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Opinion No. 45/2016 concerning Ny Sokha, Nay Vanda, Yi Soksan, Lim Mony and Ny Chakrya (Cambodia)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 33/30 of 30 September 2016.

2. In accordance with its methods of work (A/HRC/30/69), on 21 June 2016 the Working Group transmitted a communication to the Government of Cambodia concerning Ny Sokha, Nay Vanda, Yi Soksan, Lim Mony and Ny Chakrya. 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);

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(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).

Submissions

Communication from the source

4. The case submitted by the source involves five Cambodian nationals who are current and former members of the Cambodian Human Rights and Development Association (ADHOC). ADHOC is a non-governmental organization founded in 1991 that provides legal assistance to victims of human rights violations, monitors human rights in Cambodia and engages in human rights advocacy through press statements, conferences and the publication of thematic reports on the situation of human rights in Cambodia.

5. The source provided the information below on the following five individuals involved in the present case:

(a) Mr. Sokha is 44 years old and the Head of the Human Rights Section of ADHOC;

(b) Mr. Vanda is 42 years old and the Deputy Head of the Human Rights Section of ADHOC;

(c) Mr. Soksan is 53 years old and the Senior Investigator of the Land and Natural Resources Section of ADHOC;

(d) Ms. Mony is 58 years old and the Senior Investigator of the Women and Children's Rights Programme of ADHOC;

(e) Mr. Chakrya is 46 years old and the Deputy Secretary-General of the National Election Committee and former Head of the Human Rights Section of ADHOC.

Background to the arrest and detention of the five individuals

6. On 29 February 2016, an audio recording of an intercepted telephone conversation between a woman and a member of Parliament — the acting President of the Cambodia National Rescue Party — became public when it was posted anonymously on social media.[1] The conversation reportedly included references to an alleged extramarital affair between the two parties. On 3 March 2016, similar audio recordings of alleged conversations between the member of Parliament and another unidentified woman were also posted on social media.

7. On 11 March 2016, the woman was summoned for questioning by the antiterrorism police in relation to the audio recording. She denied the authenticity of the recording. A student group that had been publicly pursuing the affair lodged a complaint against her for lying to the competent authorities. The matter became the subject of extensive public discussion, with senior government officials reportedly commenting on the case while it

[1] The names of both parties are known to the Working Group but have been withheld to protect their privacy. Neither party is the subject of the present opinion.

was under investigation. On 17 March 2016, the Prime Minister declared that he had extensive personal information about the woman and proof that the alleged affair had taken place. On 21 March 2016, the National Assembly requested the member of Parliament to respond to the allegations brought by the student group.

8. On 22 March 2016, the woman was summoned to appear in Phnom Penh Municipal Court in connection with allegations of providing false testimony and of having engaged in prostitution. The same day, the Anti-Corruption Unit held a meeting with the student group that had lodged the complaint and declared that the failure by the member of Parliament to deny publicly that it had been his voice in the audio recording amounted to a tacit admission that the recordings were authentic and could be used in court. On 24 March 2016, the Anti-Corruption Unit announced that it was launching a formal investigation into the allegations that the member of Parliament had unlawfully purchased properties for the woman. On 29 March 2016, the National Assembly announced that it may consider establishing a special committee to investigate the alleged affair.

9. On 19 April 2016, following questioning of the woman in court, the prosecution office attached to the Phnom Penh Municipal Court issued a written statement according to which the woman identified herself and the member of Parliament as the voices on the audio recording that had been released in March 2016, contrary to her previous denial of the authenticity of the recorded telephone conversation.

10. According to the source, following the alleged intimidation of the woman by the antiterrorism police, ADHOC responded to her request for legal and material assistance after having assessed that her case fell within its mandate for the provision of legal aid and related support. ADHOC provided the woman with $204 to cover food and transport costs, including to attend questioning by judicial authorities and to travel to the ADHOC office to meet with her lawyer and senior investigators. The source notes that the provision of such support is standard practice for legal aid organizations such as ADHOC.

11. On 23 April 2016, a letter signed by the woman was published by Cambodian online media, in which she reportedly accused the four current members of ADHOC, a national officer from the Office of the United Nations High Commissioner for Human Rights (OHCHR), the president of another human rights organization and a local commune chief of convincing her to lie to the authorities. The same day, the Ministry of Justice issued a public statement in which it listed the persons named in the woman's letter and stated that they had committed illegal acts that had seriously affected the rights, freedoms and dignity of the woman and the principle of the rule of law. The statement called their actions a serious violation of laws applicable in Cambodia, strongly condemned the alleged illegal acts of the organizations and appealed to the authorities to conduct a thorough investigation and to take strict legal action. The Cambodia Human Rights Committee issued a statement that, while not listing the names of the accused, used exactly the same terms to condemn the situation. The Ministry of Women's Affairs and the Cambodian National Council for Women also issued a joint statement that referred to the letter, condemned those who had allegedly violated women's rights and appealed to all relevant competent authorities to take the strictest action in accordance with the law.

Current situation of the five individuals

12. On 25 April 2016, the five current and former members of ADHOC and the OHCHR staff member were summoned for questioning on 27 and 28 April 2016 by the Anti-Corruption Unit, which has the authority to investigate corruption. The OHCHR staff member did not present himself for questioning on the basis of his immunity from legal action as a United Nations staff member.

13. The five individuals from ADHOC were interrogated for five to six days, first by officers from the Anti-Corruption Unit and then by the prosecution office of the Phnom Penh Municipal Court. The source reports that the letter issued by the Anti-Corruption Unit requiring the five individuals to attend for questioning made reference to: (a) articles 25 and 26 of the Anti-Corruption Law, which provides investigative and special investigative powers to the Anti-Corruption Unit and allows the Unit to hold persons in custody; and (b) article 111 of the Code of Criminal Procedure, which refers to the preliminary inquiry powers of judicial police. The Anti-Corruption Unit officers later used their authority under articles 25 and 26 of the Anti-Corruption Law to arrest the five individuals and hold them in custody.

14. From 28 April to 2 May 2016, the five individuals were detained by the Anti-Corruption Unit in Phnom Penh. On 29 April 2016 — 24 hours after their official period of detention began — the five individuals were offered a choice either to have access to their lawyer or to see their families. The source alleges that the five individuals had not previously been informed of their right to legal assistance by the Anti-Corruption Unit. Mr. Vanda asserted that right, but his written request for legal assistance was never processed. According to the source, the Anti-Corruption Unit continued to deny the five individuals access to legal assistance.

15. On 30 April 2016, the five individuals were brought before the prosecutor of the Phnom Penh Municipal Court, who approved the extension of their detention by the Anti-Corruption Unit for a further 24 hours, without providing a reason, the legal basis for the decision or any other explanation, as required under article 96 of the Code of Criminal Procedure. The five individuals continued to be denied access to private consultations with a lawyer, even when they appeared in court for the application to extend their detention.

16. The source reports that, on the morning of 1 May 2016, Messrs. Vanda, Soksan and Chakrya, in the presence of their lawyer, were questioned by the prosecutor of the Phnom Penh Municipal Court. They were asked to return in the afternoon for follow-up questions by the prosecutor. In the afternoon, Mr. Sokha and Ms. Mony were questioned by the prosecutor, in the presence of their lawyers. Despite the presence of their lawyers during questioning by the prosecutor, the five individuals were neither given time to consult with their lawyers prior to questioning by the prosecutor, nor allowed to be in contact with their lawyers in the courtroom, as such contact was forbidden by an Anti-Corruption Unit officer.

17. On 1 May 2016, the Prime Minister stated that the local OHCHR staff member and others involved in bribing a witness would go to jail, and issued a warning message for all non-governmental organizations or United Nations staff not to depend on immunity, threatening that they could still be arrested and jailed.

18. The Anti-Corruption Unit subsequently brought charges against the five individuals for having induced the woman to perjure herself in a criminal investigation by denying her alleged affair with the member of Parliament. The financial support provided by ADHOC to the woman was alleged to be a bribe. According to the source, following the publication of the letter signed by the woman containing the allegations against the five individuals, her status changed from “suspect” to “witness”, suggesting that she was being used as a means to target human rights defenders in the case.

19. The source reports that the Head of the Anti-Corruption Unit publicly accused ADHOC staff of having promised the woman that, if she lied to the authorities, they would assist her in temporarily relocating abroad. Although the $204 was initially cited as a means of inducing false testimony, it was believed the alleged offer of relocation also constituted the basis for the charges. The source states that the Anti-Corruption Unit interpreted the provision of financial assistance for transportation and living costs as evidence that she had

been bribed, as she was destitute and could not afford an airfare ticket herself. However, the source points out that providing material support and relocation assistance for "at-risk" individuals is an ordinary and legitimate practice for legal aid and human rights organizations in Cambodia. The source claims that the Anti-Corruption Unit has provided little evidence to support its allegations.

20. On 2 May 2016, the prosecutor formally accused the four current ADHOC members of "bribery of a witness" under article 548 of the Criminal Code, and Mr. Chakrya and the OHCHR staff member of being accomplices under articles 29 and 548 of the Criminal Code. The same day, the investigating judge formally charged them. The OHCHR staff member was charged in absentia, although his case was subsequently settled by agreement with the Ministry of Foreign Affairs and International Cooperation. The offence of bribery of a witness is punishable by 5-10 years' imprisonment. Alleged accomplices face the same punishment.

21. According to the source, the investigating judge stated that he had decided to issue a detention order because the ADHOC staff members had "committed a crime", based on allegations made by the woman, her lawyer and her sister-in-law, who had all testified to the Anti-Corruption Unit. According to the detention order, issued in accordance with article 206 of the Code of Criminal Procedure, three of the relevant criteria for the imposition of pretrial detention under article 205 had been satisfied. However, the source submits that no evidence was offered to demonstrate that the five individuals would reoffend or were a flight risk under article 205 (1) and (2). The source further submits that detention in order to "ensure the security" of the five individuals was unsubstantiated grounds for pretrial detention, particularly as the conditions of detention have had an adverse impact on the five individuals. In addition, the assertion of guilt underpinning the investigating judge's decision to detain the five individuals contravened the presumption of innocence.

22. On 2 May 2016, Messrs. Sokha, Vanda and Soksan were placed in pretrial detention in Prey Sar Prison (Correctional Centre 1), while Ms. Mony was placed in pretrial detention in Prey Sar Prison (Correctional Centre 2) in Phnom Penh. Mr. Chakrya was charged as an accomplice to bribery and was subsequently placed in pretrial detention in the Police Judiciaire Prison in Phnom Penh. The three ADHOC members held at Correctional Centre 1 have been separated.

23. According to the source, the conditions in which all five individuals are being held fail to meet minimum standards of humane treatment. Their cells hold more than 30 prisoners, without separation between pretrial detainees and convicted prisoners, contrary to international standards and article 26 of the Law on Prisons of Cambodia. Their cells lack adequate hygiene, resulting in a serious deterioration of the health of the five individuals. At Correctional Centre 1, family access is granted only three times per week, allowing only three visitors at a time, with visitors prohibited entirely on Sundays and public holidays. Visitors are denied any physical contact with detainees. Their daily allowance of one hour in the open air (except on weekends and national holidays) is of concern, given the five individuals' health problems as a consequence of exposure to secondary smoke in small, cramped prison cells. Lawyers have been told that rooms for private meetings with their clients are fully booked, thereby denying the five individuals their right to confidential discussions with their legal representatives.

24. The case was the subject of a joint urgent appeal sent on 11 May 2016 by the Working Group, 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 of association and the Special Rapporteur on the situation of human rights defenders. The Government did not respond to the joint urgent appeal. The ADHOC members were also the subject of communications pertaining to unrelated cases sent from

other special procedure mandate holders in August 2015, August 2012 and February 2011. The Government did not respond to any of those additional communications.

25. On 18 May 2016, the lawyers acting for the five individuals appealed against the decision of the investigating judge to deny them bail, and the matter went before the Chamber of Investigating Judges, which forms part of the Court of Appeal. The lawyers also challenged the basis of the charges and requested that the charges be dismissed. On 13 June 2016, the Court of Appeal in Phnom Penh denied bail to the five individuals, who remain in pretrial detention. They have now been detained since 28 April 2016.

Submissions regarding arbitrary detention

26. The source submits that the deprivation of liberty of Messrs. Sokha, Vanda, Soksan and Chakrya and Ms. Mony is arbitrary according to categories II and III of the categories applied by the Working Group.

27. In relation to category II, the source submits that the charges against the five individuals represent a contrived and politically motivated misinterpretation of bribery under article 548 of the Criminal Code in order to sanction the legitimate activities of human rights defenders.

28. The source claims that the investigation, arrest, charging and detention of the five individuals constitutes a violation of their right to equality before the law, as they have been discriminated against on the basis of their status as human rights defenders, contrary to article 26 of the Covenant. The five individuals have been deprived of their right to carry out their legitimate human rights-related occupations. The source also submits that the Government has not only failed in its duty to take the necessary measures to prevent and halt the discrimination against the five individuals on the basis of their status as human rights defenders, but has also actively participated in those arbitrary actions through the misuse of the criminal justice system. The arrests and detentions were procedurally flawed, lacked sufficient evidence and were a direct consequence of the legitimate intervention of the human rights defenders in a politically sensitive legal process.

29. Furthermore, the source claims that the targeting of ADHOC members, including Mr. Chakrya, based on his status as a prominent former ADHOC employee, must be considered as an unlawful restriction of the freedom of association, in violation of article 22 of the Covenant.

30. The source emphasizes that the arrests form part of a broader attack on ADHOC as an organization. In the immediate aftermath of the charges being laid by the Phnom Penh Municipal Court, two pro-government non-governmental organizations called upon the authorities to apply the recently promulgated Law on Associations and Non-Governmental Organizations to take action against ADHOC. The Cambodia Human Rights Committee, an official government body, also reportedly echoed the calls to take “strict legal action”. The source notes that the Law has been considered by the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on the situation of human rights in Cambodia as violating fundamental freedoms. The Law contains provisions that demand “political neutrality” on the part of all non-governmental organizations; otherwise they may be subject to dissolution. In response to those calls by pro-government organizations, a spokesman for the ruling party confirmed that application of the Law would be considered after the trial of the five accused individuals. The source submits that the ruling party has long characterized independent human rights organizations as being supporters of the opposition, and the current crackdown on civil society is occurring in the context of an even wider crackdown on the political opposition.

31. In relation to category III, the source claims that the deprivation of liberty of the five current and former members of ADHOC resulted from a violation of their right to a fair

trial under article 14 of the Covenant. The source points to the lengthy questioning of the five individuals by the Anti-Corruption Unit on 27 or 28 April 2016 without providing any access to a lawyer and without informing them of their right to legal assistance.

32. According to the source, the Anti-Corruption Unit considered that the period of detention of each of the five individuals only commenced at 8 p.m. on 28 April 2016, when they were arrested by officials from the Unit, meaning that their right to legal counsel under article 98 of the Code of Criminal Procedure[2] only took effect at 8 p.m. on 29 April 2016 and not during the earlier extensive period of questioning of the five individuals. The source concludes that the determination of the period of detention as having begun at 8 p.m. on 28 April 2016 was arbitrary and inconsistent with international human rights norms that define detention. The five individuals were told that they would be arrested if they did not appear for questioning and were then denied access to legal counsel from the moment they presented themselves to the Anti-Corruption Unit, which was no later than 8 a.m. on 28 April 2016 for Messrs. Sokha, Vanda, Soksan and Chakrya, and 10 a.m. for Ms. Mony. The source refers to article 96 of the Code of Criminal Procedure, which states that the duration of custody shall commence from the time when the detained person arrives at the police or military police office. Access to a lawyer should therefore have begun at 8 a.m. on 29 April 2016 for Messrs. Sokha, Vanda, Soksan and Chakrya, and 10 a.m. for Ms. Mony.

33. The source also notes that the five individuals were informed at 8 p.m. on 29 April 2016 that they could choose either to see their families, who outside the Anti-Corruption Unit premises, or their lawyers for 30 minutes, and that all five individuals chose to see their families. The source submits that this constitutes a constructive denial of their right to access legal counsel, as forcing the choice between seeing one's family and gaining access to legal counsel constitutes mental duress and a form of emotional blackmail. In addition, the ADHOC members were not permitted to have their lawyers present at any point during questioning. All five individuals only gained access to their lawyers when they were questioned by the prosecutor in the presence of their lawyers on 1 May 2016. Although the five individuals appeared before the Phnom Penh Municipal Court on the previous day while the prosecutor considered extending their period of detention, they were given no opportunity to consult their lawyers at that time.

34. Furthermore, the source argues that the pretrial detention provisions under the Code of Criminal Procedure were applied without the required recognition of constitutionally and internationally applicable protections for charged persons. While article 203 of the Code of Criminal Procedure provides that in principle charged persons shall remain at liberty, the Cambodian authorities have a long record of imposing punitively long periods of pretrial detention in cases involving human rights defenders. According to the source, the widespread and abusive use of pretrial detention to silence human rights defenders occurs despite the existence of a domestic legal framework that theoretically protects the rights of charged persons.

35. In the present case, the five individuals should have benefited from a presumption of continued liberty on the basis of their presumed innocence, unless the prosecutor had been able to provide sufficient evidence of specific risk according to the criteria in article 205 of the Code of Criminal Procedure. The source alleges that the prosecutor made no effort to satisfy any burden of proof or demonstrate any level of necessity for the detention of the five individuals. While the court should have applied these legal provisions to protect the rights of the five individuals, the investigating judge did not even consider the option of bail. No evidence supporting the detention order was presented and, while the investigating

[2] According to the source, an individual in police custody is only entitled to legal representation after a period of 24 hours under article 98 of the Cambodian Code of Criminal Procedure.

judge stated that three criteria for the imposition of pretrial detention under article 206 of the Code of Criminal Procedure had been met, no evidence or justification for any of the six criteria was presented individually. Lawyers representing the five individuals were present and attempted to challenge the decision of the investigating judge, who dismissed their appeals, stating that they had "committed a crime", directly imputing guilt without trial and using that assumption as a pretext for detention. The source submits that such a statement clearly contradicts the presumption of innocence, violating the five individuals' right to a fair trial and their right to liberty under Cambodian and international law.

36. Finally, the source notes that lawyers for the five individuals filed an application for bail to the Phnom Penh Municipal Court on 16 May 2016. They argued that none of the grounds for detention under article 205 of the Code of Criminal Procedure were applicable. They pointed out that the five individuals had no intention to flee the country or tamper with evidence, nor did they pose a threat to public order. The lawyers reiterated that the five individuals had not committed any crime, thus there was a lack of reasonable belief that they would commit any crime if released. However, the application was denied on 17 May 2016, and denied by the Court of Appeal on 13 June 2016.

Response from the Government

37. On 21 June 2016, the Working Group transmitted the allegations from the source to the Government under its regular communication procedure. The Working Group requested the Government to provide detailed information by 21 August 2016 about the current situation of the five above-mentioned individuals, and any comment on the source's allegations. The Working Group also requested the Government to clarify the legal grounds for the arrest and detention of the five individuals and to provide details regarding the conformity of the legal proceedings against them with international law, particularly international human rights treaties to which Cambodia is a party.

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

Discussion

39. 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.

40. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

41. There is a growing body of reliable information that supports the source's claims and strongly suggests that the motivation behind the arrest and detention of Messrs. Sokha, Vanda, Soksan and Chakrya and Ms. Mony was to deter ADHOC and its members from carrying out their functions as human rights defenders and from exercising their rights and freedoms. For example, in a recent report following a visit to Cambodia from 21-31 March 2016, the Special Rapporteur on the situation of human rights in Cambodia found that there had been a raft of arrests, detentions, charges and convictions against members of political parties and civil society. Viewed together, these developments suggest that the law is increasingly being used to restrict the democratic space in the country. The Special

Rapporteur specifically referred to the charges brought against the five individuals in the present case.[3]

42. Similar findings were made in May 2016 by four special procedure mandate holders, who issued a press release calling upon the Government to stop targeting civil society, human rights defenders, parliamentarians and United Nations personnel through the escalation of criminal charges, questioning, court proceedings and public statements against them. The mandate holders commented on the ADHOC case, stating that:

> The investigators' relentless quest for a confession by the woman, their subsequent outright reliance on it to initiate the other "bribery" cases against defenders, as well as public statements by senior State officials portraying the accused as guilty, generally suggest that this entire episode is nothing more than a politically motivated persecution of civil society. It also raises serious questions about woefully flawed due process.[4]

43. The Working Group considers that there is a sufficient basis to conclude that the five individuals in the present case have been discriminated against on the basis of their status as human rights defenders and in violation of their right to equality before the law and equal protection of the law under article 26 of the Covenant. In coming to this conclusion, the Working Group has taken several factors into account, including:

(a) The concerted effort by government agencies — including the antiterrorism police, which does not have an obvious mandate to investigate an extramarital affair — to interrogate the woman prior to her accusations against the five individuals;

(b) The minor amount of the alleged bribe, which appears to be well within a reasonable amount of support that a non-governmental organization might provide to a person who had requested its assistance;

(c) Public comments by senior government officials, ministries and others that were critical of ADHOC while the charges against the five individuals were under investigation, including calls for the Law on Associations and Non-Governmental Organizations to be applied against ADHOC;

(d) Comments made by the investigating judge prejudging the guilt of the five individuals and referring to them as having "committed a crime";

(e) The pretrial detention of ADHOC members without consideration of bail, despite the lack of supporting evidence for the detention order.

44. In paragraph 7 of its general comment No. 18 (1989) on non-discrimination, the Human Rights Committee stated that "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference that is based on any grounds, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, that has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. The Working Group considers that the references to "political or other opinion" and "other status" in article 26 of the Covenant include a person's status as a human rights defender.

[3] See the report of the Special Rapporteur on the situation of human rights in Cambodia, A/HRC/33/62, paras. 6 and 7.

[4] See OHCHR, "UN rights experts urge Cambodia to stop attacks against civil society and human rights defenders", Geneva, 12 May 2016, available from www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19954&LangID=E.

45. Moreover, the Human Rights Committee stated in paragraph 12 of general comment No. 18 that the right to equality before the law and equal protection of the law under article 26 of the Covenant prohibits discrimination in any field regulated and protected by public authorities and is not limited to those rights that are provided for in the Covenant. In the view of the Working Group, article 26 therefore prohibits discrimination in the exercise of rights elaborated under declaratory instruments such as the Declaration on Human Rights Defenders.[5] These include the rights to offer and provide professionally qualified legal assistance or other relevant advice and assistance in defending human rights (art. 9 (3) (c)); to the lawful exercise of one's occupation or profession (art. 11); and to effective protection under national law in reacting against or opposing, through peaceful means, acts or omissions attributable to the State that result in violations of human rights (art. 12 (3)). States also have a responsibility to protect everyone from retaliation, discrimination, pressure or other arbitrary action as a consequence of the legitimate exercise of rights referred to in the Declaration (art. 12 (2)).

46. The Working Group also considers that the targeting of ADHOC members for having provided legitimate legal advice and other assistance to the woman — who was herself the potential victim of abuse of authority — violates the right to freedom of association under article 22 of the Covenant. This conclusion is consistent with article 5 of the Declaration on Human Rights Defenders, which recognizes the importance of free association and communication with non-governmental organizations in the promotion and protection of human rights; a freedom that would not be possible if the provision of standard forms of support to those who seek assistance from such organizations is criminalized, as it was in the present case.

47. Accordingly, the Working Group concludes that the five individuals were detained as a result of the exercise of their rights and freedoms under articles 7 and 20 of the Universal Declaration of Human Rights and articles 22 and 26 of the Covenant, and that their case falls within category II of the categories applied by the Working Group.

48. The Working Group considers that the source's allegations also disclose violations of the right to a fair trial. Specifically, the five individuals involved in the present case have been denied the presumption of innocence under article 14 (2) of the Covenant. In paragraph 30 of its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, the Human Rights Committee stated that it was the duty of all public authorities to refrain from prejudging the outcome of a trial, including by abstaining from making public statements affirming the guilt of the accused. The statements made by the Prime Minister, the Ministry of Justice, the Ministry of Women's Affairs, the Cambodia Human Rights Committee, the Head of the Anti-Corruption Unit and the investigating judge assumed that the five individuals were guilty of a crime and denied them the presumption of innocence.

49. Furthermore, the five individuals have been denied the right to legal counsel, contrary to article 14 (3) (b) and (d) of the Covenant. They had no access to a lawyer and did not have a lawyer present while being questioned at the Anti-Corruption Unit from 27-29 April 2016 and when the prosecutor decided to extend their detention on 30 April 2016. They were not informed of their right to a lawyer until late in that period, when they were offered the choice at 8 p.m. on 29 April 2016 either to have access to a lawyer or to see their families. This amounted to an ongoing denial of counsel as the five individuals should not have been asked to choose between legal assistance and a family visit. In addition, the five individuals had no opportunity to consult confidentially with their lawyers prior to or

[5] General Assembly resolution 53/144.

during questioning by the prosecutor on 1 May 2016, as they were prevented from doing so by the Anti-Corruption Unit officer.

50. The Working Group considers that the five individuals should have been given access to a lawyer from the moment they presented themselves for questioning at the Anti-Corruption Unit on 27 and 28 April 2016. Even though article 98 of the Code of Criminal Procedure only provides for access to a lawyer after the detainee has been in custody for 24 hours, international human rights standards require that persons deprived of their liberty have access to legal assistance at any time during their detention, including from the outset of their deprivation of liberty.[6] As the Working Group has consistently stated in its jurisprudence, even if the detention is in conformity with national legislation, the Working Group must still ensure that it is also consistent with the relevant provisions of international human rights law.[7]

51. Furthermore, in relation to the pretrial detention of and denial of bail to the five individuals in the present case, the Working Group recalls that, according to article 9 (3) of the Covenant, pretrial detention should be the exception rather than the rule and as short as possible. As the Human Rights Committee stated in paragraph 38 of its general comment No. 35 (2014) on liberty and security of person, pretrial detention must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime. Courts must examine whether alternatives to pretrial detention, such as bail, would render detention unnecessary. As the source points out and the Government has not contested, the investigating judge did not base his decision to detain the five individuals on evidence of risk or provide sufficient reasoning for the decision. The investigating judge did not even initially consider the option of bail, and denied bail when it was requested by the lawyers acting for the five individuals. The Court of Appeal also denied bail on appeal. Under those circumstances, the pretrial detention of the five individuals falls significantly short of the requirements of article 9 (3) of the Covenant.

52. The Working Group concludes that the violations of the right to a fair trial under articles 9, 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant are of such gravity as to give the deprivation of liberty of the five individuals an arbitrary character according to category III of the categories applied by the Working Group.

53. Finally, the Working Group notes that the five individuals have been detained with convicted prisoners, contrary to article 10 (2) (a) of the Covenant, rule 11 (b) of the revised Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) and principle 8 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

Disposition

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

The deprivation of liberty of Ny Sokha, Nay Vanda, Yi Soksan, Lim Mony and Ny Chakrya, being in contravention of articles 7, 9, 10, 11 and 20 of the Universal Declaration of Human Rights and of articles 9, 10, 14, 22 and 26 of the International

[6] See 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, A/HRC/30/37, Principle 9. See also concluding observations on the second periodic report of Cambodia, CCPR/C/KHM/CO/2, para. 17.

[7] See, for example, opinions No. 24/2015 and No. 41/2014.

Covenant on Civil and Political Rights, is arbitrary and falls within categories II and III.

55. The Working Group requests the Government to take the steps necessary to remedy the situation of the five above-mentioned individuals without delay and bring it into conformity with the standards and principles in the Universal Declaration of Human Rights and Covenant.

56. Taking into account all the circumstances of the case, the Working Group considers that the adequate remedy would be to release the five above-mentioned individuals immediately and accord them an enforceable right to compensation in accordance with article 9 (5) of the Covenant.

Follow-up procedure

57. 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 the five above-mentioned individuals have been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to them;

(c) Whether an investigation has been conducted into the violation of their 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 the Government with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

58. 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.

59. The Working Group requests the source and the Government to provide the above information within six months of the date of the 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.

60. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and 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.[8]

[*Adopted on 21 November 2016*]

[8] See Human Rights Council resolution 33/30, paras. 3 and 7.