

Shrinking space for free expression in Cambodia during Covid-19: Opportunistic repression or proportionate necessity?

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Abstract

In Covid-19, a vast number of countries have faced their biggest public health crisis in a century. For many such countries, the pandemic has emerged at a critical juncture following consecutive years of so-called democratic backsliding, where political space has narrowed and fundamental freedoms are under increasing threat. This trend is particularly observable within hybrid regimes under “Strongman” rule. A question posed by the Covid-19 crisis is the extent to which such regimes are taking advantage of the pandemic in order to hastily usher in new restrictions on human rights. Such leaders, it has been claimed, are actively capitalising on the crisis to further cement their rule, and to rapidly stock their arsenals with weapons of “lawfare” to more efficiently quash current or future dissent. A secondary, related question is the extent to which such accusations are being unfairly levelled against leaders of hybrid regimes for taking steps that liberal democracies are also taking without the same level of scrutiny from international observers. After all, the legitimate limitation by states of citizens’ exercise of their rights in times of exception is a norm firmly set out in international law. This article uses a case study of Cambodia, focusing on the impact of its Covid-19 response on the exercise of free expression. Applying the “three-part test,” it analyses whether Cambodia’s response falls within the permissible restrictions on freedom of expression during a time of normalcy (given Cambodia, at the time of writing, has not declared a state of emergency). It then also assesses whether Cambodia’s newly promulgated Emergency Law should be seen as a clear case of a hybrid regime exploiting Covid-19 to hasten restrictions on rights, or whether the criticism levelled against it is excessive, given the constitutional basis for such legislation and the critical nature of the Covid-19 pandemic.

Keywords: *Freedom of Expression, Shrinking Space, Cambodia, Emergency Laws*

I. INTRODUCTION: COVID-19 VERSUS ARTICLE 19

If we were to wake up in a world, post-pandemic, in which the rule of law is weaker, in which authoritarians are stronger, in which democracies are more fragile as a result of the exceptional expansion of emergency powers, we may

have beaten the health pandemic but we would be facing a crisis of law, a crisis of legitimacy, and a crisis of rights, the day after the pandemic ends.¹

2020 has seen a vast number of countries face their biggest public health crisis in a century. Covid-19, at the time of writing, has caused some 380,000 deaths, with over six million confirmed cases.² Scores of countries – rich and poor; large and small; democratic, authoritarian and in-between – have grappled with how best to contain, delay, research and mitigate the virus, with some proving more successful than others at flattening the curve.

At the same time, according to Freedom House, 2020 also follows 14 consecutive years in which global freedom has declined.³ Organisations such as CIVICUS have tracked increases in so-called “regressive forces” gaining ground in recent years, with such illiberal consolidation resulting in an “immense contestation for fundamental rights”.⁴ Indeed, according to CIVICUS, there are now serious restrictions on civic and political space on every continent.⁵ This shrinkage of space can be most clearly observed within what are here termed “hybrid regimes”,⁶ but which are also known as “electoral authoritarians”,⁷ “competitive authoritarians”,⁸ or “illiberal democracies”.⁹ These each refer to a growing category of states sitting somewhere along a spectrum between pluralist democracies and fully authoritarian states.

A question that the Covid-19 crisis poses is the extent to which leaders of such hybrid regimes – many of whom fit the profile of a “Strongman”, – are taking advantage of the pandemic for political gain and in order to hastily usher in new restrictions on rights and freedoms. Many such leaders have been accused of introducing sweeping emergency powers via legislation or policies containing

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- 1 Fionnuala Ní Aoláin, “COVID-19: States of Emergency and Government Powers in and After the Pandemic,” (Seminar, Columbia Law School Human Rights Institute, 31 March 2020), online: <<https://www.youtube.com/watch?v=wu-iL32uPA0&list=PL0xWoLxZcz8Re-9B-mpZfy aKZcFyPoFFi>>.
 - 2 Johns Hopkins University, “COVID-19 Map” (1 June 2020), online: *Johns Hopkins Coronavirus Resource Center* <<https://coronavirus.jhu.edu/map.html>>.
 - 3 Freedom House, “Freedom in the World 2020: A Leaderless Struggle for Democracy” (4 March 2020) 1, online (pdf): *Freedom House* <https://freedomhouse.org/sites/default/files/2020-02/FIW_2020_REPORT_BOOKLET_Final.pdf>.
 - 4 CIVICUS, ‘State of Civil Society Report 2019’ (March 2019) 6, online (pdf): <https://www.civicus.org/documents/reports-and-publications/SOCS/2019/state-of-civil-society-report-2019_executive-summary.pdf>.
 - 5 *Ibid.*
 - 6 Antoine Buyse, “Squeezing Civic Space: Restrictions on Civil Society Organizations and the Linkages with Human Rights” (2018) 22(8) *The International Journal of Human Rights* 977.
 - 7 Matthijs Bogaards, ‘How to classify hybrid regimes? Defective democracy and electoral authoritarianism’ (2009) 16(2) *Democratization* 399.
 - 8 Steven Levitsky & Lucan Way, “The Myth of Democratic Recession” (2015) 26(1) *Journal of Democracy* 45.
 - 9 Fareed Zakaria, “The Rise of Illiberal Democracy” (1997) 76 *Foreign Affairs* 22.

provisions that are disproportionate or even irrelevant to the current health crisis.¹⁰ Such leaders, it is claimed, are actively capitalising on the crisis to further cement their rule, and to rapidly stock their executive, legislative and judicial arsenals with weapons of “lawfare” to more efficiently quash current or indeed future dissent.¹¹ If true, this use of lawfare would present a surge in an already established trend of “autocratic legalism” that scholars such as Corrales¹² and Scheppele¹³ have argued is a core feature of authoritarian consolidation.

A secondary, related question is the extent to which those making these Covid-19 related accusations, among them local and international non-governmental organisations (NGOs) and institutions such as the UN Special Procedures, are unfairly or inappropriately rushing to judge leaders of hybrid regimes for taking steps that liberal democracies are also taking without the same level of scrutiny or outcry from international observers. After all, the legitimate limitation by states of citizens’ exercise of their rights in times of exception is a norm firmly set out in international law: The system of derogation from human rights treaties allows states to limit certain rights in certain circumstances, including health crises.¹⁴

This permissibility is by no means a blank cheque, and restrictions do apply, as does the general principle that the restoration of a state of normalcy must be the predominant objective of derogation.¹⁵ But to what extent, if any, are leaders of hybrid regimes – many already pariahs in the international sphere – being unfairly called out (as many claim they are) for carrying out what are in fact legitimate steps to protect their populace in this near-global public health emergency? Thus, two interrelated questions are explored throughout this article. Namely, whether hybrid regimes can be seen to be exploiting Covid-19 to hasten restrictions on rights, and whether criticism levelled at such leaders for introducing measures or laws is warranted given the critical nature of the Covid-19 pandemic.

In seeking to answer these questions, the article focuses on one Southeast Asian hybrid regime, that of Cambodia – a country that at the time of writing appears to have avoided a widespread outbreak of Covid-19.¹⁶ It also focuses on one right protected by the International Covenant on Civil and Political Rights (ICCPR), that

10 Tony La Viña, “The False Premise and Promise of Emergency Powers” *Rappler* (23 March 2020), online: <<https://www.rappler.com/thought-leaders/255541-opinion-false-premise-promise-emergency-powers-coronavirus>>.

11 Evan Gerstmann, “How The COVID-19 Crisis Is Threatening Freedom and Democracy Across the Globe” *Forbes*, (12 April 2020), online: <<https://www.forbes.com/sites/evangerstmann/2020/04/12/how-the-covid-19-crisis-is-threatening-freedom-and-democracy-across-the-globe/#4f44a6f24f16>>.

12 Javier Corrales, “The Authoritarian Resurgence: Autocratic Legalism in Venezuela” (2015) 26(2) *Journal of Democracy* 37.

13 Kim Lane Scheppele, “Autocratic legalism” (2018) 85(2) *The University of Chicago Law Review* 545.

14 UN Human Rights Committee (UNHRC), *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, (31 August 2001), CCPR/C/21/Rev.1/Add.11.

15 *Ibid* at para 1.

16 According to Johns Hopkins, *supra* note 2, as at June 4 2020 Cambodia had 126 confirmed Covid-19 cases and zero deaths.

of freedom of expression. Freedom of expression was deliberately chosen as a focus, as, unlike others such as freedom of movement, it is a right that many argue should not require, (and therefore should not be subject to) additional restriction during a public health crisis.¹⁷

Political space in Cambodia has been widely observed to have narrowed in recent years.¹⁸ Under its long-term leader Hun Sen, the ruling Cambodia People's Party (CPP) has been criticised for human rights abuses against human rights defenders (HRDs) and political opponents, for the alleged manipulation of electoral results, and a trend of apparent democratic backsliding culminating in – but also extending beyond – the dissolution of the main opposition party, the Cambodia National Rescue Party (CNRP) in late 2017.¹⁹ Cambodia's relationship with China has also been in the spotlight in recent years, as the country pivots away from Western powers who have demanded political reform in return for continued political and economic support.²⁰ With Covid-19 having entered this frame in January 2020, Cambodia provides an interesting case study of a hybrid regime where the pandemic has apparently aided the ruling party in accelerating and further cementing democratic decline. The international backlash to Cambodia's Covid-19 response is also worthy of scrutiny and analysis.

This article will provide a rights-based analysis of the Cambodian government's response to the Covid-19 crisis, with a focus on freedom of expression. It will begin with a brief review of the literature, serving to situate the analysis within a country where space for civil society, HRDs and the populace broadly was already markedly on the decline pre-pandemic. It will also provide a legal snapshot of permissible limitations on freedom of expression during both states of normalcy and exception, before moving into an analysis of Cambodia's response to the pandemic, including its recently promulgated but as yet dormant Law on the Management of the Nation in State of Emergency (hereafter the "Emergency Law"). Finally, the article will analyse the international and local criticism levelled at these measures in order to determine whether such outcry is warranted – especially given the apparent success of the Cambodian government in "flattening the curve" and avoiding a widespread outbreak thus far.

II. METHODOLOGY

Due to the present sensitivities in providing public comment on the Cambodian Covid-19 response, this article relies on comments that are already in the public domain. A literature review was conducted of academic literature on shrinking space

17 Amnesty International, "Cambodia: Proposed emergency powers would obliterate human rights" (2 April 2020), online: *Amnesty International* <<https://www.amnesty.org/en/latest/news/2020/04/cambodia-proposed-emergency-power-obliterate-human-rights/>>

18 Lee Morgenbesser, "Cambodia's Transition to Hegemonic Authoritarianism" (2019) 30(1) *Journal of Democracy* 158.

19 *Ibid.*

20 Patrick Schröder & Sokphea Young, "The Implications of Closing Civic Space for Sustainable Development in Cambodia" (2019) 16, online (pdf): *Institute for Development Studies* <<https://opendocs.ids.ac.uk/opendocs/handle/20.500.12413/14510>>

within hybrid regimes generally and within Cambodia specifically, building on ongoing research on the same subject for the author's doctoral thesis. A wide array of grey literature, including press statements, fact sheets, policy briefs and other materials from international and local civil society actors were also collected and reviewed. Thirdly, comparative legal research was conducted, analysing relevant international conventions and their associated interpretative General Comments, alongside Cambodia's relevant domestic legislation (primarily the Constitution, Criminal Code and the publicly available draft of the new Emergency Law). Finally, textual analysis was conducted of every article mentioning the Covid-19 crisis in the government-friendly English-language news publication *The Khmer Times* between January and May 2020, to aid in the analysis of the types of frames the ruling CPP has invoked in seeking to legitimise its response to Covid-19.

III. CAMBODIA PRE-COVID: ON A “DESCENT INTO DICTATORSHIP”

Many, including Mooney & Baydas,²¹ Ong,²² and Gemzell²³ have written on the alarming increase in restrictions of freedom of expression in Cambodia in recent years. This trend is part of a wider crackdown on fundamental freedoms in the country, which include the blacklisting and targeting of certain organisations and unions, the judicial harassment and shuttering of independent media outlets, the imprisonment of opposition party members and HRDs on spurious, politically motivated charges, and threats of violence against government critics.²⁴ A web of overlapping legal instruments has been woven into the Civil and Criminal Codes, deliberately vague in language and arbitrary in implementation, instilling a “chilling effect” on those who fear crossing a line that they cannot readily make out.²⁵

For instance, Criminal Code provisions considered to place unjustified restrictions on free expression remain in place despite ongoing criticism from human rights groups and during Universal Periodic Review processes.²⁶ With internet coverage and penetration significantly expanding in the country in the past several years, government surveillance and criminalisation of expression has also forayed into

21 Lauren Mooney & Lana Baydas, “Cambodian Civil Society at a Critical Juncture” (June 2018) online (pdf): *Center for Strategic and International Studies* <<https://www.csis.org/analysis/cambodian-civil-society-critical-juncture>>.

22 Elvin Ong, “Online Repression and Self-Censorship: Evidence from Southeast Asia” *Government and Opposition* (2019).

23 Martin Gemzell, “Cambodia: Shrinking Spaces Versus Empowerment of Communities” (2017) online (pdf): *Stiftung Asienhaus* <https://www.asienhaus.de/archiv/asienhaus/user_upload/2017_Cambodia_Shrinking_spaces_versus_empowerment_of_communities_01.pdf>

24 Morgenbesser, *supra* note 18.

25 Melissa Curley, “Governing Civil Society in Cambodia: Implications of the NGO Law for the “Rule of Law”” (2018) 42(2) *Asian Studies Review* 248.

26 ARTICLE 19 & PEN America, “Joint submission to the Universal Periodic Review of Cambodia” (12 July 2018), online (pdf): *ARTICLE 19 & PEN America* <<https://www.article19.org/wp-content/uploads/2018/08/2018.07.12-A19-PEN-America-Joint-UPR-Cambodia-as-submitted-1.pdf>>

the digital sphere with increasing numbers of criminal proceedings against individuals for comments made or content shared online.²⁷ Increasing numbers of social media users have found themselves facing defamation, public insult, incitement or *lèse majesté* charges for political comments made publicly or privately online.²⁸

The application of the criminal law in this way has been described by human rights organisations as demonstrating a routine application of certain provisions in an abusive and arbitrary fashion to silence HRDs and obstruct their work.²⁹ Exacerbating the well-documented “chilling effect”³⁰ of these arrests on the exercise of free expression in Cambodia, Hun Sen himself warned outright during a public speech that the government was capable of locating the whereabouts of Facebook users within minutes: “Please, police and intelligence [officers], reveal all the technology we have to catch Facebook posters ... It doesn’t take much time, only six minutes ... No need to send police from Phnom Penh [to you]. We have the force there.”³¹

In addition to targeting individual citizens for voicing criticism of the government, a drastic rollback of press freedom has resulted in almost no remaining independent media in the country. The *Cambodia Daily* newspaper, shuttered in October 2017 following government accusations of tax evasion, printed its final front page with the headline: “Descent into Outright Dictatorship,” coupled with images of the arrest of opposition leader Kem Sokha at his home in the early hours of that morning.³² The *Phnom Penh Post*, the remaining independent English language daily newspaper, was sold less than a year later into the hands of investors with alleged ties to the ruling party.³³ Dozens of radio stations and online publications were also shuttered in late 2017, and arrests, surveillance and threats against journalists have remained part of the “new normal” media landscape since that time.³⁴

Diplomatic relations between Cambodia and the West frayed to varying extents over this period as a result of Cambodia’s increasingly poor human rights performance – the most significant consequence of which has been the partial

27 Ong, *supra* note 22.

28 Freedom House, “Freedom on the Net 2018 - Cambodia,” (1 November 2018), online: *Freedom House* <<https://www.refworld.org/docid/5be16b22c.html>>

29 ARTICLE 19 & PEN America, *supra* note 26.

30 Adam Bemma, “I used to talk about politics on Facebook, but now it's scary” *Al Jazeera* (23 August 2018), online: <<https://www.aljazeera.com/indepth/features/talk-politics-facebook-scary-180822210835357.html>>.

31 George Wright & George Styllis, “Facebook now ‘crucial’ news source in run-up to Cambodia election” *Nikkei Asian Review* (12 July 2018), online: <<https://asia.nikkei.com/Spotlight/Hun-Sen-s-Cambodia/Facebook-now-crucial-news-source-in-run-up-to-Cambodia-election>>.

32 Matthew Tostevin & Prak Chan Thul, “Cambodian paper shuts with dictatorship parting shot” *Reuters* (3 September 2017), online: <<https://www.reuters.com/article/us-cambodia-media/cambodian-paper-shuts-with-dictatorship-parting-shot-idUSKCN1BE11H>>

33 Julia Wallace & Mike Ives, “A Newspaper Is Sold, and Cambodians Fear the End of Press Freedom” *The New York Times* (7 May 2018), online: <<https://www.nytimes.com/2018/05/07/world/asia/cambodia-phnom-penh-post-sale.html>>

34 Cambodian Centre for Human Rights, “Press Freedom in Cambodia in 2017-2018” (May 2018), online (pdf): *CCHR*, <https://cchrcambodia.org/index_old.php?url=media/media.php&p=newsletter_detail.php&nsid=71&id=5>

withdrawal in early 2020 of the European Union’s Everything But Arms (EBA) preferential trade agreement, which many observers predict will devastate Cambodia’s all-important garment sector.³⁵ One country seemingly without the same qualms about the end of multiparty democracy or observable increase in crackdowns against dissidents, is China. Indeed, the CPP has shown clear signs in recent years of pivoting firmly towards China as its key international ally and benefactor.³⁶

It is within this context, of shrinking space for independent critical voices, and a hard pivot towards China, that the Covid-19 pandemic emerged in early 2020. Before analysing the Cambodian response to the crisis and the subsequent impact on freedom of expression, it is worth setting out what this right entails, and within which parameters countries can legitimately limit the exercise of their citizens’ rights during times of both normalcy and exception.

IV. LEGAL SNAPSHOT

It is important to acknowledge that while “freedom of expression is a fundamental right... it is not an absolute right. It may be restricted legitimately.”³⁷ This section will briefly set out what measures countries can legitimately take to restrict their citizens’ exercise of freedom of expression at different times. It begins by setting out those restrictions that are permitted during times of “normalcy,” and those that may be taken in emergencies, or times of “exception.”

1. Legitimate Limitations on Freedom of Expression at the Best of Times

Freedom of expression, along with its counterpart, freedom to information,³⁸ is set out within Article 19 of ICCPR. In Cambodia, the legal requirements set out within the Covenant are given constitutional status and are therefore directly applicable in domestic law. Unlike the Universal Declaration of Human Rights, the ICCPR expressly allows for the restriction of the right to freedom of expression at any time. However, as NGO Media Legal Defence Initiative clarifies: “The process of limiting freedom of expression... is not a blank cheque for dictators. It is not sufficient for a government simply to invoke ‘national security’... and then violate human rights. There is a well-established process for determining whether the right to freedom of expression may be limited.”³⁹

35 Danielle Keeton-Olsen, “Cambodia’s Struggling Garment Workers to Feel the Pinch as Europe Cuts EBA Trade Benefits” *South China Morning Post* (13 February 2020), online: <<https://www.scmp.com/week-asia/economics/article/3050340/cambodias-struggling-garment-workers-feel-pinch-europe-cuts-eba>>.

36 Aurel Croissant, “Cambodia in 2018: Requiem for Multiparty Politics” (2019) 59(1) *Asian Survey* 174.

37 Ní Aoláin, *supra* note 1.

38 Freedom of information and freedom of opinion are not discussed in this article due to the limited wordcount.

39 Richard Carver, “Training Manual on International and Comparative Media and Freedom of Expression Law” (2018) 11, online (pdf): *Media Legal Defence Initiative*

This well-established process is often referred to as the “three-part test,” and is laid out within the text of Article 19 itself and elaborated within relevant General Comments.

1. Firstly, the restrictions must be set in law, and thus formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly. This law must be made accessible to the public. Such a law may not confer “unfettered discretion,” on those charged with its execution, and cannot be overbroad or vague.⁴⁰
2. Secondly, restrictions on freedom of expression must be necessary, and serve a legitimate purpose. Such restrictions must conform to the principle of proportionality: Restrictive measures, as interpreted by the Human Rights Council, must “be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected...”⁴¹ This core principle of proportionality must be respected not only in the law that frames the restrictions but also by any administrative and judicial authorities in applying the law.⁴²
3. Lastly, any restrictions must be limited to very specific grounds, namely: National security and public order; the rights and reputation of others; public health, and public morals.⁴³

The above three-part test, along with the principle of non-discrimination laid out within the Covenant, forms the fundamental framework upon which restrictions to freedom of expression is based. Additionally, it is important to note that the value placed by the Covenant upon uninhibited expression is particularly high where it involves political speech concerning public figures and institutions.⁴⁴ Further, despite the permissibility of these restrictions in times of normalcy, it is crucial that “when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself.”⁴⁵ This means that restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.

2. Legitimate Limitations on Freedom of Expression at the Worst of Times

The previous section showed that the exercise of one’s right to freedom of expression can be legitimately limited by the state, for a number of reasons, at any given time. so

<<https://10years.mediadefence.org/wp/wp-content/uploads/2018/11/Legal-resources-1-Freedom-of-Expression-2.pdf>>.

40 UN Human Rights Committee (UNHRC), *CCPR General comment No. 34: Article 19, Freedoms of opinion and expression*, (12 September 2011), CCPR/C/GC/34 at para 25.

41 *Ibid* at para 34.

42 *Ibid*.

43 *Ibid* at para 22.

44 *Ibid* at para 38.

45 *Ibid* at para 31.

what changes then, during an emergency or “time of exception?” In theory, the answer is: Very little. The relevant parameters are set out in Art 4 of the ICCPR and stipulate that in a time of public emergency, States Parties may take measures derogating from their obligations under the Convention “to the extent strictly required by the exigencies of the situation,” provided such measures are not inconsistent with their other obligations under international law and are non-discriminatory.⁴⁶

Certain articles within the Covenant, such as the right to life (Article 6) or prohibitions on slavery (Article 8) cannot be derogated from under any circumstances. Because of its omission from the list of non-derogable rights, derogation from Article 19 is *theoretically* permitted during a legally proclaimed public emergency. However, limitations on any such derogations are laid out within Article 4 and again expanded upon within a number of General Comments. The limitations – as they relate to free expression – are largely identical to those permissible restrictions applicable during a time of normalcy that are set out in Article 19 of the Convention and were explored in the previous section, albeit in a different order and applying slightly different phrasing.

Firstly, any and all measures taken by a state must be directly in response to the emergency at hand and must be strictly necessary to respond to that particular situation. Secondly, any measures introducing restraints on rights or behaviours of the public must be based in law and they must be knowable, via means of public proclamation. Thirdly, again, any measures must be proportionate. Speaking directly to the Covid-19 crisis, Special Rapporteur for Counter-Terrorism and Human Rights Fionnuala Ní Aoláin put it that: If states are going to take measures to restrict human rights in the context of a [health] emergency, there has to be a meaningful relationship between the restriction that’s taken and the focus of the health emergency. It cannot be measures that are simply a wish list of the kinds of powers that a state would like to have, occasioned or facilitated by a particular crisis.⁴⁷ The fourth and final restriction is that any measures taken must be non-discriminatory. They cannot affect or be targeted at particular groups, minorities or vulnerable groups, specifically because of their status. Finally, and unlike during a time of normalcy, States Parties must immediately notify the UN Secretary General of the provisions from which it has derogated and the reasons by which derogation was actuated.

V. DISCUSSION: ENDEARMENT ABROAD, REPRESSION AT HOME IN THE TIME OF CORONAVIRUS

Having set out the legal parameters within which States such as Cambodia that are party to the ICCPR may restrict freedom of expression in regular circumstances, and those that may be taken during times of emergency, this article turns now to a practical examination of the course of action taken by the Cambodian government since the outbreak of the pandemic in Wuhan, China. It will analyse the response to the Covid-

46 UNHRC, *supra* note 14 at para 4.

47 Ní Aoláin, *supra* note 1.

19 pandemic thus far, both outside and within the Emergency Law, specifically in relation to conformance with human rights norms that uphold the exercise of freedom of expression.

In order to assess the legitimacy of the legal response to the Covid-19 pandemic, and the introduction of the Emergency Law in particular, it is important to examine not only the letter of the law, but the enveloping political context. Such an approach is in line with Schiff's classic socio-legal approach, whereby the analysis of law is "directly linked to the analysis of the social situation to which the law applies, and should be put into the perspective of that situation by seeing the part the law plays in the creation, maintenance and/or change of the situation."⁴⁸

Given its critical and constructivist perspective, a socio-legal approach is conceptually distinguished from more positivistic approaches.⁴⁹ Therefore, we must look critically to the enveloping context in the immediate lead-up to the drafting and passing of the law in order to properly consider and analyse its content and purpose. This context was one of increasing violations of Article 19, and the use of frames to justify and legitimate repression.

1. Travel to China in the Midst of a Pandemic

Thursday, January 30. The expected announcement of the European Union's partial withdrawal from the crucial Everything But Arms (EBA) preferential trade scheme looms. Likewise, concern about the spread of a new virus in Wuhan, China, is growing by the day. Hun Sen tells a crowded press gathering that anyone wearing a facemask would be removed. Such measures, he asserted, were creating an unwarranted climate of fear. "The prime minister doesn't wear a mask, so why do you?"⁵⁰

Cambodia at that time had just one confirmed case, involving a Chinese national in the port city of Sihanoukville, which has been remade in recent years by an influx of tens of thousands of Chinese workers. The Chinese government was putting pressure on countries not to ban its travellers, calling an entry ban enacted by the United States "not in keeping with the facts" and not "in keeping with friendship."⁵¹

Hun Sen announced that flights from China would not be banned "because doing so would kill our economy and destroy ties with China," nor would he organise an effort to evacuate Cambodians from Wuhan, because "we are keeping them there

48 David N. Schiff, "Socio-legal theory: Social structure and law" (1976) 39(3) *The Modern Law Review* 287.

49 *Ibid.*

50 Hannah Beech, "Quieter Response to Coronavirus in Countries Where China Holds Sway" *New York Times* (2 February 2020), online: <<https://www.nytimes.com/2020/02/02/world/asia/china-coronavirus-philippines-thailand.html>>.

51 *Ibid.*

to share [China's] happiness and pain, and to help them solve this situation.”⁵² Beijing-controlled Xinhua News lauded this approach, saying it demonstrated “important support for China.” His stance was also praised by President Xi Jinping as he welcomed Hun Sen to Beijing on February 5.⁵³

This dramatic political statement, of physically travelling to China in the midst of a contagious virus outbreak and large-scale public health crisis, was reportedly “to showcase Cambodia’s support to China in fighting the outbreak of the epidemic.”⁵⁴ To many observers in Cambodia, it appeared that Hun Sen was trying to prove a point by firmly “doubling down,” following criticism that he was not taking the virus outbreak seriously enough.⁵⁵ This culminated in his bizarre public announcement that he intended to travel on to Wuhan, to visit Cambodian students quarantined there. These plans (if they were ever genuine) were thwarted when China denied the request, with a Foreign Ministry spokesperson stating “Considering the fact that Wuhan is doing all it can to fight the outbreak, and given the tight schedule, a visit to Wuhan at this moment cannot be properly arranged.”⁵⁶

2. Rolling out the Red Carpet for the *Westerdam*

Another example of “doubling down” in the Prime Minister’s downplaying of the pandemic in its early months can be found in the episode involving the *Westerdam* cruise ship. The *Westerdam* had been stranded at sea for several weeks and was turned away by five countries before Cambodia offered to let them dock in Sihanoukville.⁵⁷ On February 14th, Hun Sen personally greeted disembarking passengers, handing out roses and traditional *krama* scarves. Just 20 of the more than 2,500 passengers on board had been tested, and many were transported to Phnom Penh for a guided tour of the city’s sights before traveling on to their destination countries.⁵⁸

Whatever the true motivation for the *Westerdam* incident, which made international news coverage, the act served Hun Sen in a number of ways. Firstly, it

52 Richard S Ehrlich, “In Sickness and Health, Cambodia Kowtows to China” *Asia Times*, (13 February 2020) online: <<https://asiatimes.com/2020/02/in-sickness-and-health-cambodia-kowtows-to-china/>>.

53 *Ibid.*

54 *Ibid.*

55 Kate Ng, “Coronavirus: Cambodia Refuses to Evacuate Citizens from China as ‘We Need to Share Their Happiness and Pain’” *The Independent* (1 February 2020), online: <https://www.independent.co.uk/news/world/asia/coronavirus-cambodia-china-evacuation-hun-sen-a9312616.html>>.

56 Shannon Tiezzi, “China and Cambodia: Love in the Time of Coronavirus” *The Diplomat* (6 February 2020), online: <<https://thediplomat.com/2020/02/china-and-cambodia-love-in-the-time-of-coronavirus/>>.

57 Shaun Turton, “Cambodia Sticks by China as it Shuts out West over Coronavirus” *Nikkei Asian Review* (March 6 2020), online: <<https://asia.nikkei.com/Spotlight/Coronavirus/Cambodia-sticks-by-China-as-it-shuts-out-West-over-coronavirus>>.

58 Hannah Beech, “Cambodia’s Coronavirus Complacency May Exact a Global Toll” *The New York Times* (17 February 2020), online: <<https://www.nytimes.com/2020/02/17/world/asia/coronavirus-westerdam-cambodia-hun-sen.html>>.

again helped to downplay the seriousness of the virus, a tactic for which the government had already been rewarded via praise from China. Secondly, it helped domestically to distract from the news of the partial withdrawal of the EBA – an announcement which had garnered significant negative press despite the state’s now tight control over the media. In this sense, the *Westerdam* may be seen as a “dead cat” in the form of a cruise ship. Thirdly, it bolstered his image as a Strongman: A renegade, physically strong and steadfast in the face of a disease, and so on. Finally, it apparently succeeded in helping to mend frayed relations with the US Embassy in Cambodia by framing the incident as a humanitarian act (which, *prima facie*, it was). The new US Ambassador gave high praise for the act, personally joining the disembarkation of passengers in Sihanoukville.

The Cambodian government has ultimately deemed the *Westerdam* incident to have been such a success that in late May local media reported that Hun Sen’s “actions in the face of the Covid-19 pandemic will soon be memorialised in a book” entitled “*Hun Sen: The dashing hero who went against the current to fight Covid-19*.”⁵⁹

3. Meanwhile: Domestic Repression

While the mid-pandemic trip to China and personally greeting potentially infected cruise ship passengers were acts eccentric enough to garner international news coverage, a darker side to the government’s response was running in parallel in the domestic sphere. The first Covid-related arrest came on January 28, when police arrested two staff members of a tourist company in Siem Reap who had shared information on the virus on Facebook. According to Human Rights Watch (HRW), the authorities released them later the same day after they signed a pledge not to spread so-called “fake news” about the virus in the future.⁶⁰ Over the next two months, HRW recorded the similar arrests of a dozen more Facebook users, some of whom were forced to issue public apologies in addition to signing and thumb printing pledges in order to be released.⁶¹ One of these cases involved a 14-year-old girl who had expressed concern that fellow students at her language school had contracted the virus. Several were detained overnight or for several days prior to their release.

In addition to those caught and released without charge, two more Facebook users were arrested and charged with offences after they posted criticism of the government’s Covid-19 response. Both persons (one of whom was a former CNRP councillor) were charged under the Criminal Code with incitement to commit a felony,⁶² while one was also charged with plotting.⁶³ Despite both men being released

59 Sochan Ry, “New Book Will Detail PM Hun Sen’s Covid-19 Crusade” *The Phnom Penh Post* (25 May 2020), online: <<https://bit.ly/30eyuFL>>.

60 Human Rights Watch, “List of arrests and persons in detention for COVID-19 related offenses” (2020), online: *Human Rights Watch* <<https://www.hrw.org/video-photos/interactive/2020/03/23/list-arrests-and-persons-detention-covid-19-related-offenses>>.

61 *Ibid.*

62 *Cambodian Criminal Code*, Art. 495.

63 *Ibid.*, Art. 453.

on bail, HRW report that the charges against them are still pending and they will need to report each month to the police.⁶⁴

Finally, and of greatest concern, a further 14 persons have been arrested, charged and are currently imprisoned for making statements regarding the Covid-19 pandemic. A majority of these are affiliated with the dissolved CNRP. One case highlighting the simultaneously arbitrary and targeted nature of these arrests is that of Thai Sokunthea. A teacher, former CNRP activist, and member of the Cambodian Independent Teachers Association (CITA), Thai was arrested after announcing via social media that he was running extra classes online.

The day prior to the arrest, Hun Sen said publicly that a teacher and former CITA member had announced the opening of extra classes on social media. When questioned by reporters what offence Thai had committed, an education ministry spokesperson referred them to an announcement (seemingly made *after* the arrest) that said “Teaching extra classes is banned in the period of fighting against Covid-19 infections. The ministry will take action against offenders.”⁶⁵

Thai, who remains in pre-trial detention in Prey Sar prison, has reportedly since been charged with treason, causing social instability and inciting the military to refuse to obey the orders of their commanders, implying that additional (as yet unknown) offences are alleged. Nonetheless, the timing of his arrest, which immediately followed his announcement about online classes on social media, combined with both Hun Sen’s reference to this activity and the ministry referral to the statement about “action against offenders” caught conducting extra classes, together imply that Covid-19 response measures were directly used to arrest Thai following his exercise of free expression online.

A second case worthy of highlighting is that of former CNRP councillor Yim Sareth, who HRW report posted on Facebook in mid-March that he wears a mask to protect himself from dirt and cement dust, but his real fear is the coronavirus.⁶⁶ Upon his arrest, the authorities alleged he spread “fake news” about Covid-19 on his Facebook page. The Phnom Penh Municipal Court then charged him with plotting and incitement to commit a felony under the Criminal Code, and placed him in pre-trial detention at Prey Sar correctional facility. HRW drew comparisons between the charges laid against Sareth with the cases of Thai and other former CNRP members and activists, calling them “fabricated and politically motivated charges... reactivated against him as part of a wider crackdown against the opposition.”⁶⁷

As well as those who can be classed as CNRP-affiliated, journalists and media outlets have also been targeted through direct threats from the Prime Minister and, in the following case, arbitrary arrest and detention. On April 7, Phnom Penh police

64 *Ibid.*

65 Niem Chheng, “Former CNRP Activist Nabbed for Offering Online English classes” *The Phnom Penh Post* (27 March 2020), online: <<https://www.phnompenhpost.com/national-politics/former-cnrp-activist-nabbed-offering-online-english-classes>>.

66 Human Rights Watch *supra* note 60.

67 *Ibid.*

arrested Sovann Rithy, a journalist and director of online TVFB news site, based on allegations that he was inciting chaos by *quoting* words from a recent Hun Sen speech. Specifically, Rithy quoted the following statement: “If motorbike-taxi drivers go bankrupt, sell your motorbikes for spending money. The government does not have the ability to help.”⁶⁸

On April 8, the National Police spokesperson announced that Hun Sen was only joking and that the quote was not supposed to be taken seriously. The following day, Rithy was charged with incitement to commit a felony, and he remains in pre-trial detention.⁶⁹ This is despite Article 4 in the press law explicitly stating that “the publication of official information may not be penalised if such publication is fully true or an accurate summary of the truth.”⁷⁰ On April 8, the Ministry of Information revoked TVFB's broadcasting license on the grounds that Rithy had broadcasted information “which was to generate an adverse effect on the security, public order and safety of society.”⁷¹ (HRW, 2020). Rithy received the 2020 Deutsche Welle Freedom of Speech Award from prison in early May.⁷²

4. The Three-Part Test Results

Each of these arrests, *prima facie*, constitute violations of the right to freedom of expression, as well as the right to liberty and security of the person: Three-part test aside, any permissible restrictions upon the right to exercise freedom of expression ultimately cannot put in jeopardy the right itself. The threats and arrests of those criticising or even quoting the prime minister, as well as public statements indicating the state is surveilling the public in response to Covid-19, and threatening declarations such as this from Hun Sen on March 9: “Don’t ever think that we don’t know what you’re doing!” clearly place all Cambodians’ right to freely express their opinions in serious jeopardy.⁷³

With regard to the three-part test, it is here argued that because of the above outlined judicial harassment of opposition activists and other critics, Cambodia’s response to the Covid-19 pandemic fails on all three counts, as will now be briefly set out.

68 Sirivadh Hun, “News Site Blocked, Journalist Jailed After Quoting Hun Sen” *Voice of Democracy* (9 April 2020), online: <<https://vodenglish.news/news-site-blocked-journalist-jailed-after-quoting-hun-sen/>>.

69 Vantha Phoung, “TVFB Owner Sovann Rithy Arrested over Facebook Post” *Cambodianess* (8 April 2020), online: <<https://cambodianess.com/article/tvfb-owner-sovann-rithy-arrested-over-facebook-post>>.

70 *Cambodian Law on the Press* (1995) online: <[http://sithi.org/admin/upload/law/Law%20on%20the%20Press%20\(1995\).ENG.pdf](http://sithi.org/admin/upload/law/Law%20on%20the%20Press%20(1995).ENG.pdf)>.

71 Human Rights Watch, *supra* note 60.

72 Vantha Phoung, “Sovann Rithy Obtains an International Freedom of Speech Award for his COVID-19 Coverage” *Cambodianess* (7 May 2020), online: <<https://cambodianess.com/article/sovann-rithy-obtains-an-international-freedom-of-speech-award-for-his-covid-19-coverage>>

73 David Hutt, “Hun Sen Blusters and Blunders Through Virus Crisis” *Asia Times* (17 March 2020), online: <<https://asiatimes.com/2020/03/hun-sen-blusters-and-blunders-through-virus-crisis/>>

1. Firstly, we look to part one of the test, which we recall sets out that the restrictions must be set in law. In order to be characterised as a “law”, a norm must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly, and must be made accessible to the public.⁷⁴ Those 12 persons who were arrested but not charged, were not even told what offence they were alleged to have committed under the law beyond “spreading fake news,” a term which presently has no legal character in Cambodia. This in itself demonstrates a failure to meet this part of the test.

For those 16 persons who have been charged, including for such offences as plotting and incitement, we should consider the following: Laws restricting freedom of expression may not confer “unfettered discretion,” on those charged with its execution, and cannot be overbroad or vague. In accordance with the principle of legality, they must “provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.”⁷⁵ Under the Criminal Code, incitement is vaguely defined in Article 494 and 495 as directly inciting the commission of a felony offence or an act that “disturbs social security” through public speech, writings or drawings, or audio-visual telecommunication that are shared with, exposed to, or intended for the public.⁷⁶ Similarly, plotting is defined as consisting of a resolution agreed upon by two or more persons to commit an attack where the resolution was put into effect by one or more material actions.⁷⁷

It is here argued that it is unlikely that a person of reasonable intelligence, upon reading these provisions, would necessarily be able to ascertain the sorts of expression that are restricted under them in order to avoid falling foul of them in the current Cambodian political context. Specifically, such a person would likely not even be able to draw a clear connection between these provisions and such actions as announcing online classes, quoting the Prime Minister, or posting that they were afraid of Covid. The defendants, therefore, cannot be seen as having had the ability to regulate their conduct accordingly. These arrests and detention, therefore, fail the first part of the three-part test.

2. Secondly, there are the questions of necessity and proportionality. General comment No. 34 stipulates that restrictions on freedom of expression must be “necessary” for a legitimate purpose. Indeed, restrictions violate the test of necessity if the protection could be achieved in other ways that do not restrict freedom of expression.⁷⁸ They must also conform to the principle of proportionality, in that they “must be the least intrusive instrument amongst those which might achieve their protective function... The principle of proportionality has to be respected not only in the law that frames the restrictions

74 UNHRC, *supra* note 40 at para 24, 25.

75 *Ibid* at para 25.

76 *Cambodian Criminal Code* (2010) at Art. 494, 495, online: <http://sithi.org/admin/upload/law/Criminal_Code_Book_with_cover_Jan_2014.pdf>.

77 *Ibid*, at Art. 453.

78 UNHRC, *supra* note 40 at para 33.

but also by the administrative and judicial authorities in applying the law”.⁷⁹//It is true that the Covid-19 pandemic presented, and still presents, a significant risk to public health in Cambodia. Combating misinformation is an important part of public health campaigns in every country, and can be achieved through the provision of up-to-date, authoritative information, and requests to the public not to share unverified rumours or “cures.” What cannot be made out is that the arrest and detention of those posting on Facebook – whether critical of the government’s response, or even making incorrect or false claims about the spread of the virus – is necessary in order to maintain public health.

For this reason, the government’s response arguably fails the second part of the three-part test. Indeed, General Comment 34 expressly states:

Paragraph 3 [of Article 19, which allows for certain restrictions] may never be invoked as a justification for the muzzling of any advocacy of... democratic tenets and human rights. Nor, under any circumstance, can an attack on a person, because of the exercise of his or her freedom of opinion or expression, including such forms of attack as arbitrary arrest, torture, threats to life and killing, be compatible with Article 19.

3. As for the third part of the test, the government’s response may be argued to be in compliance with the legitimate ground of protection of public health. However, it is here argued that the connection between the ostensible protection of public health in Cambodia and the criminalisation of online or verbal expression related to the crisis, is grossly insufficient to meet this requirement. This is especially the case given that a majority of the arrests so far have been targeted at specific members of society, namely those affiliated with the CNRP (thereby also failing the principle of non-discrimination).

Thus, in its response to the Covid-19 crisis, the above analysis shows that Cambodia has seemingly failed all three parts of the test widely used to delineate the permissible restrictions by governments of their citizens’ exercise of free expression. Assessed against the principles set out in the Covenant and relevant General Comments, the measures taken appear to have violated, *inter alia* the requirements set out for i) legality, ii) proportionality and necessity and iii) specific grounds. Such measures are reported to have included arrests, arbitrary detention, imprisonment and threats, and have been facilitated via the government’s ability to (mis)apply domestic laws which in themselves have been criticised for being poorly formulated, and for failing to comply with established human rights norms.⁸⁰ This contravenes Committee interpretation that any domestic laws or measures restricting freedom of expression, aside from meeting the three-part test, “must also themselves be compatible with the provisions, aims and objectives of the Covenant.”⁸¹

79 *Ibid*, at para 34.

80 ARTICLE 19 & PEN America, *supra* note 26.

81 UNHRC, *supra* note 40 at para 26.

5. Introduction of the Emergency Law

Having analysed the Cambodian response to Covid-19 and its failure to conform with any of the three-part in what (at the time of writing) remains a time of normalcy in the country, we turn to look at the introduction and promulgation of the Law on the Management of the Nation in a State of Emergency. This article has already outlined in detail the threats, surveillance and arrests that had taken place throughout the first several months of 2020: This was the political and social context into which the draft Emergency Law was leaked on March 31.

The introduction of such a law is allowed for under both Article 22 of the Cambodian Constitution and Article 4 of the ICCPR.⁸² However, human rights organisations and independent media outlets began immediately expressing alarm about its contents, alleging it presented an alarming risk to the exercise of fundamental freedoms in Cambodia. Amnesty International's statement carried the headline: "Cambodia: Proposed emergency powers would obliterate human rights."⁸³ Amnesty further argued that "This law should be seen for what it is – a naked power grab which seeks to manipulate the COVID-19 crisis in order to severely undercut the human rights of everyone in Cambodia."⁸⁴

The draft provides for a "state of emergency" to be declared by royal decree in multiple scenarios, from national security situations such as war or invasion to public health concerns such as pandemics and severe calamity. It additionally allows for this law to be used during the vaguely worded scenario of "severe chaos to national security and social order."⁸⁵

Article 5 of the law lays out a series of powers and actions that the government can take during a proclaimed state of emergency. Although the Cambodian government publicly indicated that the law would be implemented cautiously based on the principles in the ICCPR, local human rights organisations alleged in a joint statement that these safeguards have not been sufficiently written into the law to prevent misapplication or abuse.⁸⁶ According to the statement, released among others by the Cambodian Centre for Human Rights (CCHR), a number of the provisions in the Emergency Law do not comply with ICCPR standards, including unfettered surveillance and restrictions on freedom of assembly and movement.⁸⁷

82 *Cambodian Constitution* 1993, Art. 22; *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976) [ICCPR].

83 Amnesty International, *supra* note 17.

84 *Ibid.*

85 Aun Chhenpor, Narin Sun & Vicheika Kam, "State of Emergency' Draft Law Gives Gov't Sweeping Powers; Permits Human Rights Restrictions" *Voice of America Cambodia* (31 March 2020), online: <<https://www.voacambodia.com/a/state-of-emergency-draft-law-gives-gov-t-sweeping-powers-permits-human-rights-restrictions-/5353728.html>>.

86 Cambodian Centre for Human Rights, "Civil Society Organizations call for the Royal Government of Cambodia to Amend the State of Emergency Law to Protect Human Rights" (13 May 2020), 1, online (pdf): CCHR <https://cchrcambodia.org/index_old.php?url=media/media.php&p=press.php&id=5&show=press>.

87 *Ibid.*

With respect to freedom of expression, most concerning appears to be Article 5 point 11, which states the government may ban or restrict “the distribution of information that could scare the public, unrest, or that can negatively impact national security, or that can cause confusion in response to the state of emergency.”⁸⁸ When taken together with Articles 7, 8 and 9, which criminalise the violation or obstruction of the emergency measures, individuals or organisations charged with distributing such information could face prison sentences of up to 10 years, and, in some cases, a one billion riel fine (around \$250,000). Amnesty’s statement condemned such penalties as “utterly unjustifiable, even in emergency situations” and described as “truly outrageous” that the Cambodian government is “seeking to criminalize the sharing of information deemed frightening to the Cambodian public, which could include verifiably true information about public health or security... It is vital that that freedom of expression is respected in times of crisis, including the COVID-19 pandemic.”⁸⁹

On April 2, HRW also expressed grave concern that the Emergency Law could be easily misused to target critics of the government and rights-based NGOs, given the content of what they claim are overly broad and vague provisions – particularly within Article 5. They asserted that the bill includes “disproportionate fines and prison sentences for vague criminal offenses” and “unlimited surveillance of telecommunications,” as well as “fails to provide any oversight for the use of these sweeping executive powers.”⁹⁰

6. A Diplomatic Tit for Tat

In addition to local and foreign human rights organisations, on April 9th a group of United Nations Special Rapporteurs⁹¹ sent a communication to the Cambodian government expressing concern that, *inter alia*, “the law’s language on the protection of national security [and] public order... have been worded too broadly and threaten to violate Cambodia’s international human rights obligations.”⁹² Further, the Rapporteurs asserted that “[t]he draft law provides for a wide range of overly repressive measures which do not appear in compliance with the ICCPR”, and that “particular concern is in relation to the vaguely worded clauses including the generality of its application and its lack of compatibility with the principles of necessity

88 *Law on the Management of the Nation in State of Emergency* 2020, Art. 5.

89 Amnesty, *supra* note 17.

90 Human Rights Watch, “Cambodia: Emergency Bill Recipe for Dictatorship” (2 April 2020), online: *Human Rights Watch* <<https://www.hrw.org/node/340275/printable/print>>.

91 Rhona Smith, Special Rapporteur on the situation of human rights in Cambodia; Leigh Toomey, Vice-Chair of the Working Group on Arbitrary Detention; Dainius Puras, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; and Fionnuala Ní Aoláin, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

92 Rhona Smith et al, “Communication expressing concerns over Cambodia’s draft law on the management of the nation during state of emergency” (9 April 2020), online: *OHCHR* <<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=25186>>

and proportionality.” The communication detailed a number of specific issues, including what they described as “particular concern with regard to the ramifications to the right to freedom of expression.”⁹³

In return, the Cambodian Human Rights Committee, a state agency, issued a statement hitting back at the Special Rapporteurs’ critique by insisting that the draft law was “neither... a human rights violation nor a power gathering tool as alleged by a handful of opposition groups, but it is a valuable legal tool for the defence of the right to life, the right to peace, social stability and development.”⁹⁴ On April 17, Justice Minister Ko Eut Rith also defended the draft, calling the law “very necessary and needed” for the country: “The law is not enacted to restrict people’s rights and freedom, but the law is enacted to help the nation in the state of emergency.” Rith also labelled anyone who criticised the law as “not a friend of Cambodia.”⁹⁵

English language newspaper *The Khmer Times* published a string of articles throughout March and April in a seeming attempt to drum up support for the law, while echoing similar lines of defence as government spokespeople against criticism of it. One anonymous op-ed (a common feature in the publication) contained the following, rather stinging assessment on April 3:

“The forever-critical human rights organisations, local and foreign, are already joining the bandwagon to criticise the government on the law. However, these bleeding hearts had nothing much to say when Western powers, to whom these organisations are subservient, enforced even more draconian measures to combat the pandemic... Counter-narratives against the disinformation are needed before and after enforcing the emergency law.”⁹⁶

Perhaps the most interesting reaction to the Rapporteurs’ statements came from the Cambodian Permanent Mission to the UN in Geneva, in a heated statement posted on its Facebook page and published in the *Khmer Times* on April 17. The statement was not targeted at all four Rapporteurs, but solely at Rhona Smith, Special Rapporteur on the situation of human rights in Cambodia. The statement was released publicly a day after comments she made in a press release⁹⁷ expanding on the joint Rapporteur communication sent a week earlier.

93 *Ibid.*

94 Sun Narin, “UN Rapporteurs Raise ‘Deep Concerns’ over Draft State of Emergency Law” *Voice of America Cambodia* (15 April 2020), online: <<https://www.voacambodia.com/a/un-rapporteurs-raise-deep-concerns-over-draft-state-of-emergency-law/5372738.html>>.

95 Sun Narin, “Senate Approves Controversial ‘State of Emergency’ Law, Heads to Constitutional Council” *Voice of America Cambodia* (18 April 2020), online: <<https://www.voacambodia.com/a/senate-approves-controversial-state-of-emergency-law-heads-to-constitutional-council/5377638.html>>.

96 Anonymous, “Challenges Faced on the Enforcement of an Emergency Law” *The Khmer Times* (3 April 2020), online: <<https://www.khmertimeskh.com/708988/challenges-faced-on-the-enforcement-of-an-emergency-law/>>.

97 Rhona Smith, “Cambodia’s state of emergency law endangers human rights, warns UN expert” (17 April 2020), online: *OHCHR*, <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25801&LangID=E>>.

The statement opened that the Permanent Mission was “dismayed at and deplores” Smith’s press statement, because of its “biased and misleading elements with political grounds.”⁹⁸ The statement reads further:

“...the special rapporteur, who is not a UN staff member but serves in a personal capacity, should refrain from making public statements that could mislead public opinion, imply any kind of value judgement, and be construed as an act of interference in internal affairs of a sovereign state...

It is unfair to chide Cambodia for this vital legislation while more than 70 countries across the globe have proclaimed states of emergency and lockdown measures to prevent and contain the spread of this virus by *inter alia* provisionally derogating the people’s freedom of movement, rights to peaceful assembly and privacy.

Her assertion that the [law] jeopardises human rights is unfounded and indicative of a selective and biased application of human rights.”⁹⁹

The statement also stated that Cambodia showed “charity and humanity” when it allowed the Westerdam cruise ship to dock in Sihanoukville while other countries had prevented it from doing so for fear of contamination.¹⁰⁰

In assessing whether the Emergency Law ultimately presents a proportionate necessity or opportunistic repression, we return to Schiff’s approach and look not only to the contents of the law but to the context in which the law was drafted and promulgated. Through such an examination, it appears there are indeed fundamental issues with the Emergency Law in its current formulation. As set out in the previous section, there are, *inter alia*, vaguely worded clauses, extreme sentencing provisions and a lack of accountability through a meaningful oversight mechanism. Further, with respect to the enveloping political context, there is firstly the fact that the law was drafted and promulgated without any meaningful public or civil society consultation. In addition, and as has been explored throughout this article, the local context was also one of rapidly shrinking civic space and increasing restrictions upon freedom of expression and other human rights. This hostile environment undercuts the validity of its proponents’ arguments that the government’s sole intention in the new bill is the protection of the Cambodian people during a time of emergency.

It is true that organisations like HRW, Amnesty International and CIVICUS have harshly criticised Cambodia’s Emergency Law. From the vantage point of the Cambodian government, it is possible to see how they could perceive that they are being singled out for such criticism. Indeed, of the Black Lives Matter protests that have swept the United States, in early June, Hun Sen publicly questioned “Where

98 Permanent Mission of the Kingdom of Cambodia to the United Nations Office and other International Organisations at Geneva, “Rhona Smith’s Misleading Views on Emergency Law” *The Khmer Times* (20 April 2020), online: <<https://www.khmertimeskh.com/714663/rhona-smiths-misleading-views-on-emergency-law/>>.

99 *Ibid.*

100 *Ibid.*

are Brad Adams and Human Rights Watch? Where are they now? Why haven't we heard its cries for human rights?"¹⁰¹ However, a quick internet search reveals a range of HRW statements condemning US police brutality and the state response to protests, albeit none released by Brad Adams – who is the Asia Director.¹⁰² A further search online locates HRW criticism directed at other liberal democracies in a similar tone to that levelled against Cambodia's Emergency Law. For instance, there is the following analysis of Australia's recently introduced national security legislation: "Australia's sweeping national security laws and police actions against journalists and whistle-blowers are having a chilling effect on freedom of expression."¹⁰³

Similarly, CIVICUS' civic space monitor downgraded Australia's civic space from "open" to "narrowed" in late 2019 after becoming "extremely concerned about incursions on free speech, the increasing use of surveillance and crackdown on protesters."¹⁰⁴ In June 2020, Amnesty International UK released a press release criticising Northern Ireland's Covid-19 emergency legislation as "unacceptable." The statement included the following quote from the Director of the Committee on the Administration of Justice: "We have serious concerns both about the confused and unsatisfactory nature of emergency legislation in Northern Ireland and the policing operations over the past weekend in response to the Black Lives Matter protests... The enforcement powers themselves are so vaguely drafted that they are reminiscent of the notorious Special Powers Acts."¹⁰⁵ Lastly, on June 5, over 40 Special Rapporteurs – including the four who had earlier released the communication concerning Cambodia – released a statement expressing "deep concern" at the US government's response to the protests against systemic racism.¹⁰⁶

Thus, it is here argued that the criticism levelled against Cambodia cannot as easily be considered "unfair" and "biased" as Cambodian officials have argued in the law's defence. The content of Cambodia's Emergency Law, combined with the unfolding increases in restrictions on citizens' free expression, ultimately merit close scrutiny and evaluation – despite what other human rights restrictions and violations may also be taking place elsewhere. Cambodia is well within its rights to develop and promulgate emergency legislation, as allowed for under Article 22 of its Constitution

101 Niem Chheng, "PM slams HRW 'double standards'" *The Phnom Penh Post* (2 June 2020), online: <<https://bit.ly/2YrX6bp>>.

102 Human Rights Watch, "Black Lives Matter, Then and Now: Daily Brief" (29 May 2020), online: *Human Rights Watch* <<https://www.hrw.org/the-day-in-human-rights/2020/05/29>>.

103 Human Rights Watch, "Australia: National Security Laws Chill Free Speech" (14 January 2020) online: *Human Rights Watch* <<https://www.hrw.org/news/2020/01/14/australia-national-security-laws-chill-free-speech>>.

104 CIVICUS, "Australia's civic space rating downgraded as freedom of speech threatened" (4 December 2019), online: *CIVICUS* <<https://monitor.civicus.org/Australia.PeoplePowerUnderAttack/>>.

105 Amnesty International UK, "Laws restricting protest in Northern Ireland 'unacceptable'", (8 June 2020) online: *Amnesty International UK* <<https://www.amnesty.org.uk/press-releases/laws-restricting-protest-northern-ireland-unacceptable>>

106 E. Tendayi Achiume et al, "Statement on the Protests against Systemic Racism in the United States", (5 June 2020) online: *OHCHR* <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25927&LangID=E>>

and indeed as many other countries already have in place. However, this Emergency Law cannot be a “a wish list of the kinds of powers that a state would like to have, occasioned or facilitated by a particular crisis.”¹⁰⁷

VI. CONCLUSION

This article has examined the tightening of restrictions upon free expression in Cambodia during the Covid-19 pandemic outbreak. It began by examining the local political context in the lead-up to the pandemic outbreak, one described within the literature as “human rights in freefall” and “descent into outright dictatorship” in recent years.

It then moved on to explore whether and how the government capitalised on the Covid-19 crisis in the following ways: In order to benefit from “soft diplomacy” through its policy of Chinese appeasement, to bolster Hun Sen’s Strongman persona, and, most significantly, to target opponents and hastily usher in new restrictions on human rights. The article detailed that the measures taken to restrict free expression – ostensibly to limit the spread of the virus – included numerous threats made by public figures, state surveillance, and judicial harassment including arbitrary arrests and detention. Such measures were argued to have failed all three parts of the three-part test that is widely used to delimit permissible restrictions on free expression upon a state’s populace in times of normalcy (which Cambodia remained in throughout the pandemic, and still does at the time of writing). Assessed against the principles set out in the Covenant and relevant General Comments, the measures were argued to have violated, *inter alia* the requirements set out for i) legality, ii) proportionality and necessity and iii) specific grounds. In addition, the fact that almost half of those arrested were affiliated with the former opposition party, indicates that such measures can also be seen to fail the principle of non-discrimination.

Moving on from this analysis of restrictive measures meted out by administrative, judicial and executive functions during the time of normalcy, the article then examined the introduction of an Emergency Law. The purpose was to assess whether Cambodia’s newly promulgated Emergency Law should be seen as a clear case of a hybrid regime exploiting Covid-19 to hasten restrictions on rights, or whether the criticism levelled against the law is excessive, given the constitutional basis for such legislation and the critical nature of the Covid-19 pandemic. The criticism levelled at the law was analysed alongside its contents and the statements made by government spokespeople and diplomats in its defence. This defence mainly centred around the fact that the legitimate limitation by states of citizens’ exercise of their rights in times of exception is a norm set out in international law, and such a law is allowed for explicitly under Article 22 of the Cambodian Constitution – criticism of it from outside, therefore, merely represents selective bias.

The concluding analysis ultimately argued that the contents of the law in its current form, especially when considered with regard to the enveloping political legal context in Cambodia, cannot be seen as in conformance with Article 4 of the

107 Ní Aoláin, *supra* note 1.

Covenant. Indeed, it was argued that the hostile environment for HRDs and political opponents significantly undercuts the validity of the government's claim that the sole intention in drafting the new bill is the protection of the Cambodian people during a time of emergency. The article also examined statements released by the same INGOs and institutions (HRW, Amnesty International and CIVICUS, as well as the UN Special Procedures) that were directed at countries other than Cambodia (namely Australia and the United States), and found them to have adopted a very similar style and tone to the critiques made of Cambodia's Emergency Law. It argued that this reduces the likelihood that Cambodia is presently being unfairly singled out by these actors. Further, there is the fact that as well as the international criticism, local actors in Cambodia have voiced their concerns at the potential future misapplication of the law, including via a joint civil society statement reading: "We are legitimately concerned that [the] campaign of silencing the Cambodian people could be exacerbated through implementation of the State of Emergency Law."¹⁰⁸

This article opened with a quote by Special Rapporteur Fionnuala Ní Aoláin, in which she asked us to consider the kind of world we will wake up in, "the day after the pandemic ends," as a result of the expansion of emergency powers.¹⁰⁹ It is for now too early to say what this world will look like, as the pandemic remains widespread and the human rights situation precarious in a vast number of countries – hybrid regimes and 'liberal' democracies alike. However, the Cambodian Emergency Law analysed throughout this article, passed with no meaningful civil society consultation, will likely remain in its current form for the foreseeable future. As with such previous legislation as the Law on Associations and NGOs (LANGO), the Cambodian government has given assurances that the Emergency Law will not be misapplied to undercut human rights. The fact remains, however, that the very existence of such laws – with the "chilling effect" that accompanies their introduction – may be seen to have already placed the right to free expression in greater jeopardy.

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108 *Ibid.*

109 Ní Aoláin, *supra* note 1.

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