



Cambodia v. Thach Seta

October 2024

TRIALWATCH FAIRNESS REPORT

A CLOONEY FOUNDATION **FOR** JUSTICE INITIATIVE

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TrialWatch is an initiative of the **Clooney Foundation for Justice**. Its mission is to expose injustice, help to free those unjustly detained and promote the rule of law around the world. TrialWatch monitors criminal trials globally against those who are most vulnerable — including journalists, protesters, women, LGBTQ+ persons and minorities — and advocates for the rights of the unfairly convicted. Over time, TrialWatch will use the data it gathers to publish a Global Justice Index evaluating countries’ justice systems.

The legal assessment and conclusions expressed in this report are those of the authors and not necessarily those of the Clooney Foundation for Justice.

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Debevoise & Plimpton LLP assigned these trials a grade of D.

The timing and conduct of Mr. Setha's detention and prosecution based on allegations of forgery strongly suggest that the government of Cambodia pursued these charges for the ulterior purpose of silencing Mr. Setha's speech critical of the government. His arbitrary detention based on these charges and subsequent incitement charges violated international standards, and his prosecution for incitement further violated the principle of legality and formed part of a broader pattern by Cambodian authorities of targeting political opposition leaders and suppressing political expression. Further, Mr. Setha's consecutive trials for forgery and incitement were characterized by serious violations of international fair trial standards likely to have affected the trials' outcome, including the right to be presumed innocent; the right to adequate time and facilities to prepare a defense; the right to obtain the attendance and examination of witnesses; the right to an impartial, independent, and competent tribunal; and the right to a duly reasoned judgment. These trials also violated Mr. Setha's substantive rights to freedom of expression and freedom to take part in political affairs and be free from political discrimination.

From mid-2023 through early 2024, the Clooney Foundation for Justice's TrialWatch initiative monitored two criminal proceedings against Thach Setha, a prominent leader of the main political opposition party in Cambodia. Mr. Setha was arrested and detained by the government shortly after giving a speech critical of the government, ostensibly in relation to forgery charges. He was then also charged with incitement while in pretrial detention on the forgery charges.

After detaining him for over seven months prior to trial, in violation of his right to freedom from arbitrary detention under the International Covenant on Civil and Political Rights, Cambodian courts found Mr. Setha guilty in both proceedings: first, of forgery under Article 231 of the Cambodian Law of Negotiable Instruments and Payment Transactions; second, of incitement under Articles 244, 245, and 246 of the Criminal Code of the Kingdom of Cambodia. They did so despite lacking the required evidence for these charges, and following proceedings marred by procedural violations, including of Mr. Setha's right to call and examine witnesses, to equality of arms and impartiality, to the presumption of innocence, and to a well-reasoned judgment. The incitement charges also violated Mr. Setha's substantive rights to freedom of expression, to take part in public affairs, and to freedom from political discrimination. Mr. Setha was ultimately sentenced to prison for 18 months on the forgery charges and three years on the incitement charges and remains incarcerated as of the date of publication.

A. BACKGROUND

Mr. Setha's prosecution, conviction, and sentencing occurred against the backdrop of the Cambodian government's systematic oppression of political opposition. Since 2017, Cambodia has operated as a one-party State. The leading Communist Peoples' Party (CPP) has eliminated most participation by opposition political parties by targeting opposition leaders like Mr. Setha for prosecution. Key to the CPP's political prosecutions is its reliance on what has been described by the UN Special Rapporteur on Cambodia as a judiciary "beholden to the monopoly that prevails at the top of the executive branch."¹

Mr. Setha is the Vice President of the main opposition Candlelight Party, a former history teacher, and an outspoken critic of the CPP. Prior to his involvement with the Candlelight Party, the Cambodian government had banned Mr. Setha from engaging in political activities due to his involvement in a prior political opposition party, which Cambodian courts forcibly dissolved in 2017. Following a government pardon of Mr. Setha in 2021, he reentered politics as a leader in the new opposition Candlelight Party and continued his political dissent against the CPP.

The forgery proceedings against Mr. Setha arose from a 2016 loan made to Plaintiff Hai Vanrin, a businessman with reported links to the ruling party and family of the Prime Minister. In 2019, Mr. Vanrin brought charges against Mr. Setha under Article 231 of the Cambodian Law of Negotiable Instruments and Payment Transactions, alleging Mr. Setha issued five cashless checks to repay his loan. The proceedings were dormant for over three years until January 16, 2023, when Cambodian authorities arrested Mr. Setha three days after the release of a YouTube video of a speech wherein Mr. Setha criticized the CPP. The stated basis for Mr. Setha's arrest was failure to report for summonses that the Court had allegedly issued nearly two years earlier. While Mr. Setha was in detention in April 2023, he was additionally charged with incitement under Articles 244, 245, and 246 of the Criminal Code of the Kingdom of Cambodia for comments made in the YouTube video.

B. ANALYSIS

Both the forgery and incitement proceedings against Mr. Setha raise serious violations of international law, including Mr. Setha's rights under the International Covenant on Civil and Political Rights (ICCPR), to which Cambodia is a party.

¹ UN General Assembly, Report of the Special Rapporteur on the situation of human rights in Cambodia, Vitit Muntarbhorn, U.N. Doc A/HRC/54/75, 20 July 2023, para. 47, <https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F54%2F75&Language=E&DeviceType=Desktop&LangRequested=False>.

Mr. Setha's arrest and placement in pretrial detention in January 2023 constituted arbitrary detention in violation of Article 9 of the ICCPR. Cambodian authorities failed to provide substantive grounds for Mr. Setha's arrest or detention, and he remained imprisoned for eight months without a conviction or sufficient justification (other than alleged failure to respond to summonses that he said he had not received, and the asserted need to ensure his presence for future legal proceedings, without more).

Mr. Setha also experienced multiple violations of his fair trial rights under the ICCPR during both the incitement and the forgery proceedings. Trial documents from the forgery proceedings indicate that Mr. Setha was first interrogated without access to his lawyer, in violation of his right to counsel under Article 14(3)(b) and (d) of the ICCPR. Mr. Setha and his counsel were also denied access to key evidence during the proceedings, including the original documents underlying the allegations and the opportunity to cross-examine Mr. Vanrin, the plaintiff and only witness, violating Mr. Setha's right to adequate facilities to prepare a defense under Article 14(3)(b) and his right to call and examine witnesses under Article 14(3)(e). Moreover, the trial conduct of the judge who presided over both the forgery and incitement proceedings indicates violations of his rights to be tried by an independent and impartial decision maker and to be presumed innocent in violation of Article 14(1) and 14(2). This included making statements suggesting Mr. Setha's guilt, appearing to improperly put the burden of proof on Mr. Setha, resolving doubts in favor of the prosecution rather than Mr. Setha, and convicting him despite a lack of evidence of each of the requisite elements of the crimes.

Mr. Setha's prosecution for incitement based on his political speech also violated his substantive right to freedom of expression under Article 19, which provides heightened protection for Mr. Setha's political dissent above and beyond the already high bar that a State must meet to restrict an individual's freedom of expression. The overall context of the concurrent forgery and incitement proceedings against Mr. Setha suggests a violation of Mr. Setha's right to take part in public affairs and right to freedom from political discrimination under Articles 25 and 26, respectively.

Both at the trial and appeal phases, the Cambodian authorities also violated Mr. Setha's right to a reasoned judgment under Article 14(5) of the ICCPR. Both the trial court's decisions on the forgery and incitement charges provide little reasoning as to the basis for the court's ultimate conclusion of Mr. Setha's guilt. Both decisions failed to meet the bar provided by Article 14(5), which entitles the accused to a duly reasoned, written judgment on which they may base their appeal. For example, the court failed to point to any specific statement that Mr. Setha made that could constitute incitement under Cambodian law. Further, in both cases, the judgments of the Appeal Court failed to remedy the lower court's violations, providing only vague and conclusory statements confirming the trial court's findings.

The pursuit of these parallel charges against Mr. Seta without a sound legal basis, and his prolonged detention, appears to arise from the Cambodian authorities' well-documented practice of targeting political opposition leaders and other figures who speak out against the CPP. This report concludes that Cambodia should take steps to provide adequate substantive and procedural protections for political figures like Mr. Seta.



A. POLITICAL & LEGAL CONTEXT

Cambodia is a constitutional monarchy with a parliamentary government.² While Cambodia's parliament is elected, the Cambodian People's Party (CPP) has ruled the country continuously since 1979, when it assumed power following the fall of the Khmer Rouge Regime.³ Hun Sen was Prime Minister until August 2023, when he was succeeded by his son, Hun Manet, the current prime minister.⁴ Since 2017, when Cambodia's then-main opposition party was dissolved, Cambodia has operated as a "de facto one-party state."⁵ The CPP-led government has also sought to silence dissent by prosecuting opposition leaders, including for "incitement." These prosecutions take place within the context of a compromised judiciary that fails to meet international benchmarks for independence and impartiality, according to observers.

Suppressing Political Opposition

Until 2017, Cambodia's main opposition party was the Cambodia National Rescue Party (CNRP). The CNRP won approximately 45% of the vote in the 2013 national elections and 2017 local elections, each of which were tainted with allegations of electoral irregularities.⁶ Soon after the 2017 local elections, the Cambodian Supreme Court

² U.S. Department of State, "Cambodia 2022 Human Rights Report," Country Reports on Human Rights Practices for 2022 (2022), p. 1.

³ Bangkok Post, "Cambodia PM says ruling party to dominate for up to 100 years," 22 June 2020, <https://www.bangkokpost.com/world/1939104/cambodia-pm-says-ruling-party-to-dominate-for-up-to-100-years>; Asia Pacific Curriculum, "The Rise and Fall of the Khmer Rouge Regime," [https://asiapacificcurriculum.ca/learning-module/rise-and-fall-khmer-rouge-regime#:~:text=By%20December%201978%2C%20Vietnamese%20forces,Republic%20of%20Kampuchea%20\(PRK\)](https://asiapacificcurriculum.ca/learning-module/rise-and-fall-khmer-rouge-regime#:~:text=By%20December%201978%2C%20Vietnamese%20forces,Republic%20of%20Kampuchea%20(PRK)).

⁴ New Straits Times, "After 36 years in power, Hun Sen longest-serving PM in the world," 16 January 2021, <https://www.nst.com.my/world/region/2021/01/658102/after-36-years-power-hun-sen-longest-serving-pm-world>; Reuters, "Cambodia's new leader Hun Manet, strongman or reformer?," 22 August 2023, <https://www.reuters.com/world/asia-pacific/cambodias-new-leader-hun-manet-strongman-or-reformer-2023-08-22/>.

⁵ U.S. Department of State, "Cambodia 2022 Human Rights Report," Country Reports on Human Rights Practices for 2022 (2022), p. 1. See also Andrew Khoo and ABA Center for Human Rights, "TrialWatch Fairness Report: Cambodia v. Theary Seng," September 2022, p. 5, <https://cfj.org/reports/cambodia-v-theary-seng-september-2022/>.

⁶ The Geopolitics, "Cambodia Doomed to Repeat 2018 Electoral Farce Until Opposition CNRP Reinstated," 18 October 2021, <https://thegeopolitics.com/cambodia-doomed-to-repeat-2018-electoral-farce-until-opposition-cnrp-reinstated/>. See also Andrew Khoo and ABA Center for Human Rights, "TrialWatch Fairness Report: Cambodia v. Theary Seng," September 2022, p. 5, <https://cfj.org/reports/cambodia-v-theary-seng-september-2022/>; Alex Conte and ABA Center for Human Rights, "TrialWatch Fairness Report: Cambodia v. Kak Sovannchhay," May 2022, p. 5, <https://cfj.org/reports/cambodia-v-theary-seng-september-2022/>.

dissolved the CNRP under Cambodia's newly amended Law on Political Parties, which permitted "the dissolution of any political party deemed to be secessionist or subversive."⁷ The CPP subsequently won all 125 parliamentary seats in the 2018 national elections.⁸

In addition to dissolving the CNRP at the party level, the CPP-led Cambodian authorities also directly targeted the leadership of the CNRP with what UN and other experts have characterized as politically motivated charges. For example:

A few months before the Supreme Court's 2017 decision to dissolve the CNRP, its former president Kem Sokha was charged with treason.⁹ In 2023, a Cambodian court sentenced Mr. Sokha to 27 years of in-house detention and barred him from contesting or voting in the 2023 national elections.¹⁰ UN experts characterized the proceedings as "politically motivated and further evidence of an ongoing pattern of the misapplication of laws to target political opponents and any critic of the Government."¹¹

- Mr. Sokha's successor Sam Rainsy—who fled Cambodia in 2015 under threat of arrest and has lived in exile in Paris ever since¹²—was also charged and convicted *in absentia* for several offenses, including allegedly trying to cede four Cambodian provinces to a foreign state, and sentenced to life in prison.¹³ These proceedings, too, were widely criticized as "politically motivated."¹⁴ In October 2019, Mr. Rainsy announced that he would return to Cambodia on November 9, 2019, Cambodia's Independence Day, and called on his supporters to join him in demonstrations for

⁷ UN General Assembly, Report of the Special Rapporteur on the Situation of Human Rights in Cambodia, U.N. Doc. A/HRC/36/61, 27 July 2017, para. 8; Amnesty International, "Cambodia: Banning of opposition party a 'blatant act of political repression,'" 16 November 2017, <https://www.amnesty.org/en/latest/news/2017/11/cambodia-banning-of-opposition-party-a-blatant-act-of-political-repression/>.

⁸ U.S. Department of State, "Cambodia 2022 Human Rights Report," Country Reports on Human Rights Practices for 2022 (2022), p. 1. See also Andrew Khoo and ABA Center for Human Rights, "TrialWatch Fairness Report: Cambodia v. Theary Seng," September 2022, p. 5, <https://cfj.org/reports/cambodia-v-theary-seng-september-2022/>.

⁹ UN Human Rights Office of the High Commissioner, "Cambodia: UN experts condemn verdict against opposition leader Kem Sokha," 8 March 2023, <https://www.ohchr.org/en/press-releases/2023/03/cambodia-un-experts-condemn-verdict-against-opposition-leader-kem-sokha>.

¹⁰ *Id.*

¹¹ *Id.*

¹² Radio Free Asia, "Cambodian court warns Kem Sokha, on trial for 'treason,' not to get political," 29 June 2022, <https://www.rfa.org/english/news/cambodia/kem-sokha-06292022175231.html>; Radio Free Asia, "Opposition Leader Says Will Give Up 'Freedom and Even my Life' for Cambodian Democracy," 31 October 2019, <https://www.rfa.org/english/news/cambodia/samrainsy-message-10312019202234.html>.

¹³ Radio Free Asia, "Cambodia sentences Sam Rainsy to life in prison, concludes trial of Kem Sokha," 19 October 2022, <https://www.rfa.org/english/news/cambodia/twotrials-10192022180438.html>.

¹⁴ Al Jazeera, "'Mockery of justice': Cambodia's Rainsy gets 25-year jail term," 2 March 2021, <https://www.aljazeera.com/news/2021/3/2/mockery-of-justice-cambodias-rainsy-gets-25-year-jail-time>.

democracy upon his return.¹⁵ Government authorities in turn vowed to arrest Mr. Rainsy “as soon as he sets foot inside the country.”¹⁶ The day before his planned arrival, Mr. Rainsy was barred from boarding a flight to Bangkok in transit to Phnom Penh.¹⁷ He was again tried and sentenced *in absentia* to 25 years in prison on charges of treason and incitement, stripped of the right to vote and prohibited from standing as a candidate in an election.¹⁸

- Following Mr. Rainsy’s failed attempt to return to Cambodia, the Cambodian authorities launched a mass crackdown on political opposition and government critics. By March 2021, approximately 150 CNRP members and activists had been tried for treason and incitement, most on the basis of their support for Mr. Rainsy,¹⁹ and more than 115 former CNRP politicians and opposition activists have been convicted since 2021.²⁰

¹⁵ Radio Free Asia, “Cambodian Opposition Leader Sam Rainsy Vows to Lead ‘Tsunami’ of Supporters to Arrest Hun Sen,” 18 October 2019, <https://www.rfa.org/english/news/cambodia/tsunami-10182019164229.html>.

¹⁶ *Id.*

¹⁷ Bangkok Post, “Sam Rainsy barred from flight,” 8 November 2019, <https://www.bangkokpost.com/thailand/general/1789504/sam-rainsy-barred-from-flight>; Al Jazeera, “Cambodia’s Rainsy ‘refused boarding’ onto Paris-Bangkok flight”, 7 November 2019, <https://www.aljazeera.com/news/2019/11/7/cambodias-rainsy-refused-boarding-onto-paris-bangkok-flight>. See also Andrew Khoo and ABA Center for Human Rights, “TrialWatch Fairness Report: Cambodia v. Theary Seng,” September 2022, p. 6, <https://cfj.org/reports/cambodia-v-theary-seng-september-2022/>; Alex Conte and ABA Center for Human Rights, “TrialWatch Fairness Report: Cambodia v. Kak Sovannchhay,” May 2022, p. 6, <https://cfj.org/reports/cambodia-v-theary-seng-september-2022/>.

¹⁸ Cambodian courts sentenced several other opposition politicians, including Mu Shohua (vice-president of the CNRP) and Tioulong Saumura (Sam Rainsy’s wife), to at least 20 years in prison. Al Jazeera, “Mockery of justice’: Cambodia’s Rainsy gets 25-year jail term,” 2 March 2021, <https://www.aljazeera.com/news/2021/3/2/mockery-of-justice-cambodias-rainsy-gets-25-year-jail-time>.

¹⁹ Radio Free Asia, “Cambodia’s Acting Opposition Chief Sam Rainsy Sentenced to 25 Years For ‘Attempted Coup,’” 1 March 2023, <https://www.rfa.org/english/news/cambodia/sentenced-03012021173934.html>. See also Andrew Khoo and ABA Center for Human Rights, “TrialWatch Fairness Report: Cambodia v. Theary Seng,” September 2022, p. 6, <https://cfj.org/reports/cambodia-v-theary-seng-september-2022/>; Alex Conte and ABA Center for Human Rights, “TrialWatch Fairness Report: Cambodia v. Kak Sovannchhay,” May 2022, p. 6, <https://cfj.org/reports/cambodia-v-theary-seng-september-2022/>. See also U.S. Department of State, “Cambodia 2022 Human Rights Report,” Country Reports on Human Rights Practices for 2022 (2022), p. 7.

²⁰ House of Representatives, H.R. 4659 – Cambodia Democracy and Human Rights Act of 2023, 14 July 2023, <https://www.congress.gov/bill/118th-congress/house-bill/4659/text?format=txt&overview=closed>. See also UN General Assembly, Report of the Special Rapporteur on the situation of human rights in Cambodia, Vitit Muntarbhorn, U.N. Doc A/HRC/54/75, 20 July 2023; U.S. Department of State, “Cambodia 2022 Human Rights Report,” Country Reports on Human Rights Practices for 2022 (2022), p. 7.

After the CNRP's dissolution in 2017, the Candlelight Party emerged as the CPP's principal political competitor.²¹ However, ahead of the July 2023 national elections, the Cambodian authorities blocked the Candlelight Party from participating on the grounds that it had allegedly failed to provide necessary documents.²² The CPP won 120 out of 125 seats in those elections and, a month later, endorsed Hun Manet as Prime Minister.²³

The CPP has also prosecuted individual Candlelight party leaders in the last two years:

- After Son Chhay, a Vice President of the Candlelight Party, publicly stated that the 2022 local elections had not been fair, the CPP sued him for four billion riels (approximately USD \$1 million). Officials of the National Election Committee, which is widely perceived to be connected to the CPP,²⁴ also filed a lawsuit against
- Chhay alleging public defamation.²⁵ In August 2022, Mr. Chhay was charged with defamation under Article 305 of the Criminal Code of the Kingdom of Cambodia (Cambodian Criminal Code) in connection with the CPP's proceeding against him.²⁶

²¹ Council of Asian Liberals and Democrats, "Candlelight Party of Cambodia," <https://cald.org/member-parties/candlelight-party-of-cambodia/>.

²² AP News, "Cambodia's top opposition party barred from July elections, leaving Hun Sen's party unchallenged," 25 May 2023, <https://apnews.com/article/cambodia-opposition-party-election-hun-sen-63659ff8f2de992d84d2be748afbab8b>; Time, "Cambodia's Long Serving Strongman Is Handing Power to His Son. The World Should Speak Up," 26 July 2023, <https://time.com/6298194/cambodia-hun-sen-hun-manet/>; BBC News, "Cambodia: Opposition Candlelight Party Barred from July vote," 15 May 2023, <https://www.bbc.com/news/world-asia-65478798>.

²³ Open Development, "Results on the national assembly's election (2023)," 10 August 2023, <https://data.opendevelopmentcambodia.net/en/dataset/results-on-the-national-assembly-s-election-2023>.

²⁴ The National Election Committee is legally mandated to be nonpartisan and for its members to have balanced representation between the majority party in the National Assembly and opposition parties. However, at present, seven out of nine members are reportedly connected with the CPP. See Asian Network for Free Elections, "ANFREL Pre-Election Assessment Mission Report, Cambodia 2022 Commune and Sangkat Council Elections" (2022), pp. 11–12, <https://anfrel.org/wp-content/uploads/2022/05/ANFREL-Pre-Election-Assessment-Mission-Report-Cambodia-2022-Commune-and-Sangkat-Council-Elections.pdf>.

²⁵ The Phnom Penh Post, "NEC files defamation suit against Candlelight Party's No2," 17 June 2022, <https://phnompenhpost.com/national-politics/nec-files-defamation-suit-against-candlelight-partys-no2>; The Phnom Penh Post, "Candlelight's No2 hit with CPP lawsuit over election claims," 14 June 2022, <https://phnompenhpost.com/national-politics/candlelights-no2-hit-cpp-lawsuit-over-election-claims>.

²⁶ The Phnom Penh Post, "Candlelight Party's Son Chhay charged with defaming ruling CPP," 12 August 2022, <https://www.phnompenhpost.com/national-politics/candlelight-partys-son-chhay-charged-defaming-ruling-cpp>.

- Tithia Sum—a Candlelight Party member and U.S. citizen—fled Cambodia in July 2023 after he received notice of an arrest warrant against him for incitement of social unrest.²⁷
- Khem Monykosal—head of the Candlelight Party Operational Committee in Pailin—fled Cambodia in the same month for fear of arrest after police officers raided his house without a warrant.²⁸

International observers have expressed serious concern over these developments. On July 20, 2023, the Special Rapporteur on the situation of human rights in Cambodia noted that “since the first quarter of 2023, the political atmosphere has become more prohibitive and debilitating.”²⁹ He indicated that there “were various mass trials of members of the opposition, which prevented a large number of key political leaders from participating in the elections” and that the Candlelight Party, “[t]he main opposition party . . . [was] refused registration by the National Election Committee . . . under dubious circumstances concerning documentation[.]”³⁰ The Special Rapporteur also noted Cambodia was “off-target” for the human rights benchmark of ending “mass trials of the political opposition and guarantee[ing] space to engage in democracy and political pluralism.”³¹

In July 2023, Human Rights Watch similarly reported that although “the Candlelight Party has been barred on dubious grounds from the July national election, the authorities still view them as a threat and are suppressing them.”³²

On October 13, 2023, the UN Human Rights Council adopted a resolution extending the mandate of the UN Special Rapporteur on the situation of human rights in Cambodia.³³ The Council expressed “*serious concern* at the reported deterioration in the civil and political environment in Cambodia due to the perceived chilling effects of judicial prosecutions,” including “the holding of a general election in 2023 without the participation of two political parties, which were disqualified by the National Election Committee owing

²⁷ Human Rights Watch, “Cambodia: Harassment, Arrests of Opposition Activists,” 19 July 2023, <https://www.hrw.org/news/2023/07/19/cambodia-harassment-arrests-opposition-activists>.

²⁸ *Id.*

²⁹ UN General Assembly, Report of the Special Rapporteur on the situation of human rights in Cambodia, Vitit Muntarbhorn, U.N. Doc A/HRC/54/75, 20 July 2023, para. 14.

³⁰ *Id.* paras. 16–17.

³¹ *Id.* § V.D.

³² Human Rights Watch, “Cambodia: Harassment, Arrests of Opposition Activists,” 19 July 2023, <https://www.hrw.org/news/2023/07/19/cambodia-harassment-arrests-opposition-activists>.

³³ UN Human Rights Office of the High Commissioner, “Human Rights Council Adopts Two Resolutions, Extends Mandate of the Special Rapporteur on the Situation of Human Rights in Cambodia,” 13 October 2023, <https://www.ohchr.org/en/news/2023/10/human-rights-council-adopts-two-resolutions-extends-mandate-special-rapporteur-0>.

to their reported incomplete fulfillments of documentation requirements.”³⁴ The Council also expressed concern over the numerous court cases against opposition politicians.³⁵ In 2023, The World Justice Project ranked Cambodia 141st out of 142 countries in its Rule of Law Index.³⁶

Incitement Charges

The Cambodian government has repeatedly used the charge of “incitement to disturb the social order” under Articles 494 and 495 of the Cambodian Criminal Code to silence political opposition, including in the mass trials of CNRP members and activists referenced above.³⁷ These provisions criminalize “the direct incitement to commit a felony or to disturb social security” through speech, writing, or audio-visual communications to the public and establish punishments of six to 24 months’ imprisonment and a fine of up to four million riels (approximately USD \$975), if the incitement is “ineffective.”³⁸

As part of the Clooney Foundation for Justice’s TrialWatch initiative, the American Bar Association Center for Human Rights (ABA CHR) has observed and issued reports on several trials in Cambodia on charges of incitement under Articles 494 and 495 of the Cambodian Criminal Code.³⁹ TrialWatch has also challenged these provisions before the UN Working Group on Arbitrary Detention (WGAD). For example:

- In September 2022, a TrialWatch report by Andrew Khoo and staff at ABA CHR found that the trial of Cambodian-American activist Theary Seng on charges of incitement of social disorder and conspiracy had been deeply flawed.⁴⁰ The report concluded Seng “should have never been put on trial” and that her “resulting detention is arbitrary under international law.”⁴¹
- In May 2022, a TrialWatch report by Alex Conte and staff at the ABA CHR found that the prosecution of the autistic minor child of two opposition activists, based on allegations that the child insulted a public official and incited social disorder in a

³⁴ UN Human Rights Council, Resolution adopted by the Human Rights Council on 13 October 2023, U.N. Doc. A/HRC/RES/54/36, 17 October 2023, para. 21.

³⁵ *Id.* para. 22.

³⁶ World Justice Project, “WJP Rule of Law Index: 2023 Insights,” <https://worldjusticeproject.org/rule-of-law-index/global/2023/Cambodia/>.

³⁷ *See supra* p. 9.

³⁸ Criminal Code of the Kingdom of Cambodia, arts. 494, 495.

³⁹ For a summary of the troubling common trend in these trials, see Clooney Foundation for Justice, “Cambodia,” <https://cfj.org/wp-content/uploads/2021/04/Clooney-Foundation-for-Justice-Cambodia.pdf>.

⁴⁰ Andrew Khoo and ABA Center for Human Rights, “TrialWatch Fairness Report: Cambodia v. Theary Seng,” September 2022, <https://cfj.org/reports/cambodia-v-theary-seng-september-2022/>.

⁴¹ *Id.*

Facebook post and private Telegram voice messages, violated the child’s right to freedom of expression and his rights as a child with disabilities.⁴²

- In February 2021, another TrialWatch report by staff at ABA CHR found that the trial of journalist Ros Sokhet for incitement to disrupt social order based on Facebook posts in which he criticized high-profile political figures in Cambodia had likewise violated his right to freedom of expression.⁴³

In recent months, Cambodia has continued its pattern of charging opposition leaders with incitement. In May 2024, Sun Chanthy of the Nation Party Power—an opposition party established in late 2023—was charged with inciting social disorder.⁴⁴ Mr. Chanthy was arrested following a trip abroad where he delivered a speech to several hundred Cambodian workers critical of the Cambodian government and expressing a desire for more freedom for opposition parties in Cambodia.⁴⁵

Compromised Judiciary

Cambodia’s Constitution provides for an independent judiciary in principle. In practice, however, numerous observers have said that both the “image and substance of independence and impartiality” of the judiciary are compromised,⁴⁶ including due to the fact that numerous judges also hold positions in the CPP. These concerns are described in greater detail below.

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. However, at the conclusion of an extensive baseline study, the International Commission of Jurists

⁴² Alex Conte and ABA Center for Human Rights, “TrialWatch Fairness Report: Cambodia v. Kak Sovannchhay,” May 2022, p. 2, <https://cfj.org/reports/cambodia-v-theary-seng-september-2022/>.

⁴³ Staff at the ABA Center for Human Rights, “TrialWatch Fairness Report: Cambodia v. Ros Sokhet,” February 2021, p. 2, <https://cfj.org/reports/cambodia-v-ros-sokhet/>.

⁴⁴ AP News, “A top Cambodian opposition politician is charged with inciting disorder for criticizing government,” 11 May 2024, <https://apnews.com/article/cambodia-opposition-sun-chanthy-8fcf91a182b20fcc86352e2f8dc9e15a>.

⁴⁵ AP News, “A top Cambodian opposition politician is charged with inciting disorder for criticizing government,” 11 May 2024, <https://apnews.com/article/cambodia-opposition-sun-chanthy-8fcf91a182b20fcc86352e2f8dc9e15a>.

⁴⁶ UN General Assembly, Report of the Special Rapporteur on the situation of human rights in Cambodia, Vitit Muntarbhorn, U.N. Doc A/HRC/54/75, 20 July 2023, para. 47, <https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F54%2F75&Language=E&DeviceType=Desktop&LangRequested=False>.

found that prosecution evidence was “considered authoritative without effective challenges or judicial scrutiny.”⁴⁷

International observers have repeatedly expressed concerns about this lack of judicial independence:

- In May 2022, the UN Human Rights Committee (HRC) noted with concern that “some judges are openly members of the ruling party, often holding leadership positions, which seriously undermines their independence.”⁴⁸
- In his July 2023 report, the UN Special Rapporteur on the situation of human rights for Cambodia highlighted three Cambodian laws—the 2014 Laws on (i) the Organization of the Courts, (ii) the Statute of Judges and Prosecutors, and (iii) the Organization and Functioning of the Supreme Council of the Magistracy—which “opened the door to executive infiltration of the judiciary,” resulting “in influence over the selection and promotion process of members of the judiciary.”⁴⁹
- The International Commission of Jurists has similarly criticized the 2014 Laws as “institutionaliz[ing] the prosecution and judiciary’s lack of independence from the executive”⁵⁰ and observed that courts are “well known as political tools of the CPP.”⁵¹
- Freedom House likewise stated in its 2022 report on Cambodia that the “judiciary is marred by corruption and a lack of independence” and that judges “have facilitated the government’s ability to pursue charges against a broad range of opposition politicians.”⁵²

⁴⁷ International Commission of Jurists, “Achieving Justice for Gross Human Rights Violations in Cambodia: Baseline Study,” October 2017, p. 20, <https://www.icj.org/wp-content/uploads/2017/10/Cambodia-GRA-Baseline-Study-Publications-Reports-Thematic-reports-2017-ENG.pdf>.

⁴⁸ UN Human Rights Committee, Concluding observations on the third periodic report of Cambodia, U.N. Doc. CCPR/C/KHM/CO/3, 18 May 2022, para. 32.

⁴⁹ UN General Assembly, Report of the Special Rapporteur on the situation of human rights in Cambodia, Vitit Muntarbhorn, U.N. Doc A/HRC/54/75, 20 July 2023, para. 48, <https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F54%2F75&Language=E&DeviceType=Desktop&LangRequested=False>.

⁵⁰ International Commission of Jurists, “Misuse of law will do long-term damage to Cambodia,” 26 July 2018, <https://www.icj.org/misuse-of-law-will-do-long-term-damage-to-cambodia/>.

⁵¹ International Commission of Jurists, “Achieving Justice for Gross Human Rights Violations in Cambodia: Baseline Study,” October 2017, p. 19, <https://www.icj.org/wp-content/uploads/2017/10/Cambodia-GRA-Baseline-Study-Publications-Reports-Thematic-reports-2017-ENG.pdf>.

⁵² Freedom House, “Freedom in the World Report on Cambodia,” 2022, <https://freedomhouse.org/country/cambodia/freedom-world/2022>.

- In its 2022 Human Rights Report on Cambodia, the U.S. State Department likewise affirmed that “the government did not respect judicial independence, exerting extensive political control over the courts.”⁵³ As of 2022, judicial officials, including the chief of the Supreme Court, “simultaneously held positions in the ruling [CPP]” and according to observers, “only those with strong ties to the CPP or personal relationships with senior officials received judicial appointments.”⁵⁴
- The International Federation of Human Rights and the Cambodian Human Rights and Development Association prepared a joint submission on Cambodia for the 46th Session of the Human Rights Council Universal Periodic Review in October 2023. Among other things, the report noted that the judiciary lacked independence from the executive branch, citing the “continued dominance of the ruling party over the legislature and executive branches of government,” which “has enabled the CPP to extend political control over nominally independent bodies, such as the Supreme Council of Magistracy—a nine-member body that is responsible for making recommendations to the King on the appointment and transfer of all judges and prosecutors, as well as decisions on any disciplinary matters.”⁵⁵
- In its analysis of Cambodia’s practices in 2023, the 2024 Human Rights Watch World Report found that “Cambodia’s self-characterization as a democratic government does not reflect the reality,” noting “Cambodia is effectively a single-party state with fixed and controlled elections, a lack of independent media, ruling party interference and control of all state institutions, political control of the judiciary, and systematic harassment and targeting of critics in the political opposition and civil society.”⁵⁶
- In April 2024, the UN Office of the High Commissioner of Human Rights (OHCHR) issued a call from various UN Special Rapporteurs to “end all acts of harassment and prosecution against human rights defenders and civil society activists, and allow them to freely exercise their civil and political rights.” The statement drew attention to the April 2024 arrest of Koeut Saray, the President of the Khmer

⁵³ U.S. Department of State, “Cambodia 2022 Human Rights Report,” Country Reports on Human Rights Practices for 2022 (2022), p. 7.

⁵⁴ *Id.*

⁵⁵ International Federation for Human Rights and the Cambodian Human Rights and Development Association, “Universal Periodic Review – 46th Session: Cambodia,” 11 October 2023, para. 19, <https://www.fidh.org/en/region/asia/cambodia/cambodia-human-rights-report-submitted-for-the-universal-periodic>.

⁵⁶ Human Rights Watch, “Cambodia: Events of 2023” (2024), <https://www.hrw.org/world-report/2024/country-chapters/cambodia>.

Student Intellectual League Association (KSILA), for incitement. The Special Rapporteurs linked Saray's statements to his right to freedom of expression.⁵⁷

B. CASE HISTORY

Thach Setha, a 70-year-old Cambodian citizen, is and was at all relevant times the Vice President of the Candlelight Party, Cambodia's main political opposition party after the dissolution of the CNRP.⁵⁸ Mr. Setha is a former history teacher, was previously a lawmaker in the CNRP, and has been an outspoken critic of the CPP. Following the CNRP's dissolution, the government banned Mr. Setha and 118 other CNRP officials from engaging in political activities for five years.⁵⁹ In April 2021, the government pardoned Mr. Setha, permitting his reentry into politics as a prominent figure of the Candlelight Party.

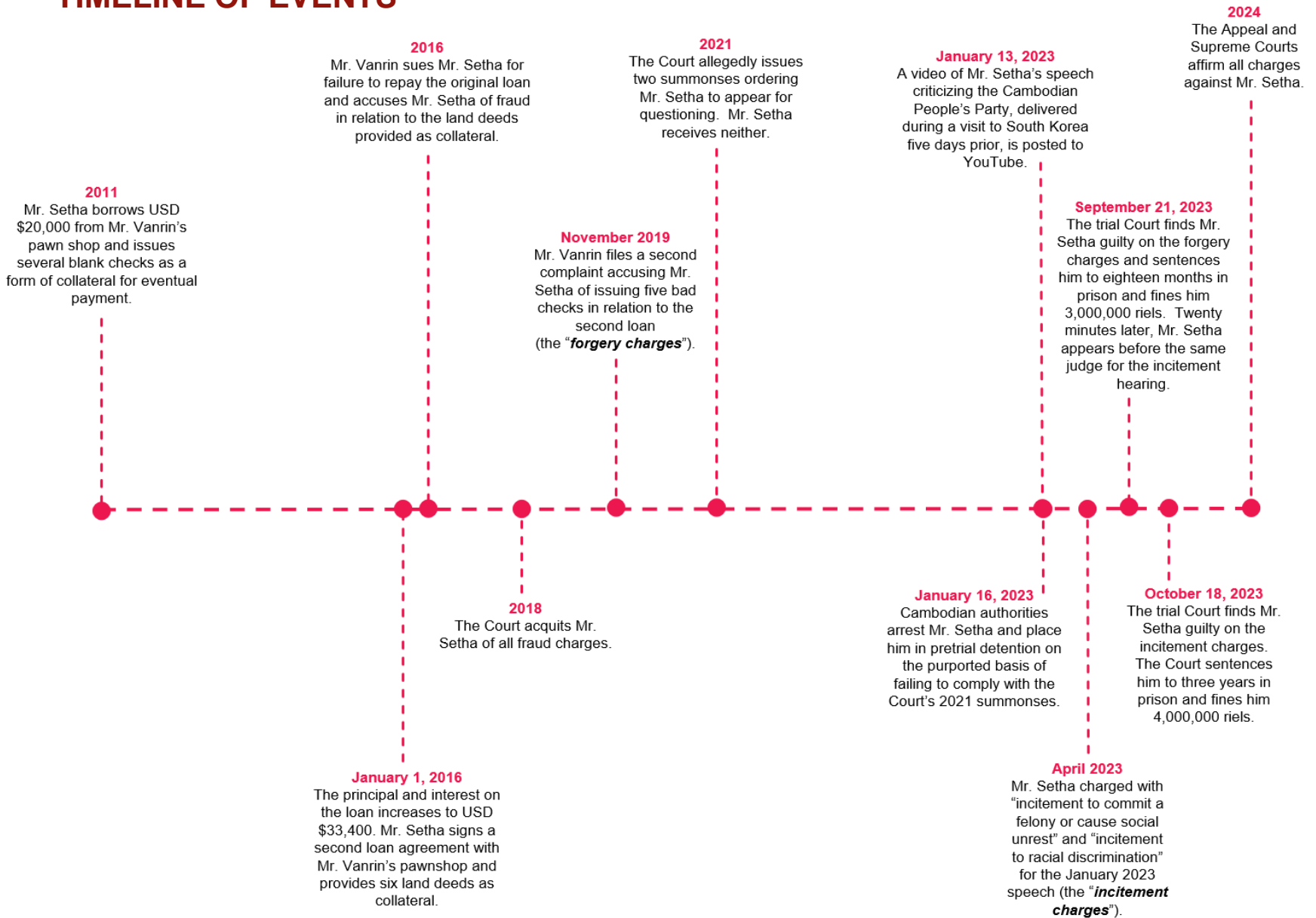
The government's detention and prosecution of Mr. Setha involved two separate sets of charges. First, several days after he gave a speech criticizing the CPP, he was detained on forgery charges under Article 231 of the Law of Negotiable Instruments and Payment Transactions. The charges arose from his alleged issuance of five bad checks years earlier. Then, while in pretrial detention for the forgery charges, Mr. Setha was also charged with incitement under Articles 494, 495, and 496 of the Cambodian Criminal Code.

⁵⁷ U.N. Office of the High Commissioner of Human Rights, Press Release, "Cambodia must end harassment of human rights defenders: UN experts," 19 April 2024, <https://www.ohchr.org/en/press-releases/2024/04/cambodia-must-end-harassment-human-rights-defenders-un-experts>.

⁵⁸ See Radio Free Asia, "Cambodian opposition leader sentenced to 18 months in bad check case," 21 September 2023, <https://www.rfa.org/english/news/cambodia/thach-setha-sentence-09212023170800.html>.

⁵⁹ Khmer Times, "Thach Setha, a former CNRP lawmaker now rehabilitated and allowed to be involved in politics again," 13 April 2021, <https://www.khmertimeskh.com/50838060/thach-setha-a-former-cnrp-lawmaker-now-rehabilitated-and-allowed-to-be-involved-in-politics-again/>.

TIMELINE OF EVENTS



Background on Forgery Charges

The forgery charges against Mr. SETHA arose from a loan agreement between Mr. SETHA and Hai Vanrin, a pawn shop owner with multiple reported close ties to the CPP and the Prime Minister's family.⁶⁰ In 2011, Mr. SETHA borrowed USD \$20,000 from Mr. Vanrin's pawn shop. Mr. SETHA signed and issued several blank checks as a form of collateral for eventual payment.⁶¹ Per Mr. SETHA, the parties agreed that as cash became available, Mr. SETHA would write down the amount he could afford to pay on the checks and Mr. Vanrin would withdraw the money as payment.⁶²

Mr. SETHA repaid about half of the 2011 loan but became unable to pay off the rest due to a number of health issues and a broader Cambodian economic crisis.⁶³ By 2016, the remaining principal plus interest on the loan had grown to USD \$33,400.⁶⁴ Mr. SETHA signed a new loan agreement with the pawn shop, which memorialized the amount due with a new two percent interest rate.⁶⁵ Mr. SETHA also provided six land deeds worth more than the outstanding loan as collateral.⁶⁶ The same year, Mr. Vanrin sued Mr. SETHA for failure to repay the original loan and accused Mr. SETHA of fraud in relation to the land deeds provided as collateral.⁶⁷ The Court acquitted Mr. SETHA of all charges in 2018.⁶⁸

In November 2019, Mr. Vanrin filed a second complaint accusing Mr. SETHA of issuing five bad checks worth approximately USD \$1,000 each in relation to the second loan.⁶⁹ The complaint charged Mr. SETHA with noncompliance to fulfill the obligation on a negotiable instrument in violation of Article 231 of the Law of Negotiable Instruments and Payment

⁶⁰ Khmer Times, "SC denies Thach SETHA's bail for fear of his fleeing abroad," 4 May 2023, <https://www.khmertimeskh.com/501284011/sc-denies-thach-sethas-bail-for-fear-of-his-fleeing-abroad/>; Voice of Democracy, "Candlelight Wants Foreign Pressure to Help Resolve Political Dispute," 18 January 2023, <https://vodenglish.news/candlelight-wants-foreign-pressure-to-help-resolve-political-dispute/> (published in January 2023 when Hun Sen was still Prime Minister, this article refers to the relationship between Hai Vanrin and the Hun family as "a business associate of the wife of [the] Prime Minister's son Hun Manith" (emphasis added)); CamboJa News, "Candlelight Leader Thach SETHA's Lawyers Decry 'Fake' Evidence in Trial's Closing Arguments," 6 September 2023, <https://cambojanews.com/candlelight-leader-thach-sethas-lawyers-decry-fake-evidence-in-trials-closing-arguments/>; Voice of Democracy, "Candlelight Wants Negotiations With Ruling Party After SETHA's Arrest," 17 January 2023, <https://vodenglish.news/candlelight-wants-negotiations-with-ruling-party-after-sethas-arrest/>.

⁶¹ Judgment of the Phnom Penh Municipal Court against Thach SETHA (trans.), 21 September 2023 (hereinafter "**Trial Court Judgment (Forgery Charges)**"), pp. 15-16.

⁶² Trial Court Judgment (Forgery Charges), pp. 15-16.

⁶³ Trial Court Judgment (Forgery Charges), pp. 15-16.

⁶⁴ Trial Court Judgment (Forgery Charges), pp. 3-5.

⁶⁵ Trial Court Judgment (Forgery Charges), pp. 5, 15-16.

⁶⁶ Trial Court Judgment (Forgery Charges), pp. 4-5, 15-16.

⁶⁷ Trial Court Judgment (Forgery Charges), pp. 3-5.

⁶⁸ Trial Court Judgment (Forgery Charges), pp. 3-5.

⁶⁹ Trial Court Judgment (Forgery Charges), pp. 3-5.

Transactions.⁷⁰ Article 231(3) states that any person who “willfully and with intent to harm another dishonors an obligation incurred on a negotiable instrument” shall be punished by a fine of two to six millions riel and imprisonment from one to three years.⁷¹

In December 2020, the Prosecutor of the Phnom Penh Municipal Court issued a forwarding order of case investigation, and the Court allegedly issued two summonses on February 8, 2021 and June 22, 2021 ordering Mr. Setha to appear before it for questioning.⁷² Mr. Setha’s lawyers emphasized that he never received the summonses.⁷³

Pretrial Detention and Incitement Charges

On January 8, 2023, Mr. Setha gave a speech during a visit to South Korea to supporters of the former Cambodia National Rescue Party (CNRP). In his remarks, Mr. Setha criticized the celebration of the January 7 Anniversary Day, an official Cambodian holiday marking the fall of the Khmer Rouge regime following the Vietnamese army’s invasion of Cambodia, and emphasized the close relationship between the CPP and Vietnam.⁷⁴ An unknown source posted a recording of Mr. Setha’s speech to YouTube on January 13, 2023.⁷⁵ On January 16, 2023, only three days after the video was posted on YouTube and seven years after Mr. Setha’s purported issuance of bad checks, Cambodian authorities arrested Mr. Setha, purportedly for failing to comply with the Court’s 2021 summonses related to the forgery charges.⁷⁶ Mr. Setha was brought before an

⁷⁰ Trial Court Judgment (Forgery Charges), pp. 2, 29.

⁷¹ Cambodian Law of Negotiable Instruments and Payment Transactions, art. 231(3)(iii).

⁷² Trial Court Judgment (Forgery Charges), p. 9; CamboJa News, “Detained Candlelight Leader Did Not Authorize Bad Checks, Lawyer says,” 23 January 2023, <https://cambojanews.com/detained-candlelight-leader-did-not-authorize-bad-checks-lawyer-says/>; Arrest Warrant for Thach Setha issued by the Investigating Judge of the Phnom Penh Municipal Court (January 10, 2023) (hereinafter “**2023 Arrest Warrant**”).

⁷³ Trial Court Judgment (Forgery Charges), p. 10.

⁷⁴ Licadho, “Candlelight Vice President Thach Setha Convicted of Incitement,” 18 October 2023, <https://www.licadho-cambodia.org/flashnews.php?perm=351>; CamboJA News, “Thach Setha Sentenced to 18 Months in Prison, Faces Further Charges,” 25 September 2023, <https://cambojanews.com/thach-setha-sentenced-to-18-months-in-prison-faces-further-charges/>. See also Trial Monitor’s Notes, 21 September 2023 (Incitement Charges). See also Khmer Times, “CP vice-president Setha jailed 3 years for incitement,” 19 October 2023.

⁷⁵ CamboJA News, “Phnom Penh Court Sentences Candlelight Leader Thach Setha to Three Years Jail for Incitement,” 18 October 2023, <https://cambojanews.com/phnom-penh-court-sentences-candlelight-leader-thach-setha-to-three-years-jail-for-incitement/>; Licadho, “Candlelight Vice President Thach Setha Convicted of Incitement,” 18 October 2023, <https://www.licadho-cambodia.org/flashnews.php?perm=351>; CamboJA News, “Thach Setha Sentenced to 18 Months in Prison, Faces Further Charges,” 25 September 2023, <https://cambojanews.com/thach-setha-sentenced-to-18-months-in-prison-faces-further-charges/>.

⁷⁶ 2023 Arrest Warrant; Thach Setha Detention Order, 16 January 2023. See also CamboJa News, “Detained Candlelight Leader Did Not Authorize Bad Checks, Lawyer says,” 23 January 2023, <https://cambojanews.com/detained-candlelight-leader-did-not-authorize-bad-checks-lawyer-says/>.

investigating judge⁷⁷ and questioned without counsel, where he requested release on bail. The investigating judge denied his request, and reportedly stated that pretrial detention was warranted for the purpose of “keeping the defendant for legal proceedings.” Mr. Setha’s detention order states only that he was placed “under scrutiny” for the alleged failure to comply with the summonses. Mr. Setha was placed in pretrial detention and has remained in custody ever since.⁷⁸

In April 2023, while in pretrial detention for the forgery charges, Mr. Setha was additionally charged with “incitement to commit a felony or cause social unrest” and “incitement to racial discrimination” under Articles 494, 495 and 496 of the Cambodian Criminal Code on the basis of his statements in the January 8, 2023 speech.⁷⁹

Article 494 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.”⁸⁰

Article 495 provides for a punishment of six months to two years imprisonment and a fine of one to four million riels for the “direct incitement to commit a felony or to disturb social security by employing one of the means defined in Article 494” where the incitement was ineffective.⁸¹

Article 496 provides for a punishment of one to three years imprisonment and a fine of two to six million riels for the “direct incitement, by one of the means defined in Article 494 . . . to discriminate,” where the incitement was ineffective.⁸²

Trial on Forgery Charges

DSG. On August 16, 2023—seven months after he was taken into custody—Mr. Setha appeared in court before Judge Chhun Davy for the first day of trial on the forgery charges.⁸³ Mr. Setha, who was in poor health, took the stand and refuted the charges. He testified that he had never provided any checks to the pawn shop in relation to the 2016 contract. Instead, he stated that he had previously provided signed checks without a date

⁷⁷ See Thach Setha Detention Order, 16 January 2023.

⁷⁸ Trial Court Judgment (Forgery Charges), p. 1, 10; AP News, “Cambodian opposition politician arrested for bounced checks,” 17 January 2023, <https://apnews.com/article/legal-proceedings-hun-sen-cambodia-prisons-68724b193fe2819b086e595347234ce5>.

⁷⁹ Trial Monitor’s Notes, 21 September 2023 (Incitement Charges); Khmer Times, “Thach Setha charged for incitement, appeals for release on bail,” 1 May 2023, <https://www.khmertimeskh.com/501281823/thach-setha-charged-for-incitement-appeals-for-release-on-bail/>.

⁸⁰ Criminal Code of the Kingdom of Cambodia, art. 494.

⁸¹ Criminal Code of the Kingdom of Cambodia, art. 495.

⁸² Criminal Code of the Kingdom of Cambodia, art. 496.

⁸³ Trial Monitor’s Notes, 16 August 2023 (Forgery Charges).

or amount to the pawn shop in 2011–2012 in relation to the first contract, to be used for his monthly installment payments. According to the judgment, he acknowledged that the five copies of checks presented appeared to reflect his bank account, signature and handwriting as to the amount. However, he noted that the dates on the checks—all of which were in 2019—were not in his handwriting, and again denied issuing any checks after 2011–2012.⁸⁴ He also denied issuing any additional checks since that date, although the checks in question were dated 2019. Both the Prosecutor and Mr. Vanrin’s lawyers cross-examined Mr. Setha; Mr. Vanrin did not appear at the trial.⁸⁵ The Prosecution presented photocopies of the alleged checks as its sole documentary evidence in support of the charges, despite repeated requests from Mr. Setha’s counsel to produce the original checks for examination.⁸⁶ The proceedings concluded early due to Mr. Setha’s health issues.⁸⁷

On September 6, 2023, the proceedings resumed for a second day. Once again, Mr. Vanrin did not attend the proceedings. Defense counsel argued that Mr. Setha should have the opportunity to cross-examine Mr. Vanrin, or at the very least, the Court should exempt Mr. Setha from cross-examination himself.⁸⁸ The Judge rejected the Defense’s arguments, stating that the “procedure was for the benefit of the accused” and it was well within Mr. Vanrin’s right to forego attendance at the proceedings.⁸⁹ Mr. Setha’s counsel also questioned the timing of the charges and called for an independent expert to examine the validity of the checks.⁹⁰ The Defense ended with a plea to the trial judge to drop all charges against Mr. Setha and release him immediately.⁹¹

The third and final day of the trial took place on September 21, 2023, at which point Mr. Setha had been in detention for over eight months.⁹² Mr. Setha’s counsel reiterated the prosecution’s lack of evidence to satisfy the charges given that they failed to produce the original checks or to demonstrate that Mr. Setha had issued the checks with a clear payment date and fixed amount, noting that it was the prosecution’s burden to do so. Mr. Setha’s counsel also raised numerous other arguments supporting his acquittal, including the fact that Mr. Vanrin still held the land deeds as collateral against the second contract and that since Mr. Setha remained subject to an enforceable contract—one for which he

⁸⁴ Mr. Setha was advised of his right to remain silent. Trial Monitor’s Notes, 16 August 2023 (Forgery Charges).

⁸⁵ Trial Monitor’s Notes, 16 August 2023 (Forgery Charges).

⁸⁶ Trial Monitor’s Notes, 16 August 2023 (Forgery Charges), p. 4.

⁸⁷ Trial Monitor’s Notes, 16 August 2023 (Forgery Charges), p. 4.

⁸⁸ Trial Monitor’s Notes, 6 September 2023 (Forgery Charges), p. 1.

⁸⁹ Trial Monitor’s Notes, 6 September 2023 (Forgery Charges), p. 1.

⁹⁰ Trial Monitor’s Notes, 6 September 2023 (Forgery Charges), p. 3.

⁹¹ Trial Monitor’s Notes, 6 September 2023 (Forgery Charges), p. 3.

⁹² Trial Court Judgment (Forgery Charges), p. 7.

had offered collateral in support—any alleged nonpayment was properly resolved as a civil, not criminal, matter.

In response, Mr. Vanrin’s counsel presented a “Letter of Check Return” from Mr. Setha’s bank for each of the five checks following attempts to cash them, arguing that these letters were sufficient proof, and there was no need to examine the original instruments. Mr. Vanrin’s counsel also submitted verification of Mr. Setha’s account number showing it was still active today.⁹³ Mr. Vanrin’s counsel argued these facts proved Mr. Setha’s guilt beyond a reasonable doubt for the criminal offense of forgery. The Prosecutor similarly emphasized the bank’s confirmation of the checks as cashless and drew attention to Mr. Setha’s acknowledgment that (i) the checks were his, (ii) certain Khmer letters written on the checks were his, and (iii) the signatures on the checks were his own.⁹⁴ On this basis, the Prosecutor concluded Mr. Setha was guilty of failing to fulfill his obligations under Article 231 and requested the Court punish him “in accordance with the law.”⁹⁵

Neither the Prosecutor nor Plaintiff’s counsel made any argument or presented any evidence about Mr. Setha’s “intent” to cause harm, a requisite element of the crime under Article 231. Instead, Plaintiff’s counsel pointed only to Mr. Setha’s acknowledgment that he owned the checks and that the signatures on the checks were his.⁹⁶

At the conclusion of the hearing, Judge Chhun Davy held that, based on the evidence, it was “certain” that Mr. Setha issued the five checks with the intention of harming others; that Mr. Setha was indebted to the negotiable instrument; that Mr. Setha had no intention of repaying the instrument at the time of the due date; and that Mr. Setha did not comply with his obligations to do so.⁹⁷ Together, the Court found that these acts constituted a breach of Article 231 of the Law of Negotiable Instruments and Payment Transactions. The Court ordered Mr. Setha to repay Mr. Vanrin the USD \$33,400 owed as well as 5,000,000 riels in compensation (approximately USD \$1,222.49). The Court sentenced Mr. Setha to prison for 18 months and fined him 3,000,000 riels (approximately USD \$733.50).⁹⁸

Trial on Incitement Charges

Twenty minutes after the Court found him guilty of forgery, Mr. Setha appeared again before Judge Chhun Davy—the same judge presiding over the forgery hearing—for the

⁹³ Trial Court Judgment (Forgery Charges), p. 11.

⁹⁴ Trial Court Judgment (Forgery Charges), p. 13.

⁹⁵ Trial Court Judgment (Forgery Charges), p. 14.

⁹⁶ Trial Court Judgment (Forgery Charges), p. 18.

⁹⁷ Trial Court Judgment (Forgery Charges), pp. 18–19.

⁹⁸ Trial Court Judgment (Forgery Charges), p. 28.

first hearing in the incitement case.⁹⁹ Six police officers were present at the hearing.¹⁰⁰ Judge Chhun Davy began by directly examining Mr. SETHA about the contents of his speech and his intention in making the speech.¹⁰¹ Mr. SETHA replied that he wanted to educate the public about Cambodia's history, remind them to care about and prevent Cambodia from going to war, and ask them to protect against any invasion from neighboring countries.¹⁰² Mr. SETHA stated that he also wanted to emphasize the history of Cambodia's January 7 Anniversary Day—in particular, that the CPP's founders were Vietnamese, and the April 17, 1975 revolution was supported by Vietnam, which he referred to as “the real killer[] of Khmer people.”¹⁰³

During her examination, Judge Chhun Davy asked Mr. SETHA: “Were you aware that your public speeches are influencing people to commit any violation against the government and discriminate against our neighbor nation?”¹⁰⁴ Mr. SETHA responded that the “supreme law” did not restrict him from giving a speech and that as a politician he should be able “to fully exercise the rights to speech and opinion.”¹⁰⁵ Mr. SETHA also observed that following the release of the YouTube video, “nothing happened.”¹⁰⁶

The Prosecutor then cross-examined Mr. SETHA. Using near-verbatim language to Judge Chhun Davy, the Prosecutor asked Mr. SETHA if he knew that his speech had had a “deeply negative” effect on the people of Cambodia “to commit . . . violation [sic] against the government and [Vietnam].”¹⁰⁷ Mr. SETHA reiterated his constitutional right to deliver the speech and called on the Prosecutor to indicate “any specific laws that forbid people and/or opposition parties to criticize the government and ruling party.”¹⁰⁸ Mr. SETHA later noted that he went to South Korea by himself and that the workers to whom he gave the speech were not members of the Candlelight Party.¹⁰⁹

After the examinations ended, Judge Chhun Davy allowed a police officer to read out select parts of Mr. SETHA's speech.¹¹⁰ The YouTube video itself—which is just over 20

⁹⁹ Trial Monitor's Notes, 21 September 2023 (Incitement Charges); Trial Monitor's Notes, 21 September 2023 (Forgery Charges), p. 1.

¹⁰⁰ Trial Monitor's Notes, 21 September 2023 (Incitement Charges), p. 1.

¹⁰¹ Trial Monitor's Notes, 21 September 2023 (Incitement Charges), p. 1.

¹⁰² Trial Monitor's Notes, 21 September 2023 (Incitement Charges), p. 1.

¹⁰³ Trial Monitor's Notes, 21 September 2023 (Incitement Charges), p. 2.

¹⁰⁴ Trial Monitor's Notes, 21 September 2023 (Incitement Charges), p. 2.

¹⁰⁵ Trial Monitor's Notes, 21 September 2023 (Incitement Charges), p. 2.

¹⁰⁶ Trial Monitor's Notes, 21 September 2023 (Incitement Charges), p. 2.

¹⁰⁷ Trial Monitor's Notes, 21 September 2023 (Incitement Charges), p. 2.

¹⁰⁸ Trial Monitor's Notes, 21 September 2023 (Incitement Charges), p. 3.

¹⁰⁹ Trial Monitor's Notes, 21 September 2023 (Incitement Charges), p. 3.

¹¹⁰ Trial Monitor's Notes, 21 September 2023 (Incitement Charges), pp. 3–4.

minutes in length—was not shown in court.¹¹¹ Instead, the officer read the following quotes:

- “44 years for 7 January Anniversary Day, we had celebrated a lot in Cambodia, but now they bring it to celebrate here (in South Korea).”
- “When I knew and heard that without 7 January Day, all of you would not have come to work in South Korea.”
- “Once I heard about this, I was really sorry for you and our nation because they had killed us but then we still went on to pay gratitude and thank to the killers.”
- “The CPP was formed by Vietnam, Ho Chi Minh.”
- “Then everyone is presented with a monument in all the provinces that there was a Cambodia-Vietnam Friendship Monument.”¹¹²

In closing remarks, the Prosecutor argued Mr. Setha had “committed offenses with charges of ‘incitement to create social unrest and incitement to racial discrimination’”; “used his speech[] to fight against the government” and “the ruling party”; and “made remarks of social discrimination against both the government and neighboring country.”¹¹³ He concluded Mr. Setha had “used his social media channel to bully the government and ruling party in exchange for benefits earned from supporters by having negative intention towards [them.]”¹¹⁴

On October 18, 2023, the Court announced its verdict. It found Mr. Setha guilty of incitement to disturb social security and incitement to discriminate under Articles 494, 495, and 496 of the Cambodian Criminal Code.¹¹⁵ Save for a short acknowledgement that Mr. Setha was convicted “for a speech that he made to his supporters of the former CNRP early this year,” the Court provided no further explanation for its findings.¹¹⁶ The Court sentenced Mr. Setha to three years’ imprisonment and a fine of four million riels.¹¹⁷

Appeals

Mr. Setha appealed the Municipal Court’s judgments in both the forgery and incitement cases.

¹¹¹ See Trial Monitor’s Notes, 21 September 2023 (Incitement Charges), pp. 3–4.

¹¹² Trial Monitor’s Notes, 21 September 2023 (Incitement Charges), pp. 3–4.

¹¹³ Trial Monitor’s Notes, 21 September 2023 (Incitement Charges), p. 4.

¹¹⁴ Trial Monitor’s Notes, 21 September 2023 (Incitement Charges), p. 4.

¹¹⁵ Trial Monitor’s Notes, 18 October 2023 (Incitement Charges), p. 1.

¹¹⁶ Trial Monitor’s Notes, 18 October 2023 (Incitement Charges), p. 1.

¹¹⁷ Trial Monitor’s Notes, 18 October 2023 (Incitement Charges) p. 1.

Forgery Charges

On December 15, 2023, Mr. Setha appeared before the Phnom Penh Appeal Court in relation to the forgery charges, again denying their basis. He also requested release from prison due to poor health, including heart problems, high blood pressure, and diabetes.¹¹⁸ Defense counsel emphasized the lack of original evidence and that both the Cambodian Constitution and Cambodian Criminal Code required proving the charges against Mr. Setha beyond a reasonable doubt, a burden the Prosecution had failed to meet.¹¹⁹ The Prosecution and Plaintiff's counsel largely reiterated their prior arguments, this time relying heavily on the findings of the lower Court and the investigative judge.¹²⁰

Eleven days later, the Court rejected Mr. Setha's request that Cambodian authorities release him from prison pending the Appeal Court decision, reasoning Mr. Setha was a flight risk.¹²¹ On January 22, 2024, the Appeal Court affirmed the lower Court's findings of guilt, stating only that Mr. Setha's issuance of five cashless checks was sufficient to hold him liable under Article 231.¹²² The Court ordered Mr. Setha to serve the remainder of his 18-month sentence in accordance with the lower court's judgment.¹²³

The following week, on February 1, 2024, Mr. Setha appealed to the Supreme Court.¹²⁴ At a hearing on May 20, 2024, Mr. Setha's counsel argued there were many irregularities in the case and again requested the presentation of original evidence.¹²⁵ Mr. Setha emphasized his hope "that the Supreme Court will carry out a thorough and fair hearing without any influence" and underscored that he did not issue the five checks under consideration.¹²⁶ On May 31, 2024, the Supreme Court rejected the appeal and affirmed the underlying Appeal Court decision, finding that the Phnom Penh Municipal Court properly applied the criminal law.¹²⁷ Mr. Seth has no further appeals.

¹¹⁸ Khmer Times, "SC rejects Setha's get-out-of-jail bid," 26 December 2023, <https://www.khmertimeskh.com/501412852/sc-rejects-sethas-get-out-of-jail-bid/>.

¹¹⁹ Judgment of the Phnom Penh Appeal Court against Thach Setha (trans.), *Forgery Charges*, 22 January 2024 (hereinafter "**Appeal Court Judgment (Forgery Charges)**"), pp. 8–9.

¹²⁰ Appeal Court Judgment (*Forgery Charges*), pp. 13–14.

¹²¹ Khmer Times, "SC rejects Setha's get-out-of-jail bid," 26 December 2023, <https://www.khmertimeskh.com/501412852/sc-rejects-sethas-get-out-of-jail-bid/>.

¹²² Appeal Court Judgment (*Forgery Charges*), pp. 17–18.

¹²³ Appeal Court Judgment (*Forgery Charges*), p. 18.

¹²⁴ Judgment of the Cambodian Supreme Court against Thach Setha (trans.), *Forgery Charges*, 31 May 2024 (hereinafter "**Supreme Court Judgment (Forgery Charges)**"), p. 8.

¹²⁵ Trial Monitor's Notes, 20 May 2024 (*Forgery Charges*).

¹²⁶ Trial Monitor's Notes, 20 May 2024 (*Forgery Charges*).

¹²⁷ Supreme Court Judgment (*Forgery Charges*), pp. 6–7.

Incitement Charges

On January 18, 2024, Mr. Setha appeared before the Phnom Penh Court of Appeals to petition the Court to overturn the Trial Court’s conviction on incitement.¹²⁸ Mr. Setha argued that his comments in the video simply reiterated historical events and that his “words so far have not caused the CPP to lose credibility or weaken at all.”¹²⁹ His lawyer also directed the Court to historical evidence that verified the points made by Mr. Setha in his speech.¹³⁰ Addressing allegations of his intent to “deliberately mislead the Cambodian people,”¹³¹ Mr. Setha noted that “[a]s a politician, I have no intention of dividing the Khmer nation.”¹³² His team emphasized “there is not enough evidence” for the incitement charges and referred the Court to the Cambodian Constitution and UN human rights instruments protective of Mr. Setha’s right to freedom of speech.¹³³ Mr. Setha’s counsel also pointed to deficiencies in the lower Court’s verdict, including its lack of specificity in finding the prosecution of Mr. Setha had met the elements of the charges, highlighting for instance the lower Court’s failure to identify who Mr. Setha had allegedly incited: “Incitement as a person, incitement as a group, incitement as a party?”¹³⁴ The Prosecutor General argued that the verdict was proper because “the actions and statements in the video clip on YouTube incite hatred of the CPP leadership and discrimination against Vietnamese, causing serious chaos to national security, if it had not been prevented in time.”¹³⁵

On February 28, 2024, the Phnom Penh Appeal Court sustained Mr. Setha’s three-year prison sentence for violations of Articles 494, 495, and 496 of the Cambodian Criminal Code.¹³⁶ The verdict characterized Mr. Setha as “deliberately mislead[ing] the Cambodian people by employing insidious tactics to incite discrimination against other nationals and for people to come together to act against the Royal Government of Cambodia.”¹³⁷ It attributed the video’s upload to YouTube to Mr. Setha “and his cronies”¹³⁸ and stated that,

¹²⁸ Judgment of the Phnom Penh Appeal Court against Thach Setha (trans.), *Incitement Charges*, 18 January 2024, p. 1 (hereinafter “**Appeal Court Judgment (Incitement Charges)**”).

¹²⁹ *Appeal Court Judgment (Incitement Charges)*, p. 4.

¹³⁰ *Appeal Court Judgment (Incitement Charges)*, p. 5.

¹³¹ *Appeal Court Judgment (Incitement Charges)*, p. 2.

¹³² *Appeal Court Judgment (Incitement Charges)*, p. 6.

¹³³ *Appeal Court Judgment (Incitement Charges)*, p. 5.

¹³⁴ *Appeal Court Judgment (Incitement Charges)*, p. 6.

¹³⁵ *Appeal Court Judgment (Incitement Charges)*, p. 5.

¹³⁶ *CamboJa News*, “Appeal Court Upholds Thach Setha’s Incitement Verdict, Dismisses Appeal,” 28 February 2024, <https://cambojanews.com/appeal-court-upholds-thach-sethas-incitement-verdict-dismisses-appeal/>.

¹³⁷ *Appeal Court Judgment (Incitement Charges)*, p. 2.

¹³⁸ *Appeal Court Judgment (Incitement Charges)*, p. 2.

taken together, the contents of Mr. Setha’s speech and subsequent publication “caused serious chaos to social security and incited discrimination.”¹³⁹

Mr. Setha appealed to the Cambodian Supreme Court. During the trial proceedings on July 31, 2024, Judge You Ottara of the Supreme Court stated “the testimony of the parties involved in this case” was not required.¹⁴⁰ The judge gave Mr. Setha the opportunity to present, but only insofar as he could “explain . . . the law” in his defense.¹⁴¹ Mr. Setha’s lawyers described his sentence as unacceptable and noted that the decisions of the lower courts had violated international human rights law, including the right to a fair trial under the ICCPR and the Cambodian Constitution.¹⁴² On August 9, 2024, the Court upheld Mr. Setha’s three-year prison sentence and fine.¹⁴³ Mr. Setha has no further appeals.

¹³⁹ Appeal Court Judgment (Incitement Charges), p.7.

¹⁴⁰ Trial Monitor’s Notes, 31 July 2024 (Incitement Charges), p. 1.

¹⁴¹ Trial Monitor’s Notes, 31 July 2024 (Incitement Charges), p. 1.

¹⁴² Trial Monitor’s Notes, 31 July 2024 (Incitement Charges), p. 2.

¹⁴³ Radio Free Asia, “Jailed Cambodian opposition leader’s final appeal denied,” 9 August 2023, <https://www.rfa.org/english/news/cambodia/thach-setha-appeal-incitement-vietnam-video-08092024134359.html>; Trial Monitor’s Notes, 9 August 2024 (Incitement Charges), p. 1.

METHODOLOGY



A. THE MONITORING PHASE

The Clooney Foundation for Justice (CFJ) deployed a Khmer-speaking monitor to Mr. Setha's two trials before the Phnom Penh Municipal Court. The monitor did not experience any restrictions in entering court or observing the trials, which consisted of proceedings related to the fraud charges, with hearings on August 16, 2023 and September 6, 2023, the hearing and issuance of a judgment of the Phnom Penh Municipal Court on September 21, 2023; and proceedings related to the incitement charges, with a hearing on September 21, 2023 and the issuance of a judgment of the Phnom Penh Municipal Court on October 18, 2023.

B. THE ASSESSMENT PHASE

The authors reviewed trial monitor notes taken during the proceedings, and the written judgments of the Phnom Penh Municipal Court, the Phnom Penh Appeal Court, and the Cambodian Supreme Court for both the fraud and incitement charges, translated from Khmer to English. The authors found that these proceedings involved clear violations of Mr. Setha's substantive and procedural rights under both Cambodian and international law. These included violations of the right to counsel; the right to adequate time and facilities to prepare a defense; the right to call and examine witnesses; the right to be tried by an independent and impartial court established by law; the right to the presumption of innocence and entitlement to benefit of the doubt; the right to a reasoned judgment; the right to freedom of expression; the right to take part in public affairs; and the right to freedom from political discrimination. Additionally, Mr. Setha was arbitrarily detained for nearly eight months prior to his conviction and continues to be arbitrarily detained by Cambodian authorities,¹⁴⁴ in violation of Article 9 of the ICCPR.

In light of these violations under both Cambodian and international law, the trial has been assigned a D under the grading methodology described in the Annex.

¹⁴⁴ CamboJa News, "Court of Appeal Denies Thach Setha Bail Request," 31 March 2023, <https://cambojanews.com/court-of-appeal-denies-thach-setha-bail-request/>; Radio Free Asia, "Jailed Cambodian opposition leader's final appeal denied," 9 August 2024, <https://www.rfa.org/english/news/cambodia/thach-setha-appeal-incitement-vietnam-video-08092024134359.html>.

ANALYSIS



A. APPLICABLE LAW

This report draws upon the ICCPR;¹⁴⁵ jurisprudence from the HRC, the body tasked with interpreting and monitoring implementation of the ICCPR; the European Convention of Human Rights (ECHR); jurisprudence from the European Court of Human Rights (ECtHR), the body tasked with interpreting and monitoring implementation of the ECHR (and which the HRC has deemed relevant for interpreting the provisions of the ICCPR);¹⁴⁶ jurisprudence from the UN WGAD; the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; customary international law; and relevant provisions of Cambodian legislation.

B. PRETRIAL VIOLATIONS

As explained above, Mr. Setha was in pretrial detention from January 2023 until his trial commenced in August 2023 and remains imprisoned today.¹⁴⁷ The stated basis for Mr. Setha's pretrial detention was his alleged failure to appear before the Phnom Penh Municipal Court following two 2021 summonses that were allegedly issued for the forgery charges, which Mr. Setha attests that he never received.¹⁴⁸ TrialWatch does not have access to the underlying detention orders (with the exception of the initial arrest warrant and order actioning that warrant) or the charging document referred to at trial; the following analysis of Mr. Setha's detention is thus based on trial monitoring and media reporting. Based on this information, Mr. Setha's pretrial detention violated his rights not to be arbitrarily detained under international law, because there was no sufficient legal basis to justify his detention and the circumstances suggest it was politically motivated.

¹⁴⁵ Cambodia signed the ICCPR on October 17, 1980 and acceded to the ICCPR on May 26, 1992. UN Treaty Collection, International Covenant on Civil and Political Rights, https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND.

¹⁴⁶ See, e.g., UN Human Rights Committee, General Comment No. 37 (2020) on the right of peaceful assembly (article 21), U.N. Doc. CCPR/C/GC/37, 17 September 2020, ns. 15, 18, 28, 52, 61, 65, 73–75, 99, 118, 122, 132; UN Human Rights Committee, General Comment No. 36: Article 6: rights to life, U.N. Doc. CCPR/C/GC/36, 3 September 2019, ns. 5, 6, 32, 64, 86, 88, 92, 104, 126–129, 136, 164, 215, 217.

¹⁴⁷ AP News, "Cambodian opposition politician arrested for bounced checks," 17 January 2023, <https://apnews.com/article/legal-proceedings-hun-sen-cambodia-prisons-68724b193fe2819b086e595347234ce5>; Radio Free Asia, "Jailed Cambodian opposition leader's final appeal denied," 9 August 2024, <https://www.rfa.org/english/news/cambodia/thach-setha-appeal-incident-vietnam-video-08092024134359.html>.

¹⁴⁸ Trial Court Judgment (Forgery Charges), pp. 1, 10; AP News, "Cambodian opposition politician arrested for bounced checks," 17 January 2023, <https://apnews.com/article/legal-proceedings-hun-sen-cambodia-prisons-68724b193fe2819b086e595347234ce5>; Camboja News, "Detained Candlelight Leader Did Not Authorize Bad Checks, Lawyer says," 23 January 2023, <https://cambojanews.com/detained-candlelight-leader-did-not-authorize-bad-checks-lawyer-says/>.

Additionally, Mr. Setha was denied his right to consult with counsel following his arrest and during his detention hearing, another violation of his rights under the ICCPR.

Article 9 of the ICCPR mandates that “[n]o one shall be subjected to arbitrary arrest or detention” or “deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”¹⁴⁹ Per the HRC,

any substantive grounds for arrest or detention must be prescribed by law and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application. Deprivation of liberty without such legal authorization is unlawful.¹⁵⁰

Detention is arbitrary where it is “clearly impossible to invoke any legal basis to justify the deprivation of liberty.”¹⁵¹

The HRC has also clarified that pretrial detention should be as short as possible and “reasonable and necessary in all circumstances, for example to prevent flight, interference with evidence or the recurrence of crime.”¹⁵² In evaluating the reasonableness and necessity of pretrial detention, courts must make an “individualized determination.”¹⁵³

The Cambodian Criminal Code also sets forth legal standards that must be satisfied for pretrial detention. Article 205 only permits pretrial detention when it is *necessary* to either (i) stop the offense or prevent the offense from happening again; (ii) prevent interference with witnesses or victims or collusion with an accomplice; (iii) preserve evidence; (iv) ensure that the accused is kept for the court to decide according to its procedures; (v) protect the security of the accused; or (vi) maintain public order.¹⁵⁴

¹⁴⁹ ICCPR, art. 9.

¹⁵⁰ UN Human Rights Committee, General Comment No. 35: Article 9 (Liberty and security of person), U.N. Doc. CCPR/C/GC/35, 16 December 2014, para. 22 (internal citations omitted).

¹⁵¹ UN General Assembly, Report of the 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, U.N. Doc. A/HRC/30/37, 6 July 2015, para. 10(a).

¹⁵² UN Human Rights Committee, General Comment No. 35: Article 9 (Liberty and security of person), U.N. Doc. CCPR/C/GC/35, 16 December 2014, para. 12; Human Rights Committee, *Cedeno v. Bolivarian Republic of Venezuela*, Comm. No. 1940/2010, U.N. Doc. CCPR/C/106/D/1940/2010, Oct. 29, 2012, para. 7.10.

¹⁵³ UN Human Rights Committee, General Comment No. 35: Article 9 (Liberty and security of person), U.N. Doc. CCPR/C/GC/35, 16 December 2014, para. 38 (“Detention pending trial must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime. The relevant factors should be specified in law and should not include vague and expansive standards such as ‘public security.’”).

¹⁵⁴ Criminal Procedure Code of the Kingdom of Cambodia, art. 205.

Mr. Setha's pretrial detention constituted an arbitrary detention in violation of Article 9 of the ICCPR and appears inconsistent with Article 205 of the Cambodian Criminal Code.

First, Mr. Setha's pretrial imprisonment constitutes an arbitrary detention under international law because no legal basis justified Mr. Setha's deprivation of liberty.¹⁵⁵ The sole basis on which Cambodian authorities justified detaining Mr. Setha in January 2023 was for purportedly failing to obey the Cambodian Court's 2021 summonses to appear for questioning.¹⁵⁶ However, there is no evidence that Mr. Setha ever received the original summonses.¹⁵⁷ In a previous communication in which government authorities failed to notify an individual that he was required to appear before them on a certain date and then arrested him following his failure to appear, the WGAD found that "the authorities did not adhere to the legal procedures necessary to ensure a legal basis for [the accused]'s detention" and thus that the detention was arbitrary.¹⁵⁸ Here, because there is no evidence that Mr. Setha received the summonses, his alleged failure to respond to them cannot provide a legal basis justifying his detention.

Similarly, because there is no evidence Mr. Setha received the summonses, there is likewise no apparent legal basis for Mr. Setha's detention under Article 205 of the Cambodian Code of Criminal Procedure, which permits pretrial detention only if one of the enumerated conditions is satisfied.

To the extent Mr. Setha's pretrial detention was sought to be justified on the ground that he was likely to flee, none of the public reporting suggests that specific reasons to believe this was a risk were articulated.¹⁵⁹ In fact, the forgery judgment reflects that the reason for Mr. Setha's pretrial detention was "due to" his alleged failure to respond to the summons, with no attempt to connect this to a future flight risk or any other ground under Article 205—and no acknowledgment that Mr. Setha argued he had never received the summonses.¹⁶⁰

Second, in addition to the lack of evidence that Mr. Setha ever received the summonses, the timing of Mr. Setha's detention strongly suggests that it was based not on grounds prescribed by law but rather on political considerations. While Mr. Setha's alleged failure

¹⁵⁵ UN General Assembly, Report of the 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, U.N. Doc. A/HRC/30/37, 6 July 2015, para. 10(a).

¹⁵⁶ Trial Court Judgment (Forgery Charges), p. 9; CamboJa News, "Detained Candlelight Leader Did Not Authorize Bad Checks, Lawyer says," 23 January 2023, <https://cambojanews.com/detained-candlelight-leader-did-not-authorize-bad-checks-lawyer-says/>.

¹⁵⁷ Trial Court Judgment (Forgery Charges), p. 10.

¹⁵⁸ UN Human Rights Council, Opinion No. 65/2020 concerning Roberto de Jesus Quinones Haces (Cuba), U.N. Doc. A/HRC/WGAD/2020/65, 29 January 2021, paras. 81–82.

¹⁵⁹ Khmer Times, "SC denies Thach Setha's bail for fear of his fleeing abroad," 4 May 2023, <https://www.khmertimeskh.com/501284011/sc-denies-thach-sethas-bail-for-fear-of-his-fleeing-abroad>

¹⁶⁰ Trial Court Judgment (Forgery Charges), p. 9.

to appear before the Court occurred in 2021, he was not detained until January 2023. Moreover, his detention occurred only days after the video of his January 8, 2023 speech was posted on YouTube. That Mr. Setha was then charged with incitement for his comments in the speech while already in pretrial detention for his alleged failure to respond to the forgery case summonses further suggests that his January 8, 2023 speech motivated his arrest and detention.

Third, even if Mr. Setha's pretrial arrest was initially lawful, the investigating judge's questioning of Mr. Setha without counsel violated Mr. Setha's right to legal assistance during a detention hearing.¹⁶¹ Per HRC guidance, Cambodia is required to "give full effect to the rights of accused persons to contact counsel before and during interrogation, and when they are brought before courts."¹⁶² Instead of permitting Mr. Setha to contact a lawyer of his choosing at the time of arrest, as Cambodian authorities were obligated to do under international law, Mr. Setha was questioned, detained, and denied bail before he was finally permitted access to counsel. The Prosecutor used Mr. Setha's uncounseled answers as evidence of Mr. Setha's purported guilt in subsequent hearings.¹⁶³ Deprivation of counsel in these circumstances violates the WGAD's direction to provide persons in pretrial detention with "the right to legal assistance by counsel of their choice . . . including immediately after the moment of apprehension."¹⁶⁴

C. VIOLATIONS AT TRIAL

Right to Counsel

Under Article 14(3)(b) and (d) of the ICCPR, everyone charged with a criminal offense has the right to the assistance of counsel of his or her choosing, including the right to communicate with counsel.¹⁶⁵ The HRC has explained that the right to counsel "is an

¹⁶¹ UN Human Rights Committee, General Comment No. 35: Article 9 (Liberty and security of person), U.N. Doc. CCPR/C/GC/35, 16 December 2014, para. 34.

¹⁶² UN Human Rights Committee, Consideration of reports submitted by States parties under article 40 of the Covenant, U.N. Doc. CCPR/C/KEN/CO/3, 31 August 2012, para. 19.

¹⁶³ See, e.g., Trial Monitor Notes (Forgery Charges), 16 August 2023, p. 3.

¹⁶⁴ UN General Assembly, Report of the 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, U.N. Doc. A/HRC/30/37, 6 July 2015, Principle 9, para. 12.

¹⁶⁵ ICCPR, arts. 14(3)(b) ("In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: . . . (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing"), 14(3)(d) ("To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it"). See also UN Human Rights Committee, Communication No. 1125/2002: *Quispe Roque v. Peru*, U.N. Doc. CCPR/C/85/D/1125/2002, 3 November

important element of the guarantee of a fair trial and an application of the principle of equality of arms.”¹⁶⁶ The right to counsel applies at all stages of criminal proceedings and is particularly vital during periods of detention.¹⁶⁷ In this regard, the HRC has stated that “all persons who are arrested must immediately have access to counsel.”¹⁶⁸ Interpreting the requirements under Article 14, the HRC has noted that the accused must have access to documents and other evidence required to prepare his case, as well as adequate time to engage and communicate with counsel.¹⁶⁹

In *Zhuk v. Belarus*, the Committee found a violation of Article 14(3)(b) and (d) where a detainee had “only been allowed to see a lawyer for five minutes and ha[d] effectively been deprived of legal assistance during the initial phases of the investigative proceedings, and . . . was forced to participate in investigative actions [including police interrogation] without legal advice, despite his requests for a lawyer.”¹⁷⁰ In the WGAD’s Opinion concerning Cambodian human rights activist Theary Seng, the Group found a

2005, para. 7.3; UN Human Rights Committee, Communication No. 1126/2002: *Carranza Alegre v. Peru*, U.N. Doc. CCPR/C/85/D/1126/2002, 17 November 2005, para. 7. 5.

¹⁶⁶ UN Human Rights Committee, General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32, 23 August 2007, para. 32.

¹⁶⁷ See Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Basic Principles on the Role of Lawyers, 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1, p. 117, Principle 1, <https://www.ohchr.org/en/professionalinterest/pages/roleoflawyers.aspx>; UN General Assembly, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, U.N. Doc. A/RES/43/173, 9 December 1988, Annex, Principles 17(1), 18. See also Council of Europe, 21st General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1 August 2010–31 July 2011), 10 November 2011, para. 20, <https://rm.coe.int/1680696a88>.

¹⁶⁸ UN Human Rights Committee, Concluding observations of the Human Rights Committee: Georgia, U.N. Doc. CCPR/C/79/Add.75, 5 May 1997, para. 27. See also UN Human Rights Committee, General Comment No. 35: Article 9 (Liberty and security of person), U.N. Doc. CCPR/C/GC/35, 16 December 2014, para. 35; European Court of Human Rights, *Dayanan v. Turkey*, App. No. 7377/03, 13 October 2009, paras. 30–32; European Court of Human Rights, *Brusco v. France*, App. No. 1466/07, 14 October 2010, para. 45.

¹⁶⁹ UN Human Rights Committee, General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/35, 23 August 2007, para. 23.

¹⁷⁰ UN Human Rights Committee, Communication No. 1910/2009: *Zhuk v. Belarus*, U.N. Doc. CCPR/C/109/D/1910/2009, 30 October 2013, paras. 2.1, 8.5. See also UN Human Rights Committee, Communication No. 1552/2007: *Lyashkevich v. Uzbekistan*, U.N. Doc. CCPR/C/98/D/1552/2007, 11 May 2010, para. 9.4; UN Human Rights Committee, Communication No. 770/1997: *Gridin v. Russian Federation*, U.N. Doc. CCPR/C/69/D/770/1997, 18 July 2000, para. 8.5; UN Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2680/2015: *Saidov v. Tajikistan*, U.N. Doc. CCPR/C/122/D/2680/2015, 20 September 2018, para. 9.5; UN Human Rights Committee, Communication No. 1126/2002: *Carranza Alegre v. Peru*, U.N. Doc. CCPR/C/85/D/1126/2002, 28 October 2005, para. 7.5; UN Human Rights Committee, Communication No. 1402/2005: *Krasnova v. Kyrgyzstan*, U.N. Doc. CCPR/C/101/D/1402/2005, 29 March 2011, para. 8.6.

violation of Article 14(3) where Seng was not permitted to call her lawyer, including immediately after the moment of her apprehension.¹⁷¹

In Mr. Setha's case, Mr. Setha's acknowledgment during the detention hearing that the checks at issue belonged to him was made without access to his lawyer's advice.¹⁷² Mr. Setha's counsel noted that Mr. Setha had "acknowledged" the photocopied evidence during this pretrial hearing before the investigating judge "because he was not aware of the law."¹⁷³ The Prosecutor and counsel for Plaintiff later used this purported admission to support the argument that Mr. Setha issued the cashless checks.¹⁷⁴

Mr. Setha was accordingly effectively denied his right to assistance of counsel under Article 14.

Right to Adequate time and Facilities to Prepare a Defense

Article 14(3)(b) of the ICCPR states that anyone charged with a criminal offense has the right to "adequate time and facilities for the preparation of his defense."¹⁷⁵ The amount of time required for the preparation of a defense will depend on the circumstances of each case.¹⁷⁶ The HRC has explained that "adequate facilities" includes "access to documents and other evidence," including "all materials that the prosecution plans to offer in court against the accused or that are exculpatory."¹⁷⁷ Exculpatory material includes both material establishing innocence and also any other evidence that could assist the accused with preparation of their defense.¹⁷⁸

Mr. Setha was denied access to adequate facilities for the preparation of a defense under Article 14(3)(b) of the ICCPR. In particular, throughout the proceedings, Mr. Setha's counsel repeatedly requested original copies of the checks in question as a foundational component of the charges brought against Mr. Setha.¹⁷⁹ The government never produced this evidence. The Court also did not address the defense team's objections to the substitution of photocopied evidence for the original checks, including that "[e]veryone

¹⁷¹ UN Human Rights Council, Opinion No. 5/2023 concerning Seng Chan Theary (Cambodia), U.N. Doc. A/HRC/WGAD/2023/5, 15 June 2023, paras. 74–75.

¹⁷² See Trial Court Judgment (Forgery Charges), pp. 5–7.

¹⁷³ Trial Court Judgment (Forgery Charges), p. 7.

¹⁷⁴ Trial Court Judgment (Forgery Charges), pp. 9–10, 12–13, 21–22.

¹⁷⁵ ICCPR, art. 14(3)(b).

¹⁷⁶ UN Human Rights Committee, General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/35, 23 August 2007, para. 32.

¹⁷⁷ UN Human Rights Committee, General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/35, 23 August 2007, para. 33.

¹⁷⁸ UN Human Rights Committee, General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/35, 23 August 2007, para. 33.

¹⁷⁹ See, e.g., Trial Court Judgment (Forgery Charges), pp. 6–7.

knows how to use photoshop,” and that failure to submit the original evidence was a violation of “procedural justice.”¹⁸⁰

Right to Call and Examine Witnesses

Article 14(3)(e) of the ICCPR provides that everyone shall be entitled to the minimum guarantee to “examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”¹⁸¹ Per the HRC:

As an application of the principle of equality of arms, this guarantee is important for ensuring an effective defense 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.¹⁸²

The HRC has found violations of Article 14(3)(e) where a national court prohibited the accused from questioning the majority of witnesses that he requested to examine and who were of relevance to the proceedings.¹⁸³ The Committee has further underscored that a State’s failure to provide any reasons for refusing the questioning of relevant witnesses indicates a violation of the rights of the accused under Article 14(3)(e).¹⁸⁴ In a case before the HRC where a Russian court denied the accused’s request to cross-examine the only available witness to the alleged crime without sufficient explanation, the Committee concluded the Court “did not respect the requirement of equality between prosecution and defence in producing evidence and that this amounted to a denial of justice” in violation of the accused’s rights under Article 14(3)(e).¹⁸⁵

The right of the accused to cross-examine witnesses is subject to certain limitations. For instance, the right only extends to the cross-examination of witnesses relevant for the

¹⁸⁰ Trial Court Judgment (Forgery Charges), p. 9.

¹⁸¹ ICCPR, art. 14(3)(e).

¹⁸² UN Human Rights Committee, General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32, 23 August 2007, para. 39.

¹⁸³ UN Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2555/2015: *Allaberdiev v. Uzbekistan*, U.N. Doc. CCPR/C/119/D/2555/2015, 18 May 2017, paras. 3.5, 8.7–8.9.

¹⁸⁴ UN Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2555/2015: *Allaberdiev v. Uzbekistan*, U.N. Doc. CCPR/C/119/D/2555/2015, 18 May 2017, para. 8.9.

¹⁸⁵ UN Human Rights Committee, Communication No. 815/1998, U.N. Doc. CCPR/C/81/D/815/1998, 18 August 2004, paras. 2.1, 3.1, 9.3.

accused's defense.¹⁸⁶ Further, cross-examination at trial is not a requirement in every case; the right has been considered fulfilled where the accused has been given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings.¹⁸⁷ Finally, the accused must propose cross-examination of witnesses in a timely manner in compliance with procedural requirements.¹⁸⁸

During the forgery proceedings, the Court violated Mr. Setha's rights under Article 14(3)(e) of the ICCPR by denying his request to cross-examine the plaintiff and key fact witness, Mr. Vanrin, even though the prosecution against Mr. Setha was based on Mr. Vanrin's allegations and his representations that the five photocopied checks presented in the hearing were provided by Mr. Setha.

Mr. Vanrin's testimony was clearly relevant to the charges against Mr. Setha, particularly given the lack of documentary evidence and the prosecution's failure to produce the original checks.¹⁸⁹ Among other objections, Mr. Setha's counsel repeatedly questioned the provenance and authenticity of the photocopied checks, and Mr. Setha was consistent in testifying that he had neither dated the checks nor issued any checks to the pawn shop as collateral for the second contract.¹⁹⁰ Accordingly, Mr. Setha's counsel repeatedly requested that Mr. Vanrin submit to cross-examination.¹⁹¹ The Court's only explanation for denying this request was that "the company owner . . . has the right not to show up to court."¹⁹²

Given that Mr. Setha's prosecution rested on Mr. Vanrin's allegations—which the Court credited, despite his lack of appearance—the Court's refusal to allow examination of Mr. Vanrin clearly hampered Mr. Setha's ability to produce evidence on his own behalf and present an effective defense in violation of his rights under Article 14(3)(e). The fact that the Court failed to provide sufficient explanation for refusing to call Mr. Vanrin further indicates a violation of Mr. Setha's rights. Mr. Setha was also not permitted to examine Mr. Vanrin at any other stage of the proceeding, and there was no suggestion by the Court that Mr. Setha's counsel failed to request his participation in a timely manner.

¹⁸⁶ UN Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, 23 August 2007, para. 39. See also UN Human Rights Committee, *Saidov v. Tajikistan*, U.N. Doc. CCPR/C/122/D/2680/2015, 20 September 2018, para. 9.6 (witness must be relevant to the proceedings).

¹⁸⁷ UN Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, 23 August 2007, para. 39. See also UN Human Rights Committee, *Saidov v. Tajikistan*, U.N. Doc. CCPR/C/122/D/2680/2015, 20 September 2018, para. 9.6.

¹⁸⁸ UN Human Rights Committee, *Johnson v. Spain*, U.N. Doc. CCPR/C/86/D/1102/2002, 27 March 2006, para. 6.5; UN Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, 23 August 2007, para. 39.

¹⁸⁹ See, e.g., Trial Monitor's Notes, 16 August 2023 (Forgery Charges).

¹⁹⁰ See, e.g., Trial Monitor's Notes, 16 August 2023 (Forgery Charges); Trial Court Judgment (Forgery Charges), pp. 7, 24; Trial Monitor's Notes, 20 May 2024 (Forgery Charges).

¹⁹¹ See, e.g., Trial Monitor's Notes, 16 August 2023 (Forgery Charges).

¹⁹² Trial Monitor's Notes, 6 September 2023 (Forgery Charges), p. 1.

Accordingly, Mr. Setha was entitled to call and examine Mr. Vanrin at the trial to have the opportunity to present an effective defense, and the Court's refusal to allow him to do so violated his rights under Article 14(3)(e) of the ICCPR.

Right to Be Tried by an Independent and Impartial Court

Article 14(1) of the ICCPR provides that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."¹⁹³ The HRC maintains this "is an absolute right that is not subject to any exception."¹⁹⁴ The right to an independent and impartial court encompasses (i) "the actual independence of the judiciary from political interference by the executive branch and legislature,"¹⁹⁵ and (ii) the impartiality guarantee, which has a subjective and objective dimension.¹⁹⁶

The subjective aspect of the impartiality guarantee mandates that "judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour 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."¹⁹⁷ In *Ashurov v. Tajikistan*, the HRC found a violation of the right to be tried by an impartial court where the judge asked leading questions, sought to exclude the accused's lawyer and dismissed the accused's requests without providing reasons.¹⁹⁸

The objective aspect of impartiality mandates that "the tribunal must also appear to a reasonable observer to be impartial," even in the absence of actual bias.¹⁹⁹ In interpreting corresponding guarantees under Article 6(1) of the ECHR,²⁰⁰ the European Court of Human Rights (ECtHR) explained the objective test inquires if "the tribunal itself . . . offered sufficient guarantees to exclude *any legitimate doubt* in respect of its impartiality."²⁰¹ This not only implicates the judge's conduct but also requires evaluation

¹⁹³ ICCPR, art. 14(1).

¹⁹⁴ UN Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, 23 August 2007, para. 19.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* para. 21.

¹⁹⁷ *Id.*

¹⁹⁸ UN Human Rights Committee, Communication No. 1348/2005: *Ashurov v. Tajikistan*, U.N. Doc. CCPR/C/89/D/1348/2005, 20 March 2007, para. 6.6.

¹⁹⁹ UN Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, 23 August 2007, para. 21.

²⁰⁰ Article 6(1) of the ECHR provides that defendant's "of any criminal charge" are "entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." ECHR, art. 6(1).

²⁰¹ European Court of Human Rights, *Nicholas v. Cyprus*, App. No. 63246/10, 9 January 2018, para. 49 (emphasis added). See also European Court of Human Rights, *Kyprianou v. Cyprus*, App. No. 73797/01, 15 December 2005, para. 118.

of any “ascertainable facts which may raise doubts as to [the tribunal’s] impartiality.”²⁰² For example, in *Toziczka v. Poland*, the ECtHR noted, “it is necessary to consider whether the link between substantive issues determined at various stages of the proceedings is so close as to cast doubt on the impartiality of the judge participating in the decision-making at these stages.”²⁰³

The conduct and statements of the judge presiding over both Mr. SETHA’s trials indicate that Mr. SETHA was not given the opportunity to be tried by an independent and impartial court, in violation of his rights under Article 14(1) of the ICCPR.

First, Judge Chhun Davy repeatedly rejected efforts by Mr. SETHA’s counsel in the forgery proceedings to introduce or question the evidence before the court, offering little to no explanation for why she declined to do so. As explained above, Judge Chhun Davy refused to call the plaintiff, Mr. Vanrin, for cross-examination despite Mr. SETHA’s counsel request and the centrality of Mr. Vanrin’s allegations to the forgery charges, offering only a minimal explanation for doing so. She also declined to address Mr. SETHA and his counsel’s repeated requests that the prosecution produce for examination the original checks. The trial transcript reflected in the trial court judgment indicates that Mr. SETHA or his counsel requested the presentation of the original checks at least 24 separate times.²⁰⁴ Mr. SETHA’s Defense counsel also requested that the Court appoint an independent expert to examine the checks to determine their authenticity.²⁰⁵ The Court did not grant either request, and instead convicted Mr. SETHA for forgery without ever examining the originals of the purportedly forged documents.²⁰⁶

Second, the Court failed to consider or address Mr. SETHA’s testimony in which he denied issuing any checks to Mr. Vanrin after 2011, testified that the handwriting dating the 2019 checks at issue was not his handwriting, and questioned whether the photocopied checks presented were authentic or rather manipulated copies of earlier checks, all of which went to the heart of the claims against him.²⁰⁷ Instead, the Court pointed to Mr. SETHA’s acknowledgement that the checks and signature appeared to be his as an admission that he had issued the instruments in question, without addressing these counterarguments.

²⁰² European Court of Human Rights, *Nicholas v. Cyprus*, App. No. 63246/10, 9 January 2018, para. 52. See also European Court of Human Rights, *Kyprianou v. Cyprus*, App. No. 73797/01, 15 December 2005, para. 118.

²⁰³ European Court of Human Rights, *Toziczka v. Poland*, App. No. 29995/08, 24 July 2012, para. 36.

²⁰⁴ See, e.g., Trial Court Judgment (Forgery Charges), pp. 6–7, 9–10, 14–17, 24–27.

²⁰⁵ Trial Monitor’s Notes, 6 September 2023 (Forgery Charges), p. 3.

²⁰⁶ Trial Monitor’s Notes, 16 August 2023 (Forgery Charges), p. 4; Trial Monitor’s Notes, 6 September 2023 (Forgery Charges), p. 2.

²⁰⁷ Trial Monitor’s Notes, 16 August 2023 (Forgery Charges), pp. 2–3; Trial Monitor’s Notes, 6 September 2023 (Forgery Charges), p. 1.

Third, in both the forgery and incitement proceedings, the Court found Mr. Setha guilty without finding evidence in support of the required elements of the crime, suggesting a lack of impartiality and independence from the prosecution.

Under Cambodian law, finding an individual guilty of forgery under Article 231 of the Law of Negotiable Instruments and Payment Transactions requires that the accused *willfully* failed to honor an obligation under a negotiable instrument (i.e., a check) with the *intent* to harm another.²⁰⁸ However, the Prosecution did not provide any evidence of either Mr. Setha’s intent to cause harm or his intent to avoid payment.²⁰⁹ Instead, the Prosecution relied solely on the photocopies of the checks, the fact that Mr. Setha’s account did not have sufficient funds to cover the checks, and Mr. Setha’s acknowledgment that the checks were his checks containing his signature. The Court similarly did not interrogate the intent elements of the crime nor request that the Prosecution demonstrate that these elements were satisfied. Instead, in its verdict, the Court found Mr. Setha guilty based solely on his acknowledgment that the checks were his; that some of his writing appeared on the check; and that it was his signature on each of the checks, in combination with the bank’s confirmation that the checks were cashless,²¹⁰ and then concluded—without explanation or any reference to the record—that “it is certain that the issuance of five checks made by the accused with the intention of harming others.”²¹¹ In so doing, the Court also ignored the existence of an enforceable contract that designated the land deeds as collateral,²¹² demonstrating Mr. Setha’s intent to ensure payment rather than avoid it.

Similarly, with respect to incitement, Articles 495 and 496 of the Cambodian Criminal Code respectively require evidence of “direct incitement” to commit an identifiable felony²¹³ or the disturbance of social security;²¹⁴ or “direct incitement” of discrimination, violence or malicious actions against “a person or a group of persons because of their membership or non-membership of a particular ethnicity, nationality, race or religion.”²¹⁵ The sole evidence the prosecution presented for both charges was excerpts of Mr. Setha’s January 8, 2023 speech.²¹⁶ While the Cambodian Criminal Code does not define “incitement,” Mr. Setha’s speech on its face did not include typical markers of this concept, such as imperative language, threats, or persuasion to undertake any particular actions nor did

²⁰⁸ Cambodian Law of Negotiable Instruments and Payment Transactions, art. 231(3).

²⁰⁹ See *generally* Trial Monitor’s Notes, 16 August 2023 (Forgery Charges); Trial Monitor’s Notes, 6 September 2023 (Forgery Charges).

²¹⁰ Trial Court Judgment (Forgery Charges), pp. 18–19.

²¹¹ Trial Court Judgment (Forgery Charges), p. 18.

²¹² Trial Court Judgment (Forgery Charges), pp. 3–5.

²¹³ Criminal Code of the Kingdom of Cambodia, art. 495.

²¹⁴ Criminal Code of the Kingdom of Cambodia, art. 495.

²¹⁵ Criminal Code of the Kingdom of Cambodia, art. 496.

²¹⁶ Trial Monitor’s Notes, 21 September 2023 (Incitement Charges), pp. 3–4.

he call for the commission of a felony, disturbance of social security or violence or discrimination against a person or group.²¹⁷ Judge Chhun Davy did not explain why any of Mr. Setha's statements satisfied the elements of the incitement charge in her verdict²¹⁸ but instead stated only that Mr. Setha was convicted "for a speech that he made to his supporters of the former CNRP early this year."²¹⁹

Judge Chhun Davy also gave no explanation for why Mr. Setha satisfied the charges' required element of intent to incite discrimination or the commission of a felony or disturbance of social security.²²⁰ The Prosecution offered no evidence in support of this element, other than alleging that Mr. Setha had a "negative intention towards the government and ruling party."²²¹ By contrast, Mr. Setha had testified that his intention in giving the January 8 speech was for his remarks to inform and remind Cambodian citizens about historical events.²²² The Court gave no explanation for why it apparently failed to credit this testimony. Moreover, the Court's verdict did not clarify whether or on what basis it had concluded that Mr. Setha had intentionally incited others.

Fourth, Judge Chhun Davy made statements during the proceedings suggesting a subjective lack of impartiality and independence. In particular, based on the monitoring, after a few preliminary questions about the YouTube video, Judge Chhun Davy began the incitement hearing—which commenced only 20 minutes after she found Mr. Setha guilty and sentenced him on the forgery charges—by directly asking Mr. Setha, "Were you aware that your public speeches are influencing people to commit any violation against the government and discriminate against our neighbor nation?"²²³ The framing of Judge Chhun Davy's question implies a foregone conclusion of Mr. Setha's guilt on the incitement charge and is an "ascertainable fact[] which may raise doubts as to [the tribunal's] impartiality."²²⁴

²¹⁷ Trial Monitor's Notes, 21 September 2023 (Incitement Charges), pp. 3–4.

²¹⁸ Trial Monitor's Notes, 18 October 2023 (Incitement Charges), p. 1.

²¹⁹ Trial Monitor's Notes, 18 October 2023 (Incitement Charges), p. 1.

²²⁰ Article 4 of the Cambodian Criminal Code provides that, unless otherwise specified, the Prosecution must prove that an accused person had *intent* to commit the crime. Articles 494, 495 of the Cambodian Criminal Code do not specify a different *mens rea*, thus the standard of intent under Article 4 applies; that is, an accused individual may only be found guilty of incitement if the Prosecution can prove the accused's *intention* to commit the acts listed under Articles 494 and 495.

²²¹ Trial Monitor's Notes, 21 September 2023 (Incitement Charges), p. 4.

²²² Trial Monitor's Notes, 21 September 2023 (Incitement Charges), p. 2.

²²³ Trial Monitor's Notes, 21 September 2023 (Incitement Charges), p. 2.

²²⁴ European Court of Human Rights, *Nicholas v. Cyprus*, App. No. 63246/10, 9 January 2018, para. 52. See also European Court of Human Rights, *Kyprianou v. Cyprus*, App. No. 73797/01, 15 December 2005, para. 118.

Right to 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.”²²⁵ The HRC 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.²²⁶

The HRC has explained that the right to be presumed innocent requires that the Court gives the accused the benefit of doubt.²²⁷ A conviction notwithstanding the prosecution’s failure to prove its case beyond a reasonable doubt can thus violate Article 14(2).²²⁸ The European Court of Human Rights has similarly clarified that the right to be presumed innocent requires all doubts to be resolved in favor of the accused.²²⁹ The HRC has also looked to the conduct of the presiding judge and found that demeaning comments and accusations against a defendant during trial²³⁰ and a judge’s refusal to question the version of events advanced by the Prosecution to the detriment of the accused²³¹ indicate violations of Article 14(2). In determining whether a violation has occurred, the HRC has stressed that “it is for the organs of States parties to evaluate the facts and the evidence in each case, or the application of domestic legislation, unless it can be shown that this evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice.”²³²

The Cambodian Constitution similarly affirms that the “accused shall have the benefit of any reasonable doubt” under Cambodian law, and that any “accused shall be presumed

²²⁵ ICCPR, art. 14(2).

²²⁶ UN Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, 23 August 2007, para. 30. See also UN Human Rights Committee, Communication No. 2680/2015: *Saidov v. Tajikistan*, U.N. Doc. CCPR/C/122/D/2680/2015, 20 September 2018, para. 9.4.

²²⁷ UN Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, 23 August 2007, para. 30.

²²⁸ See UN Human Rights Committee, Communication No. 1348/2005: *Ashurov v. Tajikistan*, U.N. Doc. CCPR/C/89/D/1348/2005, 20 March 2007, para. 6.7.

²²⁹ European Court of Human Rights, *Melich and Beck v. Czech Republic*, App. No. 35450/04, 24 July 2008, para. 49.

²³⁰ UN Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3061/2017, U.N. Doc. CCPR/C/133/D/3061/2017, 3 February 2022, para. 3.2.

²³¹ *Id.*

²³² UN Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2930/2017, U.N. Doc. CCPR/C/129/D/2930/2017, 11 December 2020, para. 6.7.

to be innocent until they are finally convicted by the court.”²³³ Article 351 the Cambodian Code of Criminal Procedure incorporates this protection, stating that the accused shall have the benefit of reasonable doubt.²³⁴

The materials reviewed further indicate that the Court failed to observe Mr. Setha’s right to the presumption of innocence under Article 14(2) and Cambodian law in both the forgery and incitement proceedings.

First, in the forgery proceedings, the Court appeared to improperly place the burden of proof on Mr. Setha, rather than on the prosecution. In particular, the Court allowed the prosecution to rely on photocopies of the five alleged bad checks, despite Mr. Setha and his counsel’s repeated questions about their authenticity and provenance. Mr. Setha’s counsel repeatedly drew the Court’s attention to the prosecution’s failure to meet its burden of proof by declining to produce the original checks, noting that because they failed to do so, there was no evidence against Mr. Setha on the charges. Mr. Setha’s counsel further repeatedly noted that it was not Mr. Setha’s burden to produce evidence acquitting him of the charges where the prosecution had failed to produce evidence supporting them. However, as explained above, the Court failed to address these arguments and instead found Mr. Setha guilty without requiring examination of the original checks.

Second, in both the forgery and incitement proceedings, Mr. Setha was convicted despite the prosecution’s failure to prove all elements of the crime beyond a reasonable doubt. As explained in the preceding section, in both cases, Mr. Setha was convicted, even though the prosecution produced no evidence for the required elements of intent nor evidence sufficient to demonstrate “incitement.”²³⁵ Given the prosecution’s lack of evidence, any doubt as to whether these elements were met should have been resolved in Mr. Setha’s favor in light of the presumption of innocence, and the Court’s failure to do so constituted a “manifest error or denial of justice.”

Third, the Court appeared to simply accept the Prosecution’s version of events in both cases, suggesting that it failed to observe the presumption of innocence.²³⁶ For example, in the forgery proceeding, the Court did not question the provenance of the photocopied checks presented by the prosecution despite Mr. Setha’s counsel’s objections. The Court also stated as fact the prosecution’s version of facts that were disputed without explanation, in particular, that Mr. Setha had issued the checks in 2019. Similarly, in the

²³³ Constitution of the Kingdom of Cambodia, art. 38.

²³⁴ Criminal Procedure Code of the Kingdom of Cambodia, art. 351.

²³⁵ See *supra* p. 38.

²³⁶ See UN Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3061/2017, U.N. Doc. CCPR/C/133/D/3061/2017, 3 February 2022, para. 3.2.

incitement proceeding, Judge Chhun Davy appeared to accept the Prosecution’s characterization of Mr. Setha’s speech as incendiary from the outset of the proceedings.

Finally, Judge Chhun Davy’s comments in the incitement proceeding are indicative of a failure to observe the presumption of innocence of the accused. In particular, as discussed above, she asked Mr. Setha at the outset of proceedings if he was aware that his speeches were “influencing people to commit any violation against the government and discriminate against our neighbor nation”²³⁷—a question that appeared to assume his statements constituted incitement, an element of the charges against him.

Right to a Reasoned Judgment

Under Article 14(5) of the ICCPR, “[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.”²³⁸ This right of review implicitly contains as a corollary the right “to have access to a duly reasoned, written judgment of the trial court,” as this is the only way a convicted individual may effectively exercise their right to appeal.²³⁹ In addition, the judgment must “give reasons for the dismissal of the [accused person’s] defence.”²⁴⁰ The HRC has found violations of Article 14(5) where the only documents provided to the accused in explanation of the Court’s guilty verdict “could not have provided guidance as to the motivation of the first instance court in convicting the author of a criminal offence, nor indication on what particular evidence the court had relied.”²⁴¹

The judgments and verdicts in both the forgery and incitement proceedings failed to satisfy this standard.

Judgment on Forgery Charges

While the Municipal Court provided a written judgment on the forgery charges, the Court’s judgment was not “duly reasoned” so as to allow Mr. Setha to effectively exercise his right to appeal.

First, the Court’s articulated basis for its guilty verdict failed to adequately explain why it concluded that Mr. Setha met the elements of the crime of forgery under Article 231, notwithstanding a total lack of evidence from the prosecution on the element of intent. As explained above, the Court found that “it is certain that” Mr. Setha issued the checks with

²³⁷ Trial Monitor’s Notes, 21 September 2023 (Incitement Charges), p. 2.

²³⁸ ICCPR, art. 14(1).

²³⁹ UN Human Rights Committee, Communication No. 1797/2008, U.N. Doc. CCPR/C/99/D/1797/2008, 24 August 2010, paras. 3.1, 8.2.

²⁴⁰ UN Human Rights Committee, Communication No. 903/1999: *Van Hulst v. Netherlands*, U.N. Doc. CCPR/C/82/D/903/1999, 1 November 2004, paras. 6.4–6.5.

²⁴¹ UN Human Rights Committee, Communication No. 1797/2008, U.N. Doc. CCPR/C/99/D/1797/2008, 24 August 2010, para. 8.2.

the intention of harming others and of not repaying them or fulfilling the obligations thereunder. It stated that this conclusion was based on Mr. Setha “acknowledging the checks were his,” that he “recognized the letter written of the amount on the check, which was written in the Khmer language,” his “acknowledg[ing] that the signature on the check belonged to him,” and on the fact that “the bank has already confirmed that five checks were cashless.”²⁴² However, nothing in this analysis provides an explanation for why the Court determined that Mr. Setha had intentionally sought to harm others or to avoid payment, as required under Article 231.

Second, the judgment offered no explanation or justification for why it rejected multiple arguments from the defense that went to the heart of the charges against Mr. Setha. In particular, the judgment offered no explanation for why the Court determined that the photocopies of the checks constituted sufficient evidence to convict Mr. Setha, notwithstanding Mr. Setha’s repeated challenges to their authenticity and provenance. It also entirely failed to address Mr. Setha’s testimony that he had not entered the dates on the checks nor provided any checks to Mr. Vanrin’s company since 2011, whereas the checks were dated from 2019. The judgment also did not address the unusual timing of the proceedings, and in particular, the fact that the prosecution did not actively pursue the case against Mr. Setha until his January 8, 2023 speech, despite the fact that Mr. Vanrin initiated his complaint in 2019.

Third, neither of the decisions on appeal remedied the deficiencies in the Trial Court’s judgment. The Appeal Court’s only explanation of Mr. Setha’s “sufficient guilt” was its conclusory statement that “Setha’s action of issuing 5 checks of the Foreign Trade Bank of Cambodia . . . which were cashless” satisfied all elements of a criminal offense under Article 231.²⁴³ The Supreme Court similarly pointed only to Mr. Setha’s handwriting and signature affixed to the “cashless” checks to confirm the illegality of the acts and the validity of the underlying judgment.²⁴⁴

These failures to provide a “duly reasoned” judgment violated Mr. Setha’s rights under Article 14(5) of the ICCPR.

Judgment on Incitement Charges

The Phnom Penh Municipal Court provided a written judgment on the incitement charges. However, as with the forgery judgment, the Court did not provide sufficient reasoning for the effective exercise of Mr. Setha’s right to appeal as required under Article 14(5) of the ICCPR.

²⁴² Trial Court Judgment (Forgery Charges), pp. 6, 18–19.

²⁴³ Appeal Court Judgment (Forgery Charges), p. 17.

²⁴⁴ Supreme Court Judgment (Forgery Charges), p. 13.

First, the Court’s judgment largely failed to support its finding of guilt with relevant evidence or reasoning. After noting that the “Department of External Intelligence and Technology” had conducted “research” on the content of the YouTube video clip, the Court held that,

The commentary in the video clip was maliciously misleading the Cambodian people by embedding political tricks to incite discrimination against other races and to get the people to act against the Royal Government of Cambodia (RGC), which would lead to a severe impact on political stability and destruction of peace and national security.²⁴⁵

The Court did not point to any specific statements in the video that led to this finding. Nor did it explain how it had determined that a “severe impact” on political stability would result from Mr. Setha’s statements, or what the specifics of the Department of External Intelligence and Technology’s “research” had entailed.

Second, where the Court did discuss specific evidence or arguments underlying its findings, its references either could not support the requisite elements of the offense or were impermissibly vague. The Court, for example, found “sufficient elements” of the incitement charges “[a]ccording to the prosecution’s conclusion.”²⁴⁶ However, the Prosecution’s conclusion, at least as described in the judgment and as articulated at trial, did not mention, much less prove, the requisite element of intent.²⁴⁷ In addition, the Court made general reference to the “answers by the charged person, the explanations by the witnesses who are judicial police officers, the evidence in the case file, and the synthesis report by the judicial police officers,” noting each was “consistent” with Mr. Setha’s acts on the date of the speech and during 2023 but without any explanation of their relevance or legal significance.²⁴⁸

Third, while the Court recalled a number of Mr. Setha’s arguments made during the hearing—including Mr. Setha’s observation that all of his statements made during the speech had their basis in historical documents—the judgment did not engage with them in substance.²⁴⁹ Instead, the judgment simply states these arguments before concluding that Mr. Setha was guilty of the charges.²⁵⁰

The Phnom Penh Court of Appeal also issued a written judgment. Like the trial court’s judgment, it failed to provide sufficient reasoning. In particular, it offered no reasoning in

²⁴⁵ Judgment of the Phnom Penh Municipal Court against Thach Setha (trans.), Incitement Charges 18 October 2023 (hereinafter “**Trial Court Judgment (Incitement Charges)**”), p. 10, para. 2.

²⁴⁶ Trial Court Judgment (Incitement Charges), p. 13, para. 8.

²⁴⁷ Trial Court Judgment (Incitement Charges), p. 8.

²⁴⁸ Trial Court Judgment (Incitement Charges), p. 13.

²⁴⁹ Trial Court Judgment (Incitement Charges), p. 10, para. 3.

²⁵⁰ Trial Court Judgment (Incitement Charges), pp. 10–11, para. 4.

support of its conclusion that Mr. Setha’s speech “caused serious chaos to social security and incited discrimination.”²⁵¹ Nor did it explain why the Court described Mr. Setha as “giving false information; causing the public to be confused, angry and disgusted with the CPP; inciting anger, discrimination and resentment towards the CPP, causing racism and anger against Vietnamese people.”²⁵² The judgment further provided no explanation for disregarding Mr. Setha’s testimony that contradicted these conclusions. Instead, it summed up the evidence by simply stating that:

As for the evidence against Thach Setha, as stated by the Phnom Penh Municipal Court in the verdict, it is already clear in accordance with the law that the acts of the accused have sufficient factors as criminal offenses as stipulated and punished under Articles 494, 495 and 496 of the Penal Code of the Kingdom of Cambodia. Therefore, the decision of the Phnom Penh Municipal Court to convict the accused Thach Setha according to the above verdict is correct according to the facts and evidence in accordance with the provisions of the law.²⁵³

This vague and conclusory reasoning falls far short of the well-reasoned judgment required for conviction under Article 14(5) of the ICCPR.

D. VIOLATIONS OF SUBSTANTIVE RIGHTS

Right to Freedom of Expression

Article 19 of the ICCPR guarantees the right to freedom of opinion and expression.²⁵⁴ The HRC has explained that, in light of these broad guarantees, any restriction on the right to freedom of expression must (i) be provided by law, i.e., comply with the principle of legality; (ii) pursue a legitimate aim; and (iii) be necessary and proportional to that aim.²⁵⁵

The principle of legality (or “provided by law” requirement) requires any law that restricts an individual’s freedom of speech to be:

²⁵¹ Appeal Court Judgment (Incitement Charges), pp. 7, 9.

²⁵² Appeal Court Judgment (Incitement Charges), p. 8.

²⁵³ Appeal Court Judgment (Incitement Charges), p. 8.

²⁵⁴ ICCPR, art. 19(2) (“Everyone shall have the right to freedom of expression; this right shall include 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 of his choice”). The ICCPR is binding on Cambodia. See *supra* n.145. Parallel persuasive but non-binding legislation includes Article 10 of the ECHR, Article 13 of the Inter-American Convention on Human Rights, and Article 9 of the African Charter of Human and People’s Rights, among others.

²⁵⁵ UN Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, 12 September 2011.

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.²⁵⁶

The UN Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion has further clarified that “the restriction must be provided by laws that are precise, public and transparent; it must avoid providing authorities with unbounded discretion.”²⁵⁷ Further, per the WGAD and the HRC, any restriction by law “cannot confer, on those charged with its execution, unfettered discretion to restrict freedom of expression.”²⁵⁸

Article 19(3) of the ICCPR establishes that “legitimate aims” in the context of restrictions on speech are the protection of national security, public order, public health or morals, or the rights and reputations of others.²⁵⁹ In cases concerning national security, the HRC has found that the State must precisely identify the nature of the threat posed by the expression at issue. The HRC has also considered the overall climate of dissent when evaluating the legitimacy of the State’s aim.²⁶⁰ Per the HRC, it is the State’s burden to demonstrate that the restriction in question is necessary and proportionate to a particular aim.

The Rabat Plan of Action, which the HRC has referenced in several resolutions,²⁶¹ provides further guidance on necessity and proportionality, and in particular, on the interaction between States’ obligations to uphold the rights to freedom of expression and opinion under Article 19 of the ICCPR and the requirement to prohibit by law “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination” under Article 20 of the ICCPR. The Rabat Plan of Action notes that criminal sanctions for incitement should be “last resort measures to be applied only in strictly justifiable situations.” In particular, speech should only amount to a criminal offense if the

²⁵⁶ *Id.* para. 25.

²⁵⁷ UN General Assembly, Report of the Special Rapporteur on the promotion and protection of freedom of expression, U.N. Doc. A/74/486, 9 October 2019, para. 6(a).

²⁵⁸ UN Human Rights Council, Opinion No. 75/2021 concerning Ros Sokhet (Cambodia), U.N. Doc. A/HRC/WGAD/2021/75, 27 January 2022, para. 55. See also UN Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, 12 September 2011, para. 25.

²⁵⁹ ICCPR, art. 19(3); UN Human Rights Committee, Communication No. 574/1994: *Kim v. Republic of Korea*, U.N. Doc. CCPR/64/D/574/1994, 4 January 1999.

²⁶⁰ UN Human Rights Committee, Communication No. 574/1994: *Kim v. Republic of Korea*, U.N. Doc. CCPR/64/D/574/1994, 4 January 1999.

²⁶¹ See, e.g., UN Human Rights Council, Resolution adopted by the Human Rights Council on 31 March 2022, U.N. Doc. A/HRC/RES/49/5, 11 April 2022; UN Human Rights Council, Resolution adopted by the Human Rights Council on 24 March 2017, U.N. Doc. A/HRC/RES/34/22, 3 April 2017.

authorities can establish, among other things, that the speaker had the intent to incite hatred and that there was a reasonable probability of harm.²⁶²

The HRC has repeatedly stressed that Article 19 protects “political discourse [and] commentary on one’s own and on public affairs” and emphasized that “in circumstances of public debate concerning . . . public institutions, the value placed by the Covenant upon uninhibited expression is particularly high.”²⁶³ This includes the expression and distribution of opinions critical of or in opposition to the government on social media.²⁶⁴

Mr. Setha’s prosecution and conviction for the incitement charges, which were based entirely on his comments in the January 8 speech, fails to satisfy the HRC’s three-factor test and constituted a violation of his right to freedom of expression and opinion under Article 19(2) of the ICCPR.

First, the restriction on Mr. Setha’s speech was not “provided by law” because Articles 494 and 495 of the Cambodian Criminal Code—the provisions under which Mr. Setha was prosecuted and convicted—are impermissibly vague and overly broad. As such, and as they do not comply with the principle of legality, they cannot form the basis for a lawful restriction on Mr. Setha’s right to freedom of expression. In particular, the open-ended language of both provisions makes them susceptible to misuse; ripe for political discrimination; and allows Cambodian authorities to make convictions based on an individual’s online activity even without any reference to actual incitement, or based only on an individual’s insults to prominent political figures.²⁶⁵ In 2021, in response to a petition filed by the Clooney Foundation for Justice and Debevoise & Plimpton LLP on behalf of Cambodian journalist Ros Sokhet, the WGAD confirmed that “Articles 494 and 495 of the Criminal Code are incompatible with article 19 (3) of the [ICCPR] because they are impermissibly vague and overly broad.”²⁶⁶

²⁶² UN Human Rights Committee, Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility of violence, U.N. Doc. A/HRC/22/17/Add.4 (Appendix), 11 January 2013, paras. 29, 34.

²⁶³ UN Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, 12 September 2011, paras. 11, 38; see *also* UN Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3252/2018, U.N. Doc. CCPR/C/139/D/3252/2018, 14 February 2024, para. 8.2 (finding violations of Article 19(2) based on State limiting the speech of dissident figure who expressed views counter to those of the majority government).

²⁶⁴ UN Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, 12 September 2011, paras. 11, 38, 42.

²⁶⁵ See UN Human Rights Council, Opinion No. 75/2021 concerning Ros Sokhet (Cambodia), U.N. Doc. A/HRC/WGAD/2021/75, 27 January 2022, para. 22 (recalling the arguments made by Debevoise & Plimpton LLP and the Clooney Foundation for Justice, which WGAD implicitly endorsed with its finding that Articles 494 and 495 of the Cambodian Criminal Code violated the principle of legality).

²⁶⁶ UN Human Rights Council, Opinion No. 75/2021 concerning Ros Sokhet (Cambodia), U.N. Doc. A/HRC/WGAD/2021/75, 27 January 2022, para. 55.

Second, it does not appear that the authorities acted based on legitimate aims in prosecuting and convicting Mr. Setha for incitement. At trial, according to the monitoring, the Prosecution argued that Mr. Setha's statements were made to "bully the government and ruling party" and expressed "social discrimination against both the government and the neighboring country."²⁶⁷ Even if proven, neither of these appears to relate to any "legitimate aim" under Article 19. On appeal, the Prosecution argued that Mr. Setha's speech could have "incite[d] hatred of the CPP leadership and discrimination against Vietnamese, causing serious chaos to national security, if it had not been prevented in time" but did not provide even a tenuous link between Mr. Setha's comments and any purported national security concern nor is any such link apparent.²⁶⁸ Rather, Mr. Setha's comments fall squarely within the limits of protected political speech.

Moreover, Mr. Setha's prosecution took place within an overall context of targeting opposition leaders with incitement charges and what the HRC has termed a "pattern of silencing opposing voices, such as journalists and media outlets across Cambodia."²⁶⁹ This overall climate of suppressing political opposition casts further doubt on the legitimacy of the government's aims in prosecuting Mr. Setha.

Third, even if the authorities pursued legitimate aims, Mr. Setha's criminal prosecution and sentence were neither necessary nor proportionate—the "least restrictive means"—to achieving those aims. The ICCPR places a particularly high value on political speech given its fundamental importance to the protection of other civil and political rights. Given the total lack of evidence that Mr. Setha's speech was either intended to or likely to cause harm, criminally prosecuting and sentencing him to three years in prison for his political statements was neither necessary nor proportionate.

Moreover, *none* of the six factors the Rabat Plan identifies as necessary to justify criminal penalties for expression—context, identity of the speaker, intent, content and form, extent of the speech act, and likelihood of incitement (including imminence)—support prosecution in Mr. Setha's case.²⁷⁰ Mr. Setha delivered his speech criticizing the CPP as an opposition leader during an election year, to a peaceful crowd outside of the country. There was no evidence that Mr. Setha's intention in giving the speech was to incite others to any particular conduct; rather Mr. Setha confirmed that his intent was to educate listeners by providing historical context for the present-day political landscape in Cambodia. Moreover, the authorities failed entirely to identify *any* "degree of risk or harm," including a "reasonable probability that the speech would succeed in inciting actual action

²⁶⁷ Trial Monitor's Notes, 21 September 2023 (Incitement Charges), p. 4.

²⁶⁸ Appeal Court Judgment (Incitement Charges), p. 5.

²⁶⁹ UN Human Rights Council, Opinion No. 3/2019 concerning Uon Chhin and Yeang Sothearin (Cambodia), U.N. Doc. A/HRC/WGAD/2019/3, 29 May 2018, paras. 45–47.

²⁷⁰ UN Human Rights Committee, Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, U.N. Doc. A/HRC/22/17/Add.4 (Appendix), 11 January 2013, para. 29.

against the target group,”²⁷¹ let alone any risk or harm directly caused by Mr. Setha’s comments.

Mr. Setha’s sentence of three years is clearly disproportionate to any legitimate aim, particularly given the lack of evidence regarding his intent, the lack of any evidence of imminent risk or harm caused by his statements, and Mr. Setha’s age and poor health.

Because the State failed to meet all three elements of the HRC test justifying restrictions of speech under Article 19 of the ICCPR, the prosecution and sentencing of Mr. Setha for incitement violated his right to freedom of expression.

Right to Take Part in Public Affairs and Right to Freedom from Political Discrimination

Article 25 of the ICCPR offers broad protections for participation in public affairs, both directly and “through freely chosen representatives.”²⁷²

The HRC has noted that citizens take part in public affairs through freely chosen representatives and through public debate and discourse.²⁷³ Citizens have the right to participate in public affairs through holding legislative or executive office,²⁷⁴ and persons “who are otherwise eligible to stand for election should not be excluded . . . by reason of political affiliation.”²⁷⁵ Further, “to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential.”²⁷⁶

Article 26 of the ICCPR offers specific protections against discrimination for political affiliation and opinion, each identified as protected characteristics.²⁷⁷ Where the HRC has identified patterns of arrests of opposition party leaders based on questionable charges, these facts have informed the Committee’s findings that the State discriminated against the accused on the basis of their political affiliations in violation of Article 26.²⁷⁸

²⁷¹ *Id.* para. 29(f).

²⁷² ICCPR, art. 25.

²⁷³ UN Human Rights Committee, General Comment No. 25, U.N. Doc. CCPR/C/21/Rev.1/Add.7, 12 July 1996, paras. 6–8.

²⁷⁴ *Id.* para. 6.

²⁷⁵ *Id.* para. 15.

²⁷⁶ *Id.* para. 25.

²⁷⁷ ICCPR, art. 26 (“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as . . . political or other opinion[.]”).

²⁷⁸ UN Human Rights Committee, Views: Communication No. 1449/2006, U.N. Doc. CCPR/C/100/D/1449/2006, 3 November 2010, para. 8.8.

There is strong circumstantial evidence that Cambodia violated Mr. Setha's rights under Articles 25 and 26 of the ICCPR by pursuing politically motivated charges against Mr. Setha due to his opposition to the CPP.

First, the timing of Mr. Setha's detention on the forgery charges—which had lain dormant for three years at that point—suggest that the Prosecution revived them in retaliation for Mr. Setha's January 8, 2023 speech. In particular, the government issued two temporary detention orders against Mr. Setha only three days after his speech was posted to YouTube. Mr. Setha's detention also coincided with the campaign season for national elections,²⁷⁹ and he was ultimately detained “provisionally” through the July 2023 elections.²⁸⁰ The plaintiff in the forgery proceedings, Mr. Vanrin, also reportedly has close links to the Prime Minister's family.²⁸¹

Second, during the incitement proceedings against Mr. Setha, the Prosecution and the Court repeatedly focused on statements that they claimed criticized or sought to undermine the CPP as the basis for the prosecution.²⁸² For example, Judge Chhun Davy questioned Mr. Setha if he was “aware that your public speeches are influencing people to commit any violation against the government and discriminate against our neighbor nation?” In cross-examination, the Prosecutor asked Mr. Setha, “You have used your words and messages to attack the government and CPP, did you know that?”

Third, as discussed above, Mr. Setha was convicted despite a lack of evidence supporting elements of the charges, suggesting that he was prosecuted for ulterior political motives.

Taken together, the circumstances suggest that Mr. Setha was detained, prosecuted, and convicted due to his political opinion and to prevent him from speaking out against the CPP, in violation of his rights under Articles 25 and 26 of the ICCPR.

²⁷⁹ The Prosecutor issued a forwarding order of case investigation on the forgery charges in December 2020; for over three years, there were no public developments in the case. Only on January 16, 2023—three days after the publication of Mr. Setha's speech on YouTube, and six months prior to the national election—did the Prosecutor issue two detention orders against Mr. Setha. The incitement charges and additional orders of provisional detention pursuant to those proceedings followed in April 2023.

²⁸⁰ Council on Foreign Relations, “Cambodia's Elections: No Surprises, but an Uncertain Leadership Future,” 25 July 2023, <https://www.cfr.org/in-brief/cambodias-elections-no-surprises-uncertain-leadership-future>.

²⁸¹ Vod, “Candlelight Wants Foreign Pressure to Help Resolve Political Dispute,” 18 January 2023, <https://vodenglish.news/candlelight-wants-foreign-pressure-to-help-resolve-political-dispute/>.

²⁸² Trial Monitor's Notes, 21 September 2023 (Incitement Charges), pp. 2–3.

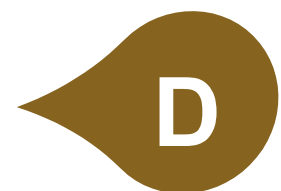
CONCLUSION AND GRADE



The Cambodian authorities' pursuit of parallel incitement and forgery charges against Mr. Seta reflects an aggressive and repetitive pattern of targeted prosecution of opposition leaders and others that speak out against the CPP. Taken together, the revival of the forgery charges shortly after Mr. Seta's expression of political dissent and in proximity to national elections, the Cambodian authorities' pursuit of incitement charges based on Mr. Seta's political speech, and the Cambodian courts' systematic violation of Mr. Seta's fair trial rights under international law indicate Mr. Seta was the victim of trumped-up political charges and predetermined findings of guilt. Cambodian authorities' pattern of using Articles 494 and 495 to jail political dissenters under the guise of incitement charges provides further support for these violations.

Cambodia should take several steps to ensure protection of the rights of accused persons against political disclination and their right to exercise political dissent. Articles 494 and 495 are inconsistent with international standards and should be reformed, as recommended by the WGAD. In the meantime, Cambodian authorities must carefully review all charges brought under these provisions to ensure that they not only satisfy the (minimal) requirements under Cambodian law but that they also accord with international standards on freedom of expression and freedom from political discrimination. Finally, as the last bulwark against the complete violation of accused persons' rights, judges in Cambodian Courts must take care to strictly enforce defendants' procedural rights, including and especially when facts hint at underlying prosecutorial motives of political discrimination.

GRADE:





A. 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,”¹ 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.

¹ ICCPR, art. 26.