

Public Comment on the Oversight Board’s Case 2023-003-FB-MR

I. Introduction

1. The International Commission of Jurists (ICJ), composed of 60 eminent judges and lawyers from all regions of the world, works to advance respect for the rule of law and the promotion and protection of human rights globally. Established in 1952, in consultative status with the Economic and Social Council, and active on five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political, and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.
2. The ICJ welcomes the opportunity to contribute a public comment to assist the Oversight Board’s deliberation of Case 2023-003-FB-MR, regarding Meta’s handling of potentially violent speech from Hun Sen, Cambodia’s Prime Minister and President of the Cambodian People’s Party (CPP). The ICJ reiterates the responsibility of Meta to moderate content on its platforms in line with international human rights law and standards, as reflected in the principles of the International Covenant on Civil and Political Rights and in the UN Guiding Principles on Business and Human Rights.¹
3. In this public comment, the ICJ makes the following submissions:
 - a. Meta must assess whether Hun Sen’s call for violence against his political opponents, within the overall context of the poor human rights situation and democratic deficit in Cambodia in the lead-up to the July 2023 election, and the ongoing violence and crackdown against perceived political opponents, would lead to a real risk of human rights abuses and other harm to concerned persons;
 - b. Meta should prohibit content inciting violence, hostility or discrimination, in line with article 20(2), read together with article 19(3), of the International Covenant on Civil and Political Rights (ICCPR). Assessments on the severity of the harmful speech should be drawn from the six-factor test under the Rabat Plan of Action, which provides guidance on how to assess calls to violence by influential State actors in the context of upcoming elections and violence against political opponents; and
 - c. There is no “newsworthiness allowance” for expression inciting violence under international human rights law, and no discretion should be granted for forms of expression that are prohibited under international human rights law. More clarity is needed to ensure that Meta’s content moderation policies regarding the “newsworthiness allowance” is consistent, transparent and accessible.

II. Political and Human Rights Situation in Cambodia

4. The potential harm of Hun Sen’s incitement of violence against his political opponents needs to be analyzed in the context of the democratic deficit and endemic pattern of violence and intimidation against perceived political opponents in Cambodia. Hun Sen and the Cambodian authorities have systematically restricted human rights and fundamental freedoms protected

¹ OHCHR, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, available at: https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

under international human rights law, including the rights to political and public participation, freedom of association, freedom of assembly and freedom of expression in the country. These restrictions have included, among others, the dissolution of the Cambodia National Rescue Party (CNRP) by the Supreme Court in 2017;² mass convictions of opposition party leaders, members and supporters on spurious charges and often *in absentia*;³ and “weaponization” of laws that are not compliant with human rights law and standards to restrict free expression, both offline and online.⁴

5. Of particular relevance to this case is the persistent reports of harassment, intimidation and violence against members and supporters of opposition parties. It has been reported that between 2017 and 2022, more than 30 opposition activists were “violently attacked”, usually by “unknown assailants on public streets”.⁵ These attacks can have fatal consequences. For instance, in November 2021, Sin Khon, an activist affiliated with the CNRP, was violently killed under suspicious circumstances.⁶ In July 2016, Kem Ley, a key political commentator, was shot at a petrol station.⁷ There has been systematic impunity for perpetrators of these attacks. No effective investigations, arrests or prosecutions appear to have been undertaken in relation to the attacks on the 30 opposition members,⁸ and the cases of Sin Khon and Kem Ley are “still awaiting effective investigation and resolution”.⁹ This dereliction on the part of the authorities has contributed to the atmosphere of impunity for violence against perceived political opponents.
6. Ahead of the July 2023 general election, the Cambodian authorities have continued their campaign of repression of the exercise of human rights and fundamental freedoms, including the suppression of disfavoured political and other expression. In March 2023, the Phnom Penh Municipal Court convicted Kem Sokha, leader of the CNRP, on spurious charges of “conspiracy with a foreign power” under article 443 of the Criminal Code, confirming the politicization and non-independence of the Cambodian judiciary.¹⁰ In February and March 2023, the authorities arbitrarily revoked the media license of Voice of Democracy (VOD)¹¹ and other media outlets,¹² without due process. The ICJ expects that there is likely be an escalation of human rights violations and abuses, including violence against opposition political figures and dissenting voices in the lead-up to the elections.

III. Moderation of Harmful Content by State Actors

- a. International Law and Standards on Freedom of Expression and Prohibition on Incitement to Violence, Hostility or Discrimination by State Actors

² ICJ, “Cambodia: the ICJ condemns dissolution of main opposition party”, 16 November 2017, available at: <https://www.icj.org/cambodia-the-icj-condemns-dissolution-of-main-opposition-party/>.

³ ICJ, “Cambodia: Kem Sokha’s conviction is another assault on human rights, the rule of law and democracy”, 3 March 2023, available at: <https://www.icj.org/cambodia-kem-sokhas-conviction-is-another-assault-on-human-rights-the-rule-of-law-and-democracy/>; ICJ, “Cambodia: Mass convictions of opposition politicians and human rights defenders deepen rule of law crisis and must be reversed”, 15 June 2022, available at: <https://www.icj.org/cambodia-mass-convictions-of-opposition-politicians-and-human-rights-defenders-deepen-rule-of-law-crisis-and-must-be-reversed/>.

⁴ ICJ, “New ICJ report highlighted intensified human rights violations and abuses online”, 23 December 2021, available at: <https://www.icj.org/cambodia-new-icj-report-highlights-intensified-human-rights-violations-and-abuses-online/>.

⁵ Morm Moniroth, “Over 30 Opposition Activists Assaulted in Five Years: Lawyer”, VOD, 20 July 2022, available at: <https://vodenglish.news/over-30-opposition-activists-assaulted-in-five-years-lawyer/>.

⁶ OHCHR, “Comments by UN Human Rights Office spokesperson Rupert Colville on killing of Cambodian activist and refoulements from Thailand”, 3 December 2021, available at: <https://www.ohchr.org/en/2021/12/comment-un-human-rights-office-spokesperson-rupert-colville-killing-cambodian-activist-and-refoulements-from-thailand>; Human Rights Committee, *Concluding observations on the third periodic report of Cambodia*, UN Doc. CCRP/C/KHM/CO/3, 18 May 2022, paras. 38 – 39.

⁷ ICJ, “Cambodia: No Justice At 5-Year Anniversary of Kem Ley’s Death”, 9 July 2021, available at: <https://www.icj.org/cambodia-no-justice-at-5-year-anniversary-of-kem-leys-death/>.

⁸ CIVICUS, “Prominent Union Leader Convicted, as Activists and Journalists Continue to be Silenced in Cambodia”, 9 September 2021, available at: <https://monitor.civicus.org/explore/prominent-union-leader-convicted-activists-and-journalists-continue-to-be-silenced-cambodia/>.

⁹ Human Rights Council, *Situation of human rights in Cambodia: Report of the Special Rapporteur on the situation of human rights in Cambodia*, UN Doc. A/HRC/51/66, 18 August 2022, para. 45; ICJ, *Achieving Justice for Gross Human Rights Violations in Cambodia: Baseline Study, October 2017*, October 2017, p. 25 – 27, available at: <https://icj2.wpenginepowered.com/wp-content/uploads/2017/10/Cambodia-GRA-Baseline-Study-Publications-Reports-Thematic-reports-2017-ENG.pdf>; OHCHR, “Comments by UN Human Rights Office spokesperson Rupert Colville on killing of Cambodian activist and refoulements from Thailand”, 3 December 2021, available at: <https://www.ohchr.org/en/2021/12/comment-un-human-rights-office-spokesperson-rupert-colville-killing-cambodian-activist-and-refoulements-from-thailand>; Human Rights Committee, *Concluding observations on the third periodic report of Cambodia*, UN Doc. CCRP/C/KHM/CO/3, 18 May 2022, paras. 38 – 39.

¹⁰ ICJ, “Cambodia: Kem Sokha’s conviction another assault on human rights, the rule of law and democracy”, 3 March 2023, available at: <https://www.icj.org/cambodia-kem-sokhas-conviction-is-another-assault-on-human-rights-the-rule-of-law-and-democracy/>.

¹¹ OHCHR, “Cambodia: UN experts call for reinstatement of Voice of Democracy, say free media critics ahead of elections”, 20 February 2023, <https://www.ohchr.org/en/press-releases/2023/02/cambodia-un-experts-call-reinstatement-voice-democracy-say-free-media>.

¹² Khuon Narim, “Information Ministry Revokes Three Media Licenses Following Reports on Senior Official’s Role in Land Fraud”, *CamboJA News*, 18 March 2023, available at: <https://cambojanews.com/information-ministry-revokes-three-media-licenses-following-reports-on-senior-officials-role-in-land-fraud/>.

7. Article 19 of the ICCPR protects the right to freedom of expression and information. Under narrow circumstances, the right to freedom of expression may be subject to certain restrictions, but “these shall only be such as are provided by law and are necessary: (a) for respect of the rights of reputations of others; (b) for the protection of national security or of public order (*ordre public*), or of public health or morals”.¹³
8. While article 19 provides for the permissible basis for restrictions, article 20(2) imposes a mandatory duty to prohibit by law any “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”.¹⁴ The requirement to prohibit expression that incites violence under article 20(2) is *per se* necessary and proportionate to meet the legitimate purpose of protecting the rights of others and for public order, pursuant to the strict test enumerated under article 19(3) of the ICCPR. As affirmed by the Human Rights Committee in its authoritative General Comment No. 34, articles 19 and 20 “are compatible with and complement each other”.¹⁵ What distinguishes the acts addressed in article 20 from other acts that may be subject to restriction under article 19(3), is that for the acts addressed in article 20, the ICCPR indicates the specific response required from the State: their prohibition by law.
9. The ICJ submits that international human rights law unequivocally requires the prohibition of expression inciting violence, hostility or discrimination, as reflected in Meta’s Violence and Incitement Community Standard. State actors do not enjoy higher protections for any incitement to violence by virtue of their status, as the same rules must apply to all users.¹⁶ Although international human rights law places a high value on “uninhibited expression ... in the circumstances of public debate in a democratic society concerning figures in the public and political domain”,¹⁷ this does not cover all forms of expression by State actors, as it excludes expression inciting violence, hostility or discrimination.
10. The scope and nature of the prohibition on incitement to violence, hostility or discrimination under article 20(2) has been authoritatively set out in the Rabat Plan of Action. As the Rabat Plan makes clear, political leaders “should refrain from using messages of intolerance or expressions which may incite violence, hostility or discrimination.”¹⁸ Furthermore, the severity of the harmful expression should be assessed using the six factors enumerated in the Rabat Plan. Under the six-factor test articulated in the Rabat Plan, which looks into, *inter alia*, the context, status of the speaker, and extent and reach of the expression, State actors like Hun Sen, who is situated in the highest position of authority in Cambodia, will have a greater propensity to cause harm due to their influence¹⁹ in the lead-up to an election. This risk of such harm is necessarily magnified where there is an entrenched history of violence and threats against political opponents.

b. Application of the Six-Factor Test under the Rabat Plan of Action

11. The ICJ agrees with Meta’s assessment that Hun Sen’s call for his party’s supporters to protest and beat political opponents up is plainly incitement to violence that is prohibited under international human rights law, and Meta’s own Violence and Incitement Community Standard. An assessment of the speech using the six factors from the Rabat Plan indicates that the speech is severe in terms of its human rights harms:

¹³ Article 19, International Covenant on Civil and Political Rights.

¹⁴ Article 20(2), International Covenant on Civil and Political Rights.

¹⁵ Human Rights Committee, *General comment No. 34, Article 19: Freedoms of opinion and expression*, UN Doc. CCPR/C/GC/34, paras. 50 – 52.

¹⁶ UN General Assembly, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. A/74/486, 9 October 2019, para. 47(d).

¹⁷ Human Rights Committee, *General comment No. 34, Article 19: Freedoms of opinion and expression*, UN Doc. CCPR/C/GC/34, paras. 34, 20.

¹⁸ Human Rights Council, *Annual report of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/22/17/Add.4, 11 January 2013, para. 35.

¹⁹ As noted by the former UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, “incitement is almost certainly more harmful when uttered by leaders than by other users, and that factor should be part of the evaluation of platform content”; UN General Assembly, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. A/74/486, 9 October 2019, para. 47(d).

- a. Context: The speech was made during the lead-up of the July 2023 general election, against a backdrop of violence, intimidation, and harassment of real and perceived political opponents. The risk of violence is exacerbated by the constant antagonization of such persons and entities through mass convictions and other arbitrary restrictions on the rights to political participation and freedom of expression, including by the conviction of Kem Sokha and the shutdown of VOD and other independent media outlets.
- b. Status of the speaker: Hun Sen’s identity as Prime Minister of Cambodia gave his speech a high degree of influence. He has been the Prime Minister of Cambodia since 1985, and acts of violence are frequently committed against his political opponents with impunity. This creates the risk that CPP supporters would understand that they can commit further acts of violence with no accountability.
- c. Intent: Hun Sen’s threat to gather “CPP people to protest and beat [his opponents] up” demonstrated a clear intent to incite violence against his political opponents. The assertion made at the end of his speech that “we don’t incite people and encourage people to use force” contradicted and belied what he said before and would not be taken as evidence of mitigation or restraint by a reasonable observer. It is plain that he intended to issue a warning or threat to curtail the rights of his political opponents to political participation and freedom of expression and that there is a real risk that his words would be taken as a signal to some of his supporters that acts of intimidation or violence would be tolerated.
- d. Content and form: Hun Sen threatened to gather “CPP people to protest and beat [his opponents] up” by “sending people to [their] place and home”, and warned them to “behave” and that he “may arrest a traitor with sufficient evidence at midnight”. These words are clearly threats of violence, which do not constitute the “free communication of information and ideas about public political issues”²⁰ protected under the right to freedom of expression.
- e. Extent and reach: The video was viewed about 600,000 times and was shared fewer than 3,000 times. Hun Sen’s comments were also picked up by major news outlets and shared more broadly through mass media channels.²¹
- f. Imminence of harm: The video was made in the lead-up to the July 2023 elections, in the context of normalized violence against perceived political opponents. In order to mitigate the risk of physical violence against them, it has been reported that members of the Candlelight Party have started engaging in self-censorship “to avoid making the situation even more serious”,²² demonstrating the detrimental impact of the speech on human rights, including the rights to political and public participation and freedom of expression to avoid further threats to their rights to life, freedom from ill-treatment, and liberty and security of person.

IV. Criteria and Application of “Newsworthiness Allowance”

12. There is no express “newsworthiness” or “public interest” exception to the prohibition of incitement to violence, hostility or discrimination recognized under article 20(2). “Public interest” is certainly a value informing the protection of freedom of expression under article

²⁰ Human Rights Committee, *General comment No. 34, Article 19: Freedoms of opinion and expression*, UN Doc. CCPR/C/GC/34, paras. 34, 20.

²¹ See, for instance, Bangkok Post, “Cambodia PM Hun Sen warns rivals face ‘legal action or sticks’”, 9 January 2023, available at:

<https://www.bangkokpost.com/world/2478517/cambodia-pm-hun-sen-warns-rivals-face-legal-action-or-sticks>; Sebastian Strangio, “Cambodian PM Threatens Opponents with Legal Action, Violence”, *The Diplomat*, 11 January 2023, available at: <https://thediplomat.com/2023/01/cambodian-pm-threatens-opponents-with-legal-action-violence/>.

²² Ouch Sony, “Candlelight Leadership Calls for Calm After Hun Sen Threats”, *VOD*, 23 January 2023, available at: <https://vodenglish.news/candlelight-leadership-calls-for-calm-after-hun-sen-threats/>.

19 as a defence to defamation laws,²³ or for journalists reporting on hate speech.²⁴ However, article 20(2) is aimed at a different value which does not admit any exception. Meta’s “newsworthiness allowance”, if it is not applied with additional protections, would eviscerate the protection provided by international human rights law against expression inciting violence, hostility or discrimination.

13. In fact, “newsworthiness” should not be treated as an exception to article 20(2). However, in some instances, the reporting of expression that would otherwise be prohibited may be permitted and even deemed necessary, when it is contextualized in a journalistic or similar professional context. This is in line with the specific legal protection granted to journalists “by virtue of their function and the public interest in disclosure”.²⁵ Far greater clarity is needed from Meta on the exact ambit within which such expression may be countenanced, in line with the principle of legality under international human rights law. The principle of legality requires laws and rules to be “formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly”, and to not “confer unfettered discretion for the restriction of freedom of expression on those charges with its execution”.²⁶
14. Meta has made certain clarifications to its own definition of “newsworthy” content in response to the Oversight Board’s decision in Case 2021-001-FB-FBR on the suspension of Donald Trump, former President of the United States.²⁷ Presently, the exception conducts a “balancing exercise” on “whether that content surfaces an imminent threat to public health or safety, or gives voice to perspectives currently being debated as part of a political process”, and also considers factors such as “country-specific circumstances”, “the nature of the speech”, and “the political structure of the country”. Politicians no longer enjoy a presumption that their speech is “inherently newsworthy”, and three examples have also been given on when Meta has granted exemptions to content that would otherwise violate its policies.²⁸
15. However, the revamped policy still lacks sufficient precision and grants significant latitude to Meta’s content reviewers to decide what constitutes “newsworthy” content. This is especially with regard to expression that is prohibited under international human rights law, such as that inciting or directly threatening violence, or speech advocating hatred inciting violence, hostility or discrimination.²⁹ While Meta has stated that they will remove content, “even it has some degree of newsworthiness, when leaving it up presents a risk of harm, such as physical, emotional and financial harm, or a direct threat to public safety”, there is currently no reference at all to how it will apply this exception to speech inflicting, threatening or inciting violence, both in its articulation of the policy and examples given of past allowances that have been granted.³⁰
16. Thus, more clarity is needed to ensure that Meta’s content moderation policies regarding the “newsworthiness allowance” is consistent, transparent and accessible, and does not effectively infringe the express provisions of article 20(3). The ICJ submits that no discretion should be granted in granting “newsworthiness allowances” for forms of expression that are prohibited under international human rights law.

²³ Human Rights Committee, *General comment No. 34, Article 19: Freedoms of opinion and expression*, UN Doc. CCPR/C/GC/34, paras. 47.

²⁴ UN General Assembly, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. A/74/486, 9 October 2019, para. 47(d); UN General Assembly, *Reinforcing media freedom and the safety of journalists in the digital age*, UN Doc. A/HRC/50/29, 20 April 2022, para. 13.

²⁵ UN General Assembly, *Reinforcing media freedom and the safety of journalists in the digital age*, UN Doc. A/HRC/50/29, 20 April 2022, para. 13.

²⁶ Human Rights Committee, *General comment No. 34, Article 19: Freedoms of opinion and expression*, UN Doc. CCPR/C/GC/34, paras. 25.

²⁷ Oversight Board, “2021-001-FB-FBR: Former President Trump’s suspension”, available at: <https://www.oversightboard.com/decision/FB-691QAMHJ>.

²⁸ Meta, “Our approach to newsworthy content”, 25 August 2022, available at: <https://transparency.fb.com/en-gb/features/approach-to-newsworthy-content/>.

²⁹ For an international human rights law framework on responding to expression constituting “hate speech”, see, Daron Tan, “Avoiding Overreach: Shaping State Responses to Anti-LGBTI Online Hate Speech in Southeast Asia”, *Opinio Juris*, 18 June 2022, available at: <https://opiniojuris.org/2022/06/18/avoiding-overreach-shaping-state-responses-to-anti-lgbti-online-hate-speech-in-southeast-asia/>.

³⁰ Meta, “Our approach to newsworthy content”, 25 August 2022, available at: <https://transparency.fb.com/en-gb/features/approach-to-newsworthy-content/>.