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**Human Rights Council**  
Working Group on Arbitrary Detention

## **Opinions adopted by the Working Group on Arbitrary Detention at its ninety-sixth session, 27 March–5 April 2023**

### **Opinion No. 5/2023 concerning Seng Chan Theory (Cambodia)**

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 51/8.

2. In accordance with its methods of work,<sup>1</sup> on 5 December 2022 the Working Group transmitted to the Government of Cambodia a communication concerning Seng Chan Theory. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum-seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

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<sup>1</sup> [A/HRC/36/38](#).

## Submissions

### *Communication from the source*

4. Seng Chan Theary, born in 1971, is a dual national of Cambodia and the United States of America. Her usual place of residence is Koh Prak Village, Kandal Province, Cambodia.

5. According to the source, Ms. Seng is a lifelong human rights defender, advocating for human rights, democracy and civic engagement in Cambodia. She emigrated to the United States as a child after her parents were murdered by the Khmer Rouge. After earning her bachelor's and law degrees, she returned to Cambodia in 2004 and founded two human rights organizations, the Center for Justice and Reconciliation and the Center for Cambodian Civic Education, aimed at both transitional justice – helping victims of the Khmer Rouge to testify before the Extraordinary Chambers in the Courts of Cambodia – and civic engagement.

6. The source submits that, in recent years, Ms. Seng has become the highest-profile critic in Cambodia of the country's Prime Minister for repressing freedom of expression, undermining due process and crushing political opposition. The Government has detained journalists and revoked their media licences. Human rights activists and bloggers have been arrested, beaten and intimidated. Moreover, the Government has worked to dismantle democratic opposition in Cambodia. In November 2017, it asked the Supreme Court of Cambodia to dissolve the country's main opposition party, the Cambodia National Rescue Party, which was accused of plotting to take power with the help of the United States. The Government's targeting of the opposition has resulted in wrongful detentions, the exile of opposition leaders and politically motivated prosecutions.

a. Context

7. According to the source, over the years, Ms. Seng has endured intimidation and assault for her activism and her criticism of the Government of Cambodia. Shortly before a visit to Cambodia by the President of the United States at the time, Barack Obama, in November 2012, unidentified men confronted her outside the headquarters of the Center for Cambodian Civic Education. The day before his visit to the United States Embassy, a group of plain-clothes security officers and district officials assaulted Ms. Seng. On the day of his visit, Ms. Seng and her assistant attempted to peacefully hold a banner at the embassy in protest of war crimes, but they were surrounded by 30 security officials and blocked from view. During the Speak Truth to Power campaign, police and security officers disrupted 10 of 15 authorized public gatherings by tearing down posters and playing loud music. The authorities also imposed restrictive policies on human rights non-governmental organizations that impeded the operations of the Center for Cambodian Civic Education and caused its registration to lapse.

8. In 2019, Ms. Seng shifted her human rights advocacy to her personal website and Facebook page. In early November 2019, only a few days prior to when exiled Cambodia National Rescue Party leader was set to return to Cambodia, on 9 November, Ms. Seng attended the Asia-Europe Foundation Seminar on Human Rights Education and Training. There, she emphasized the need for exiled opposition to return and be allowed to meaningfully participate in elections. She held up nine fingers at events, a gesture that has become symbolic of the return to Cambodia of the leader of the Cambodia National Rescue Party. Although Ms. Seng has no formal affiliation with the Cambodia National Rescue Party, she has long advocated online for its exiled leader to return and for democracy in Cambodia. In November 2020, she and more than 60 individuals affiliated with the Cambodia National Rescue Party were charged with treason.

9. According to the source, it was observed that the trial of Ms. Seng entailed a gross violation of international standards that affected the outcome and/or resulted in significant harm.<sup>2</sup> On 6 November 2020, Ms. Seng received news from a relative that the local police had called about a summons for her. The next morning, a single-page summons was delivered to her family member's fruit orchard requesting that Ms. Seng appear in court on 26

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<sup>2</sup> See [https://www.americanbar.org/content/dam/aba/administrative/human\\_rights/trialwatch/theary-seng-trialwatch-report.pdf](https://www.americanbar.org/content/dam/aba/administrative/human_rights/trialwatch/theary-seng-trialwatch-report.pdf).

November 2020, on charges of incitement to create social disorder (Criminal Code, arts. 494 and 495) and conspiracy to commit treason (Criminal Code, art. 453) in 2019. Ms. Seng's family member was not present when the summons was delivered, so the police left it with an orchard worker, who gave it to Ms. Seng's family member, who then gave it to Ms. Seng.

10. Through the news, Ms. Seng learned that more than 60 other people, including the leader, vice president and other leaders and members of the Cambodia National Rescue Party – had also received a summons to appear on 26 November to face similar charges. Once notified of the summons, Ms. Seng posted a statement on her Facebook page that she would appear and represent herself to fight the charges. As Ms. Seng has never engaged in or supported violent protest, she maintained that the charges against her were politically motivated and intended to force her to quietly leave Cambodia.

11. After she received the summons, Ms. Seng's trial was repeatedly postponed and then indefinitely delayed. Between 26 November 2020 and her conviction and sentencing on 14 June 2022, Ms. Seng appeared before the Phnom Penh Municipal Court more than a dozen times in a protracted legal proceeding designed to intimidate her into silence. Ms. Seng first appeared in court on 26 November 2020. A total of 121 defendants had been summoned, but only 34 appeared – many were in exile, convinced that they would not get a fair hearing. All of the other defendants had ties to the Cambodia National Rescue Party. Ms. Seng received the summons because, in the prosecutor's final submission and an investigating judge's closing order issuing the charges, she was named as an accused person. At this appearance, Ms. Seng requested her case file, but the judge responded that she could get it from her lawyer, which she did not have at the time.

12. Ms. Seng's trial was rescheduled for 14 January 2021. Before the trial, Ms. Seng experienced increased harassment and intimidation, including shortages of water and electricity to her house, and being followed by a police chief. At her court appearance, Ms. Seng again requested access to her case file. The prosecution argued that self-representation was not allowed under the Criminal Procedure Code and that Ms. Seng could not be granted access to her file – and the judge agreed. Her trial was postponed to 28 January, and then to 25 February. Without any reason, the trial was postponed and delayed indefinitely.

13. On 22 November 2021, three police officers visited Ms. Seng's home with a new summons to appear in the Phnom Penh Municipal Court on 7 December. The summons had been signed by the prosecutor's office on 12 November, two days after the United States announced new sanctions against two high-ranking government officials. The summons also indicated, without explanation or justification, that one of the three judges empanelled for the trial would suddenly be replaced by another judge.

14. Ms. Seng has brought global attention to the legal proceedings against her. She has worn a series of symbolic costumes to each court appearance. For her appearance on 7 December 2021, she wore the costume of a traditional Cambodian Apsara dancer. Instead of the elaborate headdress that would normally accompany the costume, Ms. Seng shaved her head (a symbol of mourning in Cambodian culture) to represent the Cambodian population suffering under the autocratic rule.

15. Ms. Seng's international counsel travelled to Phnom Penh in an informal capacity to support her. Reportedly, during his visit, a group close to the Government – the Kingdom of Cambodia Royal Government Attorney Group – issued a communiqué containing fabricated allegations against the international counsel and accusing him of violating provisions of article 522 of the Criminal Code for “publication of commentaries intended to unlawfully coerce judicial authorities”. The international counsel was later permanently banned from entering Cambodia, despite never engaging in any illegal activity. At the hearing on 7 December 2021, the trial was postponed to 28 December.

16. On 28 December 2021, Ms. Seng was first questioned in court about the charges against her. The judge asked her about a Facebook post that she had allegedly made, but Ms. Seng informed the court that she had not been given notice of this evidence and had not been given access to her full case file. Under the pressure of not being able to access her case file, Ms. Seng accepted a court-appointed lawyer.

17. Ms. Seng's trial was postponed to 4 January 2022, on which date Ms. Seng wore an orange prison jumpsuit and ankle shackles as a reference to her imprisonment under the Khmer Rouge. While walking to the courthouse, she was assaulted by 40 armed officers, who forced her into a vehicle and drove away. She was briefly detained and later released. In her absence, her court-appointed lawyer requested an extension to study her case file, and her trial was rescheduled for 15 February and then it was moved to 22 February. Ms. Seng was questioned at this hearing, on democracy, justice and civic engagement. In particular, the presiding judge asked Ms. Seng about whether she was "satisfied" with the Government of Cambodia and whether she had shared social media posts criticizing it. When asked what she would do to "stop the dictatorship Government", Ms. Seng replied, "elections".

18. On 1 March 2022, the questioning of Ms. Seng continued. Ms. Seng reminded the court that the due process violations in her case nullified the proceedings, in accordance with article 252 of the Criminal Procedure Code. She was cut off and told not to raise "that matter" and to only answer the questions asked, which concerned nine pieces of paper showing Facebook posts that she had allegedly shared. Ms. Seng noted that one of the posts had not been made by her and seemed to have been posted by someone else. She repeatedly explained her support for democracy and peace, even as the court asked her about video clips of the leader of the Cambodia National Rescue Party that did not contain a mention of her and were never entered as evidence against her.

19. On 10 March 2022, officers from the Interior Ministry were questioned about the posts presented to Ms. Seng. Although Ms. Seng had brought printouts illustrating the due process violations in her case, a security officer confiscated them, and they were never returned. Ms. Seng appeared in court wearing make-up and was forced to take it off by the presiding judge and prosecutor. Ms. Seng's defence lawyer then questioned the judicial police officer about the relevance to Ms. Seng of the video clips of the leader of the Cambodia National Rescue Party, and the officer could not answer the defence lawyer's question.

20. On 28 March 2022, Ms. Seng asked the panel of judges if there was any factual evidence that connected her charges with the case file. The court merely replied that "she should not worry since the court was in charge of it". None of the videos and posts presented that day mentioned or appeared relevant to Ms. Seng. Proceedings continued on 5 April, but Ms. Seng was denied entry into the courtroom for wearing a sarong. She was represented in absentia by her court-appointed lawyer. On 12 April, Ms. Seng arrived at the court dressed in traditional Khmer new year's attire. As she exited a motorized rickshaw, a dozen armed officers surrounded her and threatened to arrest her.

21. On 3 May 2022, Ms. Seng's lengthy trial concluded. Dressed as Lady Justice, Ms. Seng was told she could not enter the courthouse unless she removed the flowers from her hair and left her costume outside. The prosecution's closing argument did not even mention Ms. Seng or cite any specific instances in which she had committed a crime. She gave a statement from the courthouse steps highlighting the grave violations of both Cambodian and international law in her case.

22. On 14 June 2022, Ms. Seng arrived at the Municipal Courthouse dressed as Lady Liberty to hear the verdict in her case. She was convicted of incitement to create social disorder and conspiracy to commit treason, and sentenced to six years in prison. The court's oral announcement of the conviction contained no explanation as to why it had found Ms. Seng guilty. Ms. Seng remained outside the courthouse so that her arrest<sup>3</sup> would be carried out in broad daylight. Around 30 security guards exited the courthouse and came up behind her. Four or five guards grasped her arms and dragged her into a nearby van marked "Police". The other 25 guards pushed back protesters and crowds, including Ms. Seng's family members.

23. Ms. Seng arrived at Prey Sar Prison on the outskirts of Phnom Penh between 10 and 10.45 a.m. The source recalls that the Working Group has previously condemned the conditions in Prey Sar Prison, noting that it is notorious for its appalling detention conditions.

<sup>3</sup> The source notes that no warrant was shown at time of arrest, but an arrest warrant was ordered in the verdict reached on 14 June 2022.

It has also observed that the treatment afforded to certain detainees in Prey Sar Prison posed serious threats to their health and fell short of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).<sup>4</sup> Ms. Seng was initially denied access to her family and counsel in Prey Sar Prison. On 14 June at 2 p.m., two of Ms. Seng's family members and her court-appointed lawyer were denied a visit. Initially, correctional officials told them that they could not visit owing to the coronavirus disease (COVID-19). The prison administrator then told them to wait. They waited until 4.30 p.m., but their request to see Ms. Seng was denied.

24. On 15 June 2022, Ms. Seng's lawyer called the court to request more information about Ms. Seng's whereabouts. The court representative refused to answer, saying that it was not the court's responsibility to answer the lawyer's questions. On 16 June, Ms. Seng's lawyer learned through unofficial channels that Ms. Seng had been transferred to Preah Vihear Prison, a remote prison 300 km and a six-hour drive away from Phnom Penh. Only when questioned by Ms. Seng's lawyer did prison officials confirm that Ms. Seng had been transferred on 15 June. Ms. Seng's lawyer was never informed that his client had been transferred, nor was a reason provided. Later, a spokesperson for the General Department of Prisons confirmed that Ms. Seng had been transferred to Preah Vihear Prison because of "security concerns," noting only that Ms. Seng had once staged public protests. Speaking to the press, the spokesperson said that the reason for her transfer was public security and that if she remained at Prey Sar Prison her supporters would come to disturb the prison and the work of the prison officers.

25. On 5 July 2022, one of Ms. Seng's family member drove to Preah Vihear Prison and asked to visit her, but his request was denied. On 12 July, the family member met with Ms. Seng, but under strict conditions. There were three guards in the room during the visit: two on Ms. Seng's side of the room, taking notes about their conversation, and one on the family member's side, also taking notes. There was a video camera in the room and the guards forbid them from communicating in English. The guards confiscated the news articles about Ms. Seng that the family member had brought. Ms. Seng's local counsel has visited her at Preah Vihear Prison, but he does not know whether a camera was in the room. Ms. Seng's friends have been summarily denied visits; on 2 September, they applied for a permit to visit her from the Ministry of the Interior, but their application was denied.

26. While the conditions of Preah Vihear Prison are marginally better than at Prey Sar Prison, Ms. Seng remains in dismal conditions. She shares a 5-metre-square cell with 19 other female prisoners. She does not have access to a telephone or to a radio; for a fee, she can have access to a television with only government-controlled channels. She has no access to outside information other than what her local counsel has been able to tell her. Owing to overcrowding, Ms. Seng contracted COVID-19 in late August 2022.

b. Analysis of violations

i. Category I

27. The source recalls that a detention is arbitrary under category I when it is clearly impossible to invoke any legal basis justifying the deprivation of liberty. The Working Group has found detention to be arbitrary under category I where the law giving rise to the detention is extremely vague and lacks the requisite degree of precision and legal certainty and therefore leads to deprivation of liberty which is unreasonable or unnecessary.<sup>5</sup>

28. Ms. Seng was convicted under articles 453 (conspiracy to commit treason) and 494–495 (incitement to create social disorder) of the Criminal Code. The source submits that international human rights organizations and special procedure mandate holders of the Human Rights Council<sup>6</sup> have recognized that these articles are vague and overbroad, which allows them to be misused to target opponents of the Government. The source recalls that the

<sup>4</sup> Opinion No. 75/2021, para. 77.

<sup>5</sup> The source refers to opinion No. 8/2017, paras. 36 and 38.

<sup>6</sup> See <https://srdefenders.org/cambodia-un-experts-condemn-conviction-of-trade-union-leader-systematic-crackdown-on-human-rights-defenders>.

Working Group has found that articles 494 and 495 of the Criminal Code are incompatible with article 11 (2) of the Universal Declaration of Human Rights and article 15 (1) of the Covenant due to their vague and overly broad language.<sup>7</sup> Thus, Ms. Seng's ongoing detention is arbitrary under category I.

ii. Category II

29. The source argues that Ms. Seng's detention is arbitrary because it is a direct result of her exercise of her right to freedom of expression, which is protected under international law. The only evidence presented against Ms. Seng at trial were screenshots from nine Facebook posts that she had allegedly made. Most of those posts simply referenced the date 9 November 2019 and the intended return to Cambodia of the leader of the Cambodia National Rescue Party on that date. Two posts were longer – one was a statement criticizing the Prime Minister and his family in various peaceful ways and the other was a reposted statement by the leader of the Cambodia National Rescue Party explaining the purpose of his intended return (namely, to oppose what he viewed as a dictatorial Government and to help bring democracy back to Cambodia).

30. The source submits that all of those posts constitute protected opinion and expression under international law. The Human Rights Committee has explained that the right to freedom of expression includes political discourse, commentary on public affairs and discussion of human rights.<sup>8</sup> The Committee has similarly emphasized that freedom of expression includes the right of individuals to criticize or openly and publicly evaluate their Governments without fear of interference or punishment.<sup>9</sup> Moreover, although Ms. Seng denies posting the comments that might be considered disparaging of the Prime Minister, the source recalls that “all public figures, including those exercising the highest political authority such as Heads of State and Government, are legitimately subject to criticism 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.”<sup>10</sup>

31. According to the source, while the right to freedom of opinion and expression can be restricted in certain circumstances, including to protect public order or national security,<sup>11</sup> this cannot be used to justify Ms. Seng's detention. As the Human Rights Committee has explained, public order and 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>12</sup> The Committee has further emphasized that it is not compatible with the Covenant to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute human rights defenders, or others, for having disseminated such information.<sup>13</sup> The Human Rights Council has similarly affirmed that the following forms of expression can never be restricted: (a) discussion of government policies; (b) political debate; (c) reporting on human rights and government activities; (d) political activities, including for peace or democracy; and (e) the expression of opinion or dissent.<sup>14</sup>

32. The source recalls that the Johannesburg Principles on National Security, Freedom of Expression and Access to Information state that advocating for the non-violent change of government policy or even the Government itself cannot be considered a threat to national security, nor can criticism of the Government, its agencies, or public officials (principle 7 (a) (i) and (ii)). The statement by the leader of the Cambodia National Rescue Party, reposted by Ms. Seng, did not in any way advocate for a violent overthrow of the Government of Cambodia; in fact, his statement cited the 1986 People Power Revolution in the Philippines,

<sup>7</sup> Opinion No. 75/2021, para. 66.

<sup>8</sup> General comment No. 34 (2011), para. 11.

<sup>9</sup> *De Moraes v. Angola* (CCPR/C/83/D/1128/2002), para. 6.7.

<sup>10</sup> Human Rights Committee, general comment No. 34 (2011), para. 38.

<sup>11</sup> International Covenant on Civil and Political Rights, art. 19 (3) (b).

<sup>12</sup> General comment No. 34 (2011), para. 23.

<sup>13</sup> *Ibid.*, para. 30.

<sup>14</sup> Human Rights Council resolution 12/16, para. 5 (p) (i).

which was a non-violent movement to change the government. Thus, Ms. Seng's detention is arbitrary under category II.

33. The source recalls that freedom of peaceful assembly and association are guaranteed by articles 21 and 22 (1) of the Covenant and article 20 (1) of the Universal Declaration of Human Rights. Although these rights are not absolute, the Human Rights Committee has found that there would not be a necessary reason to arrest, torture or threaten the life of a human rights defender.<sup>15</sup> Furthermore, leading or founding a human rights organization,<sup>16</sup> belonging to a human rights organization<sup>17</sup> and forming part of a group described as counter-revolutionary by the Government<sup>18</sup> are all examples of the legitimate exercise of the rights set out in the Covenant and the Universal Declaration of Human Rights. Moreover, detaining individuals on the basis of their activities as human rights defenders further violates their rights to equality before the law and equal protection under article 26 of the Covenant and article 7 of the Universal Declaration of Human Rights.<sup>19</sup>

34. The source submits that Ms. Seng is a human rights defender and that targeting her is an unlawful restriction on her rights to freedom of peaceful assembly and association. Her detention resulted from her long-term, high-profile criticism of the Prime Minister and her pro-democracy activism. She was previously targeted for her human rights activities at the Center for Social Development, and she was charged, tried and convicted alongside dozens of other human rights leaders, prominent political dissidents and democracy activists belonging to the Cambodia National Rescue Party. This context illuminates the political motivation behind her detention, which intends to stymie her influence as a human rights defender and prominent member of human rights organizations. She was even clandestinely transferred from Prey Sar Prison to a remote prison many hours away to prevent her friends and colleagues from visiting and supporting her. Thus, her detention violates category II.

iii. Category III

35. The source submits that Ms. Seng's detention is arbitrary under category III.

36. The source recalls article 14 (3) (a) of the Covenant.<sup>20</sup> The Human Rights Committee has explained that this right applies to all cases of criminal charges, including those of persons not in detention, and requires that information be given as soon as the person concerned is formally charged with a criminal offence under domestic law, or the individual is publicly named as such.<sup>21</sup> Article 470 of the Criminal Procedure Code of Cambodia requires the bailiff serving the summons to make a written note of both the identity of the person receiving the summons and the date of delivery, and the person receiving the summons must sign the original. Article 474 provides that a summons must include a copy of the indictment, providing the detailed alleged evidence in a case.

37. The source submits that Ms. Seng's charging documents comply with neither international nor Cambodian law. She was summarily charged with conspiracy to commit treason and incitement of social disorder, but the documents, which include the prosecutor's closing argument or final submission and the investigating judge's closing order, do not identify any alleged criminal conduct by Ms. Seng that would give rise to criminal liability. Instead, the documents merely identify Ms. Seng as a person accused of a crime. Further, Ms. Seng's summons did not contain the information required by Cambodian law, nor did it have a signature from any receiving party, even though it was issued on 10 October 2020. The indictment was not attached to Ms. Seng's summons. Ms. Seng was left to guess what alleged conduct underlay her charges for the first full year of her case. She only learned of the alleged conduct when she received her case file in court on 28 December 2021, the day on which the prosecutor and judge began questioning her.

<sup>15</sup> The source refers to *Njuru v. Cameroon* (CCPR/C/89/D/1353/2005), para. 6.4.

<sup>16</sup> Opinions No. 60/1993 and 53/2011.

<sup>17</sup> Opinion No. 10/1993, para. 5 (h).

<sup>18</sup> Opinion No. 26/1992.

<sup>19</sup> Opinions No. 9/2019, No. 15/2020 and No. 16/2020.

<sup>20</sup> General comment No. 32 (2007), para. 31.

<sup>21</sup> *Ibid.*

38. The source recalls that article 14 (3) (d) of the Covenant guarantees the right of the accused to a defence through legal assistance of his or her own choosing, including the right to defend himself or herself in person. Counsel can be assigned by the court where the interests of justice so require but, for a court to assign a lawyer over the wishes of the accused, it must have an objective and sufficiently serious justification for doing so.<sup>22</sup> The Working Group has found clear violations of the right to counsel where counsel was denied access to a copy of the indictment and other essential documents.<sup>23</sup>

39. The source submits that the court repeatedly obstructed Ms. Seng's right to counsel of her choice throughout the proceedings. First, the court refused to recognize Ms. Seng's right to self-representation by denying her access to her case file until she allowed the court to appoint her a lawyer in January 2022. The court's meagre justification is that Cambodia does not allow self-representation in criminal felony trials. This is not a serious justification for acting against Ms. Seng's wishes, since Ms. Seng herself is a lawyer with a desire and ability to represent herself.

40. All legal provisions relating to her defence, in particular, article 129 of the Criminal Code, which provides lawyers access to case files, should have been read to facilitate Ms. Seng's right to represent herself. By refusing to recognize Ms. Seng's right to represent herself, the court effectively deprived Ms. Seng of access to counsel of her choice from 26 November 2020 to January 2022, when a court-appointed lawyer began to represent her. Regardless, the Government also actively deprived Ms. Seng of access to her international counsel as he was banned from returning to Cambodia.

41. The source notes that article 14 (3) (b) of the Covenant provides an accused the right to have adequate time and facilities for the preparation of his or her defence. Adequate facilities includes access to documents and other evidence, including all materials that the prosecution plans to offer in court against the accused. The Working Group has found violations of the right to a fair trial when the lack of specific details in the charges brought did not allow the accused to defend themselves appropriately.<sup>24</sup>

42. The source recalls that Ms. Seng was not provided with information about the facts and alleged conduct underlying her charges, thereby impeding her ability to defend herself in court. Moreover, by 28 December 2021, Ms. Seng still had not received the information and had received only the prosecutor's introductory and closing submissions and the investigating judge's closing order. On 28 December, the judge asked her about a Facebook post she had allegedly made, but Ms. Seng had never seen it before and was not given notice of this evidence, in violation of her right to access all materials that the prosecution planned to offer in court against her. Further, Ms. Seng was not given access to her case file until January 2022, after accepting, under pressure, a court-appointed lawyer.

43. The source notes that article 14 (1) of the Covenant provides that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law; this is reiterated in article 10 of the Universal Declaration of Human Rights. Moreover, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment requires a judicial or other authority to have the strongest possible guarantees of competence, impartiality and independence. The Human Rights Committee has emphasized that the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception<sup>25</sup> and that States must ensure the actual independence of the judiciary from political interference by the executive branch and protect judges from any form of political influence in their decision-making.<sup>26</sup> Detention has been found to be arbitrary in cases where the judiciary is indistinguishable from the executive, or if the executive branch has the ability to control or direct the workings of the adjudicatory body.<sup>27</sup>

<sup>22</sup> Human Rights Committee, general comment No. 32 (2007), para. 37.

<sup>23</sup> The source refers to opinion No. 46/2011, para. 12.

<sup>24</sup> Opinion No. 7/2009.

<sup>25</sup> *González del Río v. Peru* (CCPR/C/46/D/263/1987), para. 5.2.

<sup>26</sup> General comment No. 32 (2007), para. 19.

<sup>27</sup> See, for example, *Bahomonde v. Equatorial Guinea* (CCPR/C/49/D/468/1991), para. 9.4.

44. The source submits that Ms. Seng's judges were neither independent nor impartial. Reportedly, Cambodian judicial officials are often subject to political influence, with many judicial officials simultaneously holding positions in the ruling party. For instance, Cambodian laws grant an excessively powerful role to the Minister of Justice, an executive branch position, through which the Minister can exercise discretion and influence over almost every element of a judge's career. Allegedly, judges are under constant pressure and cases are allocated to those who are expected to follow orders.

45. The source submits that Ms. Seng's trial was clearly politically motivated. She was charged with incitement alongside over 100 Cambodia National Rescue Party members and other critics of the Prime Minister in a mass trial. The Working Group has previously noted that a mass trial is inherently political and incompatible with the interest of justice or human rights. A mass trial such as Ms. Seng's can hardly meet the standard for a fair trial because it is impossible to conduct a specified legal assessment of each individual defendant in such a setting.<sup>28</sup> The Special Rapporteur on the situation of human rights in Cambodia reported in 2021 that, since June 2019, more than 150 people associated with the Cambodia National Rescue Party had been arrested, detained and subjected to judicial proceedings.<sup>29</sup>

46. Furthermore, the source argues that proceedings themselves indicate the court was not impartial. The charges against Ms. Seng were confirmed even though the prosecution's final submission did not contain any allegations of specific criminal conduct. On 28 December 2021, Ms. Seng was questioned by judges about whether she was satisfied with the current Government, and, on a number of occasions, the prosecution and judges complained about Ms. Seng's dress (at one point, even barring her entry into the courtroom until she changed clothes and removed her make-up), without citing any rules against it. Lastly, Ms. Seng was convicted in the absence of any evidence or arguments presented on the material elements of her charges.

47. The source recalls that article 14 (2) of the Covenant guarantees that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. This right is reiterated in article 11 of the Universal Declaration of Human Rights. The Human Rights Committee explains 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>30</sup>

48. The source submits that Ms. Seng's trial satisfied none of these requirements. First, Ms. Seng was never presumed innocent – her charges were confirmed despite the absence of any concrete evidence or facts cited in the prosecutor's submissions. Second, she was charged with conspiracy under article 453 of the Criminal Code, which requires "a resolution agreed upon by two or more persons to commit an attack" as a central element. No evidence that Ms. Seng had agreed to commit an attack was ever presented. The only evidence ever presented against Ms. Seng was that she shared some of the Facebook posts of the leader of the Cambodia National Rescue Party, which "fell far short" of proving any agreement to commit an attack. Third, Ms. Seng was charged with incitement to social disorder under article 495, and no evidence was ever presented showing her intent to incite social unrest. In fact, her testimony illustrated the opposite: she testified about her intent to support democracy, the peaceful return of the leader of the Cambodia National Rescue Party, and human rights. Critically, the prosecution failed to demonstrate that the nine Facebook posts, the only evidence presented against Ms. Seng, even qualified as incitement to social disorder.

49. The source recalls that article 14 (3) (b) of the Covenant protects the right to communicate with counsel. Both the Human Rights Committee<sup>31</sup> and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment<sup>32</sup> emphasize that this right must be promptly recognized, without delay or censorship. Ms. Seng arrived at

<sup>28</sup> Opinion No. 65/2019, para. 75.

<sup>29</sup> A/HRC/48/79, para. 40.

<sup>30</sup> General comment No. 32 (2007), para. 30.

<sup>31</sup> *Ibid.*, para. 34.

<sup>32</sup> Principle 18 (3).

Prey Sar Prison following the verdict on 14 June 2022. Her family member and appointed lawyer went to visit her at 2 p.m., but they were denied entry to the prison and correctional officers told them to wait. They waited for two hours and were still denied access to Ms. Seng. Ms. Seng's lawyer later learned from unofficial channels that Ms. Seng had been clandestinely transferred to Preah Vihear Prison, over 300 km away. By both denying visitation and secretly sending Ms. Seng to a faraway prison, the Government hindered Ms. Seng's right to prompt communication with counsel. Moreover, Ms. Seng is prohibited from making telephone calls from prison, making direct communication with her international lawyer impossible.

iv. Category V

50. The source recalls that detention is arbitrary under category V when it constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status. This includes discrimination based on a person's status as a human rights defender and, in particular, discrimination in the exercise of rights elaborated under declaratory instruments such as the Declaration on Human Rights Defenders.<sup>33</sup>

51. The source submits that Ms. Seng is being targeted, prosecuted and imprisoned for her outspoken criticism of the Government and peaceful advocacy for political change and democratic principles. All these activities are protected rights under the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms. Numerous organizations and experts have characterized Ms. Seng's prosecution (and the prosecution of her co-defendants) as an attempt to silence anyone opposing the Government, including human rights defenders. In November 2020, the Special Rapporteur on the situation of human rights in Cambodia noted that the mass trials appeared to be part of a strategy to intimidate and discredit opponents of the Government.<sup>34</sup>

*Response from the Government*

52. On 5 December 2022, the Working Group transmitted the allegations made by the source to the Government through its regular communications procedure, requesting a reply by 3 February 2023.

53. The Working Group regrets that it did not receive a response from the Government to that communication. The Government did not request an extension of the time limit for its reply, as provided for in paragraph 16 of the Working Group's methods of work.

**Discussion**

54. The Working Group thanks the source for its submission. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

55. In determining whether Ms Seng's detention is arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has presented a prima facie case for breach of the international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations.<sup>35</sup> In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

<sup>33</sup> Opinion No. 45/2016, paras. 44 and 45.

<sup>34</sup> See <https://www.ohchr.org/en/press-releases/2020/11/cambodia-un-expert-alarmed-reports-mass-trial-activists>. See also [https://www.americanbar.org/content/dam/aba/administrative/human\\_rights/trialwatch/theary-seng-trialwatch-report.pdf](https://www.americanbar.org/content/dam/aba/administrative/human_rights/trialwatch/theary-seng-trialwatch-report.pdf).

<sup>35</sup> A/HRC/19/57, para. 68.

*Category II*

56. The source argues that Ms. Seng's detention is arbitrary because it is a direct result of her exercise of her right to freedom of expression under article 19 of the Covenant. The source further submits that all her nine Facebook posts (the only evidence presented in her trial) constitute protected opinion and expression under international law. The source also submits that Ms. Seng is a human rights defender and that targeting her is an unlawful restriction on her right to freedom of peaceful assembly and association, guaranteed by articles 21 and 22 (1) of the Covenant and article 20 (1) Universal Declaration of Human Rights.

57. The Human Rights Committee has specifically recognized that article 19 (2) protects the right of individuals to criticize or openly and publicly evaluate their Government without fear of interference or punishment.<sup>36</sup> As such, article 19 (2) of the Covenant protects the holding and expression of opinions, including those that are not in line with government policy.<sup>37</sup>

58. Under article 19 (3) of the Covenant, any restriction imposed on the right to freedom of expression must satisfy three requirements, namely, the restriction must be provided by law, be designed to achieve a legitimate aim (namely the protection of national security, public order, public health or morals), and be imposed in accordance with the requirements of necessity and proportionality.<sup>38</sup>

59. Ms. Seng's prosecution and conviction fail to satisfy these requirements. In order for a legislative provision to be characterized as a law within the meaning of article 19 (3) of the Covenant, it must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly. Furthermore, the provision cannot confer on those charged with its execution, unfettered discretion to restrict freedom of expression.<sup>39</sup> Articles 494 and 495 of the Criminal Code are incompatible with article 19 (3) of the Covenant because they are impermissibly vague and overly broad, as will be discussed in further detail below.

60. The Government has provided no specific information as to how Ms. Seng presented a threat to any of the legitimate interests enumerated in article 19 (3) of the Covenant. International standards require specificity and an individualized assessment of the risk posed as a result of the exercise of freedom of expression. In this regard, the Working Group recalls its findings that, when seeking to restrict speech, Governments must specifically identify the language creating the alleged threat on the basis of which the restriction is implemented.<sup>40</sup>

61. Any restriction on the right to freedom of expression must be a necessary and proportionate means of achieving a legitimate aim, meaning that it must be the least intrusive instrument among those which might achieve their protective function.<sup>41</sup>

62. The Human Rights Committee has emphasized that the form of expression is highly relevant in assessing whether a restriction is proportionate. In its resolution 12/16, the Human Rights Council called upon States to refrain from imposing restrictions under article 19 (3) that were not consistent with international human rights law. As stipulated by the Council in that resolution, the following types of expression should never be subject to restrictions: (a) discussion of government policies and political debate; (b) reporting on human rights, government activities and corruption in Government; (c) engaging in election campaigns, peaceful demonstrations or political activities, including for peace or democracy; and (d) expression of opinion and dissent, religion or belief, including by persons belonging to minorities or vulnerable groups.<sup>42</sup>

63. The burden is on the Government to show that prosecution of Ms Seng on a charge of treason is a necessary, reasonable and proportionate response in protecting national security

<sup>36</sup> *De Morais v. Angola*, para. 6.7.

<sup>37</sup> Opinions No. 8/2019, para. 55; and No. 79/2017, para. 55.

<sup>38</sup> Human Rights Committee, general comment No. 34 (2011), paras. 21–36.

<sup>39</sup> *Ibid.*, para. 25.

<sup>40</sup> Opinion No. 75/2021, para. 56.

<sup>41</sup> Human Rights Committee, general comment No. 34 (2011), para. 34; and [A/HRC/14/23](#), para. 79 (g) (iv).

<sup>42</sup> See also [A/HRC/14/23](#), para. 81 (i).

or public order, and it has not done so. Ms. Seng's arrest, prosecution and conviction are disproportionate and cannot be justified as the least intrusive instrument among those which might achieve their protective function.<sup>43</sup> The Working Group finds that the permitted restrictions on the freedom of expression under article 19 (3) of the Covenant do not apply in the present case.<sup>44</sup>

64. In relation to Ms. Seng's exercise of her rights to peaceful assembly and association, the Working Group concludes that none of the limitations set out in articles 21 and 22 (2) of the Covenant apply in her case. The Government has not demonstrated how Ms. Seng's peaceful posts could invoke any of the restrictions set out in those articles.

65. The Working Group recalls that the Special Rapporteur on the situation of human rights in Cambodia and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression have expressed concern at an escalating trend of suppression by the Government of Cambodia of dissenting opinions in what appears to be an attempt to intimidate or silence political opinion, noting in particular the use of criminal law to target free speech, both offline and online.<sup>45</sup>

66. The Human Rights Council has expressed serious concern over the deterioration of the civil and political environment in Cambodia as a result of the chilling effect of judicial prosecutions and other actions against members of political parties, civil society and the media, and has called upon the Government to guarantee the right to freedom of expression and association and take appropriate measures to encourage and enable civil society to play a constructive role in consolidating democratic development in Cambodia.<sup>46</sup>

67. The source has argued that it was clearly impossible to invoke a legal basis justifying the deprivation of liberty of Ms. Seng, who was convicted under articles 453 (conspiracy to commit treason) and 494 and 495 (incitement to create social disorder) of the Criminal Code.

68. The Working Group has repeatedly found that the principle of legality requires that laws be formulated with sufficient precision so that individuals can access and understand the law, and regulate their conduct accordingly.<sup>47</sup> The Working Group reiterates that laws may be so lacking in sufficient detail of the conduct that may be penalized that it is impossible to invoke a legal basis justifying the deprivation of liberty.<sup>48</sup> Charges involving vague and imprecise offences jeopardize the ability of individuals to exercise their fundamental rights and are likely to result in arbitrary deprivation of liberty. In this regard, the Working Group recalls its jurisprudence on prosecution under vague penal laws.<sup>49</sup>

69. As the Working Group has previously found, the vague and overly broad nature of articles 494 and 495 of the Criminal Code fails to distinguish between violent acts and the peaceful exercise of fundamental freedoms. Critical elements of the crime such as "incitement" and "social order" are not defined.<sup>50</sup> In the absence of parameters to regulate their use, these provisions are susceptible to being arbitrarily applied, as has occurred in the case of Ms. Seng.

70. In the absence of the Government's explanation as to how Ms. Seng's conduct could be considered as inciting disruption of the social order, the Working Group observes that there is nothing to suggest that she engaged in or incited violence as part of her activities that might have given cause to restrict her behaviour. Her Facebook posts do not demonstrate any

<sup>43</sup> Human Rights Committee, general comment No. 27 (1999), para. 14.

<sup>44</sup> See also opinion No. 9/2018, para. 42.

<sup>45</sup> See <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24711&LangID=E>. See also [A/HRC/36/61](#) and [A/HRC/39/73/Add.1](#).

<sup>46</sup> Human Rights Council resolution 48/23, para. 21. See also Human Rights Council resolution 36/32, para. 22; and opinions No. 9/2018, para. 45; and No. 3/2019, para. 50.

<sup>47</sup> Opinion No. 41/2017, paras. 98–101. See also opinion No. 62/2018, paras. 57–59; and Human Rights Committee, general comment No. 35 (2014), para. 22.

<sup>48</sup> Opinions No. 35/2018, para. 36; No. 52/2018, para. 78; No. 36/2020, para. 54; No. 6/2021, para. 60; and No. 11/2021, para. 65.

<sup>49</sup> Opinions No. 9/2018 and No. 2019/3. See also opinions No. 9/2019, para. 39; No. 44/2019, para. 55; No. 45/2019, para. 54; and No. 15/2020, para. 58.

<sup>50</sup> Opinion No. 75/2021, para. 64.

evidence of inciting or engaging in violent behaviour. The Working Group thus finds that articles 494 and 495 of the Criminal Code are incompatible with article 11 (2) of the Universal Declaration of Human Rights and article 15 (1) of the Covenant and cannot be considered as defined with sufficient precision, due to their vague and overly broad language.<sup>51</sup>

71. For these reasons, the Working Group concludes that Ms. Seng's detention resulted from her exercise of her right to freedom of opinion, expression, peaceful assembly and association and is contrary to articles 19 and 20 of the Universal Declaration and articles 19, 21 and 22 of the Covenant. The Working Group finds that Ms. Seng's arrest and detention is arbitrary under category II. The Working Group refers the present case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the rights to freedom of peaceful assembly and association and the Special Rapporteur on the situation of human rights in Cambodia.

### *Category III*

72. Given its finding that Ms. Seng's detention is arbitrary under category II, the Working Group emphasizes that no trial of Ms. Seng should have taken place. However, on 14 June 2022, Ms. Seng was convicted and sentenced to six years' imprisonment. The source alleges that Ms. Seng was subjected to numerous violations of her due process and fair trial rights, which are set out at length in the submission.

73. The source alleges that Ms. Seng's right to be informed promptly of the nature and cause of the charges against her was breached in violation of international law and Cambodian law. Despite being charged with conspiracy to commit treason and incitement of social disorder, her charging conduct does not identify any criminal conduct on Ms. Seng's part. Having no indication of the alleged conduct that underlay her charges for the first full year of the case, she reportedly received that information when she received her court file, on the day on which the prosecutor and judge began their questioning of her. Based on the foregoing, the Working Group finds that Ms. Seng's right under article 14 (3) (a) of the Covenant to be informed promptly and in detail of the nature and cause of the charges against her was violated.

74. The source submits that Ms. Seng's right to access of counsel of her choice was obstructed throughout the proceedings. This included effectively refusing to recognize her right to self-representation by denying her access to her case file until she accepted a court-appointed lawyer as her local lawyer. Her international lawyer was banned from returning to Cambodia, thus she was deprived of her access to him. The Working Group thus finds that her right to present an effective defence through counsel of her choosing under article 14 (3) (d) of the Covenant was violated. The Working Group recalls that all persons deprived of their liberty have the right to legal assistance by counsel of their choice, at any time during their detention, including immediately after the moment of apprehension, and such access must be provided without delay.<sup>52</sup>

75. The source also submits that Ms. Seng was not informed of the conduct underlying her charges in a timely manner, and that she was also not given timely access of her case file, or notified of the evidence against her. In those circumstances, the Working Group finds that Ms. Seng's right to adequate time and facilities for the preparation of her defence and to communicate with counsel of her choosing under article 14 (3) (b) of the Covenant and principles 17 (1) and 18 (2) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment was violated.

76. The source submits that Ms. Seng was not allowed to call her international lawyer, who had been barred from Cambodia, and that she was transferred clandestinely to a prison

<sup>51</sup> Human Rights Committee, general comment No. 34 (2011), para. 25.

<sup>52</sup> United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, principle 9 and guideline 8; and Human Rights Committee, general comment No. 35 (2014), para. 35. See also [A/HRC/45/16](#), para. 51.

300 km away, which also hindered her right to receive visitors. Accordingly, the Working Group finds that Ms. Seng's right to contact with the outside world was denied, contrary to rule 58 of the Nelson Mandela Rules<sup>53</sup> and principles 15 and 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.<sup>54</sup> Moreover, in the absence of any Government submissions, the Working Group concludes that her transfer to a faraway prison contravenes rule 59 of the Nelson Mandela Rules, which requires that prisoners shall be allocated, to the extent possible, to prisons close to their homes.

77. The source argues that Ms. Seng's judges were neither independent nor impartial. Judicial officials are often reportedly subject to political influence. These submissions are consistent with finding of the Special Rapporteur on the situation of human rights in Cambodia that the judiciary has faced challenges, including allegations of corruption and bribery, as well as executive interference in its work, and a resulting lack of public trust in it.<sup>55</sup> The Working Group recalls that the Human Rights Committee has noted that the requirement of competence, independence and impartiality of a tribunal under article 14 (1) of the Covenant is an absolute right that is not subject to any exception.<sup>56</sup> Furthermore, the Committee has observed that the tribunal must also appear to a reasonable observer to be impartial.<sup>57</sup> In this regard, the Working Group notes the harsh treatment meted out by the court to Ms. Seng (without citing to any rules) in relation to her attire and appearance, and the cursory dismissal of the concerns she raised about serious due process violations and evidentiary issues during her trial, as well as the questions posed about her views on the current Government.

78. Moreover, Ms. Seng was convicted in a mass trial with over 100 Cambodia National Rescue Party members, which underscores the reported political motivation of the trials. The Working Group recalls that the Special Rapporteur on the situation of human rights in Cambodia reported in 2021 that since June 2019, more than 150 people associated with the Cambodia National Rescue Party had been arrested, detained and subjected to judicial proceedings.<sup>58</sup> As the Working Group has emphasized, such mass trials are incompatible with the interests of justice and do not meet the standards of a fair trial, given that it is impossible during such proceedings to conduct a specific assessment of individual responsibility.<sup>59</sup> The Working Group is not convinced that it was possible for all defendants in such a large trial to receive an individualized assessment of their culpability beyond reasonable doubt.<sup>60</sup> In November 2020, the Special Rapporteur on the situation of human rights in Cambodia noted that the mass trials appeared to be part of a strategy to intimidate and discredit opponents of the Government.<sup>61</sup> For these reasons, the Working Group finds a violation of the right to an independent and impartial tribunal as set out in article 10 of the Universal Declaration and article 14 (1) of the Covenant.

79. The Working Group concludes that the above-mentioned violations of the right to due process and a fair trial are of such gravity as to render Ms. Seng's deprivation of liberty arbitrary under category III. The Working Group refers the case to the Special Rapporteur on the independence of judges and lawyers.

<sup>53</sup> Opinions No. 35/2018, para. 39; No. 44/2019, paras. 74 and 75; and No. 45/2019, para. 76.

<sup>54</sup> See also Human Rights Committee, general comment No. 35, para. 58; and opinion No. 84/2020, para. 69.

<sup>55</sup> A/HRC/42/60, para. 58.

<sup>56</sup> General comment No. 32 (2007), para. 19.

<sup>57</sup> *Ibid.*, para. 21.

<sup>58</sup> A/HRC/48/79, para. 40.

<sup>59</sup> Opinions No. 65/2019, para. 75; and No. 5/2020, para. 86.

<sup>60</sup> Opinion No. 34/2021, para. 91.

<sup>61</sup> See <https://www.ohchr.org/en/press-releases/2020/11/cambodia-un-expert-alarmed-reports-mass-trial-activists>. See also [https://www.americanbar.org/content/dam/aba/administrative/human\\_rights/trialwatch/theary-seng-trialwatch-report.pdf](https://www.americanbar.org/content/dam/aba/administrative/human_rights/trialwatch/theary-seng-trialwatch-report.pdf).

*Category V*

80. In addition, the Working Group considers that Ms. Seng was targeted because of her activities as a human rights defender who disseminated posts and information that were critical of the Government.

81. The Working Group finds to be credible the source's submission that Ms. Seng has been targeted, prosecuted and imprisoned for her outspoken criticism of the Government and peaceful advocacy for political change and democratic principles. Moreover, it would appear that Ms. Seng's detention is situated within a wider crackdown on freedom of expression that appears designed to suppress dissent. The Working Group recalls previous opinions on Cambodia, in which it noted that the law was increasingly being used to restrict the democratic space<sup>62</sup> and highlighted the widespread concern within the international community about the application of criminal law in Cambodia to restrict the exercise of human rights.<sup>63</sup> In this regard, the Working Group notes the source's submissions that Ms. Seng's trial was repeatedly postponed and delayed in protracted legal proceedings designed to intimidate her into silence.

82. The Working Group is cognizant of widespread concern within the international community about the application of criminal law in Cambodia to restrict the exercise of human rights.<sup>64</sup> On 11 October 2021, the Human Rights Council adopted resolution 48/23 on Cambodia, in which it expressed serious concern at the deterioration of the civil and political environment owing to judicial prosecutions. On 2 November 2021, the Special Rapporteur on the situation of human rights in Cambodia, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the situation of human rights defenders criticized Cambodia for weaponizing its court system to methodically reduce the scope for citizen action and called upon the country to protect freedom of expression after the convictions of 15 human rights defenders and political activists in two separate cases.<sup>65</sup>

83. Moreover, as established in the discussion above concerning category II, Ms. Seng's detention resulted from the peaceful exercise of her fundamental rights under international law. When detention has resulted from the active exercise of civil and political rights, there is a strong presumption that the detention also constitutes a violation of international law on the grounds of discrimination based on political or other views.

84. For these reasons, the Working Group finds that Ms. Seng was deprived of her liberty on discriminatory grounds, on the basis of her political or other opinion. Her detention therefore violates articles 2 and 7 of the Universal Declaration and articles 2 (1) and 26 of the Covenant and is arbitrary under category V.<sup>66</sup> The Working Group refers the present case to the Special Rapporteur on the situation of human rights defenders.

**Concluding remarks**

85. The Working Group notes with alarm the harassment and intimidation violence faced by Ms. Seng over several years preceding her arrest and the physical violence she faced during the trial process. It recalls the source's submission on her clandestine transfer to Preah Vihear Prison, 300 km away from her home and family, and the dismal living conditions there where she reportedly shares a 5-metre-square cell with 19 other female prisoners. The Working Group reminds the Government of its obligation under article 10 (1) of the Covenant and rules 1, 12 and 21 of the Nelson Mandela Rules that all persons deprived of their liberty must be treated with humanity. International standards also require that non-custodial measures be prioritized for women.<sup>67</sup>

<sup>62</sup> Opinion No. 45/2016, para. 41.

<sup>63</sup> Opinions No. 9/2018, para. 45; and No. 75/2021, para. 74.

<sup>64</sup> A/HRC/41/17, paras. 110.82, 110.84, 110.92, 110.97 and 110.110.

<sup>65</sup> See <https://cambodia.ohchr.org/en/content/cambodia-stop-using-courts-persecute-people-who-stand-human-rights-%CC%B6-un-experts>.

<sup>66</sup> See opinions No. 45/2018, No. 46/2018, No. 9/2019, No. 44/2019 and No. 45/2019.

<sup>67</sup> United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), sect. III. See also A/HRC/48/55, annex, paras. 7–9; and Opinion No. 40/2021, para. 85.

### **Disposition**

86. In the light of the foregoing, the Working Group renders the following opinion:

The deprivation of liberty of Seng Chan Theary, being in contravention of articles 2, 3, 7, 9, 10, 11, 19 and 20 of the Universal Declaration of Human Rights and articles 2, 9, 14, 15, 19, 21, 22 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories II, III and V.

87. The Working Group requests the Government of Cambodia to take the steps necessary to remedy the situation of Ms. Seng without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

88. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Ms. Seng immediately and accord her an enforceable right to compensation and other reparations, in accordance with international law. In the current context of the global coronavirus disease (COVID-19) pandemic and the threat that it poses in places of detention, the Working Group calls upon the Government to take urgent action to ensure the immediate unconditional release of Ms. Seng.

89. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Ms. Seng and to take appropriate measures against those responsible for the violation of her rights.

90. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to 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, the Special Rapporteur on the independence of judges and lawyers, and the Special Rapporteur on the situation of human rights in Cambodia, for appropriate action.

91. The Working Group requests the Government to disseminate the present opinion through all available means and as widely as possible.

### **Follow-up procedure**

92. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

- (a) Whether Ms. Seng has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Ms. Seng;
- (c) Whether an investigation has been conducted into the violation of Ms. Seng's rights and, if so, the outcome of the investigation;
- (d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Cambodia with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

93. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example through a visit by the Working Group.

94. The Working Group requests the source and the Government to provide the above-mentioned information within six months of the date of transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

95. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views

and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.<sup>68</sup>

*[Adopted on 27 March 2023]*

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Advance Edited Version

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<sup>68</sup> Human Rights Council resolution 51/8, paras. 6 and 9.