



AMERICAN **BAR** ASSOCIATION

Center for Human Rights



Cambodia vs. Uon Chhin and Yeang Sothearin

January 2020

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

ABOUT THE AUTHORS

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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, religious 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



Göran Sluiter, Professor of International Criminal Law at the University of Amsterdam and member of the TrialWatch Experts Panel, assigned this trial a grade of D:

This is a preliminary finding, as the trial is at present adjourned for the purpose of further investigations. A future ruling, notably an acquittal or dismissal of charges, could potentially remedy the human rights violations that can be identified in this case. The trial entailed gross violations of international standards, resulting in significant harm for the defendants. There was no evidence that the defendants, both journalists, were doing anything other than their work, as protected by international human rights law. The charges were in and of themselves a serious interference with the right to freedom of expression and the trial could be seen as a government-influenced attempt to retaliate against Radio Free Asia and its two former employees. In addition, the trial - until now - appears to be inconsistent with a number of fair trial rights, such as the right to be adequately informed of the nature and cause of the charges, the right to an independent and impartial tribunal, and the right to the presumption of innocence.

In mid-2019, the American Bar Association (ABA) Center for Human Rights monitored the criminal trial of former Radio Free Asia (RFA) journalists Yeang Sothearin and Uon Chhin in Cambodia as part of the Clooney Foundation for Justice's TrialWatch initiative. The process was marred by serious fair trial violations and constituted a violation of the defendants' right to freedom of expression. The court ultimately reopened the investigation instead of reaching a verdict. Due to the severe ramifications for the defendants and in anticipation of the defendants' appeal, the Center is releasing this report now as opposed to awaiting final disposition of the case, which could be years away.

Mr. Sothearin and Mr. Chhin worked for RFA in Phnom Penh until September 2017, when the station terminated its operations, "citing 'unprecedented' government intimidation of the media."¹ RFA is a private, nonprofit corporation funded by the United States Agency for Global Media (USAGM) but protected by a legislative firewall that bars U.S. government interference.²

In November 2017, Mr. Chhin and Mr. Sothearin were charged with espionage, an offense that carries a sentence of up to 15 years in prison. Specifically, the authorities alleged that following RFA's departure from Cambodia, Mr. Chhin and Mr. Sothearin continued to

¹ Voice of America, "2 Former Radio Free Asia Journalists on Trial in Cambodia", August 9, 2019. Available at <https://www.voanews.com/press-freedom/2-former-radio-free-asia-journalists-trial-cambodia>. See also State Department, "2018 Country Reports on Human Rights Practices: Cambodia", March 13, 2019, pg. 12. Available at <https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/cambodia/> (discussing larger government crackdown on independent media).

² Radio Free Asia, "About Radio Free Asia". Available at <https://www.rfa.org/about/>.

share information about local events with RFA and installed broadcasting equipment in a hotel in Phnom Penh to send news reports to RFA's Washington D.C. headquarters. Both Mr. Chhin and Mr. Sothearin acknowledged having shared publicly available information about local events with RFA. With respect to the alleged broadcast studio, Mr. Chhin claimed that the equipment was intended for his new karaoke business. The defendants denied having committed espionage or undermined national security in any way.

Following their arrests, Mr. Chhin and Mr. Sothearin spent approximately 9 months in pretrial detention. During this period, the government additionally charged both men with producing pornography.³ Because the hearings on the pornography charge were closed to the public, this report addresses only the charge of espionage.

The pretrial stage of the proceedings was plagued by significant due process abuses, including violations of the right to be informed of the reasons for arrest, the right to communicate with counsel, and the prohibition against cruel, inhuman, or degrading treatment. Further, the detention of Mr. Chhin and Mr. Sothearin was arbitrary. The justifications provided for imposing detention - that the journalists posed a flight risk and threatened public order - were inadequately supported. The evidence suggests that the men were actually detained on the basis of their work for RFA, which entailed reporting critical of the government.

The trial itself was marked by fair trial violations.

First, the defendants' right to be informed of the factual basis of the charges against them was violated. At trial, the prosecution introduced evidence regarding Mr. Chhin's delivery of a hard drive to the U.S. embassy in Phnom Penh at the behest of his boss at RFA. However, according to defense counsel, information regarding the hard drive was not included in the criminal complaint or the investigating judge's indictment.⁴

Second, the court's conduct evinced bias, as it appeared to improperly promote the interests of the prosecution over the interests of the defense. Notably, the court limited its questions to those favorable to the prosecution's theory of the case and failed to pursue inquiries into the gaps and inconsistencies revealed in documents and witness testimony. In addition, the court permitted a junior police officer to repeatedly whisper to a senior police officer testifying for the prosecution. This allowance demonstrated partiality and likewise implicated the defense's right to call and examine witnesses. The prosecution's witnesses - who, as evidenced by the coaching of the senior police officer, were ill-

³ It is worth mentioning that the charge was not one of child pornography and that recent news reports concerning other Cambodian "pornography cases" show that such accusations can be very vague and may not involve conduct that would generally be regarded as criminal in other criminal justice systems. See BBC, "Cambodia: Briton given jail sentence over pornography", March 20, 2018. Available at <https://www.bbc.com/news/world-asia-43469936>.

⁴ Counsel relayed that he could not share either document with the Center due to regulations regarding ongoing investigations.

equipped to speak to the facts of the case - relied almost entirely on out-of-court statements by individuals who were not made available for the defense to cross-examine.

Third, the evidence put forth by the prosecution, as evaluated by a review of court documents and the prosecution's presentation at trial, failed to prove that the defendants had committed espionage. The espionage provision under which the accused were charged is Article 445 of the Cambodian criminal code, which proscribes providing or making accessible to a foreign state or its agents information that undermines the national defense. At no point, however, did the prosecution attempt to explain the impact of any alleged transmissions on Cambodia's national security, or address which foreign state - or agents thereof - was involved.⁵ Despite the prosecution's failure to meet its burden, the court refused to acquit the defendants, instead reopening the investigation. Given the lack of evidence against the defendants, this decision was inconsistent with the presumption of innocence.

Fourth, the proceedings against Mr. Chhin and Mr. Sothearin contravened their right to freedom of expression. There are clear indicia - including the insufficiency of the evidence, statements made by the Cambodian authorities, and the government's reported crackdown on independent media - that the aim of the case was to silence the free press.

Moreover, the prosecution never identified any information disclosed by the defendants excepting the aforementioned publicly available stories, which concerned protests and the closure of RFA's office in Phnom Penh. This information falls well within the category of protected speech. Sharing such information with contacts in other countries, the defendants' supposed "crime", is standard practice for journalists. The trial thus signals to journalists - and Cambodian society more broadly - that communications with foreign contacts, however innocuous, can result in arrest, jail time, smear campaigns, and job insecurity. The implications for press freedom and freedom of expression are troubling.

⁵ While the prosecution did not name a foreign state or agents, it is clear from the court's decision to reopen the investigation that the theory is the United States.



A. POLITICAL AND LEGAL CONTEXT

The trial of Mr. Chhin and Mr. Sothearin is consistent with a larger pattern of state harassment of journalists and independent media outlets in Cambodia. According to the 2018 State Department Report on Cambodia's human rights practices, "the government spent much effort to weaken the independent press and enacted ever greater restrictions on free expression."⁶ Notably, Cambodia ranked just 143rd out of 180 countries in Reporters Without Borders' 2019 Press Freedom Index.⁷ Over the past several years the government has shut down and/or censored a number of independent news outlets, including The Cambodia Daily, Radio Free Asia, and Voice of Democracy,⁸ and has passed laws that limit the right to freedom of expression.⁹

As documented by Front Line Defenders, "[j]ournalists who criticise the government ... face serious charges, lengthy trials, imprisonment and violence."¹⁰ In 2017, for example, two Cambodia Daily journalists - one international and one Cambodian - were charged with inciting violence for interviewing voters in the northeastern province of Ratanakiri as part of their coverage of local elections.¹¹ The Cambodian journalist has since been granted refugee status and is living in the United States.¹²

With respect to the courtroom, international organizations and institutions have repeatedly questioned the independence of the judiciary. Although the Cambodian Constitution provides for an independent judiciary,¹³ "in 2014, three 'judicial reform laws' were passed which institutionalized the prosecution and judiciary's lack of independence from the

⁶ State Department, "2018 Country Reports on Human Rights Practices: Cambodia", March 13, 2019, pg. 12.

⁷ RSF, "2019 World Press Freedom Index". Available at <https://rsf.org/en/ranking>.

⁸ See Reuters, "Cambodia blocks some independent news media sites: rights group," July 27, 2018. Available at <https://www.reuters.com/article/us-cambodia-election-censorship/cambodia-blocks-some-independent-news-media-sites-rights-group-idUSKBN1KH29Q>.

⁹ See Human Rights Watch, "Cambodia: Drop Radio Free Asia Case", June 19, 2019. Available at <https://www.hrw.org/news/2019/06/19/cambodia-drop-radio-free-asia-case>; Human Rights Watch, "Cambodia: Legislating New Tools of Repression," February 14, 2018. Available at <https://www.hrw.org/news/2018/02/14/cambodia-legislating-new-tools-repression> (discussing revisions to the penal code making it a crime - punishable by up to 5 years in prison - to insult the monarchy).

¹⁰ See Front Line Defenders, "Cambodia". Available at <https://www.frontlinedefenders.org/en/location/cambodia>. See also State Department, "2018 Country Reports on Human Rights Practices: Cambodia", March 13, 2019, pg. 14.

¹¹ Committee to Protect Journalists, "Two Journalists Charged with Incitement in Cambodia", October 10, 2017. Available at <https://cpj.org/2017/10/two-journalists-charged-with-incitement-in-cambodi.php>; Reporters Without Borders, "Reporters in Cambodia charged with 'inciting crime' for covering election", October 12, 2017. Available at <https://www.refworld.org/docid/59df4a5b4.html>.

¹² Voice of America, "As Cambodia Marks Press Freedom Day, Journalists Fear Increasing Restrictions Following Crackdown", May 3, 2018. Available at <https://www.voacambodia.com/a/as-cambodia-marks-press-freedom-day-journalists-fear-increasing-restrictions-/4376043.html>.

¹³ The Constitution of the Kingdom of Cambodia, Chapter 11: Article 128. Available at http://cambodia.ohchr.org/~cambodiaohchr/sites/default/files/Constitution_ENG.pdf.

executive.”¹⁴ Among other things, the 2014 laws granted the Ministry of Justice, a branch of the executive, significant power in the appointment, discipline, and removal of judges and prosecutors.¹⁵ Jumping ahead four years, the U.S. State Department noted in its 2018 human rights report that “[t]he courts were subject to influence and interference by the executive branch [currently controlled by Prime Minister Hun Sen’s Cambodian People’s Party (CPP)], which has the authority to promote, dismiss, and discipline judges at will.”¹⁶ Many judicial officials also hold positions within the CPP.¹⁷

There has been extensive documentation of corruption in the judicial system:¹⁸ Freedom House, for example, has observed that “[s]ham trials are frequent.”¹⁹ International organizations and institutions have likewise documented a failure to adhere to fair trial standards.²⁰ In monitoring proceedings at the Phnom Penh Court of Appeal from 2016-2017, the Cambodian Center for Human Rights - while noting some positive practices - found “a lack of compliance” with fundamental fair trial rights such as the presumption of innocence, the right to be present at trial, the right to legal counsel, and the right not to be compelled to testify against oneself.²¹ In one notable episode from 2018, Cambodia National Rescue Party President Kem Sokha was charged with planning to overthrow the government and was denied the right to appear at his own bail hearing.²² Reports of unjustified and unlawful detention are common.²³

B. CASE HISTORY

¹⁴ 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/>. See also International Bar Association, “Justice versus Corruption: Challenges to the independence of the judiciary in Cambodia”, September 2015. Available at <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=FB11E885-5F1D-4C03-9C55-86FF42157AE1>; State Department, “2018 Country Reports on Human Rights Practices: Cambodia”, March 13, 2019, pg. 8.

¹⁵ International Bar Association, “Justice versus Corruption: Challenges to the independence of the judiciary in Cambodia”, September 2015, pgs. 17-18.

¹⁶ State Department, “2018 Country Reports on Human Rights Practices: Cambodia”, March 13, 2019, pg. 8.

¹⁷ Id; International Bar Association, “Justice versus Corruption: Challenges to the independence of the judiciary in Cambodia”, September 2015, pgs. 7, 26, 37.

¹⁸ See Freedom House, “Cambodia Country Profile”, 2019. Available at <https://freedomhouse.org/report/freedom-world/2019/cambodia>; International Bar Association, “Justice versus Corruption: Challenges to the independence of the judiciary in Cambodia”, September 2015; State Department, “2018 Country Reports on Human Rights Practices: Cambodia”, March 13, 2019, pg. 8.

¹⁹ Freedom House, “Cambodia Country Profile”, 2019.

²⁰ See Freedom House, “Cambodia Country Profile”, 2019; State Department, “2018 Country Reports on Human Rights Practices: Cambodia”, March 13, 2019, pgs. 9-10; Cambodian Center for Human Rights, “Fair Trial Rights in Cambodia: Monitoring at the Court of Appeal,” June 2018. Available at https://cchrcambodia.org/admin/media/report/report/english/CCHR%20Report%20on%20Fair%20Trial%20Rights_%20ENG_.pdf.

²¹ Cambodian Center for Human Rights, “Fair Trial Rights in Cambodia: Monitoring at the Court of Appeal,” June 2018, pg. v.

²² Radio Free Asia, “Cambodia Judiciary Routinely Violates Fair Trial Rights: CCHR”, June 19, 2018. Available at <https://www.rfa.org/english/news/cambodia/judiciary-06192018153148.html>.

²³ See id; Freedom House, “Cambodia Country Profile”, 2019.

Mr. Chhin and Mr. Sothearin are freelance journalists who formerly worked for Radio Free Asia (RFA) in Phnom Penh.²⁴ In September 2017, RFA terminated all operations in Cambodia due to “the government’s crackdown on free press.”²⁵ The two men’s freelance contracts with RFA expired on September 30, 2017.²⁶ Thereafter, Mr. Chhin started a wedding and karaoke video production business that he operated from a hotel room.²⁷ Mr. Chhin frequently moved equipment in and out of the hotel, with the result that the Cambodian authorities purportedly grew “suspicious.”²⁸ (According to the preliminary judgment, the authorities “conducted an administration [sic] inspection and found that broadcasting devices and equipment were installed” and thereafter decided to investigate.)²⁹

On November 14, 2017, the police confronted Mr. Chhin at the hotel, accusing him of “continuing to report for Radio Free Asia by running a studio out of the [] room.”³⁰ After the police arrived, Mr. Chhin called Mr. Sothearin to the hotel to verify that he was not working for RFA.³¹ When Mr. Sothearin arrived, the police arrested both journalists, allegedly without specifying the basis of the arrest or the charges against them.³² Mr. Chhin and Mr. Sothearin were subsequently transported to and detained at police headquarters in Phnom Penh.³³

On November 18, 2017, the defendants were formally charged with supplying a foreign state with information destructive to national defense under Article 445 of the Cambodian Criminal Code, an offense that carries a sentence of up to 15 years in prison.³⁴ The investigating judge ordered that Mr. Chhin and Mr. Sothearin be placed in pretrial

²⁴ U.S. Agency for Global Media, “Yeang Sothearin.” Available at <https://www.usagm.gov/news-and-information/threats-to-press/yeang-sothearin/>. As noted above, while RFA is funded by a branch of the U.S. government, the U.S. Agency for Global Media (USAGM), the firewall established in the USAGM’s enabling legislation prohibits any interference from government officials in the reporting of news, thereby ensuring that RFA and its counterparts will be free from political interference. As such, the notion that RFA is directed by the US government - though not raised at trial - is a misconception.

²⁵ *Id.*

²⁶ The Washington Post, “In Cambodia, journalism has become a crime,” August 23, 2019. Available at https://www.washingtonpost.com/opinions/global-opinions/in-cambodia-journalism-has-become-a-crime/2019/08/23/52e57b0c-afb9-11e9-bc5c-e73b603e7f38_story.html?noredirect=on.

²⁷ Monitor’s Notes, July 26, 2019; UN 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 session, para. 8 [hereinafter UNWGAD Opinion]. Available at https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session84/A_HRC_WGAD_2019_3.pdf.

²⁸ Monitor’s Notes, July 26, 2019; UNWGAD Opinion at para. 9.

²⁹ Phnom Penh Court of First Instance, Preliminary Judgment, October 3, 2019, pg. 5 [hereinafter “Preliminary Judgment”] (unofficial translation).

³⁰ UNWGAD Opinion at para. 9.

³¹ Al Jazeera, “Espionage trial of two former RFA journalists starts in Cambodia,” July 26, 2019. Available at <https://www.aljazeera.com/news/2019/07/espionage-trial-rfa-journalists-starts-cambodia-190726070844918.html>. See also Preliminary Judgment at pg. 5 (“At about 1 o’clock Uon Chhin phoned him [Mr. Sothearin] telling him that the police came to check the studio and at that time he went to see the studio.”)

³² UNWGAD Opinion at paras. 10, 43.

³³ *Id.* at para. 11.

³⁴ U.S. Agency for Global Media, “Uon Chhin.” Available at <https://www.usagm.gov/news-and-information/threats-to-press/uon-chhin/>.

detention.³⁵ In March 2018, while the accused were still in prison, the government added a production of pornography charge, which carries a sentence of up to 1 year.³⁶

On August 21, 2018, after over nine months in detention, the accused were released on bail under court supervision, which entailed relinquishing their passports and presenting themselves at the local police station on a monthly basis.³⁷ Following their release, Mr. Chhin and Mr. Sothearin applied to annul the legal proceedings against them, citing the absence of proof as well as the government's failure to comply with requisite detention procedures.³⁸ In September 2018, the Cambodian Supreme Court rejected this petition. In May 2019, the U.N. Working Group on Arbitrary Detention ruled that the detention of Mr. Chhin and Mr. Sothearin was arbitrary, finding that numerous fair trial violations had been committed in the pretrial stage.³⁹

The trial against Mr. Chhin and Mr. Sothearin began on July 26, 2019 in Cambodia before the Phnom Penh Court of First Instance.⁴⁰ As noted above, while the prosecution initially based the espionage charge on the alleged establishment of a broadcasting studio, its theory evolved to include Mr. Chhin's delivery of a hard drive to the U.S. Embassy in Phnom Penh and the defendants' dissemination of stories to RFA after the outlet left Phnom Penh. The verdict was originally scheduled for August 30th but was postponed to October 3rd.⁴¹ On October 3rd, the court announced that the case required further investigation due to insufficient evidence regarding - among other things - the capabilities of the broadcasting equipment and the contents of the hard drive, sending the file back to the investigating judge without stipulating any timeline for completion of the investigation.⁴²

³⁵ UNWGAD Opinion at para. 11.

³⁶ See The Washington Post, "In Cambodia, journalism has become a crime," August 23, 2019.

³⁷ U.S. Agency for Global Media, "Yeang Sothearin"; The Washington Post, "Cambodian Judge Orders New Probe in Reporters' Spying Case", October 3, 2019. Available at https://www.washingtonpost.com/world/asia_pacific/cambodian-judge-orders-new-probe-in-reporters-spying-case/2019/10/02/80b3e374-e589-11e9-b0a6-3d03721b85ef_story.html.

³⁸ UNWGAD Opinion at para. 18.

³⁹ UNWGAD Opinion.

⁴⁰ Monitor's Notes, July 26, 2019.

⁴¹ Human Rights Watch, "Civil Society Organizations Condemn the Continued Investigation of Ex-RFA Journalists Yeang Sothearin and Uon Chhin", October 4, 2019. Available at <https://www.hrw.org/news/2019/10/04/civil-society-organizations-condemn-continued-investigation-ex-rfa-journalists-yeang>.

⁴² Monitor's Notes, October 3, 2019; Preliminary Judgment.

METHODOLOGY



A. THE MONITORING PHASE

As part of the Clooney Foundation for Justice's TrialWatch initiative, the ABA Center for Human Rights deployed several monitors to the trial of Mr. Chhin and Mr. Sothearin before the Phnom Penh Court of First Instance. The monitors were assisted by interpreters. Prior to the trial, the Center conducted background research, consulted with country experts, and prepared a memorandum for monitors outlining the case's procedural history and the political/legal context in Cambodia.

The monitors did not experience any impediments in entering the courtroom and were present for the entirety of the trial: hearings took place on July 26, August 9, August 30, and October 3, 2019. The monitors used the CFJ TrialWatch App to record and track what transpired in court and the degree to which the defendants' fair trial rights were respected. The monitors' TrialWatch App responses and notes were shared with Göran Sluiter, professor of international criminal law at the University of Amsterdam and the member of the TrialWatch Experts Panel responsible for evaluating the fairness of the trial.

B. THE ASSESSMENT PHASE

To evaluate the trial's fairness and arrive at a grade, TrialWatch Expert Göran Sluiter reviewed responses to the standardized questionnaire (collected via the CFJ TrialWatch App) as well as notes taken during the proceedings. Professor Sluiter's conclusions are below:

As a preliminary evaluation, the trial entailed serious violations of fundamental rights. Given the reopening of the investigation, however, an acquittal or dismissal of the charges could potentially mitigate the harms caused by identified violations.

Concerns regarding this trial are threefold. First, the trial should not have taken place at all, as it grossly interfered with freedom of expression and freedom of the press - everyone's right to both express and receive information. The legal analysis in this report explains that interference with the free press may only occur under strict conditions. In evaluating the trial and Cambodia's substantive criminal law, there was not a shred of evidence presented in court that could potentially justify interfering with the two accused's sharing of information and/or their work as journalists more generally.

In particular, no evidence or reasonable argument has surfaced as to how the alleged activities of the two defendants could have objectively prejudiced Cambodia's national security. Instead, it appears from the proceedings that the prosecution acted upon the theory that any activity the government considers against its interests or overly critical of

its policies prejudices national security. This view conflicts with established international human rights law, which specifically protects the media's role as a critical watchdog of governments.

It is troubling that the case reached the trial phase. Upon a review of the charges, it is clear that the accusations flew in the face of the right to freedom of expression and a free press - guaranteed by Article 19 of the International Covenant on Civil and Political Rights. Nevertheless, a criminal investigation was initiated by the Cambodian Prosecution Service. It is worth mentioning that in Cambodian criminal proceedings, charges must be confirmed by an Investigating Judge before being sent to trial. This extra filter between the prosecutor's actions and trial should have resulted in the dismissal of the case. Continuation of the proceedings in the absence of persuasive evidence violates the right to be presumed innocent.

Second, the trial - unsurprisingly given that the aim appears to have been the unlawful restriction of the free press - generated a number of fairness violations. Uncertainty about the charges, not unlike Kafka's *Der Prozess*, and an appearance of bias against the defendants are two prime examples. The legal analysis set forth below identifies violations that occurred both pre-trial and at trial. These violations cannot be dissociated from the starting point of the trial: denial of press freedom in violation of Article 19 of the ICCPR. However, certain violations may be indicative of broader fairness problems in the Cambodian criminal justice system and might thus also occur in other, less political trials.

Third, the illogic and vagueness of the espionage allegations became increasingly clear throughout the trial. During the hearings, the argumentation and questioning of witnesses often seemed peripheral - even irrelevant - to the heart of the case. The acts of the defendants are obfuscated; what is that they have actually said or done?; was the information they shared in any way confidential or privileged?; can sharing information with RFA abroad be equated with sharing information with a foreign State?; how could the information the defendants shared prejudice national security? This leaves the observer with serious concerns as to potentially improper motives behind the trial, raising the question of whether the proceedings were genuine or amounted to a sham trial aimed at silencing the critical press in general and retaliating against RFA specifically.

Subsequent developments - especially whether this case ends with a conviction, acquittal, or dismissal of charges - will allow for a more definitive evaluation of these essential issues.

ANALYSIS



A. APPLICABLE LAW

This report draws upon the International Covenant on Civil and Political Rights (ICCPR);⁴³ jurisprudence from the UN Human Rights Committee, tasked with monitoring implementation of the ICCPR; and widely accepted guidelines that establish best practices in the field of prosecutorial ethics. Cambodia ratified the ICCPR in 1992.

B. INVESTIGATION AND PRETRIAL STAGE VIOLATIONS

In the investigation and pretrial stage of the case against Mr. Chhin and Mr. Sothearin, violations were committed that compromised the fairness of the proceedings. Mr. Chhin and Mr. Sothearin were arrested without being informed of the rationale; were detained without bail despite a lack of justification; were denied access to counsel in the initial stage of their detention; and suffered inhuman conditions in detention that seriously affected their health.

Right to be Informed of the Reasons for Arrest and the Charges

Arresting an individual without explaining the rationale behind the arrest violates the ICCPR. Under Article 9(2), anyone arrested must be informed, at the time of arrest, of the reasons for his arrest and must be promptly informed of any charges against him.⁴⁴ The UN Human Rights Committee has further clarified that the information provided must include not only the “general legal basis of the arrest, but also enough factual specifics to indicate the substance of the complaint, such as the wrongful act and the identity of an alleged victim.”⁴⁵

In the instant case, Mr. Chhin and Mr. Sothearin petitioned the UN Working Group on Arbitrary Detention to challenge the legitimacy of their detention. In May 2019, the Working Group found that when the police arrested Mr. Chhin and Mr. Sothearin, they did not present an arrest warrant and did not relay the reasons for the arrest or any charges against the accused, let alone “enough factual specifics to indicate the substance of the complaint.”⁴⁶ As such, the authorities’ actions contravened Article 9(2) of the ICCPR.

⁴³ International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 [hereinafter “ICCPR”].

⁴⁴ ICCPR, Article 9(2).

⁴⁵ Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 25.

⁴⁶ See UNWGAD Opinion at para. 43.

Arbitrary Detention

Under the ICCPR, an individual “shall [not] be subjected to arbitrary arrest or detention ... [nor] be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”⁴⁷ The UN Human Rights Committee has noted that 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.”⁴⁸ Not only should pretrial detention be the exception and as short as possible,⁴⁹ but detention must be “lawful” (in accordance with domestic law) and “reasonable and necessary in all circumstances.”⁵⁰ This means that pretrial detention is appropriate for a limited number of purposes: namely, to prevent flight, interference with evidence, and the recurrence of serious crime.⁵¹

In support of these justifications for pretrial detention, the prosecution must provide proof: the ICCPR mandates the presentation of an adequately substantiated rationale as to why pretrial detention is required.⁵² Vague pronouncements fail to meet this standard.⁵³ In *Elijio Cedeño v. Bolivarian Republic of Venezuela*, for example, the prosecution argued that the defendant should be detained due to the risk of flight, citing the fact that he had significant financial resources and owned an airplane.⁵⁴ The Committee concluded that this reasoning relied on “mere assumption” as to why the defendant’s pretrial detention was necessary and reasonable.⁵⁵ As such, the Committee found that Article 9 had been violated.⁵⁶

In the instant case, Mr. Chhin and Mr. Sothearin were detained from November 2017 to August 2018, during which time the government failed to demonstrate the necessity or reasonableness of the defendants’ detention. The investigating judge as well as the Court of Appeals repeatedly denied bail on the grounds that the defendants represented a flight risk.⁵⁷ However, both defendants had turned over their passports and their families had

⁴⁷ ICCPR, Article 9(1).

⁴⁸ Human Rights Committee, *Izmet Oselik et al v. Turkey*, U.N. Doc. CCPR/C/125/D/2980/2017, May 28, 2019, para. 9.3.

⁴⁹ Human Rights Committee, *Cedeno v. Bolivarian Republic of Venezuela*, U.N. Doc. CCPR/C/106/D/1940/2010, December 4, 2012, para. 7.10.

⁵⁰ *Id.*

⁵¹ Human Rights Committee, *Mikhail Marinich v. Belarus*, U.N. Doc. CCPR/C/99/D/1502/2006, July 16, 2010, para. 10.4.

⁵² 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.

⁵³ See Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 38.

⁵⁴ Human Rights Committee, *Cedeno v. Bolivarian Republic of Venezuela*, U.N. Doc. CCPR/C/106/D/1940/2010, December 4, 2012, para. 2.5.

⁵⁵ *Id.* at para. 7.10

⁵⁶ *Id.*

⁵⁷ UNWGAD Opinion at paras. 12-14, 55.

provided assurances that they would not flee.⁵⁸ As noted by the UN Working Group on Arbitrary Detention, the government did not appear to take these factors into consideration when determining whether pretrial detention was imperative and whether there were available alternatives.⁵⁹ Accordingly, the multiple decisions that cited the risk of flight were not reasonable or necessary but instead reliant on the type of “mere assumption” deemed inadequate by the UN Human Rights Committee.

In July 2018, following the series of decisions denying bail based on flight risk, the Supreme Court of Cambodia ruled that the defendants’ pretrial detention should continue because they posed a threat to national security - a change from the original justification.⁶⁰ It is unclear how the defendants, who had no history of criminal behavior,⁶¹ might endanger the public order. The prosecution was unable to provide concrete evidence to support the charge of espionage at any stage of the case, including when litigating the defendants’ detention (the prosecution’s presentation of evidence at trial will be discussed at length below).⁶² The detention of Mr. Chhin and Mr. Sothearin on the grounds of national security was thus unsubstantiated by the record and a violation of Article 9. The UN Working Group on Arbitrary Detention likewise found that this justification failed to meet the Article 9 standard.⁶³

As stated by the UN Human Rights Committee, “[a]rrest or detention as punishment for the legitimate exercise of the rights as guaranteed by the Covenant is arbitrary, including freedom of opinion and expression.”⁶⁴ There are strong indicia that the defendants were charged and detained due to their reporting for RFA. As noted above, RFA was forced to suspend its in-country news operations in September 2017 in response to what it characterized as a government crackdown on independent media outlets⁶⁵ and the alleged harassment of its staff.⁶⁶ After RFA’s departure, Cambodia’s Ministries of Information and Interior publicly declared that they would consider all journalists still working for RFA to be spies.⁶⁷ In light of the surrounding context and the lack of evidence regarding the espionage charge, it appears that the detention of Mr. Chhin and Mr. Sothearin was retaliation for their affiliation with and work on behalf of RFA.

The UN Working Group on Arbitrary Detention also concluded that the two men were detained due to their “peaceful exercise of their rights to freedom of opinion and

⁵⁸ Id.

⁵⁹ Id at para. 57.

⁶⁰ Id at para. 14.

⁶¹ See id at para. 46.

⁶² See id at paras. 20, 49.

⁶³ See id at para. 15.

⁶⁴ Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 17.

⁶⁵ U.S. Agency for Global Media, “Uon Chhin”.

⁶⁶ Human Rights Watch, “Cambodia: Drop Case Against Journalists”, July 24, 2019. Available at <https://www.hrw.org/news/2019/07/24/cambodia-drop-case-against-journalists>.

⁶⁷ Radio Free Asia, “Cambodian Court Begins Trial of Former RFA Reporters Charged with Espionage”, July 26, 2019. Available at <https://www.rfa.org/english/news/cambodia/trial-07262019170337.html>.

expression.”⁶⁸ Notably, the Working Group deemed the detention of Mr. Chhin and Mr. Sothearin part of the Cambodian authorities’ efforts to “silenc[e] opposing voices.”⁶⁹

In sum, in addition to the inadequately substantiated justification for the defendants’ prolonged pretrial detention, the likelihood of political motivations renders the measure arbitrary and in violation of Article 9(1).

Right to Communication with Counsel

Article 14(3)(b) of the ICCPR guarantees the right to communicate with counsel. As noted by the UN Human Rights Committee, “[s]tates parties should permit and facilitate access to counsel for detainees in criminal cases from the outset of their detention.”⁷⁰ The UN Working Group on Arbitrary Detention has likewise stated that all persons “deprived of their liberty have the right to legal assistance by counsel of their choice at any time during their detention.”⁷¹ The fairness of a trial is particularly undermined when a detainee is interrogated without defense counsel present, given that the lack of legal advice during interrogation can compromise a defendant’s case.⁷²

In the present case, according to the source of the complaint to the Working Group, Mr. Chhin and Mr. Sothearin were held incommunicado for the first 24 hours they were detained at the Phnom Penh Municipal Police Headquarters. The defendants reportedly “were not given the option of retaining a lawyer to receive prompt and full communication of their order of detention or to present evidence in their defence.”⁷³ In being denied access to counsel during those crucial first 24 hours, the accused’s chances at a fair process were diminished and their rights under Article 14(3)(b) violated. The Working Group likewise found a violation.⁷⁴

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.”⁷⁵ The UN Human Rights Committee has found violations in cases involving small cells, lack

⁶⁸ UNWGAD Opinion at paras. 45-47, 51.

⁶⁹ *Id.* at para. 47.

⁷⁰ Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 35. See also Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, paras. 32, 34.

⁷¹ UN Working Group on Arbitrary Detention, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, May 4, 2015, Principle 9, Guideline 8.

⁷² See Human Rights Committee, *Gridin v. Russian Federation*, U.N. Doc. CCPR/C/69/D/770/1997, July 18, 2000, para. 8.5; Human Rights Committee, *Lyashkevich v. Uzbekistan*, U.N. Doc. CCPR/C/98/D/1552/2007, May 11, 2010, para. 9.4.

⁷³ UNWGAD Opinion at para. 53.

⁷⁴ *Id.* at para. 54.

⁷⁵ Human Rights Committee, General Comment No. 20, March 10, 1992, paras. 2, 5.

of natural light, poor sleeping conditions, the deprivation of food/water, and limitations on bathroom access.⁷⁶ Further, Article 10 of the ICCPR - which requires that detainees “be treated with humanity” - “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 treatment or punishment contained in article 7 of the Covenant.”⁷⁷ Consequently, the Committee has observed that inadequate medical care in prisons can amount to inhuman treatment.⁷⁸

In the instant case, according to the source of the UNWGAD complaint, the accused were subjected to “squalid and cramped conditions that posed serious threats to their health”,⁷⁹ undermining their physical and mental integrity: a violation of Article 7. Additionally, Mr. Chhin and Mr. Sothearin reportedly contracted an undiagnosed skin disease while in prison and did not receive appropriate medical treatment.⁸⁰ The lack of appropriate care exacerbated their suffering and arguably constituted inhuman treatment, violating the government’s positive obligations under Article 10.

C. VIOLATIONS AT TRIAL

Right to be Informed of the Charges

Article 14(3)(a) of the ICCPR mandates that defendants be notified of the “nature and cause” of criminal charges as soon as formal charges are laid.⁸¹ Where the information is first provided orally, it must later be provided in writing: through a charge sheet or indictment.⁸² Such documents should include “both the law and the alleged general facts on which the charge is based.”⁸³

During the present trial, as will be discussed in more detail below, the prosecutor referenced an incident in which Mr. Chhin, at the instruction of his boss at RFA, delivered a hard drive to the U.S. Embassy in Phnom Penh immediately prior to the closure of the RFA office.⁸⁴ Although there was no evidence offered as to the contents of the hard drive

⁷⁶ Human Rights Committee, *Sannikov v. Belarus*, U.N. Doc. CCPR/C/122/D/2212/2012, April 6, 2018, paras. 2.9, 6.2; Human Rights Committee, *Barkovsky v. Belarus*, U.N. Doc. CCPR/C/123/D/2247/2013, July 13, 2018, para. 6.2; 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.

⁷⁷ Human Rights Committee, General Comment 21, U.N. Doc. HRI/GEN/1/Rev.1, April 10, 1992, para. 3.

⁷⁸ See Human Rights Committee, *Raul Sendic Antonaccio v. Uruguay*, U.N. Doc. Supp. No. 40 (A/37/40) at 114, 1982, para. 20; Human Rights Committee, *Sannikov v. Belarus*, U.N. Doc. CCPR/C/122/D/2212/2012, April 6, 2018, para. 6.2; Human Rights Committee, *Cariboni v. Uruguay*, U.N. Doc. CCPR/C/31/D/161/1983, October 27, 1987.

⁷⁹ UNWGAD Opinion at para. 17.

⁸⁰ *Id.*

⁸¹ ICCPR, Article 14(3)(a).

⁸² Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 31.

⁸³ *Id.*

⁸⁴ Monitor’s Notes, July 26, 2019.

and Mr. Chhin testified that he had not looked at the drive, the prosecution indicated that this incident was proof of espionage.⁸⁵ The decision to reopen the investigation, as opposed to acquitting or convicting the defendants, likewise referenced the delivery of the hard drive.

According to defense counsel, the initial criminal complaint charging the defendants under Article 445 of the Cambodian Criminal Code as well as the investigating judge's subsequent closing order - akin to an indictment - did not include this episode as part of the factual basis for the espionage charges. As such, the defendants lacked sufficient information about the scope of the case against them, violating Article 14(3)(a).

Right to Judicial Impartiality

Article 14(1) of the ICCPR mandates judicial impartiality. As stated by the UN Human Rights Committee, “[t]he requirement of impartiality has two aspects. First, judges must not allow their judgment to be influenced by personal bias or prejudice, nor harbor preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the Tribunal must also appear to a reasonable observer to be impartial.”⁸⁶ In *Ashurov v. Tajikistan*, the Committee found a violation of Article 14(1) where the court, as recounted by the complainant, asked leading questions and “effectively replaced the passive and unprepared prosecutor”.⁸⁷

In the instant case, the court exhibited bias and undermined the necessary procedural balance between the prosecution and the defense, at times appearing to act more as an arm of the prosecutorial team rather than a neutral truth seeker - similar to the court in *Ashurov*.

In particular, the court limited its inquiries to questions favorable to the prosecution's case. The court, for example, repeatedly asked the defendants why they continued to send information to RFA after the outlet left Phnom Penh.⁸⁸ In so doing, the court seemingly pursued the prosecution's central, flawed theory: that sharing publicly available information that could be construed as critical of the government with a foreign news outlet constituted espionage or a threat to national security. As referenced above, the defendants testified that all the stories they sent were public, including stories about protests against opposition leader Kem Sokha's imprisonment, the closure of RFA's offices in Phnom Penh, and messages posted online by opposition leader Sam Rainsy.

⁸⁵ *Id.*

⁸⁶ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 21. See also Human Rights Committee, *Karttunen v. Finland*, U.N. Doc. CCPR/C/46/D/387/1989, November 5, 1992, para. 7.2.

⁸⁷ Human Rights Committee, *Ashurov v. Tajikistan*, U.N. Doc. CCPR/C/89/D/1348/2005, March 20, 2007, paras. 2.8, 6.6.

⁸⁸ Monitor's Notes, July 26, 2019.

The prosecution did not challenge this claim. International standards on freedom of expression protect the dissemination of such materials. The court, however, returned to the defendant's continued contact with RFA again and again, implying that - in itself - the defendants' circulation of stories to RFA was relevant to the espionage charge. This approach not only failed to hold the prosecution accountable for its misapplication of the criminal law but appeared to endorse it.

The court further asked why Mr. Chhin had rented a hotel room on the 7th floor (the prosecution claimed that higher floors enabled broadcasting), suggesting that the purpose may have been to hide something, and inquired as to who paid for the hard drive that Mr. Chhin had delivered to the U.S. Embassy on RFA's behalf. As noted above, the prosecution raised this incident without offering evidence on key topics such as the information contained on the hard drive, whether Mr. Chhin was aware of the drive's contents, and the nature of RFA's relationship with the U.S. embassy. The court likewise neglected to pursue clarification.⁸⁹

Questions that would have exposed holes in the prosecution's case were avoided. In contrast to the court's examination of the defendants and, in particular, persistent inquiries about the defendants' continued communication with RFA, the court did not challenge the prosecution's witnesses. Two senior police officers testified about the investigation. Notably, the court did not push the officers to explain if the department (1) had assessed the equipment's broadcasting capabilities; (2) had assessed whether the equipment had actually been used for broadcasting; (3) had any factual basis for the claim in the indictment that the defendant's alleged communications were prejudicial to national security; or (4) had any factual basis for disputing Mr. Chhin's claim that the equipment was for karaoke. This selective questioning "improperly promote[d] the interests" of the prosecution to the detriment of the defense and created the appearance of bias.

Meanwhile, it rapidly became evident that one of the police officers who testified was not familiar with the case, struggling to answer basic questions.⁹⁰ A younger officer then began whispering answers into his ear, a practice that lasted for the duration of the senior officer's testimony.⁹¹ The presiding judge did not intervene despite the fact that the officer was clearly unqualified to testify as a witness. This allowance deprived the defense of its right to cross-examine witnesses, again "improperly promot[ing] the interests" of the prosecution to the detriment of the defense.

In sum, the court's line of questioning as well as the latitude provided to the prosecution's witnesses created an evident disparity in its treatment of the parties.

⁸⁹ Id.

⁹⁰ Id.

⁹¹ Id.

Right to Communicate with Counsel

A criminal defendant's right to counsel is a fundamental component of the right to a fair trial. Article 14(3)(b) of the ICCPR provides that criminal defendants must "have adequate time and facilities for the preparation of [their] defense and to communicate with counsel of [their] own choosing." The UN Human Rights Committee has established that this provision means "giving full respect to the confidentiality of [lawyer-client] communications."⁹² In *Rayos v. the Philippines*, the Committee found an Article 14(3)(b) violation because the defendant "could only consult with counsel for a few moments during each day of the trial," which resulted in him not "hav[ing] adequate time and facilities to prepare his defence."⁹³

In the present case, the accused's ability to communicate with counsel was hindered in a manner similar to that of the complainant in *Rayos*. The defendants were seated apart from their lawyers for the duration of trial, with counsel positioned on the right side of the room, the defendants in the middle, and the prosecution on the left. The courtroom arrangement prevented the defendants from asking counsel questions, providing input on strategy, and offering feedback on witnesses' testimony. Consequently, the physical distance between the defendants and their lawyers constituted a violation of Article 14(3)(b).

Right to Call and Examine Witnesses

Under Article 14(3)(e) of the ICCPR, all persons accused of a crime are entitled "to examine, or have examined, the witnesses against [them] and to obtain the attendance and examination of witnesses on [their] behalf under the same conditions as witnesses against [them]." As explained by the UN Human Rights Committee, this provision "is important for ensuring an effective defence by the accused and their counsel and thus guarantees the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution."⁹⁴ The Committee has found violations of Article 14(3)(e) where the prosecution introduced out-of-court statements by key witnesses without making those witnesses available for cross-examination by the defense.⁹⁵

⁹² Human Rights Committee, General Comment No. 13, April 13, 1984, para. 9.

⁹³ Human Rights Committee, *Rayos v. Philippines*, U.N. Doc. CCPR/C/81/D/1167/2003, July 27, 2004, paras. 3.9, 7.3.

⁹⁴ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 39. See also Human Rights Committee, *Sirozhiddin Allaberdiyev v. Uzbekistan*, U.N. Doc. CCPR/C/119/D/2555/2015, March 21, 2017, para. 8.8.

⁹⁵ See Human Rights Committee, *Y.M. v. Russian Federation*, U.N. Doc. CCPR/C/116/D/2059/2011, May 13, 2016, para. 9.9; Human Rights Committee, *Rouse v. Philippines*, U.N. Doc. CCPR/C/84/D/1089/2002, July 25, 2005, para. 7.5; Human Rights Committee, *Dugin v. Russian Federation*, U.N. Doc. CCPR/C/81/D/815/1998, July 5, 2004, para. 9.3.

In the present case, four witnesses testified - Mr. Chhin, Mr. Sothearin, and two police officers. As mentioned above, when one of the officers testified, it was clear that he did not possess the requisite factual understanding of the case to serve as witness: he had not conducted the investigation and only repeated information from a report compiled by a different officer.⁹⁶ Nonetheless, the court allowed him to proceed, permitting a junior officer to whisper answers into his ear throughout his testimony and rejecting the defense motion that the police officers actually involved in the investigation should testify.⁹⁷

Subsequently, another police officer testified for the prosecution. On the subject of the broadcast studio, he referenced a statement made by a Ministry of Information employee, who had purportedly concluded that the equipment in question could be used to broadcast information.⁹⁸ The defense had argued that a Ministry of Information expert should have been in court to explain such analysis and should have been made available for cross examination.⁹⁹

Correspondingly, the prosecution introduced preliminary conclusions from the Ministry of Information and the Phnom Penh Municipal Department of Culture and Arts that the equipment could potentially be used for broadcasting: again, no one from either institution testified to this fact, and the defense could not effectively conduct cross-examination with respect to the preliminary conclusions.

That the prosecution and its witnesses were permitted to rely on out-of-court statements by key individuals in the case (the officers who were familiar with/ conducted the investigation, and the Ministry of Information and Phnom Penh Municipal Department of Culture and Arts experts) deprived the defense of the opportunity for cross-examination and contravened Article 14(3)(e) of the ICCPR.

Right to a Trial Without Undue Delay

The continued prosecution and investigation of Mr. Chhin and Mr. Sothearin implicates their Article 14 right to a speedy trial. Article 14(3)(c) of the ICCPR provides that in the determination of any criminal charge, defendants are entitled to a trial without undue delay. This right is geared towards limiting the uncertainty faced by accused.¹⁰⁰ The burden of proof to show that a delay is justifiable rests on the state.¹⁰¹ Notably, cases in

⁹⁶ Monitor's Notes, July 26, 2019.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Human Rights Committee, General Comment 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 35.

¹⁰¹ See Human Rights Committee, *Barroso v. Panama*, U.N. Doc. CCPR/C/54/D/473/1991, July 19, 1995, para. 8.5.

which defendants are denied bail heighten the state's responsibility to proceed without undue delay.¹⁰²

The relevant time period for assessing undue delay begins to run as soon as a person is charged and ends at the final judgment on appeal.¹⁰³ The clock started ticking for the Cambodian authorities in November 2017, when Mr. Chhin and Mr. Sothearin were arrested and charged, and will continue until the charges are dismissed or an appellate court upholds a conviction or appeal.

Assessment of the reasonableness of a delay is based on several factors: "the complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the administrative and judicial authorities."¹⁰⁴ The Human Rights Committee has found a delay of 22 months unreasonable where the defendant was charged with a serious crime and held in custody until trial, and "where the factual evidence was straight forward and apparently required little police investigation."¹⁰⁵

In the instant case, several factors suggest that the delay of two plus years in the defendants' case is similarly unreasonable. First, Mr. Chhin and Mr. Sothearin were held in detention for more than nine months over the course of the investigation, imposing a heightened duty to try the case expeditiously. Second, the process against the accused has already stretched over two years, with no end in sight. The order reopening the investigation does not specify any timeline for conclusion and as such, the men continue to deal with the "uncertainty" engendered by a criminal investigation.

Third, the investigation was not especially complex. The espionage charge was confined to several discrete pieces of information (the public stories the defendants sent RFA and the transfer of the hard disk) and assessment of whether a specific set of equipment possessed broadcasting capabilities: there was not a mass of documentary materials nor an extensive list of witnesses. In fact, as noted above, the only witnesses called by the prosecution were the police officers who investigated the case. Just 9 other witnesses, defendants included, were interviewed pretrial.¹⁰⁶ Physical and documentary evidence was limited to the broadcasting equipment and the aforementioned preliminary conclusions from the Ministry of Information and the Phnom Penh Municipal Department of Culture and Arts.¹⁰⁷

¹⁰² *Id.*; Human Rights Committee, General Comment 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 35.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Human Rights Committee, *Sextus v. Trinidad and Tobago*, U.N. Doc. CCPR/C/72/D/818/1998, July 16, 2001, para. 7.2 (defendant was charged with murder).

¹⁰⁶ Preliminary Judgment.

¹⁰⁷ Monitor's Notes, July 26, 2019; Preliminary Judgment.

As such, it does not appear that the case against Mr. Chhin and Mr. Sothearin warranted almost two years of investigation, particularly considering that the government has provided no explanation for the delays and that the accused were imprisoned for a significant portion of that time. Now the defendants are faced with the prospect of an open-ended investigation, which - based on precedent - could last several more years. During this time they have been unable to travel due to the confiscation of their passports. Multiple years of delay given the factors discussed above raises concerns about a violation of Article 9(3).

Presumption of Innocence

Article 14(2) of the ICCPR guarantees that “everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law.” This right applies to the pretrial stage as well as to the trial itself.¹⁰⁸ 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 the doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle.”¹⁰⁹

In the present case, as essentially stated by the court in its order to reopen the investigation, the prosecution failed to prove the defendants’ guilt. As such, the court’s decision to remand the case to the investigation stage as opposed to acquitting the defendants - permitting the prosecution another attempt at conviction - is inconsistent with the presumption of innocence.

Lack of Evidence

At trial, the prosecution was unable to demonstrate the guilt of Mr. Chhin and Mr. Sothearin. Each of the prosecution’s arguments for the espionage charge - that the defendants sent stories to RFA after it suspended in-country operations, that the defendants set up a broadcast studio to secretly transmit information to RFA, and that Mr. Chhin delivered a hard drive to the U.S. embassy - failed to prove the elements of espionage.

As discussed above, the defendants acknowledged sending stories to RFA following its departure from Cambodia but maintained that all such information was publicly available: the stories concerned protests regarding opposition leader Kem Sokha’s imprisonment,

¹⁰⁸ See Human Rights Committee, Concluding Observations of the Human Rights Committee: Italy, U.N. Doc. CCPR/C/ITA/CO/5, April 24, 2006, para. 14.

¹⁰⁹ Human Rights Committee, *Saidova v. Tajikistan*, U.N. Doc. CCPR/C/122/D/2680/2015, September 20, 2018, para. 9.4.

messages posted online by opposition leader Sam Rainsy, and the closure of RFA's offices in Phnom Penh.¹¹⁰ The prosecution did not challenge this claim.¹¹¹

Article 445 of the Cambodian Criminal Code proscribes providing or making accessible to a foreign state or its agents information that undermines the national defense. The prosecution, however, did not offer evidence or call witnesses to testify that the stories had damaged Cambodia's national defense, a foundational element of Article 445. In this regard, the prosecution asserted that the information had previously been confined to the local context and that the defendants had sent it abroad, expanding the scope of the audience.¹¹²

Article 445, however, mandates that information be relayed to a foreign state or its agents. An international audience does not suffice. In this case, the prosecution never explicitly named any foreign state or agents of a foreign state as the intended recipient of the defendants' alleged transmissions. During closing arguments, for example, the defense repeatedly requested that the prosecution identify the purported foreign state.¹¹³ When the judge gave the prosecution the floor to respond, the prosecutor bypassed the topic entirely.¹¹⁴ Given that RFA is a news agency,¹¹⁵ not a foreign state, the prosecution neglected this key element of the offense of espionage.¹¹⁶

Meanwhile, the prosecution's arguments about the defendants' broadcasting plans were weak at best, and a distraction at worst. Though the equipment in question was offered as evidence in court, not a single expert testified about the equipment's capacity to transmit information to RFA's headquarters. Even assuming the equipment had been capable, the prosecution did not attempt to prove that it *actually had been used* to transmit anything. The prosecution likewise provided no information about the damaging nature of the alleged broadcasts or the foreign state behind the broadcasts.

The deficiencies in the prosecution's case were further demonstrated by repeated references to Mr. Chhin's failure to apply for a business license in establishing his karaoke studio. The prosecution cited this point as evidence that the defendants had perpetrated espionage.¹¹⁷ Failure to obtain a business license, however, is an administrative matter and certainly not probative of intent to undermine public security.

¹¹⁰ See Preliminary Judgment at pgs. 3, 5, 13-15.

¹¹¹ Id.; Monitor's Notes, July 26, 2019; Monitor's Notes, August 9, 2019.

¹¹² Monitor's Notes, August 9, 2019.

¹¹³ Id.

¹¹⁴ Id.

¹¹⁵ See *supra*.

¹¹⁶ Notably, in the preliminary judgment ordering reopening of the investigation, the court appeared to suggest that RFA was a foreign state, remarking that the defendants had "sent a lot of information from Cambodia to a foreign country (RFA in the US)." Preliminary Judgment at pg. 2. Again, the prosecution did not offer evidence of this affiliation.

¹¹⁷ Monitor's Notes, July 26, 2019; Monitor's Notes, August 9, 2019.

As noted above, the prosecution briefly mentioned an incident in which Mr. Chhin delivered a hard drive to the U.S. embassy immediately before RFA's closure. Mr. Chhin testified that he did not know what was on the hard drive and was acting on the instructions of his boss.¹¹⁸ The prosecution did not present evidence as to the contents of the hard drive nor did it claim that the hard drive contained confidential or damaging information or that Mr. Chhin was serving as a U.S. agent.¹¹⁹ It is unclear if the prosecution intended to use the hard drive episode to undermine RFA's standing as a news service or to imply a direct link between the defendants and a foreign state: namely, the U.S. In any event, the prosecution's arguments regarding the hard drive were, like those regarding the broadcasting studio and the publicly available stories, grossly inadequate to prove espionage.

Reopening of the Investigation

The factual matters cited by the court as necessitating further investigation were the same as those at issue during the trial: whether the equipment was in fact capable of broadcasting, what information resided on the hard drive that Mr. Chhin delivered to the U.S. embassy, and which news stories were relayed to RFA by the defendants.¹²⁰ As such, the court's order reopening the investigation exposes the prosecution's failure to provide evidence on key issues, demonstrating that the case should have culminated in an acquittal, in line with the presumption of innocence.

With respect to the hard drive, for example, the court states that "during the investigation, no questions have been clearly asked about the source and what documents are contained on the hard drive."¹²¹ With respect to the broadcasting equipment, the court states: "no questions were asked regarding the source of installing the equipment, no specialists have been invited to provide their clarification of the studio establishment, what materials and equipment are needed? What kinds of experts are needed for the operation of the studio? No experts have been invited to provide their clarification the establishment of Radio and TV online; what kinds of technical experts are needed for the operation of the Radio and TV online? And what permits are required for the operation? Such information is needed to compare with the equipment installed by Uon Chhin and Yeang Sothearin, also called Yeang Socheameta, in order to have the basis to adjudge whether the equipment installation by both defendants is the establishment of a studio or the establishment of Information and Communication Technology System to operate with communication networks."¹²²

These are questions that the prosecution neglected to ask, experts that the prosecution neglected to call, and pieces of evidence that the prosecution neglected to present. The

¹¹⁸ Monitor's Notes, July 26, 2019.

¹¹⁹ Id; Monitor's Notes, August 9, 2019; Preliminary Judgment.

¹²⁰ Preliminary Judgment at pgs. 14-15.

¹²¹ Id at pg. 14.

¹²² Id at pg. 15.

court further notes that additional investigation is required to clarify whether the stories provided by Mr. Sothearin to RFA (stories about opposition leader, Sam Rainsy) ever resulted in a news article.¹²³ It is unclear how this information bears upon the charge of espionage or - again - why the prosecution could not have provided this information at trial.¹²⁴

The court concludes by stating that re-investigation is imperative to “remove the above mentioned shortcomings.”¹²⁵ These shortcomings, however, resulted from the state’s failures: the burden of proof rests on the prosecution. The fact that the state could not generate proof beyond a reasonable doubt on its first attempt does not mean that it should be permitted another try at the expense of Mr. Chhin and Mr. Sothearin. Accordingly, the reopening of the investigation is inconsistent with the defendants’ right to the presumption of innocence.

D. OTHER FAIRNESS CONCERNS

Prosecutorial Misconduct

The actions of the prosecution in the case against Mr. Chhin and Mr. Sothearin breach best practices on prosecutorial ethics.

International standards in this regard are clear: prosecutors should terminate proceedings when there is no evidence to support the charges. The United Nations Guidelines on the Role of Prosecutors, for example, establish that prosecutors should “perform their duties fairly, consistently and expeditiously.”¹²⁶ In particular, the Guidelines stipulate that “prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charges to be unfounded.”¹²⁷ Parallel guidelines issued by the International Association of Prosecutors and the Council of Europe similarly state that prosecutors should “proceed only when a case is well-founded upon evidence reasonably believed to be reliable” and should decline to prosecute a case “beyond what is indicated by the evidence.”¹²⁸

¹²³ Id at pg. 14.

¹²⁴ It is further worth noting that this evidence would not impact whether or not Mr. Sothearin’s activities were in fact protected by international law (see below).

¹²⁵ Id at pg. 15.

¹²⁶ United Nations Office of the High Commissioner for Human Rights, United Nations Guidelines on the Role of Prosecutors, 1990, para. 12. Available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>.

¹²⁷ Id at para. 14.

¹²⁸ International Association of Prosecutors, Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, 1999, Principles 3.6, 4.2. Available at [https://www.iap-association.org/getattachment/Resources-Dokumentation/IAP-Standards-\(1\)/IAP_Standards_Oktober-2018_FINAL_20180210.pdf.aspx](https://www.iap-association.org/getattachment/Resources-Dokumentation/IAP-Standards-(1)/IAP_Standards_Oktober-2018_FINAL_20180210.pdf.aspx). See also Council of Europe, European Guidelines on Ethics and Conduct for Public Prosecutors, 2005, Section III. Available at <https://rm.coe.int/conference-of-prosecutors-general-of-europe-6th-session-organised-by-t/16807204b5>.

Accordingly, in bringing charges against and trying Mr. Chhin and Mr. Sothearin, the prosecution's conduct fell short of the standards established by international guidelines. As discussed above, the prosecution presented scant evidence of espionage and thus should have discontinued proceedings at an earlier juncture.

Freedom of Expression

The right to freedom of expression is a fundamental right guaranteed by the ICCPR. Article 19 of the treaty establishes the "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers ... through any [] media." This right encompasses "political discourse, commentary on one's own and on public affairs ... discussion of human rights, [and] journalism."¹²⁹ Notably, the expression and/or dissemination of opinions that are critical of - or not in line with - official government policy is protected.¹³⁰

The UN Human Rights Committee has noted that any limitations on the Article 19 right to freedom of expression must be strictly and narrowly tailored in accordance with a three-part test. The restriction must (i) be provided by law, (ii) pursue a legitimate aim, and (iii) be necessary and proportional.¹³¹ In the present case, the prosecution of the defendants fails to meet the standards established by the latter two prongs.

The defendants were charged with espionage under Article 445 of the Cambodian criminal code for allegedly sending information to RFA and setting up a studio to broadcast Cambodian news abroad.¹³² Given that the right to freedom of expression includes "impart[ing] information and ideas", the defendants' actions were protected unless the "limitations" - i.e. the criminal prosecution - pass the aforementioned test.

Legitimate aims accepted by the Committee as potentially giving rise to lawful restrictions are respect for the rights and reputation of others, protection of national security or public order, and protection of public health or morals.¹³³ The Committee has stated that in cases concerning national security, the state must identify the "precise nature of the threat allegedly posed by the author's exercise of freedom of expression."¹³⁴ As noted above, in the case at hand, the prosecution failed to provide any specifics as to how the defendants'

¹²⁹ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 11.

¹³⁰ *Id.* at paras. 38, 42.

¹³¹ *Id.* at para. 22. See also Human Rights Committee, *Velichkin v. Belarus*, U.N. Doc. CCPR/C/85/D/1022/20001, October 20, 2005, para 7.3.

¹³² As noted above, the prosecution also briefly referenced an incident in which Mr. Chhin delivered a hard disk drive to the U.S. embassy but did not clarify its connection to the espionage charges. The freedom of expression section focuses on the allegation that the defendants' dissemination of stories to RFA constituted espionage.

¹³³ Human Rights Committee, *Kim v. Republic of Korea*, U.N. Doc. CCPR/64/D/574/1994, Jan. 4, 1999, para. 12.2.

¹³⁴ *Id.* at para. 12.5.

actions threatened the national defense, creating doubt as to the validity of this justification.

Moreover, as also discussed above, the trial fell in line with a larger “pattern of silencing opposing voices, such as journalists and media outlets across Cambodia.”¹³⁵ Before leaving Phnom Penh, RFA had “a long history of reporting on corruption, social and labor issues, illegal logging, and violations of land rights in Cambodia.”¹³⁶ The outlet’s Cambodia branch - like several other independent media outlets across the country - was forced to terminate operations amidst a government crackdown, at which point Cambodia’s Ministries of Information and Interior proclaimed that “any journalists still working for RFA after its office in the [Phnom Penh] closed would be treated as spies.”¹³⁷ This political context as well as the lack of evidence that the defendants endangered national security suggests that the government’s objective in prosecuting the accused was the suppression of independent journalism, an illegitimate objective under Article 19 of the ICCPR.

With respect to the third prong of the UN Human Rights Committee’s test, the government must show that the restriction imposed was necessary to achieve a legitimate purpose and was the least intrusive means of achieving that purpose.¹³⁸ Even assuming that the purpose in question was legitimate, the government’s actions in the instant case fall short of this standard. The prosecution’s case focused on the accused’s transmission of stories to RFA following the outlet’s departure from Phnom Penh. As noted above, however, the prosecution did not introduce evidence that the defendants had disclosed confidential/damaging information and did not dispute the defendants’ claim that all information sent to RFA was publicly available. The prosecution asserted only that the defendants’ dissemination of stories meant that an international audience, not just a local one, was made aware of the events in question. Accordingly, given that the “crime” was communicating with a news outlet about publicly known facts, the nine-month detention of Mr. Chhin and Mr. Sothearin and their subsequent prosecution were surely disproportionate. As argued by the defense at trial, any disputes regarding the revocation of RFA’s press license and the alleged establishment of a broadcast studio/dissemination of stories should have been dealt with by administrative institutions, not the criminal courts.

Notably, the UN Working Group on Arbitrary Detention also concluded that the defendants’ right to freedom of expression was violated by the bringing of charges,¹³⁹

¹³⁵ UNWGAD Opinion at paras. 45-47.

¹³⁶ Human Rights Watch, “Cambodia: Drop Case Against Journalists”, July 24, 2019.

¹³⁷ RFA, “Cambodian Court Begins Trial of Former RFA Reporters Charged with Espionage”, July 26, 2019.

¹³⁸ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, paras. 33-34.

¹³⁹ UNWGAD Opinion at paras. 45-47.

finding that the exceptions permitted under Article 19(3) of the ICCPR did not apply to the defendants' case.¹⁴⁰

¹⁴⁰ Id at para. 48.

CONCLUSION AND GRADE



The proceedings against Mr. Chhin and Mr. Sothearin not only constituted a gross violation of their right to freedom of expression but also entailed serious fair trial abuses. That the Cambodian authorities are still pursuing the charges despite the lack of evidence suggests that the objective is to intimidate the independent media. As such, the human rights violations in the present case extend beyond the fate of the two individuals who were tried. All of Cambodian society is victim when the free press is stifled and judicial proceedings flout fair trial standards.

Professor Sluiter's Recommendations:

- Going forward, steps should be taken to ensure that such cases do not proceed to trial: this is primarily the responsibility of the Prosecution Service but also that of the judiciary given the extra filter of the judicial investigation stage. One fundamental aim of this stage is the protection of individuals against unfounded and frivolous charges. Investigating judges should take this consideration more seriously. This means that investigating judges should more carefully evaluate whether the Prosecution has met the burden of proof required to send an individual to trial and should give the suspect the benefit of any doubt related to the intended charges (in dubio pro reo).
- The Prosecution Service should develop public prosecutorial policy documents or directives that indicate with clarity and precision the conditions under which prosecutions in Article 445 cases can be initiated. Such directives exist in many countries and are especially useful when the substantive crime is susceptible to different interpretations. These directives can also assist with improving prosecutorial independence in relation to the government.

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,”¹⁴¹ 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.

¹⁴¹ ICCPR, Article 26.