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Center for Human Rights



Cambodia v. Kong Raiya

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TRIALWATCH FAIRNESS REPORT
A CLOONEY FOUNDATION **FOR** JUSTICE INITIATIVE

ABOUT THE AUTHORS:

Arthur Traldi is an attorney in Pennsylvania. He has served as a trial attorney in the Office of the Prosecutor at the International Criminal Tribunal for the former Yugoslavia and worked in Chambers at the International Criminal Tribunal for Rwanda, the State Court for Bosnia and Herzegovina, the Pennsylvania Supreme Court, and the Monroe County Court of Common Pleas. Among his professional activities, he is a member of the TrialWatch Expert Panel; a member of the Advisory Board of the ABA's International Criminal Justice Standards Working Group; and a co-chair of the ABA's International Criminal Law Committee.

Staff at the American Bar Association Center for Human Rights helped to draft this report. The **American Bar Association** (ABA) is the largest voluntary association of lawyers and legal professionals in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law. The **ABA Center for Human Rights** has monitored trials and provided pro bono assistance to at-risk human rights defenders in over 60 countries. It is an implementing partner in the Clooney Foundation for Justice's TrialWatch initiative.

ABOUT THE CLOONEY FOUNDATION FOR JUSTICE'S TRIALWATCH INITIATIVE

The **Clooney Foundation for Justice's TrialWatch initiative** monitors and grades the fairness of trials of vulnerable people around the world, including journalists, women and girls, religious minorities, LGBTQ persons and human rights defenders. Using this data, TrialWatch advocates for victims and is developing a Global Justice Ranking measuring national courts' compliance with international human rights standards.

The statements and analysis expressed have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and do not represent the position or policy of the American Bar Association. 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



TrialWatch Expert Arthur Traldi assigned this trial a grade of D:

The case against Mr. Raiya should never have been tried, because it violated his right to freedom of expression. Mr. Raiya appears to have been tried, convicted, and sentenced merely for engaging in non-violent political speech. Mr. Raiya's trial and the subsequent judgement appear to have also violated his rights to be presumed innocent and to a duly reasoned opinion. Because the violation of Mr. Raiya's right to freedom of expression affected the outcome of the trial and/or resulted in significant harm to Mr. Raiya, who spent approximately five months in detention and was criminally convicted, the trial has been assigned a "D" under the grading methodology described in the Annex.

In mid-2020, the American Bar Association (ABA) Center for Human Rights monitored the criminal trial of activist Kong Raiya in Cambodia as part of the Clooney Foundation for Justice's TrialWatch initiative. Mr. Raiya was prosecuted and convicted for "incitement to disrupt social order." The case against him stemmed from Facebook posts in which he advertised the sale of t-shirts commemorating a slain critic of the Cambodian government. The shirts did not bear any call for violence or disorder and, as documented by the monitor, the prosecution did not adduce any evidence to show the shirts would be understood to call for social disorder; that the shirts might have the effect of creating social disorder; or that Mr. Raiya had intended such effects. The case against Mr. Raiya thus contravened his right to freedom of expression in addition to undermining other rights, such as his right to the presumption of innocence - detailed below.

Mr. Raiya is a prominent youth activist formerly affiliated with the now-banned Cambodia National Rescue Party (CNRP). Ahead of the three-year anniversary of the killing of Kem Ley, a popular political analyst and government critic who was murdered on July 10, 2016, Mr. Raiya printed t-shirts with the image of Kem Ley and two quotes from him: "Wipe your tears and continue your journey" on the front and "Although you do nothing, you may still be victimized. It's just a matter of time until it's your turn" on the back. On July 8, 2019, Mr. Raiya posted on Facebook advertising the t-shirts and relaying taxi information for a commemoration event.

On July 9, 2019, the day after Mr. Raiya posted on Facebook, two plainclothes policemen went to his house posing as customers and arrested him. They also arrested his wife, infant, sister, and brother-in-law and took them to the police station. Mr. Raiya's

relatives were released later that day after signing a document promising they would not undertake further action related to the alleged offense.

On July 11, 2019, Mr. Raiya was charged with incitement to disrupt social order under Article 494 and Article 495 (entitled “incitement to commit a felony”) of Cambodia’s Penal Code, which provide for a sentence ranging from six months to two years’ imprisonment and a fine from one to four million riels. Article 4 of the Code stipulates that unless stated otherwise, intent is a requisite element of criminal offenses. Articles 494 and 495 set forth no explicit *mens rea* and thereby mandate proof of intent.

Subsequent to the filing of charges, Mr. Raiya was transferred to Phnom Penh’s Correctional Center (CC1). On July 24, 2019, two weeks after Mr. Raiya’s initial arrest, the Phnom Penh Municipal Court of First Instance (Municipal Court) denied Mr. Raiya’s bail application and imposed pretrial detention. In August, the Phnom Penh Court of Appeals upheld the Municipal Court’s decision denying bail, and in November the Supreme Court of Cambodia affirmed. That same month, in conjunction with the mass release of political prisoners ahead of a report potentially damaging to an important EU trade deal, the Municipal Court set Mr. Raiya free pending trial.

Mr. Raiya’s trial commenced at the Municipal Court on May 20, 2020 and consisted of a half-day hearing. Only one witness appeared before the court: a police officer who testified for the prosecution about a department report on the undercover operation against Mr. Raiya. Statements of other witnesses, including Mr. Raiya, were admitted into evidence in writing. On June 19, the Municipal Court found Mr. Raiya guilty of violating Articles 494 and 495 and imposed a two-year suspended sentence, with credit for time served.

Mr. Raiya’s arrest, prosecution and conviction violated his right to freedom of expression, guaranteed by Article 19 of the International Covenant on Civil and Political Rights (ICCPR), to which Cambodia is a party. The imparting of information on social media, including commercial advertising, is protected speech. The United Nations Human Rights Committee, charged with interpreting the ICCPR, has delineated requirements that States party to the ICCPR must fulfil to restrict speech protected by Article 19: crucially, even if a State party “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 ... a direct and immediate connection between the expression and the threat.” In Mr. Raiya’s case, as set forth below, the prosecution failed to demonstrate the threat that allegedly justified criminal proceedings and failed to demonstrate a connection between the expression and the threat.

Meanwhile, the Municipal Court’s conviction of Mr. Raiya appears to have violated the presumption of innocence guaranteed by Article 14(2) of the ICCPR, under which the

prosecution must prove guilt beyond a reasonable doubt. At trial, the prosecution failed to prove the elements of Articles 494 and 495. The prosecution, for example, presented no evidence to show Mr. Raiya intended to incite social unrest.

Notwithstanding such gaps, the court convicted Mr. Raiya, resolving all doubts in the prosecution's favor. This violated his right to be presumed innocent. The court likewise provided scant reasoning for its verdict, omitting explanation of why it had rejected defense arguments on freedom of expression and why it found that Mr. Raiya possessed the requisite intent. This violated Mr. Raiya's right to appeal under Article 14(5) of the ICCPR, which includes the right to a duly reasoned decision.

More generally, international bodies have made clear that imprisonment for speech offenses should be reserved for exceptionally grave acts, such as incitement to genocide and terrorism. Article 495's broad criminalization of speech perceived as inciting social unrest, without further specification or procedural safeguards, extends beyond the enumerated exceptions. As demonstrated by Mr. Raiya's case, the authorities have used the provision to prosecute individuals for protected speech, chilling public discourse and further narrowing the already cramped civic space in which former CNRP members such as Mr. Raiya operate.

BACKGROUND INFORMATION



A. POLITICAL AND LEGAL CONTEXT

Although Cambodia has an elected parliament, Prime Minister Hun Sen and the Cambodian People's Party (CPP) have been in power for decades. The Supreme Court of Cambodia dissolved the main opposition party, the Cambodia National Rescue Party (CNRP), in 2017, all but ensuring that the CPP won all National Assembly seats in the July 2018 elections.¹ As documented by international and domestic organizations and institutions, political rights and civil liberties are severely curtailed; in its 2020 "Freedom in the World" report, for example, Freedom House rated Cambodia "not free," reporting concerns about allegedly politically motivated prosecutions and the harassment of political opposition, independent press, and activists.²

Political Opposition

There are extensive reports of government targeting of former members of the dissolved CNRP party. In August 2019, for example, a former CNRP official was arrested after he helped "organize gatherings of former CNRP elected officials and activists for meals," with the authorities alleging that he had disobeyed the Supreme Court order dissolving the party.³ That same year, United Nations experts noted that "more than 140 members of the former Cambodia National Rescue Party (CNRP) ha[d] been questioned by the authorities, summoned or detained in relation to attendance at gatherings and comments made in support of the two former leaders of the court-dissolved CNRP, Mr. Kem Sokha and Mr. Sam Rainsy."⁴ By the end of 2019, the United Nations Special Rapporteur on the situation of human rights in Cambodia (Special Rapporteur on Cambodia) had reported over 200 "cases of harassment, and judicial actions against CNRP members or supporters."⁵ In November 2020, the US Embassy in

¹ See U.S. State Department, "2019 Country Report on Human Rights Practices: Cambodia", 2020, pgs. 17-18. Available at <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/cambodia/>.

² Freedom House, "Freedom in the World Report on Cambodia", 2020. Available at <https://freedomhouse.org/country/cambodia/freedom-world/2020>. See also Human Rights Watch, "World Report 2020: Cambodia", 2020. Available at <https://www.hrw.org/world-report/2020/country-chapters/cambodia>; Amnesty International, "Cambodia: Overview." Available at <https://www.amnesty.org/en/countries/asia-and-the-pacific/cambodia/>; Human Rights Watch, "Cambodia: Repeal of Abusive Associations Rule", December 7, 2018. Available at <https://www.hrw.org/news/2018/12/07/cambodia-repeal-abusive-associations-rule>.

³ Human Rights Watch, "Cambodia: Former opposition official detained", August 19, 2019. <https://www.hrw.org/news/2019/08/19/cambodia-former-opposition-official-detained>.

⁴ Office of the High Commissioner for 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>.

⁵ Office of the High Commissioner for Human Rights, "Cambodia: UN expert concerned at escalating tensions and crackdowns", November 8, 2019. Available at

Phnom Penh stated that it was “closely following a growing number of court cases targeting,” among others, “supporters of Cambodia’s primary political opposition party, the Cambodia National Rescue Party.”⁶

Suppression of Speech and Assembly

Notwithstanding the Cambodian Constitution’s guarantee of freedom of expression, there have been reports of the government systematically curtailing dissenting voices, described below. These reports intensified in 2017, ahead of the 2018 elections, with the government forcing independent media outlets to close and, according to Amnesty International, “perpetuat[ing] a culture of fear and self-censorship.”⁷

The Special Rapporteur on Cambodia and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression have 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.”⁸ In particular, the Rapporteurs have highlighted “the use of criminal law to target free speech, both offline and online.”⁹

In this vein, the government has employed broadly defined offenses, such as incitement to commit a felony, insult, and disinformation, against perceived critics.¹⁰ In 2017, for example, two journalists at the *Cambodia Daily* were charged with “incitement to commit a felony” under Articles 494 and 495 of the Cambodian Criminal Code in connection with their election coverage of a community that had previously elected opposition party members.¹¹ The charges came one month after the *Cambodia Daily*, a long-running

<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25260&LangID=E>. See also Freedom House, “Freedom in the World Report on Cambodia”, 2020.

⁶ U.S. Embassy Phnom Penh, Cambodia, Official Facebook Page Post, November 17, 2020. Available at <https://www.facebook.com/us.embassy.phnom.penh/photos/a.390395653223/10157827793028224/>.

⁷ Amnesty International, “Cambodia 2019.” Available at <https://www.amnesty.org/en/countries/asia-and-the-pacific/cambodia/report-cambodia/>.

⁸ Office of High Commissioner of Human Rights, “Cambodia: UN experts concerned at Government moves to silence political opponents”, June 19, 2019.

⁹ *Id.*

¹⁰ See *id.*; Human Rights Watch, “Cambodia: Over 145 Opposition Members Summoned”, June 2, 2019. Available at <https://www.hrw.org/news/2019/06/02/cambodia-over-145-opposition-members-summoned>; Human Rights Watch, “Cambodia: Drop case against opposition activist”, March 21, 2020. Available at <https://www.hrw.org/news/2020/03/21/cambodia-drop-case-against-opposition-activist>; U.S. State Department, “2019 Country Report on Human Rights Practices: Cambodia”, 2020, pg. 11; ASEAN Parliamentarians for Human Rights, “Cambodia must release opposition member detained for ‘incitement,’ regional lawmakers say”, January 22, 2019. Available at <https://aseanmp.org/2019/01/22/cambodia-must-release-opposition-member-detained-for-incitement/>.

¹¹ The Phnom Penh Post, “Former Cambodia Daily reporters charged with ‘incitement’”, October 6, 2017. Available at <https://www.phnompenhpost.com/national/former-cambodia-daily-reporters-charged-incitement>; Human Rights Watch, “Cambodia: Drop Charges Against Journalists”, December 22, 2019. Available at <https://www.hrw.org/news/2019/12/22/cambodia-drop-charges-against-journalists>.

independent English-language news outlet, shut down due to a \$6.3 million tax bill.¹² In 2019, Kong Mas, a member of the dissolved CNRP, was convicted of public insult and incitement to commit a felony for Facebook posts critical of the government.¹³ It is not only journalists and public figures who have been targeted under these laws; in 2018, a Cambodian migrant worker was arrested and charged with defamation and incitement to commit a felony for allegedly insulting the prime minister in a video clip he had posted on social media two years earlier.¹⁴ The Office of the United Nations High Commissioner for Human Rights recently noted that of 24 human rights defenders arrested between the end of July and beginning of September 2020, most are facing charges of incitement.¹⁵

In her 2019 report to the Human Rights Council, the Special Rapporteur on Cambodia concluded that the authorities have also suppressed the right to freedom of assembly.¹⁶ Human rights groups have correspondingly documented “arbitrary restrictions” on protests as well as the “unnecessary and excessive use of force” against demonstrators who gather in defiance of government bans.¹⁷ Between April 2018 and March 2019, the Cambodian Center for Human Rights documented 99 violations of the freedom of peaceful assembly.¹⁸

In November 2020, 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 criminalisation of human rights defenders, as well as excessive use of force against them.”¹⁹ The Special Rapporteur on the situation of

¹² The Phnom Penh Post, “Daily silenced after 24 years”, September 4, 2018. Available at <https://www.phnompenhpost.com/national/daily-silenced-after-24-years>.

¹³ Human Rights Watch, “Cambodia: Drop case against opposition activist”, March 21, 2020.

¹⁴ Phnom Penh Post, “Migrant arrested for insulting PM on Facebook”, April 4, 2018. Available at <https://www.phnompenhpost.com/national/migrant-arrested-insulting-pm-facebook>. The exact content of the video is unknown because it has since been deleted from Facebook.

¹⁵ Office of the High Commissioner for Human Rights, Press Briefing Notes on Cambodia, September 11, 2020. Available at

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26223&LangID=E>.

¹⁶ Human Rights Council, Report of the Special Rapporteur on the Situation of Human Rights in Cambodia, U.N. Doc. A/HRC/42/60, August 27, 2019, para. 56.

¹⁷ See Amnesty International, “Taking to the Streets: Freedom of Peaceful Assembly in Cambodia”, May 2015. Available at <https://www.refworld.org/pdfid/557576a54.pdf>.

¹⁸ Cambodian Center for Human Rights, “Fact Sheet: The Right to Freedom of Peaceful Assembly in relation to Land Disputes in Cambodia”, August 2019, pg. 2. Available at https://cchrcambodia.org/admin/media/factsheet/factsheet/english/Factsheet%20on%20Freedom%20of%20Assembly%20and%20Land%20Disputes_ENG_Final.pdf.

¹⁹ 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.

human rights defenders cited credible reports that at least 21 human rights defenders had been threatened, arrested, and detained for exercising their rights to freedom of assembly and freedom of expression in the preceding three months.²⁰ Also in November, a group of United States Senators and members of the House of Representatives issued a public letter to the State Department describing an “escalating wave of arrests,” particularly “since the outbreak of the COVID-19 pandemic,” and urging the State Department to “condemn[] ... Hun Sen and his party’s crackdown on free speech, association, and assembly.”²¹

Due Process and Fair Trial Rights

According to Freedom House, due process rights in Cambodia are “poorly upheld.”²² There are reports that excessive and arbitrary detention is not uncommon, particularly in politically motivated prosecutions.²³

International and domestic organizations and institutions have also repeatedly questioned the independence of the judiciary.²⁴ Although the Cambodian Constitution formally provides for an independent judiciary, the International Commission of Jurists (ICJ) has criticized three “judicial reform laws” passed in 2014 as effectively “institutionaliz[ing] the prosecution and judiciary’s lack of independence from the executive.”²⁵

Notably, in Cambodia’s civil law system, judges function as both finders of fact and law: after the prosecutor determines there is sufficient evidence to bring charges, for example, the prosecutor’s office forwards the indictment to the investigating judge, who is empowered to question relevant parties and issue warrants as needed. If the investigating judge decides that there is sufficient evidence for trial, he or she forwards

²⁰ *Id.*

²¹ U.S. Senate, Letter re deterioration in human rights protection and democratic rule in Cambodia, November 16, 2020. Available at [https://www.markey.senate.gov/imo/media/doc/\(11.16.2020\)%202020-11-](https://www.markey.senate.gov/imo/media/doc/(11.16.2020)%202020-11-)

[11-11%20Letter%20to%20Sec%20Pompeo%20on%20Cambodia_with%20sigs_PDF.pdf?fbclid=IwAR31Va5BgDw6OTaYJv_t7XE2HMZErYbRJO1CkFAxxeAXo7EgvhFYUreNT-0](https://www.markey.senate.gov/imo/media/doc/(11.16.2020)%202020-11-11%20Letter%20to%20Sec%20Pompeo%20on%20Cambodia_with%20sigs_PDF.pdf?fbclid=IwAR31Va5BgDw6OTaYJv_t7XE2HMZErYbRJO1CkFAxxeAXo7EgvhFYUreNT-0).

²² Freedom House, “Freedom in the World Report on Cambodia”, 2020.

²³ U.S. State Department, “2019 Country Report on Human Rights Practices: Cambodia”, 2020, pgs. 5-7; Human Rights Watch, “World Report 2019: Cambodia”, 2019. Available at <https://www.hrw.org/world-report/2019/country-chapters/cambodia>.

²⁴ See Freedom House, “Freedom in the World Report on Cambodia”, 2020; International Bar Association, “Justice versus Corruption: Challenges to the independence of the judiciary in Cambodia”, September 17, 2015. Available at <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=FB11E885-5F1D-4C03-9C55-86FF42157AE1>; U.S. State Department, “2019 Country Report on Human Rights Practices: Cambodia”, 2020, pg. 7; Licadho, “Unconstitutional Draft Laws on the Judiciary should be Rejected”, June 15, 2014. Available at <https://www.licadho-cambodia.org/pressrelease.php?perm=346>.

²⁵ 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/>.

the case to the presiding court. At trial, the court is empowered to ask questions of witnesses and the parties.

In 2017, at the conclusion of an extensive baseline study, the ICJ asserted that “the rule of law [was] virtually absent from the Cambodian justice system,”²⁶ and that courts were “well known as political tools of the CPP [the ruling political party].”²⁷ The ICJ described an “absence of judicial and prosecutorial accountability for lack of adherence to basic fair trial standards” that severely hampered the ability of defense lawyers to serve their clients’ interests.²⁸ Among other things, prosecution evidence was “considered to be authoritative without effective challenges or judicial scrutiny,” and trial judges regularly admitted the statements of prosecution witnesses who failed to appear for cross-examination.²⁹ The ICJ concluded that outcomes often appeared predetermined, finding it “routine” for trial judges to “simply endorse the results of judicial investigations.”³⁰

In monitoring proceedings at the Phnom Penh Court of Appeal³¹ from 2017-2018, the Cambodian Center for Human Rights (CCHR) similarly found “a lack of compliance” with certain fundamental fair trial rights, including the right to the presumption of innocence.³² The CCHR deemed the quality of evidence presented during trials of “great concern.”³³

It was against this backdrop that Kong Raiya’s arrest and trial took place.

B. CASE HISTORY

Kong Raiya, 29 (as of November 2020), is a prominent Cambodian youth activist who lives with his wife, their young child, and his wife’s parents. Mr. Raiya was a member of the now-banned opposition Cambodia National Rescue Party (CNRP). In 2015, while a university student, he was charged with “incitement to commit a felony” on the basis of a

²⁶ International Commission of Jurists, “Achieving Justice for Gross Human Rights Violations in Cambodia: Baseline Study”, October 2017, pg. 3. Available at <https://www.icj.org/wp-content/uploads/2017/10/Cambodia-GRA-Baseline-Study-Publications-Reports-Thematic-reports-2017-ENG.pdf>.

²⁷ *Id.* at pgs. 19-20.

²⁸ *Id.* at pg. 20.

²⁹ *Id.*

³⁰ *Id.*

³¹ Appellate courts in Cambodia consider not only questions of law but also questions of fact. They are empowered to evaluate evidence, much like a first instance court.

³² Cambodian Center for Human Rights, “Fair Trial Rights in Cambodia: Monitoring at the Court of Appeal”, October 2019, vii-viii. Available at https://cchrcambodia.org/admin/media/report/report/english/CCHR%20Report%20on%20Fair%20Trial%20Rights_%202017-2018_ENG.pdf.

³³ *Id.* at pg. 32.

Facebook post critical of the government, was convicted, and served an 18-month prison sentence.³⁴

Mr. Raiya was arrested and detained on July 9, 2019 for promoting the sale of t-shirts featuring images of and quotes from the late Kem Ley, a popular political analyst and government critic who was killed on July 10, 2016 while having coffee at a petrol station.³⁵ The investigation into Kem Ley's murder has been widely criticized; although an individual was found guilty of the killing after a half-day hearing, UN experts have expressed concern that "there has been no apparent independent and impartial investigation," noting that "[o]ngoing investigations seeking to identify others who may have been involved in Kem Ley's murder have apparently stalled with no one summoned in relation to the investigation."³⁶ In this vein, the US government has called for a "full, transparent, and credible investigation"³⁷ and more than 100 human rights organizations have called on the Cambodian government to establish a Commission of Inquiry to conduct an "effective and impartial investigation."³⁸

In the leadup to the three year anniversary of Kem Ley's death, Mr. Raiya printed t-shirts with two of Kem Ley's quotes on them: "Wipe your tears and continue your journey" on the front and "Although you do nothing, you may still be victimized. It's just a matter of time until it's your turn" on the back.³⁹ On July 8, Mr. Raiya posted on his Facebook account advertising the t-shirts for sale.⁴⁰ An accompanying post provided details for taxi services to a ceremony commemorating Kem Ley's death.⁴¹

³⁴ Amnesty International, "Cambodia: Release Prisoners of Conscience Kong Raiya and Soung Neakpaon", October 7, 2019. Available at <https://www.amnesty.org/download/Documents/ASA2312912019ENGLISH.pdf>.

³⁵ Khmer Times, "Supreme Court denies bail for Kong Raiya", November 5, 2019. Available at <https://www.khmertimeskh.com/657105/supreme-court-denies-bail-for-kong-raiya/>; Radio Free Asia, "Jailed Cambodian Activist Marks Fifth Day of Hunger Strike Protesting Conditions in Detention", July 15, 2019. Available at <https://www.rfa.org/english/news/cambodia/strike-07152019165359.html>.

³⁶ Office of the High Commissioner, "Cambodia: UN experts concerned by arrests around Kem Ley memorial service", July 26, 2019. Available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24850&LangID=E>.

³⁷ U.S Embassy in Cambodia, "Cambodia: Three years and still no effective investigation into Dr. Kem Ley's Killing", July 11, 2019. Available at <https://kh.usembassy.gov/cambodia-three-years-and-still-no-effective-investigation-into-dr-kem-leys-killing/>.

³⁸ See Amnesty International, et. al, "Cambodia: 4 Years On, No Effective Investigation into Kem Ley's Unlawful Killing", July 9, 2020. Available at <https://www.amnesty.org/download/Documents/ASA2327052020ENGLISH.pdf>; Amnesty International, et. al, "Cambodia: Three years and still no effective investigation into Dr. Kem Ley's death", July 9, 2019. Available at https://www.hrw.org/sites/default/files/supporting_resources/190709_kem_ley_statement.pdf; Human Rights Watch, et. al, "Joint Letter on Investigation into Killing of Kem Ley", July 7, 2017. Available at <https://www.hrw.org/news/2017/07/07/joint-letter-investigation-killing-kem-ley#>.

³⁹ Monitor's Notes, May 20, 2020.

⁴⁰ Id.

⁴¹ Phnom Penh Court of First Instance, Judgment, June 19, 2020.

On July 9, two undercover police officers posing as customers went to Mr. Raiya's house.⁴² Mr. Raiya was not aware that the men were police officers.⁴³ Mr. Raiya was arrested after handing the t-shirts to the undercover officers and was brought to the police station.⁴⁴ The officers confiscated the t-shirts, books about Kem Ley, and several computers and smartphones.⁴⁵ Mr. Raiya's wife, baby, sister, and brother-in-law were also brought to the police station, where they were questioned and then released; a police officer who testified at trial stated that Mr. Raiya's family members were released after it was determined that they did not appear to be involved in the incident.⁴⁶ Public reporting suggested the adults were additionally required to sign a "confession" or contract that they would not engage in related acts.⁴⁷

On July 10, the three-year anniversary of Kem Ley's death was commemorated across the country, including outside of the Phnom Penh petrol station where he was murdered (Mr. Raiya did not attend as he was in detention). At the ceremony in Phnom Penh, police and members of the security forces (reports vary from 50 to 100) surrounded the activists and prevented them from laying floral wreaths.⁴⁸ Attendees wearing Kem Ley shirts were required to take them off or cover them up.⁴⁹ The police arrested three attendees, including youth activist Soung Neak Poan, who was distributing leaflets demanding that the government stop extrajudicial killings.⁵⁰ While the other two activists were released later that evening, Soung Neak Poan was charged with "incitement to commit a felony," held in pre-trial detention until November 2019, and convicted *in absentia* in December 2019.⁵¹

⁴² Monitor's Notes, May 20, 2020.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*; Monitor's Notes, Conversation with Defense Counsel, June 24, 2020.

⁴⁷ Human Rights Watch, "Cambodia: Activists charged for participating in a memorial", July 12, 2019. Available at <https://www.hrw.org/news/2019/07/12/cambodia-activists-charged-participating-memorial>. See also Phnom Penh Post, "PP court charges former CNRP activist Raiya for alleged role in Kem Ley commemorations", July 12, 2019. Available at www.phnompenhpost.com/national-politics/pp-court-charges-former-cnrp-activist-reiya-alleged-role-commemorations; Amnesty International, "Cambodia: Release Prisoners of Conscience Kong Raiya and Soung Neakpaon", October 7, 2019. Note: Amnesty International's press release states that Mr. Raiya was detained alongside his wife, child, and two siblings, and that his relatives were released the next day. This slightly differs from defense counsel's account that Mr. Raiya's wife, child, sister, and brother-in-law were detained and later released the same day. The monitor's notes do not reflect whether the police officer who testified at trial was questioned about any agreement between Mr. Raiya's family members and the police.

⁴⁸ Human Rights Watch, "Cambodia: Activists charged for participating in a memorial", July 12, 2019; Radio Free Asia, "Jailed Cambodian activist marks fifth day of hunger strike protesting conditions in detention", July 15, 2019.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Amnesty International, et. al, "Cambodia: 4 Years On, No Effective Investigation into Kem Ley's Unlawful Killing", July 9, 2020.

On July 11, the day after the Kem Ley commemoration, Mr. Raiya was charged under Articles 494 and 495 of Cambodia's Penal Code for selling t-shirts bearing the image of and quotes from Kem Ley.⁵² Article 494 (existence of incitement) makes "incitement" punishable when it is committed: "by speech of any kind, made in a public place or meeting; by writing or picture of any kind, either displayed or distributed to the public; by any audio-visual communication to the public."⁵³ Articles 495 and 496 define forms of incitement which may give rise to criminal consequences.

Article 495 states:

The direct incitement to commit a felony or to disrupt social order by employing one of the means defined in Article 494 (existence of incitement) of this Code shall be punishable by imprisonment from six months to two years and a fine from one million to four million riels, where the incitement was ineffective.⁵⁴

Mr. Raiya was specifically alleged to have incited the disruption of social order. He was transferred to Phnom Penh's Correctional Center 1 (CC1), and denied bail by the Phnom Penh Municipal Court of First Instance (Municipal Court) on July 24, 2019.⁵⁵ The Appeals Court upheld the denial on August 13, and the Supreme Court subsequently upheld the Appeals Court's decision on November 4.⁵⁶

Mr. Raiya's arrest garnered significant attention, with local civil society,⁵⁷ human rights organizations,⁵⁸ and UN Special Rapporteurs all calling on the Cambodian government to release him and drop the charges.⁵⁹ On November 29, the Municipal Court released Mr. Raiya on bail with several conditions, including banning Mr. Raiya from using

⁵² Monitor's Notes, May 20, 2020; Amnesty International, "Cambodia: Release Prisoners of Conscience Kong Raiya and Soung Neakpaon", October 7, 2019; Khmer Times, "Activist charged with incitement over Kem Ley t-shirt sales", July 12, 2019. Available at <https://www.khmertimeskh.com/50623244/activist-charged-with-incitement-over-kem-ley-t-shirt-sales/>.

⁵³ Criminal Code of the Kingdom of Cambodia, Article 494.

⁵⁴ Criminal Code of the Kingdom of Cambodia, Article 495.

⁵⁵ Amnesty International, "Cambodia: Release Prisoners of Conscience Kong Raiya and Soung Neakpaon", October 7, 2019.

⁵⁶ Khmer Times, "Supreme Court denies bail for Kong Raiya", November 5, 2019.

⁵⁷ Cambodian League for the Promotion and Defense of Human Rights (LICADHO), "Arrest of Two Activists Highlights Authorities' Lack of Respect for Freedom of Expression and Assembly", July 12, 2019. Available at <https://www.licadho-cambodia.org/pressrelease.php?perm=443>.

⁵⁸ See Amnesty International, "Cambodia: Release Prisoners of Conscience Kong Raiya and Soung Neakpaon", October 7, 2019.

⁵⁹ Office of the High Commissioner for Human Rights, "Cambodia: UN experts concerned by arrests around Kem Ley memorial service", July 26, 2019. These included the Special Rapporteur on the situation of human rights in Cambodia, the Special Rapporteur on the right to peaceful assembly and association, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on extrajudicial, summary or arbitrary execution, and the Special Rapporteur on the situation of human rights defenders.

Facebook for political purposes and requiring him to attend court when summoned.⁶⁰ Mr. Raiya's release on bail coincided with the government's decision to release more than 70 individuals on bail (mostly political prisoners) shortly after the European Union sent the government a report highly critical of Cambodia's human rights record.⁶¹ Earlier in the year, the European Union had begun the process of partially suspending Cambodia's preferential trade treatment under the "Everything But Arms" deal due to the government's failure to address human rights concerns, "mostly ... violations of political rights."⁶²

Mr. Raiya's trial before the Municipal Court consisted of one hearing on May 20, 2020. Mr. Raiya was not present at the hearing but was properly notified in advance and represented by his lawyers.⁶³ The trial began with the testimony of a prosecution witness - a police officer who stated that he did not have first-hand knowledge of the investigation but who had been asked to testify to details regarding the undercover operation.⁶⁴ On cross-examination, the witness was unable to answer many of the questions posed by defense counsel.⁶⁵ The officer was the only witness to testify.⁶⁶ The trial judge then asked the clerk to read the statement Mr. Raiya had provided to the investigating judge.⁶⁷ In the statement, Mr. Raiya acknowledged selling the shirts to the undercover officers but denied intent to incite social unrest.⁶⁸ He explained that he had advertised the t-shirts with Kem Ley's image and quotes because he loved Kem Ley and was trying to financially support his wife and child.⁶⁹

At closing argument, the prosecution asserted that "Kong Raiya's acts of advertising the quotes on t-shirts" were "a way to incite people to commit a felony."⁷⁰ According to the prosecution, "when people wore the t-shirts ... the quotes could be seen by the public. And these acts are in violation of Articles 494 and 495 of the Criminal Code of the Kingdom of Cambodia."⁷¹ Defense counsel countered that Mr. Raiya had sold the same

⁶⁰ Khmer Times, "Jailed activist released on bail", November 29, 2019. Available at <https://www.khmertimeskh.com/50665693/jailed-activist-released-on-bail/>; Voice of Asia, "Youth Activist Kong Raiya Released On Bail, Kept Under Court Supervision", December 1, 2019. Available at <https://www.voacambodia.com/a/youth-activist-kong-raiya-released-on-bail-kept-under-court-supervision/5188068.html>.

⁶¹ See Voice of Asia, "Youth Activist Kong Raiya Released on Bail, Kept Under Court Supervision", December 1, 2019.

⁶² Al Jazeera, "Cambodia starts release of opposition activists", November 18, 2019. Available at <https://www.aljazeera.com/news/2019/11/cambodia-starts-release-opposition-activists-191116062400263.html>.

⁶³ Monitor's Notes, May 20, 2020.

⁶⁴ Id.

⁶⁵ Id.

⁶⁶ Id.

⁶⁷ Id.

⁶⁸ Id.

⁶⁹ Id.

⁷⁰ Id.

⁷¹ Id.

t-shirts in 2017, and that no social unrest had resulted.⁷² Counsel further argued that Mr. Raiya’s post on Facebook was for commercial purposes, that he had no ill-will or intent to incite unrest, and that he was exercising his right to expression and publication.⁷³

On June 19, 2020, the Municipal Court convicted Mr. Raiya of violating Articles 494 and 495, finding that he had “intent to cause unrest to the society as a whole.”⁷⁴ Mr. Raiya was also convicted of violating Article 88 of the Criminal Code, which prescribes a higher sentence for an individual convicted of the same misdemeanor a second time.⁷⁵ Mr. Raiya received a suspended sentence of two years’ imprisonment, with credit for time served in pre-trial detention.⁷⁶

⁷² Id.

⁷³ Id.

⁷⁴ Phnom Penh Court of First Instance, Judgment, June 19, 2020, pg. 9. See also Monitor’s Notes, June 19, 2020.

⁷⁵ Id. at pg. 10.

⁷⁶ Id.

METHODOLOGY



A. THE MONITORING PHASE

The American Bar Association's Center for Human Rights deployed a monitor to the trial of Kong Raiya 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 May 20, 2020 and the delivery of the verdict on June 19, 2020.

B. THE ASSESSMENT PHASE

To evaluate the trial's fairness and arrive at a grade, TrialWatch Expert Arthur Traldi reviewed notes taken during the proceedings, an unofficial translation of the trial judgment, and an analysis of the case and the political and legal context in Cambodia prepared by staff at the Center for Human Rights. Mr. Traldi concluded: This trial violated Mr. Raiya's right to freedom of expression. Available documentation reflects that Mr. Raiya simply sold t-shirts imprinted with two peaceful slogans by murdered government critic Kem Ley.

Neither the judgement nor the trial monitor's notes reflect any reason to believe that the t-shirts were either intended or likely to incite felonious behavior or social disorder, or to have any effect beyond engagement in protected political speech. In short, if Mr. Raiya meaningfully or intentionally incited the disruption of social order, felonious conduct, or violence, the prosecution had a responsibility to adduce that evidence and provide him an opportunity to test it. Without such evidence, it appears that Mr. Raiya was convicted and sentenced for protected political speech. These charges for political speech are severe violations of Mr. Raiya's expression rights and impacted the outcome of the trial because it would not have occurred in the absence of the violations.

Concerns extend beyond the gravamen of the charges. Mr. Raiya was detained in conditions that give rise to concerns about inhuman treatment and was deprived of the presumption of innocence. Each violation is also independently severe, justifying a grade of D.

ANALYSIS



A. APPLICABLE LAW

This report draws upon the International Covenant on Civil and Political Rights (ICCPR); jurisprudence from the United Nations Human Rights Committee, which is tasked with interpreting and monitoring implementation of the ICCPR; and commentary from the United Nations Special Procedures. Cambodia ratified the ICCPR in 1992.

B. INVESTIGATION AND PRETRIAL STAGE VIOLATIONS

Arbitrary Arrest and Detention

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.” Mr. Raiya was detained for almost five months prior to trial.

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.”⁷⁷ Not only should pretrial detention be the exception and as short as possible, but also detention must be “lawful” (in accordance with domestic law) and “reasonable and necessary in all circumstances.”⁷⁸ 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.⁷⁹

In evaluating the reasonableness and necessity of pretrial detention, courts must undertake an “individualized determination” of the accused’s particular circumstances.⁸⁰ Vague pronouncements fail to meet this standard.⁸¹ Courts must

⁷⁷ Human Rights Committee, *Izmet Oselik et al v. Turkey*, U.N. Doc. CCPR/C/125/D/2980/2017, September 23, 2019, para. 9.3.

⁷⁸ Human Rights Committee, *Cedeno v. Bolivarian Republic of Venezuela*, U.N. Doc. CCPR/C/106/D/1940/2010, December 4, 2012, para. 7.10.

⁷⁹ Human Rights Committee, *Mikhail Marinich v. Belarus*, U.N. Doc. CCPR/C/99/D/1502/2006, August 19, 2010, para. 10.4.

⁸⁰ See Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 38. See also See Human Rights Committee, *Cedeno 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.

⁸¹ *Id.*

additionally examine whether non-custodial alternatives, such as bail and monitoring devices, “would render detention necessary in the particular case.”⁸² In *Eligio Cedeño v. Bolivarian Republic of Venezuela*, for example, the court imposed pretrial detention due to the risk of flight, citing the fact that the defendant had significant financial resources and owned an airplane.⁸³ The UN Human Rights Committee concluded that this reasoning relied on “mere assumption” as to why the defendant’s pretrial detention was necessary and reasonable.⁸⁴ As such, the Committee found that Article 9 had been violated.⁸⁵

According to defense counsel, the imposition of pretrial detention in Mr. Raiya’s case was similarly unsubstantiated.⁸⁶ Counsel stated that none of the courts that decided on Mr. Raiya’s detention undertook an individualized evaluation of his specific circumstances, instead relying on general pronouncements regarding flight risk and threats of interference with the proceedings. Notably, Mr. Raiya had no history of intimidating witnesses or of being a flight risk. Defense counsel also stated that the courts did not appear to explore potential non-custodial alternatives to detention. This is consistent with reports from international and domestic institutions and organizations that courts in Cambodia automatically resort to detention without considering non-custodial options.⁸⁷

The conduct alleged fails to meet the standards prescribed by Article 9(1) of the ICCPR and would render Mr. Raiya’s detention arbitrary.

⁸² *Id.*

⁸³ Human Rights Committee, *Cedeno v. Bolivarian Republic of Venezuela*, U.N. Doc. CCPR/C/106/D/1940/2010, December 4, 2012, para. 2.5.

⁸⁴ *Id.* at para 7.10.

⁸⁵ *Id.*

⁸⁶ To note, the Center did not have access to the underlying detention orders or bail applications.

⁸⁷ See Cambodian Center for Human Rights, Destination Justice, Cambodian Human Rights and Development Association, “Joint Submission to the Human Rights Council of the United Nations Third Universal Periodic Review of the Kingdom of Cambodia”, July 2018, paras. 38-41. Available at https://www.upr-info.org/sites/default/files/document/cambodia/session_32_-_january_2019/js7_upr32_khm_e_main.pdf; Human Rights Council, Report of the Special Rapporteur on the situation of human rights in Cambodia, U.N. Doc. A/HRC/36/61, para. 20; Licadho, “Time for Bail: Ending Needless Mass Detention”, October 2018. Available at https://www.licadho-cambodia.org/reports/files/227Time%20for%20Bail_Ending%20Needless%20Mass%20Detention_fin.pdf; Working Group on Arbitrary Detention, Opinion No. 3/2019 concerning Uon Chhin and Yeang Sothearin (Cambodia), U.N. Doc. A/HRC/WGAD/2019/3, April 24-May 3, 2019, paras. 56-57. Available at https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session84/A_HRC_WGAD_2019_3.pdf; Working Group on Arbitrary Detention, Opinion No. 9/2018 concerning Kem Sokha (Cambodia), U.N. Doc. A/HRC/WGAD/2018/9, June 5, 2018, para. 51. Available at https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session81/A_HRC_WGAD_2018_9.pdf; Amnesty International, “Cambodian Authorities Must Keep Their Promise to Release 10,000 Prisoners”, July 23, 2020. Available at <https://www.ecoi.net/en/file/local/2034521/ASA2327682020ENGLISH.pdf>.

Right to Appear Before a Judge/Court

Article 9(4) of the ICCPR provides that anyone deprived of his liberty by arrest or detention “shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.” The United Nations Human Rights Committee has explained that “in general, the detainee has the right to appear in person before the court, especially where such presence would serve the inquiry into the lawfulness of detention or where questions regarding ill-treatment of the detainee arise.”⁸⁸

In the present case, Mr. Raiya challenged his detention and sought release on bail. As recounted by defense counsel, Mr. Raiya was not physically brought before the Phnom Penh Municipal Court, which reviewed and rejected his application for bail on July 24, 2019: his lawyers argued the case on his behalf. Similarly, the authorities failed to transport Mr. Raiya from prison to appear in person before the Appeals Court on August 13 for review of the Municipal Court’s decision.⁸⁹ Despite counsel’s objections that Mr. Raiya was entitled to be present, the Appeals Court went ahead with the proceedings and upheld the denial of bail.⁹⁰ Mr. Raiya’s right to physically appear before a court was particularly relevant because he had commenced a hunger strike on July 11, two days after his arrest, in order to draw attention to the conditions of his detention.⁹¹

That Mr. Raiya was not physically brought before a court in the initial period following his arrest constituted a violation of his Article 9(4) right to take proceedings before a court for release from arbitrary detention.

Cruel, Inhuman, or Degrading Treatment

The prohibition on cruel, inhuman or degrading treatment or punishment enshrined in Article 7 of the ICCPR is a fundamental component of human rights law. The aim of Article 7 is to “protect both the dignity and the physical and mental integrity of the individual.”⁹² Article 10 of the ICCPR requires States to treat all persons deprived of their liberty “with humanity and with respect for the inherent dignity of the human person.” The provision “imposes on States parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty, and complements for them the ban on torture or other cruel, inhuman or degrading

⁸⁸ *Id.* at para. 42.

⁸⁹ Phnom Penh Post, “Court rules to deny bail for Kem Ley ‘inciters’ Raiya and Neakpon”, August 12, 2019. Available at <https://www.phnompenhpost.com/national/court-rules-deny-bail-kem-ley-inciters-raiya-and-neakpaon>.

⁹⁰ *Id.*

⁹¹ Radio Free Asia, “Jailed Cambodian Activist Marks Fifth Day of Hunger Strike Protesting Conditions in Detention”, July 15, 2019.

⁹² Human Rights Committee, General Comment No. 20, March 10, 1992, paras. 2, 5.

treatment or punishment contained in article 7 of the Covenant.”⁹³ The United Nations Human Rights Committee has found violations of both articles in cases involving small cells, lack of natural light, poor sleeping conditions, the deprivation of food/water, and limitations on bathroom access.⁹⁴

As reported by Amnesty International, Mr. Raiya was held in “a severely overcrowded 4x5 meter jail cell[!] in CC1 prison.”⁹⁵ At one point, his cell held 27 prisoners, “leaving less than 0.75 square meters per prisoner.”⁹⁶ He was restricted to this overcrowded cell for 23 hours per day, a situation that Amnesty International described as having “serious implications for [his] physical and mental health.”⁹⁷ In response, Mr. Raiya held a hunger strike for several days.⁹⁸

The conditions alleged fail to “protect both the dignity and the physical and mental integrity of the individual,” and so would contravene Articles 7 and 10(1) of the ICCPR.

C. VIOLATIONS AT TRIAL

Right to the Presumption of Innocence

Article 14(2) of the ICCPR guarantees that “everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.” The United Nations Human Rights Committee has stated that Article 14(2) “imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle.”⁹⁹ It follows that a conviction notwithstanding the prosecution’s failure to prove its case beyond a reasonable doubt violates Article 14(2) of the ICCPR.¹⁰⁰ The protections of this article also prohibit public authorities from prejudging the outcome of a trial.¹⁰¹

⁹³ Human Rights Committee, General Comment No. 21, U.N. Doc. HRI/GEN/1/Rev.1, April 10, 1992, para. 3.

⁹⁴ See Human Rights Committee, *Barkovsky v. Belarus*, U.N. Doc. CCPR/C/123/D/2247/2013, July 13, 2018, paras. 6.2-6.3; Human Rights Committee, *Xavier Evans v. Trinidad and Tobago*, U.N. Doc. CCPR/C/77/D/908/2000, May 5, 2003, paras. 2.3, 6.4.

⁹⁵ Amnesty International, “Cambodia: Release Prisoners of Conscience Kong Raiya and Soung Neakpaon”, October 7, 2019.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Human Rights Committee, General Comment 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 30. See also Human Rights Committee, *Saidov v. Tajikistan*, U.N. Doc. CCPR/C/122/D/2680/2015, September 20, 2018, para. 9.4.

¹⁰⁰ See Human Rights Committee, *Ashurov v. Tajikistan*, U.N. Doc. CCPR/C/89/D/1348/2005, March 20, 2007, para. 6.7.

¹⁰¹ Human Rights Committee, *Gridin v. Russian Federation*, U.N. Doc. CCPR/C/69/D/770/1997, July 18, 2000, para. 8.3.

In the present case, Mr. Raiya was convicted despite the prosecution's failure to prove guilt beyond a reasonable doubt. In accordance with Article 4 of the Cambodian Criminal Code, unless the law establishing an offense specifies a particular *mens rea*, the prosecution must prove that an accused had intent to commit the crime in order to meet its burden of proof. Articles 494 and 495 do not specify a *mens rea*, meaning that intent is required for an accused to be found guilty.

Despite asserting the existence of intent, the prosecution offered no evidence in this regard.¹⁰² The verdict, however, finds Mr. Raiya guilty of intentional incitement without explanation: the court simply states that Mr. Raiya had "intent to cause unrest to the society as a whole, which is punishable by law."¹⁰³

The prosecution likewise failed to demonstrate that the sale of t-shirts even qualified as incitement. Defense counsel argued that the sale of the t-shirts could not constitute the crime of inciting social unrest given that Kem Ley's quotes and imagery were widely available and that Mr. Raiya had sold similar t-shirts in 2017 to no effect.¹⁰⁴ In this regard, the prosecution's only comment was: "these words are on banners, which are not very obvious; however, once they are on the T-shirts worn by people on the street, they can be seen by lots of people."¹⁰⁵

The judgment unquestioningly accepts the prosecution's account. In the court's words, "the accused's action has affected the peace of the Cambodian people."¹⁰⁶ There is no clarification as to why the court characterized Mr. Raiya's advertisement of the t-shirts as incitement, let alone intentional incitement.

Reading the judgement in the most favorable light, the court drew inculpatory inferences without explaining those inferences or addressing contrary evidence. By doing so, the court effectively shifted the burden of proof to Mr. Raiya. Mr. Raiya's right to be presumed innocent was thereby violated.

Right to Appeal: Duly Reasoned Judgment

Article 14(5) of the ICCPR establishes the right to appeal. As stated by the United Nations Human Rights Committee, exercise of the right to appeal necessitates a "duly reasoned" written judgment: if a court does not provide sufficient rationale for a conviction, a defendant cannot effectively challenge the decision before a higher

¹⁰² See Phnom Penh Court of First Instance, Judgment, June 19, 2020; Monitor's Notes, May 20, 2020.

¹⁰³ Phnom Penh Court of First Instance, Judgment, June 19, 2020, pg. 9.

¹⁰⁴ Monitor's Notes, May 20, 2020.

¹⁰⁵ Phnom Penh Court of First Instance, Judgment, June 19, 2020, pg. 5. See also Monitor's Notes, May 20, 2020.

¹⁰⁶ *Id.* at pg. 9.

tribunal.¹⁰⁷ In *Van Hulst v. The Netherlands*, for example, the Committee found that courts must give “reasons” for dismissing a defense case.¹⁰⁸

In the present case, the court failed to give reasons for dismissing key defense arguments. The judgment does not address one of Mr. Raiya’s primary defenses: that his speech was protected by the right to freedom of expression.¹⁰⁹ Moreover, the court summarily dismisses the defense assertion that Mr. Raiya lacked the requisite intent, concluding that the evidence was sufficient to convict Mr. Raiya: “[a]ccording to the responses of the accused, the witnesses, the police report, and the evidences as well as other documents in the case files which are consistent, it can be concluded that the accused Kong Raiya has truly committed an action to incite to commit a felony causing severe civil unrest on July 9, 2019 and committing a misdemeanor.”¹¹⁰ Mr. Raiya, however, had stated that he “had no intention to commit the action,”¹¹¹ raising the question of how the court determined that his “response” was consistent with either the evidence put forth by the prosecution (apart from the state having failed to put forth evidence of intent at all) or the conclusion that he had committed the act of incitement. No explanation is provided.

This analysis falls short of the “duly reasoned” standard. It would be difficult for a defense lawyer reading the judgment to ascertain the reasoning behind the finding of guilt, in violation of the Article 14(5) right to appeal.

D. OTHER FAIRNESS CONCERNS

Freedom of Expression

International Standards and Article 495 of the Cambodian Criminal Code

Article 19 of the ICCPR guarantees the right to freedom of opinion and expression.¹¹² The United Nations Human Rights Committee has placed a high value on “uninhibited

¹⁰⁷ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 49; Human Rights Committee, *Van Hulst v. Netherlands*, U.N. Doc. CCPR/C/82/D/903/1999, November 1, 2004, paras. 6.4-6.5. The violation of the right to appeal due to the absence of a duly reasoned judgment can also be characterized as a violation of the right to a reasoned judgment protected by Article 14(1).

¹⁰⁸ *Van Hulst v. Netherlands*, U.N. Doc. CCPR/C/82/D/903/1999, November 1, 2004, paras. 6.4-6.5. See also Human Rights Committee, *Mennen v. Netherlands*, U.N. Doc. CCPR/C/99/D/1797/2008, August 24, 2010, para. 8.3; Human Rights Committee, *Hamilton v. Jamaica*, U.N. Doc. CCPR/C/50/D/333/1988, March 25, 1994, para. 9.1.

¹⁰⁹ See Phnom Penh Court of First Instance, Judgment, June 19, 2020; Monitor’s Notes, May 20, 2020 (defense counsel closing arguments about freedom of expression).

¹¹⁰ Phnom Penh Court of First Instance, Judgment, June 19, 2020, pg. 9.

¹¹¹ *Id.* at pg. 8.

¹¹² Free expression is also protected by Article 41 of the Cambodian Constitution.

expression,”¹¹³ explaining that restrictions on the right to freedom of expression 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.¹¹⁴ 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.¹¹⁵

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.”¹¹⁶ The UN Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion (Special Rapporteur on Freedom of Expression) has noted: “the restriction must be provided by laws that are precise, public and transparent; it must avoid providing authorities with unbounded discretion.”¹¹⁷

A restriction “violates the test of necessity if the protection could be achieved in other ways that do not restrict freedom of expression.”¹¹⁸ 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.”¹¹⁹ As such, laws cannot be overbroad.¹²⁰ In line with necessity and proportionality standards, the UN Special Rapporteur on 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.¹²¹ 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.¹²²

¹¹³ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 38.

¹¹⁴ See Human Rights Committee, *Kim v. Republic of Korea*, U.N. Doc. CCPR/C/64/D/574/1994, 1999, para. 12.2; Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, paras. 22, 34.

¹¹⁵ Article 19(3).

¹¹⁶ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 25.

¹¹⁷ 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.

¹¹⁸ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 33.

¹¹⁹ *Id.* at para. 34.

¹²⁰ *Id.*

¹²¹ 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.

¹²² *Id.*

The formulation of Article 495 of Cambodia's Criminal Code is not precisely drafted or narrowly tailored, in contravention of the legality prong of the Human Rights Committee's three-part test. Article 495 criminalizes "direct incitement to commit a felony or to disrupt social order."¹²³ 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 contravene 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" potentially places a broad swath of non-violent political speech within the scope of the law - as demonstrated by Mr. Raiya's case. 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 encompasses offenses that may warrant criminal penalties, such as incitement to terrorism, public incitement to genocide, and advocacy for national, racial, or religious hatred, it extends beyond this narrow sub-set 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.

International Standards and Kong Raiya's Prosecution

Mr. Raiya was charged and convicted of incitement to disrupt social order for a Facebook post that advertised t-shirts featuring the image and quotes of slain government critic Kem Ley. The right to freedom of expression entails "impart[ing] information and ideas" through any media,¹²⁴ which the United Nations Human Rights Committee has specified includes "commercial advertising."¹²⁵ Given that Mr. Raiya's posts were protected, the "limitation" imposed - i.e. his criminal prosecution, conviction, and sentencing - must pass the three-part test delineated by the Human Rights Committee.

¹²³ Criminal Code of the Kingdom of Cambodia, Article 495.

¹²⁴ ICCPR, Article 19(2).

¹²⁵ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, paras. 11, 33.

The UN Human Rights Committee has stated that the burden is on the State to demonstrate that the restriction in question is necessary and proportionate.¹²⁶ Notably,

when a State party 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 proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.¹²⁷

The Rabat Plan of Action provides further guidance. 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.¹²⁸ The resulting Plan urges that criminal sanctions for incitement be “last resort measures to be applied only in strictly justifiable situations.”¹²⁹ As established by the Plan, States must draw distinctions between “(a) forms of expression that should constitute a criminal offence; (b) forms of expression that are not criminally punishable, but may justify a civil suit; and (c) forms of expression that do not give rise to criminal or civil sanctions, but still raise concerns in terms of tolerance, civility and respect for the convictions of others.”¹³⁰ For speech to amount to a criminal offense and be subject to criminal penalties, the authorities must establish, among other things, that the speaker had the intent to incite hatred, and that there was a reasonable probability of harm.¹³¹

Mr. Raiya’s prosecution and conviction falls afoul of the international standards outlined above. As a baseline matter, the prosecution failed to “demonstrate in specific and individualized fashion the precise nature of the threat.” As discussed above, the prosecution neither specified what type of social unrest Mr. Raiya might have incited by selling the t-shirts nor who the alleged incitees were, instead relying on vague pronouncements that “when people wore the t-shirts ... the quotes could be seen by the

¹²⁶ See Human Rights Committee, *Poplavny and Sudalenko v. Belarus*, U.N. Doc. CCPR/C/122/DZ/2190/2012, November 24, 2016, para. 8.3; Human Rights Committee, *Olechkevitch v. Belarus*, U.N. Doc. CCPR/C/107/D/1785/2008, June 6, 2013, para. 8.5.

¹²⁷ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 35.

¹²⁸ 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>.

¹²⁹ 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. 34.

¹³⁰ *Id.* at para. 12.

¹³¹ *Id.* at para. 29.

public.”¹³² The “precise nature of the threat” posed by Mr. Raiya’s posts was thus unclear.

With regard to “the necessity and proportionality of the specific action taken,” the prosecution likewise failed to establish any “direct and immediate connection between the expression and the threat”: namely, the prosecution presented no evidence as to the “connection” between the advertising of t-shirts and imminent social unrest. Indeed, the defense noted at trial that Mr. Raiya had sold the same t-shirts in 2017 and that no social unrest had ensued.¹³³ As such, even assuming that the State’s aim for restricting Mr. Raiya’s speech was legitimate (part two of the three-part test), his criminal prosecution was neither necessary nor proportionate, violating Mr. Raiya’s right to freedom of expression under Article 19 of the ICCPR.

Mr. Raiya’s prosecution further contravenes the standards established by the Rabat Plan. Under the Rabat Plan, to criminalize incitement to violence, discrimination, or hostility (although again, it is unclear what precisely the prosecution was alleging Mr. Raiya to have incited), there must be proof of intent and of likelihood of imminence of harm. In the present case, the prosecution provided no evidence of intent to incite and, as noted above, no evidence of imminence of harm. Cryptic assertion does not a criminal case make.

Lastly, when the Phnom Penh Municipal Court granted bail to Mr. Raiya on November 29th, it also banned him from using Facebook for political purposes. This measure impermissibly restricted protected speech, which includes political discourse.¹³⁴ Even if the Municipal Court had a legitimate interest in imposing the ban, the Court failed to demonstrate that the restriction was necessary and proportionate given the ban’s expansiveness in prohibiting Mr. Raiya from *all* political discourse on Facebook, without exception. Mr. Raiya’s Article 19 right to freedom of expression was thus violated.

¹³² Monitor’s Notes, May 20, 2020.

¹³³ *Id.*

¹³⁴ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 11.

CONCLUSION AND GRADE



If Mr. Raiya meaningfully or intentionally incited the disruption of social order, felonious conduct, or violence, the prosecution had a responsibility to adduce that evidence and provide him an opportunity to test it. The court likewise had a responsibility to provide reasoning for its conviction of Mr. Raiya. In light of the failure of the prosecution and court to fulfill their respective obligations, it unacceptably appears that Mr. Raiya's trial and conviction was based on his exercise of his right to freedom of expression. Arrests, trials, and the imposition of sentences of incarceration will inevitably curtail civil space and preclude other activists from exercising their civil rights, particularly in the context of widespread reports of opposition activists like Mr. Raiya being similarly targeted with charges of incitement.

Going forward, police, prosecutors, and judges should carefully review proposed charges under Article 494 or 495 to ensure any such case involves reliable, admissible evidence that both satisfies the legal requirement of proving a defendant acted intentionally and satisfies the international standard that the criminal conduct incited be sufficiently grave to justify a restriction on freedom of expression - not mere political protest.

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, taking into account, *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, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,”¹³⁵ 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.

¹³⁵ ICCPR, Article 26.