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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-fourth session, 24 April to 3 May 2019

Opinion No. 8/2019 concerning Duy Nguyen Huu Quoc (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 33/30.
2. In accordance with its methods of work (A/HRC/36/38), on 8 January 2019 the Working Group transmitted to the Government of Viet Nam a communication concerning Duy Nguyen Huu Quoc. The Government submitted a response on 25 March 2019.
3. The State has been a party to the International Covenant on Civil and Political Rights since its accession on 24 September 1982. It is also worth noting that the State ratified the Convention against Torture and Other Cruel, Inhuman or Degrading or Punishment on 5 February 2015.
4. 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

5. Duy Nguyen Huu Quoc is a Vietnamese citizen, born in 1985, who was living, at the time of his arrest, in Khanh Hoa Province. Mr. Nguyen Huu Quoc is a worker in a local market, together with his mother. Mr. Nguyen Huu Quoc graduated from college with a degree in education.

6. According to the source, prior to his arrest, Mr. Nguyen Huu Quoc was active on social media, specifically on Facebook. There, he made statements and reposted articles critical of governmental corruption, acts of police violence, and deficiencies in the local educational system on his personal Facebook page.

(a) Arrest and detention

7. The source reports that, on 28 August 2015, Mr. Nguyen Huu Quoc was arrested at his home by the Khanh Hoa Provincial Police, in the presence of his parents. At no point did the police officers show Mr. Nguyen Huu Quoc an arrest warrant, nor did they inform him of the charges or reasons for his arrest. The arrest was made by both uniformed and plain-clothed police officers, who confiscated Mr. Nguyen Huu Quoc's laptop and mobile telephone. Three days later, on 31 August 2015, Mr. Nguyen Huu Quoc was released from police custody, allegedly because of a lack of evidence.

8. The source specifies that, also on 28 August 2015, the cousin of Mr. Nguyen Huu Quoc was arrested for having spray-painted the initials "DMCS" on the side of a police station. The initials stand for "Địt Mẹ Cộng Sản", which can be translated as "fuck communism", the origin of which is also the title of a rap song that inspired an anti-communist youth movement called the Viet Tran or "Zombie" movement. According to the source, members of the movement have been persecuted by governmental authorities because they are active on social media and hold public demonstrations in order to show their opposition to the corruption of public officials and the Government. While the cousin of Mr. Nguyen Huu Quoc is a known member of the Zombie movement, Mr. Nguyen Huu Quoc is not one of its members, nor does he associate himself with it.

9. Reportedly, after his release on 31 August 2015, Mr. Nguyen Huu Quoc not only resumed his criticism of governmental corruption but also began to advocate for the release of his cousin on social media. As a result of the posts, Mr. Nguyen Huu Quoc was arrested on 21 November 2015 by the Khanh Hoa Provincial Police. Like in the case of his previous arrest, the police produced no arrest warrant, nor did they inform Mr. Nguyen Huu Quoc of the charges against him or the reasons for his arrest. The police also confiscated Mr. Nguyen Huu Quoc's laptop and mobile telephone.

10. According to the source, from 21 November 2015 to the start of his trial, Mr. Nguyen Huu Quoc was held incommunicado by the Khanh Hoa Provincial Police. A member of Mr. Nguyen Huu Quoc's family learned that Mr. Nguyen Huu Quoc was being held at Ninh Hoa prison, and attempted to visit him on several occasions, but was not allowed to do so. He also attempted to deliver food to Mr. Nguyen Huu Quoc every week, to no avail. Furthermore, the source states that two lawyers were hired by the family member to represent Mr. Nguyen Huu Quoc at trial; when the family member informed the prosecutor's office that the two lawyers would represent Mr. Nguyen Huu Quoc, however, the prosecutor's office replied that Mr. Nguyen Huu Quoc had chosen a different lawyer. The lawyer designated by the family member explained nevertheless that he had met Mr. Nguyen Huu Quoc in prison when visiting another client and had agreed to represent him free of charge. Reportedly, the lawyer had probably been chosen by the police to represent Mr. Nguyen Huu Quoc; there are also concerns that Mr. Nguyen Huu Quoc did not meet this lawyer until the day of the trial.

(b) Trial proceedings

11. The source explains that Mr. Nguyen Huu Quoc and his cousin were tried on 23 August 2016 in the south-central province of Khanh Hoa in the city of Nha Trang. Members of Mr. Nguyen Huu Quoc's family attempted to attend the trial; the police at the courthouse, however, claimed that they needed an invitation from the court to do so, and prevented them from entering the court. Moreover, the source reports that Mr. Nguyen Huu Quoc's mother was not only denied access to the trial but was physically detained by police for its duration. In addition to Mr. Nguyen Huu Quoc's family, 11 activists from Ho Chi Minh City travelled to Nha Trang to attend the trial, but were arrested and detained by the police en route.

12. According to the source, after a one-day trial, Mr. Nguyen Huu Quoc and his cousin were convicted for spreading anti-government propaganda, pursuant to article 88 of the Penal Code. Mr. Nguyen Huu Quoc was sentenced to 3 years in prison, while his cousin, after a plea agreement, was sentenced to 2 years in prison.

13. The source also specifies that, as the trial was closed to the public, the only account of the trial available was that provided by the State media, according to which Mr. Nguyen Huu Quoc was convicted for posting articles that distorted the policies of the Communist Party and had called for the overthrow of the Government, while his cousin was convicted of writing "reactionary" slogans on the wall of a police station. The trial judge stated that the actions of Mr. Nguyen Huu Quoc and his cousin were very serious and had undermined confidence in the leadership of the Communist Party, and hurt social order.

14. The source also reports that, immediately following his conviction, Mr. Nguyen Huu Quoc was placed in solitary confinement in Phuoc Dong prison in Khanh Hoa Province. As he was still being held incommunicado, little is known about the conditions of his imprisonment in Phuoc Dong.

15. Moreover, the source explains that, on 25 December 2016, Mr. Nguyen Huu Quoc was notified that his appeal would be heard the next day. While Mr. Nguyen Huu Quoc was finally allowed to meet with a lawyer (hired by his mother) prior to the appeal hearing, the lawyer was only given a short period of time to speak with Mr. Nguyen Huu Quoc. Mr. Nguyen Huu Quoc's appeal was rejected, and his three-year sentence upheld.

16. On 13 February 2017, Mr. Nguyen Huu Quoc was transferred to An Diem prison in Quang Nam Province, which is over 500 km away from his family. On 23 February 2017, a member of Mr. Nguyen Huu Quoc's family was able to visit him in prison for the first time since he was arrested in November 2015. Mr. Nguyen Huu Quoc was permitted to receive visits on a monthly basis, for one hour. He was not allowed to discuss the conditions of his detention with his family member, aside from telling that he was no longer in solitary confinement and that he lived in a small room with another prisoner.

17. The source further indicates that, on 21 November 2018, Mr. Nguyen Huu Quoc was released, at the expiry of his sentence. According to the source, however, Mr. Nguyen Huu Quoc remains in danger should he exercise his right to free expression online, given the recent crackdown on online activists in Viet Nam.

(c) Legal analysis

18. According to the source, Mr. Nguyen Huu Quoc's detention constitutes an arbitrary deprivation of liberty under categories II and III as defined by the Working Group.

(i) Deprivation of liberty under category II

19. The source explains that the crime of "conducting propaganda against the Socialist Republic of Viet Nam" under article 88 of the Penal Code is in violation of an individual's freedom of expression, as it penalizes an excessively broad array of non-violent expression critical of the Government. Although the offence of "conducting propaganda" is classified as a crime infringing upon national security in the Penal Code, permissible limitations of the right of freedom of expression under article 19 (3) of the International Covenant on Civil and Political Rights do not apply in the present case. Indeed, according to the source, it is difficult for the Government to argue in good faith that preventing propaganda is a

legitimate national security interest. Moreover, imprisonment of an individual for such alleged propaganda is not necessary to safeguard national security.

20. The source argues that Mr. Nguyen Huu Quoc's use of social media to broadcast his opinions clearly falls under his right to freedom of opinion and expression. Mr. Nguyen Huu Quoc merely made his opinions known and disseminated information on Facebook in relation to governmental corruption, police brutality, and problems within the education system. Ultimately, the Government detained Mr. Nguyen Huu Quoc simply for making statements that the Government found to be disagreeable. According to the source, national security and the public order were not threatened, nor did the Government specify the precise nature of the perceived threat or demonstrate any connection between Mr. Nguyen Huu Quoc's statements and the perceived threat. Rather, the Government detained Mr. Nguyen Huu Quoc as part of its attempt to silence critical voices.

21. The source therefore claims that, because Mr. Nguyen Huu Quoc was detained for making statements that were protected by his freedoms of opinion and expression, his detention is arbitrary under category II.

(ii) *Deprivation of liberty under category III*

22. The source alleges that the authorities failed to observe the minimum international standards of due process by denying Mr. Nguyen Huu Quoc his rights not to be subjected to an arbitrary arrest, to a prompt habeas corpus review, to a hearing by an independent and impartial tribunal, to equality before the court, to the presumption of innocence, to prepare a defence, to be represented by counsel of his own choosing, to be released pending trial and to be tried without undue delay.

23. According to the source, Mr. Nguyen Huu Quoc's arrest did not comply with international and national law, as Mr. Nguyen Huu Quoc was not shown an arrest warrant. Such a failure to follow the legal procedure violated Mr. Nguyen Huu Quoc's right to freedom from arbitrary arrest under article 9 (1) of the Covenant, article 9 of the Universal Declaration of Human Rights and principles 2 and 36 (2) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

24. The source claims that, because Mr. Nguyen Huu Quoc was held incommunicado from 21 November 2015 to 24 December 2016 (the day when he was allowed to meet with his attorney), it is uncertain whether he was promptly brought before a judge to adjudicate the legality of his detention. The source thus regards as unlikely that Mr. Nguyen Huu Quoc was promptly – or indeed ever – brought before a judge to exercise his habeas corpus rights, especially due to the fact that such an arraignment was held in secret and without Mr. Nguyen Huu Quoc being represented by a lawyer, in violation of his rights under article 9 (3) and (4) of the Covenant.

25. Moreover, the source indicates that Mr. Nguyen Huu Quoc was never released on bail pending trial. Indeed, the source claims that the Government did not conduct any public assessment of Mr. Nguyen Huu Quoc's detention with regard to the requirement that pretrial detention must be the exception rather than the rule, and that such pretrial detention must be based on an individualized determination that it is both reasonable and necessary to deny release. The source therefore argues that the Government impermissibly continued to detain Mr. Nguyen Huu Quoc.

26. In addition, the source reports that, even after Mr. Nguyen Huu Quoc was allowed to meet his attorney on 24 December 2016, he was not allowed to see his family until February 2017, after he was transferred to An Diem prison, in violation of principle 19 of the Body of Principles.

27. The source therefore argues that the incommunicado detention of Mr. Nguyen Huu Quoc not only violates his human rights but also makes it likely that other violations, such as torture, were committed while Mr. Nguyen Huu Quoc was being held without access to his lawyer or family. Moreover, even though Mr. Nguyen Huu Quoc has been able to meet with his family since February 2017 while being detained at An Diem prison, he has been limited in what he could say about the conditions of his detention. In this regard, the source notes that torture is widespread and routinely used against detainees in Viet Nam. Therefore,

given Mr. Nguyen Huu Quoc's lengthy incommunicado detention and the current limitations on his ability to speak freely, the source has been unable to ascertain whether Mr. Nguyen Huu Quoc was tortured.

28. The source therefore concludes that, by holding Mr. Nguyen Huu Quoc incommunicado, refusing to publicly and promptly bring him before a judge to challenge the detention, and denying him release pending trial without public explanation, the Government violated article 9 (3) and (4) of the Covenant and principles 4, 11, 15, 18, 19, 32, 37, 38 and 39 of the Body of Principles. Such incommunicado detention may also cover other violations, such as torture.

29. Moreover, the source argues that, contrary to article 14 of the Covenant, Mr. Nguyen Huu Quoc was not tried as expeditiously as possible; indeed, he was held incommunicado in pretrial detention for more than nine months, despite the fact that, as the source points out, he was on trial for the content of his Facebook posts, which was hardly a complex case requiring additional time before a trial could be held. Therefore, according to the source, the Government violated article 14 (2) (c) of the Covenant and principle 38 of the Body of Principles.

30. The source also claims that the trial held on 23 August 2016 trial was closed to the public. According to the source, this is contrary to article 14 (1) of the Covenant, according to which criminal defendants enjoy the right "to a fair and public hearing by a competent, independent and impartial tribunal established by law".

31. Moreover, the source claims that, in Mr. Nguyen Huu Quoc's case, the court was not independent and did not grant Mr. Nguyen Huu Quoc equality of arms nor presumption of innocence. Specifically, the source argues that national courts are subordinated to the Communist Party of Viet Nam, which has control over the judicial system. Reportedly, in practice, national courts do not operate independently and are not free from political interference, as the failure to secure Mr. Nguyen Huu Quoc's procedural rights show. In addition, the source argues that Mr. Nguyen Huu Quoc was not allowed to prepare or to present his own case, although he had a lawyer with him during the trial. The source alleges that it is likely that the lawyer was acting on behalf of the Government, which further restricted Mr. Nguyen Huu Quoc's ability to present his case. The fact that Mr. Nguyen Huu Quoc was unable to be represented by an attorney of his own choice shows that the court did not afford him the same procedural rights as the ones granted to the prosecution, in violation of the principle of equality of arms guaranteed in article 14 (1) of the Covenant. Finally, the source argues that Mr. Nguyen Huu Quoc was tried jointly with his cousin, who was arrested for an act of vandalism. The State-owned Vietnam News Agency identified Mr. Nguyen Huu Quoc's cousin as a member of the Viet Tan reactionary group. By trying both men at the same time, the Government conflated two alleged offences that were based on completely separate facts. Allegedly, in doing so, the Government was not trying Mr. Nguyen Huu Quoc on the merits of his own case, but rather on an alleged vandalism offence, attributing also his cousin's membership in the Zombie movement to Mr. Nguyen Huu Quoc. Such conflation of offences interfered with Mr. Nguyen Huu Quoc's right to be presumed innocent.

32. In the light of these facts, the source argues that the authorities violated article 14 (1) and (2) of the Covenant, articles 7, 10 and 11 (1) of the Universal Declaration of Human Rights and principle 36 (1) of the Body of Principles. The source also notes that, because Mr. Nguyen Huu Quoc's trial was closed to the public, the source was unable to identify other violations that may have been committed within the procedure itself.

33. The source also notes that, prior to the first instance trial, Mr. Nguyen Huu Quoc's family member hired two attorneys to represent him. The attorneys were, however, barred from meeting with Mr. Nguyen Huu Quoc both before and during the trial. In fact, Mr. Nguyen Huu Quoc was not able to have access to them until his appeal hearing, despite the absence of "exceptional circumstances" justifying preventing Mr. Nguyen Huu Quoc from speaking with his attorney. In addition, no attorney was present during Mr. Nguyen Huu Quoc's questioning by the police after his arrest, which also increases the likelihood that the police used torture to obtain information. Furthermore, while Mr. Nguyen Huu Quoc was provided with an attorney during the first instance trial, the attorney was not of his own

choosing, and, reportedly, was most likely working on behalf of the interests of the Government. Mr. Nguyen Huu Quoc therefore not only did not benefit from an attorney advocating for his interests during the trial of first instance, but his attorney was, allegedly, actively working against his interests on behalf of the State. Reportedly, these facts show a violation of the right to communicate with and to have assistance of a legal counsel to prepare a defence.

34. The source also explains that, on two separate occasions, the police searched Mr. Nguyen Huu Quoc's home without a search warrant, confiscating Mr. Nguyen Huu Quoc's mobile telephone and laptop computer. The search of Mr. Nguyen Huu Quoc's home took place without Mr. Nguyen Huu Quoc actually being present; it was, however, witnessed by his parents. The source argues that the arbitrary search of Mr. Nguyen Huu Quoc's home and the seizure of his personal property by the authorities were a violation of article 17 of the Covenant and article 12 of the Universal Declaration of Human Rights.

35. Finally, the source claims that, following his conviction during the trial of first instance on 23 August 2016, Mr. Nguyen Huu Quoc was placed in solitary confinement. Given that Mr. Nguyen Huu Quoc was being held incommunicado and owing to the restrictions to communicate with his family, how long Mr. Nguyen Huu Quoc actually spent in solitary confinement is not known. Mr. Nguyen Huu Quoc's family member learned through another prisoner that he was kept in solitary confinement for a considerable length of time. According to the source, this constitutes a violation of articles 7 and 10 (1) of the Covenant, article 5 of the Universal Declaration of Human Rights, articles 1, 2 and 16 (1) of the Convention Against Torture, principles 1 and 6 of the Body of Principles and rules 1, 43 (1) (b) and 45 (1) of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).

Response from the Government

36. On 8 January 2019, a communication relating to the allegations set out above was sent to the Government of Viet Nam. In accordance with its methods of work, the Working Group gave the Government until 11 March 2019 to submit its response.

37. On 8 March 2019, the Government of Viet Nam requested a one-month extension of the deadline for its response. The extension was granted until 25 March 2019. The Government of Viet Nam submitted a reply on 25 March 2019.

38. In its response, the Government gives the legal grounds for the arrest of Mr. Nguyen Huu Quoc, stating that he was part of a movement, that was controlled by the terrorist group of Viet Tan, aiming at overthrowing the Government. The Government also stated that Mr. Nguyen Huu Quoc conspired to use drones to destroy the statue of Ho Chi Minh on Nguyen Street in Ho Chi Minh City. The Government submits that these acts therefore constitute the offence of "conducting propaganda against the State" under article 88 of the Criminal Code.

39. The Government notes that no one may be detained in Viet Nam for exercising their right to freedom of expression. It also recalls that the right to freedom of expression is not without limits, particularly when it can infringe upon the rights of others, national security or public order, according to article 19 of the Covenant.

40. According to the Government, Mr. Nguyen Huu Quoc's arrest was carried out in accordance with applicable national law and its relevant international obligations, especially those relating to Mr. Nguyen Huu Quoc's trial and detention.

Additional comments from the source

41. On 10 April 2019, the Working Group received further comments from the source concerning the response of the Government.

42. The source rejects the points made by the Government, and affirms that Mr. Nguyen Huu Quoc's detention was a continuation of a long-running pattern followed by the Government of seeking to silence peaceful government critics and political opponents.

43. The source also notes that, despite his release, Mr. Nguyen Huu Quoc remains in danger of being wrongfully detained again in the future.

44. Finally, the source maintains that the Government's response is based on false and unsubstantiated claims, the Government not having provided any documentary evidence.

Discussion

45. The Working Group is grateful for the cooperation of the parties, which allows it to settle the dispute, considering their respective views.

46. The Working Group notes that Mr. Nguyen Huu Quoc was released from prison. It can nonetheless render an opinion in conformity with paragraph 17 (a) of its methods of work. In the present case, the reasons given for Mr. Nguyen Huu's arrest and detention and the continuous risk alleged by the source justify the decision of the Working Group to do so.

47. The Working Group recalls the principles established in its jurisprudence to address evidentiary issues. If the source has presented a *prima facie* case for breach of the 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). Mere assertions by the Government that lawful procedures were followed are not sufficient to rebut the source's allegations.

48. In the present instance, the Working Group acknowledges the response given by the Government of Viet Nam but regrets its lack of precision and supporting evidence. The Government provides no substantive evidence on the objection to the arbitrary detention of Mr. Nguyen Huu Quoc. The Working Group will now consider the allegations one category at a time.

49. The source alleges that Mr. Nguyen Huu Quoc was not shown any arrest warrant when arrested, in the presence of his parents, on two occasions (28 August and 21 November 2015) at his home by the Khanh Hoa Provincial Police. In addition, the law enforcement agents did not inform him of the reasons of his arrest. The Government referred to the allegations in its response, but does not provide any contemporaneous evidence that the same was duly disclosed to Mr. Nguyen Huu Quoc at the time of his arrest, during his detention or during his trial. The Working Group therefore considers that it has been established that Mr. Nguyen Huu Quoc was arrested and detained without any disclosed legal grounds, in violation of his rights under article 9 of the Covenant.

50. Furthermore, the Working Group recalls that Mr. Nguyen Huu Quoc was held incommunicado; the authorities did not present Mr. Nguyen Huu Quoc promptly to a judge to afford him an opportunity to challenge his detention. This is a violation of article 9 (3) and (4) of the Covenant and principles 4, 11, 15, 18, 19, 32, 37, 38 and 39 of the Body of Principles.

51. The Working Group therefore concludes that the arrest and subsequent detention are arbitrary within Category I.

52. The present case is one of many cases that have been brought before the Working Group in recent years concerning the arbitrary deprivation of liberty of persons in Viet Nam, where the Working Group stated that "spreading" anti-government propaganda cannot be seen as a permissible limitation of the right of freedom of expression.

53. At the outset, the Working Group recalls that, in numerous opinions relating to Viet Nam, it has constantly stated that article 88 of the Penal Code of Viet Nam is not consistent with the human rights obligations consented to by the State.¹ The article refers to conducting propaganda against the State, and prescribes a sentence of 3 to 12 years of imprisonment for anyone guilty of (a) propagating against, distorting and/or defaming the people's administration; (b) propagating psychological warfare or spreading fabricated

¹ See, for example, opinions No. 1/2009, No. 6/2010, No. 24/2011, No. 46/2011, No. 27/2012, No. 42/2012, No. 26/2013, No. 33/2013, No. 45/2015, No. 46/2015, No. 40/2016, No. 26/2017, No. 27/2017, No. 75/2017, No. 79/2017, No. 35/2018 and No. 36/2018.

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.

54. The Working Group also recalls that, following its official visit to Viet Nam in 1994, it pointed out that the wording of certain criminal offences was so vague that it could result in penalties being imposed not only on persons using violence for political ends but also on persons who have merely exercised their legitimate right to freedom of opinion or expression (E/CN.4/1995/31/Add.4, para. 58).

55. The Working Group underlines the fact that Mr. Nguyen Huu Quoc was convicted for posting articles that the Government regarded as distorting the policies of the Communist Party and calling for its overthrow, and was then charged for spreading anti-government propaganda. The Working Group recalls, however, that holding and expressing opinions, including those not in line with official governmental policy, are protected under article 19 of the Covenant to which Viet Nam is a party. “Spreading” anti-government propaganda cannot be seen as a permissible limitation of the freedom of expression. That Mr. Nguyen Huu Quoc was a danger to national security or public order has not been demonstrated. The Working Group therefore concludes that Mr. Nguyen Huu Quoc has been deprived of his liberty for the sole reason of making use of freedoms guaranteed in international instruments. His arrest and detention are therefore arbitrary, and fall within category II.

56. Whenever an arrest and detention is found to be arbitrary under category II, no trial should be held. In the present case, however, a trial was held, and the subject was convicted and served the sentence. It is therefore necessary to assess whether the situation warrants further qualification within the mandate of the Working Group.

57. The source alleges that Mr. Nguyen Huu Quoc was detained incommunicado following his second arrest on 21 November 2015 until the day of his trial, on 23 August 2016. Indeed, his mother was not permitted to visit him or to obtain any information from her son on the conditions of detention, or to send him food. In addition, and as reported to the Working Group, even after Mr. Nguyen Huu Quoc was allowed to meet his attorney on 24 December 2016, he was unable to see his family until February 2017, after he was transferred to An Diem prison.

58. As the Working Group stated in its previous opinion No. 35/2018, prolonged incommunicado detention creates the conditions that may lead to violations of the Convention against Torture, and may itself constitute torture or ill-treatment. The Working Group considers that the incommunicado detention of Mr. Nguyen Huu Quoc violated articles 9, 10 and 11 (1) of the Universal Declaration of Human Rights and article 9 of the Covenant. In addition, such detention effectively placed Mr. Nguyen Huu Quoc 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.

59. Moreover, the Working Group finds that the solitary confinement imposed on Mr. Nguyen Huu Quoc for a considerable length of time following his conviction at the trial of first instance on 23 August 2016, as alleged by the source, constitutes a violation of articles 7 and 10 (1) of the Covenant, article 5 of the Universal Declaration of Human Rights, articles 1, 2 and 16 (1) of the Convention against Torture, principles 1 and 6 of the Body of Principles and rules 1, 43 (1) (b) and 45 (1) of the Nelson Mandela Rules.

60. The Working Group concludes that the denial of contact with Mr. Nguyen Huu Quoc’s family and the refusal to provide information to them on his whereabouts and health also amount to a violation of the right to have contact with the outside world, in accordance with rules 43 (3), 58 (1) and 68 of the Nelson Mandela Rules and principles 15, 16 (1) and 19 of the Body of Principles.

61. In addition, the source alleges that, during the trial on 23 August 2016, Mr. Nguyen Huu Quoc was represented by an appointed lawyer he had not previously met, reportedly chosen by the Khanh Hoa Provincial Police, even though his mother had hired two lawyers to represent him at trial. In the light of these facts, the Working Group considers that Mr. Nguyen Huu Quoc not only did not benefit from an attorney advocating for his interests during the trial of first instance, but his attorney was, allegedly, actively working against his

interests on behalf of the State. Given the circumstances, the Working Group considers that Mr. Nguyen Huu Quoc's right to communicate with and to have the assistance of legal counsel to prepare his defence, as guaranteed by article 14 (3) (b) of the Covenant and principle 17 (1) of the Body of Principles, was violated. It is also convinced that Mr. Nguyen Huu Quoc's right to have effective legal representation, adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing was not respected by the Government of Viet Nam, in violation of article 14 (3) (b) and (d) of the Covenant and principle 17 (1) of the Body of Principles.

62. Finally, the source alleges that the trial held on 23 August 2016 was closed to the public, and a relative was physically detained by police for the duration of the trial, together with 11 activists from Ho Chi Minh, to prevent him from attending. The Government chose not to refute this specific allegation. The Working Group notes that the right to a public hearing extends to the entire duration of the proceedings, and is especially important for the conclusion of a trial. Although exceptions were certainly possible, the Government failed to make any. The Working Group therefore concludes that, to conduct or, worse, to conclude a trial behind closed doors is to undermine the transparency of the entire hearing, in violation of article 14 (1) of the Covenant.

63. The present case is one of several cases brought before the Working Group in recent years concerning the arbitrary deprivation of liberty of persons in Viet Nam.² The Working Group notes that many of the cases involving Viet Nam follow a familiar pattern of lengthy pretrial detention, with no access given to judicial review and often without legal counsel; charges and prosecution under vaguely worded criminal offences; a very brief closed trial and appeal, at which basic due process has not been observed; and denial of access to the outside world and to medical treatment. The Working Group recalls that, under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty, in violation of the rules of international law, may constitute a crime against humanity.³

64. The Working Group concludes that the non-observance of the international norms relating to the right to a fair trial in the present case is of such gravity as to render Mr. Nguyen Huu Quoc's deprivation of liberty arbitrary under category III.

65. In accordance with its practice, the Working Group will refer the alleged instances of torture to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for due consideration.

Disposition

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

The deprivation of liberty of Duy Nguyen Huu Quoc, being in contravention of articles 5, 7, 9, 10 and 11 of the Universal Declaration of Human Rights and of articles 7, 9, 10, 14, 17 and 19 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II and III.

67. The Working Group requests the Government of Viet Nam to take the steps necessary to remedy the situation of Mr. Nguyen Huu Quoc 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.

68. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to accord Mr. Nguyen Huu Quoc an enforceable right to compensation and other reparations, in accordance with international law.

69. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr.

² See, for example, opinions No. 45/2015, No. 40/2016, No. 26/2017, No. 27/2017, No. 75/2017, No. 79/2017, No. 35/2018, No. 36/2018, No. 45/2018 and No. 46/2018.

³ See, for example, opinion No. 47/2012, para. 22.

Nguyen Huu Quoc, and to take appropriate measures against those responsible for the violation of his rights.

70. The Working Group requests the Government to bring its laws, particularly article 79 of the revised Penal Code, into conformity with the recommendations made in the present opinion and with the commitments made by Viet Nam under international human rights law.

71. 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 the situation of human rights defenders and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, for appropriate action.

72. The Working Group encourages the Government to incorporate the Model Law for the Recognition and Protection of Human Rights Defenders into its domestic legislation and to ensure its implementation.⁴

Follow-up procedure

73. 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 compensation or other reparations have been made to Duy Nguyen Huu Quoc;

(b) Whether an investigation has been conducted into the violation of Duy Nguyen Huu Quoc's rights and, if so, the outcome of the investigation;

(c) 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;

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

74. 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.

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

76. The Working Group requests the Government to disseminate through all available means the present opinion among all stakeholders.

77. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.⁵

[Adopted on 25 April 2019]

⁴ The Model Law was developed in consultation with more than 500 human rights defenders from around the world and 27 human rights experts. See www.ishr.ch/sites/default/files/documents/model_law_full_digital_updated_15june2016.pdf.

⁵ Human Rights Council resolution 33/30, paras. 3 and 7.