

PETITION TO
UNITED NATIONS
WORKING GROUP ON ARBITRARY DETENTION

Chair-Rapporteur: Dr. Miriam Estrada-Castillo (Ecuador)
Vice-Chair: Mr. Mumba Malila (Zambia)
Dr. Elina Steinerte (Latvia)
Ms. Priya Gopalan (Malaysia)
Mr. Mathew Gillett (New Zealand)

HUMAN RIGHTS COUNCIL
UNITED NATIONS GENERAL ASSEMBLY

In the Matter of

Seng Chan Theary (“Theary Seng”)

v.

The Government of Cambodia

Petition for Relief Pursuant to Resolutions 1997/50, 2000/36, 2003/31, 6/4, 15/18, 20/16, 24/7,
33/30, 42/22, and 51/8¹

Submitted by

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November 10, 2022

¹ Resolutions 1997/50, 2000/36, and 2003/31 were adopted by the U.N. Commission on Human Rights extending the mandate of the Working Group on Arbitrary Detention. The Human Rights Council, which “assume[d] . . . all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights” pursuant to U.N. General Assembly Resolution 60/251, G.A. Res. 60/251, at ¶ 6 (Mar. 15, 2006), has further extended the Working Group’s mandate through Resolutions 6/4, 15/18, 20/16, 24/7, 33/30, 42/22, and 51/8.

INTRODUCTION

As set forth in this petition, the Government of Cambodia is arbitrarily depriving Seng Chan Theary (“Theary Seng”) of her liberty. Theary is a lifelong human rights defender, advocating for human rights, democracy, and civic engagement in Cambodia. She is a U.S.-Cambodian dual national, who emigrated to the U.S. 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 aimed at both transitional justice – helping victims of the Khmer Rouge to testify before the UN hybrid tribunal – and civic engagement. In recent years, Theary has become, arguably, the highest-profile critic in Cambodia of its strongman dictator, Prime Minister Hun Sen, who has been in power since 1985. For her activism, she has endured intimidation, threats of arrest, harassment, surveillance, and even physical assault by the regime. Yet, she bravely pursued her advocacy for democracy and her criticism of Hun Sen.

Theary was detained on June 14, 2022, after being convicted of “incitement to create social disorder” and “conspiracy to commit treason” under Articles 494, 495, and 453, respectively, under the Cambodian Criminal Code. The UN Working Group on Arbitrary Detention (“Working Group”), additional UN special procedures, and independent human rights organizations have all warned that these provisions are weaponized against Cambodian political opposition leaders, journalists, and human rights defenders. Indeed, Theary was convicted and sentenced alongside dozens of leaders and members of the Cambodia National Rescue Party (“CNRP”), the leading opposition political party, which was previously disbanded by the Government. Although Theary is not a member of CNRP, she and more than 60 of its members were summoned to court on November 26, 2020. Theary was not provided with any information, including the material facts and alleged conduct underlying her charges, until December 28, 2021, when she was first questioned in court. On that date, she first learned that the conduct underlying her charges and the “evidence” against her amounted to nine Facebook posts. These posts involved her criticizing Hun Sen and sharing posts from Sam Rainsy, the leader of CNRP, supporting his peaceful return to Cambodia for the CNRP to participate in electoral processes.

The international law violations in Theary’s case expose the Government’s political motivations. During the proceedings against her, the prosecution failed to demonstrate that the nine Facebook posts ever amounted to “incitement.” Without having received notice of the Facebook posts, Theary was questioned about them in court on December 28. Additionally, the judge and prosecution questioned her about whether she was satisfied with the current government and asked her to comment on videos of CNRP leadership that did not mention her and were not relevant to her. The court and prosecution repeatedly condemned her dress and makeup in court without citing any rules prohibiting it. And the court coerced her into taking on a court-appointed lawyer, saying that she could not access her case file without one – even though Theary is a human rights lawyer with the ability to represent herself. Theary was without access to her case file for over one year of these proceedings until she agreed to have an appointed lawyer. The regime also banned her chosen international counsel, Jared Genser, from ever returning to Cambodia. When she was detained on June 14, 2022, she was denied access to her brother and appointed lawyer. And, in the middle of the night on June 15, without notifying her lawyer, she was clandestinely transferred from Phnom Penh Prison to the remote Preah Vihear Prison – 300 km away from her family, friends, and counsel.

Theary’s arbitrary detention is just one recent example of the Hun Sen regime’s longstanding campaign to silence human rights activists and democratic opposition. Accordingly, it is hereby requested that the attached Petition be considered a formal request for an opinion of the Working Group on Arbitrary Detention pursuant to Resolution 1997/50 of the UN Commission on

Human Rights, as reconfirmed by Resolutions 2000/36 and 2003/31, and UN Human Rights Council Resolutions 6/4, 15/18, 20/16, 24/7, 33/30, 42/22, and 51/8.

QUESTIONNAIRE FOR SENG CHAN THEARY (“THEARY SENG”)²

I. IDENTITY

- 1. Family name:** Seng
- 2. First name:** Theary
- 3. Birthdate:** November 10, 1971
- 4. Nationalities:** U.S.A. and Cambodia dual national
- 5. Profession and/or activity (if believed to be relevant to the arrest/detention):** Theary is a lifelong human rights defender who advocates for democracy and human rights in Cambodia. She founded two prominent human rights organizations which focus on civic engagement and helping victims of genocide to testify before the Extraordinary Chambers in the Courts of Cambodia (“ECCC”).³ She is an outspoken “irritant”⁴ to and critic of Cambodian Prime Minister Hun Sen⁵ for repressing freedom of expression,⁶ undermining due process, and crushing political opposition.⁷ In November 2020, she and more than 60 individuals affiliated with the CNRP, an opposition party that was dissolved under the Hun Sen regime, were charged with treason.⁸ Then, on June 14, 2022, Theary and 51 opposition leaders were convicted.⁹ The only evidence at trial presented against Theary was a series of Facebook posts critical of the regime.¹⁰ Thus, Theary’s role as a critic of Hun Sen is believed to be the main reason for her detention.

² Based upon MODEL QUESTIONNAIRE TO BE COMPLETED BY PERSONS ALLEGING ARBITRARY ARREST OR DETENTION, U.N. WORKING GROUP ON ARBITRARY DETENTION, accessed Sept. 2, 2022, available at <http://www.ohchr.org/EN/Issues/Detention/Pages/Complaints.aspx>.

³ Seth Mydans, *Charged with Treason, A Genocide Survivor Opted to Fight, Not Flee*, NEW YORK TIMES, Aug. 6, 2021, available at <https://www.nytimes.com/2021/08/06/world/asia/cambodia-genocide-theary-seng.html> [hereinafter “Charged with Treason”].

⁴ *Id.*

⁵ J.J. Rose, *Taking on Cambodia’s “Lady Liberty,”* THE INTERPRETER, LOWY INSTITUTE, Jul. 1, 2022, available at <https://www.lowyinstitute.org/the-interpreter/taking-cambodia-s-lady-liberty>.

⁶ Theary Seng, Facebook Post, Mar. 28, 2014, available at <https://www.facebook.com/theary.c.seng/posts/10152254732151281>.

⁷ Theary Seng, *Public Blog, My Commentary on the 30 Year Rule of Hun Sen*, Jan. 12, 2015, available at http://www.thearyseng.com/columnist/32-theary-sengs-blog/421-3-years-of-hun-sen-hrc-keeping-the-faith-report-new-us-passport-delilah-swims-see-you-in-the-new-year-cnrp-north-america-europe- nominate-theary-to-nec?fbclid=IwAR0_m_pZnZCf7WForkwpf1gjZI-2nbTXkfLDCpZBAEx-OoSLRTjl0L8U1vw.

⁸ *Cambodian Court Jails American Lawyer, Dozens of Others for Treason*, CNN, Jun. 14, 2022, available at <https://www.cnn.com/2022/06/14/asia/cambodia-human-rights-treason-trial-theary-seng-intl-hnk/index.html> and *Urgent Appeal to the UN Special Rapporteurs on the Situation of Human Rights in Cambodia and on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, PERSEUS STRATEGIES, Nov. 23, 2020, at 1, available at <https://www.perseus-strategies.com/wp-content/uploads/2020/11/Theary-Seng-Cambodia-UN-Rapporteurs-11.23.20.pdf> [hereinafter “Appendix I”].

⁹ *Cambodia: 51 Opposition Politicians Convicted in Mass Trial*, HUMAN RIGHTS WATCH, Jun. 14, 2022, available at <https://www.hrw.org/news/2022/06/14/cambodia-51-opposition-politicians-convicted-mass-trial> [hereinafter “HUMAN RIGHTS WATCH”]; Seth Mydans, *Cambodia Sends U.S. Activist and Other Opposition Members to Prison*, NEW YORK TIMES, Jun. 14, 2022, available at <https://www.nytimes.com/2022/06/14/world/asia/cambodia-theary-seng-sentenced.html>; Media Release, *American-Cambodian Human Rights Defender Theary Seng Convicted, Sentenced to Six Years in Prison*, PERSEUS STRATEGIES, Jun. 14, 2022, available at <https://www.perseus-strategies.com/wp-content/uploads/2022/06/Theary-Seng-conviction-press-release-06.14.22.pdf>.

¹⁰ English Translation of Criminal Verdict Against Theary Seng and Others, Case No. 1140, Jun. 14, 2022, Phnom Penh Municipal Court, at 74-79 [hereinafter “Appendix II”] and TRIAL OBSERVATION REPORT: CAMBODIA V. THEARY SENG, AMERICAN BAR ASSOCIATION CENTER FOR HUMAN RIGHTS AND TRIAL WATCH: A CLOONEY

6. **Address of usual residence:** Koh Prak Village, Phum Thom Commune, Kien Svay District, Kandal Province

II. ARREST

1. **Date of arrest:** June 14, 2022
2. **Place of arrest:** Outside the Phnom Penh Municipal Court.¹¹ Following the verdict on June 14, Theary was outside the courthouse dressed as Lady Liberty.¹² Approximately 30 security guards exited the courthouse and came up behind Theary, then 4-5 guards grasped her arms and dragged her into a nearby vehicle. The other 25 guards pushed back protesters and crowds, including Theary's family members.
3. **Forces who carried out the arrest:** Police
4. **Did they show a warrant or other decision by a public authority?** No warrant shown at time of arrest, but an arrest warrant was ordered in a June 14, 2022, verdict.¹³
5. **Authority who issued the warrant or decision:** Phnom Penh Municipal Court
6. **Imputed reasons for the arrest:** Allegation that Theary committed "conspiracy to commit treason" and "incitement to create gross chaos impacting public security."¹⁴
7. **Legal basis for the arrest including relevant legislation applied (if known):** Article 353 of the Cambodian Criminal Procedure Code.¹⁵

III. DETENTION

1. **Date of detention:** June 14, 2022
2. **Duration of detention:** Ongoing. Motion for bail was last denied on September 1, 2022.
3. **Forces holding the detainee under custody:** Correctional officials, Preah Vihear Prison
4. **Place of detention:** Preah Vihear Province, Cambodia. Theary was originally taken to Phnom Penh Prison, and then she was clandestinely transferred to Preah Vihear, far away from her friends, family, and lawyer on June 15, 2022.¹⁶
5. **Authorities that ordered the detention:** Phnom Penh Municipal Court
6. **Reasons for the detention imputed by the authorities:** Same as for arrest.
7. **Relevant legislation applied (if known):** Articles 453, 494, and 495 of the Cambodian Criminal Code.¹⁷

I. CIRCUMSTANCES SURROUNDING THE ARREST AND DETENTION OF THEARY SENG

FOUNDATION FOR JUSTICE INITIATIVE, Sept. 2022, at 4, *available at* https://www.americanbar.org/content/dam/aba/administrative/human_rights/trialwatch/theary-seng-trialwatch-report.pdf [hereinafter "Appendix III"].

¹¹ *Cambodian American Lawyer Gets 6 Years for "Treason" in Mass Sentencing of Opposition*, RADIO FREE ASIA, Jun. 14, 2022, *available at* <https://www.rfa.org/english/news/cambodia/theary-seng-06142022162251.html>.

¹² *Mass Convictions of Opposition Activists in Cambodia*, VOICE OF AMERICA, Jul. 1, 2022, *available at* <https://editorials.voa.gov/a/mass-convictions-of-opposition-activists-in-cambodia/6640280.html#:~:text=Cambodian%2DUS%20human%20rights%20advocate,court%20on%20June%2014%2C%202022>.

¹³ Appendix II, *supra* note 10, at 159.

¹⁴ *Cambodia Sends U.S. Activist and Other Opposition Members to Prison*, *supra* note 9.

¹⁵ Criminal Procedure Code of the Kingdom of Cambodia (2007), at Art. 353, *available at* <https://www.ajne.org/sites/default/files/resource/laws/7196/criminal-procedure-code-en.pdf> ("Detention Warrant and Arrest Warrant Issued by the Court" allows the court to undertake a special decision, with reasons, to issue a detention or arrest warrant during a hearing in which it declares punishment of at least 1 year in prison) [hereinafter "Criminal Procedure Code"] and Appendix II, *supra* note 10, at 159.

¹⁶ Appendix III, *supra* note 10, at 22.

¹⁷ *Id.*, at 26 and Criminal Code of the Kingdom of Cambodia, *available at* <https://www.ajne.org/sites/default/files/resource/laws/7195/criminal-code-cambodia-en-kh.pdf> [hereinafter "Criminal Code"].

A. Statement of Facts

1. Background on the Human Rights Landscape in Democratic Kampuchea

Between 1975 and 1979, Prime Minister Pol Pot and the Khmer Rouge waged a genocide that killed nearly two million people through mass executions, torture, forced labor, and the rampant spread of disease and famine.¹⁸ The regime executed intellectuals, professionals, foreigners, factory workers, the religious, and others.¹⁹ Cambodians were condemned to death for seemingly trivial characteristics, such as wearing glasses or knowing a foreign language.²⁰ Cities were forcibly evacuated and millions were forced to walk to the countryside to work on agricultural collectives, toil in labor camps, or languish in prisons. The country's rice paddies became mass graves – referred to as “the Killing Fields” – as the Khmer Rouge massacred and buried over one million Cambodians, including Theary's parents.²¹

2. Crackdown on Civic Space, Human Rights Defenders, and Democratic Opposition

After the collapse of the Khmer Rouge, Cambodia entered a “human rights freefall.”²² Freedom House rates freedom to express political views in Cambodia without fear of retribution as “1/4.”²³ Since 1979, the Cambodian Peoples’ Party (“CPP”) has consolidated power and eliminated democratic opposition – and Cambodia, whose name was changed back in 1989, has increasingly become a one-party state.²⁴ Prime Minister Hun Sen, the President of the CPP, came to power in 1985 and is one of the five longest-serving autocrats in the world.²⁵ Human Rights Watch notes: “[T]hrough politically motivated violence, control of the security forces, manipulated elections, massive corruption, and the tacit support of foreign powers, [Hun Sen] [has] been able to remain in power well beyond the time any leader in a genuinely democratic political system has ever served.”²⁶

Hun Sen’s rule has been disastrous for human rights in Cambodia. His efforts to subvert the Khmer Rouge Tribunal, the hybrid court to prosecute perpetrators of the Khmer Rouge’s atrocities, inhibited its work and only three individuals were ever convicted.²⁷ The regime has detained journalists and revoked their media licenses, and between January and May 2020, Cambodian

¹⁸ Appendix I, *supra* note 8, at 2 and *Khmer Rouge: Cambodia’s Years of Brutality*, BBC News, Nov. 16, 2018, available at <https://www.bbc.com/news/world-asia-pacific-10684399>.

¹⁹ *Id.* and *Genocide in Cambodia*, HOLOCAUST MUSEUM HOUSTON, accessed Nov. 20, 2020, available at <https://hmh.org/library/research/genocide-in-cambodia-guide/>.

²⁰ *Khmer Rouge: Cambodia’s Years of Brutality*, *supra* note 18.

²¹ Appendix I, *supra* note 8, at 2 and Reena Shah, *Rice Crop Sprouts in Killing Field*, TAMPA BAY TIMES, Oct. 17, 2005, available at <https://www.tampabay.com/archive/1990/05/18/rice-crop-sprouts-in-killing-field/>.

²² CAMBODIA’S DIRTY DOZEN: A LONG HISTORY OF RIGHTS ABUSES BY HUN SEN’S GENERALS, HUMAN RIGHTS WATCH, Jun. 27, 2018, available at <https://www.hrw.org/report/2018/06/27/cambodias-dirty-dozen/long-history-rights-abuses-hun-sens-generals> [hereinafter “CAMBODIA’S DIRTY DOZEN”].

²³ FREEDOM IN THE WORLD 2022: CAMBODIA, FREEDOM HOUSE (2022), available at <https://freedomhouse.org/country/cambodia/freedom-world/2022>.

²⁴ Appendix III, *supra* note 10, at 5.

²⁵ CAMBODIA’S DIRTY DOZEN, *supra* note 22.

²⁶ 30 YEARS OF HUN SEN: VIOLENCE, REPRESSION, AND CORRUPTION IN CAMBODIA, HUMAN RIGHTS WATCH, Jan. 12, 2015, available at <https://www.hrw.org/report/2015/01/12/30-years-hun-sen/violence-repression-and-corruption-cambodia>

²⁷ Appendix I, *supra* note 8, at 3 and Josh Kurlantzick, *The Death of Nuon Chea and Cambodia’s Failed Khmer Rouge Tribunal*, WORLD POLITICS REVIEW, Aug. 15, 2019, available at <https://www.worldpoliticsreview.com/articles/28121/the-death-of-nuon-chea-and-cambodia-s-failed-khmer-rouge-tribunal>.

police and judicial authorities questioned at least a dozen journalists for their reporting alone.²⁸ Human rights activists and bloggers have been arrested, beaten, and intimidated.²⁹

Moreover, the regime has worked tirelessly 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 CNRP, which was accused of plotting to take power with the help of the U.S.³⁰ In the 2013 election, Hun Sen won only 48.8% of the vote – whereas CNRP leader Sam Rainsy and his party won 44.5% of the votes.³¹ Due to gerrymandering, the seat split in the National Assembly at that time was 68-55-2, but after the CNRP was dissolved in 2017, Hun Sen then won **all** 125 seats in 2018.³²

The regime's targeting of opposition has resulted in "dozens of wrongful detentions,"³³ exiling opposition leaders, and politically motivated prosecutions. The Working Group and independent human rights organizations have warned that Articles 453 ("plotting") and 494 and 495 ("incitement") of the Cambodian Criminal Code are weaponized against opposition and human rights activists.³⁴ And in March 2022, the UN Human Rights Committee expressed deep concern about "threats, harassment, arbitrary arrests, and mass trials" against members of the CNRP.³⁵

B. Biography of Theary Seng

Theary was born in 1971 in Phnom Penh during the Cambodian Civil War. The Khmer Rouge murdered her parents and, while she was still a small child, arbitrarily detained her for nearly six months in Boeung Prison, where she was shackled at night and forced to do manual labor during

²⁸ *Cambodia's Government Should Stop Silencing Journalists, Media Outlets*, AMNESTY INTERNATIONAL, Nov. 2, 2020, available at <https://www.amnesty.org/en/documents/asa23/3294/2020/en/>.

²⁹ Appendix I, *supra* note 8, at 3; Appendix III, *supra* note 10, at 8 (citing UN HUMAN RIGHTS COUNCIL, Resolution adopted Oct. 11, 2021, U.N. Doc. A/HRC/RES/48/23, Oct. 14, 2021, ¶ 32, available at <https://documents-ddsny.un.org/doc/UNDOC/GEN/G21/287/49/PDF/G2128749.pdf?OpenElement> (expressing "serious concern at the reported deterioration in the civil and political environment in Cambodia due to the perceived chilling effects of judicial prosecution [...] and of other actions, including arrests and alleged surveillance, harassment and violence, against members of political parties.") [hereinafter "A/HRC/RES/48/23"]); *Political Prisoners Cambodia*, HUMAN RIGHTS WATCH, Jan. 24, 2020, available at <https://www.hrw.org/video-photos/interactive/2020/01/24/political-prisoners-cambodia>.

³⁰ Prak Chan Thul, Amy Sawitta Lefevre, *Cambodia's Main Opposition Party Dissolved by Supreme Court*, REUTERS, Nov. 16, 2017, available at <https://www.reuters.com/article/us-cambodia-politics/cambodias-main-opposition-party-dissolved-by-supreme-court-idUSKBN1DG1BO>.

³¹ Prak Chan Thul, *Cambodia Election Crisis Deepens as Opposition Rejects Results*, REUTERS, Aug. 11, 2013, available at <https://www.reuters.com/article/us-cambodia-election-count/cambodia-election-crisis-deepens-as-opposition-rejects-results-idUSBRE97B02I20130812>.

³² *No Competition: Cambodia's 2018 Elections*, RADIO FREE ASIA, available at <https://www.rfa.org/english/news/special/cambodia-election2018/>.

³³ *Cambodia: Repression of Opposition Increases*, HUMAN RIGHTS WATCH, Jan. 14, 2020, available at <https://www.hrw.org/news/2020/01/14/cambodia-repression-opposition-increases>.

³⁴ See, e.g., Communication of the UN Working Group on Arbitrary Detention, Special Rapporteur on the situation of human rights in Cambodia, & Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, et al., Nov. 10, 2020, available at <https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25670> (expressing grave concern about "vaguely worded provisions of the Penal Code, such as articles 494 & 495 ('incitement to commit a felony or cause social unrest'), which seems to be used against human rights defenders and activists who have merely exercised their right to freedom of peaceful assembly and association, and freedom of expression") and *Cambodia: Mass Convictions of Opposition Politicians and Human Rights Defenders Deepen Rule of Law Crisis and Must Be Reversed*, INT'L COMM'N OF JURISTS, June 15, 2022, available at <https://www.icj.org/cambodia-mass-convictions-of-opposition-politicians-and-human-rights-defenders-deepen-rule-of-law-crisis-and-must-be-reversed/> [hereinafter "INT'L COMM'N OF JURISTS"] ("Articles 453, 494 and 495 of the Criminal Code are frequently invoked to target political opponents of the Cambodian government, in part due to the vague and overbroad language of these legal provisions."). See also Appendix I, *supra* note 8, at 8-10 (providing examples of Cambodian activists and dissidents who had been charged under these articles for political reasons).

³⁵ Appendix III, *supra* note 10, at 9 (citing Concluding Observations on the third periodic report of Cambodia, UN HUMAN RIGHTS COMM., U.N. Doc. CCPR/C/KHM/CO/3, May 18, 2022, at ¶¶ 34, 38, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fKHM%2fCO%2f3&Lang=en).

the day. In 1979, she fled across the Thai border with her surviving family members and then emigrated to the U.S. There, she excelled academically and graduated from the Georgetown University School of Foreign Service and the University of Michigan Law School.³⁶ In January 2004, she returned permanently to Cambodia, where she has become a leading human rights lawyer and renowned opposition figure in civil society.³⁷

In 2006, she became the Executive Director of the Center for Social Development (“CSD”), engaging in public fora victims and perpetrators of the Khmer Rouge’s atrocities. In 2009, she was forced to step down at CSD due to a politically motivated injunction order intended to stymy her activism by freezing CSD funds. Undeterred, she founded the Center for Justice and Reconciliation (“CJR”) that same year to remain involved in Cambodia’s transitional justice efforts. In 2010, she also founded the Center for Cambodian Civic Education (“CIVICUS”). Eventually, CJR was integrated into CIVICUS, and CIVICUS became the primary platform for Theary’s human rights advocacy. CIVICUS has partnered with numerous respected human rights organizations, including Robert F. Kennedy Human Rights’ *Speak Truth to Power* program.³⁸

C. Prolonged Political Persecution of Theary Seng

1. Activism Prior to Summons

Over the years, Theary has endured intimidation and assault for her criticism of the regime. Leading up to then-U.S. President Obama’s visit to Cambodia in November 2012, unidentified men confronted her outside CIVICUS’s headquarters.³⁹ The day before President Obama’s visit to the U.S. Embassy, a group of plainclothes security officers and district officials assaulted Theary.⁴⁰ On the day of his visit, Theary and her assistant attempted to peacefully hold a banner at the Embassy in protest of war crimes, but they were surrounded by 30 top 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. Hun Sen’s regime also targeted Cambodian human rights NGOs with restrictive policies, which impeded CIVICUS’s operations and caused its registration to lapse.⁴¹

In 2019, Theary shifted her human rights advocacy to her personal website and Facebook page. In early November 2019, only a few days prior to when exiled CNRP leader Sam Rainsy was set to return to Cambodia on November 9, Theary attended the Asia-Europe Meeting (“ASEM”) 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 Rainsy’s return to Cambodia.⁴² Although Theary has no formal affiliation the CNRP, she has long advocated online for its exiled leader to return and for democracy in Cambodia (see Appendix IV).⁴³

³⁶ Appendix I, *supra* note 8, at 4.

³⁷ *Charged with Treason*, *supra* note 3.

³⁸ Appendix I, *supra* note 8, at 5.

³⁹ *Id.*, at 5.

⁴⁰ *Id.* (citing Luke Hunt, *Kissinger in Cambodia*, NEW YORK TIMES LATITUDE BLOGS, Nov. 20, 2012, available at <https://latitude.blogs.nytimes.com/2012/11/20/protests-greet-obamas-visit-to-cambodia>).

⁴¹ *Id.*

⁴² Appendix I, *supra* note 8, at 5 and Theary C. Seng, FACEBOOK, Nov. 6, 2019, available at <https://www.facebook.com/photo.php?fbid=1015721114166281&set=a.426820856280&type=3&theater>.

⁴³ Theary C. Seng, FACEBOOK, accessed Nov. 20, 2020, available at <https://www.facebook.com/theary.c.seng> [hereinafter “Theary’s Nov. 20, 2020, Facebook Post”] and Certification by Theary Seng’s Local Counsel, Description of the 9 Facebook Posts, and Pictures of the 9 Facebook Posts [hereinafter “Appendix IV”].

2. Legal Proceedings

a. Summons and Context of the Charges

The following facts have led the Clooney Foundation for Justice’s TrialWatch Initiative to grade Theary’s trial as an “F” as “a trial that entailed a gross violation of international standards that affected the outcome and/or resulted in significant harm.”⁴⁴ On Friday, November 6, 2020, Theary received news from a relative that the local police called about a summons for her. The next morning, a single-page summons was delivered to her brother’s fruit orchard requesting that Theary appear in court on November 26, 2020, on charges of “incitement to create social disorder” (Criminal Code Articles 494 and 495) and “conspiracy to commit treason” (Criminal Code Article 453) in 2019.⁴⁵ Theary’s brother was not present when the summons was delivered, so the police left it with an orchard worker, who gave it to Theary’s brother, who then gave it to Theary.

Through the news, Theary learned that some 60+ others – including Rainsy, his Vice President Mu Sochua, and other CNRP leaders and members – were also summoned to appear on November 26 to face similar charges.⁴⁶ Once notified of the summons, Theary posted a statement on her Facebook page that she would appear and represent herself to fight the charges.⁴⁷ Because Theary 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.⁴⁸

b. Prolonged Show Trial between November 2020 and June 2022

After she received the summons, Theary’s trial was repeatedly postponed and then indefinitely delayed. Between November 26, 2020, and her conviction and sentencing on June 14, 2022, Theary appeared before the Phnom Penh Municipal Court more than a dozen times in what became a protracted legal proceeding designed to intimidate her into silence. Theary first appeared in court on November 26, 2020. A total of 121 defendants were summoned to appear, but only 34 appeared – many were in exile, “convinced they would not get a fair hearing.”⁴⁹ All of the other defendants had ties to the CNRP.⁵⁰ Theary received the summons because, in the prosecutor’s final submission and an investigating judge’s closing order issuing the charges, Theary was named as an accused person.⁵¹ At this appearance, Theary requested her case file from the judge, but the judge responded that Theary could get it from her Khmer lawyer, which she did not have at the time.⁵²

Theary’s trial was rescheduled for January 14, 2021. Before the trial, Theary 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, Theary again requested access to her case file. The prosecution argued that self-representation was not allowed under the Criminal

⁴⁴ Appendix III, *supra* note 10, at 43.

⁴⁵ Appendix I, *supra* note 8, at 6.

⁴⁶ Appendix I, *supra* note 8, at 6.; Hul Reaksmey, *More Than 60 Former CNRP Members Summoned for “Incitement” Trial*, VOA, Nov. 17, 2020, available at <https://www.voacambodia.com/a/more-than-60-former-cnrp-members-summoned-for-incitement-trial/5665755.html?fbclid=IwAR3kwin6urs6cQgSPG6GnHCgaKoDQgwfKqWBxdOQrve961ucy5qZInhqshw> [hereinafter “Reaksmey”]; see also Paul Eckert, *Cambodian-American Lawyer Vows to Challenge Treason Charge in Court*, RADIO FREE ASIA, Nov. 19, 2020, available at <https://www.rfa.org/english/news/cambodia/lawyer-treason-11192020220236.html> [hereinafter “Eckert”].

⁴⁷ Theary C. Seng, FACEBOOK, Nov. 6, 2020, available at <https://www.facebook.com/537161280/posts/10158317667206281/>.

⁴⁸ Appendix I, *supra* note 8, at 7.

⁴⁹ *Cambodia Puts 121 Opposition Figures on Trial for Treason*, AL JAZEERA, Nov. 26, 2020, available at <https://www.aljazeera.com/news/2020/11/26/cambodia-treason-trial>.

⁵⁰ *Id.*

⁵¹ Appendix III, *supra* note 10, at 27.

⁵² Appendix III, *supra* note 10, at 14.

Procedure Code and that Theary must not be granted access to her file – and the judge agreed.⁵³ Then, her trial was postponed to January 28, and postponed again to February 25. Without any reason, the trial was postponed and delayed indefinitely.

c. Proceedings Resume Almost One Year Later and Theary’s International Counsel Banned from Cambodia

On November 22, 2021, three police officers visited Theary’s home with a new summons to appear in the Phnom Penh Municipal Court on December 7.⁵⁴ The summons was signed by the prosecutor’s office on November 12 (a mere two days after the U.S. announced new sanctions on two high-ranking regime officials).⁵⁵ The summons also indicated, without explanation or justification, that Judge Koeurt Sang, one of the three judges empaneled for the trial, would suddenly be replaced by Judge Soeung Chariya.⁵⁶

Theary has attracted global attention to the legal proceedings against her. She has worn a series of symbolic costumes to each court appearance, explaining that if she is going to be subjected to a show trial, she is going to “play her part” in the “political theater.”⁵⁷ For her December 7 appearance, she wore the costume of a traditional Cambodian Apsara dancer. Instead of the elaborate headdress that would normally accompany the costume, Theary shaved her head (a symbol of mourning in Cambodian culture) to represent “the Cambodian population suffering under this autocratic regime.”⁵⁸

Theary’s international counsel, Jared Genser, traveled to Phnom Penh in an informal capacity to support her, as her friend and former law school classmate. During his visit, a regime proxy group – the “Kingdom of Cambodia Royal Government Attorney Group” – issued a threatening communique leveling a libelous series of fabricated allegations against him and accusing him of violating provisions of Article 522 of the Cambodian Criminal Code for “publication of commentaries intended to unlawfully coerce judicial authorities.”⁵⁹ Genser was later banned from entering Cambodia “forever,” despite never engaging in any illegal activity.⁶⁰ At the December 7 appearance, the trial was postponed to December 28.

On December 28, 2021, Theary was first questioned in court about the charges against her. The judge asked her about a Facebook post that she allegedly made, but Theary informed the court that she had not been given notice of this evidence and had not been given access to her full case file.⁶¹ Under the pressure of not being able to access her case file, Theary ultimately accepted a court-appointed Khmer lawyer.⁶²

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Press Release, *Treasury Targets Corrupt Military Officials in Cambodia*, U.S. DEP’T OF THE TREASURY, Nov. 10, 2021, available at <https://home.treasury.gov/news/press-releases/jy0475>.

⁵⁶ Appendix III, *supra* note 10, at 14.

⁵⁷ *Id.* and *Government Critics Back in Court*, THE STAR, Dec. 9, 2021, available at <https://www.thestar.com.my/aseanplus/aseanplus-news/2021/12/09/govt-critics-back-in-court>.

⁵⁸ *Cambodian Mass Trial Against Government Opponents Reopens*, VOA, Dec. 7, 2021, available at <https://www.voacambodia.com/a/cambodian-mass-trial-against-government-opponents-reopens/6342825.html>.

⁵⁹ *Response by Jared Genser to Threat of Arrest by Cambodian Government Proxy Group*, PERSEUS STRATEGIES, Dec. 9, 2021, available at <https://www.perseus-strategies.com/wp-content/uploads/2021/12/Response-by-Jared-Genser-to-arrest-threat-Cambodia.pdf>

⁶⁰ Soben Ung, *Theary Seng’s Legal Counsel, Jared Genser Banned from Entering Cambodia Forever, Latest Update*, KHMERPOST USA, Feb. 3, 2022, available at <https://www.perseus-strategies.com/wp-content/uploads/2022/03/Theary-Sengs-Legal-Counsel-Jared-Genser-Banned-from-Entering-Cambodia-Forever-Latest-Update.pdf> [hereinafter “Ung”].

⁶¹ Appendix III, *supra* note 10, at 15.

⁶² *Id.*

Theary's trial was postponed to January 4, 2022. On January 4, Theary wore an orange prison jumpsuit and ankle shackles as a reference to her imprisonment under the Khmer Rouge.⁶³ While walking to the courthouse, she was assaulted by 40 armed officers, who forced her into a vehicle and drove away.⁶⁴ 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 February 15.⁶⁵ Due to a COVID-19 exposure, her trial was moved again to February 22. Theary was questioned at this hearing on democracy, justice, and civic engagement.⁶⁶ In particular, the presiding judge asked Theary about whether she was "satisfied with the Cambodian government" and if she had shared social media statuses criticizing it.⁶⁷ When asked what she would do to "stop the dictatorship government," Theary replied, "elections."⁶⁸

On March 1, 2022, questioning of Theary continued. Theary reminded the court that the due process violations in her case nullify 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 with Facebook posts Theary allegedly made.⁶⁹ Theary noted that one of the posts, 83/106,⁷⁰ was not made by her and seemed to be posted by someone else.⁷¹ Theary repeatedly explained her support for democracy and peace, even as the court asked her about video clips of Rainsy that did not mention Theary and were never entered as evidence against her.⁷²

Then, on March 10, 2022, officers from the Interior Ministry of the Government were questioned about the posts presented against Theary. Although Theary brought printouts illustrating due process violations in her case, a security officer confiscated them, and they were never returned. Theary also appeared in court wearing makeup and was forced to take it off by the presiding judge and prosecutor.⁷³ Theary's defense lawyer then questioned the judicial police officer about the relevance of Rainsy's video clips to Theary, and the officer "could not answer the defense lawyer's question."⁷⁴

On March 28, 2022, Theary 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."⁷⁵ None of the videos and posts presented that day mentioned or appeared relevant to Theary.⁷⁶ Proceedings continued April 5, but Theary was denied entry into the courtroom for wearing a sarong. She was represented *in absentia* by her court-appointed lawyer.⁷⁷ On April 12, Theary 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.

⁶³ *Id.*

⁶⁴ *Cambodia Activist Briefly Detained After Protest in Shackles*, ASSOCIATED PRESS, Jan. 4, 2022, available at <https://apnews.com/article/cambodia-phnom-penh-hun-sen8ed1009592ca726037ad9fc299c943e9>.

⁶⁵ Appendix III, *supra* note 10, at 16.

⁶⁶ Theary Seng, *Legal Defense of Theary Seng before the Court: Concluding Remarks*, PERSEUS STRATEGIES, May 3, 2022, available at <https://www.perseus-strategies.com/wp-content/uploads/2022/05/FINALLegDefenseConcludingRemarksENG17May22.pdf> [hereinafter "Appendix V"].

⁶⁷ Appendix III, *supra* note 10, at 17.

⁶⁸ *Id.*

⁶⁹ See Appendix IV, *supra* note 43, at 3 (noting that Theary denied having made one of the posts presented as evidence against her).

⁷⁰ See Appendix IV, *supra* note 43, at 2-3.

⁷¹ Appendix III, *supra* note 10, at 18-19.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Appendix III, *supra* note 10, at 20.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*, at 21.

On May 3, 2022, Theary's lengthy trial finally concluded. Dressed as Lady Justice, Theary was told she could not enter the courthouse unless she removed the flowers from her hair and left her costume outside.⁷⁸ The prosecution's closing argument did not even mention Theary or cite any specific instances in which she had committed a crime.⁷⁹ She gave a statement from the courthouse steps highlighting the grave violations of both Cambodian and international law in her case.⁸⁰

3. Arrest and Detention

a. Arrest

On June 14, 2022, Theary arrived at the Municipal Courthouse dressed as Lady Liberty to hear the verdict in her case.⁸¹ She was convicted of "incitement to create social disorder," and "conspiracy to commit treason," and sentenced to six years in prison.⁸² The court's oral announcement of the conviction contained no explanation as to why it found Theary guilty.⁸³ Theary remained outside the courthouse to force the authorities to detain her 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."⁸⁴ The other 25 guards pushed back protesters and crowds, including Theary's family members.

b. Detention

Theary arrived at Prey Sar Prison on the outskirts of Phnom Penh between 10:00 and 10:45 am local time. Immediately, senior U.S. government officials and independent human rights organizations called for Theary's release from "unjust" imprisonment.⁸⁵ The Working Group has previously condemned the conditions in Prey Sar Prison, noting that it is "notorious for its appalling detention conditions."⁸⁶ 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 Nelson Mandela Rules."⁸⁷ Theary was initially denied access to her family and counsel in Prey Sar Prison. On June 14 at 2:00 pm local time, Theary's brother, cousin, and court-appointed lawyer were denied visitation. Initially, correctional officials told them they could not visit due to "COVID-19 quarantine." Then, the prison administrator told them to wait. They waited until 4:30 pm until Theary's lawyer and family demanded to see her, but their request was denied.

⁷⁸ Appendix III, *supra* note 10, at 21.

⁷⁹ *Id.*

⁸⁰ Appendix V, *supra* note 66 and Sopheng Cheang, *Cambodian Dissident Dresses Up as 'Lady Justice' for Trial*, ABC NEWS, May 3, 2022, available at <https://abcnews.go.com/International/wireStory/cambodian-dissident-dresses-lady-justice-trial-84463495>.

⁸¹ *Mass Convictions of Opposition Activists in Cambodia*, *supra* note 12.

⁸² Appendix III, *supra* note 10, at 22.

⁸³ *Id.*

⁸⁴ *Cambodian American Lawyer Gets 6 Years for 'Treason' in Mass Sentencing of Opposition*, *supra* note 11.

⁸⁵ See, e.g., Tweet by USAID Administrator Samantha Power (@PowerUSAID), TWITTER, Jun. 16, 2022, 12:27pm, available at <https://twitter.com/PowerUSAID/status/1537471903081840641?s=20&t=aBosSAWAA5myAA56k671-Q>; Tweet by Under-Secretary for Civilian Security, Democracy, and Human Rights Uzra Zeya (@UnderSecStateJ), TWITTER, Jun. 15, 2022, 9:54pm, available at <https://twitter.com/undersecstatej/status/1537252335331823617?s=21&t=O5IBRdZaB3dnfTXQ3onAMg>; Tweet from U.S. Ambassador to Cambodia W. Patrick Murphy (@USAmbCambodia), TWITTER, Jun. 13, 2022, 11:52pm, available at https://twitter.com/USAmbCambodia/status/1536557150893654016?s=20&t=9PHHI TP_iOUjUe-S86cP7A; Appendix III, *supra* note 10, at 22.

⁸⁶ *Ros Sokhet v. Cambodia*, Opinion No. 75/2021, U.N. Doc. A/HRC/WGAD/2021/75, U.N. WORKING GROUP ON ARBITRARY DETENTION, adopted Nov. 18, 2021, at ¶ 77 [hereinafter "*Ros Sokhet v. Cambodia*, Opinion No. 75/2021"].

⁸⁷ *Id.*

On June 15, Theary's lawyer called the court to request more information about Theary's whereabouts. The court refused to answer, saying it was not the court's responsibility to answer the lawyer's questions. On June 16, Theary's lawyer learned through the Cambodian League for the Promotion and Defense of Human Rights that the UN Office of the High Commissioner for Human Rights ("OHCHR") reported Theary was transferred from Prey Sar Prison to Preah Vihear Prison, a remote prison 300 km and a six-hour drive away from Phnom Penh. Only when questioned by Theary's lawyer did prison officials confirm that Theary was transferred on June 15. Theary's lawyer was never informed that his client was transferred, nor was a reason provided. Later, Nuth Savna, spokesperson for the General Department of Prisons, confirmed that Theary was transferred to Preah Vihear Prison due to "security concerns," noting only that Theary once staged public protests. Speaking to the press, Mr. Savna said, "The reason is [concerning] public security. [...] If we keep her at [Prey Sar Prison], they (her supporters) will come to disturb the prison, and how will my officers work?"⁸⁸

On July 5, 2022, Theary's brother drove to Preah Vihear Prison and asked to visit his sister. His request was denied. One week later, on July 12, he successfully met with Theary, but with strict rules. There were three guards in the room during the visit: Two on Theary's side of the room taking notes about their conversation and one on the brother's side also taking notes. There was a video camera in the room, and the guards said, "no communication in English." The guards confiscated the news articles about Theary that her brother had brought. Theary's local counsel has visited her at Preah Vihear Prison, but he does not know whether a camera was in the room. Theary's friends have been summarily denied visits; on September 2, they applied for a permit to visit her from the Ministry of the Interior, but their application was denied.

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

II. LEGAL ANALYSIS

For the reasons set forth below, Theary Seng's detention constitutes an arbitrary deprivation of her liberty under Categories I, II, III, and V of the Working Group's Revised Methods of Work. The Government of Cambodia ratified the International Covenant on Civil and Political Rights ("ICCPR") on May 26, 1992. The Working Group may look to other instruments in determining whether a deprivation of liberty is arbitrary, such as the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment ("Body of Principles").⁸⁹

Both the ICCPR and the Universal Declaration of Human Rights ("UDHR") state that "no one shall be subjected to arbitrary arrest, detention, or exile."⁹⁰ The Working Group has held that this prohibition is a peremptory norm of international law and cannot be derogated from even

⁸⁸ Khuon Narim, *Seng Theary Secretly Transferred to Preah Vihear Prison*, CAMBOJA NEWS, Jun. 17, 2022, available at <https://cambojanews.com/seng-theary-secretly-transferred-to-preah-vihear-prison/> [hereinafter "Khuon Narim"].

⁸⁹ METHODS OF WORK OF THE WORKING GROUP ON ARBITRARY DETENTION, U.N. HUMAN RIGHTS COUNCIL, 36th Sess., U.N. Doc. A/HRC/36/38, July 13, 2017, at ¶ 7(e)–(f), (i) [hereinafter "REVISED METHODS OF WORK"].

⁹⁰ International Covenant on Civil and Political Rights, G.A. Res 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 52 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, at Art. 9(1) [hereinafter "ICCPR"] and Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, *adopted* 1948, at Art. 9 [hereinafter "UDHR"].

during states of emergency.⁹¹ Additionally, the Working Group “subjects interventions against individuals who may qualify as human rights defenders to particularly intense review.”⁹² Theary qualifies as a human rights defender. Thus, the Working Group should review her case and the numerous violations contained within it using this heightened level of scrutiny.

A. Category I: No Legal Basis for Detention

A detention is arbitrary under Category I when “it is clearly impossible to invoke any legal basis justifying the deprivation of liberty.”⁹³ 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.”⁹⁴ In analyzing Category I, the Working Group has similarly considered whether a given law “might allow an excessively broad interpretation of its provisions due to their vagueness . . . resulting in unjustified and arbitrary criminalization of the legitimate exercise of the right to freedom of expression.”⁹⁵

Theary was convicted under Criminal Code Articles 453 (“conspiracy to commit treason”) and 494–495 (“incitement to create social disorder”). Both civil society⁹⁶ and UN special procedures⁹⁷ have recognized that these articles are vague and overbroad, which allows them to be misused to target regime opponents. In fact, the Working Group itself adopted an opinion last year finding that “articles 494 and 495 of the [Cambodian] Criminal Code are incompatible with article 11 (2) of the [UDHR] and article 15 (1) of the [ICCPR] . . . due to their vague and overly broad language.”⁹⁸ Therefore, Theary’s ongoing detention is arbitrary under Category I.

B. Category II: Detention Based on the Exercise of Fundamental Rights and Freedoms

⁹¹ *Liu Xia v. China*, Opinion No. 16/2011, U.N. Doc. A/HRC/WGAD/2011/16, U.N. WORKING GROUP ON ARBITRARY DETENTION, adopted May 5, 2011, at ¶ 12 (holding that the Working Group views the prohibition on arbitrary arrest and detention as *jus cogens* and that it follows the Human Rights Committee’s General Comment 29 on states of emergency in its opinions with respect to *jus cogens*) and *Santhathevan Ganesharatnam v. Sri Lanka*, Opinion No. 9/2013, U.N. Doc. A/HRC/WGAD/2013/9, U.N. WORKING GROUP ON ARBITRARY DETENTION, adopted May 2, 2013 (finding that detention was arbitrary despite the state’s proclamation of emergency and the legality of detention under the state’s domestic laws).

⁹² *Chen Guancheng v. People’s Republic of China*, Opinion No. 47/2006, U.N. Doc. A/HRC/7/4/Add.1, U.N. WORKING GROUP ON ARBITRARY DETENTION, adopted Nov. 24, 2006, at ¶¶ 6, 10.

⁹³ REVISED METHODS OF WORK, *supra* note 89, at ¶ 8(a).

⁹⁴ *Hassan Zafar Arif v. Pakistan*, Opinion No. 8/2017, U.N. Doc. A/HRC/WGAD/2017/8, U.N. WORKING GROUP ON ARBITRARY DETENTION, adopted Apr. 19, 2017, at ¶¶ 36, 38.

⁹⁵ *Musallam Mohamed Hamad al-Barrik v. Kuwait*, Opinion No. 20/2017, U.N. Doc. A/HRC/WGAD/2017/20, U.N. WORKING GROUP ON ARBITRARY DETENTION, adopted Apr. 24, 2017, at ¶ 35.

⁹⁶ See, e.g., INT’L COMM’N OF JURISTS, *supra* note 34 and SHADOW REPORT FOR THE REVIEW OF CAMBODIA’S THIRD PERIODIC REPORT, FIDH, Jan. 31, 2022, at ¶ 29, available at https://www.fidh.org/IMG/pdf/20220131_cambodia_ccpr134_fidh_en-2.pdf (“The government has continued to use overly broad and vague provisions of the Criminal Code such as “incitement to commit a felony [Articles 494–495],” . . . and “plotting” [Article 453] to arrest and prosecute opponents and critics for exercising their rights to freedom of expression.”).

⁹⁷ See, e.g., *Cambodia: UN Experts Condemn Conviction of Trade Union Leader, Systematic Crackdown on Human Rights Defenders*, U.N. SPECIAL RAPPORTEUR ON HUMAN RIGHTS DEFENDERS, Aug. 24, 2021, available at <https://srdefenders.org/cambodia-un-experts-condemn-conviction-of-trade-union-leader-systematic-crackdown-on-human-rights-defenders/> (“We are seriously concerned that the Cambodian government uses the vaguely-worded Articles 494 and 495 of the Criminal Code against ‘incitement to create felony’ to crack down on dissent and to stifle free expression.”).

⁹⁸ *Ros Sokhet v. Cambodia*, Opinion No. 75/2021, *supra* note 86, at ¶ 66.

A detention is arbitrary under Category II when it results from the exercise of fundamental rights or freedoms protected under the ICCPR and UDHR.⁹⁹ Theary's detention is arbitrary because it resulted from the exercise of (1) her fundamental right to freedom of expression¹⁰⁰ and (2) her right to freedom of peaceful assembly and association.¹⁰¹

1. Theary was detained because she exercised her right to freedom of expression

Theary'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.¹⁰² As explained above, the only evidence presented against Theary at trial were screenshots from nine Facebook posts that she allegedly made.¹⁰³ Most of these posts simply referenced the date November 9, 2019, and Rainsy's intended return to Cambodia on that date.¹⁰⁴ Two posts were longer – one was a statement¹⁰⁵ criticizing Hun Sen and his family in various peaceful ways and the other was a reposted statement by Rainsy explaining the purpose of his intended return (*i.e.*, to oppose what he viewed as a dictatorial regime and to help bring democracy back to Cambodia).¹⁰⁶

All of these posts constitute protected opinion and expression under international law. The UN Human Rights Committee, for example, has explained that the right to freedom of expression includes political discourse, commentary on public affairs, and discussion of human rights.¹⁰⁷ 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.”¹⁰⁸ Moreover, although Theary denies making the posting that might be considered disparaging of Hun Sen (83/106, *see* Appendix IV at p. 14), ultimately, this does not matter, as “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.”¹⁰⁹

While the right to freedom of opinion and expression can be restricted in certain circumstances, including to protect public order or national security,¹¹⁰ this cannot be used to justify Theary's detention. As the UN 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.”¹¹¹ The Committee further emphasized: “It is not compatible with [the ICCPR] . . . to suppress or withhold from the public information of legitimate

⁹⁹ Specifically, detention is arbitrary under Category II “When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13–14 and 18–21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18–19, 21–22 and 25–27 of the International Covenant on Civil and Political Rights.” REVISED METHODS OF WORK, *supra* note 89, at ¶ 8(b).

¹⁰⁰ ICCPR, *supra* note 90, at Arts. 19.

¹⁰¹ *Id.*, at Arts. 21–22.

¹⁰² UDHR, *supra* note 90, at Arts. 19(2), 21.

¹⁰³ *See* Appendix IV, *supra* note 43, at 7–14.

¹⁰⁴ *See* Appendix III, *supra* note 10, at 6,15 and Appendix IV, *supra* note 43, at 7–14.

¹⁰⁵ Appendix IV, *supra* note 43, at 2–3, 14 (Trial Doc. No. 83/106).

¹⁰⁶ *Id.*, at 13–14.

¹⁰⁷ *General Comment No. 34 on Article 19: Freedoms of Opinion and Expression*, U.N. HUMAN RIGHTS COMM., U.N. Doc. CCPR/C/GC/34, Sept. 12, 2011, at ¶ 11 [hereinafter “Human Rights Committee General Comment No. 34”].

¹⁰⁸ *De Morais v. Angola*, Communication No. 1128/2002, U.N. Doc. CCPR/C/83/D/1128/2002, U.N. HUMAN RIGHTS COMM., adopted Mar. 29, 2005, at ¶ 6.7.

¹⁰⁹ Human Rights Committee General Comment No. 34, *supra* note 107, at ¶ 38.

¹¹⁰ ICCPR, *supra* note 90, at Art. 19(3)(b).

¹¹¹ *General Comment No. 34*, *supra* note 107, at ¶ 23.

public interest that does not harm national security or to prosecute . . . human rights defenders, or others, for having disseminated such information.”¹¹² The UN Human Rights Council has similarly affirmed that the following forms of expression can *never* be restricted – discussion of government policies; political debate; reporting on human rights and government activities; political activities, including for peace or democracy; and the expression of opinion or dissent.¹¹³

Furthermore, the Johannesburg Principles on National Security, Freedom of Expression and Access to Information – which have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression and have regularly been referenced by the UN Human Rights Council¹¹⁴ – state that advocating for the non-violent change of government policy or even the government itself cannot be considered a threat to national security, and nor can criticism of the government, its agencies, or public officials.¹¹⁵ It is worth noting that Rainsy’s statement, reposted by Theary, did not in any way advocate for a violent overthrow of the Cambodian Government – in fact, Rainsy’s statement cited the 1986 People Power Revolution in the Philippines, which was a *non-violent* movement to change the government.¹¹⁶ Thus, Theary’s detention is arbitrary under Category II.

2. Theary was detained because she exercised her rights to freedom of peaceful assembly and association

Freedom of peaceful assembly and association are guaranteed by Articles 21 and 22(1) of the ICCPR and Article 20(1) of the UDHR. Although these rights are not absolute,¹¹⁷ 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.¹¹⁸ And this Working Group has previously found that leading or founding a human rights organization,¹¹⁹ belonging to a human rights organization,¹²⁰ and “forming part of a group” described as counter-revolutionary by the government¹²¹ are all examples of the legitimate exercise of the rights set out in the ICCPR and UDHR. This Working Group has even found that detaining individuals based upon their activities as human rights

¹¹² *Id.*, at ¶ 30.

¹¹³ Freedom of Opinion and Expression, Human Rights Council Res. 12/16, U.N. Doc. A/HRC/RES/12/16, U.N. HUMAN RIGHTS COUNCIL, *adopted* Oct. 2, 2009, at ¶ 5(p)(i).

¹¹⁴ Joshua Mmali, *UNMISS Hails Agreement on Governance as an Important Step in Resolution of South Sudanese Conflict*, U.N. MISSION IN SOUTH SUDAN, Aug. 6, 2018, at 9 n.40, available at <https://unmiss.unmissions.org/unmiss-hails-agreement-governance-important-step-resolution-south-sudanese-conflict> (“The Principles have been endorsed by the United Nations Special Rapporteur on Freedom of Opinion and Expression, and have regularly been referred to by the United Nations Commission on Human Rights and its successor, the Human Rights Council”).

¹¹⁵ Johannesburg Principles on National Security, Freedom of Expression and Access to Information, in Abid Hussain, REPORT OF THE SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF THE RIGHT TO FREEDOM OF OPINION AND EXPRESSION, U.N. Doc. E/CN.4/1996/39, Mar. 22, 1996, at Principle 7(a)(i)–(ii), available at http://ap.ohchr.org/documents/alldocs.aspx?doc_id=700

¹¹⁶ See, e.g., Cesar Ramirez, *People Power Revolution: The 35th Anniversary*, MCGILL INT’L REV., Feb. 25, 2021, available at <https://www.mironline.ca/people-power-revolution-the-35th-anniversary/> (noting that the People Power Revolution “end[ed] nearly 14 years of dictatorship through non-violent means”).

¹¹⁷ ICCPR, *supra* note 90, at Arts. 21–22.

¹¹⁸ *Njaru v. Cameroon*, Views, U.N. Doc. CCPR/C/89/D/1353/2005, U.N. HUMAN RIGHTS COMM., *adopted* Apr. 3, 2007, at ¶ 6.4.

¹¹⁹ See generally *Muhammed Abdullah al-Mas’ari & Abdullah al-Hamed v. Saudi Arabia*, Opinion No. 60/1993, U.N. Doc.

A/HRC/WGAD/1993/60, U.N. WORKING GROUP ON ARBITRARY DETENTION, *adopted* Dec. 9, 1993; and *Akzam Turgunov v. Uzbekistan*, Opinion No. 53/2011, U.N. Doc. A/HRC/WGAD/2011/53, U.N. WORKING GROUP ON ARBITRARY DETENTION, *adopted* Nov. 17, 2011.

¹²⁰ *Mazhar v. Syria*, Opinion No. 10/1993, U.N. Doc. A/HRC/WGAD/1993/10, U.N. WORKING GROUP ON ARBITRARY DETENTION, *adopted* Apr. 19, 2017, at ¶ 5(h).

¹²¹ *Rubén Hoyos Ruiz, et al. v. Cuba*, Opinion No. 26/1992, U.N. Doc. A/HRC/WGAD/1992/26, U.N. WORKING GROUP ON ARBITRARY DETENTION, *adopted* Session No. 4.

defenders further violates their rights to equality before the law and equal protection under Article 26 of the ICCPR and Article 7 of the UDHR.¹²²

Theary is a human rights defender and targeting her is an unlawful restriction on her rights to freedom of peaceful assembly and association.¹²³ Her detention resulted from her long-term, high-profile criticism of Prime Minister Hun Sen and her pro-democracy activism. She was previously targeted for her human rights activities at CSD, and she was charged, tried, and convicted alongside dozens of other human rights leaders, prominent political dissidents, and democracy activists belonging to the CNRP. This context illuminates the political motivation behind her detention, which intends to stymy 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 accessing and supporting her.¹²⁴

C. Category III: Violation of Due Process Rights

Detention is considered arbitrary under Category III “[w]hen the total or partial nonobservance 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.”¹²⁵ The Working Group has found detention arbitrary in all five cases brought against Cambodia alleging Category III violations.¹²⁶ All five of these cases involved due process violations in politically-motivated trials against opposition party members, human rights defenders, or journalists.¹²⁷ In this case, Theary was subjected to numerous violations of Article 14 of the ICCPR and other instruments, and her detention is arbitrary under Category III.

¹²² See, e.g., *Ngô Văn Dũng v. Viet Nam*, Opinion No. 16/2020, U.N. Doc. A/HRC/WGAD/2020/16, U.N. WORKING GROUP ON ARBITRARY DETENTION, adopted May 1, 2020; *Phan Kim Khanh v. Viet Nam*, Opinion No. 15/2020, U.N. Doc. A/HRC/WGAD/2020/15, U.N. WORKING GROUP ON ARBITRARY DETENTION, adopted May 1, 2020; *Trần Thị Xuân v. Viet Nam*, Opinion No. 9/2019, U.N. Doc. A/HRC/WGAD/2019/9, U.N. WORKING GROUP ON ARBITRARY DETENTION, adopted Apr. 25, 2019; *Nguyễn Văn Hóa v. Viet Nam*, Opinion No. 44/2019, U.N. Doc. A/HRC/WGAD/2019/44, U.N. WORKING GROUP ON ARBITRARY DETENTION, adopted Aug. 15, 2019; *Le Dinh Luong v. Viet Nam*, Opinion No. 45/2019, U.N. Doc. A/HRC/WGAD/2019/45, U.N. WORKING GROUP ON ARBITRARY DETENTION, adopted Aug. 15, 2019; *Luu Van Vinh v. Viet Nam*, Opinion No. 35/2018, U.N. Doc. A/HRC/WGAD/2018/35, U.N. WORKING GROUP ON ARBITRARY DETENTION, adopted Apr. 26, 2018; *Ngô Hào v. Viet Nam*, Opinion No. 36/2018, U.N. Doc. A/HRC/WGAD/2018/36, U.N. WORKING GROUP ON ARBITRARY DETENTION, adopted Apr. 26, 2018; *Hoang Duc Binh v. Viet Nam*, Opinion No. 45/2018, U.N. Doc. A/HRC/WGAD/2018/45, U.N. WORKING GROUP ON ARBITRARY DETENTION, adopted Aug. 21, 2018; *Lê Thu Hà, Nguyen Trung Ton and Nguyen Trung Truc v. Viet Nam*, Opinion No. 46/2018, U.N. Doc. A/HRC/WGAD/2018/46, U.N. WORKING GROUP ON ARBITRARY DETENTION, adopted Aug. 21, 2018; *Can Thi Theu v. Viet Nam*, Opinion No. 79/2017, U.N. Doc. A/HRC/WGAD/2017/79, U.N. WORKING GROUP ON ARBITRARY DETENTION, adopted Nov. 22, 2017; *Tran Thi Nga v. Viet Nam*, Opinion No. 75/2017, U.N. Doc. A/HRC/WGAD/2017/75, U.N. WORKING GROUP ON ARBITRARY DETENTION, adopted Nov. 21, 2017.

¹²³ See *Who is a defender*, UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, available at <http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Defender.aspx>.

¹²⁴ Khuon Narim, *supra* note 88.

¹²⁵ REVISED METHODS OF WORK, *supra* note 89, at ¶ 8.

¹²⁶ See, e.g., *Osman Karaca v. Cambodia and Turkey*, Opinion No. 84/2020, U.N. Doc. A/HRC/WGAD/2020/84, U.N. WORKING GROUP ON ARBITRARY DETENTION, adopted Nov. 26, 2020; *Uon Chhin and Yeang Sothearin v. Cambodia*, Opinion No. 3/2019, U.N. Doc. A/HRC/WGAD/2019/3, U.N. WORKING GROUP ON ARBITRARY DETENTION, adopted Apr. 24, 2019; *Kem Sokha v. Cambodia*, Opinion No. 9/2018, U.N. Doc. A/HRC/WGAD/2018/9, U.N. WORKING GROUP ON ARBITRARY DETENTION, adopted Apr. 19, 2018; *Ny Sokha, Ny Vanda, Yi Soksan, Lim Mony, and Ny Chakrya v. Cambodia*, Opinion No. 45/2016, U.N. Doc. A/HRC/WGAD/2016/45, U.N. WORKING GROUP ON ARBITRARY DETENTION, adopted Dec. 8, 2016 [hereinafter “*, Opinion No. 45/2016”]; *Channy Cheam v. Cambodia*, Opinion No. 39/2005, U.N. Doc. A/HRC/4/40/Add.1, U.N. WORKING GROUP ON ARBITRARY DETENTION, adopted Nov. 25, 2005.*

¹²⁷ See *id.*

1. Theary was not promptly informed in detail of the nature and cause of the charges against her

Article 14(3)(a) of the ICCPR stipulates that an accused has the right “to be informed promptly and in detail . . . of the nature and cause of the charge[s] against [her].”¹²⁸ Importantly, “both the law and the alleged general facts on which the charge is based” must be provided.¹²⁹ The UN 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.”¹³⁰ Under Cambodian law, Article 470 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.¹³¹ And second, a summons must include a copy of the indictment, providing the detailed alleged evidence in a case.¹³²

Theary’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 her charging 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 Theary that would give rise to criminal liability.¹³³ Instead, these documents merely identify Theary as a person accused of a crime.¹³⁴ Further, Theary’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 October 10, 2020.¹³⁵ The indictment was not attached to Theary’s summons.¹³⁶ Theary 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 December 28, 2021, the day on which the prosecutor and judge began questioning her.¹³⁷

2. Theary was denied access to counsel of her choice

Article 14(3)(d) of the ICCPR guarantees the right of the accused to a defense “through legal assistance of his own choosing,”¹³⁸ including the right “to defend himself in person.”¹³⁹ Counsel can be assigned by the court “where the interests of justice so require,”¹⁴⁰ but that 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.¹⁴¹ For its part, the Working Group has found clear violations of the right

¹²⁸ ICCPR, *supra* note 90, at Art. 14(3)(a).

¹²⁹ *General Comment No. 32 on Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial*; U.N. HUMAN RIGHTS COMM., U.N. Doc. CCPR/C/GC/32, Aug. 23, 2007, at ¶ 31 [hereinafter “General Comment No. 32”].

¹³⁰ *Id.*

¹³¹ Criminal Procedure Code, *supra* note 15, at Art. 470 (“The bailiff shall make a written note on the original summons that a copy of the original summons has been delivered to the person who was present at the residence. The bailiff shall make a written note of the identity of such person and the date of delivery. The person who received the summons shall sign the original summons.”).

¹³² Criminal Procedure Code, *supra* note 15, at Arts. 294 (“A copy of the indictment shall be attached to the summons to be delivered to the accused.”) and 474 (“In all cases, a copy of the indictment shall be attached to the summons.”).

¹³³ Appendix III, *supra* note 10, at 27.

¹³⁴ *Id.*

¹³⁵ Appendix III, *supra* note 10, at 13 (citing Theary 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>).

¹³⁶ Appendix I, *supra* note 8, at 6.

¹³⁷ Appendix III, *supra* note 10, at 27.

¹³⁸ ICCPR, *supra* note 90, at Art. 14(3)(d).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *General Comment 32*, *supra* note 129, at ¶ 37.

to counsel where counsel was denied access to a copy of the indictment and other essential documents.¹⁴²

The court repeatedly obstructed Theary's right to counsel of her choice throughout the proceedings. First, the court refused to recognize Theary's right to self-representation by denying her access to her case file until she allowed the court to appoint her a Khmer lawyer in January 2022.¹⁴³ The court's meager justification is that Cambodia does not allow self-representation in criminal felony trials. This is not a serious justification for acting against Theary's wishes, since Theary herself is a lawyer with an interest in and ability to represent herself.¹⁴⁴ All legal provisions relating to her defense should have been read to facilitate Theary's right to represent herself – particularly, Article 129 of the Cambodian Criminal Code, which provides lawyers access to case files.¹⁴⁵ By refusing to recognize Theary's right to represent herself, the court effectively deprived Theary of access to counsel of her choice from November 26, 2020 to January 2022, when a court-appointed lawyer began to represent her. Regardless, the regime actively deprived Theary access to her international counsel, as Jared Genser was banned from ever returning to Cambodia.¹⁴⁶

3. Theary was denied adequate facilities to prepare a defense

Article 14(3)(b) of the ICCPR further provides an accused the right “[t]o have adequate time and facilities for the preparation of his defence.”¹⁴⁷ “Adequate facilities” includes “access to documents and other evidence,” including “all materials that the prosecution plans to offer in court against the accused.”¹⁴⁸ The Working Group found violations of the right to a fair trial in three cases in which the “lack of specific details in the charges brought [did] not allow the accused to defend himself appropriately.”¹⁴⁹

As discussed in section II(c)(1) above, Theary was not provided with information about the facts and alleged conduct underlying her charges, thereby impeding her ability to defend herself in court. Additionally, by December 28, 2021, Theary still had not received this information and had received only the prosecutor's introductory and closing submissions and the investigating judge's closing order.¹⁵⁰ On December 28, the judge asked her about a Facebook post she had allegedly made, but Theary had never seen it before and was not given notice of this evidence,¹⁵¹ in violation of her right to access “all materials that the prosecution plans to offer in court against [her].”¹⁵² Further, Theary was not given access to her case file until January 2022 after accepting a court-appointed lawyer, under pressure.¹⁵³

4. Theary was denied access to a competent, independent, and fair tribunal

¹⁴² See *Tran Thi Thuy, et al. v. Viet Nam*, Opinion No. 46/2011, U.N. Doc. A/HRC/WGAD/2011/46, U.N. WORKING GROUP ON ARBITRARY DETENTION, adopted Sept. 2, 2011, at ¶ 12.

¹⁴³ Appendix V, *supra* note 66, at ¶¶ 15-16.

¹⁴⁴ *Id.*, at ¶ 11.

¹⁴⁵ *Id.*, at ¶ 14.

¹⁴⁶ Ung, *supra* note 60.

¹⁴⁷ ICCPR, *supra* note 90, at Art. 14(3)(b).

¹⁴⁸ Appendix III, *supra* note 10, at 28 (quoting *General Comment No. 32*, *supra* note 129, at ¶ 33).

¹⁴⁹ *Moussa Kaka v. Niger*, Opinion No. 7/2009, U.N. Doc. A/HRC/13/30/Add.1, U.N. WORKING GROUP ON ARBITRARY DETENTION, adopted May 7, 2009, at ¶ 27.

¹⁵⁰ Appendix III, *supra* note 10, at 28.

¹⁵¹ *Id.*, at 29 and see Appendix IV, *supra* note 43, at 3.

¹⁵² Appendix III, *supra* note 10, at 29.

¹⁵³ *Id.*, at 28.

Article 14(1) of the ICCPR provides that “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law,” which is reiterated in Article 10 of the UDHR.¹⁵⁴ In addition, the Body of Principles requires a “judicial or other authority” to have the “strongest possible guarantees of competence, impartiality and independence.”¹⁵⁵ The UN 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”¹⁵⁶ 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.”¹⁵⁷ The Working Group has found detention 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.¹⁵⁸

Theary’s judges were neither independent nor impartial. It is internationally recognized that Cambodian judicial officials are often subject to political influence, with many judicial officials simultaneously holding positions in the ruling party.¹⁵⁹ The International Commission of Jurists (“ICJ”), for example, has noted that Cambodian laws grant an “excessively powerful” role to the Cambodian Minister of Justice, an executive branch position, through which he can “exercise discretion and influence over almost every element of a judge’s career.”¹⁶⁰ The ICJ further warns that “[j]udges work for the party and its interests rather than those of the people...[c]ases are allocated to those who are expected to follow orders and there is constant pressure in this regard.”¹⁶¹

Theary’s trial was clearly political theater. She was charged with “incitement” alongside over one hundred CNRP members and other critics of Hun Sen in a mass trial.¹⁶² The Working Group has noted that a mass trial is inherently political and “incompatible with the interest of justice or human rights.”¹⁶³ A mass trial such as Theary’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.¹⁶⁴ And, as the U.S. State Department notes, the Cambodian government has increasingly used this tactic to silence political opposition leaders.¹⁶⁵ The UN Special Rapporteur for the Situation of Human Rights in Cambodia also reported in 2021 that “since June 2019, more than 150 people associated with the Cambodian National Rescue Party ha[ve] been arrested detained and subjected to judicial proceedings.”¹⁶⁶

¹⁵⁴ See UDHR, *supra* note 90, at Art. 10.

¹⁵⁵ Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, G.A. Res. 47/173, U.N. Doc. A/43/49, *adopted* 1988, at Scope of the Body of Principles (f).

¹⁵⁶ *González del Río v. Peru*, Communication No. 263/1987, U.N. Doc. CCPR/C/46/D/263/1987, U.N. HUMAN RIGHTS COMM., *adopted* Oct. 28, 1992, at ¶ 5.2.

¹⁵⁷ *General Comment No. 32 on Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial*, U.N. HUMAN RIGHTS COMM., U.N. Doc. CCPR/C/GC/32, Aug. 23, 2007, at ¶ 19 [hereinafter *General Comment 32*].

¹⁵⁸ See, e.g., *Bahomonde v. Equatorial Guinea*, Communication No. 468/1991, U.N. Doc. CCPR/C/49/D/468/1991, U.N. HUMAN RIGHTS COMM., *adopted* Oct. 20, 1993, at ¶ 9.4.

¹⁵⁹ CAMBODIA 2021 HUMAN RIGHTS REPORT, U.S. DEPARTMENT OF STATE, 2021, at 9 [hereinafter U.S. STATE DEPARTMENT 2021 REPORT].

¹⁶⁰ ACHIEVING JUSTICE FOR GROSS HUMAN RIGHTS VIOLATIONS IN CAMBODIA: BASELINE STUDY, OCTOBER 2017, INTERNATIONAL COMMISSION OF JURISTS, Oct. 2017, at § 2.2 [hereinafter ICJ CAMBODIA REPORT].

¹⁶¹ *Id.*

¹⁶² Appendix V, *supra* note 66, at ¶ 19.

¹⁶³ *Ammar Yasser Abdelaziz el-Sudany, Belal Hasnein Abdelaziz Hasnein and two other minors v. Egypt*, Opinion No. 65/2019, U.N. Doc. A/HRC/WGAD/2019/65, U.N. WORKING GROUP ON ARBITRARY DETENTION, *adopted* Nov. 19, 2019, at ¶ 75.

¹⁶⁴ *Id.*

¹⁶⁵ U.S. STATE DEPARTMENT 2021 REPORT, *supra* note 159, at 9.

¹⁶⁶ Vittit Muntarbhorn, REPORT OF THE SPECIAL RAPPORTEUR ON THE SITUATION OF HUMAN RIGHTS IN CAMBODIA, U.N. Doc. A/HRC/48/79, aug. 3, 2021, at ¶ 40, *available at* <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/210/37/PDF/G2121037.pdf?OpenElement>.

Further, the proceedings themselves indicate the court was not impartial. The charges against Theary were confirmed even though the prosecution's final submission did not contain any allegations of specific criminal conduct.¹⁶⁷ On December 28, 2021, Theary was questioned by judges about whether she was satisfied with the current government,¹⁶⁸ and, on a number of occasions, the prosecution and judges complained about Theary's dress (at one point, even barring her entry into the courtroom until she changed clothes and removed her makeup) without citing any rules against it.¹⁶⁹ Finally, Theary was convicted in the absence of any evidence or arguments presented on the material elements of her charges.

5. Theary was denied the presumption of innocence

Article 14(2) of the ICCPR guarantees that "everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."¹⁷⁰ This right is reiterated in the UDHR.¹⁷¹ The UN 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."¹⁷²

Theary's trial satisfied none of these requirements. First, Theary was never presumed innocent – her charges were confirmed despite the absence of any concrete evidence or facts cited in the prosecutor's submissions. Second, Theary 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.¹⁷³ No evidence that Theary had agreed to commit an attack was ever presented. The only evidence ever presented against Theary was that she shared some of Rainsy's Facebook posts,¹⁷⁴ which "fell far short" of proving any agreement to commit an attack.¹⁷⁵ Third, Theary was charged with incitement to social disorder under Article 495, and no evidence was ever presented showing her intent to incite social unrest.¹⁷⁶ In fact, her testimony illustrated the opposite – she testified about her intent to support democracy, the peaceful return of Rainsy, and human rights. Critically, the prosecution failed to demonstrate that the nine Facebook posts, the only evidence presented against Theary, even qualified as incitement to social disorder.¹⁷⁷

6. Theary's right to communication with counsel was undermined

Article 14(3)(b) of the ICCPR protects the right to "communicate with counsel."¹⁷⁸ Both the UN Human Rights Committee¹⁷⁹ and the Body of Principles¹⁸⁰ emphasize that this right must be promptly recognized, without "delay" or "censorship."¹⁸¹ Theary arrived at Prey Sar Prison

¹⁶⁷ Appendix III, *supra* note 10, at 32.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ ICCPR, *supra* note 90, at Art. 14(2).

¹⁷¹ UDHR, *supra* note 90, at Art. 11.

¹⁷² Appendix III, *supra* note 10, at 30-31 (citing General Comment No. 32, *supra* note 129, at ¶ 33).

¹⁷³ Criminal Code, *supra* note 17, at Art. 453.

¹⁷⁴ Appendix III, *supra* note 10, at 30.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ ICCPR, *supra* note 90

¹⁷⁹ General Comment No. 32, *supra* note 129, at ¶ 34.

¹⁸⁰ Body of Principles, *supra* note 155, at Principle 18(3).

¹⁸¹ *Id.*

following the verdict on June 14, 2022. Her brother and appointed lawyer went to visit her at 2:00 pm local time, but they were denied entry to the prison and correctional officers told them to “wait.”¹⁸² They waited for two hours and were still denied access to Theary. Theary’s lawyer later learned from an NGO, which heard from the UN OHCHR, that Theary had been clandestinely transferred to Preah Vihear Prison, over 300 km away. By both denying visitation and secretly sending Theary to a faraway prison, the Government of Cambodia severely hindered Theary’s right to prompt communication with counsel. In addition, Theary is prohibited from making telephone calls from prison, making direct communication with her international lawyer impossible when considering he has been barred for life from returning to Cambodia.

D. Category V: Discrimination Based on a Protected Class

A 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.”¹⁸³ The Working Group has clarified that 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.”¹⁸⁴

As discussed above, Theary is being targeted, prosecuted, and imprisoned for her outspoken criticism of the government and peaceful advocacy¹⁸⁵ for political change and democratic principles. All these activities are protected rights under the UN Declaration on Human Rights Defenders.¹⁸⁶ In fact, numerous reputable organizations and experts have characterized Theary’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.”¹⁸⁷ Similarly, in June 2021, the Clooney Foundation’s TrialWatch initiative reported that Theary’s prosecution “is but a pretext to curtail her freedom of expression and . . . is meant to serve as a broader warning to dissenting voices.”¹⁸⁸

III. INTERNAL STEPS, INCLUDING DOMESTIC REMEDIES, TAKEN

Theary’s appointed lawyer appealed her conviction on June 27, 2022, and it is pending before the court. Additionally, her lawyer filed for bail on August 24, but this motion was denied on September 1. Her lawyer filed for her transfer from Preah Vihear Prison back to Prey Sar Prison in Phnom Penh, but this motion was also denied on September 30, 2022.

¹⁸² Appendix III, *supra* note 10, at 35.

¹⁸³ REVISED METHODS OF WORK, *supra* note 89, at ¶ 8(e).

¹⁸⁴ *Ny Sokha v. Cambodia*, Opinion No. 45/2016, *supra* note 126, at ¶¶ 44–45.

¹⁸⁵ See Appendix IV, *supra* note 43, at 1 (certifying that Theary has never used or advocated for violence).

¹⁸⁶ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, G.A. Res. 53/144, U.N. Doc. A/RES/53/144, adopted Dec. 9, 1998.

¹⁸⁷ Press Release, *Cambodia: UN Expert Alarmed by Reports of Mass Trial of Activists*, OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS, Nov. 25, 2020, available at <https://www.ohchr.org/en/press-releases/2020/11/cambodia-un-expert-alarmed-reports-mass-trial-activists>.

¹⁸⁸ Appendix III, *supra* note 10, at 2.