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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-seventh session, 27 April–1 May 2020

Opinion No. 15/2020 concerning Phan Kim Khanh (Viet Nam)

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 (A/HRC/36/38), on 5 November 2019, the Working Group transmitted to the Government of Viet Nam a communication concerning Phan Kim Khanh. The Government replied to the communication on 5 February 2020. Viet Nam 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. Phan Kim Khanh is a 26-year-old citizen of Viet Nam. He is a student and a blogger. He usually resides in Phu Tho Province, Viet Nam.

5. Prior to his arrest, Mr. Phan had been studying at Thái Nguyên University, where he was active in student life, including through the university's student association. Mr. Phan also worked as the head of the marketing department for OTVINA Software, a software company in Thái Nguyên. According to the source, Mr. Phan posted articles and news stories on social media to report on corruption and advocate for democracy, military depoliticization, free elections and press freedom. He had no prior criminal record.

Arrest, pretrial detention and trial proceedings

6. On 21 March 2017, representatives of the Investigation Security Agency of the Thái Nguyên Provincial Police, allegedly acting upon a report made by a citizen, came to Mr. Phan's workplace and conducted an inspection of Mr. Phan's office, searching his laptop and seizing various personal objects and documents. On the same day, investigators conducted an inspection of Mr. Phan's residence, where they confiscated personal items, letters and other documents. The examination of Mr. Phan's laptop revealed that he had helped to administer two websites, two Facebook accounts, three Facebook pages, two YouTube accounts and five email accounts. The Investigation Security Agency determined that the contents of those accounts contained articles, comments, pictures and videos that constituted "propaganda against the Socialist Republic of Viet Nam". While most of the accounts are no longer public and cannot be located, the exception is the Corruption Report website, which appears to be a professional or semi-professional blog that posts articles about politics, the economy and the environment.

7. Also on 21 March 2017, Mr. Phan was arrested at his office. The source alleges that he was never presented with a search warrant and was not informed of the charges against him. His family was sent a copy of an emergency arrest warrant for Mr. Phan after his arrest. On 22 March 2017, Mr. Phan was formally charged with violating article 88 (a) and (c) of the Penal Code of Viet Nam of 1999, which prohibits propagating, distorting or defaming the Government, as well as producing, storing or circulating documents with contents against the Government.

8. On 28 March 2017, the Investigation Security Agency issued Decision No. 3, requesting the Ministry of Information and Communications to assess the content of 11 articles found on Mr. Phan's computer to identify "signs of propaganda against the Government" and use of "abusive speech and defaming the reputation of the leaders of the party and the Government". On 22 May 2017, the Ministry issued its assessment, claiming that each of the 11 articles contained propaganda against the Government, although it was only able to determine that one of the articles had actually been written by Mr. Phan.

9. Mr. Phan was held in pretrial detention for seven months before his trial took place on 25 October 2017. The source alleges that the court never held a bail hearing or issued a ruling that Mr. Phan should remain in prison and that he never appeared before a judge until the trial. Throughout most of his pretrial detention, Mr. Phan was held incommunicado. He was not allowed to see his family until the day of his trial and was not permitted to speak with his lawyer until 20 September 2017. Prior to that time, the Investigation Security Agency refused to grant Mr. Phan's lawyer a defence counsel certificate.

10. On 10 April 2017, Mr. Phan's lawyer received a handwritten document allegedly from Mr. Phan in which he "confessed" to the charges and refused the assistance of defence counsel. However, the police reportedly threatened Mr. Phan during his detention and advised him to admit his guilt in order to receive a reduced sentence. According to the source, Mr. Phan's lawyer was not allowed to speak with him before the confession was obtained, or for several months thereafter. Mr. Phan later complained that he had been verbally threatened by police. International human rights organizations have noted that it is common in Viet Nam for confessions to be fabricated or coerced by the police. On 4 May 2017, the government-run news outlet reported that Mr. Phan had "acknowledged the crime of conducting activities against the Socialist Republic of Viet Nam" and reported that the websites that Mr. Phan had created were managed by "terrorist organizations and some foreign reactionary

organizations”. Once Mr. Phan’s lawyer was able to speak with him in prison – six months after his arrest – contact was limited to an hour at a time, and all conversations between Mr. Phan and his lawyer were monitored by the police.

11. On 28 August 2017, over five months after Mr. Phan’s arrest, the prosecutor issued a sentencing report, recommending charges under article 88 of the Penal Code. On 25 October 2017, Mr. Phan was tried in the People’s Court of Thái Nguyên Province and, after only a four-hour hearing, was convicted of the crime of conducting propaganda against the Government, under article 88 of the Penal Code. Only one member of Mr. Phan’s family was allowed to attend the trial, and other family members were turned away. The source alleges that there was strict security at the trial to prevent Mr. Phan’s family, friends and activists from attending. The evidence cited by the Court in support of Mr. Phan’s conviction included the websites, articles and social media posts found on his computer. The Court also cited Mr. Phan’s online communications with other political bloggers imprisoned for posting “propaganda”, as well as members of the Việt Tân, a pro-democracy organization based in the United States of America. According to the source, Mr. Phan admitted in court to running the blogs, but said that his main purpose was to fight corruption. In its judgment, the Court stated, *inter alia*, that Mr. Phan had joined an online training programme to learn about “the left-wing media” and “non-violent resistance”, which had the purpose of “gaining experience of setting up propaganda against the Government using the media”.

12. Following the four-hour trial, Mr. Phan was convicted and sentenced to six to seven years’ imprisonment and three to four years’ house arrest. After the conviction, Mr. Phan was returned to prison in Thái Nguyên and was not allowed to have any contact with his lawyer or family. On 10 January 2018, he was transferred to a prison in Ha Nam Province, although his family was not notified until they received a letter from him.

13. Mr. Phan sought to appeal his conviction a few days after he was convicted, but prison officials refused to submit his appeal. In February 2019, Mr. Phan submitted a complaint questioning why the authorities had not submitted his appeal. Since he submitted the complaint, the prison authorities have mistreated Mr. Phan and threatened to put him in solitary confinement or to withhold supplies if he does not stop seeking to challenge his conviction. Mr. Phan’s health has deteriorated, and there are concerns that his life may be in danger.

Analysis of violations

14. The source submits that Mr. Phan’s detention is arbitrary under categories I, II and III.

Category I

15. Article 9 (3) of the Covenant calls for anyone arrested or detained on a criminal charge to be brought promptly before a judge or other officer authorized to exercise judicial power. The obligation for a habeas corpus hearing “without delay” is reiterated in article 9 (4) of the Covenant. Incommunicado detention is an inherent violation of article 9 (3) of the Covenant.¹ The prohibition against incommunicado detention is also articulated in principle 15 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

16. Mr. Phan was arrested on 21 March 2017 and was not brought before a judge to confirm the legal basis of his arrest. Mr. Phan’s indictment was not issued until 28 August 2017, and the court never held a hearing or made an individualized determination regarding his arrest or continuing pretrial detention. The first time that Mr. Phan had access to a judge was at his trial on the merits on 25 October 2017, seven months and four days after his arrest. During the first six months of his detention, Mr. Phan was held incommunicado, and he was not permitted to receive any family visits during his detention. He was allowed to see his lawyer only on 20 September 2017, a month before his trial. As a result, there was no legal basis for Mr. Phan’s detention because he was held without access to the outside world for over six months and never given an opportunity to challenge the legality of his arrest and detention.

¹ Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, para. 35.

17. Article 11 (2) of the Universal Declaration of Human Rights and article 15 (1) of the Covenant guarantee individuals the right to know what the law is and what conduct is in violation of the law. Any substantive grounds for arrest or detention must be prescribed by law and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application.² Article 88 of the 1999 Penal Code defines the crime of “conducting propaganda” so vaguely as to make it impossible to reasonably foresee what behaviour is criminal.

Category II

18. Mr. Phan’s detention is the result of his exercise of the freedoms of opinion, expression and association guaranteed by the Universal Declaration of Human Rights and the Covenant. Furthermore, none of the restrictions enumerated in articles 19 (3) and 22 (2) of the Covenant apply to his prosecution.

19. The authorities detained Mr. Phan as a direct result of his speech in his capacity as a citizen journalist. The charge of “conducting propaganda” under article 88 of the Penal Code is in violation of an individual’s freedom of expression, because it vaguely criminalizes a broad range of speech and information-sharing acts. Whether the underlying factual allegations are true or not, the authorities have therefore deprived Mr. Phan of his liberty under a law which is itself incompatible with the freedom of expression guaranteed by article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant.

20. Mr. Phan was specifically targeted for his independent reporting, and his detention is in violation of his right to freedom of expression, both *de jure* and *de facto*. Mr. Phan posted articles on blogs and social media pages to report on instances of corruption and advocated for plural democracy, military de-politicization, free elections and press freedom. Many of the documents presented at trial were writings that Mr. Phan had collected and published as a citizen journalist in order to share them with others. His arrest, conviction and lengthy sentence was an attempt by the Government to silence and punish him for sharing pro-democracy and anti-corruption information as an independent reporter. Mr. Phan’s detention for his critical expression also corresponds to the Government’s well-documented pattern of silencing journalists through arbitrary detention.

21. Contrary to international standards, the authorities have criminalized and imprisoned individuals for associating with other journalists and political organizations, as evidenced by the treatment of Mr. Phan’s communications with bloggers and Việt Tân members. The court stated in its judgment that Mr. Phan “connected with some members of the ‘Việt Tân’, an organization whose principle is to abolish the Communist Party and socialism in Viet Nam, and this organization has its headquarters overseas”. Although Mr. Phan has the right to associate with political groups of his choice and express his political opinions through such organizations, the Government has punished him on the basis of his involvement with groups that are critical of the Government. The authorities have violated Mr. Phan’s right to freedom of association contrary to article 20 (1) of the Universal Declaration of Human Rights, article 22 (1) of the Covenant and article 25 of the Constitution of Viet Nam.

22. The Government’s restriction of Mr. Phan’s freedom of expression and association was not for a proper purpose. Although the Government claimed that his detention was based on “conducting propaganda”, none of Mr. Phan’s reports or online postings called directly or indirectly for violence or could reasonably be considered as a threat to national security, public order, public health or morals or the rights or reputations of others. Rather, the authorities used the veil of “conducting propaganda” as a pretext to silence criticism, which is not an acceptable purpose under article 19 (3) of the Covenant. On the contrary, political discourse, journalism and discussion of human rights are explicitly recognized as protected speech.³

Category III

23. For more than seven months between his arrest on 21 March 2017 and his trial on 25 October 2017, Mr. Phan was not once brought before a judge to determine the legality of his

² Ibid., para. 22.

³ Human Rights Committee, general comment No. 34 (2011) on the freedoms of opinion and expression, para. 11.

detention. Although the Ministry of Information and Communications did not issue its determination regarding whether the postings constituted propaganda until 22 May 2017 and Mr. Phan was not formally indicted until 28 August 2017, Mr. Phan was detained without access to his family or a lawyer throughout that period. There was no bail hearing or publicly released individualized determination made about why such an extended pretrial detention was proper. Mr. Phan's entire pretrial detention was not authorized by a judicial officer. By refusing to bring Mr. Phan promptly before a judge, and by denying him release pending trial, the authorities violated article 9 (3) and (4) of the Covenant and principles 11, 32 and 37 to 39 of the Body of Principles.

24. Mr. Phan was held incommunicado for over six months after his arrest in March 2017. His lawyer was able to see him only one month before the trial, and his family was prohibited from meeting with him during his pretrial detention. The authorities violated Mr. Phan's right to be visited by his family and to communicate with the outside world, contrary to principle 19 of the Body of Principles and rules 43, 58 and 106 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).

25. In addition, more than seven months elapsed before Mr. Phan was tried. During that time, he was held in custody at the Thái Nguyên Provincial Police detention centre. The authorities did not provide any explanation as to why Mr. Phan's case necessitated such a delay, nor does it seem that any such circumstances existed. The need for trial without undue delay was exacerbated by the fact that Mr. Phan was never given a bail hearing and was forced to remain in detention for seven months before his trial. The authorities thereby violated article 14 (3) (c) of the Covenant, principle 38 of the Body of Principles and article 31 of the Constitution of Viet Nam.

26. Mr. Phan was also deprived of his right to communicate with counsel and to prepare a defence. He was held incommunicado for six months after his arrest and was not permitted access to a lawyer or his family. The Investigation Security Agency refused to grant Mr. Phan's lawyer a defence counsel certificate for the first six months that Mr. Phan was detained prior to trial. He was not able to communicate with his lawyer or plan a defence until he met with his lawyer for the first time on 20 September 2017, one month before the trial. Although the Government asserts that Mr. Phan refused the assistance of counsel, his alleged refusal was not communicated directly between Mr. Phan and the lawyer, but instead through communications sent from the court. Given that Mr. Phan never publicly announced his desire to reject counsel or spoke with his lawyer about that decision, the credible allegations that Mr. Phan was threatened and coerced to confess, and the pattern of Viet Nam commonly denying the assistance of counsel to defendants, it is highly likely that Mr. Phan's "refusal" of legal services was involuntary or the result of undue pressure. The authorities violated article 14 (3) (b) and (d) of the Covenant, principle 18 of the Body of Principles, rule 119 of the Nelson Mandela Rules and article 31 of the Constitution of Viet Nam.

27. Moreover, before the trial hearing, when Mr. Phan was allowed to meet with counsel, the meetings were all held in the presence of prison authorities and were limited to one hour's duration, without justification. The authorities have violated, and continue to violate, article 14 (3) (b) of the Covenant and principle 18 (3) of the Body of Principles.

28. Mr. Phan was coerced into confessing to running blogs that were critical of the Government. While in detention, the Investigation Security Agency threatened Mr. Phan and offered a reduced sentence in exchange for a confession, both of which impaired Mr. Phan's decision-making capacity. The authorities exerted further pressure on Mr. Phan to sign a confession by holding him incommunicado for six months. Moreover, the Government widely publicized Mr. Phan's "guilt" months before his conviction, by broadcasting his confession over government-run media. By threatening and coercing Mr. Phan to confess, the authorities violated article 14 (3) (g) of the Covenant, principle 21 (1) of the Body of Principles and article 60 (2) of the Criminal Procedure Code of Viet Nam. By publicly releasing a statement that Mr. Phan had admitted his guilt, the authorities treated Mr. Phan's guilt as a foregone conclusion prior to his trial, violating his right to the presumption of innocence under article 11 (1) of the Universal Declaration of Human Rights, article 14 (2) of the Covenant, principles 21 (1) and 36 (1) of the Body of Principles, article 31 (1) of the Constitution of Viet Nam and article 13 of the Criminal Procedure Code of Viet Nam.

29. Mr. Phan's trial was neither fair nor public, and there was no legitimate reason to treat his case as one requiring a closed hearing. Although Mr. Phan was permitted to speak in his defence, the duration of his trial was short. The entire trial, which resulted in a lengthy six-

year prison sentence, lasted only four hours, suggesting that the court did not fairly consider all evidence and that the trial was used to give a legal imprimatur to the Government's persecution of Mr. Phan. Only one of Mr. Phan's family members was permitted to enter the courtroom, and others were forbidden from entering. Although article 14 (1) of the Covenant does allow for a closed hearing, there was nothing in the court's consideration of Mr. Phan's conduct that would threaten morals, public order, national security, his private life or the interests of justice. In fact, the court never attempted to provide a justification for holding a closed trial. By preventing Mr. Phan from presenting his case fully and from challenging the prosecution's evidence and by refusing to hold a public trial, the authorities denied his rights to a fair and public trial and to challenge the evidence against him, in violation of articles 7 and 10 of the Universal Declaration of Human Rights, article 14 (1) and (3) (e) of the Covenant and articles 31 and 103 of the Constitution of Viet Nam.

30. In addition, Mr. Phan submitted a formal petition to appeal his conviction, but officials in the detention centre did not forward the petition to the appellate court and forced him to abandon his appeal. Neither the detention centre nor the appellate court has acknowledged Mr. Phan's petition, and they have refused to provide his family with any acknowledgement. Mr. Phan has been threatened with solitary confinement if he does not cease his attempts to appeal his conviction. By denying Mr. Phan a genuine review of his case and a reasoned appeal of the charges against him, the authorities violated article 14 (5) of the Covenant.

31. The source concludes by arguing that Mr. Phan was subjected to cruel, inhuman or degrading treatment by law enforcement authorities during his pretrial and post-trial detention. Before his trial, Mr. Phan was threatened by interrogators in order to obtain his confession. He continues to suffer threats, abuse and mistreatment following his conviction, and his life may be in danger.

Response from the Government

32. On 5 November 2019, the Working Group transmitted the source's allegations to the Government under its regular communication procedure, requesting the Government to provide detailed information by 6 January 2020 about the current situation of Mr. Phan.

33. On 2 January 2020, the Government requested an extension of the deadline for response. The extension was granted, with a new deadline of 6 February 2020.

34. In its response of 5 February 2020, the Government denied the source's allegations, noting that the authorities had arrested and tried Mr. Phan with full respect for the legal process set out in Vietnamese law and consistent with international conventions to which Viet Nam was party.

35. On 25 October 2017, the People's Court of Thái Nguyên Province tried and sentenced Mr. Phan to six years' imprisonment for "conducting propaganda against the State of Viet Nam", under article 88 of the Penal Code. On 10 January 2018, Mr. Phan was transferred to Nam Ha Prison in Ha Nam Province to serve his sentence. His health status is normal.

36. Since 2013, Mr. Phan used social media to communicate and exchange information with members of the terrorist organization Việt Tân and created a number of websites and directly edited and posted articles, photos and video clips criticizing, distorting and slandering the laws and policies of the State and sowing public confusion. His activities on social media and the Internet defamed public institutions, libelled leaders of the State, misrepresented the socioeconomic environment and disrupted social stability. In addition, Mr. Phan conspired with others to incite people to overthrow the Government, posing a threat to social stability and national security. Mr. Phan admitted to the charge under article 88 of the Penal Code during his trial.

37. On 21 March 2017, the Thái Nguyên Provincial Police executed Emergency Arrest Warrant No. 1 against Mr. Phan for the charge under article 88 and informed his family and the local administration where he resided of the arrest. The arrest followed a series of steps set out by law: (a) Mr. Phan was read the charge and the arrest warrant was explained to him, which was witnessed by members of the community and local administration; and (b) the arrest minutes were signed by all relevant parties, including Mr. Phan. On 22 March 2017, the police commenced the criminal prosecution of Mr. Phan, filed charges and executed a temporary detention order against him. The warrants and orders were approved by the People's Procuracy of Thái Nguyên Province before being executed.

38. Mr. Phan took part in editing and posting documents with the intention of overthrowing the State, disrupting social order and distorting policies and laws of the State. His illegal conduct did not involve the exercise of the freedom of speech, but was an abuse of that right. Mr. Phan attended meetings and received financial support from Việt Tân to conduct anti-State propaganda and misinformation campaigns. Việt Tân has sent people and weapons to Viet Nam to provoke public riots and incite hatred. Recently, Việt Tân has continued anti-State activities, including resisting public officers on duty and destroying property. That conduct cannot be justified as an exercise of the freedom of association. In Viet Nam, no one is arrested, prosecuted or tried for exercising fundamental freedoms. Mr. Phan was arrested and tried for violating Vietnamese laws.

39. The Constitution of Viet Nam protects the rights to freedom of speech and freedom of the press, the right to access to information, the right to association and the right to demonstrate. The Government refers to the protections provided by articles 14 (2) and 15 (4) of the Constitution. Article 88 of the Penal Code does not limit freedom of expression but criminalizes deliberate attempts to fool people with false information. That is compatible with articles 19 (3), 21 and 22 (2) of the Covenant.

40. Mr. Phan was not subjected to incommunicado detention, torture, harsh treatment or forced confession. During his custody and detention, Mr. Phan was entitled to prescribed allowances for food, clothing and general living conditions. Like other detainees, he is guaranteed his rights to receive family visits, make telephone calls and receive medical care. During his time in custody and detention, he has not lodged any complaint about a violation of his rights.

41. According to article 22 (4) of the Law on Custody and Temporary Detention of 2015, if family visits are deemed detrimental to the resolution of a criminal case, the authorities may deny such visits to persons in temporary detention. Mr. Phan's family was promptly notified of that. After Mr. Phan was transferred to Nam Ha Prison, his family was notified of the transfer and, since then, he has had the right to receive family visits. He has met with his family on 17 occasions, sent six letters and made telephone calls to his family each month.

42. Mr. Phan's right to legal counsel was observed. During interrogations on 24 March 2017, Mr. Phan stated that he "for the time being, had no need for hiring a defence lawyer". He signed the interrogation minutes. On 7 April 2017, Mr. Phan wrote a letter to the Police Investigation Security Agency expressing his "refusal to hire a defence lawyer". On the basis of the laws governing criminal proceedings and Mr. Phan's own request, the Agency did not grant permission for defence lawyers to participate in the proceedings.

43. On 30 August 2017, upon receiving requests for defence lawyers from Mr. Phan's family and a local law firm, the People's Court of Thái Nguyên Province issued defence permission to the law firm. The regulations on access to legal counsel for persons in temporary detention allow for unlimited meetings with counsel, provided that each meeting does not exceed one hour and that the meeting is monitored to prevent the detainee from escaping and the transfer of prohibited objects. However, the content of discussions between the detainee and legal counsel is kept confidential, consistent with article 14 of the Covenant.

44. The trial on 25 October 2017 followed due process. The verdict and sentencing were decided on the basis of the evidence, interrogations and in-court oral arguments. The trial was attended by lawyers, witnesses, one of Mr. Phan's family members and other relevant parties. Mr. Phan was entitled to file an appeal within 15 days from the trial, but did not do so. The allegation that Mr. Phan was threatened and treated harshly before and after sentencing is not accurate.

Additional comments from the source

45. In relation to the Government's assertion that no one is arrested, prosecuted or tried in Viet Nam for exercising fundamental freedoms, in previous opinions, the Working Group has documented the crackdown against online activists and bloggers who disagree with the authorities.

46. The Government failed to demonstrate that it complied with article 9 (3) of the Covenant. The Government also failed to refute the allegation that Mr. Phan was held incommunicado during the first six months of his detention and following his trial, including when he was attempting to file an appeal. The justification for restricting family visits is

inconsistent with Mr. Phan's alleged confession and purported refusal to engage a lawyer. Furthermore, the Government does not address the allegation that article 88 of the Penal Code is vague, and did not present any evidence that Mr. Phan's conduct falls within the public order exceptions under the Covenant.

47. Mr. Phan was coerced into making a confession. Notably, the Government did not provide the records of the interrogation conducted on 24 March 2017. The Government asserts that Mr. Phan refused a lawyer three days after his arrest, but fails to explain why he was not provided a lawyer immediately upon arrest. Moreover, the Government violated the right to confidentiality with counsel, because any monitoring of meetings between a detainee and counsel is contrary to article 14 of the Covenant. The Government also failed to address several allegations under category III.

Discussion

48. The Working Group thanks the source and the Government for their submissions.

49. In determining whether Mr. Phan's detention 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 the international law constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations (A/HRC/19/57, para. 68).⁴

50. The source reports that, on 21 March 2017, the Thái Nguyên Police Investigation Security Agency came to Mr. Phan's workplace, conducted an inspection of his office and seized various documents. According to the source, the investigators also inspected Mr. Phan's residence, where they confiscated personal items and documents. On the same day, Mr. Phan was arrested at his office. The source alleges that Mr. Phan was never presented with a search warrant and that his family was sent a copy of an emergency arrest warrant after his arrest. In its response, the Government states that, on 21 March 2017, the Thái Nguyên Provincial Police executed Emergency Arrest Warrant No. 1 against Mr. Phan and informed his family and the local administration where he resided of the arrest. Mr. Phan was read the charge and the arrest warrant was explained to him, which was witnessed by the local administration. The arrest minutes were signed by all relevant parties, including Mr. Phan. The warrant was approved by the People's Procuracy of Thái Nguyên Province before being executed.

51. The Working Group considers that the source has presented a credible *prima facie* case that the authorities did not present an arrest warrant at the time of Mr. Phan's arrest. That allegation has not been rebutted by the Government. The Government did not provide an explanation to the Working Group regarding the nature and content of an emergency arrest warrant and the circumstances in which it would be executed. The Government also did not explain the content of the minutes of arrest. Moreover, in a series of recent cases, the Working Group has found that an arrest warrant was not presented at the time of the arrest, suggesting that the source's claims are credible.⁵

52. The Government did not address the source's allegation that no search warrant was presented to Mr. Phan, even though his office and residence were searched and items confiscated. The Working Group has found detention to be arbitrary when evidence obtained

⁴ The Government annexed to their response 10 documents in Vietnamese, which is not one of the Working Group's three working languages. The Government was requested to translate the annexes into English. On 5 February 2020, the Government provided the following list of the documents in English, but did not translate their content: (i) emergency arrest warrant; (ii) minutes of arrest; (iii) notice of emergency arrest; (iv) custody decision; (v) criminal prosecution decision; (vi) criminal charges decision; (vii) temporary detention order; (viii) notice of criminal prosecution and temporary detention; (ix) request for not hiring defence lawyers; and (x) decision sanctioning criminal charges.

⁵ Opinions No. 45/2019, para. 50; No. 44/2019, para. 51; No. 9/2019, para. 29; No. 8/2019, para. 49; No. 46/2018, para. 48; No. 45/2018, para. 40; No. 36/2018, para. 39; No. 35/2018, para. 26; and No. 75/2017, para. 35.

without a search warrant is used in court proceedings.⁶ The source alleges, and the Government does not deny, that evidence cited by the court in support of Mr. Phan's conviction included articles, social media posts and communications with other bloggers and Việt Tân members found on his computer. That evidence should not have been used against Mr. Phan, because it was improperly obtained, without a search warrant, and cannot form the legal basis of a decision to detain him. According to article 9 (1) of the Covenant, no one shall be deprived of liberty except on such grounds and in accordance with such procedure as are established by law. Mr. Phan was arrested without an arrest warrant⁷ and his possessions confiscated without a search warrant. His right to freedom from arbitrary arrest and detention under article 9 (1) of the Covenant was violated.

53. The source further alleges that Mr. Phan was arrested on 21 March 2017 and was not brought before a judge to confirm the legal basis of his arrest. His indictment was not issued until 28 August 2017, and a court did not make a determination regarding Mr. Phan's detention. The first time that Mr. Phan had access to a judge was at his trial on 25 October 2017. In its response, the Government states that, on 22 March 2017, the Thái Nguyên Provincial Police executed a temporary detention order against Mr. Phan, which was approved by the People's Procuracy.

54. It is clear from the Government's response that Mr. Phan was not brought promptly before a judicial authority to challenge his detention. Although the Government states that the detention order was approved by the People's Procuracy, the Working Group has consistently found that the Procuracy is not an independent judicial authority and does not satisfy the criteria of article 9 of the Covenant.⁸ Mr. Phan was held for seven months and four days, from 21 March 2017 until his trial on 25 October 2017, without being brought before a court. According to the Human Rights Committee, 48 hours is ordinarily sufficient to bring an individual before a judicial authority, and any longer delay must remain absolutely exceptional and be justified under the circumstances.⁹ No such justification was presented by the Government. The Working Group finds that Mr. Phan was not brought promptly before a judicial authority, in violation of article 9 (3) of the Covenant.

55. In addition, the source alleges that Mr. Phan was held incommunicado at the Thái Nguyên Provincial Police detention centre for over six months following his arrest. Mr. Phan was not allowed to see his family until the day of his trial and was not permitted to speak with his lawyer until a month before his trial. The Government denies that Mr. Phan was held incommunicado, although it only refers to Mr. Phan receiving family visits after his conviction and subsequent transfer to Nam Ha Prison on 10 January 2018. The Government also asserts that Mr. Phan initially refused legal counsel and that permission for legal representation was granted by the court to his lawyer on 30 August 2017, a claim that is discussed further under category III below.

56. The submissions of both parties indicate that Mr. Phan did not have access to his family prior to his trial and did not meet with counsel before the end of August 2017. He was therefore held incommunicado for a prolonged period during his pretrial detention. As the Working Group and other human rights mechanisms have stated, holding persons incommunicado is in violation of their right to challenge the lawfulness of detention before a court under article 9 (3)¹⁰ and (4) of the Covenant.¹¹ Judicial oversight of detention is a

⁶ Opinions No. 33/2019, No. 31/2019, No. 83/2018, No. 78/2018 and No. 36/2018. See also opinion No. 83/2019.

⁷ It is not sufficient that there is a law that authorizes the arrest. The authorities must invoke that legal basis and apply it through an arrest warrant: Opinions No. 45/2019, para. 51; No. 44/2019, para. 52; No. 46/2018, para. 48; and No. 36/2018, paras. 39–40.

⁸ E/CN.4/1995/31/Add.4, para. 57 (c); opinions No. 45/2019, para. 52; No. 44/2019, para. 53; No. 46/2018, para. 50; No. 35/2018, para. 37; and No. 75/2017, para. 48; and Human Rights Committee, general comment No. 35, para. 32. See also CCPR/C/VNM/CO/3, para. 26; and CAT/C/VNM/CO/1, paras. 24–25.

⁹ Human Rights Committee, general comment No. 35, para. 33.

¹⁰ Ibid., para. 35.

¹¹ Opinions No. 45/2019, 44/2019, 9/2019, 35/2018, 46/2017, 45/2017.

fundamental safeguard of personal liberty¹² and is essential in ensuring that detention has a legal basis. Given that Mr. Phan was unable to challenge his detention before a court, his right to an effective remedy under article 8 of the Universal Declaration of Human Rights and article 2 (3) of the Covenant was violated. He was also placed outside the protection of the law, in violation of his right to be recognized as a person before the law under article 6 of the Universal Declaration of Human Rights and article 16 of the Covenant.

57. Furthermore, according to article 9 (3) of the Covenant, pretrial detention should be the exception, not the rule, and should be ordered for as short a duration as possible.¹³ Liberty is recognized under article 9 (3) as a principle, and detention as an exception.¹⁴ Detention pending trial must be based on an individualized determination that it is reasonable and necessary, for such purposes as to prevent flight, interference with evidence or the recurrence of crime.¹⁵ In the present case, there appears to have been no individualized judicial review of Mr. Phan's situation or consideration of alternatives to detention. His pretrial detention was not properly constituted or reviewed and therefore had no legal basis.

58. The Working Group considers that the charge on which Mr. Phan was detained and ultimately convicted is so vague that it is impossible to invoke a legal basis for his detention. Mr. Phan was convicted of "conducting propaganda against the State" under article 88 of the Penal Code. The Working Group has raised the issue of prosecution under vague penal laws with the Government on several occasions, noting that article 88 does not satisfy the principle of legality.¹⁶ The principle of legality requires that laws be formulated with sufficient precision so that individuals can gain access to and understand the law and regulate their conduct accordingly.¹⁷ Mr. Phan could not have foreseen that posting articles on social media relating to corruption and democracy and communicating with other bloggers and organizations would amount to criminal conduct.

59. For those reasons, the Working Group finds that the Government failed to establish a legal basis for Mr. Phan's arrest and detention. His detention is therefore arbitrary under category I.

60. Furthermore, the source alleges that Mr. Phan has been deprived of his liberty as a result of peacefully exercising his rights to freedom of opinion and expression and freedom of association. The Government argues that Mr. Phan was arrested and tried for violating Vietnamese law, in particular article 88 of the Penal Code.

61. Article 88 prescribes a sentence of 3 to 12 years' imprisonment for anyone guilty of: (a) propagating against, distorting and/or defaming the people's administration; (b) propagating psychological warfare and spreading fabricated news in order to foment confusion among the people; or (c) making, storing and/or circulating documents and/or cultural products with contents against the State.

62. The Working Group has considered the application of article 88 in numerous opinions, finding that convictions under that provision for the peaceful exercise of rights cannot be regarded as consistent with the Universal Declaration of Human Rights or the Covenant.¹⁸ The Working Group came to a similar conclusion during its visit to Viet Nam in October

¹² Report of the Working Group on Arbitrary Detention on 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 (A/HRC/30/37), para. 3; and CAT/C/VNM/CO/1, para. 24.

¹³ A/HRC/19/57, sect. III.A.

¹⁴ Ibid., para. 54.

¹⁵ Human Rights Committee, general comment No. 35, para. 38.

¹⁶ Opinions No. 45/2019, para. 54; No. 9/2019, para. 39; No. 46/2018, para. 62; No. 36/2018, para. 51; No. 35/2018, para. 36; No. 79/2017, para. 54; No. 40/2016, para. 36; No. 45/2015, para. 15; No. 20/2003, para. 19; No. 13/1999, para. 12; No. 27/1998, para. 9; and No. 21/1997, para. 6. In relation to article 88 of the Penal Code, see opinions No. 44/2019, para. 55; No. 8/2019, para. 54; No. 75/2017, para. 40; No. 27/2017, para. 35; No. 26/2017, para. 51; No. 26/2013, para. 68; No. 27/2012, para. 41; and No. 24/2011, para. 24.

¹⁷ Opinion No. 41/2017, paras. 98–101. See also opinion No. 62/2018, paras. 57–59; Human Rights Committee, general comment No. 35, para. 22; and CCPR/C/VNM/CO/3, paras. 45–46.

¹⁸ Opinions No. 45/2019, No. 44/2019, No. 8/2019, No. 75/2017, No. 27/2017, No. 26/2017, No. 26/2013, No. 27/2012, No. 24/2011, No. 6/2010, No. 1/2009 and No. 1/2003; and A/HRC/41/7, paras. 38.73, 38.171 and 38.188.

1994, noting that vague national security offences do not distinguish between violent acts capable of threatening national security and the peaceful exercise of rights.¹⁹

63. In the present case, the source argues that Mr. Phan was targeted for his independent reporting as a blogger. His conviction was intended to punish him for sharing pro-democracy and anti-corruption information. The detention of Mr. Phan for his critical expression is part of the Government's well-documented pattern of silencing journalists through arbitrary detention. The Government has also punished Mr. Phan on the basis of his communication and association with bloggers and Việt Tân members who are critical of the Government.

64. The Government refers to criminal acts allegedly committed by Mr. Phan since 2013, including: (a) using social media accounts to exchange information with members of the Việt Tân; (b) creating websites and posting articles, photos and video clips criticizing, distorting and slandering the laws and policies of the State and sowing public confusion; and (c) defaming public institutions, libelling State leaders, misrepresenting the socioeconomic environment and disrupting social stability. In addition, Mr. Phan conspired with others to incite people to overthrow the Government, including by attending meetings and connecting with and receiving financial support from Việt Tân members.

65. Article 19 (2) of the Covenant provides that everyone has the right to freedom of expression; that right includes the 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 or her choice. That right also includes political discourse, commentary on public affairs, discussion of human rights and journalism.²⁰ It protects the holding and expression of opinions, including those which are not in line with government policy.²¹

66. The Working Group considers that Mr. Phan's conduct falls within the right to freedom of opinion and expression protected under article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant. Similarly, Mr. Phan engaged in advocacy relating to democracy and fighting corruption in Viet Nam and was detained for exercising his right to take part in the conduct of public affairs under article 21 of the Universal Declaration of Human Rights and article 25 (a) of the Covenant.²² Moreover, Mr. Phan was convicted for exercising his right to freedom of association under article 20 of the Universal Declaration of Human Rights and article 22 of the Covenant, given his communication with other bloggers and members of Việt Tân, an organization carrying out peaceful activities aimed at enhancing democracy.²³

67. There is nothing to suggest that the permissible restrictions on those rights set out in articles 19 (3), 22 (2) and 25 of the Covenant apply in the present case. Although the Government referred to articles 19 (3) and 22 (2), the Working Group was not convinced that prosecuting Mr. Phan was necessary to protect a legitimate interest under those provisions, nor that Mr. Phan's conviction and sentence were a proportionate response to his peaceful activities. Importantly, there is no evidence to suggest that Mr. Phan's writing, online postings and communications with others called directly or indirectly for violence or could reasonably be considered to threaten national security, public order, public health or morals or the rights or reputations of others. 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.²⁴ 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 and the Special Rapporteur on the rights to freedom of peaceful assembly and of association.

¹⁹ E/CN.4/1995/31/Add.4, paras. 58–60. See also CCPR/C/VNM/CO/3, para. 45 (d).

²⁰ Human Rights Committee, general comment No. 34, para. 11.

²¹ Opinions No. 8/2019, para. 55; and No. 79/2017, para. 55.

²² Citizens may take part in the conduct of public affairs by exerting influence through public debate. Human Rights Committee, general comment No. 25 (1996) on participation in public affairs and the right to vote, para. 8. Opinions No. 45/2019, No. 44/2019, No. 9/2019, No. 46/2018, No. 45/2018, No. 36/2018, No. 35/2018, No. 40/2016, No. 26/2013, No. 42/2012, No. 46/2011 and No. 13/2007.

²³ Affiliation with Việt Tân alone does not justify detention: opinions No. 45/2019, para. 61; No. 75/2017, para. 43; No. 27/2017, para. 36; No. 40/2016, para. 38; No. 26/2013, para. 67; and No. 46/2011, paras. 20–22.

²⁴ A/HRC/RES/12/16, para. 5 (p).

68. 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.²⁵ The source has demonstrated that Mr. Phan was detained for the exercise of his rights under the Declaration in promoting democracy and fighting corruption. The Working Group has determined that detaining individuals on the basis of their activities as human rights defenders is in violation of 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.²⁶

69. The Working Group concludes that Mr. Phan's detention resulted from the peaceful exercise of his rights to freedom of expression and association, as well as the right to take part in the conduct of public affairs, and that it was contrary to article 7 of the Universal Declaration of Human Rights and article 26 of the Covenant. His detention is therefore arbitrary under category II.

70. Given its finding that Mr. Phan's detention is arbitrary under category II, the Working Group emphasizes that no trial of Mr. Phan should have taken place. However, he was tried, convicted and sentenced on 25 October 2017. The information submitted by the source discloses violations of Mr. Phan's right to a fair trial during those proceedings.

71. The source argues that Mr. Phan was not afforded his right to be tried without undue delay, given that more than seven months elapsed between his arrest and trial. The reasonableness of any delay in bringing a case to trial must be assessed in the circumstances of each case, taking into account the complexity of the case, the conduct of the accused and the manner in which the matter was handled by the authorities.²⁷ The delay in bringing Mr. Phan to trial was unacceptably long, in violation of articles 9 (3) and 14 (3) (c) of the Covenant. The delay in the present case is exacerbated by the fact that Mr. Phan was not provided with a bail hearing and, as noted above, it is clear to the Working Group that he is, but should not have been, detained solely for the exercise of his rights under international human rights law.²⁸

72. In addition, the source alleges that Mr. Phan was deprived of his right to communicate with counsel and to prepare a defence, given that he met with his lawyer for the first time only on 20 September 2017, one month before his trial. The Investigation Security Agency refused to grant Mr. Phan's lawyer a defence counsel certificate for the first six months of Mr. Phan's detention. The source alleges that Mr. Phan's refusal of legal services was involuntary. In addition, when Mr. Phan was allowed to meet with counsel, the meetings were limited to one hour. The Government states that, on 24 March 2017, Mr. Phan refused a lawyer during questioning and that, on 7 April 2017, he wrote a letter to the police in which he again refused to hire a lawyer. According to the Government, on 30 August 2017, the court issued permission to a law firm to represent Mr. Phan. The Government notes that regulations allow for unlimited meetings with counsel, provided that each meeting does not exceed one hour and that the meeting is monitored to prevent the detainee from escaping and the transfer of prohibited objects. However, the content of the discussion is kept confidential.

73. Having examined the submissions from both parties, the Working Group considers that the source's version of events is credible. In two recent cases involving Viet Nam, the Working Group found that similar alleged refusals of counsel were implausible.²⁹ More generally, the Working Group has found that legal representation was denied or limited for

²⁵ General Assembly resolution 53/144, annex, articles 1 and 6 (c). See also General Assembly resolution 74/146, para. 12.

²⁶ Opinions No. 45/2019, No. 44/2019, No. 9/2019, No. 46/2018, No. 45/2018, No. 36/2018, No. 35/2018, No. 79/2017 and No. 75/2017.

²⁷ Human Rights Committee, general comment No. 35, para. 37; and general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 35.

²⁸ Opinion No. 46/2019, para. 63, in which the Working Group was not convinced that there was a category II violation and was unable to find that a 16-month delay before the trial was unreasonable.

²⁹ Opinions No. 44/2019, para. 72; and No. 46/2018, para. 64.

individuals facing serious charges, suggesting that there is a systemic failure to provide access to counsel during criminal proceedings in Viet Nam.³⁰

74. All persons deprived of their liberty have the right to legal assistance by the counsel of their choice at any time during their detention, including immediately after their apprehension, and such access must be provided without delay.³¹ The lack of legal assistance from the outset and the subsequent limitation of meetings to one hour violated Mr. Phan's rights to adequate time and facilities to prepare his defence, under article 14 (3) (b) of the Covenant, and to defend himself through legal assistance of his choosing, under article 14 (3) (d). Legal consultations may be within sight but not within hearing of the authorities, and all communications with counsel must remain confidential.³²

75. The source alleges that Mr. Phan was coerced by the authorities to confess to running blogs that were critical of the Government, including being threatened and offered a reduced sentence while he was being held incommunicado. According to the source, the Government also widely publicized Mr. Phan's confession over government-run media, which reported that the websites that Mr. Phan had created were managed by "terrorist organizations and some foreign reactionary organizations". The Government denies that Mr. Phan's confession was forced, noting that he signed the interrogation minutes and admitted to the charge at trial.

76. The burden is on the Government to prove that Mr. Phan's confession was given freely and without any direct or indirect physical or undue psychological pressure from the investigating authorities,³³ and it has not done so. As a result, the Working Group finds that Mr. Phan'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.³⁴ Furthermore, by releasing the statement in the media, the authorities violated Mr. Phan's right to the presumption of innocence, under article 14 (2) of the Covenant.³⁵

77. In addition, the source argues that Mr. Phan did not receive a public hearing. The Government states that the trial was attended by lawyers, witnesses, one of Mr. Phan's family members and other relevant parties. Given the conflicting versions of events, the Working Group is unable to reach a conclusion on that issue.

78. Furthermore, Mr. Phan's trial lasted only four hours. Even if, as the Government alleges, Mr. Phan had admitted his guilt, that was indeed a short hearing. Following the trial, a heavy penalty of six years' imprisonment and a term of house arrest was imposed. As the Working Group has observed,³⁶ a short trial for a serious criminal offence suggests that Mr. Phan's guilt had been determined prior to the hearing. That was a further denial of Mr. Phan's right to the presumption of innocence under article 14 (2) of the Covenant.

79. The source alleges that Mr. Phan submitted an appeal petition, but that the authorities in the Thái Nguyên detention centre did not forward it to the appellate court and that Mr. Phan has been threatened with solitary confinement if he does not cease his attempts to appeal. In its response, the Government states that Mr. Phan was entitled to file an appeal within 15 days after the trial, but did not do so. The Government denies that Mr. Phan was threatened, noting that he has not submitted any complaints. It appears from the Government's response that, following the trial, Mr. Phan only had access to his family after 10 January 2018 and not during the 15-day period for appeal. That suggests that the assistance of his family and

³⁰ Opinions No. 45/2019, No. 44/2019, No. 9/2019, No. 46/2018, No. 35/2018, No. 79/2017, No. 75/2017, No. 27/2017, No. 26/2017 and No. 40/2016.

³¹ United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (A/HRC/30/37, annex), principle 9 and guideline 8.

³² *Ibid.*; United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), rule 61 (1); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 18; and CCPR/C/VNM/CO/3, para. 36.

³³ Human Rights Committee, general comment No. 32, para. 41; and opinions 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).

³⁴ Opinions No. 14/2019, para. 71; No. 1/2014, para. 22; and No. 40/2012, para. 48; and E/CN.4/2003/68, para. 26 (e).

³⁵ Human Rights Committee, general comment No. 32, para. 30.

³⁶ Opinions No. 45/2019, No. 44/2019, No. 46/2018, No. 45/2018, No. 36/2018 and No. 75/2017.

lawyer was not available in ensuring that the appeal was filed. Moreover, given that Mr. Phan made significant attempts to challenge the case against him at trial, including through engaging legal counsel and by speaking in his defence, the Working Group considers it likely that he would have attempted to appeal his conviction and lengthy sentence. The Government is obliged to ensure that Mr. Phan's right to a review of his conviction and sentence by a higher tribunal is upheld in accordance with article 14 (5) of the Covenant.

80. The Working Group considers that the source has presented a *prima facie* case that Mr. Phan has experienced ill-treatment, in violation of article 5 of the Universal Declaration of Human Rights, article 7 of the Covenant and article 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Government denies that Mr. Phan has been subject to torture or ill-treatment, but provides no further information. The Working Group refers that case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

81. The Working Group concludes that the violations of the right to a fair trial are of such gravity as to give Mr. Phan's detention an arbitrary character under category III.

82. In addition, the Working Group considers that Mr. Phan was targeted because of his advocacy for democracy, free elections and press freedom and his attempts to combat corruption. There appears to be a pattern in Viet Nam of detaining human rights defenders for their work, and the present case is another such example.³⁷ Moreover, in the discussion above concerning category II, the Working Group established that Mr. Phan's detention resulted from the peaceful exercise of his rights under international law. When detention has resulted 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.³⁸

83. Mr. Phan was deprived of his liberty on discriminatory grounds, owing to his status as a human rights defender, and on the basis of his political or other opinion. His detention was in violation of 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 the present case to the Special Rapporteur on the situation of human rights defenders.

84. Mr. Phan was not permitted to contact his family before trial, in violation of his right to contact with the outside world under rule 58 (1) of the Nelson Mandela Rules and principles 15 and 19 of the Body of Principles. The Government asserts that family visits can be denied under Vietnamese law to persons in temporary detention if such visits are deemed detrimental to the resolution of a criminal case. However, it did not explain why such visits would be detrimental in Mr. Phan's case. The seven-month denial of access to his family did not meet the requirements of rule 43 (3) of the Nelson Mandela Rules that family contact may only be restricted for a limited time and as strictly required for maintaining security and order.

85. The Working Group is concerned about Mr. Phan's health, which is reportedly deteriorating, and that his life may be at risk. Although the Government states that Mr. Phan is in a normal state of health, the Working Group notes that he is allegedly subject to ongoing mistreatment and has been detained for over three years. The Working Group urges the Government to immediately and unconditionally release him and ensure that he receives medical care.

86. The present case is one of many cases brought before the Working Group in recent years concerning arbitrary detention in Viet Nam.³⁹ The cases follow a familiar pattern: arrest that does not comply with international norms; lengthy detention pending trial with no access to judicial review; denial of access to legal counsel; incommunicado detention; prosecution under vaguely worded criminal offences for the peaceful exercise of human rights; brief, closed trial at which due process is not observed; disproportionate sentencing; and denial of

³⁷ Opinions No. 45/2019, No. 44/2019, No. 9/2019, No. 46/2018, No. 45/2018, No. 36/2018, No. 35/2018, No. 79/2017, No. 75/2017 and No. 27/2017. See also CCPR/C/VNM/CO/3, para. 25.

³⁸ Opinions No. 59/2019, para. 79; No. 13/2018, para. 34; and No. 88/2017, para. 43.

³⁹ Opinions No. 45/2019, No. 44/2019, No. 9/2019, No. 8/2019, No. 46/2018, No. 45/2018, No. 36/2018, No. 35/2018, No. 79/2017, No. 75/2017, No. 27/2017, No. 26/2017, No. 40/2016, No. 46/2015 and No. 45/2015.

access to the outside world. That pattern indicates a systemic problem with arbitrary detention in Viet Nam which, if it continues, may amount to a serious violation of international law.⁴⁰

87. The Working Group would welcome the opportunity to work constructively with the Government to address arbitrary detention. A significant period has passed since its last visit to Viet Nam, in October 1994, and the Working Group considers that it is now an appropriate time to conduct another visit. On 11 June 2018, the Working Group reiterated earlier requests to the Government to undertake a country visit and will continue to seek a positive response.

Disposition

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

The deprivation of liberty of Phan Kim Khanh, being in contravention of articles 2, 6, 7, 8, 9, 10, 11, 19, 20 and 21 of the Universal Declaration of Human Rights and articles 2 (1) and (3), 9, 14, 16, 19, 22, 25 (a) and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

89. The Working Group requests the Government of Viet Nam to take the steps necessary to remedy the situation of Mr. Phan 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.

90. The Working Group considers that, taking into account all the circumstances of the case, in particular the risk of harm to Mr. Phan's health, the appropriate remedy would be to release Mr. Phan immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law. 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 Mr. Phan.

91. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary detention of Mr. Phan, including the allegations that he has been subject to threats and mistreatment, and to take appropriate measures against those responsible for the violation of his rights.

92. The Working Group requests the Government to bring its laws, in particular article 88 of the Penal Code (now article 117 of the revised Code), into conformity with the recommendations made in the present opinion and with the commitments made by Viet Nam under international human rights law.

93. 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 the rights to freedom of peaceful assembly and of association, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Special Rapporteur on the situation of human rights defenders, for appropriate action.

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

Follow-up procedure

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

⁴⁰ Opinion No. 47/2012, para. 22.

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Viet Nam with its international obligations in line with the present opinion;

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

96. 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.

97. 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.

98. 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.⁴¹

[Adopted on 1 May 2020]

⁴¹ Human Rights Council resolution 42/22, paras. 3 and 7.