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Center for Human Rights



Cambodia v. Ros Sokhet

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TRIALWATCH FAIRNESS REPORT

A CLOONEY FOUNDATION **FOR** JUSTICE INITIATIVE

ABOUT THE AUTHOR:

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

TrialWatch is an initiative of the **Clooney Foundation for Justice** focused on monitoring and responding to trials around the world that pose a high risk of human rights violations. TrialWatch is global in scope and focused on trials targeting journalists, LGBTQ persons, women and girls, minorities, and human rights defenders. It works to expose injustice and rally support to secure justice for defendants whose rights have been violated.

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EXECUTIVE SUMMARY



ABA Center for Human Rights staff who are members of the TrialWatch Experts Panel assigned these proceedings a grade of D:

Mr. Sokhet was criminally prosecuted, convicted, and sentenced for non-violent political speech, violating his right to freedom of expression. His conviction and the subsequent judgement also violated his right to be presumed innocent and right to a duly reasoned judicial decision. Because the violations of Mr. Sokhet's right to freedom of expression and right to the presumption of innocence affected the outcome of the trial and/or resulted in significant harm to Mr. Sokhet, who was convicted and sentenced to 18 months in prison, the trial has been assigned a "D" under the grading methodology described in the Annex.

In late 2020, the American Bar Association (ABA) Center for Human Rights monitored the criminal trial of journalist Ros Sokhet in Cambodia as part of the Clooney Foundation for Justice's TrialWatch initiative. Mr. Sokhet was prosecuted and convicted for "incitement to disrupt social order." The case against him stemmed from Facebook posts in which he criticized high profile political figures: among others, Prime Minister Hun Sen. The posts did not call for violence or acts of disorder and the prosecution did not adduce any evidence to show the posts would be understood to call for social disorder, that the posts might have the effect of creating social disorder, or that Mr. Sokhet had intended such effects. Consequently, the prosecution of Mr. Sokhet contravened his right to freedom of expression in addition to violating other rights, such as his right to the presumption of innocence - detailed below.

Mr. Sokhet is a Cambodian journalist known for his criticism of the ruling party. He is the founder of the independent news outlet, *Khmer Nation*. Between May and June 2020, Mr. Sokhet made a series of posts for *Khmer Nation* on his Facebook page. Among other things, the posts denounced the Telecommunications Minister for allegedly failing to confront corruption; criticized Prime Minister Hun Sen for promoting his son as his successor, for allegedly ordering the confiscation of the property of Cambodians struggling to pay back bank loans, and for allegedly targeting journalists; and accused various government officials of committing crimes. On June 25, Mr. Sokhet was arrested by police in Kampong Chhnang province and transferred to the Phnom Penh Municipal Police's Cybercrime Bureau. According to the warrant for his arrest, Mr. Sokhet was alleged to have committed "incitement to provoke serious chaos in social security" for his Facebook comments about Prime Minister Hun Sen. Mr. Sokhet was interrogated on June 26 and transferred to pre-trial detention at Prey Sar Prison thereafter.

On June 28, Mr. Sokhet was charged with “incitement to disrupt social order” under Articles 494 and 495 of Cambodia’s Criminal Code. The charges were based not only on the Facebook posts about Hun Sen but also on the other posts mentioned above. Article 494 and Article 495 (entitled “incitement to commit a felony”) 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 thus the general requirements for proving intent apply.

Mr. Sokhet’s trial commenced before the Phnom Penh Municipal Court on October 27, 2020 and consisted of a half-day hearing. Two witnesses appeared before the court: Mr. Sokhet and a police officer who testified for the prosecution about the Cybercrime Bureau’s investigation into Mr. Sokhet’s Facebook posts. The police officer stated that although the Bureau had not received any complaints about the posts, it had determined that the posts constituted incitement to disrupt social order. The officer provided no further details. Mr. Sokhet testified that he never intended to incite disorder and that his primary aim was to generate traffic to his Facebook page. On November 11, the Municipal Court found Mr. Sokhet guilty of violating Articles 494 and 495 and imposed an 18-month sentence, with credit for time served.

Mr. Sokhet’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 expression of opinions about public figures 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. Sokhet’s case, even assuming the goal of the proceedings was to protect public order, the prosecution did not put forth any evidence concerning the potential for unrest, failing to demonstrate “in specific and individualized fashion the precise nature of the threat” and failing to demonstrate a “direct and immediate” connection between Mr. Sokhet’s posts and the threat.

Meanwhile, the Municipal Court’s conviction of Mr. Sokhet 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. Sokhet intended to incite social unrest. Notwithstanding such gaps, the court convicted Mr. Sokhet, 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, neglecting key defense arguments. This violated Mr. Sokhet'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, is inconsistent with international human rights standards.

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, the government severely curtails political rights and civil liberties; in its 2020 "Freedom in the World" report, for example, Freedom House rated Cambodia "not free," reporting concerns about "politically motivated prosecutions" and the harassment of political opposition, independent press, and activists.²

Suppression of Dissent

Notwithstanding the Cambodian Constitution's guarantee of freedom of expression, there have been reports of the government systematically stifling dissenting voices. 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."³

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."⁴ In particular, the Rapporteurs have highlighted "the use of criminal law to target free speech, both offline and online."⁵ Correspondingly, Freedom House's 2020 report on Freedom on the Net awarded Cambodia a score of 43 out of 100: a rating of "partly

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

⁴ Office of 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>.

⁵ Id.

free.” According to Freedom House, the authorities had “arrest[ed] and charg[ed] members of the banned opposition Cambodian National Rescue Party (CNRP) for their social media posts, as well as ordinary users for their online speech ... contribut[ing] to an environment of fear and self-censorship.”⁶

In this vein, the government has employed broadly defined offenses, such as incitement to commit a felony, insult, defamation, and disinformation, against perceived critics.⁷ Article 495 of the Cambodian Criminal Code (entitled incitement to commit a felony) 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.⁸

In 2017, two journalists affiliated with the *Cambodia Daily*, a long-running independent English-language news outlet, were charged with incitement under Articles 494 and 495 in connection with their election coverage of a community that had previously elected opposition party members.⁹ The charges came one month after the *Cambodia Daily* was forced to shut down due to a \$6.3 million tax bill.¹⁰ In 2019, Kong Mas, a member of the dissolved CNRP, was convicted of public insult and incitement for Facebook posts critical of the government.¹¹ It is not only journalists and activists who have been targeted under these laws; in 2018, a Cambodian migrant worker was arrested and

⁶ Freedom House, “Freedom on the Net 2020: Cambodia”, 2020. Available at <https://freedomhouse.org/country/cambodia/freedom-net/2020>.

⁷ See Office of High Commissioner of Human Rights, “Cambodia: UN experts concerned at Government moves to silence political opponents”, June 19, 2019; 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/>.

⁸ Criminal Code of the Kingdom of Cambodia, Article 495. The second part of the provision, incitement to disrupt social order, was added in 2010.

⁹ 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>.

¹⁰ The Phnom Penh Post, “Daily silenced after 24 years”, September 4, 2018. Available at <https://www.phnompenhpost.com/national/daily-silenced-after-24-years>.

¹¹ Human Rights Watch, “Cambodia: Drop case against opposition activist”, March 21, 2020.

charged with defamation and incitement for allegedly insulting the prime minister in a video clip he had posted on social media two years earlier.¹²

In particular, the last year has seen the authorities rely heavily on incitement charges. In September 2020, the Office of the United Nations High Commissioner for Human Rights noted that of 24 human rights defenders arrested between the end of July and beginning of September, most faced charges of incitement.¹³ In November 2020, over 100 individuals, many of whom have ties to the CNRP, were summoned to the Phnom Penh Municipal Court for a trial on incitement charges, among other alleged offenses.¹⁴ The group was split into two: the trial of the first group started in mid-January and the trial of the second group is due to start in March.¹⁵

Notably, human rights organizations have expressed concern that the authorities have used the COVID-19 pandemic as a pretext to further suppress freedom of expression.¹⁶ In early April 2020, for example, the Cambodian legislature passed a law granting the government extensive powers to restrict access to information and free speech in times of emergency, including by criminalizing the “distribution of information that could scare the public.”¹⁷ In conjunction with more repressive legislation, the pandemic has heralded an increase in arrests and trials. In November 2020, a group of United States Senators and members of the House of Representatives made public their letter to the U.S. State Department describing an “escalating wave of arrests,” particularly “since the outbreak

¹² 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.

¹³ 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>.

¹⁴ Radio Free Asia, “Opposition Brass to Return to Cambodia in January to Face Courts, Seek Political Resolution”, December 1, 2020. Available at <https://www.rfa.org/english/news/cambodia/return-12012020184429.html>.

¹⁵ Al Jazeera, “Cambodia Begins Mass Treason Trial of Opposition Activists”, January 14, 2021. Available at <https://www.aljazeera.com/news/2021/1/14/cambodia-begins-mass-conspiracy-trial-against-opposition-party>.

¹⁶ Human Rights Watch, “Cambodia’s government should end silencing of journalists, media outlets”, November 2, 2020. Available at <https://www.hrw.org/news/2020/11/02/cambodias-government-should-stop-silencing-journalists-media-outlets>; Freedom House, “Freedom on the Net 2020: Cambodia”, 2020; Amnesty International, “Cambodia: Proposed emergency powers would obliterate human rights”, April 2, 2020. Available at <https://www.amnesty.org/en/latest/news/2020/04/cambodia-proposed-emergency-power-obliterate-human-rights/>; ARTICLE 19 and Cambodian Center for Human Rights, Statement at 45th Session of the Human Rights Council, October 1, 2020. Available at <https://www.article19.org/resources/hrc45-deterioration-of-human-rights-in-cambodia-amid-covid-19/>.

¹⁷ Amnesty International, “Cambodia: Proposed emergency powers would obliterate human rights”, April 2, 2020. See also Office of the High Commissioner for Human Rights, “Cambodia’s state of emergency law endangers human rights, warns UN expert”, April 17, 2020. Available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25801&LangID=E>.

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."¹⁸

That same month, 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 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 peaceful assembly and freedom of expression in the preceding three months.²⁰

Targeting of the Press

Amidst an escalating crackdown, journalists have been vulnerable. In its 2020 World Press Freedom Index, Reporters Without Borders ranked Cambodia 144 out of 180 countries, a drop of one slot from the previous year and 16 slots since 2016.²¹ In recent months, the government has targeted independent media outlets and journalists who have commented on topics ranging from the government's COVID-19 response to land rights issues.²² Common tactics have included the revocation of media licenses and criminal prosecutions.²³

¹⁸ 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/\(11.16.2020\)%202020-11-11%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).

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.

²⁰ Id. According to Article 19 and the Cambodian Center for Human Rights, at least 28 individuals were arrested for exercising their rights to expression, association, and peaceful assembly in the months of August and September. ARTICLE 19 and Cambodian Center for Human Rights, Statement at 45th Session of the Human Rights Council, October 1, 2020.

²¹ Reporters Without Borders, "Cambodia." Available at <https://rsf.org/en/cambodia>.

²² ARTICLE 19 and Cambodian Center for Human Rights, Statement at 45th Session of the Human Rights Council, October 1, 2020; Voice of America, "Cambodia's sentencing of journalist over COVID-19 comment a threat to freedoms, media groups say", October 9, 2020. Available at <https://www.voanews.com/press-freedom/cambodias-sentencing-journalist-over-covid-19-comment-threat-freedoms-media-groups>.

²³ Freedom House, "Freedom on the Net 2020: Cambodia", 2020. See also Voice of America, "Amid backsliding on press freedoms, Phnom Penh calls for 'professional' reporting", May 4, 2020. Available at <https://www.voacambodia.com/a/5404013.html>; Voice of America, "Cambodia's sentencing of journalist over COVID-19 comment a threat to freedoms, media groups say", October 9, 2020. Available at <https://www.voanews.com/press-freedom/cambodias-sentencing-journalist-over-covid-19-comment-threat-freedoms-media-groups>.

In line with the trends described above, the authorities have frequently used incitement charges against the press. In particular, a number of journalists have been prosecuted under the second part of Article 495: incitement to “disrupt social order,” which is more vaguely worded than the first part of the provision, “incitement to commit a felony.” In April 2020, for instance, journalist Sovann Rithy was arrested and detained on charges of incitement to disrupt social order. The charges stemmed from a social media post in which he quoted Prime Minister Hun Sen’s remarks that motorcycle-taxi drivers should sell their motorcycles to mitigate the economic crisis caused by the COVID-19 pandemic.²⁴ The license of Mr. Rithy’s online media outlet, TVFB, was revoked soon after his arrest.²⁵ In October, Mr. Rithy was convicted of incitement by the Phnom Penh Municipal Court and sentenced to 18 months in prison.²⁶

In a similar case that began in May 2020, journalist and radio station owner Sok Udom was charged with incitement to “disrupt social order” and had his media license revoked after posting on Facebook about several land disputes; officials alleged that his posts were “exaggerated and inciting” and “affected social security.”²⁷ In September 2020, three journalists and environmental activists working for the NGO Mother Nature Cambodia were arrested on charges of incitement for investigating and reporting on a government plan to build a potentially environmentally-damaging military base.²⁸ Like the cases above, the three defendants were specifically charged with incitement to disrupt social order.²⁹

Due Process and Fair Trial Rights

According to Freedom House, due process rights in Cambodia are “poorly upheld.”³⁰ Excessive and arbitrary detention is not uncommon, particularly in cases concerning political figures or politically sensitive topics.³¹ Meanwhile, international and domestic organizations and institutions have repeatedly questioned the independence of the

²⁴ Voice of Democracy, “News site blocked, journalist jailed after quoting Hun Sen”, April 9, 2020. Available at <https://vodenglish.news/news-site-blocked-journalist-jailed-after-quoting-hun-sen/>.

²⁵ *Id.*

²⁶ Voice of America, “Cambodia’s sentencing of journalist over COVID-19 comment a threat to freedoms, media groups say”, October 9, 2020. Mr. Rithy had been detained since his arrest in April. When he was convicted and sentenced, the court ordered that he be released for the remainder of his sentence.

²⁷ Voice of Democracy, “Journalist jailed, Media license revoked over ‘exaggerated’ coverage”, May 15, 2020. Available at <https://vodenglish.news/journalist-jailed-media-license-revoked-over-exaggerated-coverage/>.

²⁸ Reporters Without Borders, “Three Mother Nature Cambodia reporters arrested for ‘inciting crime’”, September 30, 2020. Available at <https://rsf.org/en/news/three-mother-nature-cambodia-reporters-arrested-inciting-crime>.

²⁹ Cambodian Journalists Alliance, “Three Mother Nature Activists Charged with Incitement”, September 7, 2020. Available at <https://english.cambodiadaily.com/news/three-mother-nature-activists-charged-with-incitement-168942/>.

³⁰ Freedom House, “Freedom in the World Report on Cambodia”, 2020.

³¹ 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>.

judiciary.³² The International Commission of Jurists (ICJ), for example, has criticized three “judicial reform laws” passed in 2014 as effectively “institutionaliz[ing] the prosecution and judiciary’s lack of independence from the executive.”³³

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, 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 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,”³⁴ and that courts were “well known as political tools of the CPP [the ruling political party].”³⁵ 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.³⁶ 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.³⁷ The ICJ concluded that outcomes often appeared predetermined, finding it “routine” for trial judges to “simply endorse the results of judicial investigations.”³⁸

In monitoring proceedings at the Phnom Penh Court of Appeal³⁹ 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

³² 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>.

³³ 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/>.

³⁴ 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>.

³⁵ *Id.* at pgs. 19-20.

³⁶ *Id.* at pg. 20.

³⁷ *Id.*

³⁸ *Id.*

³⁹ 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.

innocence.⁴⁰ The CCHR deemed the quality of evidence presented during trials of “great concern.”⁴¹

Most recently, a TrialWatch report on the incitement trial of CNRP youth activist Kong Raiya, which was authored by the Center and TrialWatch expert Arthur Traldi, found that the Phnom Penh Municipal Court had violated the presumption of innocence by convicting Mr. Raiya despite significant gaps in the evidence, including an absence of proof as to his intent.⁴²

It was against this backdrop that Ros Sokhet’s arrest and trial took place.

B. CASE HISTORY

Ros Sokhet is a Cambodian journalist and the publisher of the privately-owned *Cheat Khmer (Khmer Nation)* newspaper. In 2009, he was prosecuted for and convicted of disseminating disinformation for sending text messages to Soy Sopheap, a television personality known to have close ties with the government.⁴³ The text messages alleged that Mr. Sopheap had extorted money from the wife of a political advisor to the legislature.⁴⁴ Mr. Sokhet was sentenced to two years in prison but released after one year.

On June 24, 2020, Mr. Sokhet posted on his Facebook page on behalf of *Khmer Nation*, criticizing Prime Minister Hun Sen for promoting his son as his successor and for allegedly ordering the confiscation of property of Cambodians struggling to pay back bank loans. On June 25, Mr. Sokhet was arrested by police in Kampong Chhnang province and transferred to the Phnom Penh Municipal Police’s Cybercrime Bureau.⁴⁵ According to the warrant for his arrest, Mr. Sokhet was alleged to have committed “incitement to provoke serious chaos in social security” for his Facebook comments

⁴⁰ Cambodian Center for Human Rights, “Fair Trial Rights in Cambodia: Monitoring at the Court of Appeal”, October 2019, pgs. vii-viii. Available at https://cchrcambodia.org/admin/media/report/report/english/CCHR%20Report%20on%20Fair%20Trial%20Rights_%202017-2018_ENG.pdf.

⁴¹ Id. at pg. 32.

⁴² American Bar Association Center for Human Rights, “Cambodia v. Kong Raiya”, November 2020. Available at

https://www.americanbar.org/content/dam/aba/administrative/human_rights/trialwatch/fair_trial_report_cambodia_kong_raiya.pdf.

⁴³ The Cambodia Daily, “Appeal Court sets date for Ros Sokhet case”, August 3, 2010. Available at <https://english.cambodiadaily.com/news/appeal-court-sets-date-for-ros-sokhet-case-101037/>.

⁴⁴ Id.

⁴⁵ The Cambodia Daily, “Cambodian journalist Ros Sokhet detained, charged with incitement”, July 1, 2020. Available at <https://english.cambodiadaily.com/news/cambodian-journalist-ros-sokhet-detained-charged-with-incitement-166154/>. See also Cambodian Journalists Alliance, “Newspaper publisher arrested over Facebook posts”, June 27, 2020. Available at <https://cambojanews.com/newspaper-publisher-arrested-over-facebook-posts/>.

about Prime Minister Hun Sen.⁴⁶ Phnom Penh Municipal Police Chief Sar Thet stated to local news reporters that Mr. Sokhet had committed the crime of “incitement to provoke social insecurity by criticizing the top leader.”⁴⁷ Mr. Sokhet was interrogated on June 26 and transferred to pre-trial detention at Prey Sar Prison thereafter. Also on June 26, the Ministry of Information announced that it would review the media license previously granted to *Khmer Nation* and decide whether to revoke it.⁴⁸

On June 28, Mr. Sokhet was charged with incitement to disrupt social order under Articles 494 and 495 of the Criminal Code based not only on the Facebook posts about Hun Sen but also on other posts, stretching back to May 17, 2020.⁴⁹ 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.”⁵⁰ As discussed above, Article 495 criminalizes “direct incitement to commit a felony or to disrupt social order by employing one of the means defined in Article 494.”⁵¹

Mr. Sokhet remained in pre-trial detention in Prey Sar prison until his trial on October 27, 2020. The trial consisted of one hearing, lasting one and a half hours, before the Phnom Penh Municipal Court of First Instance. Mr. Sokhet was present at the hearing along with his lawyers.

The hearing began with an inquiry into Mr. Sokhet’s health.⁵² Mr. Sokhet stated that he had a heart problem but that he was able to stand trial.⁵³ The prosecutor asked Mr. Sokhet if he was capable of responding to questions, and Mr. Sokhet stated that he was “fine.”⁵⁴ The trial judge proceeded to note that Mr. Sokhet had previously been convicted and sentenced for disseminating disinformation.⁵⁵

The judge then read the indictment, which referred to nine Facebook posts made by Mr. Sokhet between May 17 and June 24.⁵⁶ According to the judgment, the posts at issue can be summarized as follows:

⁴⁶ Cambodian Journalists Alliance, “Newspaper publisher arrested over Facebook posts”, June 27, 2020.

⁴⁷ Id.

⁴⁸ Id.

⁴⁹ Trial Monitor Notes, October 27, 2020. See also Khmer Times, “Journalist charged with incitement in capital”, June 30, 2020. Available at <https://www.khmertimeskh.com/50739490/journalist-charged-with-incitement-in-capital/>.

⁵⁰ Criminal Code of the Kingdom of Cambodia, Article 494.

⁵¹ Id. at Article 495.

⁵² Trial Monitor Notes, October 27, 2020.

⁵³ Id.

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ Id.

1. Chea Vandeth, the new Telecommunications Minister, does not care about extensive corruption within the Telecommunications Regulator of Cambodia;
2. Prime Minister Hun Sen's three sons and Dy Vichea, his son-in law and the Head of the National Police Espionage Unit, listen in on Sar Kheng's (current Minister of the Interior) conversations so as to prevent Sar Kheng from becoming the next Prime Minister in place of Hun Sen's son;
3. Prime Minister Hun Sen's family conspired with the "wicked" Phay Siphon (a government spokesperson) to pay off his debts, including dental treatment in the United States and money owed to Moeung Son (President of the Khmer Civilization Foundation);
4. Prime Minister Hun Sen conspired with the "wicked" Phay Siphon to pay off the aforementioned debts and Phay Siphon should be convicted of a criminal offense;
5. Very few people attended the commemoration ceremony of the 43rd anniversary of Prime Minister Hun Sen's departure from Cambodia to Vietnam to seek assistance in fighting the Khmer Rouge. The Minister of Defense, Tea Banh, expressed regret that certain officials were not in attendance;
6. Huy Vannak (President of the Union of Journalist Federations of Cambodia and the Secretary of State of the Ministry of the Interior) accepts bribes from Hun Sen and his wife, Bun Rany, to target journalists;
7. Prime Minister Hun Sen will lose everything if he pushes for his son to succeed him as Prime Minister because Vietnam will not support this move;
8. Prime Minister Hun Sen encourages banks to confiscate the property of people who cannot pay back their loans.⁵⁷

The posts included photos of the individuals referenced.⁵⁸

The judge briefly questioned Mr. Sokhet, who admitted to posting the statements on Facebook.⁵⁹ Specifically, the judge asked Mr. Sokhet why he made the posts. Mr. Sokhet responded that he wanted "to draw more attention" and increase the audience of his Facebook page.⁶⁰ Next, the prosecutor questioned Mr. Sokhet about his newspaper, *Khmer Nation*.⁶¹ Mr. Sokhet explained that he had received a media license in 2011, that the paper employed 12 individuals between 2011 and 2016, and that the paper survived during that time by selling printed newspapers.⁶² After 2016, the paper shifted to online publication on Mr. Sokhet's Facebook page.⁶³

⁵⁷ Phnom Penh Court of First Instance, Criminal Judgment, November 11, 2020, pgs. 2-3. See also <https://www.facebook.com/sokhet.ros>.

⁵⁸ Trial Monitor's Notes, October 27, 2020.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

The prosecutor asked Mr. Sokhet why he had “insult[ed] prominent figures and dignitaries.” In line with his response to the judge’s questioning, Mr. Sokhet answered that he hoped to boost his Facebook page’s popularity.⁶⁴ Mr. Sokhet also stated that he no longer printed newspapers, that no one was funding his work, and that he would not continue to operate the newspaper if he was released because he was too old.⁶⁵ In response to additional questioning by defense counsel, Mr. Sokhet stated that the content of his posts was “not that sensitive,” and that he “just wanted to attract more readers and likes from the audience.”⁶⁶ He also affirmed that he had submitted a letter of apology to the Prime Minister on August 4, 2020.⁶⁷

Apart from Mr. Sokhet, one witness testified (on behalf of the prosecution): Sam Vandy, the head of the Phnom Penh Municipal Police’s Cybercrime Bureau. Mr. Vandy stated that the Bureau began investigating Mr. Sokhet’s Facebook posts on June 20, and that it had “found” that his posts “amounted to social provocation.”⁶⁸ In response to questioning by the judge, Mr. Vandy stated that the police had not received any complaints about Mr. Sokhet’s posts.⁶⁹ The defense then briefly questioned Mr. Vandy, who asserted that he had read just “some” of Mr. Sokhet’s post and had concluded that those posts “could provoke social insecurity.”⁷⁰ The only other evidence presented by the prosecution in court was Mr. Sokhet’s Facebook posts.

At closing argument, the prosecution stated that it had determined that Mr. Sokhet had committed incitement to disrupt social order based on “evidence collected from the Bureau” and asked the judge to convict Mr. Sokhet.⁷¹ Defense counsel argued that Mr. Sokhet had made the posts in a journalistic capacity and that he had no intention of inciting any crimes, as required to prove guilt under Articles 494 and 495.⁷² Defense counsel also stated that no disruption had transpired as the result of Mr. Sokhet’s social media posts.⁷³ The trial closed with Mr. Sokhet’s request to be released so that he could undergo better treatment for his heart condition.⁷⁴

On November 11, Mr. Sokhet was sentenced to 18 months imprisonment, with credit for time served, and fined two million riel (500 USD).⁷⁵

⁶⁴ Id.

⁶⁵ Id.

⁶⁶ Id.

⁶⁷ Id.

⁶⁸ Id.

⁶⁹ Id.

⁷⁰ Id.

⁷¹ Id.

⁷² Id.

⁷³ Id.

⁷⁴ Id.

⁷⁵ Trial Monitor Notes, November 11, 2020; Voice of America, “Cambodian journalist sentenced to 18 months for criticizing Hun Sen”, November 12, 2020. Available at

METHODOLOGY



A. THE MONITORING PHASE

The American Bar Association's Center for Human Rights deployed a monitor to the trial of Ros Sokhet 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 October 27, 2020 and the delivery of the verdict on November 11, 2020.

B. THE ASSESSMENT PHASE

To evaluate the fairness of the proceedings and arrive at a grade, ABA Center staff who are members of the TrialWatch Experts Panel reviewed the judgment, monitor notes, and CFJ TrialWatch App responses. Center staff found that the proceedings entailed severe violations of Mr. Sokhet's right to the presumption of innocence and right to freedom of expression. Center staff further assessed Article 495 of Cambodia's penal code, which criminalizes incitement to disrupt social order, and found that it falls afoul of international standards on freedom of expression.

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 United Nations Special Procedures. Cambodia ratified the ICCPR in 1992.⁷⁶

B. 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.”⁷⁷ It follows that a conviction notwithstanding the prosecution’s failure to prove its case beyond a reasonable doubt violates Article 14(2).⁷⁸ While the Committee has noted that “it is generally not for itself, but for the courts of States parties, to review or to evaluate facts and evidence, or to examine the interpretation of domestic legislation by national courts and tribunals,” it may choose to comment where “it can be ascertained that the conduct of the trial or the evaluation of facts and evidence or interpretation of legislation was manifestly arbitrary or amounted to a denial of justice.”⁷⁹

In *Larranaga v. The Philippines*, for example, the UN Human Rights Committee found a violation of the presumption of innocence partially because the court had failed to address serious evidentiary issues in its convicting judgment.⁸⁰ Similarly, in *Ashurov v. Tajikistan*, the Committee found that the Tajik court system had failed to consider major

⁷⁶ United Nations Treaty Collection, “Status of Treaties.” Available at https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND.

⁷⁷ 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.

⁷⁸ See Human Rights Committee, *Ashurov v. Tajikistan*, U.N. Doc. CCPR/C/89/D/1348/2005, March 20, 2007, para. 6.7.

⁷⁹ *Id.*

⁸⁰ Human Rights Committee, *Larranaga v. The Philippines*, U.N. Doc. CCPR/C/87/D/1421/2005, July 24, 2006, para 7.4.

gaps in the case, meaning that the accused was “not afforded the benefit of the doubt” - in violation of Article 14(2).⁸¹

In the present case, Mr. Sokhet was convicted despite the prosecution’s manifest 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.⁸² The verdict, however, finds Mr. Sokhet guilty of intentional incitement, stating: “[t]here is consistency between the statements of Ros Sokhet’s confession and the photographic evidence proving that Ros Sokhet had used his Facebook account for posting ... which shows that Ros Sokhet actually posted articles on Facebook that were intended to cause serious social security unrest.”⁸³ The court does not explain how Mr. Sokhet’s assertions that he did not intend to cause social unrest were “consisten[t]” with its findings to the contrary.

The prosecution likewise failed to demonstrate that Mr. Sokhet’s Facebook posts even qualified as incitement. Apart from the posts, the sole evidence presented by the prosecution was the testimony of Sam Vandy, the head of the Phnom Penh Municipal Police’s Cybercrime Bureau. Mr. Vandy testified that the Bureau began investigating Mr. Sokhet’s Facebook posts on June 20, and that that it had “found” that the posts “amounted to social provocation.”⁸⁴ In response to questioning by the judge, Mr. Vandy stated that the police had not received any complaints about Mr. Sokhet’s posts.⁸⁵ Mr. Vandy provided no information as to what type of disorder the Facebook posts might incite and how. At closing, the prosecution offered no clarification, stating merely that it had determined the existence of a crime through the Bureau’s investigation.⁸⁶

The judgment unquestioningly accepts the prosecution’s account. The court does not explain why it characterized Mr. Sokhet’s Facebook posts as incitement, let alone intentional incitement. Instead, the court proclaims without further detail: “[t]he acts committed by the Accused Ros Sokhet undermined social security, public order and

⁸¹ Human Rights Committee, *Ashurov v. Tajikistan*, U.N. Doc. CCPR/C/89/D/1348/2005, March 20, 2007, para. 6.7.

⁸² See Phnom Penh Court of First Instance, Criminal Judgment, November 11, 2020; Trial Monitor Notes, October 27, 2020.

⁸³ Phnom Penh Court of First Instance, Criminal Judgment, November 11, 2020, pg. 6.

⁸⁴ Trial Monitor Notes, October 27, 2020.

⁸⁵ *Id.*

⁸⁶ *Id.*

social order, which are defined as a criminal offense under Articles 494 and 495 of the Criminal Code.”⁸⁷

Reading the judgment in its most favorable light, the court resolved all gaps and uncertainties in favor of the prosecution, denying Mr. Sokhet the benefit of the doubt and effectively shifting the burden of proof to the defense. Mr. Sokhet’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 conviction, a defendant cannot effectively challenge the decision before a higher tribunal.⁸⁸ In *Van Hulst v. The Netherlands*, the Committee noted that courts must give “reasons” for dismissing defense arguments to comply with Article 14(5).⁸⁹

In the present case, the court failed to give reasons for dismissing key defense arguments. The judgment does not address one of Mr. Sokhet’s primary defenses: that his speech was protected by his right to freedom of expression and, more specifically, by his rights as a journalist. Meanwhile, the judgment summarily rejects the defense assertion that Mr. Sokhet lacked the requisite intent, concluding that the evidence was sufficient to convict Mr. Sokhet.

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.

C. OTHER FAIRNESS CONCERNS

Freedom of Expression

International Standards and Article 495 of the Cambodian Criminal Code

⁸⁷ Phnom Penh Court of First Instance, Criminal Judgment, November 11, 2020, pg. 7.

⁸⁸ 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).

⁸⁹ See *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.

Article 19 of the ICCPR guarantees the right to freedom of opinion and expression.⁹⁰ The United Nations Human Rights Committee has placed a high value on “uninhibited expression,”⁹¹ 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.⁹² 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.⁹³

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.”⁹⁴ 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.”⁹⁵

A restriction “violates the test of necessity if the protection could be achieved in other ways that do not restrict freedom of expression.”⁹⁶ 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.”⁹⁷ As such, laws cannot be overbroad.⁹⁸ 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, incitement to genocide, and advocacy of national, racial, or religious hatred.⁹⁹ According to the Special Rapporteur, it is never permissible to levy criminal penalties in response to

⁹⁰ Free expression is also protected by Article 41 of the Cambodian Constitution.

⁹¹ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 38.

⁹² 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.

⁹³ Article 19(3).

⁹⁴ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 25.

⁹⁵ 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.

⁹⁶ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 33.

⁹⁷ *Id.* at para. 34.

⁹⁸ *Id.*

⁹⁹ 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.

expression that does not fall into these categories given the “significant chilling effect” on legitimate speech that such penalties create.¹⁰⁰

The formulation of Article 495 of Cambodia’s Criminal Code is insufficiently precise, in contravention of the legality prong of the UN Human Rights Committee’s three-part test. Article 495 criminalizes “direct incitement to commit a felony or to disrupt social order.”¹⁰¹ In terms of the acts 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. This sweeping language makes it difficult for individuals to “regulate [their] conduct accordingly,” affording the authorities extensive discretion. 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. Sokhet’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 arguably encompasses offenses that may warrant criminal penalties, such as public incitement to genocide, 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 Ros Sokhet’s Prosecution

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.”¹⁰² 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.”¹⁰³ Notably, the expression and/or dissemination of opinions that are critical of - or not in line with - official government policy is protected.¹⁰⁴ The Committee has correspondingly established that heads of state and government are “legitimately subject to criticism and political opposition,” emphasizing that “in circumstances of

¹⁰⁰ Id.

¹⁰¹ Criminal Code of the Kingdom of Cambodia, Article 495.

¹⁰² ICCPR, Article 19(2).

¹⁰³ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 11.

¹⁰⁴ Id. at paras. 38, 42.

public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high.”¹⁰⁵ As stated by the Committee, “the penalization of a media outlet, publishers or journalist solely for being critical of the government or the political social system espoused by the government can never be considered to be a necessary restriction of freedom of expression.”¹⁰⁶

Mr. Sokhet was charged and convicted of incitement to disrupt social order on the basis of multiple Facebook posts criticizing government figures - principally Prime Minister Hun Sen - and alleging that they had pursued poor policies and/or committed crimes. Given that heads of state and government figures are “legitimately subject to criticism,” Mr. Sokhet’s posts were protected speech unless the limitation imposed - i.e. his criminal prosecution, conviction and sentencing - passed the three-part test delineated by the UN Human Rights Committee.

The Committee has stated that the burden is on the State to demonstrate that the restriction in question is necessary and proportionate.¹⁰⁷ 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 proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.”¹⁰⁸

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.¹⁰⁹ The resulting Plan urges that criminal sanctions for incitement be “last resort measures to be applied only in strictly justifiable situations.”¹¹⁰ 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

¹⁰⁵ Id. at para. 38.

¹⁰⁶ Id. at para. 42.

¹⁰⁷ 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.

¹⁰⁸ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 35.

¹⁰⁹ 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>.

¹¹⁰ 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.

tolerance, civility and respect for the convictions of others.”¹¹¹ 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.¹¹²

Mr. Sokhet’s prosecution and conviction falls afoul of the international standards outlined above.

With respect to the aim of the proceedings, Mr. Sokhet’s arrest and prosecution for incitement occurred in the midst of an escalating government crackdown on dissenting voices, as described in the background section. Immediately after Mr. Sokhet’s arrest, Phnom Penh Municipal Police Chief Sar Thet stated to local news reporters that Mr. Sokhet had committed the crime of “incitement to provoke social insecurity by criticizing the top leader.”¹¹³ This suggests Mr. Sokhet was targeted specifically because of his critical comments about Prime Minister Hun Sen and other government figures: an unacceptable justification for restricting freedom of expression.

Even assuming the prosecution was initiated to protect “public order” (a facially legitimate ground for restriction of speech), the prosecution failed to “demonstrate in specific and individualized fashion the precise nature of the threat”; at trial, the prosecution neither specified what “social disorder” Mr. Sokhet was accused of inciting nor presented any evidence of particular individuals or populations who might have been incited. As discussed above, the prosecution’s case rested on a single police witness who testified that he had read some of Mr. Sokhet’s posts and that the police investigation had found that the posts amounted to “social provocation.”¹¹⁴ No further details were provided. The “precise nature of the threat” was thus unclear.

Regarding “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 Mr. Sokhet’s posts and imminent social unrest. Indeed, the police witness noted that the department had not received any complaints regarding the posts.¹¹⁵

As such, even assuming that the State’s aim in restricting Mr. Sokhet’s speech was legitimate (part two of the three-part test), his criminal prosecution was neither necessary nor proportionate, violating his right to freedom of expression under Article 19 of the ICCPR.

¹¹¹ Id. at para. 12.

¹¹² Id. at para. 29.

¹¹³ Id.

¹¹⁴ Trial Monitor Notes, October 27, 2020.

¹¹⁵ Id.

Mr. Sokhet'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. Sokhet to have incited), there must be proof of intent and of likelihood of imminence of harm. In the present case, as noted above, the prosecution put forth no evidence of intent to incite and no evidence of imminence of harm.

Defamation

The imposition of an 18-month sentence on Mr. Sokhet is also concerning given the case's resemblance to a defamation prosecution. While the provisions under which Mr. Sokhet was prosecuted do not explicitly criminalize defamation, in this case they were applied in such a way as to *de facto* prohibit statements about the Prime Minister and his political allies that were perceived to be defamatory. A lead police investigator, for example, stated that Mr. Sokhet had committed incitement because he had "criticiz[ed] the top leader,"¹¹⁶ while the prosecution described Mr. Sokhet's posts as "insult[ing] to prominent figures and dignitaries."¹¹⁷

Although protecting the "reputations of others" is a legitimate ground for restricting speech under the ICCPR, such restrictions must meet the test of necessity and proportionality. In this regard, the UN Human Rights Committee has concluded that "imprisonment is never an appropriate penalty" for defamation offenses.¹¹⁸ The Committee has further advised states to decriminalize defamation, urging "the application of the criminal law [to] only be countenanced in the most serious of cases."¹¹⁹

In the case at hand, even if the prosecution had established that Mr. Sokhet's posts constituted defamation, the criminal prosecution and sentencing of Mr. Sokhet to 18 months in prison was a disproportionate and excessively punitive punishment, contravening international standards.

¹¹⁶ Cambodian Journalists Alliance, "Newspaper publisher arrested over Facebook posts", June 27, 2020.

¹¹⁷ Trial Monitor Notes, October 27, 2020.

¹¹⁸ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 47.

¹¹⁹ *Id.*

CONCLUSION AND GRADE



The case against Mr. Sokhet reflects a pattern in which the Cambodian authorities have used incitement charges to target dissenting voices and have issued convictions despite scant evidence. These outcomes are facilitated by the fact that the term “incitement to disrupt social order” in Article 495 is so broad and vague that prosecutors and judges can characterize any action as “disruptive.”

Going forward, police, prosecutors, and judges should carefully review proposed charges under Article 495 to ensure that the criminal conduct at issue is sufficiently grave to warrant a criminal prosecution, in line with international standards on freedom of expression, and to ensure that there is sufficient evidence of intent to incite disorder, in line with domestic legal requirements and international standards on the presumption of innocence. Further, Cambodia must revise Article 495 to ensure that it complies with the right to freedom of expression and no longer affords the authorities unfettered discretion to criminalize protected speech.

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,”¹²⁰ 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.

¹²⁰ ICCPR, Article 26.