



General Assembly

Distr.: General
30 November 2018

Original: English

Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-second session, 20–24 August 2018

Opinion No. 61/2018 concerning Leila Norma Eulalia Josefa De Lima (Philippines)

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 33/30.
2. In accordance with its methods of work (A/HRC/36/38), on 20 February 2018 the Working Group transmitted to the Government of the Philippines a communication concerning Leila Norma Eulalia Josefa De Lima. 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).



Submissions

Communication from the source

4. Leila Norma Eulalia Josefa De Lima is a national of the Philippines born in 1950. She lives in Parañaque, the Philippines. She is a lawyer and a senator.

Context and background

5. The source reports that, in May 2008, Ms. De Lima was appointed Chair of the Commission on Human Rights. In that role, from March 2009, she investigated extrajudicial killings allegedly carried out by the Davao Death Squad in Davao City under the then Mayor, Rodrigo Duterte, who had reported links to that organization.

6. According to the source, from July 2010 to October 2015, Ms. De Lima served as Secretary of Justice. During her term, Ms. De Lima's actions led to the incarceration of a former President and three senators, as well as the filing of criminal cases against several congressmen, all for plunder and corruption.¹

7. In addition, the source reports that, on 15 December 2014, Ms. De Lima led a raid on the National Penitentiary in Muntinlupa City, Metro Manila, which is also known as the New Bilibid Prison. This raid was motivated by a desire to confiscate contraband items, isolate 19 identified drug lords and gang leaders, also known as the "Bilibid drug lords" or "Bilibid 19", and paralyze the drug network that existed in the prison facility. The operation resulted in the extraction and transfer of the 19 drug lords, the seizure of drugs, firearms, cash and other contraband items and the dismantling of the luxurious private quarters.

8. The source indicates that several of the Bilibid drug lords filed cases with the Ombudsman and the Court of Appeals against Ms. De Lima. Reportedly, their lawyer is one of Ms. De Lima's detractors. In addition, the lawyer is also the counsel of the former President who is in detention, as mentioned above, and who expressed a desire to see Ms. De Lima in jail. The source also contends that the lawyer has talked to his clients and their networks, and prepared potential willing witnesses to testify against Ms. De Lima in exchange for their preferential treatment under the new administration, including possible executive clemency. Allegedly, some other inmates also agreed to provide "coached testimonies" against Ms. De Lima in exchange for prison amenities and privileges.

9. The source further alleges that, on 28 September 2016, some of the 19 drug lords who had initially refused to testify against Ms. De Lima were stabbed during a "prison riot" at a building belonging to the New Bilibid Prison, which exclusively housed the Bilibid 19 and another individual.

10. According to the source, Ms. De Lima was elected as a senator on 9 May 2016. On 13 July 2016, Ms. De Lima filed a resolution calling for an investigation into extrajudicial killings during the President's war on drugs. In addition, on 11 August 2016, Ms. De Lima announced that she would lead the Senate Committee on Justice and Human Rights in conducting an investigation into the extrajudicial killings. The source alleges that, thereafter, the President told reporters in Davao City that he would destroy her in public and began daily accusations and sexist insults.

11. Reportedly, on 19 September 2016, Ms. De Lima was ousted from her position of Chair of the Senate Committee on Justice and Human Rights through the efforts of senators allied with the President.

Investigation, arrest and detention

12. According to the source, on 19 August 2016, a resolution was filed in order to investigate the proliferation of the drug trade at the New Bilibid Prison while Ms. De Lima was Secretary of Justice. Allegedly, the President released a so-called drug matrix,

¹ The Working Group notes that it found Ms. Arroyo's deprivation of liberty arbitrary in its Opinion No. 24/2015.

purportedly showing that Ms. De Lima was at the heart of the drug trade operations inside the New Bilibid Prison. Ms. De Lima dismissed all the allegations.

13. The source explains that, on 20 September 2016, the House of Representatives commenced an inquiry pursuant to that resolution. At the hearing, the residential address and telephone numbers of Ms. De Lima were publically disclosed on national television. This triggered a flood of hate messages and death threats against her. Reportedly, members of the House of Representatives also asked insulting questions about her personal affairs and threatened to show a fabricated “sex video” supposedly of her. The Secretary of Justice then questioned witnesses, who were mostly the Bilibid drug lords against whom Ms. De Lima had undertaken the operation.

14. According to the source, on 7 November 2016, Ms. De Lima filed a petition for writ of *habeas data* before the Supreme Court seeking to stop the President from divulging private details about her personal life and using them to degrade her dignity as a human being, a woman and a senator. To this day, the Supreme Court has yet to deliberate on this petition.

15. Allegedly, in December 2016, three criminal complaints for illegal drug trading were filed against Ms. De Lima with the Department of Justice. The source claims that the evidence presented before the Department of Justice was the same evidence as that presented by the Secretary of Justice during the congressional hearing on the Bilibid drug trade. The source alleges that the Department of Justice considered whether there was sufficient evidence to charge Ms. De Lima in court after the Secretary of Justice had already prejudged Ms. De Lima’s guilt during the congressional hearings. Therefore, the source claims that the Secretary of Justice and the Department of Justice acted both as prosecutor and judge in the determination of probable cause to charge her in court. Indeed, the source explains that, under national laws, the Department of Justice, when acting as a preliminary investigator, acts as a judge and must decide independently and impartially. For the source, this was violated when it was the Secretary of Justice himself who presented witnesses and effectively “prosecuted” Ms. De Lima in a trial by publicity at the congressional hearings.

16. In addition, the source explains that the Department of Justice chose to exercise jurisdiction over the criminal complaints against Ms. De Lima, even though the independent Office of the Ombudsman had exclusive jurisdiction over them. Under national law, the preliminary investigation of alleged crimes committed by public officials of a certain category, to which Ms. De Lima belongs, is exclusively under the jurisdiction of the independent Ombudsman. The source points out that this demonstrates the lack of independence of the Department of Justice.

17. The source also reports that, during the preliminary investigation by the Department of Justice, Ms. De Lima filed several motions questioning the jurisdiction of the Department of Justice and requesting the transfer of the preliminary investigation to the independent Office of the Ombudsman. Ms. De Lima’s motions were ignored by the Department of Justice’s Panel of Prosecutors, who are directly under the control of the Secretary of Justice. The Panel did not issue any written order or ruling on Ms. De Lima’s motions. Instead, it continued to exercise jurisdiction and proceeded to determine probable cause and to file cases in court against her without giving her the opportunity to question the purely testimonial nature of the evidence against her.

18. In addition, the source alleges that the Panel of Prosecutors did not personally examine the witnesses against Ms. De Lima. They relied on the affidavits and transcripts of the congressional hearings on the Bilibid drug trade without examining the credibility of witnesses who had been convicted of various criminal offences and who, by law, were even prohibited from being presented in court as State witnesses. The Panel of Prosecutors also ignored the absence of the most important evidence, namely the drugs. Even though national law and jurisprudence require the identification and presentation of the drugs traded as *corpus delicti*, the Panel of Prosecutors proceeded to file criminal information for illegal drug trading against Ms. De Lima with the courts, knowing that it was impossible to prosecute such a charge without presenting the drugs traded as evidence.

19. On 17 February 2017, the Secretary of Justice announced that charges had been filed against Ms. De Lima and several other individuals for alleged violations of illegal drug trading punishable under section 5, in relation to sections 3 (jj), 26 (b) and 28 of the Republic Act No. 9165 (Comprehensive Dangerous Drugs Act of 2002), prohibiting the “sale, trading, administration, dispensation, delivery, distribution and transportation of illegal drugs”.

20. On 20 February 2017, Ms. De Lima filed a motion to quash, citing the (a) the Muntinlupa Regional Trial Court’s lack of jurisdiction over the offence in question and the Panel of Prosecutors’ lack of authority over the case and (b) the fact that the allegations and the recital of facts, both in the Information and in the Department of Justice’s joint resolution, did not allege the corpus delicti of illegal drug trading.

21. The source reports that, on 23 February 2017, despite the unresolved motion to quash, Regional Trial Court Branch 204 issued an order of arrest against Ms. De Lima. On 24 February 2017, Ms. De Lima presented herself to the arresting officers of the Philippine National Police Criminal Investigation and Detection Group.

22. According to the source, the offence with which Ms. De Lima was charged was non-bailable under national law. Article III, section 13, of the Constitution provides that all persons, except those charged with offences punishable by *reclusion perpetua* when evidence of guilt is strong, shall, before conviction, be bailable by sufficient sureties, or be released on recognizance as may be provided by law. The penalty for the fabricated offences against Ms. De Lima is life imprisonment or the death penalty.

23. The source further explains that Ms. De Lima filed, before the Supreme Court, a petition for *certiorari* and prohibition on 24 February 2017, requesting the Court to annul the order of arrest, the warrant of arrest, enjoin the trial court judge from proceeding with the case and restore the statuses of the parties prior to the issuance of the order.

24. Reportedly, on 10 October 2017, the Supreme Court issued a decision in which five justices stated that the relevant charge was illegal drug trading, three other justices believed that the charge should be conspiracy to commit illegal drug trading, and one justice indicated that the charge could be either of the two. The remaining six justices believed that the charge should be a bailable charge of bribery or no charge at all on the basis that it might be a complete fabrication altogether. Despite these divergent views, the majority of the justices (nine) decided that Ms. De Lima should continue to be detained, even though they were not sure what exactly she was in jail for and even while the Government was sorting out for itself the proper charges to file against Ms. De Lima. After issuing this decision, the Government proceeded to amend the charges against Ms. De Lima, from illegal drug trading to conspiracy to commit illegal drug trading.

25. The source emphasizes that only one of the Bilibid drug lords who testified against Ms. De Lima has been charged as a co-conspirator.

26. In addition, despite the proposed amendment of the charges against her, Ms. De Lima continues to be detained by orders of three regional trial courts that are yet to decide whether to allow the amendment of the charges, and whether the amendment is supported by the evidence on record. On 16 November 2017, a third warrant of arrest for illegal drug trading was issued against Ms. De Lima. Furthermore, on 4, 22 and 23 January 2018, three judges recused themselves from the case.

27. Finally, the source reports that, since being detained, Ms. De Lima has been refused certain visits and her request for furlough to participate in Senate hearings, most notably on the recent drug-related killing of 17-year-old Kian delos Santos, was rejected. In addition, the source claims that some of the documents given to her are routinely inspected or confiscated as they are considered “propaganda material” or “signs of protest”.

Legal analysis

Category II

28. The source claims that, in the case of Ms. De Lima, certain rights enshrined in the Universal Declaration of Human Rights have been violated, in particular the rights guaranteed by articles 7, 10, 11 (2), 12 and 19.

29. The source claims that the members of the House of Representatives violated Ms. De Lima's rights, under the pretext that they were investigating the proliferation of illicit drugs in the national penitentiary. Moreover, this inquiry was carried out with egregious acts of discrimination against Ms. De Lima because of her womanhood. Such action impinged her right to due process and equal protection before the law. The source alleges that the multiple threats to her womanhood, public humiliation and the acts to shame a female legislator further corroborate this claim. The source refers mainly to public humiliation that blighted her womanhood, to threats of publicly exhibiting a manufactured video of her supposed intimacies, to the questions asked to witnesses to shame a female legislator and to the public disclosure of her residential address and contact telephone numbers, which resulted in death threats and hate calls.

30. The source also alleges that, contrary to article 19 of the Universal Declaration of Human Rights, the charges brought against Ms. De Lima were created in response to the actions she took as Chair of the Commission on Human Rights. As such, she investigated the alleged acts of the Davao Death Squad. In 2016, once elected as senator, Ms. De Lima filed a resolution that called for an inquiry into the deaths that had coincided with President Duterte's campaign against illicit drugs.

31. The source further claims that the President, with the assistance of his Secretary of Justice, singled out Ms. De Lima from among several of his vocal and persistent political critics, and deprived her of liberty as an alleged drug lord. The source cites a number of statements from the President indicating that he treated her with contempt in every public speech, and labelled her as the public official responsible for the proliferation of the New Bilibid Prison drug trade. In a number of other statements, he reportedly expressed a willingness to destroy Ms. De Lima and made degrading comments about her and her private life. After her arrest, the source claims that the President continued making prejudicial statements against her.

32. Moreover, the source claims that the evidence and charges against Ms. De Lima were manufactured and fabricated upon the orders of the President. The source alleges that 7 of the Bilibid 19 are the main witnesses against Ms. De Lima. All are convicted criminals serving life sentences for various crimes, such as robbery with murder, kidnapping and drug trading.

33. In addition, according to the source, in May 2016, Ms. De Lima was informed that a group of individuals had started going around the New Bilibid Prison to solicit incriminating testimonies to be used against her, regarding any supposed irregularity that had taken place in the national penitentiary during her term as Secretary of Justice. Reportedly, a legal officer from the Bureau of Corrections attested to the fact that inmates who had testified against Ms. De Lima were now housed at the Armed Forces of the Philippines Custodial Centre and enjoyed increased prison privileges.

34. The source also contends that multiple employees from the Department of Justice, an informant involved in the 2014 raid and employees of the Drug Enforcement Agency have been threatened, intimidated or pressured into testifying against Ms. De Lima. Namely, in August 2016, the Secretary of Justice forced and intimidated two Department of Justice employees into admitting ownership of bank accounts that they supposedly held for Ms. De Lima. The source reports that, after being confronted with bank transaction slips, which ultimately turned out to be fake, the two Department of Justice employees denied ownership of the bank accounts and refused to testify against Ms. De Lima.

35. Moreover, the source reports that, following the President's orders, the Secretary of Justice pronounced the guilt of Ms. De Lima in public even before any formal government investigation had been conducted against her.

36. In the same vein, the source claims that the Secretary of Justice and the President carried out a public smear campaign against Ms. De Lima. Prior to her arrest, the Secretary of Justice had told the media that Ms. De Lima had kept money seized during the 2014 raid on the New Bilibid Prison, that there were documents from the Anti-Money Laundering Council showing that there were bank transactions that could link her to drug syndicates operating from the New Bilibid Prison and that all the evidence pointed to Ms. De Lima having accepted drug money. According to the source, those are reckless accusatory pronouncements as he has failed to present any evidence. Moreover, as mentioned above, the Secretary of Justice acted as the prosecutor against Ms. De Lima in the inquiry of the House of Representatives into the Bilibid drug trade when he presented and conducted the direct examination of the Bilibid witnesses, even before a formal preliminary investigation had been conducted by the Department of Justice. This constitutes, for the source, a case of prejudgment by the Secretary of Justice, whose department was to eventually file criminal charges against Ms. De Lima based on the very same testimonies of criminal convicts presented by its Secretary during the inquiry of the House of Representatives.

Category III

37. The source alleges that Ms. De Lima's fair trial rights have been violated insofar as, even before the beginning of her trial or before any charges were filed before the courts, she had been found guilty in a trial by publicity by the authorities. The source claims that this amounts to a clear case of political persecution and violation of her right to a presumption of innocence.

Category V

38. The source claims that Ms. De Lima has been deprived of her liberty for reasons of discrimination. Ms. De Lima was subjected to insults and shaming by congressmen taking turns in asking her misogynist questions and making misogynist statements against her during the official congressional hearings, which were broadcast live on national television and radio.

39. Ms. De Lima has previously been the subject of a joint urgent appeal (PHL 5/2017) issued on 27 March 2017. The Working Group acknowledges the Government's reply of 11 April 2017.

Response from the Government

40. On 20 February 2018, the Working Group transmitted the allegations from the source to the Government through its regular communication procedure. The Working Group requested the Government to provide detailed information by 23 April 2018 about the current situation of Ms. De Lima and any comments that it might have on the source's allegations. Moreover, the Working Group called upon the Government to ensure Ms. De Lima's physical and mental integrity.

41. The Working Group regrets that it did not receive a response from the Government to this communication, and 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

42. 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.

43. 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 (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.

44. The Working Group wishes to reaffirm that the Government has the obligation to respect, protect and fulfil the right to liberty of person and that any national law allowing

deprivation of liberty should be made and implemented in conformity with the relevant international standards set forth in the Universal Declaration of Human Rights and other applicable international or regional instruments.² Consequently, even if the detention is in conformity with national legislation, regulations and practices, the Working Group is entitled and obliged to assess the judicial proceedings and the law itself to determine whether such detention is also consistent with the relevant rules and standards of international human rights law.³

45. The Working Group also wishes to reiterate that it applies a heightened standard of review in cases in which the rights to freedom of movement and residence, asylum, thought, conscience and religion, opinion and expression, peaceful assembly and association, participation in political and public affairs and equality and non-discrimination; the protection of persons belonging to ethnic, religious or linguistic minorities is restricted; or human rights defenders are involved.⁴ Ms. De Lima's role as a prominent human rights defender for over a decade in the Philippines requires the Working Group to undertake this kind of intense and strict scrutiny.⁵

Category I

46. The Working Group will first determine whether it is impossible to invoke any legal basis to justify Ms. De Lima's arrest and detention from 24 February 2017 that would render it arbitrary in terms of category I.

47. At the outset, the Working Group wishes to stress that pretrial detention should be the exception not the rule and a detainee should be entitled to periodic judicial review of his or her detention. In the present case, the Working Group revisits the incompatibility of a non-bailable offence under Philippine law, which precludes consideration — or reconsideration on a periodic basis — of a detainee's individual circumstances, with international standards.⁶

48. The Working Group reiterates that pretrial detention must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances.⁷ Pretrial detention should not be ordered for a period based on the potential sentence for the crime charged, rather than on a determination of necessity; courts must examine whether alternatives to pretrial detention, such as bail, electronic bracelets or other conditions, would render detention unnecessary in the particular case.⁸ The Working Group thus concurs with the fact that “automatic rejection of the applicant's applications for bail ..., devoid of any judicial control of the particular circumstances of his detention, [is] incompatible with the guarantees”⁹ of article 9 (3) of the Covenant.

² See General Assembly resolution 72/180, fifth preambular paragraph; Commission on Human Rights resolutions 1991/42, para. 2, and 1997/50, para. 15; and Human Rights Council resolutions 6/4, para. 1 (a), and 10/9.

³ See opinions No. 94/2017, para. 47; No. 76/2017, para. 49; No. 1/2003, para. 17; No. 5/1999, para. 15; and No. 1/1998, para. 13.

⁴ See, for example, opinions No. 13/2018, para. 22; No. 3/2018, para. 40; No. 94/2017, para. 49; and No. 57/2017, para. 46. Domestic authorities and international supervisory bodies should apply the heightened standard of review of government action, especially when there are claims of a pattern of harassment (see opinion No. 39/2012, para. 45). See also General Assembly resolution 53/144, annex (Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms), art. 9 (3).

⁵ Human rights defenders, in particular, have the right to study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and, through those and other appropriate means, to draw public attention to such matters (see General Assembly resolution 53/144, annex, art. 6 (c)). See also opinion No. 8/2009, para. 18.

⁶ See opinion No. 24/2015, paras. 36–40.

⁷ Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, para. 38, cited in opinion No. 24/2015, para. 37.

⁸ General comment No. 35, para. 38. See also A/HRC/19/57, paras. 48–58.

⁹ European Court of Human Rights, *Piruzyan v. Armenia* (application No. 33376/07), judgment of 26 June 2012, para. 105, cited in opinion No. 24/2015, para. 37.

49. The Working Group also notes that article III, section 13, of the Constitution provides that: “all persons, except those charged with offenses punishable by *reclusion perpetua* when evidence of guilt is strong, shall, before conviction, be bailable by sufficient sureties, or be released on recognizance as may be provided by law.” Rule 114, section 4, of the Revised Rules of Criminal Procedure, which reflects the said constitutional provision, stipulates that: “all persons in custody shall be admitted to bail as a matter of right, with sufficient sureties, or released on [recognizance] as prescribed by law or this Rule (a) before or after conviction by the Metropolitan Trial Court, Municipal Trial Court, Municipal Trial Court in Cities, or Municipal Circuit Trial Court, and (b) before conviction by the Regional Trial Court of an offense not punishable by death, *reclusion perpetua*, or life imprisonment.” The Working Group notes, in this regard, that the alleged drug-related offences against Ms. De Lima are punishable by life imprisonment.

50. Furthermore, the fact that the Philippine courts, including the Supreme Court in its controversial split decision of 10 October 2017, denied Ms. De Lima bail in accordance with the relevant national legal provisions does not prevent the detention from being arbitrary.¹⁰ In the view of the Working Group, pretrial detention without an individualized determination of the risk of flight, interference with the evidence or the recurrence of the crime, as well as consideration of less intrusive alternatives, such as bail, electronic bracelets or other conditions in accordance with the principle of necessity and proportionality, is devoid of legal basis.

51. The Working Group considers that Ms. De Lima’s pretrial detention, which has already lasted more than 17 months since her initial arrest on 24 February 2017, illustrates the importance of this fundamental legal principle concerning personal liberty.

52. The Working Group also finds another reason to question the legal basis for Ms. De Lima’s pretrial detention: the Philippine law effectively prevents periodic re-examination of the continued reasonableness and necessity of pretrial detention in the light of possible alternatives.¹¹

53. The Working Group therefore concludes that Ms. De Lima’s pretrial detention, in violation of article 9 of the Universal Declaration of Human Rights and article 9 (1) and (3) of the Covenant,¹² lacks a legal basis and falls under category I.

Category II

54. The Working Group recalls that freedom of opinion and expression and freedom of thought and conscience are fundamental human rights enshrined in articles 18 and 19 of the Universal Declaration of Human Rights and articles 18 and 19 of the Covenant.¹³

55. The Working Group notes that the Human Rights Committee, in paragraph 34 of its general comment No. 34 (2011) on the freedoms of opinion and expression, stated that restrictions on the freedom of expression must not be overbroad and recalled that such restrictions must conform to the principle of proportionality, be appropriate to achieve their protective function, be the least intrusive instrument among those that might achieve their protective function and be proportionate to the interest to be protected.¹⁴ Moreover, the Committee, in paragraph 38 of the same general comment, emphasized that all public figures were legitimately subject to criticism and political opposition and that States parties should not prohibit criticism of institutions, such as the army or the administration.

56. In the same vein, the Working Group notes that the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression reiterated that the right to freedom of expression included the expression of views and opinions that

¹⁰ Opinion No. 24/2015, para. 37.

¹¹ General comment No. 35 (2014), paras. 12 and 38.

¹² See also article 12 of the Human Rights Declaration of the Association of Southeast Asian Nations (ASEAN).

¹³ See *Kang v. the Republic of Korea* (CCPR/C/78/D/878/1999), para. 7.2. See also articles 22 and 23 of the ASEAN Human Rights Declaration.

¹⁴ See opinion No. 3/2018, para. 49.

offended, shocked or disturbed.¹⁵ Even the statements considered unacceptable, disrespectful and in very bad taste by the authorities are entitled to protection. In addition, the Human Rights Council, in its resolution No. 12/16 (para. 5 (p) (i)), stated that restrictions on discussion of government policies and political debate were not consistent with article 19 (3) of the Covenant.

57. The Working Group considers that Ms. De Lima's deprivation of liberty resulted from her personal conviction and public statements regarding extrajudicial killings in the Philippines.¹⁶ In the view of the Working Group, the source has amply shown and the Government has not disputed that Ms. De Lima's statements on the widespread and systematic campaign of extrajudicial killings in the context of the war on drugs have triggered measures of reprisals against her that included a criminal investigation conducted by the Department of Justice and her detention.

58. By the same token, the Working Group is also of the opinion that Ms. De Lima has been subjected to detention as a result of the exercise of her right to take part in government and the conduct of public affairs under article 21 of the Universal Declaration and article 25 of the Covenant.¹⁷

59. Ms. De Lima has served successively as Chair of the Commission on Human Rights, Secretary of Justice and senator during which she consistently pursued an investigation into alleged extrajudicial killings by death squads, first in Davao under then-Mayor Duterte, and later nationally under his presidency. The Working Group notes that the Government did not dispute the source's claim that Ms. De Lima was ousted as Chair of the Senate Committee on Justice and Human Rights by the President's political allies on 19 September 2016 after the announcement on 11 August 2016 that she would lead an investigation into the suspected extrajudicial killings.

60. The Working Group also finds that the current administration, including the President, has shown unfavourable intentions towards Ms. De Lima. The Working Group expresses its serious concerns about the unfavourable remarks made publicly by the President and his allies against her after she expressed her intention to investigate the extrajudicial killings under the so-called war on drugs. The Government did not rebut these allegations.

61. The Working Group therefore considers that Ms. De Lima's deprivation of liberty is arbitrary under category II, as it resulted from her exercise of the rights and freedoms guaranteed under articles 18, 19 and 21 of the Universal Declaration of Human Rights and articles 18, 19 and 25 of the Covenant.

Category III

62. Given its finding that Ms. De Lima's deprivation of liberty is arbitrary under category II, the Working Group wishes to emphasize that no trial of Ms. De Lima should have taken place. However, since the trial did take place, the Working Group will now consider whether the alleged violations of the right to a fair trial and due process were grave enough to give her deprivation of liberty an arbitrary character, so as to fall within category III.

63. The Working Group recalls that everyone charged with a penal offence enjoys the right to be presumed innocent until proven guilty according to law in a fair and public trial by a competent, independent and impartial tribunal established by law at which the accused has had all the guarantees necessary for his or her defence in accordance with articles 10 and 11 of the Universal Declaration and article 14 of the Covenant.¹⁸

¹⁵ See A/HRC/17/27, para. 37.

¹⁶ The death squads in the Philippines, in particular in Davao, have been an international concern for some time. See A/HRC/11/2/Add.8, paras. 18–23.

¹⁷ See also article 25 of the ASEAN Human Rights Declaration.

¹⁸ *Ibid.*, article 20 (1).

64. However, in the present case, the source alleges, and the Government does not dispute, that the Secretary of Justice prejudged Ms. De Lima's guilt in a trial by publicity during the congressional hearing on the Bilibid drug trade before the Department of Justice, which must decide independently and impartially when acting as a preliminary investigator.

65. In this regard, the Working Group agrees with the assessment of the Human Rights Committee that all public figures are legitimately subject to criticism and political opposition.¹⁹ Ms. De Lima should be no exception. Nevertheless, the Working Group considers that judicial officers must conduct criminal investigations in an independent and impartial manner, and respect the presumption of innocence.²⁰ It is difficult to deny that the conduct of the Secretary of Justice, as the nation's chief justice, raises doubts about his adherence to this cardinal rule for a fair trial.

66. The Working Group is also highly concerned by the recent attacks on the independence of the judiciary. The Special Rapporteur on the independence of judges and lawyers expressed grave concerns about the President's public threats against Chief Justice Sereno and warned that her dismissal, which followed those threats, was sending a chilling message to other judges.²¹ The Working Group observes that such an assault on judicial independence casts doubts on Ms. De Lima's chances of receiving a fair trial. The Supreme Court's nine-six decision of 10 October 2017 to uphold her pretrial detention, as well as the failure of the Philippine courts to entertain Ms. De Lima's *habeas data* petition of 7 November 2016, adds to the Working Group's concerns.

67. In the light of the foregoing, the Working Group concludes that the violations of Ms. De Lima's rights to a fair trial are of such gravity as to render her deprivation of liberty arbitrary, falling within category III.

Category V

68. The Working Group will now examine whether Ms. De Lima's deprivation of liberty constitutes illegal discrimination under international law for the purpose of category V.

69. First and foremost, the Working Group notes that Ms. De Lima has been a consistent critic of Mayor-cum-President Duterte's alleged death squads in his war on drugs. Ms. De Lima called for an investigation into the extrajudicial killings as the Chair of the Commission on Human Rights, as Secretary of Justice and as Chair of the Senate Committee on Justice and Human Rights. The Working Group notes that she is entitled to protection as a human rights defender.²²

70. In the discussion presented above concerning the application of category II to the present case, the Working Group has already established that Ms. De Lima's deprivation of liberty resulted from her exercise of the right to political participation, and freedoms of opinion and expression and thought and conscience. The Working Group cannot help but notice that Ms. De Lima's political views and convictions are clearly at the centre of the present case and that the authorities have displayed an attitude towards her that can only be characterized as targeted and discriminatory. Indeed, she has been the target of partisan persecution and there is no explanation for this other than her exercise of the right to express such views and convictions as a human rights defender. The Government did not refute any of these allegations.

¹⁹ Human Rights Committee general comment No. 34 (2011) on the freedoms of opinion and expression, para. 38.

²⁰ See opinion No. 43/2018, para. 90.

²¹ Office of the High Commissioner for Human Rights, "Judicial independence in Philippines is under threat, says UN human rights expert", 1 June 2018, available at www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=23163&LangID=E.

²² See the Declaration on Human Rights Defenders, arts. 9 and 12.

71. The Working Group also notes that several Special Rapporteurs have observed that human rights defenders who have worked on the cases involving the Government's war on drugs have also suffered harassment and threats as a result.²³

72. In addition, the Working Group expresses its particular concern at the sexist statements and attacks on her personal life by President Duterte and his political allies that cast serious doubt on the Government's solemn undertaking to ensure the equal right of men and women to the enjoyment of all civil and political rights as set forth in article 3 of the Covenant. The Working Group thus considers that Ms. De Lima has also been targeted and the subject of attacks and discriminatory language due to her gender.

73. For these reasons, the Working Group considers that Ms. De Lima's deprivation of liberty constitutes a violation of articles 2 and 7 of the Universal Declaration of Human Rights and articles 2, 3 and 26 of the Covenant²⁴ on the grounds of discrimination based on political or other opinion, as well as her status as a human rights defender and as a woman. Her deprivation of liberty therefore falls under category V.

Preliminary examination of the situation in the Philippines by the Prosecutor of the International Criminal Court

74. The Working Group notes that the Prosecutor of the International Criminal Court has decided to open a preliminary examination of the situation in the Philippines to analyse "crimes allegedly committed in this State Party since at least 1 July 2016, in the context of the 'war on drugs' campaign launched by the Government" in particular the allegation that "since 1 July 2016, thousands of persons have been killed for reasons related to their alleged involvement in illegal drug use or dealing" and that "many of the reported incidents involved extra-judicial killings in the course of police anti-drug operations".²⁵

75. The Working Group considers that Ms. De Lima's case is not an isolated incident. In this regard, the Working Group observes that, under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of the rules of international law may constitute crimes against humanity. The Working Group urges the Government to rescind its notification of withdrawal from the Rome Statute, which was deposited with the Secretary-General on 17 March 2018.

76. The Working Group reiterates the International Court of Justice's dictum in 1980 that "wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights".²⁶ The conventional and customary prohibition of arbitrary detention has been authoritatively recognized as a peremptory norm (*jus cogens*) of international law by the Human Rights Committee in paragraph 11 of its general comment No. 29 (2001) on states of emergency, as well as paragraphs 51 and 75 of the Working Group's deliberation No. 9 (2012) concerning the definition and scope of arbitrary deprivation of liberty under customary international law.²⁷

²³ See AL PHL 12/2017. Available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=23340>.

²⁴ See also ASEAN Human Rights Declaration, arts. 2 and 4.

²⁵ "Statement of the Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, on opening preliminary examinations into the situations in the Philippines and in [the Bolivarian Republic of] Venezuela", 8 February 2018. Available at www.icc-cpi.int/Pages/item.aspx?name=180208-otp-stat.

²⁶ See *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 3, at para. 91, cited in opinions No. 30/2018, para. 40; No. 94/2017, para. 52, footnote 9; No. 76/2017, para. 56; No. 63/2017, para. 51; No. 37/2014, para. 32; No. 22/2014, para. 18; and No. 10/2013, para. 23. See also *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, at paras. 75–85, and Separate Opinion of Judge Cançado Trindade therein, at paras. 107–142.

²⁷ See opinions No. 63/2017, para. 51; No. 10/2013, para. 32; No. 16/2011, para. 12; No. 15/2011, para. 20; and No. 24/2010, para. 28. See also *Restatement (Third) of the Foreign Relations Law of the United States* (Washington, D.C., American Law Institute, 1987), § 702, comment n, and § 102,

77. The Working Group recalls that the corollary obligations *erga omnes* of protection “bind all the States which compose the organized international community” in a horizontal dimension and “bind both the organs and agents of (State) public power, and the individuals themselves (in the inter-individual relations)” in a vertical dimension.²⁸ Hence, the duty to comply with international human rights standards that are peremptory and *erga omnes* norms, such as the prohibition of arbitrary detention, rests with all bodies and representatives of the State, all officials, including judges, prosecutors, police and security officers, and prison officers with relevant responsibilities, and all other natural and legal persons.²⁹

78. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the case to: the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Special Rapporteur on violence against women, its causes and consequences, and Special Rapporteur on the Independence of Judges and Lawyers, and requests the Government to translate and publish the present Opinion.

Disposition

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

The deprivation of liberty of Leila Norma Eulalia Josefa De Lima, being in contravention of articles 2, 7, 9, 10, 11, 12 and 21 of the Universal Declaration of Human Rights and articles 2, 3, 9, 14, 17, 25 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

80. The Working Group requests the Government of the Philippines to take the steps necessary to remedy the situation of Ms. De Lima 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.

81. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Ms. De Lima immediately and accord her an enforceable right to compensation and other reparations, in accordance with international law, including her reinstatement in the positions from which she was ousted.

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

83. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on violence against women, its causes and consequences and the Special Rapporteur on the independence of judges and lawyers.

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

comment k, listing (a) genocide; (b) slavery or slave trade; (c) the murder or causing the disappearance of individuals; (d) torture or other cruel, inhuman, or degrading treatment or punishment; (e) prolonged arbitrary detention; and (f) systematic racial discrimination as definitive peremptory norms.

²⁸ See Inter-American Court of Human Rights, *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03 of 17 September 2003, requested by the United Mexican States, Concurring Opinion of Judge A.A. Cançado Trindade, paras. 74–85, at para. 77. Available at www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf.

²⁹ See, for example, opinions No. 40/2018, para. 49; No. 94/2017, para. 73; No. 91/2017, para. 102; No. 83/2017, para. 90; No. 76/2017, para. 85; and No. 1/2016, para. 43.

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. De Lima has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Ms. De Lima;
- (c) Whether an investigation has been conducted into the violation of Ms. De Lima's rights and, if so, the outcome of the investigation;
- (d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of the Philippines 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 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.

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.³⁰

[Adopted on 24 August 2018]

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