
Advance Edited Version

Distr.: General
31 May 2021

Original: English

Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its ninetieth session, 3–12 May 2021

Opinion No. 6/2021 concerning Houayheuang Xayabouly (Lao People's Democratic Republic)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 42/22.

2. In accordance with its methods of work,¹ on 29 December 2020, the Working Group transmitted to the Government of the Lao People's Democratic Republic a communication concerning Houayheuang (also known as "Muay") Xayabouly. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.

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

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

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

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

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

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

¹ A/HRC/36/38.

Submissions

Communication from the source

4. Houayheuang (also known as “Muay”) Xayabouly is a national of the Lao People’s Democratic Republic, born in 1988. She usually resides in Champassak Province in the south-eastern region of the Lao People’s Democratic Republic.

a. Background

5. The source reports that Ms. Xayabouly is a tour guide and shop owner. She is also an environmental activist and human rights defender. Ms. Xayabouly began her awareness-raising activities in 2017 when she, along with other individuals, was required to pay an excessive toll to cross a bridge on the border between the Lao People’s Democratic Republic and Thailand. The toll was reportedly established by an international business that received a concession from the Government of the Lao People’s Democratic Republic for the construction of the bridge. Ms. Xayabouly used the bridge to travel from her home to her place of work and was required to pay the toll. She created a video to raise awareness of the financial burden the toll was causing to tradespeople who had to use the bridge daily.

6. In May 2018, Ms. Xayabouly began to draw public attention to alleged corruption involving the buying and selling of Government positions, giving examples of such corrupt practices. According to the source, Ms. Xayabouly also wished to raise awareness of the education system that encouraged the buying and selling of degrees. She began a fundraising campaign to build a school by selling t-shirts with the logo “I don’t want to buy Government positions”. On 15 October 2018, as part of that fundraising campaign, she organized a concert with the participation of prominent Internet personalities. The event was shut down by police officers who arrested those who were wearing the t-shirts.

7. The source alleges that as a result of Ms. Xayabouly’s activism and criticism of the Government, her employer was pressured into terminating her position as a tour guide, which has caused a significant financial strain on her family. After losing her employment, Ms. Xayabouly started to highlight the negative impact of international businesses operating in the Lao People’s Democratic Republic, which she had witnessed while working in the tourism industry.

8. The source notes that when Ms. Xayabouly shared information about the harm that foreign and multinational business enterprises were causing to the environment and to the citizens of the Lao People’s Democratic Republic, the Government issued a press release through State-run media outlets. The press release stated that if those who shared information on social media were found guilty of spreading false information, they would be criminally charged and sentenced to a term in prison.

9. On 23 July 2018, following the collapse of a dam that was part of a multinational hydropower project, Ms. Xayabouly began speaking about the consequences of the collapse and how it adversely affected communities in the south of the country. According to the source, the impact included flooding, destruction of villages, displacement of over 5,000 people and the disappearance and death of several villagers. The source notes that the Government discredited the coverage of the incident in all forms of media, except in the State-run media. Access to the affected villages and provinces was also restricted.

10. In response, Ms. Xayabouly posted videos on social media that she had recorded while visiting camps that housed displaced villagers. She brought the villagers money, food and clothes. According to the source, Ms. Xayabouly’s videos were one of the few sources of information about the situation and the aftermath of the collapse of the dam. In her posts, Ms. Xayabouly criticized the Government’s efforts to support affected communities. She also insisted on the need to train government officials on the subject of emergency response.

11. The source further reports that a year after these events, in August and September 2019, the same villages and provinces were once again affected by flooding and displacement as a result of tropical storms. On 5 September 2019, through a video posted on social media, Ms. Xayabouly criticized the slow response of the Government in providing assistance and stated that the authorities failed to learn from the previous experience. According to the

source, the video was viewed more than 173,000 times and was the last time that Ms. Xayabouly was allowed to freely voice her opinion on government policies and practices.

12. The source submits that the authorities view Ms. Xayabouly as a threat because of her criticism of government actions and the support these opinions received from civil society in the country.

b. Arrest and detention

13. According to the source, Ms. Xayabouly was arrested on 12 September 2019 while dining at a restaurant in Champassak Province. During her arrest, Ms. Xayabouly placed a post on social media informing her family that she had been arrested. After arriving at the police station, she was forced by the authorities to delete the post.

14. The source alleges that Ms. Xayabouly was arrested by Phonthong police officials who did not show an arrest warrant. No reason for the arrest was given to Ms. Xayabouly at the time of her arrest. She was subsequently charged under article 117 of the Criminal Code for her alleged spreading of propaganda against the Lao People's Democratic Republic.²

15. The source further alleges that upon her detention, Ms. Xayabouly was not allowed to receive any visitors and was denied bail. Her family submitted an application for bail to the Phonthong police station. After the application was signed and a bail amount was set at 100 million Lao kip, it was sent to the provincial police station for a final decision. The bail application was then rejected without any reasons being given.

16. Throughout her detention, Ms. Xayabouly was interrogated by the authorities. According to the source, the authorities forced Ms. Xayabouly to confess that she was guilty of criminal defamation. An official press release dated 17 September 2019 stated that Ms. Xayabouly had confessed that she was guilty of criminal defamation by undertaking a "campaign against the Lao People's Democratic Republic", through illegal activities and by having a connection with "bad elements" both in the country and abroad. The source alleges that the confession was taken without a lawyer or judge present and was either coerced or fabricated.

17. During her pretrial detention, Ms. Xayabouly was detained at Phonthong police station in Champassak Province.

c. Trial proceedings

18. The source alleges that during the criminal proceedings, Ms. Xayabouly was forced to repeat her confession before a judge. The source further asserts that the sole basis for bringing charges against Ms. Xayabouly was to deter others from speaking out against the Government's policies.

19. On 22 November 2019, Ms. Xayabouly was convicted under article 117 of the Criminal Code. This provision of the Criminal Code carries a penalty of up to five years' imprisonment and a fine of 5 million to 20 million Lao kip. Ms. Xayabouly was ordered to serve the maximum sentence of five years' imprisonment and to pay a fine of 20 million Lao kip. The source quotes article 117 of the Criminal Code, which penalizes propaganda activities against and slandering the Lao People's Democratic Republic, or distorting the guidelines of the Party and policies of the government, or circulating false rumours causing disorder by words, in writing, through print, newspapers, motion pictures, videos, photographs, documents, electronic media, or by other means, which are detrimental to the Lao People's Democratic Republic or are for the purpose of undermining or weakening State authority.

20. Following her trial and sentencing, Ms. Xayabouly was moved to Champassak provincial prison to serve her five-year prison sentence. According to the source, Ms. Xayabouly was detained on politically motivated charges and thus is likely to face harsher treatment in prison. The source reports that her detention and interactions within the prison

² According to the source, this provision was previously found in article 65 of the Criminal Code, which was amended as of 1 November 2018.

and with visitors is strictly monitored by the authorities, and it is thus unknown how she is being treated. Ms. Xayabouly's family has only been able to visit a few times, and non-governmental organizations have been specifically barred from visiting her in prison. Independent monitoring of the prison and detention conditions by external parties has not been allowed in her case. Ms. Xayabouly has reportedly lost significant weight and is suffering from depression.

21. The source notes that Ms. Xayabouly is the sole income earner in her family and her loss of employment and deprivation of liberty resulting from her activism has caused a significant financial strain.

d. Analysis of violations

22. The source is unable to identify a specific department, ministry or authority that ordered Ms. Xayabouly's detention. However, the source considers that it is clear that most actions against Ms. Xayabouly have been taken collectively by the Government at the national, provincial and local levels. The source alleges that the prison authorities, judicial officers and the court have all been complicit in violations of her rights, including the denial of due process.

23. The source submits that Ms. Xayabouly's detention falls under categories I, II, III, and V of the Working Group's methods of work. According to the source, her detention is arbitrary because:

(a) There is no legal basis to justify the detention;

(b) The detention resulted from Ms. Xayabouly's exercise of the rights guaranteed by article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant;³

(c) The Government has not observed Ms. Xayabouly's rights to due process and fair trial guaranteed by articles 5, 8, 9 and 11 of the Universal Declaration of Human Rights and articles 7, 9 and 14 of the Covenant;

(d) Ms. Xayabouly's detention constitutes a violation of international human rights law that prohibits discrimination based on political opinion, as enshrined in article 7 of the Universal Declaration of Human Rights and article 26 of the Covenant.

i. Category I

24. The source recalls that article 9 of the Universal Declaration of Human Rights and articles 9 (2) and 14 (3) of the Covenant require individuals to be informed about the reasons for their arrest and the charges against them. The source further recalls that the Working Group has previously held that deprivation of liberty will be arbitrary when there is a lack of legal justification for the arrest and detention, including as a result of the vagueness of the charges subsequently brought against the individual.⁴

25. The source submits that the guarantees found in articles 5, 6, 7, 17 and 62 of the Law on Criminal Procedure of the Lao People's Democratic Republic have been violated in the present case. According to these provisions, citizens cannot be detained without an order from a prosecutor, they should not be arrested due to their beliefs, they should be able to obtain their own lawyer, they should not be threatened to produce testimony and the evidence against them must be reliable.

26. According to the source, there is no legal basis for Ms. Xayabouly's detention, as she was raising public awareness of the aftermath of a tropical storm and expressing her views on how the authorities were handling it. Ms. Xayabouly's arrest and detention was aimed at punishing her political activism. The circumstances of Ms. Xayabouly's arrest and detention violate the above-mentioned provisions of national and international law, thus rendering her detention arbitrary under category I.

³ The Lao People's Democratic Republic became party to the Covenant on 25 September 2009.

⁴ See, e.g., opinion No. 60/2013, para. 22.

ii. Category II

27. The source recalls that category II applies when the deprivation of liberty results from a violation of the exercise of fundamental rights guaranteed under article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant. Specifically, article 19 (2) of the Covenant provides that everyone is to have the right to freedom of expression, and that that right is to include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of their choice. That right is also enshrined in article 44 of the 1991 Constitution of the Lao People's Democratic Republic, which guarantees the freedoms of speech, press and assembly, as well as the right to establish associations and to stage demonstrations that are not contrary to the law.

28. The source submits that Ms. Xayabouly's awareness-raising activities have led to her becoming a public figure. As a result, the authorities started pressing her to stop criticizing the Government. Before her arrest, Ms. Xayabouly was merely expressing her opinion on a public platform, which she had been doing for several years. In order to provide a justification for the arrest of Ms. Xayabouly, the Government issued a press release through State-run media outlets, warning that all those who shared false information on social media would be criminally charged and sentenced to prison. Ms. Xayabouly was arrested after her attempt to criticize the Government's efforts to assist citizens affected by a tropical storm. The detention of Ms. Xayabouly was based on her vocal criticism of governmental policies and therefore violated her right to freedom of expression.

29. According to the source, the Government uses article 117 of the Criminal Code as a means of silencing activists and human rights defenders who are critical of the authorities. This provision employs vague and broad language, allowing the authorities to restrict what citizens can say about the Government. Relevant jurisprudence of the Working Group exemplifies this practice.⁵ The source claims that the wrongful charges, conviction and sentencing of Ms. Xayabouly under article 117 of the Criminal Code for raising awareness on the Government's policies violated her fundamental right to freedom of expression.

30. In addition, while articles 19 and 20 of the Covenant provide for exceptions to free speech on the basis of national security, public safety and public order, Ms. Xayabouly's case does not fall under these exceptions. In order to qualify for the recognized exceptions, any restriction on the freedom of expression or association of an individual must be (a) provided by law, (b) for the protection and respect of the rights or reputations of others, national security, public order, or public health and morals, and (c) necessary to achieve one of these enumerated purposes. While Ms. Xayabouly's detention could prima facie fall within the exception of public safety or public order under article 19 (3) of the Covenant, paragraph 3 may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights.⁶

31. The source states that, given the rise in the arrest and detention of human rights activists over recent years, it is evident that the reason behind the arrest of Ms. Xayabouly was to silence her activism rather than public safety concerns. Ms. Xayabouly was forced to confess that she engaged in criminal defamation by undertaking a campaign against the country. However, posting on social media and being critical of the Government is not a campaign against the country. The source stresses that Ms. Xayabouly did not endanger anyone physically, nor did she do anything that would constitute an imminent threat to public safety or the country. Her arrest was therefore neither necessary nor proportionate to the aim of achieving public safety, as required by article 19 (3) of the Covenant.

32. The reasons for Ms. Xayabouly's arrest do not fall under the recognized exceptions to the right to freedom of expression. Her detention resulted from the exercise of her right to freedom of opinion and expression and to freedom of peaceful assembly and association guaranteed under articles 19 and 20 of the Universal Declaration of Human Rights and

⁵ See, e.g., opinion No. 61/2017.

⁶ Human Rights Committee, general comment No. 34 (2011) on the freedoms of opinion and expression, para. 23.

articles 19, 21 and 22 of the Covenant.⁷ By depriving Ms. Xayabouly of the right to freedom of expression, the Government also violated article 44 of the Constitution of the Lao People's Democratic Republic, giving her detention an arbitrary character under category II.

iii. Category III

33. The source refers to relevant provisions of the Covenant, namely articles 9 (1) and (2) and 14 (3) concerning due process guarantees, including the right to be informed of the reasons for the arrest and charges. In paragraph 24 of its general comment No. 35 (2014) on liberty and security of person, the Human Rights Committee clarifies the two requirements for the benefit of a person being detained: first, the detainee is to be informed, at the time of arrest, of the reasons for the arrest, and second, the detainee must be promptly informed of any charges. Principles 10 to 13 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment also require that anyone who is arrested must be informed of the reason for the arrest.

34. The source submits that Ms. Xayabouly was not arrested in accordance with the law. During her arrest, she was not provided with a warrant. Instead, she was taken to the police station without being given notice of the reason for her arrest or informed of the charges against her. There was no legal basis for her arrest, and the authorities cannot use her forced confession as a legal basis for her continued detention.

35. In addition, Ms. Xayabouly's right to prompt access to and the assistance of legal counsel under article 14 (3) (d) of the Covenant was violated. This right is confirmed in the 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.⁸ During her trial, Ms. Xayabouly was not given the option to choose her own legal counsel. Instead, a lawyer was assigned to her by the State without any explanation as to how the lawyer was appointed. The State-appointed lawyer did not speak with Ms. Xayabouly regarding her case, and she was subsequently brought before the judge to confess. Ms. Xayabouly's lawyer did not advocate on her behalf, but assisted the Government to obtain a forced confession.

36. The source alleges that Ms. Xayabouly was compelled to confess guilt. A coerced confession is a violation of article 14 (3) (g) of the Covenant and principle 21 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and cannot be used to convict an individual. Ms. Xayabouly's confession was taken at Phonthong police station without a lawyer or judge present. The police claimed that the confession was a result of their investigation and interrogation. However, Ms. Xayabouly was extensively interrogated and forced to confess that she was guilty of criminal defamation. The confession did not accurately reflect her actions, since creating a social media post criticizing the Government's response to floods that hit the country's southern provinces is in no way a campaign against the country, nor is it illegal.

37. Furthermore, the source notes the non-observance of the international norms relating to the right to a fair trial provided under articles 10 and 11 of the Universal Declaration of Human Rights and articles 14 (2) and (3) (d) of the Covenant. During her arrest, Ms. Xayabouly published a post on social media reaching out to those who could help her. Once at the police station, she was forced to delete that post. She was then detained until her trial, having been denied bail without any explanation. The source claims that the bail amount was excessive, as it was more than four times the country's gross domestic product per capita. The police informed her family and friends that she could not have any visitors as she was being investigated and interrogated.

38. Following her trial, neither Ms. Xayabouly nor her family was given a copy of the court documents, including the order pronouncing the sentence. She has also not been allowed to appeal against the decision of the court. The source concludes that it is evident from Ms. Xayabouly's prosecution, trial and conviction that minimum standards for a fair

⁷ See, e.g., opinion No. 61/2017.

⁸ A/HRC/30/37, principle 9 and guideline 8.

trial provided under international law were not met, rendering her detention arbitrary under category III.

iv. Category V

39. The source submits that Ms. Xayabouly's detention is arbitrary as it stems from the violation of article 7 of the Universal Declaration of Human Rights and article 26 of the Covenant. Discrimination based on political opinion is a violation of international law. Ms. Xayabouly was arrested after the authorities monitored her and declared her a threat to the State because she is a human rights activist and was vocal in criticizing government policies. This fact suggests that Ms. Xayabouly was only arrested and detained on the basis of her political opinion of the Government.

40. Finally, the Working Group notes that Ms. Xayabouly was the subject of an allegation letter sent by the Working Group and other special procedure mandate holders on 13 July 2020.⁹ The Working Group acknowledges the Government's response of 20 October 2020.¹⁰

Response from the Government

41. On 29 December 2020, the Working Group transmitted the source's allegations to the Government under its regular communication procedure, requesting detailed information by 1 March 2021 about the situation of Ms. Xayabouly. The Working Group also requested the Government to clarify the legal provisions justifying her detention, as well as its compatibility with the obligations of the Lao People's Democratic Republic under international human rights law. Moreover, the Working Group called upon the Government to ensure the physical and mental integrity of Ms. Xayabouly.

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

Discussion

43. 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.

44. In determining whether Ms. Xayabouly's deprivation is arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has presented a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations.¹¹ In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

Category I

45. The source alleges that Ms. Xayabouly was arrested by Phonthong police officers on 12 September 2019 without an arrest warrant. According to the source, Ms. Xayabouly was also taken to the Phonthong police station without being given notice of the reason for her arrest and the charges against her. The Government did not respond to the Working Group's communication under its regular procedure and has not addressed these allegations.

46. According to article 9 (1) of the Covenant, no one is to be deprived of liberty except on such grounds and in accordance with such procedure as are established by law. Article 9 (2) provides that anyone who is arrested is to be informed, at the time of arrest, of the reasons for the arrest and promptly informed of the charges. The Working Group considers that the source has provided credible information, which was not rebutted by the Government, that

⁹ Communication AL LAO 2/2020, dated 13 July 2020. Available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25397>.

¹⁰ The Government's response is available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=35631>.

¹¹ A/HRC/19/57, para. 68.

Ms. Xayabouly was arrested without an arrest warrant, in violation of article 9 (1).¹² She was arrested while dining at a restaurant and there were no circumstances that would give reasonable cause for an arrest in flagrante delicto.¹³ Moreover, Ms. Xayabouly was not informed of the reasons for her arrest at the time of arrest, in violation of article 9 (2) of the Covenant. As the Working Group has previously stated, an arrest is arbitrary when it is carried out without informing the arrested person of the reasons for the arrest.¹⁴ The source did not, however, specify when Ms. Xayabouly was informed of the charges against her, and the Working Group is unable to determine whether there was a further violation of her right under article 9 (2) to be promptly informed of the charges.¹⁵

47. In addition, the information submitted by the source indicates that Ms. Xayabouly was held in pretrial detention for over two months, from the time of her arrest on 12 September 2019 until her conviction and sentencing on 22 November 2019. Following her arrest, Ms. Xayabouly's family submitted an application for bail to the Phonthong police, which was subsequently rejected when sent to the provincial police station for a final decision. There is no information to suggest that Ms. Xayabouly was brought before a judicial authority to determine the legality of her detention. Indeed, the source reports that Ms. Xayabouly continued to be detained at the Phonthong police station throughout her pretrial detention, where she remained under interrogation by the authorities.

48. According to article 9 (3) of the Covenant, anyone arrested or detained on a criminal charge is to be brought promptly before a judge. As the Human Rights Committee has noted, 48 hours is ordinarily sufficient to satisfy the requirement of bringing a detainee "promptly" before a judge following his or her arrest; any longer delay must remain absolutely exceptional and be justified under the circumstances.¹⁶ In the absence of any information from the Government challenging the submissions from the source, the Working Group finds that Ms. Xayabouly was not brought promptly before a judicial authority, in violation of article 9 (3) of the Covenant. As a result, the authorities failed to establish the legal basis of her detention in accordance with the provisions of the Covenant.

49. Moreover, the Working Group considers that during her pretrial detention, Ms. Xayabouly was not afforded the right to take proceedings before a court so that it might decide without delay on the lawfulness of her detention in accordance with article 9 (4) of the Covenant. The right to bring proceedings applies in principle from the moment of arrest and any substantial waiting period before a detainee can bring a first challenge to detention is impermissible.¹⁷ It appears that Ms. Xayabouly did not have access to a lawyer during her pretrial detention, an essential safeguard that might have assisted her in challenging the legal basis for the detention.¹⁸ The right to challenge the lawfulness of detention before a court is a self-standing human right, the absence of which constitutes a human rights violation.¹⁹ Judicial oversight of the deprivation of liberty is a fundamental safeguard of personal liberty and is essential in ensuring that detention has a legal basis.²⁰ Given that Ms. Xayabouly was unable to challenge her detention, her right to an effective remedy under article 8 of the Universal Declaration of Human Rights and article 2 (3) of the Covenant was also violated.

50. Finally, under article 9 (3) of the Covenant, pretrial detention must be the exception and not the rule, and should be ordered for as short a time as possible.²¹ Detention pending trial must be based on an individualized determination that it is reasonable and necessary, for

¹² It is not sufficient that there is a law that authorizes the arrest. The authorities must invoke that legal basis and apply it to the circumstances of the case through an arrest warrant (opinions No. 45/2019, para. 51; No. 44/2019, para. 52; No. 46/2018, para. 48; and No. 36/2018, para. 40).

¹³ Opinion No. 9/2018, para. 38.

¹⁴ Opinions No. 46/2020, para. 40; No. 16/2020, para. 60; No. 46/2019, para. 51; and No. 10/2015, para. 34.

¹⁵ Human Rights Committee, general comment No. 35, para. 30. See also opinion No. 3/2019, para. 43.

¹⁶ Human Rights Committee, general comment No. 35, para. 33; and CCPR/C/LAO/CO/1, paras. 27–28.

¹⁷ Human Rights Committee, general comment No. 35, para. 42.

¹⁸ Opinions No. 61/2020, para. 70; and No. 40/2020, para. 29.

¹⁹ A/HRC/30/37, para. 2.

²⁰ *Ibid.*, para. 3.

²¹ A/HRC/19/57, paras. 48–58. See also opinions No. 62/2019, paras. 27–29; and No. 5/2019, para. 26.

such purposes as to prevent flight, interference with evidence or the recurrence of crime.²² Courts must examine whether alternatives to pretrial detention, such as bail, would render detention unnecessary.²³ As noted earlier, the police briefly considered the bail application made by Ms. Xayabouly's family. Such a review by the police does not meet the requirements of an individualized judicial review of the circumstances of Ms. Xayabouly to justify the need for her detention pending trial, including consideration of alternatives to detention. Moreover, the review by the police does not appear to have involved a genuine consideration of alternatives to detention, as the application was ultimately rejected without reasons and the bail amount set at an excessively high amount, that is, more than four times the gross domestic product per capita of the Lao People's Democratic Republic.²⁴ As a result, Ms. Xayabouly's pretrial detention was not properly constituted and thus had no legal basis.²⁵

51. For these reasons, the Working Group concludes that the Government failed to establish a legal basis for Ms. Xayabouly's detention, rendering it arbitrary under category I.

Category II

52. The source alleges that Ms. Xayabouly was detained as a result of exercising her rights to freedom of opinion and expression, peaceful assembly and association under articles 19 and 20 of the Universal Declaration of Human Rights and articles 19, 21 and 22 of the Covenant. According to the source, Ms. Xayabouly was arrested after her attempt to criticize the Government's efforts to assist citizens affected by tropical storms. The detention of Ms. Xayabouly was based on her vocal criticism of governmental policies and therefore violated her right to freedom of expression. She was convicted and sentenced to five years' imprisonment and a fine of 20 million Lao kip under article 117 of the Criminal Code, which punishes propaganda activities against the Lao People's Democratic Republic. The Government has not responded to these allegations.

53. The Working Group recalls that article 19 (2) of the Covenant provides that everyone is to have the right to freedom of expression, and that that right is to include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. That right includes political discourse, commentary on public affairs, and discussion of human rights, and protects Internet-based modes of expression.²⁶ It protects the holding and expression of opinions, including those that are critical of, or not in line with, government policy.²⁷

54. The Working Group considers that Ms. Xayabouly's conduct fell within the right to freedom of expression protected under international human rights law and that she was detained for exercising this right. In reaching this conclusion, the Working Group takes note that Ms. Xayabouly's arrest took place on 12 September 2019, just one week after she posted a video on social media on 5 September 2019 criticizing the slow response of the Government in providing assistance to those affected by the tropical storms. The information contained in this video was widely disseminated, having reportedly been viewed more than 173,000 times. These factors suggest that Ms. Xayabouly was detained as a result of her advocacy on behalf of affected communities.

55. Moreover, Ms. Xayabouly's videos posted on social media clearly concerned matters of public interest as they commented on the impact of flooding from the tropical storms, the displacement of villagers and the need for training of the authorities on how to engage in emergency response. The Working Group considers that she was detained for exercising her

²² Human Rights Committee, general comment No. 35, para. 38; and opinion No. 45/2016, para. 51.

²³ Human Rights Committee, general comment No. 35, para. 38; and CCPR/C/LAO/CO/1, paras. 27–28.

²⁴ Opinions No. 3/2019, para. 57; and No. 9/2017, para. 28.

²⁵ Opinions No. 36/2020, para. 51; and No. 68/2019, para. 96.

²⁶ Human Rights Committee, general comment No. 34, paras. 11–12.

²⁷ Opinions No. 16/2020, para. 68; No. 15/2020, para. 65; No. 8/2019, para. 55; and 79/2017, para. 55. See also CCPR/C/LAO/CO/1, paras. 33–34.

right to take part in the conduct of public affairs under article 21 (1) of the Universal Declaration of Human Rights and article 25 (a) of the Covenant.²⁸

56. There is nothing to suggest that the permissible restrictions in articles 19 (3) and 25 of the Covenant apply in the present case. The Working Group is not convinced that prosecuting Ms. Xayabouly was necessary to protect a legitimate interest under these provisions, nor that her conviction and sentence to the maximum term of imprisonment and the maximum fine available under article 117 of the Criminal Code was a proportionate response to her awareness-raising activities. Importantly, there is no evidence to suggest that Ms. Xayabouly's criticism of the Government called directly or indirectly for violence or in any way represented a threat to national security, public order, health or morals, or the rights and reputations of others.

57. As the Human Rights Committee has noted, it is not compatible with article 19 (3) of the Covenant to invoke provisions relating to the security of the State to suppress or withhold information of legitimate public interest or to prosecute environmental activists, human rights defenders or others for having disseminated such information.²⁹ In addition, the Human Rights Council has called upon States to refrain from imposing restrictions under article 19 (3) that are not consistent with international human rights law, including restrictions on discussion of government policies and reporting on human rights, government activities and corruption in government.³⁰ The Working Group refers the present case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

58. According to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and to draw public attention to the observance of human rights.³¹ Ms. Xayabouly was detained for the exercise of her rights under this Declaration. Detaining individuals for their activities as human rights defenders violates their right to equality before the law and equal protection of the law under article 7 of the Universal Declaration of Human Rights and article 26 of the Covenant.³²

59. The Working Group concludes that Ms. Xayabouly's detention resulted from the peaceful exercise of her rights to freedom of expression and to take part in the conduct of public affairs, and was contrary to article 7 of the Universal Declaration of Human Rights and article 26 of the Covenant. Her detention is arbitrary under category II.³³

60. As the Working Group has previously emphasized, the principle of legality requires that laws be formulated with sufficient precision so that the individual can access and understand the law, and regulate his or her conduct accordingly.³⁴ The language used in article 117 of the Criminal Code of 2018 of the Lao People's Democratic Republic (previously article 65) criminalizes propaganda activities against and slandering the Lao People's Democratic Republic, distorting the guidelines of the Party and policies of the government, or circulating false rumours causing disorder, which are detrimental to the Lao People's Democratic Republic or are for the purpose of undermining or weakening State authority. This provision lacks sufficient detail and may, as in the present case, proscribe the peaceful exercise of rights. The Human Rights Committee has made a similar finding, noting that the previous provision in article 65 of the Criminal Code, which criminalized propaganda

²⁸ Human Rights Committee, general comment No. 25 (1996) on participation in public affairs and the right to vote, para. 8. See also opinions No. 42/2020, No. 36/2020, No. 16/2020 and No. 15/2020.

²⁹ Human Rights Committee, general comment No. 34, para. 30.

³⁰ Human Rights Council resolution 12/16.

³¹ General Assembly resolution 53/144, annex, arts. 1 and 6 (c). See also Assembly resolution 74/146.

³² Opinions No. 42/2020, No. 36/2020, No. 16/2020, No. 15/2020, No. 45/2019, No. 44/2019, No. 9/2019, No. 46/2018, No. 45/2018, No. 36/2018 and No. 35/2018.

³³ A/HRC/44/6, para. 115.104.

³⁴ Opinion No. 41/2017, paras. 98–101. See also opinions No. 37/2020, para. 60; and 62/2018, paras. 57–59.

against the Lao People's Democratic Republic, was vague and overly broad.³⁵ The application of such a vague and overly broad provision to Ms. Xayabouly's conduct adds weight to the Working Group's conclusion that her detention falls within category II. The Working Group considers that, in some circumstances, laws may be so vague and overly broad that it is impossible to invoke a legal basis justifying the deprivation of liberty.

61. Finally, noting the source's allegation that Ms. Xayabouly was forced to confess to criminal defamation, the Working Group reiterates that imprisonment is never an appropriate penalty for defamation and is never compatible with the freedom of expression.³⁶

Category III

62. Given its finding that the detention of Ms. Xayabouly is arbitrary under category II, the Working Group emphasizes that no trial should have taken place. However, Ms. Xayabouly was tried, and was convicted and sentenced on 22 November 2019. The Working Group considers that the information submitted by the source discloses violations of the right to a fair trial throughout the proceedings against Ms. Xayabouly. The Government did not address any of the allegations, as it did not respond to the Working Group's communication under the regular procedure.

63. The source alleges that Ms. Xayabouly was denied the right to prompt access to and the assistance of legal counsel. During her trial, Ms. Xayabouly was not given the option to choose her own legal counsel. Instead, a lawyer was assigned to her by the State without any explanation as to how the lawyer was appointed. The State-appointed lawyer did not speak with Ms. Xayabouly regarding her case, and she was subsequently brought before the judge to confess. Ms. Xayabouly's lawyer did not advocate on her behalf, but assisted the Government to obtain a forced confession.

64. The Working Group recalls that all persons deprived of their liberty have the right to legal assistance by counsel of their choice at any time during their detention, including immediately after their apprehension, and such access is to be provided without delay.³⁷ The Working Group finds that the authorities did not afford Ms. Xayabouly the right to be represented by a lawyer of her choice from the outset of her detention. Furthermore, in failing to communicate with Ms. Xayabouly about her case and to advocate on her behalf, the State-appointed lawyer failed to provide effective legal assistance in representing her.³⁸ As a result, Ms. Xayabouly was denied her rights to communicate with counsel and to defend herself through legal counsel of her own choosing under articles 14 (3) (b) and (d) of the Covenant, and was denied the equality of arms that should have been respected in the criminal proceedings against her.

65. Notably, the source alleges that the State-appointed lawyer not only failed to provide effective legal assistance, but was complicit in obtaining a confession from Ms. Xayabouly when she was brought before a judge to confess. Given the serious nature of this alleged violation of the ethical duty to protect the rights of a criminal defendant, promote the cause of justice and uphold human rights standards,³⁹ the Working Group will refer the present case to the Special Rapporteur on the independence of judges and lawyers.

66. Furthermore, the source alleges that Ms. Xayabouly was compelled to confess guilt. According to the source, Ms. Xayabouly's confession was taken at Phonthong police station without a lawyer or judge present. The police claimed that the confession was a result of their investigation. However, Ms. Xayabouly was extensively interrogated and forced to confess

³⁵ CCPR/C/LAO/CO/1, paras. 33–34. The Committee recommended repeal or amendment of this provision to ensure compliance with the principle of legal certainty, and that the authorities refrain from applying it to suppress conduct and speech protected by the Covenant. See also opinion No. 61/2017; and Decision No. 2/1992.

³⁶ Human Rights Committee, general comment No. 34, para. 47. See also opinions No. 37/2020, para. 56; No. 25/2012, para. 60; and No. 35/2008, para. 36.

³⁷ A/HRC/30/37, annex, principle 9 and guideline 8; A/HRC/45/16, para. 53; and Basic Principles on the Role of Lawyers, paras. 1 and 5.

³⁸ A/HRC/45/16/Add.2, para. 59. See also A/HRC/42/39/Add.1, para. 55; and Basic Principles on the Role of Lawyers, para. 6.

³⁹ Basic Principles on the Role of Lawyers, paras. 12–15.

that she was guilty of criminal defamation. An official press release dated 17 September 2019 was issued, stating that Ms. Xayabouly had confessed that she was guilty of criminal defamation by undertaking a “campaign against the Lao People’s Democratic Republic”, through illegal activities and by having a connection with “bad elements” both in the country and abroad. Ms. Xayabouly was subsequently forced to repeat her confession before a judge.

67. The burden is on the Government to prove that Ms. Xayabouly’s confession was given freely and without any direct or indirect physical or undue psychological pressure from the investigating authorities,⁴⁰ but it has not done so in the present case. As a result, the Working Group finds that Ms. Xayabouly’s right not to be compelled to confess guilt under article 14 (3) (g) of the Covenant was violated. Confessions made in the absence of legal counsel are not admissible as evidence in criminal proceedings.⁴¹ Furthermore, by publishing the press release stating that Ms. Xayabouly had confessed, the authorities violated her right to the presumption of innocence under article 11 (1) of the Universal Declaration of Human Rights and article 14 (2) of the Covenant.⁴²

68. Finally, the source alleges that following her trial, neither Ms. Xayabouly nor her family was given a copy of the court documents, including the order pronouncing the sentence. According to the source, Ms Xayabouly has also not been allowed to appeal against the decision of the court. However, the source provided no further information on what measures have been taken by the authorities to prevent Ms. Xayabouly from filing an appeal. Moreover, as the Human Rights Committee has stated, a convicted person has the right to access relevant court documents necessary for the effective exercise of the right to appeal.⁴³ In the present case, the Working Group considers that the source did not provide sufficient information about the nature of the order pronouncing the sentence, including whether it contained substantive information on the court’s judgment. It is also not clear what effect the failure to provide this document had on Ms. Xayabouly’s ability to appeal her conviction and sentence. The Working Group is therefore unable to determine whether the failure to provide court documents, including the order pronouncing the sentence, amounted to a restriction on Ms. Xayabouly’s right to appeal under article 14 (5) of the Covenant.

69. The Working Group concludes that these violations of the right to a fair trial, namely denial of the right to prompt access to and the assistance of legal counsel, forced confession and denial of the presumption of innocence, are of such gravity as to give the detention of Ms. Xayabouly an arbitrary character under category III.

Category V

70. The source submits that Ms. Xayabouly’s detention is arbitrary because it is based on her political opinions. According to the source, Ms. Xayabouly was arrested because she is a human rights activist and was vocal in criticizing government policies. Since 2017, Ms. Xayabouly has been engaged in activism and awareness-raising on a variety of issues including the payment of a toll, corruption in government policies, education, the impact of international businesses operating in the Lao People’s Democratic Republic, and the collapse of a dam that was part of a multinational hydropower project.

71. The source claims that, in addition to being detained, Ms. Xayabouly experienced other consequences for her advocacy and awareness-raising, including having a fundraising concert shut down by the police in October 2018 and losing her employment as a tour guide when her employer was pressured into dismissing her. According to the source, in response

⁴⁰ Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 41; and opinions No. 15/2020, para. 76; No. 32/2019, para. 43; No. 14/2019, para. 68; No. 53/2018, para. 77 (a); No. 52/2018, para. 79 (i); No. 17/2017, para. 42; No. 10/2016, para. 48; and No. 1/2016, para. 40. See also A/56/156, para. 39 (j).

⁴¹ Opinions No. 63/2020, para. 42; No. 61/2020, para. 86; No. 41/2020, para. 70; No. 15/2020, para. 76; No. 5/2020, para. 83; No. 73/2019, para. 91; No. 59/2019, para. 70; No. 14/2019, para. 71; and No. 1/2014, para. 22. See also E/CN.4/2003/68, para. 26 (e); and A/HRC/45/16, para. 53.

⁴² Human Rights Committee, general comment No. 32, para. 30. See also opinions No. 63/2020, para. 39; and 15/2020, para. 76.

⁴³ Human Rights Committee, general comment No. 32, para. 49. See also opinions No. 46/2020, para. 61; No. 83/2019, para. 76; No. 27/2019, para. 78–79; and No. 14/2017, para. 55.

to Ms. Xayabouly's activities, the Government issued a press release through State-run media outlets, stating that if those who shared information on social media were found guilty of spreading false information, they would be charged and sentenced to a term of imprisonment. The Government did not respond to any of these allegations.

72. The Working Group is convinced that Ms. Xayabouly was targeted because of her views, including her most recent criticism of the Government's response to tropical storms in August and September 2019. In the discussion above concerning category II, the Working Group established that Ms. Xayabouly's detention resulted from the peaceful exercise of her rights under international law. When detention results from the active exercise of civil and political rights, there is a strong presumption that the detention also constitutes a violation of international law on the grounds of discrimination based on political or other views.⁴⁴

73. The Working Group finds that Ms. Xayabouly was deprived of her liberty on discriminatory grounds, that is, owing to her status as a human rights defender, and on the basis of her political or other opinions on government policies and performance. Her detention violates articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant, and is arbitrary according to category V. The Working Group refers this case to the Special Rapporteur on the situation of human rights defenders. In addition, given that Ms. Xayabouly sought to raise awareness on environmental rights and the impact of international businesses operating in the Lao People's Democratic Republic, the Working Group will bring the present case to the attention of the Special Rapporteur on human rights and the environment and the Working Group on the issue of human rights and transnational corporations and other business enterprises.

Concluding remarks

74. According to the source, Ms. Xayabouly's contact with her family and friends has been restricted during her detention. During her arrest, Ms. Xayabouly published a post on social media reaching out to those who could help her, but was forced to delete it. She was not permitted to receive visits during her pretrial detention at the Phonthong police station, as the police informed her family and friends that she could not have any visitors owing to the fact that she was being investigated and interrogated. In addition, since her conviction, Ms. Xayabouly's family has only been able to visit a few times, and non-governmental organizations have been specifically barred from visiting her in prison. Independent monitoring of the detention conditions by external parties has not been allowed in her case. The Government has not responded to these allegations.

75. The Working Group considers that these restrictions violated Ms. Xayabouly's right to contact with the outside world under rules 26 and 43 of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules); rules 43 (3) and 58 (1) of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules); and principles 15, 16 (1) and 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. Independent monitoring of the detention of all persons is an essential safeguard against torture and ill-treatment and detention conditions that do not meet international standards. The Working Group urges the Government to ensure access by external monitors to Ms. Xayabouly and to all detainees in the Lao People's Democratic Republic.⁴⁵ The Working Group also takes this opportunity to reiterate that pretrial detainees should not be held in unsuitable facilities, such as police stations, which are not equipped with the infrastructure and services to properly house such detainees.⁴⁶

76. Furthermore, the Working Group is concerned that Ms. Xayabouly remains in detention despite the fact that she is believed to be suffering from depression and has lost a significant amount of weight. Given that Ms. Xayabouly has been arbitrarily detained for

⁴⁴ Opinions No. 59/2019, para. 79; No. 13/2018, para. 34; and No. 88/2017, para. 43. See also CCPR/C/LAO/CO/1, para. 33 (e).

⁴⁵ CCPR/C/LAO/CO/1, paras. 23–26; and A/HRC/44/6, paras. 115.17 and 115.83–115.84.

⁴⁶ A/HRC/42/39/Add.1, para. 43.

over 18 months, the Working Group urges the Government to immediately and unconditionally release her and ensure that she receives medical care.

77. The Working Group would welcome an invitation from the Government to undertake its first country visit to the Lao People's Democratic Republic so that it can work constructively with State party authorities in addressing serious concerns relating to the arbitrary deprivation of liberty.

Disposition

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

The deprivation of liberty of Houayheuung Xayabouly, being in contravention of articles 2, 3, 7, 8, 9, 10, 11 (1), 19 and 21 (1) of the Universal Declaration of Human Rights and articles 2 (1) and (3), 9, 14, 19, 25 (a) and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

79. The Working Group requests the Government of the Lao People's Democratic Republic to take the steps necessary to remedy the situation of Ms. Xayabouly without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

80. The Working Group considers that, taking into account all the circumstances of the case, including the risk of harm to the health of Ms. Xayabouly, the appropriate remedy would be to release Ms. Xayabouly immediately, and accord her an enforceable right to compensation and other reparations, in accordance with international law.⁴⁷ In the current context of the global coronavirus disease (COVID-19) pandemic and the threat that it poses in places of detention, the Working Group calls upon the Government to take urgent action to ensure the immediate release of Ms. Xayabouly.

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

82. The Working Group urges the Government to bring relevant legislation, in particular article 117 of the Criminal Code, into conformity with the commitments of the Lao People's Democratic Republic under international human rights law.

83. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to: (i) the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, (ii) the Special Rapporteur on the independence of judges and lawyers, (iii) the Special Rapporteur on the situation of human rights defenders, (iv) the Special Rapporteur on human rights and the environment, and (v) the Working Group on the issue of human rights and transnational corporations and other business enterprises, for appropriate action.

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

Follow-up procedure

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

- (a) Whether Ms. Xayabouly has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Ms. Xayabouly;
- (c) Whether an investigation has been conducted into the violation of Ms. Xayabouly's rights and, if so, the outcome of the investigation;

⁴⁷ A/HRC/45/16, annex I (with respect to identifying comprehensive reparations to which victims of arbitrary deprivation of liberty are entitled).

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of the Lao People's Democratic Republic with its international obligations in line with the present opinion;

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

86. 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.

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

88. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.⁴⁸

[Adopted on 3 May 2021]

⁴⁸ Human Rights Council resolution 42/22, paras. 3 and 7.