under the CRC, as a child with developmental delays he should have been excluded from the criminal justice system entirely. Further, while he met the age of criminal responsibility under Cambodian law, his developmental delays mean that he was held back three years in school: at the time of trial, Sovannchhay was a 16-year-old in the ninth grade. Ninth graders in Cambodia are 14-15 years old – those in Sovannchhay’s age group of 16 to 17 are in eleventh and twelfth grades. Under best practices, Sovannchhay functionally did not meet minimum age of criminal responsibility under the CRC and should have been presumed to lack capacity for culpability.

### *Need for a separate juvenile justice system*

Children who are accused of criminal offences are entitled to not only the fair trial rights that pertain to adults but also to protection mechanisms in acknowledgement of their age, maturity, and intellectual development.<sup>124</sup> As noted by the UN Human Rights Committee,

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<sup>115</sup> Havana Rules, December 14, 1990, para. 11(a).

<sup>116</sup> See Inter-American Court of Human Rights, Advisory Opinion OC-17/02, Juridical Condition and Human Rights of the Child, Series A No. 17, August 28, 2002, para. 105

<sup>117</sup> As well as children with neurodevelopmental disorders or disabilities.

<sup>118</sup> CRC Committee, General Comment No. 24, U.N. Doc. CRC/C/GC/24, September 18, 2019, para. 28.

<sup>119</sup> CRC Committee, General Comment No. 9, U.N. Doc. CRC/C/GC/9, February 27, 2007, para. 74(b).

<sup>120</sup> CJJL, Article 4.

<sup>121</sup> See Cambodian Code of Criminal Procedure, Article 212; CJJL, Articles 7, 14, 17, 27, 39, 49; Aekje Teeuwen, “Juvenile Defendants Right to be Tried Within a Reasonable Time in Cambodia: An International Human Rights Analysis”, *Journal of Youth Justice*, March 15, 2019, pgs. 52-53.

<sup>122</sup> CCKC, Articles 38-39. See also CJJL, Article 7.

<sup>123</sup> CRC Committee, General Comment No. 24, U.N. Doc. CRC/C/GC/24, September 18, 2019, paras. 21-22.

<sup>124</sup> Convention on the Rights of the Child (CRC), November 20, 1989, Article 40.

children in conflict with the law require “special protections” in addition to the “guarantees and protections ... under article 14 of the Covenant.”<sup>125</sup>

Under both the ICCPR and the CRC, a separate juvenile criminal justice system must be established to deal with children below 18 who meet the domestic minimum age of criminal responsibility and come into conflict with the law.<sup>126</sup> Article 40(3) of the CRC mandates the establishment of “laws, procedures, authorities, and institutions specifically applicable to children”<sup>127</sup> and requires States to deal with children without resorting to judicial proceedings “whenever appropriate and desirable.”<sup>128</sup> As noted by the CRC Committee, the differences in children’s physical and psychological development form “the basis for the recognition of lesser culpability, and for a separate system with a differentiated, individualized approach”: further, “exposure to the criminal justice system has been demonstrated to cause harm to children, limiting their chances of becoming responsible adults.”<sup>129</sup>

Alternatives to the judicial system must thus be available to ensure children are treated in a manner that is appropriate to their well-being and proportionate to their circumstances and the alleged offence.<sup>130</sup> This includes developing and implementing appropriate non-custodial solutions with the aim of diversion,<sup>131</sup> such as supervision and guidance by designated officials or community service.<sup>132</sup>

In the present case, Sovannchhay was not only not diverted from the criminal justice system (despite the fact that his purported crime was not violent and was not alleged by the prosecutor to have resulted in any damage to specific individuals – more on this below) but was charged and prosecuted in adult court. This violated his rights under the ICCPR and CRC.

### *Best interests of the child*

The court’s failure to assess and consider Sovannchhay’s best interests at any time during the proceedings violated his rights under Article 3 of the CRC and Article 7 of the CRPD. The ‘best interests of the child’ principle should be used in interpreting and implementing

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<sup>125</sup> Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 42.

<sup>126</sup> Id.; CRC Committee, General Comment No. 24, U.N. Doc. CRC/C/GC/24, September 18, 2019, paras. 2, 20-21, 29-32.

<sup>127</sup> CRC, Article 40(3).

<sup>128</sup> Id. at Article 40(3)(b).

<sup>119</sup> CRC Committee, General Comment No. 24, U.N. Doc. CRC/C/GC/24, September 18, 2019, para. 2.

<sup>130</sup> CRC, Article 40(3)(b). See also Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 44.

<sup>131</sup> See General Assembly, Report of the Independent Expert leading the United Nations global study on children deprived of liberty, U.N. Doc. A/74/136, July 11, 2019, paras. 88-89.

<sup>122</sup> CRC, Article 40(3)(b); CRC Committee, General Comment No. 24, U.N. Doc. CRC/C/GC/24, September 18, 2019, paras. 13, 17. See also Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 44.

the rights recognized in the CRC.<sup>133</sup> Under Article 3(1) of the CRC, children are entitled to have their best interests assessed and taken into account as a primary consideration in all actions and decisions that concern them. Article 7(2) of the CRPD specifically recognizes this right for children with disabilities.<sup>134</sup> According to the CRC Committee, in the context of children accused of having violated criminal laws, the best interests principle “means that the traditional objectives of criminal justice, such as repression or retribution, must give way to rehabilitation and restorative justice objectives.”<sup>135</sup> As a substantive right, Article 3(1) “requires an assessment appropriate to the specific context.”<sup>136</sup> It also operates as a rule of procedure, requiring that authorities evaluate the potential positive and negative impacts of the action on the child as part of the decision-making process, and that the final decision explain how the right was taken into account, including what was “considered to be in the child’s best interests; what criteria it [was] based on; and how the child’s interests [were] weighed against other considerations.”<sup>137</sup>

With respect to detention, in addition to Article 3(1) on the best interests of the child, several other CRC articles reinforce the principle that detention of children should be avoided, including Article 9(1)’s right not to be separated from one’s parents, and Article 37(b)’s prohibition on arbitrary deprivation of liberty.<sup>138</sup> As stated in Article 37(b), “arrest, detention or imprisonment .... shall be used only as a measure of last resort and for the shortest appropriate period of time.”<sup>139</sup>

Further, given the high level of vulnerability of children with disabilities who come in conflict with the law, the CRC Committee has stated that they “should not be placed in a regular juvenile detention center by way of pre-trial detention nor by way of a punishment.”<sup>140</sup> As stated by UN experts, “[c]hildren with disabilities accused of breaking the law should be treated in line with the best interests of the child, and every effort should be made to keep them out of jail.”<sup>141</sup>

In the present case, the authorities failed to assess or consider Sovannchhay’s best interests with respect to the bringing of charges, the prosecution, the trial, and conviction. As a threshold matter, had rehabilitation and restorative justice been prioritized, as is mandated in such cases, Sovannchhay would have been diverted from the criminal justice system entirely and alternate measures such as counselling, supervision, or community

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<sup>133</sup> CRC, Article 3(1).

<sup>134</sup> CRPD, Article 7(2).

<sup>135</sup> CRC Committee, General Comment No. 14, U.N. Doc. CRC/C/GC/14, May 29, 2013, para. 28.

<sup>136</sup> *Id.* at paras. 1, 6(a).

<sup>137</sup> *Id.* at para. 6(c).

<sup>138</sup> CRC, Articles 3(1), 9(1), 37(b). See also Havana Rules, December 14, 1990, Rules 1-2; Beijing Rules, November 29, 1985, Rules 17(1)(c), 19; CJJL, Article 39 (pre-trial detention of children should be a “measure of last resort”).

<sup>139</sup> CRC, Article 37(b).

<sup>140</sup> CRC Committee, General Comment No. 9, U.N. Doc. CRC/C/GC/9, February 27, 2007, para. 74(c).

<sup>141</sup> OHCHR, “Cambodia: UN experts deeply disturbed by detention of boy with autism for on-line criticism”, September 2, 2021.



service would have been employed. Instead, traditional criminal justice objectives were allowed to trump his right to rehabilitation and restorative justice.

Meanwhile, Sovannchhay was detained prior to the start of his trial for approximately three months. However, the investigative court's detention orders contain no explanation of how his best interests as a child with disabilities were taken into consideration, and the prosecution never explicitly mentioned his best interests in any pretrial submissions. If the required assessment had taken place, it likely would have shown that Sovannchhay's best interests would have been protected by not separating him from his mother and preventing family visits (meaning that he did not see his mother, his primary caretaker, until he was released); by not holding him in prison without accommodations for his disability (more on this below); and by not preventing him from attending school. This, correspondingly, would have resulted in his release from detention.

Further, had Sovannchhay's best interests been considered with respect to the trial, he would have been tried in a juvenile justice court, not an adult court, with an approach tailored to his needs as a child. Likewise, the court would have permitted an inquiry into how his developmental delays affected both his culpability and participation in the proceedings (more on this below). There is no evidence that either the prosecution or court took these issues seriously – on the contrary, their actions, including the court's denial of the defense's request to call a medical expert to testify about Sovannchhay's diagnosis and the prosecution's declaration that Sovannchhay had been "rehabilitated" from his disability, evinced a complete disregard for Sovannchhay's best interests and a haste to convict.

The authorities' failure to assess and consider Sovannchhay's best interests at any point during the proceedings violated his rights under Article 3 of the CRC and Article 7 of the CRPD.

### *Rights of detained children with disabilities*

Sovannchhay's detention violated his rights as a child with disabilities under Article 14(2) of the CRPD and Articles 23 and 37 of the CRC. Under Article 14(2) of the CRPD, any person with disabilities deprived of their liberty is entitled to the provision of reasonable accommodations. According to the CRPD Committee, Article 14 requires States to "ensure that all places of deprivation of liberty, including ... penitentiary institutions, maintain accessible and humane living conditions responding to the requirements of all persons with disabilities," and provide "access to reasonable accommodation, including advocacy support,"<sup>142</sup> and "specific health and rehabilitation services."<sup>143</sup>

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<sup>142</sup> CRPD Committee, Concluding Observations on the Initial Report of Armenia, U.N. Doc. CRPD/C/ARM/CO/1, May 8, 2017, para. 24.

<sup>143</sup> CRPD Committee, Concluding Observations on the Initial Report of Colombia, U.N. Doc. CRPD/C/COL/CO/1, September 30, 2016, paras. 40-41.

With respect to Article 23 of the CRC, the CRC Committee has noted that “States parties have the obligation to ensure that children with disabilities who are” in detention are protected by relevant CRC provisions, such as those relating to “health care and education,”<sup>144</sup> and are placed in institutions that have “specially trained staff and other [appropriate] facilities.”<sup>145</sup>

In the present case, Sovannchhay was detained for five months, three months of which were pretrial. According to credible sources and consistent with Sovannchhay’s treatment at trial, there were no accommodations made or specialized services provided on the basis of his status as a child with disabilities. As discussed above, prisons in Cambodia lack the infrastructure and facilities to appropriately cater to the needs of persons with disabilities. The conditions of Sovannchhay’s detention thus violated his rights under Article 14(2) of the CRPD and Articles 23 and 37 of the CRC.

### *Access to justice on an equal basis*

In Sovannchhay’s case, Cambodia failed to ensure the appropriate training of officials engaged in the administration of justice in the case of a child with disabilities, violating the CRC and CRPD.

As noted by the CRC Committee, “continuous and systematic training of professionals in the child justice system is crucial to uphold” a child’s right to a fair trial (Article 40 of the CRC), including by training justice sector professionals to be “able to work in interdisciplinary teams, and ... [to be] well informed about the physical, psychological, mental and social development of children and adolescents, as well as about the special needs of the most marginalized children.”<sup>146</sup> Among other things, the State must ensure all contacts between a child and law enforcement are conducted in a manner that avoids harm and promotes the child’s well-being.<sup>147</sup>

Under Article 23 of the CRC, with respect to children with disabilities who come into conflict with the law, “given the[ir] high level of vulnerability,” they “should be interviewed using appropriate languages” and dealt with by properly trained police officers, prosecutors and judges.<sup>148</sup> Correspondingly, under Article 13(2) of the CRPD, States must ensure effective access to justice for persons with disabilities by promoting appropriate training for those working in the field of administration of justice, including police and prison staff.<sup>149</sup> The right to access to justice under Article 13 of the CRPD should be read in conjunction with Article

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<sup>144</sup> CRC Committee, General Comment No. 9, U.N. Doc. CRC/C/GC/9, February 27, 2007, para. 73.

<sup>145</sup> *Id.*, at para. 74(c).

<sup>146</sup> CRC Committee, General Comment No. 24, U.N. Doc. CRC/C/GC/24, September 18, 2019, para. 39.

<sup>147</sup> See Beijing Rules, November 29, 1985, Rule 10.3.

<sup>148</sup> CRC Committee, General Comment No. 9, U.N. Doc. CRC/C/GC/9, February 27, 2007, para. 74(a).

<sup>149</sup> CRPD, Article 13.

5 of the CRPD (on equality and non-discrimination) and Article 12 of the CRPD (on equal recognition before the law).<sup>150</sup>

In the present case, Sovannchhay was arrested by armed police officers who reportedly stormed his house and took him away in a car, evidently without any training in or regard for how an arrest of a child with disabilities should be handled.<sup>151</sup> Subsequently, Sovannchhay reportedly did not receive specialized treatment, care, or services in detention, as is required when a person with disabilities is deprived of liberty.

Based on conduct exhibited by the judge and prosecutor at trial, those working in the court system similarly lacked training in juvenile justice, such as child-friendly interviewing practices, as well as in access to justice for persons with disabilities.<sup>152</sup> This was demonstrated by the court's refusal to take Sovannchhay's developmental delays into account, including by denying the testimony of a medical expert who could have explained Sovannchhay's diagnosis and needs, and by the prosecution's declaration at closing that Sovannchhay was no longer affected by a disability, without any supporting evidence. This was also demonstrated by the prosecution's questions and remarks at trial, such as asking Sovannchhay about his autism and then negating his response, stating: "I think your answer is not correct."<sup>153</sup>

The failure to ensure appropriate training for those working in the field of administration of justice and dealing with children with disabilities contravened the right to access to justice, in violation of Articles 5, 12, and 13(2) of the CRPD and Articles 23 and 40 of the CRC.

### **Arbitrary Arrest & Deprivation of Liberty**

Article 9(1) of the ICCPR stipulates: "[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention."

The United Nations Human Rights Committee has noted that with respect to detention, the concept of "arbitrariness" must be "interpreted broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality."<sup>154</sup> Not only should pretrial detention be the exception and as short as possible, but detention must also be "lawful" (in accordance with domestic law) and "reasonable and necessary in all circumstances."<sup>155</sup>

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<sup>150</sup> OHCHR, "Right to access to justice under CRPD Art. 13", U.N. Doc. A/HRC/37/25, December 27, 2017, para. 15.

<sup>151</sup> Voice of Democracy, "Teenager Arrested for Telegram, Audio Messages Insulting Officials", June 25, 2021.

<sup>152</sup> See sections on Violations at Trial, Rights to Effective Participation & Equal Access to Justice

<sup>153</sup> Trial Monitor's Notes, September 29, 2021.

<sup>154</sup> Human Rights Committee, İsmet Özçelik et al v. Turkey, U.N. Doc. CCPR/C/125/D/2980/2017, September 23, 2019, para. 9.3.

<sup>155</sup> Human Rights Committee, Cedeño v. Bolivarian Republic of Venezuela, U.N. Doc. CCPR/C/106/D/1940/2010, December 4, 2012, para. 7.10.

This means that pretrial detention is appropriate for only a limited number of purposes: namely, to prevent flight, interference with evidence, and the recurrence of crime.<sup>156</sup>

In evaluating the reasonableness and necessity of pretrial detention, courts must undertake an “individualized determination” of the accused’s particular circumstances.<sup>157</sup> “Vague and expansive [justifications] such as ‘public security’” fail to meet this standard.<sup>158</sup> Reference to the severity of the charges is likewise insufficient. As stated by the Committee, “[p]retrial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances.”<sup>159</sup>

Courts must additionally examine whether non-custodial alternatives, such as bail and monitoring devices, “would render detention unnecessary in the particular case.”<sup>160</sup>

Notably, if exceptional circumstances exist that permit the imposition of pretrial detention, the accused is entitled to periodic review of whether detention is still necessary.<sup>161</sup> A judge “must order release” of an accused “[i]f there is no lawful basis for continuing the detention.”<sup>162</sup>

In the present case, Sovannchhay was detained from June 24 until November 10, almost five months, during which time the State failed to demonstrate the necessity of his detention. In the June 25 order approving the prosecutor’s request for provisional detention, the investigating judge cited the “the seriousness of the offense, the circumstances of committing the offense, and the extent of the damage resulting from the offense,” absent any actual explanation as to the alleged circumstances or resulting damages.<sup>163</sup>

As mentioned above, the seriousness of the offense cannot be used to justify detention without concrete indicia of a risk of flight, interference with the proceedings, or recurrence of crime. The initial detention order, however, lacks any such individualized analysis, instead broadly finding that Sovannchhay’s detention would prevent reoccurrence of the offense and ensure he attended court hearings. There is no assessment of Sovannchhay’s particular circumstances or whether alternatives to detention would be feasible: an

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<sup>156</sup> Human Rights Committee, *Mikhail Marinich v. Belarus*, U.N. Doc. CCPR/C/99/D/1502/2006, August 19, 2010, para. 10.4.

<sup>157</sup> See Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 38. See also Human Rights Committee, *Cedeño v. Bolivarian Republic of Venezuela*, U.N. Doc. CCPR/C/106/D/1940/2010, December 4, 2012, para. 7.10; Human Rights Committee, *Van Alphen v. the Netherlands*, U.N. Doc. CCPR/C/39/D/305/1988, July 23, 1990, para. 5.8; Human Rights Committee, *Mikhail Marinich v. Belarus*, U.N. Doc. CCPR/C/99/D/1502/2006, July 16, 2010, para. 10.4; Human Rights Committee, *Mukong v. Cameroon*, U.N. Doc. CCPR/C/51/D/458/1991, August 10, 1994, para. 9.8.

<sup>158</sup> Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 38.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at para. 36.

<sup>163</sup> Phnom Penh Court of First Instance, Order for Provisional Detention, June 25, 2021.

omission all the more egregious, as discussed in previous sections, because of Sovannchhay's status as a child with disabilities.

Subsequently, in the July 15 order denying Sovannchhay's application for bail, the investigating judge again cited the risks of recurrence of crime and failure to attend trial without concrete details of such and further stated that bail could not be granted because "the court was not submitted evidence of reasonable doubt."<sup>164</sup> This reasoning inverted the burden applicable to the imposition of pretrial detention: it is for the State to demonstrate that continued detention is absolutely necessary, not for the defense to generate reasonable doubt. '

In light of the inadequate justification for Sovannchhay's detention, it violated Article 9(1) of the ICCPR.

### Right to Counsel

Under Article 14(3)(b) and (d) of the ICCPR, everyone charged with a criminal offense has the right to the assistance of counsel of his or her choosing, including the right to communicate with counsel. The UN Human Rights Committee has explained that the right to counsel "is an important element of the guarantee of a fair trial and an application of the principle of equality of arms."<sup>165</sup> The right to counsel applies at all stages of criminal proceedings and is particularly vital during periods of detention.<sup>166</sup> In this regard, the Committee has stated that "all persons who are arrested must immediately have access to counsel."<sup>167</sup>

In *Zhuk v. Belarus*, for example, the Committee found a violation of Article 14(3)(b) and (d) where a detainee had "only been allowed to see a lawyer for five minutes and ha[d] effectively been deprived of legal assistance during the initial phases of the investigative proceedings, and ... was forced to participate in investigative actions [including police interrogation] without legal advice, despite his requests for a lawyer."<sup>168</sup>

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<sup>164</sup> Phnom Penh Court of First Instance, Order Not to Release the Accused, July 15, 2021, citing CCPKC Articles 217 and 218

<sup>165</sup> Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 32.

<sup>166</sup> See UN Basic Principles on the Role of Lawyers, September 7, 1990, Principle 1. Available at <https://www.ohchr.org/en/professionalinterest/pages/roleoflawyers.aspx>; UN General Assembly, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, U.N. Doc. A/RES/43/173 (Annex), December 9, 1988, Principles 17(1), 18. See also Council of Europe, 21<sup>st</sup> General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1 August 2010-31 July 2011), November 10, 2011, para. 20. Available at <https://rm.coe.int/1680696a88>.

<sup>167</sup> Human Rights Committee, Concluding observations of the Human Rights Committee: Georgia, U.N. Doc. CCPR/C/79/Add.75, May 5, 1997, para. 27. See also Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 35; European Court of Human Rights, *Dayanan v. Turkey*, App. No. 7377/03, October 13, 2009, paras. 30-32; European Court of Human Rights, *Brusco v. France*, App. No. 1466/07, October 14, 2010, para. 45.

<sup>168</sup> Human Rights Committee, *Zhuk v. Belarus*, U.N. Doc. CCPR/C/109/D/1910/2009, October 30, 2013, paras. 2.1, 8.5. See also Human Rights Committee, *Lyashkevich v. Uzbekistan*, U.N. Doc.



In Sovannchhay's case, credible sources, consistent with reports from international organizations and institutions regarding systematic violations of access to counsel, relayed that Sovannchhay was not permitted legal counsel in the initial period after he was arrested, during which he was interrogated. The facts as alleged constitute a violation of Article 14(3)(b) and (d) of the ICCPR.

## **C. VIOLATIONS AT TRIAL**

### **Rights to Equal Access to Justice & Effective Participation**

The State's lack of inquiry into the support required by Sovannchhay and corresponding failure to ensure the provision of disability-appropriate accommodations at trial violated his rights to exercise legal capacity and access justice under Articles 12 and 13 of the CRPD, respectively, and his right to an inquiry into his fitness to stand trial under Article 14(1) of the ICCPR.

#### *Reasonable accommodations*

As mentioned above, the CRPD requires that individuals with disabilities be afforded adequate support to participate in legal proceedings.

Under Article 12(2) of the Convention, States "shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life." Article 12(3) requires States to "take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity," while Article 13(1) further mandates that States ensure "effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role ... in all legal proceedings." States must tailor such "accommodations" to a particular person's requirements, meaning that States must undertake case-by-case assessments to determine what measures are necessary.

In *Noble v. Australia*, the CRPD Committee found a violation of the above provisions where the Australian authorities had failed to provide a defendant with an "intellectual and mental disability" with "adequate support or accommodation" to effectively participate in his criminal trial, instead suspending the proceedings and holding him in detention.<sup>169</sup> Notably, with regard to Article 13 of the CRPD, the Office of the High Commissioner for Human

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CCPR/C/98/D/1552/2007, May 11, 2010, para. 9.4; Human Rights Committee, Gridin v. Russian Federation, U.N. Doc. CCPR/C/69/D/770/1997, July 18, 2000, para. 8.5; Human Rights Committee, Saidov v. Tajikistan, U.N. Doc. CCPR/C/122/D/2680/2015, April 4, 2018, para. 9.5; Human Rights Committee, Carranza Alegre v. Peru, U.N. Doc. CCPR/C/85/D/1126/2002, October 28, 2005, para. 7.5; Human Rights Committee, Krasnova v. Kyrgyzstan, U.N. Doc. CCPR/C/101/D/1402/2005, March 29, 2011, para. 8.6.

<sup>169</sup> CRPD Committee, *Noble v. Australia*, U.N. Doc. CRPD/C/16/D/7/2012, October 10, 2016, paras. 8.4-8.6.



Rights has stated that the “determination of the need for procedural accommodations” must be based on the accused’s “free choice,” “should not necessarily be based on medical information,” and “cannot be subject to any disability assessment [in terms of a State certification].”<sup>170</sup> Rather, “the judge or the responsible entity should give primary consideration to the request of the individual with disability, as he or she knows best what his or her own accommodation needs are.”<sup>171</sup>

In the present case, there was no attempt to assess what type of reasonable accommodations might be required to enable Sovannchhay’s exercise of his legal capacity on an equal basis with others and effective access to justice. The court, for example, rejected the defense motion to call an expert witness who could have testified about Sovannchhay’s developmental delays and who could have clarified the potential need for accommodations. In addition to preventing the expert from testifying, the court also failed to conduct any assessment of its own with respect to necessary accommodations. Moreover, although the Cambodian Ministry of Justice claimed that the court was “continuing to process [Sovannchhay’s] case” because he had “not shown any documents to the court about his claims of autism,”<sup>172</sup> the determination of the need for procedural accommodations should not be based on medical information or State certification but on the request of the individual with a disability.

In light of the above, Cambodia violated Articles 12 and 13 of the CRPD.

### *Fitness to stand trial*

Article 14(1) of the ICCPR sets out a general guarantee of the right to a fair trial.<sup>173</sup> The United Nations Human Rights Committee has understood Article 14(1) to include a considered determination of capacity to stand trial if concerns are raised. In *Ahmed Khaleel v. Maldives*, for instance, where “there was evidence of prior State care for mental health issues” and “where the State party [did not] present evidence of a detailed inquiry into [the defendant’s] fitness to stand trial,” the UN Human Rights Committee found that “the State party failed to conduct an adequate inquiry into [the defendant’s] mental health, and thus failed to ensure that [the defendant] was capable of standing trial,” concluding that “the State party violated its obligations under Article 14(1).”<sup>174</sup>

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<sup>170</sup> Office of the United Nations Office for Human Rights, Right to Access to Justice Under Article 13 of the Convention on the Rights of Persons with Disabilities, U.N. Doc. A/HRC/37/25, December 27, 2017, para. 26.

<sup>171</sup> *Id.* See also CRPD Committee, Concluding Observations on the Initial Report of Armenia, U.N. Doc. CRPD/C/ARM/CO/1, May 8, 2017, para. 22; CRPD Committee, Concluding Observations on the Initial Report of Bosnia and Herzegovina, U.N. Doc. CRPD/C/BIH/CO/1, May 2, 2017, para. 25; CRPD Committee, Concluding Observations on the Initial Report of Serbia, U.N. Doc. CRPD/C/SRB/CO/1, May 23, 2016, para. 24.

<sup>172</sup> Khmer Times, “Government Responds to UN Prisoner Enquiry”, October 20, 2021. Available at <https://www.khmertimeskh.com/50955829/government-responds-to-un-prisoner-enquiry/>.

<sup>173</sup> ICCPR, Article 14(1).

<sup>174</sup> Human Rights Committee, *Ahmed Khaleel v. Maldives*, U.N. Doc. CCPR/C/123/D/2785/2016, August 16, 2019, para. 9.6.

While the UN Human Rights Committee has not expounded on what a “detailed” inquiry looks like, jurisprudence from the European Court of Human Rights (ECtHR) indicates that such an inquiry should center on whether a defendant is able to effectively participate in his or her trial.

In *S.C. v U.K.*, for example, the ECtHR found that the applicant’s right to a fair trial had been violated because of his apparent inability to effectively participate in the proceedings.<sup>175</sup> In addition to concerns raised by the applicant’s young age, the court cited the applicant’s psychosocial disability. The Court provided the following definition of effective participation:

Effective participation ... presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence.<sup>176</sup>

The ECtHR has indicated that the inquiry into a defendant’s ability to effectively participate must be rigorous<sup>177</sup> and has further held that States “must exercise diligence to ensure the effective enjoyment” of the right to a fair trial.<sup>178</sup>

As noted above, in Sovannchhay’s case the court rejected the defense’s preliminary motion to introduce an expert witness who could testify to Sovannchhay’s capacity to stand trial<sup>179</sup> and not only did not conduct a “rigorous” inquiry but conducted no inquiry at all. This violated Article 14(1) of the ICCPR.

Moreover, like the defendant in *S.C.* who appeared unable to effectively participate in the proceedings due to his young age and psychosocial disability, Sovannchhay’s young age and intellectual disability appeared to prevent his effective participation. For example, Sovannchhay struggled to answer basic questions from the judges and prosecutor,

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<sup>175</sup> European Court of Human Rights, *S.C. v. the United Kingdom*, App. No. 60958/00, November 10, 2004,

<sup>176</sup> *Id.* at para. 29.

<sup>177</sup> See *id.* at para. 23; European Court of Human Rights, *V. v. the United Kingdom*, App. No. 24888/94, December 16, 1999, para. 33.

<sup>178</sup> European Court of Human Rights, *Vaudelle v. France*, App. No. 35683/97, January 30, 2001, para 52.

<sup>179</sup> Trial Monitor’s Notes, September 29, 2021.

incorrectly stating his age, incorrectly stating that he had never been detained before, and telling the prosecutor that he was learning technical skills online and that his lawyer had submitted an autism certificate to the court, when in fact he was only learning Khmer characters and did not have an autism certificate, as clarified by his mother. Sovannchhay further struggled to explain his autism symptoms as well as the reasons he posted the Telegram voice clips to the chat group. Trial monitors noted that he rarely engaged with his lawyer. Sovannchhay's documented conduct and demeanor at trial thus calls into question whether he was able to follow and understand courtroom developments and communicate with his lawyer accordingly.

If Sovannchhay was indeed unable to effectively participate in the proceedings, this would have constituted an additional violation of the ICCPR. The European Court of Human Rights has held that effective participation is a key component of the right to a fair trial.<sup>180</sup> This understanding of the right to a fair trial is affirmed by various subcomponents of Article 14 of the ICCPR: the right to interpretation in court, which aims to ensure that the accused is able to follow the proceedings;<sup>181</sup> the right to be tried in one's presence, which implies the ability to hear and follow the proceedings;<sup>182</sup> the right to defend oneself in person, which of necessity assumes the ability to hear and follow the proceedings;<sup>183</sup> and the right to communicate with counsel, which likewise assumes that the accused is able to hear and follow the proceedings and confer with counsel accordingly.<sup>184</sup> Assuming Sovannchhay's inability to effectively participate, his right to a fair trial was violated.

### **Right to Call & Examine Witnesses**

By denying the defense's motion to introduce a key expert witness and key fact witnesses, the court violated the accused's rights under Article 14(3)(e) of the ICCPR.

Article 14(3)(e) provides that all persons accused of a crime are entitled "to obtain the attendance and examination of witnesses on [their] behalf under the same conditions as witnesses against [them]." In the words of the UN Human Rights Committee, this provision "is important for ensuring an effective defence by the accused and their counsel and thus guarantees the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution."<sup>185</sup> Article 14(3)(e) does not establish an absolute right to call and examine witnesses but a

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<sup>180</sup> European Court of Human Rights, *Stanford v. the United Kingdom*, App. No. 16757/90, February 23, 1994; European Court of Human Rights, *T. v. the United Kingdom*, App. No. 24724/94, December 16, 1999; European Court of Human Rights, *S.C. v. the United Kingdom*, App. No. 60958/00, November 10, 2004.

<sup>181</sup> ICCPR, Article 14(3)(f).

<sup>182</sup> *Id.* at Article 14(3)(d).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at Article 14(3)(b).

<sup>185</sup> Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 39.

right to call witnesses who are relevant,<sup>186</sup> if proposed in a timely manner in compliance with procedural requirements.<sup>187</sup>

In *Allaberdiev v. Uzbekistan*, the Committee considered a case in which the accused was charged with and convicted of drug-related offenses.<sup>188</sup> Defense counsel requested to call, among others, individuals involved with the investigation and individuals whom the accused alleged had planted the drugs.<sup>189</sup> Although these witnesses were central to the defense theory that the case was fabricated, the court rejected the request, deeming the proposed testimony irrelevant.<sup>190</sup> The Committee found a breach of Article 14(3)(e).<sup>191</sup> Similarly, in *Saidov v. Tajikistan*, the Committee found a violation of Article 14(3)(e) where the court, “stating that the witnesses requested were too close to the accused and were interested in the outcome,” prevented the accused from calling 11 witnesses.<sup>192</sup>

Notably, Article 14(3)(e) encompasses the right to call expert witnesses,<sup>193</sup> including expert medical witnesses, and commission expert examinations.

In *Khomidova v. Tajikistan*, for example, the UN Human Rights Committee found an Article 14(3)(e) violation where the court rejected the defense’s request for a medical examination of the accused to determine whether the authorities had subjected him to torture.<sup>194</sup> In *Pustovalov v. Russian Federation*, the Committee examined a case in which the petitioner had been convicted for, among other things, raping several women.<sup>195</sup> The petitioner requested an expert examination to prove that he was unable to have children: an effort to show that he could not have been the perpetrator with respect to one of the victims, who had become pregnant following the alleged assault.<sup>196</sup> The trial court declined this request.<sup>197</sup> As a result, the Committee concluded that the defendant’s rights under Article 14(3)(e) had been violated.<sup>198</sup>

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<sup>186</sup> Human Rights Committee, *Saidov v. Tajikistan*, U.N. Doc. CCPR/C/122/D/2680/2015, September 20, 2018, para. 9.6.

<sup>187</sup> Human Rights Committee, *Johnson v. Spain*, U.N. Doc. CCPR/C/86/D/1102/2002, March 27, 2006, para. 6.5; Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 39.

<sup>188</sup> Human Rights Committee, *Sirozhiddin Allaberdiev v. Uzbekistan*, U.N. Doc. CCPR/C/119/D/2555/2015, May 18, 2017, paras. 2.1–2.21.

<sup>189</sup> *Id.* at para. 3.5.

<sup>190</sup> *Id.* at paras. 8.7–8.9.

<sup>191</sup> *Id.* at paras. 8.8–8.9.

<sup>192</sup> Human Rights Committee, *Saidov v. Tajikistan*, U.N. Doc. CCPR/C/122/D/2680/2015, September 20, 2018, para. 9.6.

<sup>193</sup> See Human Rights Committee, *Pustovalov v. Russian Federation*, U.N. Doc. CCPR/C/98/D/1232/2003, May 10, 2010, para. 8.4.

<sup>194</sup> Human Rights Committee, *Khomidova v. Tajikistan*, U.N. Doc. CCPR/C/81/D/1117/2002, July 29, 2004, para. 6.5. See also Human Rights Committee, *Garcia Fuenzilada v. Ecuador*, U.N. Doc. CCPR/C/57/D/480/1991, July 12, 1996, paras. 3.5, 9.5

<sup>195</sup> Human Rights Committee, *Pustovalov v. Russian Federation*, U.N. Doc. CCPR/C/98/D/1232/2003, May 10, 2010, para. 2.1.

<sup>196</sup> *Id.* at para. 2.4.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at para. 8.4.

In Sovannchhay’s case, the judge denied the defense’s motion for testimony from key fact witnesses: namely, judicial officers from the Anti-Cybercrime Office who had prepared the investigation report determining that the crimes of incitement and insult had been committed. The prosecution heavily relied upon this report in making its case: indeed, apart from the Telegram voice clips and Facebook post themselves and Sovannchhay’s confiscated mobile phone, the investigation report is the only other evidence cited by the prosecution in the indictment. As in *Allaberdiev*, where the court’s denial of the defense request to call witnesses involved in the investigation amounted to a violation of the right to call and examine witnesses, the judge’s denial here violated Sovannchhay’s rights under Article 14(3)(e).

With respect to expert witnesses, as mentioned above, the court rejected the defense request to call a medical expert who could testify not only to Sovannchhay’s culpability but also about his fitness to stand trial and any accommodations required. The defense’s primary argument was that Sovannchhay was not capable of committing a crime because of his developmental disabilities. Since the medical expert was central to the defense’s case, the court’s denial of his testimony placed Sovannchhay at a substantial disadvantage vis-à-vis the prosecution. As such, Sovannchhay’s right to call relevant expert witnesses under Article 14(3)(e) was violated.

## **D. OTHER FAIRNESS ISSUES**

### **Arrest & Prosecution in Violation of Right to Freedom of Expression**

#### *Article 495*

Article 19 of the ICCPR guarantees the right to freedom of opinion and expression.<sup>199</sup> Restrictions on protected speech must: (i) be prescribed by law (the principle of legality); (ii) serve a legitimate objective; and (iii) be necessary to achieve and proportionate to that objective.<sup>200</sup> As stated in the ICCPR, legitimate objectives are the protection of public morals, public health, national security, public order, and/or the rights and reputation of individuals.<sup>201</sup>

In order to comply with the principle of legality, legislation must be “formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly ... [and] may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.”<sup>202</sup> The UN Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion has noted: “[the] restriction must be

<sup>199</sup> Free expression is also protected by Article 41 of the Cambodian Constitution.

<sup>200</sup> See Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, paras. 22, 34; Human Rights Committee, *Kim v. Republic of Korea*, U.N. Doc. CCPR/C/64/D/574/1994, 1999, para. 12.2.

<sup>201</sup> ICCPR, Article 19(3).

<sup>202</sup> Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 25.



provided by laws that are precise, public and transparent; it must avoid providing authorities with unbounded discretion.”<sup>203</sup>

A restriction “violates the test of necessity if the protection could be achieved in other ways that do not restrict freedom of expression.”<sup>204</sup> The necessity requirement overlaps with the proportionality requirement, as the latter means that a restriction must be the “least intrusive instrument amongst those which might achieve their protective function.”<sup>205</sup> As such, laws that restrict expression cannot be overbroad.<sup>206</sup>

In line with necessity and proportionality standards, the UN Special Rapporteur on the promotion and protection of the right to freedom of expression has concluded that criminal penalties for speech are warranted in only the most serious and exceptional cases, such as child pornography, incitement to terrorism, public incitement to genocide, and advocacy for national, racial, or religious hatred.<sup>207</sup> According to the Special Rapporteur, it is never permissible to levy criminal penalties in response to expression that does not fall into these categories given the “significant chilling effect” on legitimate speech that such penalties create.<sup>208</sup>

In addition to insult of a public official (discussed below), Sovannchhay was charged with incitement under Article 495 of Cambodia’s Criminal Code. The formulation of Article 495, which criminalizes “direct incitement to commit a felony or to disturb social security,”<sup>209</sup> is insufficiently precise, contravening the legality prong of the UN Human Rights Committee’s three-part test. In terms of the act incited, the provision covers a wide range of outcomes: all potential felonies as well as any disruption of social order, a term which is not defined. The sweeping language of the law makes it difficult for individuals to “regulate [their] conduct accordingly,” affording the authorities discretion that is ripe for abuse. Consequently, even if the government were able to demonstrate that the law possessed a legitimate purpose, such as safeguarding public order or national security, Article 495 would fail the first prong of the Human Rights Committee’s three-part test.

Article 495 likewise does not comply with the third prong of the test: necessity and proportionality. The imprecision of the term “social order” places a broad swath of non-violent political speech within the scope of the law, including dissenting opinions. As such, the law is not the “least intrusive instrument available.” Moreover, criminal penalties are only appropriate where grave crimes are at issue. While Article 495 arguably could encompass offenses that may warrant criminal penalties, such as incitement to terrorism,

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<sup>203</sup> U.N. General Assembly, Report of the Special Rapporteur on the promotion and protection of freedom of expression, U.N. Doc. A/74/486, October 9, 2019, para. 6(a).

<sup>204</sup> Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 33.

<sup>205</sup> *Id.* at para. 34.

<sup>206</sup> *Id.*

<sup>207</sup> U.N. General Assembly, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, U.N. Doc. A/66/290, August 10, 2011, para. 40.

<sup>208</sup> *Id.*

<sup>209</sup> CCKC, Article 495.

public incitement to genocide, and advocacy for national, racial, or religious hatred, it extends beyond this narrow subset of crimes to more minute disruptions of public order, which should not be criminalized under international standards.

In light of the above, Article 495 violates Article 19 of the ICCPR. Notably, in 2015 the UN Human Rights Committee advised Cambodia to “[r]eview its current and pending legislation ... to avoid the use of vague terminology and overly broad restrictions, to ensure that any restrictions on the exercise of freedom of expression ... comply with the strict requirements of articles 19 (3).”<sup>210</sup> In 2021, the UN Working Group on Arbitrary Detention found Article 495 in violation of international human rights standards, stating that the provision “fail[ed] to distinguish between violent acts and peaceful exercise of fundamental freedoms” and urging Cambodia to amend it accordingly.

### *Article 502*

Under Article 502 of the CCKC, “an insult addressed to a public official or a holder of public elected office, acting in the discharge or on the occasion of his or her office” can be punishable with imprisonment.

The right to freedom of expression delineated in Article 19 includes the “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media.”<sup>211</sup> According to the UN Human Rights Committee, Article 19 protects “political discourse, commentary on one’s own and on public affairs, ... discussion of human rights, [and] journalism.”<sup>212</sup> Notably, the expression and/or dissemination of opinions that are critical of – or not in line with – official government policy is protected.<sup>213</sup> The Committee has correspondingly established that heads of state and government are “legitimately subject to criticism and political opposition,” emphasizing that “in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high.”<sup>214</sup> As such, “the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties.”<sup>215</sup>

The Committee has thus expressed concern about laws criminalizing speech that insults, dishonors, defames, or disrespects public officials.<sup>216</sup> The UN Special Rapporteur on the promotion and protection of the right to freedom of expression has elaborated that

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<sup>210</sup> Human Rights Committee, Concluding observations on the second periodic report of Cambodia, U.N. Doc. CCPR/KHM/CO/2, April 27, 2015, para. 21(d).

<sup>211</sup> ICCPR, Article 19(2).

<sup>212</sup> Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 11.

<sup>213</sup> *Id.* at paras. 38-42.

<sup>214</sup> *Id.* at para. 38.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

limitations on the right to freedom of opinion and expression in international instruments “were designed in order to protect individuals against direct violations of their rights” and were “not intended to suppress the expression of critical views, controversial opinions or politically incorrect statements.”<sup>217</sup>

In light of the above, Article 502’s criminalization of the insult of a public official violates Article 19 of the ICCPR on its face.

### *Sovannchhay’s prosecution*

Sovannchhay was convicted of incitement to disturb social order under Article 495 of the CCKC and insulting a public official acting in the discharge of his office under Article 502 of the CCKC based on an image of Hun Sen’s family shared on Facebook, captioned “the traitor, family of the traitor, children of the traitor,” and private Telegram voice messages criticizing Hun Sen for pursuing poor policies – among other things, calling him “the stupid leader” and “blind man” who “has governed the country for many years and allowed deforestation,” and deeming his “regime ... not stable.” Some of the voice recordings also included what could be perceived as violent threats. The first category of speech will be addressed first.

Given that heads of state and government figures are legitimately subject to criticism, indeed to a greater extent than private individuals, Sovannchhay’s communications were protected speech. As such, the restrictions imposed – i.e., his criminal prosecution, conviction and sentencing – had to pass the three-part test delineated by the UN Human Rights Committee: that a restriction be prescribed by law (the legality principle); that a restriction be aimed at a legitimate objective; and that a restriction be necessary and proportional.

As a threshold matter, as discussed above, Article 495 of the CCKC on incitement to social disorder is insufficiently precise to fulfill the legality requirement, and Article 502 violates the right to freedom of expression on its face. As such, Sovannchhay’s prosecution for incitement and insult was invalid from its outset.

With respect to the question of legitimate objective, a reading of the prosecution’s case in its most favorable light could indicate that preserving public order, not repressing Sovannchhay’s criticism of the government, was the primary aim. When a State invokes a legitimate ground for restriction of freedom of expression, “it must demonstrate in specific and individualized fashion the precise nature of the threat, and the *necessity and*

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<sup>217</sup> U.N. General Assembly, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, U.N. Doc. A/HRC/7/14, February 28, 2008, para. 85. Available at <https://undocs.org/A/HRC/7/14>.

*proportionality* of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat [emphasis added].”<sup>218</sup>

The State wholly failed, however, to demonstrate the precise nature of any threat posed by Sovannchhay’s acts. At no point in its submissions or at trial did the prosecution specify what type of “social disorder” Sovannchhay might have incited, present any evidence of individuals who might have been incited, or articulate the specific nature of any potential threat to a public official. Further, given the lack of articulation of any threat, the prosecution did not go one step further and explain the “direct and immediate connection” between Sovannchhay’s speech and the threat at hand and why it was necessary and proportionate to initiate criminal proceedings. As such, Sovannchhay’s prosecution and conviction for his criticism of the government violated his right to freedom of expression.

As mentioned above, criminal penalties for speech are warranted in only the most serious and exceptional cases, such as child pornography, incitement to terrorism, public incitement to genocide, and advocacy for national, racial, or religious hatred.<sup>219</sup>

The Rabat Plan of Action provides guidance on where criminal prosecutions and penalties are appropriate in response to potential acts of incitement or advocacy of hatred. The Plan was adopted by experts convened by the Office of the United Nations High Commissioner for Human Rights to review prohibitions on incitement to violence, hostility, and discrimination. One of the goals of the Rabat workshops was to balance State prohibitions on incitement with respect for freedom of expression.<sup>220</sup>

The Plan advises that:

the terms ‘hatred’ and ‘hostility’ refer to intense and irrational emotions of opprobrium, enmity and detestation towards the target group; the term ‘advocacy’ is to be understood as requiring an intention to promote hatred publicly towards the target group; and the term ‘incitement’ refers to statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups.<sup>221</sup>

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<sup>218</sup> Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 35.

<sup>219</sup> U.N. General Assembly, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, U.N. Doc. A/66/290, August 10, 2011, para. 40.

<sup>220</sup> Office of the High Commissioner for Human Rights, “Freedom of Expression vs. Incitement to Hatred: OHCHR and the Rabat Plan of Action.” Available at <https://www.ohchr.org/EN/Issues/FreedomOpinion/Articles19-20/Pages/Index.aspx>.

<sup>221</sup> Human Rights Council, Office of the High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred (Appendix: “Rabat Plan of Action”), U.N. Doc. A/HRC/22/17/Add.4, January 11, 2013, para. 21, fn. 5.

According to the Plan, criminal penalties should only be imposed in the most severe cases of incitement:<sup>222</sup> as “last resort measures to be applied in strictly justifiable situations.”<sup>223</sup> Specifically, for speech allegedly constituting incitement to be severe enough to amount to a criminal offense and be subject to criminal penalties, it must meet a six-part threshold test that establishes: (a) the social and political context at the time the speech was made and disseminated, (b) the speaker’s position or status within society and vis-à-vis the audience to whom the speech was directed, (c) the speaker’s intent to incite hatred, (d) the content and form of the speech, (e) the extent of the speech act, and (f) the reasonable probability that the speech would cause imminent harm against the target group.<sup>224</sup> This is consistent with findings from the UN Special Rapporteur on the promotion and protection of the right to freedom of expression clarifying that although States may legitimately prohibit advocacy constituting incitement, such expression need not be criminalized.<sup>225</sup>

Two snippets of Sovannchhay’s Telegram voice clips could, when read in the most favorable light for the prosecution, be construed as, respectively, advocating hatred or inciting violence: the June 4 clip in which he states “we Cambodians, must fight to drive away, defeat the Vietnamese invaders from Cambodia,” and the June 23 clip in which he states in response to someone insulting him for being a traitor and apparently cursing at him, “If you dare scold me again, I will hit you on your head” and “I dare hit you with shoes, you curse me, come if you dare, motherfucker.”

Neither of these statements should have resulted in criminal prosecutions. With respect to the latter comment, it was directed at a fellow participant in the Telegram group. Under the Rabat Plan, incitement meriting criminal sanctions is defined as “statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those group.” Sovannchay’s online exchange with an individual, which contained no national, racial or religious implications, thus did not qualify. Further, given that prosecutions should be reserved for the worst forms of incitement and employed only as last resort measures, the comment did not meet the requisite level of gravity.

With respect to the former comment about “driv[ing] away ... Vietnamese invaders,” which could be understood to advocate for hatred, at no point did the authorities establish that there was a reasonable probability of imminent harm against Vietnamese populations in Cambodia as a result of Sovannchhay’s words. In any event, looking to the form, content, and extent of the speech act, the comment was not directed at the larger public but at a single member of a private Telegram group with whom Sovannchay was having an argument. Correspondingly, looking to Sovannchhay’s position and status within society, particularly regarding the Telegram group in which the voice clips were posted (his

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<sup>222</sup> Id. at para. 18.

<sup>223</sup> Id. at para. 34.

<sup>224</sup> Id. at para. 29.

<sup>225</sup> U.N. General Assembly, Report of the Special Rapporteur on the promotion and protection of freedom of expression, U.N. Doc, A/74/486, October 9, 2019, para. 8.



audience), he is child with autism who was subjected to insults because of his father's political affiliation. His power over the audience at hand was slim to nil. Looking to the broader social and political context, the conversation occurred during a dialogue about the political situation and the ruling CPP, which has been criticized by some for being overly friendly to Vietnam (Hun Sen escaped to Vietnam when he decided to stop fighting for the Khmer Rouge). The comment was thus not premeditated or part of a larger plan to expel the Vietnamese from Cambodia. Lastly, as was the case with the comment about hitting a group participant on the head, the reference to Vietnamese invaders was far below the threshold of gravity necessary to warrant a criminal prosecution.

In light of the above, Sovannchhay's prosecution and conviction for the aforementioned two snippets violated his right to freedom of expression.

## CONCLUSION & GRADE



It is a pivotal time in Cambodia. Communal elections will take place in June, meaning that there is sure to be an uptick in the harassment of civil society, the United States-ASEAN summit is due to be held in the coming months, and Cambodia's preferential trade status is being reviewed by both the U.S. government and the European Union. In light of the egregious violations identified in Kak Sovannchhay's trial, the international community must continue to press the Cambodian authorities to cease targeting government critics, to amend its incitement legislation, and to uphold the rights of children and persons with disabilities who come into conflict with the law.

**GRADE:**

**D**



## GRADING METHODOLOGY

Experts should assign a grade of A, B, C, D, or F to the trial reflecting their view of whether and the extent to which the trial complied with relevant international human rights law, considering, *inter alia*:

- The severity of the violation(s) that occurred
- Whether the violation(s) affected the outcome of the trial
- Whether the charges were brought in whole or in part for improper motives, including political motives, economic motives, discrimination, such as on the basis of “race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,”<sup>226</sup> and retaliation for human rights advocacy (even if the defendant was ultimately acquitted)
- The extent of the harm related to the charges (including but not limited to whether the defendant was unjustly convicted and, if so, the sentence imposed; whether the defendant was kept in unjustified pretrial detention, even if the defendant was ultimately acquitted at trial; whether the defendant was mistreated in connection with the charges or trial; and/or the extent to which the defendant’s reputation was harmed by virtue of the bringing of charges), and
- The compatibility of the law and procedure pursuant to which the defendant was prosecuted with international human rights law.

### Grading Levels

- **A:** A trial that, based on the monitoring, appeared to comply with international standards.
- **B:** A trial that appeared to generally comply with relevant human rights standards excepting minor violations, and where the violation(s) had no effect on the outcome and did not result in significant harm.
- **C:** A trial that did not meet international standards, but where the violation(s) had no effect on the outcome and did not result in significant harm.
- **D:** A trial characterized by one or more violations of international standards that affected the outcome and/or resulted in significant harm.
- **F:** A trial that entailed a gross violation of international standards that affected the outcome and/or resulted in significant harm.

<sup>226</sup> ICCPR, Article 26.