



AMERICAN **BAR** ASSOCIATION

Center for Human Rights



## Trial Observation Report: Cambodia v. Theary Seng

September 2022

**TRIALWATCH FAIRNESS REPORT**

A CLOONEY FOUNDATION **FOR** JUSTICE INITIATIVE

## ABOUT THE AUTHORS:

Staff at the **American Bar Association's (ABA) Center for Human Rights (Center)** drafted this report. The **ABA** is the world's largest voluntary association of lawyers and legal professionals and the national voice of the legal profession. It accredits law schools, provides continuing legal education, promotes policies and programs supporting the work of lawyers and judges, and works to improve the administration of justice and public understanding of the rule of law's importance, nationally and around the world. The **Center** has monitored trials and provided pro bono assistance to at-risk human rights defenders in over 60 countries, including as an implementing partner for the **TrialWatch** initiative.

**Andrew Khoo**, an Advocate and Solicitor practicing in Malaysia, is the **TrialWatch Expert** on this case. A former Co-Chair of the Malaysian Bar Council's Human Rights Committee, he is currently Co-Chair of its Constitutional Law Committee. He has been in active legal practice for 26 years. He has represented the Malaysian Human Rights Commission (SUHAKAM), the Malaysian Bar, the Council of Churches of Malaysia, the Diocese of West Malaysia and the Bible Society of Malaysia in watching briefs before the Federal Court, Court of Appeal and the High Court in cases involving election petitions, constituency redelineation, child custody, citizenship, and freedom of religion. He has also appeared as observer counsel before several SUHAKAM public inquiries, including on the enforced disappearance of 3 Christian pastors and one Muslim NGO activist. He has undertaken trial monitoring on behalf of the International Commission of Jurists. He has addressed various issues of human rights in Malaysia at the United Nations, the Human Rights Council, the United Nations High Commission for Refugees, the European Union, and the Assembly of States Parties to the Rome Statute of the International Criminal Court, amongst others. He has acted as a consultant for SUHAKAM, the UN Malaysia Country Team Human Rights Theme Group, UNICEF Malaysia, UN Malaysia and the American Bar Association - Rule of Law Initiative on human rights issues. He authored the chapter on Law and the Judiciary in the Annual SUARAM Report on Civil and Political Rights in Malaysia from 2006-2014 and 2016, and his articles have been published in The New Straits Times, The Sun, Malaysiakini (all in Malaysia), the Wall Street Journal and on the website and journal of the Malaysian Bar.

## ABOUT THE CLOONEY FOUNDATION FOR JUSTICE'S TRIALWATCH INITIATIVE:

The **Clooney Foundation for Justice** (CFJ) advocates for justice through accountability for human rights abuses around the world. **TrialWatch** is an initiative of the Clooney Foundation for Justice. Its mission is to expose injustice, help to free those unjustly detained, and promote the rule of law around the world. TrialWatch monitors criminal trials globally against those who are most vulnerable – including journalists, protesters, women, LGBTQ+ persons and minorities – and advocates for the rights of the unfairly convicted.

Over time, TrialWatch will use the data it gathers to publish a Global Justice Ranking exposing countries' performance and supporting advocacy for systemic change.

*The views expressed herein represent the opinions of the authors. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association or any of its entities. Furthermore, nothing in this report should be considered legal advice for specific cases. Additionally, the views expressed in this report are not necessarily those of the Clooney Foundation for Justice.*



## **Andrew Khoo, who is a member of the TrialWatch Experts Panel, assigned this trial a grade of F:**

This case exposed egregious and blatant violations of the rule of law and administration of justice in the repeated denial of and disregard for Ms. Seng's due process rights. The charges lacked specificity, and there was a distinct lack of particularity as to how she was alleged to have committed the offenses with which she was accused. There was also a deliberate delay in or refusal to grant her access to investigation and court documents that would have enabled her to mount a robust and comprehensive defense. The trial itself was perfunctory, with manifest procedural and other irregularities, and with the prosecution clearly failing to discharge any reasonable or satisfactory standard and burden of proof. The outcome was all but pre-determined and predictable. In short, it was a travesty of justice. Because Ms. Seng's conviction is part of a persistent, documented pattern of misuse of Cambodia's incitement law, it has been given a grade of 'F' under the methodology set out in the Annex.

As part of the Clooney Foundation for Justice's TrialWatch initiative, the American Bar Association's Center for Human Rights monitored Theary Seng's trial for charges of incitement of social disorder and conspiracy. Ms. Seng should never have been put on trial. Given the lack of evidence against her and the broader context of a mass crackdown against government critics, Ms. Seng appears to have been prosecuted solely for exercising her right to free expression, including criticizing the ruling political party and supporting the main opposition party. Notably, the prosecution never put forth evidence that she had engaged in anything other than non-violent political speech. The proceedings against her were also marred by procedural irregularities and violations at all stages: her right to be informed of the charges against her, her right to counsel, her right to adequate facilities to prepare for a defense, her right to the presumption of innocence, and her right to an independent and impartial tribunal. In light of the above, Ms. Seng's conviction is untenable, and her resulting detention is arbitrary under international law.

Ms. Seng is a Cambodian-American lawyer who emigrated to the United States from Cambodia as a child after her parents died at the hands of the Khmer Rouge. She subsequently returned to Cambodia to work on social and political issues. Specifically, Ms. Seng is a human rights lawyer who has advocated on behalf of victims of the Khmer Rouge and served as the founding director of CIVICUS: Center for Cambodian Civic Education. She is also an outspoken critic of Prime Minister Hun Sen's government.

In August 2020, Ms. Seng was charged with conspiracy under Article 453 of the Cambodian Criminal Code and incitement of social disorder under Articles 494 and 495. She was tried alongside dozens of other co-accused persons, including opposition leader-in-exile Sam

Rainsy. Her trial occurred in the context of other mass trials of former members of the banned opposition Cambodian National Rescue Party, supporters of Sam Rainsy, and critics of Prime Minister Hun Sen.

From the outset, the authorities repeatedly violated Ms. Seng's fair trial rights. The charging documents in her case only mentioned her name as part of a list of accused persons and failed to identify any specific acts underlying the offenses she was alleged to have committed. This violated her right to notice of the charges against her, as guaranteed by the International Covenant on Civil and Political Rights (ICCPR), to which Cambodia is party. Ms. Seng's right to counsel of her own choosing and her right to adequate facilities to prepare her defense were also violated when the court denied her legitimate requests to represent herself and correspondingly prevented her from obtaining the casefile against her, attempting to question her before she had accessed any materials regarding her alleged criminal acts. Furthermore, Ms. Seng's conviction despite the complete lack of evidence regarding the offenses alleged – in which the prosecution failed to prove key elements of the charges, such as an agreement under Article 453 or intent to incite under Article 495 – violated her right to be presumed innocent and indicated that the court hearing her case was neither independent nor impartial.

In addition, the proceedings were a stark violation of Ms. Seng's right to freedom of expression. While Cambodia has the right to protect its national security, under the ICCPR it must refrain from levying charges against government critics on the pretext of security. In this case, the evidence against Ms. Seng was based on nine Facebook posts on her personal account (either her own posts or posts reshared from Sam Rainsy's page) that expressed her support for Sam Rainsy and his planned return to Cambodia, and criticized the government. These posts were protected exercises of Ms. Seng's right to freedom of expression under the ICCPR. Indeed, given the numerous mass trials against critics of Prime Minister Hun Sen and his regime, Ms. Seng's prosecution and conviction are but one of many ongoing attempts by the Cambodian government to suppress dissent.

Underscoring these violations, Article 495 of the Cambodian Criminal Code – under which Ms. Seng was prosecuted for incitement to social disorder – has been found by the UN Working Group on Arbitrary Detention to violate the ICCPR for being vague and overly broad, and for failing to distinguish between violent speech and peaceful exercise of fundamental rights.

The Appellate Court must immediately overturn Ms. Seng's conviction and order her release from detention. More broadly, the State must stop targeting individuals for exercising their right to free expression and must amend Article 495 of the Criminal Code, which has been repeatedly used as a tool for repressing dissent.



## A. POLITICAL AND LEGAL CONTEXT

Cambodia is a constitutional monarchy with an elected parliamentary government. Prime Minister Hun Sen has been in power since 1985, making him one of the world's longest serving leaders.<sup>1</sup> His party, the Cambodian People's Party (CPP), has ruled the country even longer, since 1979.<sup>2</sup> The Prime Minister has chosen his son, Hun Manet, to be the CPP's next candidate for Prime Minister.<sup>3</sup>

Until 2017, the Cambodia National Rescue Party (CNRP) was Cambodia's main opposition party. It received approximately 45% of the vote in both national elections in 2013 and local elections in 2017, each of which were marred by allegations of electoral irregularities.<sup>4</sup> In early 2017, the CPP-led government amended the Law on Political Parties to "permit the dissolution of any political party deemed to be secessionist or subversive."<sup>5</sup> Soon after the 2017 election, the CNRP was dissolved by Cambodia's Supreme Court.<sup>6</sup> As a result, the CPP won all 125 seats in Cambodia's Parliament in the 2018 elections, rendering Cambodia a "*de facto* one-party state."<sup>7</sup> The U.S. State Department described the Supreme Court's decision to ban the CNRP as "the ruling Cambodian People's Party ... bann(ing) the main opposition party."<sup>8</sup> Around the same time as the Supreme Court's decision in 2017, several CNRP leaders were charged with various criminal offenses, including former

<sup>1</sup> New Straits Times, "After 36 years in power, Hun Sen longest-serving PM in world", January 16, 2021. Available at <https://www.nst.com.my/world/region/2021/01/658102/after-36-years-power-hun-sen-longest-serving-pm-world>.

<sup>2</sup> Bangkok Post, "Cambodia PM says ruling party to dominate for up to 100 years", June 22, 2020. Available at <https://www.bangkokpost.com/world/1939104/cambodia-pm-says-ruling-party-to-dominate-for-up-to-100-years>.

<sup>3</sup> See, e.g., Al Jazeera, "Hun Sen, Cambodian leader for 36 years, backs son to succeed him", December 2, 2021. Available at <https://www.aljazeera.com/news/2021/12/2/cambodian-leader-hun-sen-says-he-backs-oldest-son-to-succeed-him>; Washington Times, "Prime minister grooms West Point-educated son to take over in Cambodia", February 7, 2022. Available at <https://www.washingtontimes.com/news/2022/feb/7/hun-manet-son-cambodia-prime-minister-hun-sen-groo/>.

<sup>4</sup> Alex Conte and ABA Center for Human Rights, "TrialWatch Report: Cambodia v. Kak Sovannchay", May 2022, p.5. Available at [https://www.americanbar.org/content/dam/aba/administrative/human\\_rights/trialwatch/cambodia-sovannchay-trialwatch-report.pdf](https://www.americanbar.org/content/dam/aba/administrative/human_rights/trialwatch/cambodia-sovannchay-trialwatch-report.pdf).

<sup>5</sup> United Nations General Assembly, Report of the Special Rapporteur on the Situation of Human Rights in Cambodia, U.N. Doc. A/HRC/36/6127, July 2017, para. 8. Available at <https://www.refworld.org/docid/59b811ce4.html>.

<sup>6</sup> Voice of America, "Cambodia High Court Dissolves Opposition Party, Cementing One-Party Rule", November 16, 2017. Available at <https://www.voanews.com/a/cambodia-supreme-court-dissolves-cnrp/4117996.html>; Amnesty International, "Cambodia: Banning of opposition party a 'blatant act of political repression'", November 16, 2017. Available at <https://www.amnesty.org/en/latest/news/2017/11/cambodia-banning-of-opposition-party-a-blatant-act-of-political-repression/>.

<sup>7</sup> US Department of State, Cambodia 2021 Human Rights Report, p.1. Available at [https://www.state.gov/wp-content/uploads/2022/03/313615\\_CAMBODIA-2021-HUMAN-RIGHTS-REPORT.pdf](https://www.state.gov/wp-content/uploads/2022/03/313615_CAMBODIA-2021-HUMAN-RIGHTS-REPORT.pdf).

<sup>8</sup> Id.

CNRP President Kem Sokha, whose trial on charges of treason remains ongoing in 2022.<sup>9</sup> Others, including acting head of the CNRP Sam Rainsy, fled the country and have been living in exile.<sup>10</sup> Sam Rainsy has since been criminally charged multiple times.<sup>11</sup>

In August 2019, Sam Rainsy announced his intention to return to Cambodia on November 9th, Cambodia's Independence Day. In online statements and in interviews with media, he called on his supporters to join him in demonstrations on his return, saying that he had to "try to create People Power" (referring to the nonviolent People Power protests in the Philippines that ousted dictator Fernando Marcos in 1986) to reestablish democracy and to remove Prime Minister Hun Sen.<sup>12</sup> In response, Prime Minister Hun Sen announced that Sam Rainsy would be arrested immediately upon his return.<sup>13</sup> On November 8, Sam Rainsy was not permitted to board a flight from Paris to Bangkok, from where he had then planned to fly to Phnom Penh.<sup>14</sup>

The Cambodian authorities subsequently launched a mass crackdown on political opposition and government critics; by March 2021, at least "150 CNRP members and activists" were reported to have been charged with "treason and incitement, mostly for voicing support" for Sam Rainsy's return.<sup>15</sup> Sam Rainsy himself was convicted of treason and incitement and sentenced in absentia to 25 years in prison in March 2021, and stripped of the right to vote or stand as a candidate in upcoming elections.<sup>16</sup> Eight of his allies were similarly convicted and sentenced in absentia to 20-22 years in prison.<sup>17</sup> UN experts

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<sup>9</sup> Asia Times, "Kem Sokha trial a death blow for Cambodian democracy", January 19, 2022. Available at <https://asiatimes.com/2022/01/kem-sokha-trial-a-death-blow-for-cambodia-democracy/>; Radio Free Asia, "Cambodian court warns Kem Sokha, on trial for 'treason', not to get political", June 29, 2022. Available at <https://www.rfa.org/english/news/cambodia/kem-sokha-06292022175231.html>.

<sup>10</sup> Voice of America, "Cambodian Opposition Lawmaker Flees into Exile After Arrest Warning", October 4, 2017. Available at <https://voanews.com/a/cambodian-opposition-lawmaker-flees-country/4055748.html>.

<sup>11</sup> Voice of America, "Biography: Sam Rainsy." Available at <https://projects.voanews.com/cambodia-election-2018/english/biography/sam-rainsy.html>.

<sup>12</sup> See, e.g., The Diplomat, "Will Sam Rainsy's Promised Cambodia Return Bring People Power or Something Else?", September 11, 2019. Available at <https://thediplomat.com/2019/09/will-sam-rainsys-promised-return-bring-people-power-to-cambodia-or-something-else/>; Al Jazeera, "'No alternative': Rainsy determined to return to Cambodia", November 6, 2019. Available at <https://www.rfa.org/english/news/cambodia/samrainsy-message-10312019202234.html>.

<sup>13</sup> See, e.g., Radio Free Asia, "Cambodian Opposition Leader Sam Rainsy Vows to Lead 'Tsunami' of Supporters to Arrest PM Hun Sen", October 18, 2019. Available at <https://www.rfa.org/english/news/cambodia/tsunami-10182019164229.html>.

<sup>14</sup> Al Jazeera, "Cambodia's Rainsy 'Refused Boarding' Onto Paris-Bangkok Flight", November 7, 2019. Available at <https://www.aljazeera.com/news/2019/11/7/cambodias-rainsy-refused-boarding-onto-paris-bangkok-flight>.

<sup>15</sup> Radio Free Asia, "Cambodia's Acting Opposition Chief Sam Rainsy Sentenced to 25 Years For 'Attempted Coup'", March 1, 2021. Available at <https://www.rfa.org/english/news/cambodia/sentenced-03012021173934.html>.

<sup>16</sup> ABC News, "Cambodian opposition figure Sam Rainsy slapped with 25-year jail sentence as Australians face 'incitement' trial", March 1, 2021. Available at <https://www.abc.net.au/news/2021-03-02/cambodian-opposition-sam-rainsy-25-year-jail-sentence/13205792>; Al Jazeera, "'Mockery of justice': Cambodia's Rainsy gets 25-year jail term", March 2, 2021. Available at <https://www.aljazeera.com/news/2021/3/2/mockery-of-justice-cambodias-rainsy-gets-25-year-jail-time>.

<sup>17</sup> Id.

promptly condemned the mass trials and sentences,<sup>18</sup> and the European Parliament called for the “immediate and unconditional annulment” of the sentences of those convicted.<sup>19</sup>

As of August 2022 and the writing of this report, dozens of opposition politicians, their supporters, and activists have been convicted and sentenced to imprisonment, generally in mass trials.<sup>20</sup>

The repression of the Cambodian authorities is not only directed at the CNRP; officials in a new opposition party, the Candlelight Party, have also been criminally charged, particularly around local elections in June 2022.<sup>21</sup> For example, after the vice-president of the new opposition Candlelight Party, Son Chhay, publicly stated that the elections had not been fair, the CPP sued him for four billion Cambodian riel (approximately \$1 million U.S.), and the National Election Commission, which is widely perceived to be connected to the CPP,<sup>22</sup> asked that he be criminally charged.<sup>23</sup> In August 2022, Son Chhay was charged with defamation under Article 305 of the Cambodian Criminal Code.<sup>24</sup>

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<sup>18</sup> United Nations Office of the High Commissioner for Human Rights, “Cambodia: Long prison terms for former opposition leaders appalling, say UN experts”, March 5, 2021. Available at <https://waps.ohchr.org/en/press-releases/2021/03/cambodia-long-prison-terms-former-opposition-leaders-appalling-say-un>. See also Voice of America, “Cambodian Opposition Leaders Given ‘Outrageously Harsh’ Prison Sentences for Allegedly Plotting Coup”, March 3, 2021. Available at <https://www.voacambodia.com/a/cambodian-opposition-leaders-given-outrageously-harsh-prison-sentences-for-allegedly-plotting-coup-/5799828.html>.

<sup>19</sup> European Parliament, Resolution on the mass trials against opposition and civil society in Cambodia, Res. 2021/2579, September 3, 2021, para.2. Available at [https://www.europarl.europa.eu/doceo/document/B-9-2021-0186\\_EN.html](https://www.europarl.europa.eu/doceo/document/B-9-2021-0186_EN.html).

<sup>20</sup> See, e.g., Human Rights Watch, “Cambodia: Opposition Politicians Convicted in Mass Trial”, March 17, 2022. Available at <https://www.hrw.org/news/2022/03/17/cambodia-opposition-politicians-convicted-mass-trial>; Reuters, “Cambodia jails more opposition politicians for sedition”, March 17, 2022. Available at <https://www.reuters.com/world/asia-pacific/cambodia-jails-more-opposition-politicians-sedition-2022-03-17/>; Human Rights Watch, “Cambodia; 51 Opposition Politicians Convicted in Mass Trial”, June 14, 2022. Available at <https://www.hrw.org/news/2022/06/14/cambodia-51-opposition-politicians-convicted-mass-trial>.

<sup>21</sup> See, e.g., VOD English, “Candlelight Party Official Arrested for Plotting, Lawyer Alleges Case is Political”, June 1, 2022. Available at <https://cambojanews.com/another-candlelight-party-member-arrested-on-plotting-charge/>; CamboJA News, “Another Candlelight Party member arrested on plotting charge”, June 2, 2022. Available at <https://cambojanews.com/another-candlelight-party-member-arrested-on-plotting-charge/>.

<sup>22</sup> The National Election Commission is legally mandated to be non-partisan and for its members to have balanced representation between the majority party in the National Assembly and opposition parties. However, at present seven out of nine members are connected with the CPP. See Asian Network for Free Elections, “ANFREL Pre-Election Assessment Mission Report, Cambodia 2022 Commune and Sangkat Council Elections”, May 2022, p.11-13. Available at <https://anfrel.org/wp-content/uploads/2022/05/ANFREL-Pre-Election-Assessment-Mission-Report-Cambodia-2022-Commune-and-Sangkat-Council-Elections.pdf>.

<sup>23</sup> Phnom Penh Post, “NEC files defamation suit against Candlelight Party’s No 2”, June 17, 2022. Available at <https://phnompenhpost.com/national-politics/nec-files-defamation-suit-against-candlelight-partys-no2>; Phnom Penh Post, “Candlelight’s No 2 hit with CPP lawsuit over election claims”, June 14, 2022. Available at <https://phnompenhpost.com/national-politics/candlelights-no2-hit-cpp-lawsuit-over-election-claims>.

<sup>24</sup> Phnom Penh Post, “Candlelight Party’s Son Chhay charged with defaming ruling CPP”, August 12, 2022. Available at <https://www.phnompenhpost.com/national-politics/candlelight-partys-son-chhay-charged-defaming-ruling-cpp>.

## Suppression of Dissent

Since 2018, the human rights situation in Cambodia has “dramatically worsened,”<sup>25</sup> with increasing restrictions on civil and political rights. The World Justice Project ranked Cambodia 138<sup>th</sup> out of 139 countries in its 2021 Rule of Law Index based on a survey of dozens of indicators across eight factors. Cambodia ranked ahead of only Venezuela.<sup>26</sup> In February 2020, the European Commission withdrew some of the tariff preferences it had granted Cambodia due to “serious and systematic violations of the human rights principles enshrined in the International Covenant on Civil and Political Rights.”<sup>27</sup> The U.S. State Department’s 2021 Human Rights Report for Cambodia similarly observed that “significant human rights issues” in Cambodia included “serious restrictions on free expression,” the “inability of citizens to change their government peacefully through free and fair elections,” and “serious restrictions on political participation.”<sup>28</sup> That same year, CIVICUS, a global alliance of civil society organizations, noted that “repressive laws and judicial harassment” were being used “to restrict civic freedoms, undermine and weaken civil society, and criminalize individuals for exercising their rights to freedom of expression, freedom of association, and freedom of peaceful assembly.”<sup>29</sup>

In 2021, the UN Human Rights Council extended the mandate of the UN Special Rapporteur on the Situation of Human Rights in Cambodia (Special Rapporteur on Cambodia), expressing “serious concern at the reported deterioration in the civil and political environment in Cambodia due to the perceived chilling effects of judicial prosecution [...] and of other actions, including arrests and alleged surveillance, harassment and violence, against members of political parties.”<sup>30</sup> The UN Human Rights Council also noted with concern the dissolution of the former opposition party and the “reported general reluctance of some [Cambodians] to speak out in public and to express their opinions on the Internet for fear of arrest and surveillance.”<sup>31</sup>

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<sup>25</sup> Human Rights Watch, “UN Rights Body Should Increase Scrutiny of Cambodia’s Rights Crackdown”, October 7, 2021. Available at <https://www.hrw.org/news/2021/10/07/un-rights-body-should-increase-scrutiny-cambodias-rights-crackdown>.

<sup>26</sup> World Justice Project, “2021 Rule of Law Index.” Available at <https://worldjusticeproject.org/rule-of-law-index/global>.

<sup>27</sup> European Commission Press Release, “Trade/Human Rights: Commission decides to partially withdraw Cambodia’s preferential access to the EU market”, February 12, 2020. Available at [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_229](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_229).

<sup>28</sup> US Department of State, Cambodia 2021 Human Rights Report, p. 2. These were not new problems. See US Department of State, Cambodia 2020 Human Rights Report, p. 1. Available at <https://www.state.gov/wp-content/uploads/2021/03/CAMBODIA-2020-HUMAN-RIGHTS-REPORT.pdf>.

<sup>29</sup> CIVICUS, “UN Adopts Resolution on Cambodia”, October 11, 2021. Available at <https://www.civicus.org/index.php/media-resources/news/united-nations/geneva/5336-un-human-rights-council-adopts-resolution-on-cambodia>.

<sup>30</sup> Human Rights Council, Resolution adopted by the Human Rights Council on 11 October 2021, U.N. Doc. A/HRC/RES/48/23, October 14, 2021, para. 32. Available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/287/49/PDF/G2128749.pdf?OpenElement>.

<sup>31</sup> *Id.*, paras. 21, 24.

In March 2022, the UN Human Rights Committee issued its Concluding Observations on the third periodic report of Cambodia, stating it was “deeply concerned about the persistent violation of the freedom of expression” in Cambodia, which included the prosecution of human rights defenders, disproportionate and excessive restrictions on expression through incitement legislation, and “threats, harassment, arbitrary arrests, mass trials” and other violations against members of the CNRP.<sup>32</sup> The Committee called on the Cambodian government to “end[ ] all mass trials against members of the opposition” and prevent the harassment, intimidation, and arbitrary arrest of human rights defenders and members of the opposition.<sup>33</sup>

## Incitement Charges

The Cambodian authorities frequently use the charge of incitement to disturb social order under Articles 494 and 495 of the Cambodian Criminal Code to silence dissenting voices. The provisions make “the direct incitement to commit a felony or to disturb social order” through speech, writing, or audio-visual communications to the public punishable by six to 24 months imprisonment and a fine of up to four million riels where the incitement is ineffective.<sup>34</sup> As part of the Clooney Foundation for Justice’s TrialWatch initiative, the American Bar Association Center for Human Rights (ABA CHR) has observed and issued reports on numerous trials in Cambodia on charges of incitement under Articles 494 and 495.<sup>35</sup> And as described below, TrialWatch has also challenged this law before the UN Working Group on Arbitrary Detention.

Most recently, a TrialWatch report by TrialWatch Expert Alex Conte and staff at the ABA CHR analyzed the prosecution of the autistic minor son of a CNRP leader for insulting government officials and inciting social disorder on the basis of an argument in a private Telegram group, finding that the proceedings violated his right to freedom of expression and his rights as a child with disabilities.<sup>36</sup> In January 2021, a TrialWatch report by staff at ABA CHR analyzed the prosecution of journalist Ros Sokhet for Facebook posts critical of public figures in Cambodia, finding that he was convicted for non-violent political speech, in violation of his right to freedom of expression.<sup>37</sup> And in November 2020, a TrialWatch

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<sup>32</sup> Human Rights Committee, Concluding observations on the third periodic report of Cambodia, U.N. Doc. CCPR/C/KHM/CO/3, May 18, 2022, paras. 34, 38. Available at [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fKHM%2fCO%2f3&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fKHM%2fCO%2f3&Lang=en).

<sup>33</sup> *Id.*, paras. 35, 39.

<sup>34</sup> Criminal Code of the Kingdom of Cambodia (CCKC), Articles 494 and 495.

<sup>35</sup> See Clooney Foundation for Justice, “Cambodia: Justice for Unfair Trials”, April 2021. Available at <https://cfj.org/wp-content/uploads/2021/04/Clooney-Foundation-for-Justice-Cambodia.pdf>.

<sup>36</sup> Alex Conte and ABA Center for Human Rights, “TrialWatch Report: Cambodia v. Kak Sovannchay”, May 2022. Note: Kak Sovannchay’s father, Kak Khompear, was recently convicted alongside Theary Seng and received a six-year sentence. See VOD, “Updated: Mass Trial Sentences 31 to Jail, Cambodian-American detained”, June 14, 2022. Available at <https://vodenglish.news/mass-trial-verdict-cambodian-american-activist-taken-into-custody/>.

<sup>37</sup> ABA Center for Human Rights, “TrialWatch Report: Cambodia v. Ros Sokhet”, February 2021. Available at [https://www.americanbar.org/groups/human\\_rights/reports/fair\\_trial\\_report\\_cambodia\\_ros\\_sokhet/](https://www.americanbar.org/groups/human_rights/reports/fair_trial_report_cambodia_ros_sokhet/).

report by TrialWatch Expert Arthur Traldi and staff at ABA CHR assessed the prosecution of political activist Kong Raiya for selling t-shirts that commemorated slain opposition leader Kem Ley and bore non-violent slogans, finding that he should never have been tried for this type of non-violent political speech.<sup>38</sup> All three defendants were convicted of incitement to disturb social order under Article 495 of the Cambodian Criminal Code and each of their trials was given a grade of ‘D.’<sup>39</sup>

In November 2021, in response to a petition filed by the Clooney Foundation for Justice and Debevoise & Plimpton LLP on behalf of journalist Ros Sokhet, the UN Working Group on Arbitrary Detention found that Article 495 – under which Ms. Seng was also convicted – violated international human rights standards, stating that the provision “fail[ed] to distinguish between violent acts and peaceful exercise of fundamental freedoms.”<sup>40</sup> The Working Group urged the Cambodian government to amend the law.

Most recently, in its 2021 Human Rights Report on Cambodia, released in April 2022, the U.S. State Department expressed concern about the use of “arbitrary charges of ‘incitement’” against “political opposition leaders and their supporters” that apply “a vague standard commonly used to suppress and punish peaceful speech and dissent.”<sup>41</sup>

## Compromised Judiciary

Although the Constitution of the Kingdom of Cambodia formally provides for an independent judiciary, international and domestic organizations and institutions have repeatedly questioned the independence of Cambodia’s judiciary. The International Commission of Jurists (ICJ), for example, has criticized three “judicial reform laws” passed in 2014 as effectively “institutionaliz[ing] the prosecution and judiciary’s lack of independence from the executive”<sup>42</sup> and has further observed that courts are “well known as political tools of the CPP.”<sup>43</sup> In its 2021 Human Rights Report on Cambodia, the U.S. State Department noted that the government exerted “extensive control over the courts”

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<sup>38</sup> Arthur Traldi and ABA Center for Human Rights, “TrialWatch Report: Cambodia v. Kong Raiya”, November 2020. Available at [https://www.americanbar.org/content/dam/aba/administrative/human\\_rights/trialwatch/fair\\_trial\\_report\\_cambodia\\_kong\\_raiya.pdf](https://www.americanbar.org/content/dam/aba/administrative/human_rights/trialwatch/fair_trial_report_cambodia_kong_raiya.pdf).

<sup>39</sup> In January 2022, ABA CHR also examined the prosecution of a journalist for reporting on the seizure of citizens’ land, finding it “another example of authorities using Article 495 to quell legitimate exercise of the right to freedom of expression.” ABA Center for Human Rights, “Fair Trial Report for Sok Oudom”, January 2022. Available at [https://www.americanbar.org/content/dam/aba/administrative/human\\_rights/justice-defenders/oudom-report-english.pdf](https://www.americanbar.org/content/dam/aba/administrative/human_rights/justice-defenders/oudom-report-english.pdf). This journalist was likewise convicted.

<sup>40</sup> United Nations Working Group on Arbitrary Detention, Opinions Adopted by the Working Group on Arbitrary Detention at its Ninety-Second Session, November 15-19, 2021 (“UNWGAD, Sokhet Opinion”), U.N. Doc. A/HRC/WGAD/2021/75, January 27, 2022, para. 55. Available at [https://www.ohchr.org/sites/default/files/2022-03/A\\_HRC\\_WGAD\\_75\\_2021\\_Cambodia\\_AEV.pdf](https://www.ohchr.org/sites/default/files/2022-03/A_HRC_WGAD_75_2021_Cambodia_AEV.pdf).

<sup>41</sup> US Department of State, Cambodia 2021 Human Rights Report, p.9.

<sup>42</sup> International Commission of Jurists, “Misuse of law will do long-term damage to Cambodia”, July 26, 2018. Available at <https://www.icj.org/misuse-of-law-will-do-long-term-damage-to-cambodia/>.

<sup>43</sup> *Id.*

and that “[c]ourt decisions were often subject to political influence.” Freedom House has likewise stated that the “judiciary is marred by corruption and a lack of independence,” and that judges “have facilitated the government’s ability to pursue charges against a broad range of opposition politicians.”<sup>44</sup>

Notably, in Cambodia’s civil law system, judges function as both finders of fact and law: after the prosecutor determines there is sufficient evidence to bring charges, the prosecutor’s office forwards the indictment to the investigating judge, who is empowered to question relevant parties and issue warrants as needed. If the investigating judge decides that there is sufficient evidence for trial, he or she forwards the case to the presiding court. At trial, the court is empowered to ask questions of witnesses and the parties. However, at the conclusion of an extensive baseline study, the ICJ found that prosecution evidence was “considered authoritative without effective challenges or judicial scrutiny” and that outcomes often appeared predetermined.<sup>45</sup>

It was against this backdrop that Theary Seng’s trial took place. She is one of hundreds of Cambodians – in particular, critics of the government – who have recently been charged with incitement for non-violent expressions of political dissent.

## **B. CASE HISTORY**

Seng Chan Theary is a Cambodian-American human rights lawyer and leader in Cambodian civil society. She lost both of her parents to the Khmer Rouge and was imprisoned for five months as a child before emigrating to the United States in 1980. As an adult, Ms. Seng returned to Cambodia to work on civil and political issues; among other activities, she founded the Center for Cambodian Civic Education and the Association for Khmer Rouge Victims in Cambodia. Ms. Seng has been an outspoken critic of the ruling CPP and Prime Minister Hun Sen, denouncing him for “violently crush[ing]” his detractors,<sup>46</sup> repressing freedom of expression and assembly,<sup>47</sup> and manipulating elections.<sup>48</sup>

Ms. Seng’s trial was part of the mass crackdown on political opposition and government critics that took place after – as discussed above – Sam Rainsy, an exiled leader of the

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<sup>44</sup> Freedom House, “Freedom in the World Report on Cambodia”, 2022. Available at <https://freedomhouse.org/country/cambodia/freedom-world/2022>.

<sup>45</sup> International Commission of Jurists, “Achieving Justice for Gross Human Rights Violations in Cambodia: Baseline Study”, October 2017, pg. 20. Available at <https://www.icj.org/wpcontent/uploads/2017/10/Cambodia-GRA-Baseline-Study-Publications-Reports-Thematic-reports-2017-ENG.pdf>.

<sup>46</sup> Theary Seng, Public Blog, “My commentary on the 30 year rule of Hun Sen”, January 12, 2015. Available at [http://www.thearyseng.com/columnist/32-theary-sengs-blog/421-3-years-of-hun-sen-hrrc-keeping-the-faith-report-new-us-passport-delilah-swims-see-you-in-the-new-year-cnrp-north-america-europe-nominate-theary-to-nec?fbclid=IwAR0\\_m\\_pZnZCf7WForkwpf1gjZI-2nbTXkfLDCpZBAEx-OoSLRTjI0L8U1vw](http://www.thearyseng.com/columnist/32-theary-sengs-blog/421-3-years-of-hun-sen-hrrc-keeping-the-faith-report-new-us-passport-delilah-swims-see-you-in-the-new-year-cnrp-north-america-europe-nominate-theary-to-nec?fbclid=IwAR0_m_pZnZCf7WForkwpf1gjZI-2nbTXkfLDCpZBAEx-OoSLRTjI0L8U1vw).

<sup>47</sup> Theary Seng, Facebook Post, March 28, 2014. Available at <https://www.facebook.com/theary.c.seng/posts/10152254732151281>.

<sup>48</sup> Theary Seng, The Phnom Penh Post, “The rice has not been cooked”, October 11, 2013. Available at <https://www.phnompenhpost.com/opinion/rice-has-not-been-cooked>.

opposition CNRP, announced in August 2019 “that he and other CNRP exiles would return to Cambodia” on November 9 “to lead peaceful pro-democracy protests.”<sup>49</sup> Ms. Seng has expressed her support for Sam Rainsy and the CNRP but has also stated that she is not a party member.<sup>50</sup>

In September 2019, an investigation of Sam Rainsy and unidentified “allies” was opened on the basis of “[their] trying to appeal to and urge the people and armed forces [...] to fight against the current legal Royal Government.”<sup>51</sup> A judicial police officer in Ms. Seng’s trial later explained that the investigation started “when we heard the calls from Sam Rainsy [...] because he called to arrest the legitimate government,”<sup>52</sup> and that “there were many people under investigation.”<sup>53</sup> According to public reports, by October 2019 dozens of CNRP leaders had been arrested.<sup>54</sup> Also in October 2019, Prime Minister Hun Sen stated at a graduation ceremony for students that those who participated in activism around Sam Rainsy’s planned return would be met with violence.<sup>55</sup>

On August 13, 2020, the prosecution made its final submission (a referral of charges to the court), which named Ms. Seng and dozens of others as the previously unidentified “allies” of Sam Rainsy and sought charges of conspiracy to commit treason and incitement to social disorder.<sup>56</sup> On August 26, the investigating judge, whose role in the Cambodian system is to file the charges following submission of charges by the prosecution, issued a closing order charging Sam Rainsy, Ms. Seng, and 45 others with “conspiracy to commit treason and incitement to social disorder” under Articles 453, 494 and 495 of the Criminal Code.<sup>57</sup>

Article 453 of the Cambodian Criminal Code criminalizes conspiracy or plotting (depending on the translation), defining it as “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.” It provides for a punishment of five to ten years imprisonment.<sup>58</sup> Article 451 defines an “attack” as “the commission of one or more acts of violence liable to endanger the institutions of the Kingdom of Cambodia or violate the integrity of the national territory.”

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<sup>49</sup> Radio Free Asia, “Cambodia’s Acting Opposition Chief Sam Rainsy Sentenced to 25 Years For ‘Attempted Coup’”, March 1, 2021.

<sup>50</sup> Trial Monitor’s Notes, December 28, 2021.

<sup>51</sup> Prosecution Introductory Submission, September 2, 2019 (unofficial translation) (“Introductory Submission”), p.1.

<sup>52</sup> Trial Monitor’s Notes, March 10, 2022.

<sup>53</sup> *Id.*

<sup>54</sup> Human Rights Watch, “Cambodia: Wave of Opposition Arrests”, October 20, 2019. Available at <https://www.hrw.org/news/2019/10/20/cambodia-wave-opposition-arrests#>.

<sup>55</sup> Radio Free Asia, “Cambodian PM Threatens to Use Army to Prevent Sam Rainsy Return”, October 2, 2019. Available at <https://www.rfa.org/english/news/cambodia/hunsen-threat-10022019185233.html>.

<sup>56</sup> Prosecution Final Submission No. 4435, August 13, 2020 (unofficial translation) (“Final Submission”), p.13-16.

<sup>57</sup> Phnom Penh Municipal Court, Closing Order No. 5657, August 26, 2020 (unofficial translation) (“Closing Order”), p.10.

<sup>58</sup> CCKC, Article 453.

As mentioned above, Article 494 makes “incitement” punishable when it is committed: “by speech of any kind, made in a public or private place or meeting; by writing or picture of any kind, either displayed or distributed to the public; by any audio-visual communication to the public.”<sup>59</sup> Article 495 provides for a punishment of six months to two years imprisonment and a fine of one to four million riels for “the direct incitement to commit a felony or to disrupt social order by employing one of the means defined in Article 494,” where the incitement was ineffective.<sup>60</sup>

The closing order stated that “[d]uring 2019, while the internal security department of the Interior Ministry was monitoring security and social order via the internet, especially Facebook, [it] found actual activities of the individual Sam Rainsy and his entourage appealing to and inciting the people and the armed forces in Cambodia and other places to act together against the current legitimate government.”<sup>61</sup> The “facts” section of the closing order identified conduct by only seven of the named accused; the closing order did not contain information on how Ms. Seng was alleged to have participated in any criminal “activities” and contained no reference to her apart from naming her as an accused person.

According to Ms. Seng’s public blog, a court summons was posted at her former address on November 7, 2020.<sup>62</sup> The summons had been issued on October 10, 2020, nearly a month prior. Ms. Seng indicated that this was the first time that she learned about the charges against her (two and a half months after the closing order had been issued).<sup>63</sup>

On November 23, 2020, Ms. Seng’s international counsel wrote to the UN Special Rapporteur on the Promotion and Protection of Freedom of Opinion and Expression (Special Rapporteur on Freedom of Opinion and Expression) and the Special Rapporteur on Cambodia, requesting that they urgently communicate with the government of Cambodia regarding Ms. Seng’s situation and emphasize that “peaceful activism and speech cannot be criminalized or punished and that human rights defenders have the right to carry out their work without interference.”<sup>64</sup> Two days later, the Special Rapporteur on Cambodia expressed “serious concern” about mass trials scheduled to begin on November 26, including the one in which Ms. Seng was charged. The Special Rapporteur stated that the trials “appear to be politically motivated, lacking clear legal grounds, and constitute a serious violation of the due process rights firmly established by international human rights

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<sup>59</sup> CCKC, Article 494.

<sup>60</sup> CCKC, Article 495.

<sup>61</sup> Closing Order, p.10.

<sup>62</sup> Theory Seng, Public Blog, “My Treason and Incitement Mass Trial.” Available at <http://www.thearyseng.com/component/content/article/102-my-treason-a-incitement-trial/562-my-treason-a-incitement-trial>.

<sup>63</sup> *Id.*

<sup>64</sup> Perseus Strategies, “Request for URGENT ACTION – Forthcoming Trial of Cambodian-American Human Rights Lawyer and Advocate Theory Seng – November 26, 2020”, November 23, 2020, p.2. Available at <https://www.perseus-strategies.com/wp-content/uploads/2020/11/Theary-Seng-Cambodia-UN-Rapporteurs-11.23.20.pdf>.

law,” and appeared to be “part of a strategy to intimidate and discredit opponents of the government.”<sup>65</sup>

On November 26, 2020, Ms. Seng made her initial appearance in court. According to public reports, she “requested the court nullify all the charges” against her.<sup>66</sup> Ms. Seng also requested access to her case file; the presiding judge responded that she could get her case file from her lawyer (Ms. Seng did not have a Cambodian lawyer).<sup>67</sup> During the short hearing, the presiding judge decided to merge the criminal case in which Ms. Seng was charged (No. 6005) with another criminal case (No. 1140), in order to “speed up legal proceedings” as the “same facts and charges” were involved.<sup>68</sup> The new case number for the combined case was No. 1140.

On January 14, 2021, Ms. Seng appeared in court for the beginning of her trial. She sought to represent herself and obtain access to her casefile. The prosecution argued she was not entitled to the casefile or to represent herself, as self-representation in felony cases is not permitted under the Code of Criminal Procedure of the Kingdom of Cambodia.<sup>69</sup> The court agreed with the prosecution and did not let Ms. Seng represent herself or obtain her casefile.<sup>70</sup> After the hearing, the U.S. Embassy in Cambodia raised “serious concerns about the lack of due process” and called on the Cambodian government to “preserve the constitutional right to peaceful expression.”<sup>71</sup>

Court hearings for other accused persons in Ms. Seng’s trial proceeded on January 28 and February 18, 2021; as the accused were divided into three different groups for the purposes of hearings, Ms. Seng was not summoned to attend these hearings. During the hearings, the other defendants were not questioned about Ms. Seng.<sup>72</sup>

On November 23, 2021, a year after Ms. Seng’s first appearance in court, a new summons was delivered to her, indicating that one of three judges hearing her case would be replaced.<sup>73</sup> On December 7, 2021, Ms. Seng appeared in court in traditional Khmer dress in the style of a classical Cambodian Apsara dancer; she told reporters that her dress was

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<sup>65</sup> United Nations Human Rights Special Procedures, “Cambodia: UN Expert alarmed by reports of mass trial of activists”, November 25, 2020. Available at <https://cambodia.ohchr.org/sites/default/files/25112020%20Cambodia%20SR%20mass%20trial-EN.pdf>.

<sup>66</sup> Radio Free Asia, “Confusion in Packed Court as Cambodia Opens Mass Trial of Opposition”, November 26, 2020. Available at <https://www.rfa.org/english/news/cambodia/cnrr-trial-11262020163220.html>.

<sup>67</sup> Trial Monitor’s Notes, November 26, 2020.

<sup>68</sup> *Id.*

<sup>69</sup> Trial Monitor’s Notes, January 14, 2021. See Code of Criminal Procedure of the Kingdom of Cambodia (“CPKC”), Article 301.

<sup>70</sup> *Id.*

<sup>71</sup> U.S. Embassy, Phnom Penh, Cambodia, Facebook Post, January 14, 2021. Available at <https://www.facebook.com/us.embassy.phnom.penh/posts/10157950899333224>.

<sup>72</sup> Trial Monitor’s Notes, January 28, 2021; Trial Monitor’s Notes, February 18, 2021.

<sup>73</sup> Jared Genser, Khmer Post USA, “Debriefing on Theary Seng Mass Trial on December 7 in Phnom Penh”, December 7, 2021. Available at <https://khmerpostusa.com/an-update-on-theary-seng-case/>.

meant to make the point that her trial was “political theater.”<sup>74</sup> The prosecution requested the panel of judges to make Ms. Seng wear a “proper dress.” At the hearing, Ms. Seng and defense counsel for the other accused questioned why one of the judges had been replaced. The court dismissed their concerns and announced that the hearings would proceed along a set schedule. The presiding judge also urged Ms. Seng to wear a “proper dress” to the next hearing.<sup>75</sup>

On December 28, 2021, Ms. Seng was examined in court by the presiding judge and the prosecution, the first time the merits of the charges against her had been addressed. The presiding judge asked if she had been a member of a political party between 1998 and 2021.<sup>76</sup> Ms. Seng acknowledged her support for Sam Rainsy and his party because they were a “symbol for change,” but noted that she was not a member of the CNRP.<sup>77</sup> The presiding judge further asked her to describe how she supported Sam Rainsy and whether she supported his alleged November 9 plan to, in the words of the trial judge, “urge the police and military forces to arrest the Prime Minister Hun Sen.”<sup>78</sup> Ms. Seng reiterated that she had supported Sam Rainsy as a “democratic symbol for future political change by peaceful movement,” including by posting photos of herself on social media raising nine fingers (in reference to November 9), but that she did not support “every word or everything [that he does].”<sup>79</sup>

When further questioned by the presiding judge if she was aware of Sam Rainsy’s message allegedly inciting violence (in reference to urging the armed forces to arrest Prime Minister Hun Sen), Ms. Seng replied that what she “learned from him [was] just like a peaceful movement for change” and not violence. When the presiding judge began reading out loud what he alleged to be a post from her Facebook account, Ms. Seng noted that she had not been informed of this piece of evidence, and that she had still not received all the relevant documents in her casefile; she reminded the court that she had only been given the prosecutor’s introductory and final submissions and the investigating judge’s closing order in December 2020, and that she had not received any documents since. The presiding judge again urged Ms. Seng to work with a Cambodian lawyer so that she could obtain documents, and Ms. Seng agreed to this at the end of the hearing.<sup>80</sup>

On January 4, 2022, Ms. Seng was walking to the courthouse wearing a “prison-style orange outfit and Khmer Rouge-era ankle shackles” (which one news outlet noted was likely a reference to “both the repression of the Pol Pot period and to current Prime Minister Hun Sen’s past as a mid-level Khmer Rouge commander”) when she was briefly detained

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<sup>74</sup> VOA, “Cambodian Mass Trial Against Government Opponents Reopens”, December 7, 2021. Available at <https://www.voacambodia.com/a/cambodian-mass-trial-against-government-opponents-reopens/6342825.html>.

<sup>75</sup> Trial Monitor’s Notes, December 7, 2021.

<sup>76</sup> Trial Monitor’s Notes, December 28, 2021.

<sup>77</sup> Id.

<sup>78</sup> Id.

<sup>79</sup> Id.

<sup>80</sup> Id.

by security forces who “put her into a car and took her away.”<sup>81</sup> She was released shortly afterwards and arrived at court. At the hearing, the court gave her newly-retained Cambodian lawyer six weeks to prepare for the trial.<sup>82</sup>

On January 20, 2022, Cambodian authorities issued a notice permanently banning her international counsel, Jared Genser, from entering the country.<sup>83</sup> He had previously attended Ms. Seng’s trial in December 2021 and had given a press conference about the case while in Cambodia.

On February 22, 2022, Ms. Seng’s trial resumed, beginning with the presiding judge questioning her about her social media accounts. Among other questions, the judge asked Ms. Seng how many Facebook friends she had, if she was “satisfied with the Cambodian government,” and if she had posted social media statuses that were critical of the government. Ms. Seng affirmed that she frequently posted statuses that criticized the government leadership.<sup>84</sup> The judge asked if she had posted a status on October 1, 2019 that was “insulting” to the government; Ms. Seng acknowledged that she had probably re-shared Sam Rainsy’s social media post, which called the Hun Sen regime a dictatorship.<sup>85</sup> In further questioning by the presiding judge, Ms. Seng affirmed that she supported Sam Rainsy and wanted to gather people to stand up for democracy, but that she was not aware of all of his activities.<sup>86</sup>

Next, the prosecution cross-examined Ms. Seng, utilizing a line of questioning similar to that of the presiding judge. In response to the prosecution’s inquiries, Ms. Seng again confirmed that she supported Sam Rainsy and intended to support his return, but that she didn’t know about all of his activities and that she did not use the words “destroy Hun Sen” on her social media.<sup>87</sup> The prosecution also asked Ms. Seng what was meant by the words “dismantle the Berlin wall,” in reference to one of Sam Rainsy’s speeches on Cambodia;<sup>88</sup> Ms. Seng responded that it meant freedom. When asked what she would do “to stop the dictatorship government,” she replied, “by elections.”<sup>89</sup>

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<sup>81</sup> The Associated Press, “Cambodia activist briefly detained after protest in shackles”, January 4, 2022. Available at <https://apnews.com/article/cambodia-phnom-penh-hun-sen-8ed1009592ca726037ad9fc299c943e9>.

<sup>82</sup> Trial Monitor’s Notes, January 4, 2022.

<sup>83</sup> See Fresh News International, “Top News: Cambodia Permanently Bans Entry of Genser Jared”, January 20, 2022. Available at <http://en.freshnewsasia.com/index.php/en/localnews/26946-2022-01-20-11-03-27.html>; Khmer Post USA, “Theary Seng’s Legal Counsel, Jared Genser Barred from Entering Cambodia Forever, Latest Update”, February 3, 2022. Available at <https://khmerpostusa.com/theary-sengs-legal-counsel-jared-genser-banned-from-entering-cambodia-forever/>.

<sup>84</sup> Trial Monitor’s Notes, February 22, 2022.

<sup>85</sup> Id. Note: The post from October 1, 2019 does not appear to be one of the nine pieces of primary evidence against Ms. Seng.

<sup>86</sup> Id.

<sup>87</sup> Note: The prosecution asked Ms. Seng what she thought about the words “destroy Hun Sen”; it is unclear where the words “destroy Hun Sen” were used, but it is possible they were referencing remarks by Sam Rainsy.

<sup>88</sup> Note: The Berlin wall was referenced in the video clip of Sam Rainsy calling on the military forces.

<sup>89</sup> Id.

When questioned about her activities on November 9, 2019, she noted that she was at a meeting in Norway.<sup>90</sup> Last, the prosecutor asked her about a video clip of Sam Rainsy calling on the military forces to “turn their guns against the government” and what the objective of the video was: she replied that she understood the video clip to be about how to respond to the police and the courts using their power to impose restrictions on or to kill human rights activists – that the regime held all the power, which was being used on the people, and that the message was to turn the guns away from the people.<sup>91</sup> Notably, the prosecution did not allege that Ms. Seng herself had reposted this specific clip or that she had used those same words in any of the Facebook posts introduced as evidence against her.

Last, Ms. Seng’s lawyer questioned her. In response to his questions, she indicated that she was aware the CNRP was dissolved in 2017, and that she believed the dissolution of the CNRP to be unjust and unconstitutional.<sup>92</sup> When asked whether she thought “creating any [opposition] movement would be against the law,” Ms. Seng replied that “it was just unity among people to stand up to show support.”<sup>93</sup> Defense counsel asked her if she thought other people knew about Sam Rainsy’s plan to return, and she responded that she thought they did “because Sam Rainsy had posted on his social media.”<sup>94</sup> Next, defense counsel asked her questions about the video clip where Sam Rainsy called on the military forces to turn their guns against the government and whether the exiled opposition leader had the ability to influence the military in this manner; she replied that she thought “all military forces have the duty to protect the nation” and that she did not think the armed forces “would do any[thing] against public interests.”<sup>95</sup> Finally, Ms. Seng reiterated her belief that Sam Rainsy had planned to return to Cambodia “to show his support to people.”<sup>96</sup>

On March 1, 2022, Ms. Seng appeared in court wearing sunglasses. Again, her attire was the subject of discussion between the presiding judge and the parties. Eventually, at the request of the presiding judge, she removed her sunglasses.<sup>97</sup> Ms. Seng’s defense lawyer began questioning Ms. Seng about social media posts that the prosecution had submitted as evidence against her.<sup>98</sup> These exhibits consisted of nine pages of print-outs of Facebook

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<sup>90</sup> Id. Note: In Ms. Seng’s written closing remarks, she noted that she was at a human rights seminar convened by the Norwegian Ministry of Foreign Affairs, and that she arrived back in Cambodia on November 9. Theary Seng, “My Legal Defense Before the Court: Concluding Remarks”, May 3, 2022. Available at <https://www.perseus-strategies.com/wp-content/uploads/2022/05/Theary-Seng-concluding-statement-05.03.22.pdf>.

<sup>91</sup> Id. Note: Ms. Seng’s testimony is also summarized in the judgment, which included the following: that Sam Rainsy planned to prevent the forces from killing their own brothers and that Sam Rainsy had no army and only the power of the people. Phnom Penh Municipal Court, Judgment, June 14, 2022 (unofficial translation) (“Judgment”), p. 23-24. Note: The video clip posted by Sam Rainsy is not one of the nine labeled pieces of evidence entered against Ms. Seng.

<sup>92</sup> Id.

<sup>93</sup> Id.

<sup>94</sup> Id.

<sup>95</sup> Id.

<sup>96</sup> Id.

<sup>97</sup> Trial Monitor’s Notes, March 1, 2022.

<sup>98</sup> Id.

posts from accounts that bear the name “Theary C. Seng” in English and “Seng Theary” in Khmer.<sup>99</sup>

Defense counsel first asked Ms. Seng about posting photos of herself on social media holding up nine fingers, a symbol of support for Sam Rainsy’s return to Cambodia.<sup>100</sup> Ms. Seng replied that her intention was to “represent her support for Sam Rainsy’s return and a spirit of democracy.” She agreed that exhibits No. 83/103<sup>101</sup> and No. 83/104<sup>102</sup>, which showed photos of herself featuring the number nine, were posts she had posted to her Facebook account. She denied posting the item in exhibit No. 83/106<sup>103</sup> as she thought the writing style was not hers; the post stated that “elections, democracy, rule of law [...]” under “Hun Sen’s regime” were “fake” and alleged that he and his family had fake educational diplomas. Ms. Seng indicated that exhibit No. 83/108<sup>104</sup>, which contained a graphic that counted down the 60 days until November 9, was possibly an item that she had reshared from someone else’s account. She also acknowledged that she posted the text contained in exhibits No. 83/109 and No. 83/110,<sup>105</sup> which appeared to be a long Facebook status originally posted by Sam Rainsy that explained his plan to return to Cambodia in order to “revive democracy” and that called on the people to “rise up through non-violence to demand democratic change.” Ms. Seng affirmed her support for Sam Rainsy’s general message of stopping the regime and encouraging democratic change.<sup>106</sup> Last, her lawyer asked if she had met with Sam Rainsy to prepare for his return or if she had been involved with preparing a specific plan for his return; she replied that her posts with the number nine were aimed at showing support and encouraging people to peacefully welcome Sam Rainsy’s return, but that she was not involved in specific preparations. The prosecution and a trial judge then asked several clarifying questions.<sup>107</sup>

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<sup>99</sup> Note: These nine sheets, which are hand-numbered 83/102-82/110 and correspond to the documents discussed at trial, are posted on Ms. Seng’s personal blog. Available at <http://www.thearyseng.com/component/content/article/102-my-treason-a-incident-trial/562-my-treason-a-incident-trial/569>. The trial monitor has confirmed these were the exhibits shown in court.

<sup>100</sup> Trial Monitor’s Notes, March 1, 2022.

<sup>101</sup> No. 83/103 contained a photo with a caption that read, in part, “See you on Saturday, November 9.” Judgment (unofficial translation), p. 50; see, also, Ms. Seng’s blog.

<sup>102</sup> No. 83/104 contained a photo of Ms. Seng with the number 9 on her arm and the caption, “Do you like my tattoo? See you on Saturday, November 9, 2019.” Judgment (unofficial translation), p. 50; see, also, Ms. Seng’s blog.

<sup>103</sup> No. 83/106 contained a Facebook status asserting that Hun Sen and his family had fake university degrees. Judgment (unofficial translation), p. 51; see, also, Ms. Seng’s blog. “Under Hun Sen’s regime, there are many things around us which are fake such as elections, democracy, rule of law, development and history. Also, there is something that makes people laugh, for example, the fake diplomas of Hun Sen, his wife and children.”

<sup>104</sup> No. 83/108 contained a photo graphic with the text, “60 days left for the repatriation of the leaders of the Cambodia National Rescue Party, November 9, 2019, for the 66<sup>th</sup> anniversary of the National Independence Day, which Cambodia captured from French colonization.” Judgment (unofficial translation), p. 51; see, also, Ms. Seng’s blog.

<sup>105</sup> No. 83/109 and No. 83/110 consisted of text from a status posted by Sam Rainsy titled “Why did I return to Cambodia?” that explained the reasons he decided to return to Cambodia. Judgment (unofficial translation), p. 51; see, also, Ms. Seng’s blog.

<sup>106</sup> See, generally, Trial Monitor’s Notes, March 1, 2022.; see, also, Judgment (unofficial translation), p. 24.

<sup>107</sup> Id.

On March 10, 2022, Ms. Seng appeared in court wearing makeup. The prosecutor asked her to wash off her makeup and take off her sunglasses. The presiding judge agreed with the prosecutor and suggested court staff would remove her from the courtroom if she did not do so. Although neither the prosecutor nor the judge cited any court rules, Ms. Seng eventually agreed and went outside to remove her makeup.<sup>108</sup>

When she returned, a judicial police officer presented the primary evidence underlying the charges in the case (No. 1140). These were the three video clips that the police alleged Sam Rainsy had posted on his Facebook page, which entailed Sam Rainsy speaking about political issues in Cambodia and which were quoted in the prosecution's final submission and the judge's closing order. The videos themselves were not shown in court. Instead, the police officer read from the department's investigation report quoting selected parts of the three clips. The quotes read out in court were the following:

- An excerpt from a video clip that was 10 minutes and 29 seconds long, posted on August 19, 2019: "Hun Sen made the country lose its independence ... we will demand our national independence back from the dictatorship ... Please, military forces and police officers, stop fighting against the people by the dictatorship's order, and please turn your guns toward the dictatorship ..."<sup>109</sup>
- An excerpt from a video clip that was five minutes and 21 seconds long, from an interview of Sam Rainsy conducted by VOA on August 19, 2019: "I return to Cambodia to call on people to arrest Hun Sen with treason charges..."<sup>110</sup>
- An excerpt from a video clip that was six minutes and 28 seconds long, from an interview of Sam Rainsy conducted by SK Media on August 24, 2019: "I will not be stupid to let Hun Sen arrest me ... I will not be stupid to let Hun Sen kill me like Kem Ley ... I go to arrest Hun Sen, inspire the armed forces and millions of our compatriots who desire change. They are waiting for an opportunity on November 9, 2019. The leaders are the leaders of the CNRP, including me. So, civil servants,

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<sup>108</sup> Trial Monitor's Notes, March 10, 2022.

<sup>109</sup> Id.; See, also, Closing Order (unofficial translation), p. 7 and Judgment (unofficial translation), p. 7, which contains the quote: "Hun Sen caused the loss of independence so on November 9, 2019, we will claim back the independence for Cambodia... The second definition, November 9, the same as until 1989, was the day the Berlin Wall was demolished by the people, so on November 9, 2019, with less than three months left, we will celebrate the return of independence to Cambodia... Armed forces! The time is up now, please, do not listen to the order of the dictator, traitor. Please, do not kill the people following the order of the dictator, traitor. Please, do not take side with the dictator, traitor. Please take sides with the people, please protect the people. If you are ordered to shoot the people [or] Sam Rainsy who is the leader of Cambodia National Rescue Party, please do not do that! Please aim at Hun Sen who is the traitor..." Note: Ms. Seng was questioned about this clip at the hearing on February 22, 2022.

<sup>110</sup> Id.; See, also, Closing Order (unofficial translation), p. 7 and Judgment (unofficial translation), p. 7, which contains the quote: "The fact that I come to Cambodia is to urge the people, armed forces, patriots to arrest Hun Sen, not to allow Hun Sen to arrest me, so that Hun Sen is prosecuted for hurting the people, stealing the country, causing damage to the country, selling the country and treason."

teachers, students, workers, please take 6 days leave, which is enough for us to gather and hold mass demonstrations to make a change.”<sup>111</sup>

The prosecution and defense lawyers then questioned the judicial police officer about the investigative process and what he thought of the recordings and Sam Rainsy’s announcement that he would return to Cambodia. In his testimony, the officer stated that he believed that what was recorded on the clips constituted treason, that Sam Rainsy’s purpose was to “topple the government,” and that Sam Rainsy’s announcement of his return was meant to “call on people to hate our government.”<sup>112</sup> Notably, when Ms. Seng’s defense lawyer asked the officer whether there was “any evidence from your documentation that linked the charges to Ms. Seng,” the officer “could not answer the defense lawyer’s question.”<sup>113</sup>

When defense counsel questioned Ms. Seng about the three video clips quoted by the judicial officer, she replied that she wanted to view the clips before answering questions about them. Asked specifically about Sam Rainsy’s interview with VOA, Ms. Seng replied that she had completely forgotten about it.<sup>114</sup> When her lawyer asked if she knew of Sam Rainsy’s calls for the military and people to fight against the Prime Minister, she responded “no.” She also stated twice that she did not join Sam Rainsy in any attempt to “arrest” the Prime Minister, and that she only raised nine fingers (as seen in her Facebook posts).<sup>115</sup>

At the next hearing on March 15, 2022, Ms. Seng’s lawyer again asked her about exhibit No. 83/106, which the prosecution claimed was a post from her Facebook account that read, in pertinent part: “Under Hun Sen’s regime, there are many things around us which are fake such as elections, democracy, rule of law, development and history. Also, there is something that makes people laugh, for example, the fake diplomas of Hun Sen, his wife and children.” Ms. Seng denied writing the post.<sup>116</sup>

On March 21, 2022, Ms. Seng was questioned by one of the judges about several other posts on her Facebook account that had been entered into evidence. She acknowledged making posts in exhibits No. 83/102,<sup>117</sup> No. 83/103 and No. 83/105,<sup>118</sup> which contained different photos of Ms. Seng featuring the number nine, but again denied that she authored the post in exhibit No. 83/106, which concerned the fake educational diplomas. Ms. Seng

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<sup>111</sup> Closing Order (unofficial translation), p. 8; Judgment (unofficial translation), p. 8. Note: The reproduction of this third quote relies on the Closing Order and Judgment (which were consistent with each other), while the trial monitor’s notes record the quote slightly differently (most likely a transcription error).

<sup>112</sup> Trial Monitor’s Notes, March 10, 2022.

<sup>113</sup> Id.

<sup>114</sup> Id.

<sup>115</sup> Id.

<sup>116</sup> Trial Monitor’s Notes, March 15, 2022.

<sup>117</sup> No. 83/102 contained a photo of Ms. Seng in front of a statue raising 9 fingers with the caption, “Let’s meet together this Nov. 9 to welcome back Sam Rainsy.” Judgment (unofficial translation), p. 51; see, also, Ms. Seng’s blog.

<sup>118</sup> No. 83/105 contained a photo of Ms. Seng with a dog and raising 9 fingers with the caption, “See you on November 9.” Judgment (unofficial translation), p. 51; see, also, Ms. Seng’s blog.

suggested that with respect to this one post, her Facebook account might have been hacked.<sup>119</sup>

At the start of the next hearing on March 28, 2022, Ms. Seng asked the panel of judges if there was “any factual evidence that connected her charges with the casefile.” The court did not answer directly, replying that “she should not worry since the court was in charge of it.”<sup>120</sup> The panel and parties then reviewed the evidence for case No. 1140. Brief excerpts of six videos were shown in court: three were clips of Sam Rainsy speaking to supporters, two were interviews with CNRP officials, and one focused on the CNRP Central Committee.<sup>121</sup> Specifically, the videos showed: 1. Sam Rainsy in the United States encouraging Cambodians to fight for democracy and stand up against Prime Minister Hun Sen;<sup>122</sup> 2. Sam Rainsy in a meeting in the United States asking supporters to protect the Cambodian motherland; 3. An interview with Long Ry, a CNRP official, about the strategic plan to ensure Sam Rainsy’s return; 4. A video focused on the CNRP Central Committee, the accomplishments of the body, and the possible impact of Sam Rainsy’s return; 5. An interview with Eng Chhay Eng, a CNRP president at the time of the party’s dissolution, speaking about the party’s support in Korea and Thailand; 6. Sam Rainsy in the United States with supporters. Next, four documents were projected that primarily contained Facebook posts created by Mr. Rainsy, other defendants in the case, and other individuals (not defendants) discussing Sam Rainsy’s return.<sup>123</sup> None of the evidence presented mentioned Ms. Seng or had any apparent connection to her.

Ms. Seng was prevented from attending the next hearing on April 5, 2022 due to her outfit, reportedly a Khmer outfit typically worn in rural areas. The panel again reviewed evidence, which mostly consisted of videos, photos, and Facebook posts.<sup>124</sup>

At the hearing on April 12, 2022, several other accused persons were questioned in court. Ms. Seng was not questioned but offered to be incarcerated in exchange for the release of another defendant in pretrial detention, Ms. Yok Neang, whose request for bail had been denied.<sup>125</sup>

On May 3, 2022, Ms. Seng arrived at court dressed as Lady Justice, carrying a sword and the scales of justice and wearing a blindfold. A police officer told her she could only enter the courthouse if she left the scales and sword outside and removed flowers from her hair. She declined to do so.<sup>126</sup> Consequently, she was absent as the parties made their closing submissions to the court. In closing arguments, the prosecutor did not refer to any specific

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<sup>119</sup> Trial Monitor’s Notes, March 21, 2022.

<sup>120</sup> Trial Monitor’s Notes, March 28, 2022.

<sup>121</sup> Id.

<sup>122</sup> This clip is possibly one of the clips quoted in earlier hearings.

<sup>123</sup> Trial Monitor’s Notes, March 28, 2022.

<sup>124</sup> Trial Monitor’s Notes, April 5, 2022.

<sup>125</sup> Trial Monitor’s Notes, April 12, 2022.

<sup>126</sup> Associated Press, “Cambodian Dissident dresses up as ‘Lady Justice’ for trial”, May 3, 2022. Available at <https://abcnews.go.com/International/wireStory/cambodian-dissident-dresses-lady-justice-trial-84463495>.

acts undertaken by Ms. Seng.<sup>127</sup> In his own closing arguments, Ms. Seng's defense attorney asked rhetorically when Ms. Seng had allegedly met with others and planned to commit a crime, and what violent crimes had been committed. He noted that the prosecutors had adduced no documentary evidence or produced any witnesses to show that Ms. Seng had participated in a conspiracy or incited social disorder.<sup>128</sup>

On June 14, 2022, the court announced its judgment: Ms. Seng and her co-defendants were all convicted of treason under Article 453 and conspiracy to incite social disorder under Articles 494 and 495 of the Cambodian Criminal Code.<sup>129</sup> Ms. Seng was sentenced to six years imprisonment.<sup>130</sup> The court's oral announcement contained no explanation as to why it found Ms. Seng guilty. After the hearing, she was arrested and promptly taken into custody.<sup>131</sup>

International backlash was swift. Human Rights Watch derided the "show trial" and called the convictions "unsubstantiated,"<sup>132</sup> while a U.S. embassy spokesperson deemed the verdicts "unjust."<sup>133</sup> A U.S. State Department spokesperson stated that Ms. Seng's sentencing was "the latest instance in an alarming pattern of threats, intimidation, and persecution of opposition political leaders and parties" in Cambodia and urged the Cambodian authorities to "release all those unjustly detained, including Theary Seng."<sup>134</sup>

On the afternoon the verdict was issued, following which Ms. Seng was taken into custody and brought to a prison in Phnom Penh, her lawyer attempted to visit her. Cambodian authorities did not permit him to enter.<sup>135</sup> Soon after, Ms. Seng was transferred from Phnom Penh to a different prison approximately 300 kilometers away.<sup>136</sup>

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<sup>127</sup> Trial Monitor's Notes, May 3, 2022.

<sup>128</sup> Id.; Judgment (unofficial translation), p. 95.

<sup>129</sup> Trial Monitor's Notes, June 14, 2022.

<sup>130</sup> Eighteen other defendants received six-year sentences, twelve received sentences of eight years' imprisonment, and twenty received five-year suspended sentences. Nine defendants had their charges dropped. In total, 51 defendants in Case No. 1140 (which combined Case No. 6005 and 1140) were convicted and sentenced.

<sup>131</sup> VOD English, "Updated: Mass Trial Sentences 31 to Jail, Cambodian-American detained", June 14, 2022. Available at <https://vodenglish.news/mass-trial-verdict-cambodian-american-activist-taken-into-custody/>; Human Rights Watch, "Cambodia: 51 Opposition Politicians Convicted in Mass Trial", June 14, 2022. Available at <https://www.hrw.org/news/2022/06/14/cambodia-51-opposition-politicians-convicted-mass-trial>.

<sup>132</sup> Human Rights Watch, "Cambodia: 51 Opposition Politicians Convicted in Mass Trial", June 14, 2022. Available at <https://www.hrw.org/news/2022/06/14/cambodia-51-opposition-politicians-convicted-mass-trial>.

<sup>133</sup> Reuters, "Cambodian court jails American lawyer, dozens of others for treason", June 14, 2022. Available at <https://www.reuters.com/world/asia-pacific/cambodian-court-jails-american-lawyer-dozens-others-treason-2022-06-14/>.

<sup>134</sup> Voice of America, "US: Mass Conviction is Latest 'Alarming' Action by Cambodia", June 16, 2022. Available at <https://www.voacambodia.com/a/us-mass-conviction-is-latest-alarming-action-by-cambodia/6619881.html>

<sup>135</sup> VOD English, "Seng Theary Relocated to Preah Vihear Prison", June 17, 2022. Available at <https://vodenglish.news/seng-theary-relocated-to-preah-vihear-prison/>.

<sup>136</sup> Id.

Ms. Seng’s counsel filed an appeal at the Phnom Penh Appeals Court in late June 2022. Approximately one month after the conviction was announced, in July 2022, the court’s written judgment was made available. Most of the judgment consists of summaries of the prosecution and defense counsel’s arguments and the defendants’ testimony in court; what little analysis it contains (approximately three pages) lacks specificity and factual details. Instead, the judgment merely states that the court agreed with the prosecution that there were “sufficient elements” to prove the conspiracy and incitement to social disorder charges against Ms. Seng (and her co-defendants) based on Sam Rainsy’s plan to return to Cambodia on November 9, 2019.<sup>137</sup>

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<sup>137</sup> Judgment (unofficial translation).

# METHODOLOGY



## A. THE MONITORING PHASE

The American Bar Association’s Center for Human Rights deployed a monitor to the trial of Theary Seng before the Phnom Penh Municipal Court as part of the Clooney Foundation for Justice’s TrialWatch initiative. The monitor spoke Khmer and was able to follow the proceedings. The monitor did not experience any restrictions in entering court or observing the trial, which consisted of hearings on November 26, 2020; January 14 and 18, 2021, February 18, 2021; December 7 and 28, 2021; January 4 and 20, 2022; February 22, 2022; March 1, 10, 15, 21, and 28, 2022; April 5 and 12, 2022; May 3, 2022; and the issuance of a verdict on June 14, 2022.

## B. THE ASSESSMENT PHASE

Staff at the ABA Center for Human Rights reviewed notes taken by the trial monitor and unofficial translations of the prosecution’s initial and closing submissions, the investigating judge’s closing order, and the written judgment. To evaluate the trial’s fairness and arrive at a grade, TrialWatch Expert Andrew Khoo reviewed an analysis of the case and the political and legal context in Cambodia prepared by staff at the American Bar Association Center for Human Rights. He concluded that:

1. This case exposed egregious and blatant violations of the rule of law and administration of justice in the repeated denial of and disregard for Ms. Seng’s due process rights.
2. The charges themselves lacked specificity, and there was a distinct lack of particularity as to how Ms. Seng was alleged to have committed the offenses with which she was accused.
3. There was no evidence introduced as to how Ms. Seng’s words and social media postings contravened the law. There was no evidence adduced to show that she had the requisite *mens rea* or intent, which was a fundamental component of the offense of incitement. With respect to the offense of conspiracy to commit treason, there was also no evidence introduced to show *actus reus*, i.e., how there was actual collusion or conspiracy with others to commit a criminal attack.
4. There was a refusal to acknowledge Ms. Seng’s right to self-representation. Although she eventually appointed counsel, there was a refusal to grant her access to counsel after conviction. She was also denied access to international legal assistance when her international lawyer was barred from entering the country.
5. Ms. Seng was repeatedly denied access to investigation papers, court documents, and exhibits; she received access to her casefile only after her trial began. She was surprised with the last-minute production of evidence, for which no advance notification was given to her. This risked undermining her ability to respond to the charges against her and mount a robust and comprehensive defense.

6. The trial itself was perfunctory, with manifest procedural and other irregularities, and with the prosecution clearly failing to comply with and discharge any reasonable or satisfactory standard and burden of proof.
7. The trial judges showed their negative predisposition towards the accused by repeated comments about and criticism of Ms. Seng's dress and attire. This was irrelevant to the substance of the trial. That it became an issue is indicative of a lack of impartiality on the part of the judges.
8. The outcome was all but pre-determined and predictable. There was no attempt to provide a clear and reasoned judgment justifying the decision to convict her. The several and significant gaps in the evidence were not addressed at all. The judges were clearly not independent.
9. The trial was ultimately a travesty of justice. Ms. Seng was convicted based on "guilt by association" in that she identified with some (though not all) of the views and opinions expressed by opposition leader Sam Rainsy, had doubts about the democratic credentials of the existing government of Prime Minister Hun Sen, and supported democratic change. These are political views which should never have been the basis for any criminal charges. As such, Ms. Seng's conviction is unsupportable in law, indefensible, and arbitrary. Her continued incarceration constitutes wrongful and arbitrary detention.

# ANALYSIS



## A. APPLICABLE LAW

This report draws upon human rights laws and standards: particularly the International Covenant on Civil and Political Rights (ICCPR), which Cambodia signed on October 17, 1980 and ratified on May 26, 1992. The report’s analysis also draws upon jurisprudence from the UN Human Rights Committee, which is tasked with interpreting and monitoring implementation of the ICCPR, as well as commentary from UN Special Procedures, including the UN Working Group on Arbitrary Detention and the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression and Opinion.

Relevant Cambodian laws include Article 41 of the Constitution, which provides for freedom of expression, press, publication, and assembly,<sup>138</sup> and several articles of the Criminal Code of the Kingdom of Cambodia<sup>139</sup>:

- Article 4, which holds that “there shall be no offence in the absence of intent to commit it” unless the law specifically identifies other culpable mental states;
- Article 453, which criminalizes conspiracy or plotting and defines it as “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”;
- Article 495, which criminalizes “direct incitement to commit a felony or to disturb social order by employing one of the means described in Article 494”; and
- Article 494, which provides that incitement may be committed through (i) speech in a public place or meeting; (ii) writing or picture of any kind displayed or distributed to the public; or (iii) any audio-visual communication to the public.

## B. INVESTIGATION AND PRETRIAL VIOLATIONS

### Right to be Informed of the Charges

Article 14(3)(a) of the ICCPR entitles every person charged with a criminal offense “to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.”<sup>140</sup> Under Article 14(3)(a), a defendant must be informed of the substantive violation alleged (nature) and the conduct which allegedly gave rise to the

<sup>138</sup> Article 41, Constitution of the Kingdom of Cambodia. (“Khmer citizens shall have freedom of expression, press, publication and assembly. No one shall exercise this right to infringe upon the rights of others, to affect the good traditions of the society, to violate public law and order and national security”).

<sup>139</sup> CCKC.

<sup>140</sup> ICCPR, Article 14(3)(a). This right has also been recognized in the statutes of international criminal tribunals, e.g., ICTY Statute, Article 21(4)(a); ICTR Statute, Article 20(4)(a); STL Statute, Article 16(4)(a); ICC Statute, Article 60(1).

violation (cause), including the material underlying facts.<sup>141</sup> The UN Human Rights Committee has explained that “‘promptly’ requires that information be given as soon as the person concerned is formally charged with a criminal offence under domestic law,” and that the requirements “may be met by stating the charge either orally – if later confirmed in writing – or in writing, provided that the information indicates both the law and the alleged general facts on which the charge is based.”<sup>142</sup> The Committee has concluded that where accused persons “were not notified of the grounds for the charges against them until two days before the trial,” this violated the notice requirements of Article 14(3)(a).<sup>143</sup>

The right to be informed of the charges is interrelated with an accused person’s right to prepare a defense against criminal charges,<sup>144</sup> since it is impossible for an accused person to defend herself against charges she is not aware of or does not properly understand.<sup>145</sup>

Ms. Seng was charged with conspiracy to commit treason under Article 453 and incitement of social disorder under Article 495. The charging documents – which, in the Cambodian system, are primarily the prosecutor’s closing or final submission and the investigating judge’s closing order – do not identify any allegedly criminal conduct on Ms. Seng’s part that might give rise to criminal liability.<sup>146</sup> The documents simply identify her as an accused person. Indeed, of the 46 persons listed in the investigating judge’s closing order, the ‘facts’ section of the closing order only identifies conduct by seven defendants.<sup>147</sup> Ms. Seng was left to guess what conduct underlay the offenses she was charged with.

When her trial began over one year after she received her first summons to appear in court, Ms. Seng still had not been informed of the material facts underlying the charges against her. Indeed, the presiding trial judge and prosecution began questioning her on December 28, 2021 – before she had received the casefile, which she noted in court.<sup>148</sup> This lengthy delay in informing Ms. Seng of the “cause” of the charges against her was a violation of her right to be informed of the charges against her, as provided by Article 14(3)(a) of the ICCPR.

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<sup>141</sup> Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 31. See also Human Rights Committee, *Giménez v. Paraguay*, U.N. Doc. CCPR/C/123/D/2372/2014, July 25, 2018, para. 7.10.

<sup>142</sup> Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 31.

<sup>143</sup> Human Rights Committee, *Bee v. Equatorial Guinea*, U.N. Doc. CCPR/C/85/D/1152 & 1190/2003, October 31, 2005, para. 6.3.

<sup>144</sup> ICCPR, Article 14(3)(b).

<sup>145</sup> See, e.g., European Court of Human Rights, *Pélissier and Sassi v. France*, App. No. 25444/94, Judgment, March 25, 1999, para.54.

<sup>146</sup> Even the November 2021 summons, submitted a year after Ms. Seng was initially brought to trial, provides no information about the cause of the charges against her.

<sup>147</sup> Closing Order (unofficial translation), p. 6-8.

<sup>148</sup> Trial Monitor’s Notes, December 28, 2021.

## Right to Counsel and Right to Adequate Facilities to Prepare a Defense

Article 14(3)(b) of the ICCPR guarantees that anyone charged with a criminal offence should have the following minimum guarantees: “to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing.”<sup>149</sup> The UN Human Rights Committee has explained that “adequate facilities” includes “access to documents and other evidence,” including “all materials that the prosecution plans to offer in court against the accused.”<sup>150</sup>

Article 14(3)(d) of the ICCPR elaborates on a related but distinct guarantee: that anyone charged with a criminal offence has the right “to defend himself in person or through legal assistance of his own choosing.”<sup>151</sup> The UN Human Rights Committee has clarified that “the wording of the Covenant is clear [...] in that it provides for a defence to be conducted in person ‘or’ with legal assistance of one’s own choosing, thus providing the possibility for the accused to reject being assisted by any counsel.”<sup>152</sup> While the right to self-representation is not absolute, any restriction on this right must have “an objective and sufficiently serious purpose and not go beyond what is necessary to uphold the interests of justice.”<sup>153</sup> Specifically, domestic laws should not place an absolute bar on the right to defend oneself with legal counsel.<sup>154</sup>

Although Ms. Seng informed the court multiple times that she wished to represent herself, she was not allowed to do despite being an international lawyer who has also spent years working on legal issues in Cambodia.<sup>155</sup> The court repeatedly directed Ms. Seng to hire a Cambodian lawyer on the basis that Cambodian law does not allow self-representation in criminal trials involving felonies.<sup>156</sup> This ruling does not comport with standards set out by the UN Human Rights Committee, which permit restrictions on the right to defend oneself only in “the interests of justice.” Neither the prosecution nor the presiding judge articulated any “objective or sufficiently serious” reasons that served the interests of justice as to why Ms. Seng could not represent herself.

In addition to contravening international standards on the right to self-representation, the court’s denial of Ms. Seng’s request to represent herself undermined her right to adequate facilities to prepare a defense, as she was not allowed access to her case file for many months. When Ms. Seng requested a copy of her case file at her hearing on January 14,

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<sup>149</sup> ICCPR, Article 14(3)(b).

<sup>150</sup> Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/35, August 23, 2007, para. 33.

<sup>151</sup> ICCPR, Article 14(3)(d).

<sup>152</sup> Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/35, August 23, 2007, para. 37.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> As noted above, Ms. Seng is the founding president of the Center for Cambodian Civic Education. She is also a qualified lawyer who founded the Cambodian Center for Justice and Reconciliation and worked at the Center for Social Development.

<sup>156</sup> Trial Monitor’s Notes, January 14, 2021; Trial Monitor’s Notes, December 28, 2021.

2021, the prosecutor responded that under the Cambodian Code of Criminal Procedure, an accused facing felony charges could not access her case file without a legal representative.<sup>157</sup> The presiding judge agreed and denied her request. Nearly a year later, after hearings began in her trial, she still had not been given “access to documents and other evidence,” as required under Article 14(3)(b). At the December 28, 2021 hearing, when the presiding judge began to question her about a Facebook post, Ms. Seng testified that she had not been informed about this piece of evidence – a violation of her right to access “all materials the prosecution plan[ned] to offer in court against the accused.” At that point, she had only received the prosecutor’s introductory and closing submissions and the investigating judge’s closing order, none of which identified the conduct underlying the offenses with which she was charged.<sup>158</sup>

Ms. Seng was only allowed access to the files after she agreed to retain a Cambodian lawyer at the close of the hearing on December 28, 2021. Although she and her new defense counsel were subsequently given six weeks to prepare their defense, the court’s denial of her right to represent herself and initial year-long denial of access to her case file violated her rights under Article 14(3)(b) and 14(3)(d) of the ICCPR.

## **C. VIOLATIONS AT TRIAL**

### **Right to Presumption of Innocence**

The trial process raised serious concerns that the court violated Ms. Seng’s right to be presumed innocent.

Article 14(2) of the ICCPR guarantees that “everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”<sup>159</sup> The UN Human Rights Committee has elaborated that Article 14(2) “imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle.”<sup>160</sup> While the Committee has noted that “it is generally not for itself, but for the courts of States parties, to review or to evaluate facts and evidence, or to examine the interpretation of domestic legislation by national courts and tribunals,” it may choose to comment where “it can be ascertained that the conduct of the trial or the evaluation of facts and evidence or interpretation of legislation was manifestly arbitrary or amounted to a denial of justice.”<sup>161</sup> Thus, a conviction following the prosecution’s manifest failure to prove its case beyond a reasonable doubt violates Article 14(2): the Committee has found violations

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<sup>157</sup> Trial Monitor’s Notes, January 14, 2021.

<sup>158</sup> Trial Monitor’s Notes, December 28, 2021.

<sup>159</sup> ICCPR, Article 14(2).

<sup>160</sup> Human Rights Committee, General Comment 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 30.

<sup>161</sup> See Human Rights Committee, *Ashurov v. Tajikistan*, U.N. Doc. CCPR/C/89/D/1348/2005, March 20, 2007, para. 6.7.

of the presumption of innocence where a court did not consider major gaps in a case and where a court did not address serious evidentiary issues.<sup>162</sup>

In the present case, Ms. Seng was convicted of both of the charges against her – conspiracy to commit treason under Article 453 and incitement to social disorder under Article 495 – despite demonstrable failures by the prosecution to prove its case against her beyond a reasonable doubt.

With respect to the charge of conspiracy, Article 453 of the Criminal Code requires “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.” The prosecution did not introduce any evidence that Ms. Seng had agreed to commit any attack or had even communicated with others about an attack; the prosecution only introduced evidence that she had shared some of Sam Rainsy’s posts and videos. This fell far short of proving any resolution or agreement to commit an attack. Moreover, no evidence was presented that Ms. Seng took “material actions” to implement any alleged plan.

With respect to incitement to social disorder under Article 495, both Cambodian law (under Article 4 of the Criminal Code<sup>163</sup>) and international best practices required the prosecution to show Ms. Seng possessed intent to incite. The indictment and subsequent trial monitoring notes reflect no evidence introduced by the prosecution that credibly demonstrated Ms. Seng had the intent to incite social unrest;<sup>164</sup> instead, Ms. Seng’s testimony at trial reflected that she intended to support democratic efforts and to encourage others to peacefully support Sam Rainsy’s return.<sup>165</sup> Furthermore, the prosecution failed to demonstrate that Ms. Seng’s nine Facebook posts – which the prosecution seems to have relied on as the sole basis of the evidence against her – even qualified as incitement to social disorder. Indeed, her posts did not call for violence or disorder but primarily expressed support for Sam Rainsy’s planned return.

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<sup>162</sup> Human Rights Committee, *Saidov v. Tajikistan*, U.N. Doc. CCPR/C/122/D/2680/2015, September 20, 2018, para. 9.4; Human Rights Committee, *Larrañaga v. The Philippines*, U.N. Doc. CCPR/C/87/D/1421/2005, July 24, 2006, para 7.4; Human Rights Committee, *Ashurov v. Tajikistan*, U.N. Doc. CCPR/C/89/D/1348/2005, March 20, 2007, para. 6.7.

<sup>163</sup> Article 4 holds that “there shall be no offence in the absence of intent to commit it” unless the law specifically identifies other culpable mental states.

<sup>164</sup> The UN Human Rights Committee has provided guidance on when “public order” can be used as a legitimate ground for restricting rights protected under the ICCPR, stating that “public order” refers to the “fundamental principles on which society is founded, which also entails respect for human rights, including the right of peaceful assembly.” It has further stated that governments “should not rely on a vague definition of ‘public order’ to justify overbroad restrictions on the right of peaceful assembly,” recognizing that “[p]eaceful assemblies can in some cases be inherently or deliberately disruptive.” Human Rights Committee, General Comment No. 37, U.N. Doc. CCPR/C/GC/37, September 17, 2020, para. 44. See, also, Section E. Other Fairness Concerns: Freedom of Expression.

<sup>165</sup> Trial Monitor’s Notes, February 22, 2022; Trial Monitor’s Notes, March 1, 2022; Trial Monitor’s Notes, March 10, 2022.

The lack of evidence against Ms. Seng was underscored at trial when a judicial police officer was questioned by defense counsel and asked whether there was “any evidence that linked the charges” to Ms. Seng. He could not answer.<sup>166</sup>

Despite obvious evidentiary issues, which defense counsel raised in closing arguments, the court still convicted Ms. Seng. In its convicting judgment, the court did not address these gaps. Without setting forth any facts specific to Ms. Seng, the court made a sweeping determination “that there were sufficient elements of the offenses” charged to find her and other accused guilty. Furthermore, the judgment did not articulate how the elements of either of the charges against Ms. Seng were met; it merely stated that the court agreed “with the conclusion and the indictment of the Prosecutor” based on “the facts related to November 9, 2019”: that “the return of Sam Rainsy and his accomplices actually created an event that caused serious disturbance to the order and social disorder. And more importantly, they are inciting action against or attempting to overthrow the legitimate government,” including mobilizing “people from all walks of life to stand up against the government” and “mobilizing money to support the activities of illegal movements.”<sup>167</sup>

Given the lack of evidence against Ms. Seng under Articles 453 and 495, her conviction was manifestly arbitrary and violated her right to the presumption of innocence, in contravention of Article 14(2) of the ICCPR.

## **Right to Be Tried Before an Independent and Impartial Tribunal**

Article 14(1) of the ICCPR recognizes the right of accused persons to a “fair and public hearing by a competent, independent and impartial tribunal established by law.”<sup>168</sup> This is an “absolute right that is not subject to any exception.”<sup>169</sup> The requirement for independence includes “actual independence of the judiciary from political interference by the executive branch [...]”<sup>170</sup> The impartiality guarantee encompasses both a right to a tribunal that *is* impartial – that judges are not “influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other” – and a right to a tribunal that also *appears* to be impartial to a reasonable observer.<sup>171</sup>

There are serious concerns that the court hearing Ms. Seng’s case was neither independent nor impartial, violating her rights under Article 14(1).

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<sup>166</sup> Trial Monitor’s Notes, March 10, 2022.

<sup>167</sup> Judgment (unofficial translation), p. 95-96.

<sup>168</sup> ICCPR, Article 14(1).

<sup>169</sup> Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, Aug. 23, 2007, para. 18.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*, para. 21.

With respect to independence, the UN Special Rapporteur on Cambodia has reported on allegations of “executive interference” in the work of Cambodia’s judiciary.<sup>172</sup> The US State Department has also described “serious problems with the independence of the judiciary” – specifically that “[c]ourt decisions were often subject to political influence.”<sup>173</sup> Non-governmental organizations have raised similar concerns: the International Commission of Jurists has stated that Cambodian courts are “well known as political tools of the CPP”,<sup>174</sup> and Freedom House has noted that “[j]udges have facilitated the government’s ability to pursue charges against a broad range of opposition politicians.”<sup>175</sup> Given this context, it is unlikely that the panel of judges hearing Ms. Seng’s case was independent.

Several aspects of the proceedings against Ms. Seng further indicate that the various courts adjudicating the proceedings were not impartial. First, the investigating judge confirmed charges against Ms. Seng even though the prosecution’s final submission cited no evidence against her.<sup>176</sup> At the very least, this gave the impression of the investigating judge simply rubberstamping the charges. Second, a number of questions posed to Ms. Seng by the presiding judge gave the impression that the charges were politically motivated, such as when he asked Ms. Seng if she was satisfied with the current government.<sup>177</sup> Third, the presiding judge also regularly sided with the prosecution in various complaints about Ms. Seng’s dress and appearance, despite failing to cite any rules or regulations.<sup>178</sup> Last, the court convicted Ms. Seng despite the absence of any evidence presented by the prosecution on the requisite legal elements of the offenses with which she was charged, and gave no reasoning in either the verbal pronouncement in court or the written judgment setting out the grounds of conviction.<sup>179</sup>

Taken together, these irregularities strongly indicate that the court presiding over Ms. Seng’s trial was neither independent nor impartial, violating her rights under Article 14(1) of the ICCPR.

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<sup>172</sup> General Assembly, Report of the Special Rapporteur on the situation of human rights in Cambodia, U.N. Doc. A/HRC/42/60, August 27, 2019, para. 58.

<sup>173</sup> US Department of State, 2021 Cambodia Human Rights Report, p.1, 8-9.

<sup>174</sup> International Commission of Jurists, “Achieving Justice for Gross Human Rights Violations in Cambodia: Baseline Study”, October 2017, pg. 19.

<sup>175</sup> Freedom House, “Freedom in the World Report on Cambodia”, 2022. Available at <https://freedomhouse.org/country/cambodia/freedom-world/2022>.

<sup>176</sup> See Closing Order (unofficial translation); Prosecution Final Submission (unofficial translation).

<sup>177</sup> Trial Monitor’s Notes, February 22, 2022.

<sup>178</sup> Trial Monitor’s Notes, December 7, 2021; Trial Monitor’s Notes, March 1, 2022; Trial Monitor’s Notes, March 10, 2022.

<sup>179</sup> See section on the Right to the Presumption of Innocence

## D. Post-Conviction Violations

### Right to Counsel

Under international standards, fair trial rights, including the right to legal assistance, should be respected during the appellate process. The UN Basic Principles on the Role of Lawyers, for example, state: “All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings,” which includes the appellate stage.<sup>180</sup>

With respect to Article 14(3)(b) of the ICCPR, the right to counsel encompasses not just the right to retain and be represented by counsel, but the right to “communicate with counsel.”<sup>181</sup> The UN Human Rights Committee has emphasized that the accused should be “granted prompt access to counsel.”<sup>182</sup> The Committee’s jurisprudence confirms that fair trial rights are applicable to appellate proceedings;<sup>183</sup> for example, in *Pustovoit v. Ukraine*, the Committee found violations of Article 14(3)(b) during a complainant’s domestic appeals process.<sup>184</sup> European Court of Human Rights jurisprudence also confirms that fair trial rights are applicable to appeals proceedings.<sup>185</sup> In *Sakhnovskiy v. Russia*, in which the European Court of Human Rights considered a case concerning effective legal assistance during appellate proceedings, the court emphasized that “any limitation on relations between clients and lawyers, whether inherent or express, should not thwart the effective legal assistance to which a defendant is entitled.”<sup>186</sup>

Immediately after her conviction, Ms. Seng was arrested and detained. Her lawyer attempted to visit her the afternoon of her sentencing and was denied access. According to news reports, a prison spokesperson acknowledged that “officials had not been allowing meetings with [Ms. Seng] as she was causing disruptions.” The spokesperson further stated, “We want to control [everyone] by the same standard but she, herself, is different from others. So we also find different measures [to use] from the others. Be informed about

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<sup>180</sup> UN Basic Principles on the Role of Lawyers, September 7, 1990, Principle 1. Available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-role-lawyers>.

<sup>181</sup> ICCPR, Article 14(3)(b).

<sup>182</sup> Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 34.

<sup>183</sup> See, e.g., Human Rights Committee, *Y.M. v. Russian Federation*, U.N. Doc. CPPR/C/116/D/2059/2011, May 13, 2015, paras. 9.5-9.7 (finding violations of Article 14(3)(d)); Human Rights Committee, *Dorofeev v. Russian Federation*, U.N. Doc. CPPR/C/111/D/2041/2011, August 26, 2014, paras. 10.2-10.3.

<sup>184</sup> Human Rights Committee, *Mikhail Pustovoit v. Ukraine*, U.N. Doc. CCPR/C/110/D/1405/2005, May 12, 2014, paras. 9.2-9.3.

<sup>185</sup> See European Court of Human Rights, *Sakhnovskiy v. Russia*, App. No. 2127/03, Judgment, November 2, 2010, paras. 94-109; European Court of Human Rights, *Belziuk v. Poland*, App. No. 23103/93, Judgment, March 25, 1998, para. 37(1). (“Criminal proceedings form an entity and the protection afforded by Article 6 does not cease with the decision at first instance”).

<sup>186</sup> European Court of Human Rights, *Sakhnovskiy v. Russia*, App. No. 2127/03, Judgment, November 2, 2010, para. 102.

this, and don't think that we are discriminating because she was a political activist. It is not that.”

The next day, Ms. Seng was transferred to a detention facility approximately 300 kilometers from Phnom Penh.<sup>187</sup> The prison spokesperson told a media outlet that she was moved due to “security concerns,” explaining, “If we keep her in [Prey Sar prison in Phnom Penh], they (her supporters) will come to disturb the prison, and how will my officers work?”<sup>188</sup>

By denying Ms. Seng prompt access to counsel after she was taken into detention and then moving her to a distant prison, making it more difficult for Ms. Seng to be visited by her lawyer, the Cambodian authorities undermined Ms. Seng's ability to communicate with counsel – conduct inconsistent with Article 14(3)(b). This obstruction of her access to legal assistance negatively impacts Ms. Seng's ability to prepare for an appeal, thus also potentially undermining her right to an appeal.

## **E. Other Fairness Concerns**

### **Freedom of Expression**

Article 19(2) of the ICCPR broadly protects individuals' rights to freedom of opinion and expression. It reads:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.<sup>189</sup>

Free expression is also protected by Article 41 of the Cambodian Constitution.<sup>190</sup>

Article 19(3) of the ICCPR permits States to impose certain limitations on the exercise of free expression, provided that those limitations are (i) provided by law (referred to below as the ‘principle of legality’); (ii) based on one of a small set of legitimate state interests; and (iii) necessary to protect a legitimate interest (the ‘principle of necessity’) and proportionate. Legitimate state interests include:

- the rights and reputations of others;

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<sup>187</sup> VOD English, “Seng Theary Relocated to Preah Vihear Prison”, June 2022. Available at <https://vodenglish.news/seng-theary-relocated-to-preah-vihear-prison/>.

<sup>188</sup> CamboJA News, “Seng Theary secretly transferred to Preah Vihear prison”, June 17, 2022. Available at <https://vodenglish.news/seng-theary-relocated-to-preah-vihear-prison/>.

<sup>189</sup> ICCPR, Article 19(2).

<sup>190</sup> Constitution of the Kingdom of Cambodia, Article 41. (“Khmer citizens shall have freedom of expression of their ideas... No one shall exercise these rights to infringe upon the honor of others, or to affect the good customs of society, public order and national security”).

- national security;
- public order;
- public health; or
- public morals.<sup>191</sup>

Under Article 20, States Parties to the ICCPR also commit to prohibiting “propaganda for war” and “advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence.”<sup>192</sup> However, limitations on speech that “may fall within the scope of Article 20 must also be permissible under Article 19, paragraph 3, which lays down requirements for determining whether restrictions on expression are permissible.”<sup>193</sup> The State bears the burden of demonstrating a restriction is compatible with international law.<sup>194</sup>

In the case at hand, both Ms. Seng’s prosecution and one of the laws used to prosecute her – Article 495 of the Cambodian Criminal Code – fail to satisfy international standards. Specifically, the restrictions at issue in Ms. Seng’s case fail to meet the tests of legality or necessity and proportionality as laid out by the ICCPR. Moreover, Article 495, under which Ms. Seng was charged and convicted, is not precise enough to satisfy the principle of legality and is not narrowly tailored to protect legitimate interests.

## **International Standards and Article 495 of the Cambodian Criminal Code**

### *Legality*

The UN Human Rights Committee has explained that a restriction on the freedom of expression is “provided by law” when it is publicly accessible and “formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.”<sup>195</sup> As such, the law “may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.”<sup>196</sup> The Special Rapporteur on Freedom of Opinion and Expression has further noted: “the restriction must be provided by laws that are precise, public and transparent; it must avoid providing authorities with

<sup>191</sup> ICCPR, Article 19(3).

<sup>192</sup> ICCPR, Article 20. Notably, Article 20’s incitement exception applies only “when the speaker seeks to provoke reactions (perlocutionary acts) on the part of the audience, and there is a very close link between the expression and the resulting risk of discrimination, hostility or violence.” U.N. General Assembly, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, U.N. Doc. A/66/290, August 10, 2011, para. 28.

<sup>193</sup> Human Rights Committee, *Ross v. Canada*, U.N. Doc. CCPR/C/70/D/736/1997, October 26, 2000, para.11.1.

<sup>194</sup> U.N. General Assembly, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, U.N. Doc. A/74/486, October 9, 2019, para.21. Available at [https://www.ohchr.org/sites/default/files/Documents/Issues/Opinion/A\\_74\\_486.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Opinion/A_74_486.pdf).

<sup>195</sup> Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 25.

<sup>196</sup> *Id.*

unbounded discretion.”<sup>197</sup> Restrictions must also be compatible with the other provisions of the ICCPR, such as non-discrimination.<sup>198</sup>

In addition to conspiracy, Ms. Seng was charged with incitement under Article 495 of the Cambodian Criminal Code. The formulation of Article 495, which criminalizes “direct incitement to commit a felony or to disrupt social order,” is insufficiently precise. In terms of the act incited, the provision covers a wide range of outcomes: all potential felonies as well as any disruption of social order, a term which is not defined in the statute or elsewhere. The sweeping language of the law makes it difficult for individuals to “regulate [their] conduct accordingly,” affording authorities precisely the “unfettered discretion” that the principle of legality forbids. Consequently, even if the government were able to demonstrate that the law possessed a legitimate purpose, such as safeguarding public order or national security within the meaning intended under the ICCPR, Article 495 violates the principle of legality.

### *Necessity and Proportionality*

A restriction “violates the test of necessity if the protection could be achieved in other ways that do not restrict freedom of expression.”<sup>199</sup> The necessity requirement overlaps with the proportionality requirement, as the latter means that a restriction must be the “least intrusive instrument amongst those which might achieve their protective function.” As such, laws cannot be overbroad.<sup>200</sup>

Applying necessity and proportionality standards, the Special Rapporteur on Freedom of Opinion and Expression has concluded that criminal penalties for speech are warranted in only the most serious and exceptional cases, such as child pornography, incitement to terrorism, public incitement to genocide, and advocacy for national, racial, or religious hatred.<sup>201</sup> According to the Special Rapporteur, it is never permissible to levy criminal penalties in response to expression which does not fall into these categories given the “significant chilling effect” on legitimate speech which such penalties create.<sup>202</sup>

Article 495 violates the principles of necessity and proportionality: again, the vagueness of the term “social order” places a broad swath of protected speech within the scope of the law, such as political expression and dissenting opinions, meaning that it is not “the least intrusive instrument amongst those which might achieve their protective function.” Further, while Article 495 may encompass offenses that warrant criminal penalties, such

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<sup>197</sup> U.N. General Assembly, Report of the Special Rapporteur on the promotion and protection of freedom of expression, U.N. Doc. A/74/486, October 9, 2019, para. 6.

<sup>198</sup> Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 26.

<sup>199</sup> *Id.*, para. 33.

<sup>200</sup> *Id.*

<sup>201</sup> U.N. General Assembly, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, U.N. Doc. A/66/290, August 10, 2011, para. 40.

<sup>202</sup> *Id.*

as incitement to terrorism, public incitement to genocide, or advocacy to national, racial or religious hatred, it also potentially includes non-violent expression which should not be criminalized under international standards. As criminal penalties are only appropriate where grave crimes are at issue, Article 495 violates the principles of necessity and proportionality.

Notably, the UN Working Group on Arbitrary Detention has found Article 495 (and 494) to be “impermissibly vague and overly broad” as it “fails to distinguish between violent acts and the peaceful exercise of fundamental freedoms.”<sup>203</sup> The Working Group has thus held that Article 495 is “incompatible” with Article 19(3) of the ICCPR.

### **International Standards and Ms. Seng’s Prosecution**

Even if the text of Article 495 was consistent with Cambodia’s international obligations, the proceedings against Ms. Seng violated her right to freedom of expression. Article 19 includes the right to “[...] impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media.” The UN Human Rights Committee has established that Article 19 protects “all forms of expression, including “electronic and internet-based modes of expression” such as Facebook posts.<sup>204</sup>

With respect to content, Article 19 protects “political discourse [and] commentary on one’s own and on public affairs.”<sup>205</sup> Correspondingly, the expression and/or dissemination of opinions that are critical of – or not in line with – official government policy is protected.<sup>206</sup> Moreover, while one legitimate purpose for restricting speech is to “protect the rights and reputations of others,” this does not justify criminalizing criticism of public figures. To the contrary, the Committee has held that heads of state and government are “legitimately subject to criticism and political opposition,” emphasizing that “in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high.”<sup>207</sup>

Ms. Seng’s Facebook posts formed the sole basis for the charges against her and her eventual conviction. As described above, Ms. Seng acknowledged writing or sharing

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<sup>203</sup> UNWGAD, Sokhet Opinion, para.55.

<sup>204</sup> Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para.12. See, also, U.N. General Assembly, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, U.N. Doc. A/66/290, August 10, 2011, paras.14-15. Available at <https://undocs.org/Home/Mobile?FinalSymbol=A%2F66%2F290&Language=E&DeviceType=Desktop&LangRequested=False>; U.N. Working Group on Arbitrary Detention, Opinion 43/2011 on Mohamed bin Abdullah bin Ali Al-Abdulkareem v. Kingdom of Saudi Arabia, U.N. Doc. A/HRC/WGAD/2011/43, 2011. Available at <http://hrlibrary.umn.edu/wgad/43-2011.html>.

<sup>205</sup> Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 11.

<sup>206</sup> Id., paras. 38, 42.

<sup>207</sup> Id., para. 38.

social media posts that expressed her support for an opposition political figure and his planned return to Cambodia to enact democratic change; as expressions of “political discourse” and commentary on public affairs, her posts were protected speech. Since none of the posts at issue called for violence, they did not come close to the narrow subset of speech that may be restricted under Article 20 of the ICCPR (that is, advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence). Thus, in order to impose restrictions, the Cambodian authorities were required to demonstrate a legitimate reason for restricting Ms. Seng’s speech and to further show that the restriction was necessary and proportionate.

As a threshold matter, as discussed above, Article 495’s criminalization of incitement to social disorder is insufficiently precise to fulfill the legality requirement. Thus, Ms. Seng’s prosecution for incitement was invalid from the outset.

With respect to the aim of the proceedings, Ms. Seng’s prosecution under Article 495 (incitement to social disorder) likely falls outside the bounds of what would be considered a legitimate “public order” objective. The UN Human Rights Committee has provided guidance on when “public order” can be used as a legitimate ground for restricting rights protected under the ICCPR, stating that “public order” refers to the “fundamental principles on which society is founded, which also entails respect for human rights, including the right of peaceful assembly.”<sup>208</sup> It has further stated that governments “should not rely on a vague definition of ‘public order’ to justify overbroad restrictions on the right of peaceful assembly,” recognizing that “[p]eaceful assemblies can in some cases be inherently or deliberately disruptive.”<sup>209</sup> The Committee has thus criticized public order ordinances – for example, a law regulating “disorder in public places” – for potentially facilitating “excessive restriction” of Covenant rights.<sup>210</sup> In this case, Ms. Seng’s prosecution under Article 495 for political speech that advocated for non-violent democratic change, including through peaceful assembly – even if pursued for the purpose of preserving “public order” – was the type of “excessive restriction” that would not qualify as a legitimate invocation of “public order”.

With respect to the charge of conspiracy under Article 453, preventing an attack in line with national security objectives may in some circumstances be legitimate grounds for restrictions on the right to freedom of expression. However, the UN Human Rights Committee has warned that national security “may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights.”<sup>211</sup> Indeed, the totality of the circumstances – the complete lack of evidence tying Ms. Seng to a treasonous conspiracy and the backdrop of mass trials against government

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<sup>208</sup> Human Rights Committee, General Comment No. 37, U.N. Doc. CCPR/C/GC/37, September 17, 2020, para. 44.

<sup>209</sup> *Id.*

<sup>210</sup> Human Rights Committee, Concluding observation on the third periodic report of Hong Kong, China. CCPR/C/CHN-HKG/CO/3, April 29, 2013, para. 10.

<sup>211</sup> Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 23.

critics – suggests that Ms. Seng was targeted not for reasons of national security, but for her advocacy of democratic change and her criticism of the government, an unacceptable justification for restricting expression.

When a State invokes a legitimate ground for restriction of freedom of expression, it still has the burden to show that the restriction was necessary and proportionate: thus, even assuming Ms. Seng’s prosecution was initiated for a *prima facie* legitimate purpose (protecting “public order” or national security), the State “must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.”<sup>212</sup> It must also show that the restriction is the “least intrusive instrument among those which might achieve their protective function.”<sup>213</sup> In its opinion in the case of a Cambodian journalist convicted of inciting social disorder for social media posts criticizing the government, the UN Working Group on Arbitrary Detention underscored that when governments seek to restrict speech, they must “specifically identify the language creating the alleged threat on the basis of which the restriction is implemented.”<sup>214</sup>

Throughout the proceedings, from the charging documents to arguments at trial to the judgment, the Cambodian authorities failed to articulate the specific threat posed by Ms. Seng’s nine Facebook posts and wholly failed to explain any “direct and immediate connection” between her posts and any alleged threat. The prosecution, for example, did not specify what language in her posts constituted incitement and how the posts created a public order threat (with respect to Article 495). Moreover, the prosecution failed to produce evidence of a single person who might have been “incited to social disorder” by the posts. With respect to the charge of conspiracy to commit treason under Article 453, the prosecution likewise did not articulate how Ms. Seng’s posts created a national security threat.

Moreover, as mentioned above, necessity and proportionality requirements mean that criminal sanctions for speech are warranted for only the gravest offences, such as child pornography, incitement to terrorism, public incitement to genocide, and advocacy for national, racial, or religious hatred. While Ms. Seng testified that she intended to encourage others to support Mr. Rainsy’s return, the available documentation indicates that her posts did not contain explicit calls for violence and could not be reasonably interpreted as incitement to terrorism, genocide, or national, racial, or religious hatred issue (even the post that Ms. Seng denied was hers – which alleged that Prime Minister Hun Sen had fake educational diplomas – bore no mention of violence).

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<sup>212</sup> Id., para. 35

<sup>213</sup> Id., para. 34.

<sup>214</sup> UNWGAD, Sokhet Opinion, para. 56.

Instead, Ms. Seng’s posts appeared to constitute precisely the type of political advocacy and criticism that have “particularly high” value and must be protected in a free society.<sup>215</sup> Thus, the restrictions levied on Ms. Seng – that is, her prosecution, conviction, and sentencing to six years imprisonment – were unnecessary and disproportionate.

In light of the above, Ms. Seng’s prosecution and conviction violated her right to freedom of expression.

## **Arbitrary Detention**

Under Article 9(1) of the ICCPR, “[n]o one shall be subject to arbitrary arrest or detention.”<sup>216</sup> A sentence of confinement upon conviction (like Ms. Seng’s) is a form of detention.<sup>217</sup> Detention is “arbitrary” under the ICCPR if, among other reasons, it is based on a violation of the detained person’s right to freedom of expression or if it results from a sentence of incarceration entered after a person was convicted in a “manifestly unfair” trial.<sup>218</sup> By either of these metrics, Ms. Seng’s detention is arbitrary.

It appears that Ms. Seng’s conviction was based entirely on her social media posts – conduct that constituted protected free expression under Article 19 of the ICCPR (see above, E. Other Fairness Concerns). The written judgment contained no analysis of how Ms. Seng had engaged in a conspiracy or plot to commit an attack or how she had incited disorder.<sup>219</sup> The instances of protected speech presented as incriminating by the prosecution combined with the actual lack of evidence of any criminal acts suggests that Ms. Seng was targeted for prosecution because of her criticism of the government and political activism; her six-year sentence would thus constitute arbitrary detention in violation of international law. Indeed, the United Nations Working Group on Arbitrary Detention recently found that the deprivation of liberty of a journalist convicted under Article 495 for criticizing the Cambodian government – a case with similar circumstances to that of Ms. Seng’s – was arbitrary.<sup>220</sup>

Additionally, the range of fair trial violations documented in this report likely render her trial “manifestly unfair,” making her detention following conviction arbitrary.

Thus, Ms. Seng’s detention violates Article 9(1) of the ICCPR.

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<sup>215</sup> See Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 34; Human Rights Committee, General Comment No. 37, U.N. Doc. CCPR/C/GC/37, September 17, 2020, para. 32.

<sup>216</sup> ICCPR, Article 9(1).

<sup>217</sup> Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 5.

<sup>218</sup> *Id.*, para.17.; see, also, UNWGAD, *Sokhet Opinion*, paras. 53-67; Human Rights Committee, *Khadzhiyev and Muradova v. Turkmenistan*, U.N. Doc. CCPR/C/122/D/2252/2013, April 6, 2018, para.7.7.

<sup>219</sup> Judgment (unofficial translation).

<sup>220</sup> UNWGAD, *Sokhet Opinion*.

As of the writing of this report in August 2022, Ms. Seng continues to be detained pending appeal.

## CONCLUSION



Theary Seng should never have been charged or prosecuted for expression that is protected under international law – namely, comments supportive of the opposition and critical of the government. Considering the lack of evidence of any criminal wrongdoing, the incitement and conspiracy charges appear to have been a pretext for retaliation against her. Moreover, the proceedings against Ms. Seng have been riddled with irregularities and fair trial violations throughout all stages. Her conviction and sentence of imprisonment are therefore untenable. The decision must be overturned, and Ms. Seng must be released.

More broadly, the Cambodian authorities must stop targeting dissenting voices with criminal proceedings and must repeal or revise Article 495 of the Criminal Code, as its vague language has facilitated numerous prosecutions of government critics. Criticism of government or the authorities should be acknowledged as fair comment, should be accepted, and should not be criminalized.

**GRADE:**

**F**



## GRADING METHODOLOGY

Experts should assign a grade of A, B, C, D, or F to the trial reflecting their view of whether and the extent to which the trial complied with relevant international human rights law, considering, *inter alia*:

- The severity of the violation(s) that occurred
- Whether the violation(s) affected the outcome of the trial
- Whether the charges were brought in whole or in part for improper motives, including political motives, economic motives, discrimination, such as on the basis of “race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,”<sup>221</sup> and retaliation for human rights advocacy (even if the defendant was ultimately acquitted)
- The extent of the harm related to the charges (including but not limited to whether the defendant was unjustly convicted and, if so, the sentence imposed; whether the defendant was kept in unjustified pretrial detention, even if the defendant was ultimately acquitted at trial; whether the defendant was mistreated in connection with the charges or trial; and/or the extent to which the defendant’s reputation was harmed by virtue of the bringing of charges), and
- The compatibility of the law and procedure pursuant to which the defendant was prosecuted with international human rights law.

### Grading Levels

- **A:** A trial that, based on the monitoring, appeared to comply with international standards.
- **B:** A trial that appeared to generally comply with relevant human rights standards excepting minor violations, and where the violation(s) had no effect on the outcome and did not result in significant harm.
- **C:** A trial that did not meet international standards, but where the violation(s) had no effect on the outcome and did not result in significant harm.
- **D:** A trial characterized by one or more violations of international standards that affected the outcome and/or resulted in significant harm.
- **F:** A trial that entailed a gross violation of international standards that affected the outcome and/or resulted in significant harm.

<sup>221</sup> ICCPR, Article 26.