



Cambodia v. Theary Seng

June 2021

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

ABOUT THE AUTHOR:

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

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The **Clooney Foundation for Justice's TrialWatch initiative** is focused on monitoring and responding to trials around the world that pose a high risk of human rights violations. TrialWatch is global in scope and focused on trials targeting journalists, LGBTQ persons, women and girls, minorities, and human rights defenders. It works to expose injustice and rally support to secure justice for defendants whose rights have been violated.

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EXECUTIVE SUMMARY

The criminal prosecution of Theary Seng in Cambodia violates her fair trial rights and her right to freedom of expression.

The American Bar Association's Center for Human Rights has been monitoring Ms. Seng's trial as part of the Clooney Foundation for Justice's TrialWatch initiative. 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, including by serving as the founding director of CIVICUS: Center for Cambodian Civic Education. Ms. Seng is an outspoken critic of Prime Minister Hun Sen's government.

In November 2020, Ms. Seng learned through a court summons that charges had been filed against her for conspiracy to commit treason and incitement to social disorder. She is being tried alongside 46 co-accused, including opposition leader in exile Sam Rainsy, and is facing a 12-year prison sentence.

Thus far, due to the authorities' failure to provide information regarding the allegations of conspiracy and incitement, Ms. Seng has been unable to prepare a defense. The charging document contains *no* mention of Ms. Seng at all except for listing her name as one of 47 accused. No factual details are provided. Ms. Seng's attempts to obtain additional information about the allegations have been rebuffed by both the prosecution and the court. As such, the authorities have violated her rights to be notified of the charges against her and to have adequate facilities to prepare a defense.

The lack of information as to Ms. Seng's alleged criminal wrongdoing suggests that the prosecution is but a pretext to curtail her freedom of expression and, further, that it is meant to serve as a broader warning to dissenting voices. Indeed, Ms. Seng's trial is one of several ongoing mass trials against individuals who are affiliated with the opposition Cambodia National Rescue Party (CNRP) or who have otherwise been critical of Hun Sen.

Meanwhile, the first hearing in Ms. Seng's case entailed questioning of two co-accused about, respectively, whether one co-accused had read stories on Sam Rainsy's Facebook page and had posted a Facebook status expressing support for Sam Rainsy and whether the other co-accused had "liked" Sam Rainsy's Facebook page and had listened to a radio speech given by an opposition leader: additional indication that the purpose of the trial is intimidation and suppression of critical views.

Cambodia must respect the right to a fair trial and stop targeting individuals for exercising their right to freedom of expression.

BACKGROUND

Seng Chan Theary is a Cambodian-American human rights lawyer and leader in Cambodian civil society. She has been an outspoken critic of Prime Minister Hun Sen and his government, denouncing him for “violently crush[ing]” his detractors,¹ repressing freedom of expression and peaceful assembly,² and manipulating elections.³ Ms. Seng has further questioned Hun Sen’s relationship with Vietnam,⁴ deeming him a puppet, and has stated: while “[it] is superficially true that relative peace and stability occurred during the reign of Hun Sen’s three decades in power, … [any] achievements [of his government] are only relative to the blackness of the Khmer Rouge regime.”⁵ Notably, Ms. Seng participated in the “nine-finger campaign,” posting a picture of herself on social media holding up nine fingers in support of exiled CNRP opposition leader Sam Rainsy’s planned return to Cambodia on November 9, 2019.⁶

On November 7, 2020, a court summons was posted at Ms. Seng’s former address. The summons stated that Ms. Seng had been criminally charged and ordered her to report to the Phnom Penh Municipal Court on November 26, 2020 for a hearing.⁷ The summons was issued on October 10, 2020, nearly a month prior.⁸ According to the Phnom Penh Municipal Court’s Closing Order (akin to an indictment), Ms. Seng and 46 other individuals, including Sam Rainsy, were alleged to have conspired “to commit treason and [to have committed] incitement to create social disorder … in Cambodia

¹ 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_pZnZCf7WForkwpf1gjZl-2nbTXkfLDCpZBAEx-OoSLRTjl0L8U1vw.

²See Theary Seng, Facebook Post, March 28, 2014. Available at <https://www.facebook.com/theary.c.seng/posts/10152254732151281>.

³ 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>.

⁴ Theary Seng, Public Blog, “My Commentary on the 30 Year Rule of Hun Sen”, January 12, 2015; Theary Seng, Public Blog, “Hun Sen Has Stockholm Syndrome”, August 26, 2017. Available at http://thearyseng.com/columnist/32-theary-sengs-blog/449-hun-sens-willing-hostage-hs-has-stockholm-syndrome-suong-sophorn-strawman-sips-fiji-doodles-speaks-fluff-bbcs-asean-way-online-anti-sam-rainsy-law-em-theay-qyuonq-again-post-turns-25-canada-150?fbclid=IwAR1S0NkarepXffzRDI2th_wQQecpjhJaN4jYadLdY9jTEgRmxgZrmdG6Pow.

⁵ The Guardian, “Hun Sen, Cambodia’s prime minister marks 30 years of hardline rule”, January 14, 2015. Available at <https://www.theguardian.com/world/2015/jan/14/hun-sen-cambodias-prime-minister-marks-30-years-of-hardline-rule>.

⁶Theary 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>.

⁷ Id.

⁸ Id.

and elsewhere during 2019” in violation of Articles 453, 494 and 495 of the Penal Code.⁹

The Closing Order specifies 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.”¹⁰ Apart from naming Theary Seng as an accused person, there is no other reference to her in the Closing Order.

The proceedings against Ms. Seng are part of a deluge of cases against 150 defendants, most of whom are affiliated with the CNRP.¹¹ In March 2021, Sam Rainsy was tried *in absentia* in a mass trial (he was separately charged in the same Closing Order as Ms. Seng) and sentenced to 25 years of imprisonment “on charges related to ‘attempt to commit a felony’ and ‘attack and endanger institutions of the Kingdom of Cambodia.’”¹² Mr. Rainsy’s deputies and other senior CNRP members were also convicted and sentenced to 20-22 years in prison in the same case.¹³

Ms. Seng attended a preliminary hearing in her case on November 26, 2020 and informed the court that she intended to represent herself at trial. The presiding judge “acknowledged and permitted” her request to represent herself with the condition that she attend all court hearings.¹⁴ Ms. Seng agreed to these terms.

At her first trial hearing on January 14, 2021, the court considered two case files (Case No. 6005, under which Ms. Seng was charged, and Case No. 1140).¹⁵ While 61 individuals were charged across the two cases, only 11 accused, including Ms. Seng, were present in court.¹⁶ At the hearing, Ms. Seng – representing herself – requested a

⁹ Phnom Penh Municipal Court of First Instance, Closing Order, Criminal Case File No. 6005, August 26, 2020 (unofficial translation).

¹⁰ Id.

¹¹ Amnesty International, “Cambodia: 150 Opposition Politicians and Supporters Face Jail in Mass Trials”, January 14, 2021. Available at <https://www.amnesty.org/en/latest/news/2021/01/cambodia-opposition-mass-trials/>.

¹² 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://cambodia.ohchr.org/sites/default/files/Long%20prison%20terms%20for%20former%20opposition%20leaders%20appalling_EN_Final.pdf; 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>.

¹³ 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>.

¹⁴ Theary Seng’s Legal Defense (prepared statement), January 14, 2021, pg. 2. Available at <https://www.facebook.com/photo?fbid=10158470412926281&set=pcb.10158470413181281>.

¹⁵ Trial Monitor’s Notes, January 14, 2021.

¹⁶ Id.

copy of her case file from the court, explaining that she needed it in order to prepare her legal defense.¹⁷ The prosecutor responded that only Ms. Seng's lawyer, not Ms. Seng, could access her case file.¹⁸ Ms. Seng reiterated that she was exercising her right to self-representation, and that she had full capacity to represent herself.

The presiding judge, however, reversed his prior ruling, telling Ms. Seng she could not represent herself because she was "an accused person," and could not obtain a copy of her case file without a (Cambodian) lawyer representing her.¹⁹ When Ms. Seng attempted to respond, the judge interrupted her and did not let her proceed.²⁰ Ms. Seng was also prohibited from reading a written statement that she had prepared for her defense.²¹ At the end of the hearing, the judge stated that the accused would be separated into groups and that at each subsequent hearing only one group at a time would be required to attend.

A hearing for one group (that Ms. Seng was not a part of) was held on February 18, at which two accused were examined and cross-examined.²² The next trial hearing, at which Ms. Seng's group was due to be questioned, was scheduled for February 25 but postponed due to an outbreak of COVID-19. Cases of COVID-19 have been on the rise in Cambodia since late February, culminating in a lockdown for several weeks in April.²³ The hearing for Ms. Seng's group has yet to be rescheduled.

The mass trial Ms. Seng is facing reflects broader patterns of repression in Cambodia. Notwithstanding the Cambodian Constitution's guarantee of freedom of expression, the government has systematically silenced critics, political opponents, and journalists using vague catch-all charges. In 2019, for example, both the UN Special Rapporteur on Cambodia and the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression expressed concern at "an escalating trend of suppression by the Cambodian Government of dissenting opinions in what appears to be an attempt to intimidate or silence political opinion"²⁴ and highlighted "the use of criminal law to target free speech, both offline and online."²⁵

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

²⁰ Id.

²¹ Theary Seng, Public Blog, "My Treason and Incitement Mass Trial."

²² Trial Monitor's Notes, February 18, 2021.

²³ See The Guardian, "Cambodia Accused of Using Covid to Edge Towards 'Totalitarian Dictatorship'", April 19, 2021. Available at <https://www.theguardian.com/global-development/2021/apr/19/cambodia-accused-of-using-covid-to-edge-towards-totalitarian-dictatorship>; DW, "Covid: Cambodia's Harsh Lockdown Aggravates Food Insecurity", May 12, 2021. Available at <https://www.dw.com/en/cambodia-covid-lockdown-food-insecurity/a-57511083>.

²⁴ United Nations Office of the High Commissioner of Human Rights, "Cambodia: UN Experts Concerned at Government Moves to Silence Political Opponents", June 19, 2019. Available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24711&LangID=E>.

²⁵ Id.

In the past year, the American Bar Association’s Center for Human Rights has monitored two such criminal trials as part of the Clooney Foundation for Justice’s TrialWatch initiative.²⁶ In June 2020, activist Kong Raiya was convicted of “incitement to disrupt social order” for advertising the sale of t-shirts commemorating a slain critic of the government on Facebook.²⁷ In November 2020, journalist Ros Sokhet was also convicted of incitement – and sentenced to 18 months in prison – based on Facebook posts in which he criticized high profile public figures.²⁸ It is not just activists and journalists who have been targeted with incitement charges: in December 2020, two rappers were convicted of incitement for “writing lyrics that referenced social justice and the loss of territory to Vietnam” and sentenced to prison.²⁹ As in the case against Ms. Seng, charges of conspiracy to commit treason have often been levied alongside incitement allegations: in September 2019, for example, six former CNRP activists were detained and charged with conspiracy and incitement.³⁰

The mass trials, including the prosecution of Ms. Seng, have drawn strong condemnation from the international community. The UN Special Rapporteur on Cambodia recently expressed “serious concerns” 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 law.”³¹

Correspondingly, after Ms. Seng’s hearing on January 14, 2021, the U.S. Embassy in Phnom Penh posted a statement on social media raising “serious concerns about the lack of due process,” and urging the authorities “to preserve the constitutional right to peaceful expression.”³² Meanwhile, the European Parliament adopted a resolution on March 11, 2021 condemning the mass trials. The resolution called on the government “to put an end to all forms of harassment, intimidation and politically motivated criminal

²⁶ For a summary of the troubling common trend in these trials, see Clooney Foundation for Justice, “Cambodia.” Available at <https://cfj.org/wp-content/uploads/2021/04/Clooney-Foundation-for-Justice-Cambodia.pdf>.

²⁷ Arthur Traldi & American Bar Association, “Trial Observation Report: Cambodia v. Kong Raiya”, November 20, 2020. Available at https://www.americanbar.org/groups/human_rights/reports/fair_trial_report_cambodia_kong_raiya/.

²⁸ American Bar Association, “Trial Observation Report: Cambodia v. Ros Sokhet”, February 16, 2021. Available at https://www.americanbar.org/groups/human_rights/reports/fair_trial_report_cambodia_ros_sokhet/.

²⁹ The Diplomat, “Two Rappers Convicted of ‘Incitement’ in Cambodia”, December 23, 2020. Available at <https://thediplomat.com/2020/12/two-rappers-convicted-of-incitement-in-cambodia/>.

³⁰ Phnom Penh Post, “Six CNRP Activists Are Detained for ‘Provoking Chaos’”, September 16, 2019. Available at <https://www.phnompenhpost.com/national-politics/six-cnrp-activists-are-detained-provoking-chaos>.

³¹ United Nations Office of the High Commissioner of Human Rights, “Cambodia: UN expert Alarmed by Reports of Mass Trial of Activists”, November 25, 2020. Available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26544>.

³² U.S. Embassy Phnom Penh, Cambodia, Facebook Post, January 14, 2021. Available at <https://www.facebook.com/us.embassy.phnom.penh/posts/1015795089933224>.

charges against members of the opposition, trade unionists, human rights defenders, the media and civil society actors.”³³

³³ European Parliament, Resolution of 11 March 2021 on the Mass Trials against Opposition and Civil Society in Cambodia, 2021/2579(RSP), March 11, 2021. Available at https://www.europarl.europa.eu/doceo/document/TA-9-2021-0087_EN.pdf.

ANALYSIS

A. APPLICABLE LAW

This report draws upon: the International Covenant on Civil and Political Rights (ICCPR); jurisprudence from the United Nations Human Rights Committee, which is tasked with interpreting and monitoring implementation of the ICCPR; and commentary from United Nations special procedures. Cambodia ratified the ICCPR in 1992.³⁴

B. 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.”³⁵ 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.”³⁶ In *Engo v. Cameroon*, the Committee found a violation of Article 14(3)(a) where the complainant alleged that he “waited several months to be informed of the charges against him and to be given access to the case file” and the State party “failed to reply specifically to this point.”³⁷

In the case at hand, the information provided to Ms. Seng in the months following her initial summons has fallen short of the requirement that defendants be apprised of the “alleged general facts” on which charges are based. Ms. Seng has received three documents thus far: i) the prosecutor’s Introductory Submission; ii) the prosecutor’s Final Submission; and iii) the investigating judge’s Closing Order. Not a single one of these documents links Ms. Seng to the charges of conspiracy to commit treason or incitement to cause social unrest. Indeed, the factual sections of all three submissions do not mention Ms. Seng at all; her name is merely listed as one of 47 accused persons. As such, Ms. Seng has no understanding of the case against her, hindering her ability to prepare a defense and violating her right to be informed of the charges.

³⁴ United Nations Treaty Collection, “Status of Treaties.” Available at https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND.

³⁵ ICCPR, Article 14(3)(a).

³⁶ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 31.

³⁷ Human Rights Committee, *Engo v. Cameroon*, U.N. Doc. CCPR/C/96/D/1397/2005, August 17, 2009, para. 7.7.

Notably, the lack of individualized information in the charging documents reflects the risks inherent in mass trials. As stated by UN experts, “mass trial proceedings do not meet international standards for a fair trial set out in article 14 of the ICCPR, given that it is seemingly impossible to conduct a specified legal assessment of defendants, as well as uphold the principle of presumption of innocence during an accelerated mass verdict.”³⁸

C. RIGHT TO ADEQUATE FACILITIES TO PREPARE A DEFENSE

Under Article 14(3)(b) of the ICCPR, accused persons must have adequate time and facilities for the preparation of their defense. The UN Human Rights Committee has explained that “adequate facilities” entails access to documents and other evidence, including “all materials that the prosecution plans to offer in court against the accused or that are exculpatory.”³⁹ The Committee has defined “exculpatory materials” not only as evidence demonstrating an accused’s innocence but also as evidence that “could assist the defence.”⁴⁰ Restricted disclosure is justified in limited circumstances, such as where necessary for national security or public safety.⁴¹

In the case of *Khoroshenko v. Russia*, for example, the Committee found that the complainant “did not receive [a] copy of the trial’s records immediately after the first instance verdict was issued [and] that despite numerous requests, he was not given some documents he considered relevant for his defence.”⁴² The Committee concluded that this conduct violated Article 14(3)(b).

In the present case, the prosecution has yet to provide Ms. Seng with any of the “materials that [it] plans to offer in court against” her. Despite multiple in-person requests, including a request made to the judge at her hearing on January 14, 2021,⁴³ Ms. Seng continues to be denied access to documents relevant to her case. Specifically, Ms. Seng requested and was denied access to seven documents listed in

³⁸ Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Working Group on Arbitrary Detention; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the situation of human rights defenders; and the Special Rapporteur on the independence of judges and lawyers, Communication to Egypt, U.N. Doc. AL EGY 13/2020, October 2, 2020.

³⁹ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/35, August 23, 2007, para. 33 (internal citations omitted).

⁴⁰ *Id.*

⁴¹ Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism, U.N. Doc. A/HRC/22/26, December 17, 2012, para. 38.

⁴² Human Rights Committee, *Khoroshenko v. Russian Federation*, U.N. Doc. CCPR/C/101/D/1304/2004, April 29, 2011, para. 9.7.

⁴³ Trial Monitor’s Notes, January 14, 2021

the prosecutor's Final Submission and the investigating judge's Closing Order: "the prosecutor's Criminal Case File No. 6005; the Phnom Penh Municipal Court's Investigation Case File, No. 4164; the investigating judge's Letter to Inform the Closing of Investigation, No. 904; Order Requesting Review of Case File, No. 926; Report of the Internal Security Dept. of the Interior Ministry, No. 1177; Summons to Appear, N. 929; and Cancellation Order of Summons to Appear, No. 1079."⁴⁴ As described above, the Closing Order and Final Submission contain no factual details about what Ms. Seng is alleged to have done; obtaining access to investigation reports and other documents in the case file is thereby all the more necessary for preparation of her defense. The repeated failure of the prosecution and the court to provide Ms. Seng with such materials violates her right to adequate facilities, guaranteed by Article 14(3)(b) of the ICCPR.

D. RIGHT TO SELF-REPRESENTATION

Article 14(3)(d) of the ICCPR guarantees that anyone charged with a criminal offence has the right "to defend himself in person or through legal assistance of his own choosing." 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."⁴⁵ The right to self-representation in the context of criminal proceedings is not absolute, and a lawyer may be assigned over the objection of the accused in the "interests of justice."⁴⁶

The UN Human Rights Committee has identified potential situations in which an accused person might be assigned a lawyer against his or her own wishes: if an accused faces grave charges but is unable to act in his or her interest; if the trial would be substantially and persistently obstructed by the accused's self-representation; or to protect vulnerable witnesses from being questioned by the accused.⁴⁷ Overall, however, any restriction on the right to self-representation "must have an objective and sufficiently serious purpose and not go beyond what is necessary to uphold the interests of justice."⁴⁸

In the present case, Ms. Seng has been impermissibly denied the right to represent herself at trial. In her first appearance before the court on November 26, 2020, Ms. Seng requested and appeared to receive permission to represent herself. As such, at

⁴⁴ Theary Seng's Legal Defense (prepared statement), January 14, 2021, pg. 2.

⁴⁵ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/35, August 23, 2007, para. 37.

⁴⁶ Id.

⁴⁷ Id.

⁴⁸ Id.

her hearing on January 14, 2021, Ms. Seng requested a copy of her case file from the court.⁴⁹ 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.⁵⁰ The trial judge agreed and stated that Ms. Seng could not represent herself because she was “an accused person” and “not a civil party.”⁵¹

This ruling does not comport with standards set out by the UN Human Rights Committee: that restrictions on the right to defend oneself are permissible *only* “in the interest of justice.” As an international lawyer who graduated from a top American law school and who has spent years working on legal issues in Cambodia,⁵² Ms. Seng has the legal training and ability to represent herself. Indeed, she arrived at the hearing on January 14 with a prepared written statement describing her defense and made appropriate requests for access to case documents. Neither the prosecution nor the trial judge articulated any “objective and sufficiently serious” reason as to why Ms. Seng could not represent herself. Consequently, her right to self-representation under Article 14(3)(d) of the ICCPR has been violated.

E. PROSECUTORIAL MISCONDUCT

As the prosecution appears to have no evidence to support the charges against Ms. Seng, the State’s actions likely breach best practices on prosecutorial ethics. Under the UN Guidelines on the Role of Prosecutors, prosecutors in criminal proceedings must “not initiate or continue prosecution,” or should “make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.”⁵³ Guidelines issued by the International Association of Prosecutors (IAP Guidelines), which complement and expand on the UN Guidelines on the Role of Prosecutors, specifically require prosecutors to proceed in criminal cases “only when a case is well-founded upon evidence reasonably believed to be reliable and admissible,” and to “not continue with a prosecution in the absence of such evidence.”⁵⁴

To date, the prosecution has yet to produce any evidence or even the factual underpinning for the charges against Ms. Seng. As noted above, none of the

⁴⁹ Trial Monitor’s Notes, January 14, 2021.

⁵⁰ Id.

⁵¹ Id.

⁵² As noted above, Ms. Seng is the founding president of CIVICUS. She also founded the Cambodian Center for Justice and Reconciliation and worked at the Center for Social Development.

⁵³ United Nations Office of the High Commissioner for Human Rights, United Nations Guidelines on the Role of Prosecutors, 1990, para. 14. Available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>.

⁵⁴ International Association of Prosecutors, Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, April 23, 1999, Principle 4.2(d). Available at [https://www.iap-association.org/getattachment/Resources-Documentation/IAP-Standards-\(1\)/IAP_Standards_Oktober-2018_FINAL_20180210.pdf.aspx](https://www.iap-association.org/getattachment/Resources-Documentation/IAP-Standards-(1)/IAP_Standards_Oktober-2018_FINAL_20180210.pdf.aspx)

prosecution's submissions indicate what Ms. Seng has done to incite social disorder under Article 495 of the Criminal Code or what Ms. Seng has done to conspire to commit treason under Article 453. Further, the prosecution has obstructed Ms. Seng's attempts to obtain more information about the charges and supporting evidence. In the apparent absence of a foundation for the charges, the prosecution's continued pursuit of the case against Ms. Seng contravenes guidelines on prosecutorial conduct.

F. RIGHT TO FREEDOM OF EXPRESSION

Although the prosecution has not provided evidence as to why Ms. Seng has been charged with incitement and conspiracy to commit treason, it appears that she is being targeted for her public criticism of Cambodia's political leaders – a violation of her right to freedom of expression. Further, the law under which she is being prosecuted for incitement – Article 495 of the Cambodian Criminal Code – is incompatible with international standards.

International Standards and Article 495 of the Criminal Code

Article 19 of the ICCPR guarantees the right to freedom of opinion and expression.⁵⁵ Restrictions on protected speech must: (i) be prescribed by law (the principle of legality); (ii) serve a legitimate objective; and (iii) be necessary to achieve and proportionate to that objective.⁵⁶ As stated in the ICCPR, legitimate objectives are the protection of public morals, public health, national security, public order, and/or the rights and reputation of individuals.⁵⁷

In order to comply with the principle of legality, legislation must be “formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly ... [and] may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.”⁵⁸ The UN Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion (Special Rapporteur on Freedom of Expression) has noted: “[the] restriction must be provided by laws that are precise, public and transparent; it must avoid providing authorities with unbounded discretion.”⁵⁹

⁵⁵ Free expression is also protected by Article 41 of the Cambodian Constitution.

⁵⁶ See Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, paras. 22, 34; Human Rights Committee, *Kim v. Republic of Korea*, U.N. Doc. CCPR/C/64/D/574/1994, 1999, para. 12.2.

⁵⁷ ICCPR, Article 19(3).

⁵⁸ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 25.

⁵⁹ 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(a).

A restriction “violates the test of necessity if the protection could be achieved in other ways that do not restrict freedom of expression.”⁶⁰ 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.”⁶¹ As such, laws that restrict expression cannot be overbroad.⁶²

In line with necessity and proportionality standards, the UN Special Rapporteur on Freedom of 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.⁶³ According to the Special Rapporteur, it is never permissible to levy criminal penalties in response to expression that does not fall into these categories given the “significant chilling effect” on legitimate speech that such penalties create.⁶⁴

In addition to conspiracy to commit treason, Ms. Seng was charged with incitement under Article 495 of Cambodia’s Criminal Code. The formulation of Article 495, which criminalizes “direct incitement to commit a felony or to disturb social security,”⁶⁵ is insufficiently precise, contravening the legality prong of the UN Human Rights Committee’s three-part test. 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. The sweeping language of the law makes it difficult for individuals to “regulate [their] conduct accordingly,” affording the authorities discretion that is ripe for abuse. Consequently, even if the government were able to demonstrate that the law possessed a legitimate purpose, such as safeguarding public order or national security, Article 495 would fail the first prong of the Human Rights Committee’s three-part test.

Article 495 likewise does not comply with the third prong of the test: necessity and proportionality. The imprecision of the term “social order” places a broad swath of non-violent political speech within the scope of the law, including dissenting opinions. As such, the law is not the “least intrusive instrument available.” Moreover, criminal penalties are only appropriate where grave crimes are at issue. While Article 495 encompasses offenses that may warrant criminal penalties, such as incitement to terrorism, public incitement to genocide, and advocacy for national, racial, or religious hatred, it extends beyond this narrow subset of crimes to more minute disruptions of public order, which should not be criminalized under international standards.

⁶⁰ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 33.

⁶¹ Id. at para. 34.

⁶² Id.

⁶³ 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.

⁶⁴ Id.

⁶⁵ Criminal Code of the Kingdom of Cambodia, Article 495.

In light of the above, Article 495 violates Article 19 of the ICCPR. Notably, in 2015 the UN Human Rights Committee advised Cambodia to “[r]eview its current and pending legislation … to avoid the use of vague terminology and overly broad restrictions, to ensure that any restrictions on the exercise of freedom of expression … comply with the strict requirements of articles 19 (3).”⁶⁶

International Standards and Theory Seng’s Prosecution

The United Nations Human Rights Committee has stated that the right to freedom of expression encompasses “political discourse, commentary on one’s own and on public affairs, [and] discussion of human rights.”⁶⁷ In particular, the UN Human Rights Committee places a “particularly high” value on “uninhibited expression” in the context of “public debate concerning public figures in the political domain and public institutions.”⁶⁸ Public figures, including heads of state, are thus “legitimately subject to criticism and political opposition,” and “the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties.”⁶⁹

Absent any specific factual allegations, it appears that Ms. Seng is being prosecuted for her critical commentary on Prime Minister Hun Sen and the ruling Cambodia People’s Party. This conclusion is further supported by the fact that the Closing Order cites statements on social media as the basis for the trial. As criticism of government figures is protected speech, the limitation being imposed on Ms. Seng – that is, criminal prosecution – is a violation of her right to freedom of expression unless it passes the three-part test delineated by the UN Human Rights Committee.

The first prong of the three-part test requires that restrictions be prescribed by law and “formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.” In addition to conspiracy to commit treason, Ms. Seng has been charged with incitement under Article 495, which, as described in the preceding section, is extremely broad. Its expansive formulation makes it difficult for individuals like Ms. Seng to regulate their conduct in accordance with the law and affords the authorities extensive discretion. As such, Article 495 – and Ms. Seng’s prosecution for incitement – contravenes the legality requirement.

With respect to the aim of the proceedings, the prosecution has not demonstrated a legitimate objective for trying Ms. Seng. Ms. Seng’s prosecution is one of many trials

⁶⁶ Human Rights Committee, Concluding observations on the second periodic report of Cambodia, U.N. Doc. CCPR/KHM/CO/2, April 27, 2015, para. 21(d).

⁶⁷ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 11.

⁶⁸ Id., para. 38.

⁶⁹ Id.

currently being pursued by Cambodian authorities against activists and individuals affiliated with – or perceived as being affiliated with – the CNRP. This context indicates that the charges against Ms. Seng are politically motivated, and that she has been targeted for her criticism of Prime Minister Hun Sen. Moreover, as mentioned above, the prosecution has yet to provide any explanation for the charges against Ms. Seng. The lack of evidence of wrongdoing suggests that the objective of the proceedings is to suppress dissent, not to prosecute a criminal offense.

Correspondingly, the February 18 hearing (at which Ms. Seng was not present) entailed intensive questioning of two of Ms. Seng's co-accused by the court and prosecution on topics such as participation in a workshop on political leadership, the posting of opinions supportive of the opposition on Facebook, the exchange of private messages about opposition leader Sam Rainsy's potential return to Cambodia, the "liking" of Sam Rainsy's Facebook page, the viewing of Facebook stories about Sam Rainsy, and even mere knowledge of media coverage of Sam Rainsy and the CNRP.⁷⁰ The subject matter of these questions is further indication that the trial as a whole is but a pretext to silence opposition to Hun Sen. As such, it appears that the objective for the criminal prosecution of Ms. Seng is illegitimate.

Even assuming that the objective of the criminal proceedings against Ms. Seng were legitimate, her prosecution fails to meet necessity and proportionality standards. Where a State invokes a legitimate ground for restriction of freedom of expression, "it 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."⁷¹

In the present case, the prosecution has yet to provide any explanation, let alone evidence, detailing "in specific and individualized fashion the precise nature of the threat" alleged to be posed by Ms. Seng's actions. It also has not provided evidence showing a "direct and immediate connection" between any of Ms. Seng's actions and an alleged threat.

Finally, as noted above, criminal prosecutions for speech must be reserved for the gravest offenses, such as incitement to violence and genocide. This is to avoid a chilling effect. The prosecution, however, has yet to present evidence that any of Ms. Seng's speech meets this threshold. Nonetheless, she is facing a criminal conviction and 12-year prison sentence.

⁷⁰ Trial Monitor's Notes, February 18, 2021.

⁷¹ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 35

In light of the above, Ms. Seng's criminal prosecution violates her right to freedom of expression.

CONCLUSION



The proceedings against Ms. Seng to date have entailed significant violations of her right to a fair trial and right to freedom of expression. In light of the lack of evidence of criminal wrongdoing, the incitement and conspiracy charges appear to be a pretext for retaliation against Ms. Seng. The Cambodian authorities must stop targeting dissenting voices with criminal proceedings and must repeal or revise Article 495 of the Criminal Code, the vague language of which has facilitated numerous prosecutions of government critics.