

**OPINION No. 39/2005 (CAMBODIA)**

**Communication: addressed to the Government on 15 June 2005.**

**Concerning: Mr. Channy Cheam.**

**The State is a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 38/2005.)
2. The Working Group conveys its appreciation to the Government of Cambodia for having forwarded the requisite information.
3. (Same text as paragraph 3 of Opinion No. 38/2005.)

4. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. The Working Group transmitted the reply provided by the Government to the source and received its comments.

5. The Working Group believes that it is in a position to render an Opinion on the facts and circumstances of the cases, in the context of the allegations made and the response of the Government thereto, as well as the observations by the source.

6. The source informed the Working Group that Mr. Channy Cheam, born on 15 February 1961, of Cambodian nationality, elected member of the Cambodian Parliament for the opposition Sam Rainsy Party, was arrested on 3 February 2005 and is currently being detained at the Toul Sleng National Military Prison in Phnom Penh by the National Military Police.

7. Mr. Cheam was reportedly stopped and arrested on a public road in central Phnom Penh by National Military Police officers under a warrant issued by a Military Public Prosecutor. Although as a member of the National Assembly Mr. Cheam is protected from arrest and prosecution, his immunity was removed by a two-thirds vote by the Assembly on 3 February 2005 and he was arrested a few hours later. Two other members of Parliament of the same Party also had their immunity removed but left the country the same day.

8. Mr. Cheam has been accused, along with other members of the Sam Rainsy Party, of organizing an illegal secret army, in contravention of Cambodian law. These allegations were first raised by the Prime Minister in a public speech in July 2004, long before Mr. Cheam's arrest, although Mr. Cheam was not named then personally. In the weeks following this speech, the Cambodian Military Court launched an investigation, which resulted in charges being brought against a number of members of the Sam Rainsy Party, including Mr. Cheam. Mr. Cheam and the Sam Rainsy Party have strongly denied these accusations and have claimed that the illegal secret army that they are accused of organizing is simply a shadow ministry, one of the several party committees that form the opposition "Government-in-waiting" structure. This party committee on defence and public security had been founded by Mr. Cheam in 2002 and chaired by him since then.

9. The source mentions that after the National Assembly voted to remove Mr. Cheam's parliamentary immunity on 3 February 2005, he was arrested on order of a Military Public Prosecutor, who issued an arrest warrant and a temporary detention warrant the same day. On 4 February 2005, a Military Court Investigating Judge issued a detention warrant on the accusations of charges including complicity in organized crime and fraud, in relation to the allegations of organizing a secret illegal army.

10. The source further mentioned that Mr. Cheam had been denied bail by both the Military Court on 11 February 2005 and the Appeals Court on 21 March 2005 on the grounds that he might flee the country or interfere with the investigation. Both courts have reportedly dismissed arguments raised that his arrest and detention by military jurisdiction is illegal and he has appealed this decision to the Supreme Court. It is reported that, in addition, several other procedural irregularities have taken place since the arrest of Mr. Cheam.

11. The source submitted that the process of removal of Mr. Cheam's parliamentary immunity was not carried out properly and that the leader of the Sam Rainsy Party and another member of Parliament of the same Party are living abroad for fear of arrest. It is alleged that the charges against Mr. Cheam, as well as his arrest and continued detention constitute a politically motivated attempt to silence a member of an opposition party.

12. The source also noted that on 7 February 2005, the United Nations Special Representative of the Secretary-General for Human Rights in Cambodia publicly raised concern about the removal of Mr. Cheam's parliamentary immunity, his arrest and the accusations he is facing.

13. In its comments the Government confirmed the factual allegations of the source as to the lifting of Mr. Cheam's parliamentary immunity and his subsequent arrest. The Government explained that Mr. Cheam faced a number of criminal proceedings against him. He had been charged by the Military Prosecutor for conspiring to set up an illegal armed force, in violation of the Regulation of the Co-Commander-General-in-Chief of the Cambodian Royal Armed Forces, together with Khom Piseth, an army captain, who had escaped abroad when the Military Court issued the arrest warrant.

14. Addressing the question as to why Mr. Cheam had been prosecuted and tried by a military jurisdiction, the Government explained that when a member of the military personnel and a civilian are accused together for the same offence, it is stipulated by law that the offence shall be under the competence of the military court. Therefore, although Mr. Cheam is a civilian, the offence falls under the jurisdiction of the military court.

15. The Government further indicated that the Court had rejected the request for bail for Mr. Cheam based on the evidence presented and because of the risk that he might flee the country or be an obstacle to the investigation. The Government further states that the evidence presented at Court and the testimonies of witnesses showed that Mr. Cheam had created an illegal structure of army personnel in the army, military police, navy, air force, engineering corps, illegally promoted army commanders and recruited soldiers. In particular, he had illegally organized the military structure of military region 5 (located in Battambang and Banteay Meanchy provinces near the border with Thailand) by appointing such personnel as experts, chief and deputy chief of staff and heads of various bureaux. These persons who were illegally recruited into the military structure had to pay fees according to their ranks and files to Mr. Cheam and his accomplice Khom Piesh. For this offence, Mr. Cheam had been accused of fraud.

16. The Government claimed that evidence presented at Court showed that he had attempted to hide his actions before the national and international opinion, but that in fact he had organized real forces in the military units in order to search and collect secret military information, with the aim of destroying the Armed Forces.

17. The Government informed the Working Group that Mr. Cheam's hearing had been opened on 8 August 2005 by the Phnom Penh Military Court in relation to the above-mentioned charges. On 9 August, he was found guilty of fraud and of illegally organizing armed forces, and was sentenced by the same court to a seven-year prison term.

18. In its comments on the observations of the Government the source put forward two arguments to support that the deprivation of liberty of Mr. Cheam was arbitrary.

19. First it asserted that the Decree-Law 5 on the Organization of Military Court (1981), referred to by the Government as a legal basis for the jurisdiction of military courts against Mr. Cheam is null and void, as it had been abrogated by two more recent laws: the Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period (1992); and the Law on the Organization and Activities of the Adjudicative Courts of the State of Cambodia (1993). Both laws clearly exclude civilians from military courts jurisdictions. The relevant legal texts submitted by the source are reproduced in the annex to this chapter.

20. Secondly, the source set out several serious procedural flaws during trial. It asserted that lawyers for the defence had been prevented from questioning all witnesses for the prosecution, they had not been allowed to call their own witnesses, and their questioning of the defendant had been interrupted for no apparent reason.

21. For purpose of expediency, the Working Group wishes to concentrate its attention on the allegation that the condemnation by a military tribunal of Mr. Cheam, who is a civilian, gave his deprivation of liberty an arbitrary character.

22. The Working Group was satisfied by the convincing arguments of the source, which were supported by legal texts, that under the laws of Cambodia the military tribunal did not have jurisdiction to adjudicate in Mr. Cheam's case.

23. Article 14 (1) of the International Covenant on Civil and Political Rights provides that in the determination of any criminal charge against a person everyone shall be entitled to a fair and public hearing by a *competent*, independent and impartial tribunal established by law (*emphasis added*). The rationale of this provision, which is one of the cornerstones of fair proceedings, is that the trust and confidence in the justice system require a stable regulation of competence and that the authority shall not interfere with the administration of justice arbitrarily modifying or removing the rules on the courts' competence.

24. On that basis, the Working Group renders the following Opinion.

The deprivation of liberty of Mr. Channy Cheam is arbitrary being in contravention of article 14 of the International Covenant on Civil and Political Rights, and falls under category III of the categories applicable to the consideration of cases submitted to the Working Group.

25. Consequent upon the Opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation of Mr. Channy Cheam.

Adopted on 25 November 2005.

## **Annex**

1. Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period (1992) (known as the “UNTAC law”, which is the penal code currently in force in Cambodia and under which Mr. Cheam Channy was convicted).

Article 11 (“Military Tribunals”) of this law states:

“Military tribunals have jurisdiction only over military offences. Military offences are those involving military personnel, whether enlisted or conscripted, and which concern discipline within the armed forces or harm to military property. All ordinary offences committed by military personnel shall be tried in civilian courts”.

Article 73 (“Abrogation of Inconsistent Rules”) states:

“Any text, provision, or written or unwritten rule which is contrary to the letter or the spirit of the present text is purely and simply nullified”.

2. The Law on the Organization and Activities of the Adjudicative Courts of the State of Cambodia (1993), article 9 (“Military Court”) states:

“The military court shall have competence to adjudicate and shall be subjected to appeals for those cases of military offences. Military offences are those committed by military members in the army and which are concerned with military discipline or affect properties of military armed forces. In cases where a military member committed a normal criminal offence, he/she shall be prosecuted by the provincial/municipal court”:

Further, Article 24 (“Final Provision”), states:

“Any provision which stated otherwise contrary to this law, shall be repealed”: