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Working Group on Arbitrary Detention

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

Opinion No. 11/2021 concerning Le Huu Minh Tuan (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,[1] on 9 December 2020 the Working Group transmitted to the Government of Viet Nam a communication concerning Le Huu Minh Tuan. The Government replied to the communication on 8 March 2021. 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).

[1] A/HRC/36/38.

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Submissions

Communication from the source

4. Le Huu Minh Tuan is a citizen of Viet Nam, born in 1989. Mr. Tuan normally resides in the Province of Quang Nam.

5. Mr. Tuan is an independent journalist and a member of a journalists' association, the Independent Journalists' Association of Viet Nam. Mr. Tuan covers daily news for Viet Nam Toi Bao, a news website affiliated with the association.

a. Arrest and detention

6. On the morning of 12 June 2020, Mr. Tuan was arrested by the police following a raid on a coffee shop in a home owned by a member of his family, located in the Province of Quang Nam. Between 8.30 and 9.00 a.m., approximately 30 plain-clothed and 10 uniformed police officers forced the coffee shop to close, covered all the internal security cameras with black nylon bags and cut off the Wi-Fi.

7. The source states that the forces believed to have carried out the arrest are officials from the Ho Chi Minh City Security Bureau of Investigation. They showed a warrant issued by a public authority. After taking Mr. Tuan into custody, the police did not leave copies of the warrant with the family.

8. It is reported that right before the raid at the coffee shop, the police escorted Mr. Tuan back to his residence, which was also searched. The police officers confiscated his phone, the phone of his family member and three books.

9. According to the source, prior to his detention Mr. Tuan was summoned at least four times by the police to answer questions relating to another journalist and a fellow member of the journalists' association. Mr. Tuan reportedly did not cooperate.

10. Following his detention on 12 June 2020, Mr. Tuan is being held in Chi Hoa Prison located in Ho Chi Minh City. Mr. Tuan is reportedly being detained and has been charged under article 117 of the Penal Code, which stipulates a penalty of 5 to 12 years' imprisonment for making, storing or spreading information, materials and items for the purpose of opposing the State.

11. The source notes that in the past decade, the Government has passed several laws that restrict both freedom of personal expression and freedom of media expression, particularly in the context of electronic communications and online postings. The Law on Information Security, of 2015, Decree No. 72 of 2013 and Decree No. 174 of 2014 impose fines on anyone criticizing the Government, defaming government leaders or spreading propaganda on social media. The Law on the Press, which went into effect in 2017, stipulates that the press should propagandize for and disseminate, and contribute to the protection of, the line and policies of the Party.

b. Analysis of violations

12. The source submits that Mr. Tuan's arrest and detention is arbitrary under categories I, II and III. It specifies that the detention is arbitrary under category I because it is impossible to invoke any legal basis justifying his deprivation of liberty and continued detention. The detention is arbitrary under category II because it resulted from Mr. Tuan's peaceful exercise of his right to freedom of expression and association. Finally, the detention is arbitrary under category III because Mr. Tuan's detention and prosecution failed to meet minimum international standards of due process.

i. Category I

13. In relation to category I, the source notes that a detention falls under this category when it is clearly impossible to invoke any legal basis justifying the deprivation of liberty. It recalls that the Working Group has found detentions arbitrary under category I when some of the following violations are present: (a) when the Government has held an individual incommunicado for a period of time; (b) when the Government has arrested an individual

without a warrant and without judicial authorization for such deprivation of liberty; and (c) when vague laws are used to prosecute individuals.

14. The source submits that Mr. Tuan was held incommunicado and never given access to judicial review of his detention. He was never brought before a judge to confirm the legal basis for his arrest or his continuing pretrial detention. The source quotes article 9 (3) of the Covenant, which provides for anyone arrested or detained on a criminal charge to be brought promptly before a judge or other officer authorized by law to exercise judicial power. It notes that this obligation for a habeas corpus hearing without delay is reiterated in article 9 (4) of the Covenant.

15. The source also recalls that the Human Rights Committee has determined that incommunicado detention inherently violates article 9 (3) of the Covenant.[2] This guarantee not only serves as a check on arbitrary detention, but also provides an important safeguard for other related rights, such as freedom from torture.[3] 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, which prohibits the denial of communication between a detainee and his family or counsel for more than a few days.[4]

16. The source further submits that the Penal Code is overly broad and vague. The source specifies that article 117 of the Penal Code defines the crime so vaguely as to make it impossible for any individual to reasonably foresee what behaviour is criminal. The source quotes provisions of this article and notes that no instruction is given as to what constitutes "propagating psychological warfare, dismay among the people or documents/products that are against the Government". The source concludes that there is no intent component and no measure of what a prosecutor must prove to convict.

17. The source further states that article 117 of the Penal Code lacks meaning and gives individuals no fair notice of what conduct is prohibited. For Mr. Tuan, article 117 of the Penal Code has resulted in arbitrary prosecutions for acts that are both unforeseeable as criminal and protected under the Covenant, the Universal Declaration of Human Rights and other international norms and standards. It is submitted that because this crime is so vague, such a provision cannot supply the legal basis for detention resulting from conviction on such a charge.

18. The source recalls article 15 (1) of the Covenant and article 11 (2) of the Universal Declaration of Human Rights, which both guarantee individuals the right to know what the law is and what conduct violates the law. These articles protect citizens from prosecution for any criminal offence which did not constitute an offence, under national or international law, at the time when it was committed. The source also notes that the Human Rights Committee has stated that 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.[5]

ii. Category II

19. In relation to category II, the source observes that deprivation of liberty is arbitrary under category II when it 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 articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant. It submits that the case of Mr. Tuan meets the requirements of category II because his detention is a result of him exercising his fundamental freedoms of opinion, expression and association guaranteed by the Universal Declaration of Human Rights and the Covenant.

20. The source claims that the authorities have arbitrarily detained and prosecuted Mr. Tuan as a direct result of him publishing in a journalistic capacity. It submits that firstly, the

[2] See the Committee's general comment No. 35 (2014), para. 35.
[3] Ibid., para. 34.
[4] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 15.
[5] General comment No. 35 (2014), para. 22.

charge of opposing the State under article 117 of the Penal Code violates an individual's freedom of expression because it vaguely criminalizes a broad range of speech and of information-sharing acts. Therefore, no matter whether the underlying factual allegations are true, the Government has deprived Mr. Tuan of his liberty under a law which is itself incompatible with right to freedom of expression guaranteed under the Universal Declaration of Human Rights and the Covenant.

21. Furthermore, the source states that Mr. Tuan was targeted for his independent reporting and his detention thus violated his right to freedom of expression both de jure and de facto. Mr. Tuan, who publishes under the name "Le Tuan", is a member of the journalists' association and covers daily news for Viet Nam Toi Bao, a news website affiliated with the association. Prior to his detention, Mr. Tuan published articles on Viet Nam-China relations, democracy and politics.

22. The source submits that Mr. Tuan's arrest and detention and the charges against him are an attempt to silence and penalize him for sharing information on the above-mentioned subjects as an independent reporter, an activity which is expressly protected as free expression.

23. The source asserts that the detention of Mr. Tuan for his critical expression forms part of a well-documented pattern of attempting to silence journalists through arbitrary detention. The Government detained Mr. Tuan as a means of reprimanding him for his political opinions, for his independent reports that advocated for democracy, and for sharing the work of other writers covering the topic of anti-corruption.

24. The source recalls that the freedoms of opinion and expression are protected by international instruments and include the freedom to seek, receive and impart information of all kinds, either orally or in writing. Article 19 (2) of the Covenant provides that "everyone shall have the right to freedom of expression".[6] Article 19 of the Universal Declaration of Human Rights provides an analogous guarantee of freedom of opinion and expression. The Human Rights Committee has clarified that article 19 of the Covenant protects all forms of expression and the means of their dissemination.[7] This includes all forms of audiovisual as well as electronic and Internet-based modes of expression.[8]

25. The source emphasizes that article 19 of the Covenant is of special importance for human rights defenders and that journalists working on the reporting of human rights abuses are explicitly recognized as human rights defenders. It recalls that the Working Group has confirmed the right of human rights defenders "to investigate, gather information regarding and report on human rights violations."[9] The Human Rights Committee has also specifically recognized that article 19 (2) protects the work of journalists[10] and "includes the right of individuals to criticize or openly and publicly evaluate their Government without fear of interference or punishment".[11] The imprisonment of human rights defenders for speech-related reasons is subject to heightened scrutiny; the Working Group has recognized the necessity to subject interventions against individuals who may qualify as human rights defenders to particularly intense review.[12] This "heightened standard of review" by international bodies is especially appropriate where there is a "pattern of harassment" by national authorities targeting such individuals.[13]

26. Moreover, the source argues that Mr. Tuan's detention is arbitrary under category II because the authorities detained him as he exercised his right to freedom of association. The source notes that article 20 (1) of the Universal Declaration of Human Rights provides that everyone has the right to freedom of peaceful assembly and association. Article 22 (1) of the

[6] Viet Nam acceded to the International Covenant on Civil and Political Rights in 1982 and entered no reservations to this provision.

[7] General comment No. 34 (2011), para. 12.

[8] Ibid.

[9] A/HRC/13/30/Add.1, see opinion No. 8/2009, para. 18.

[10] See CCPR/C/95/D/1334/2004.

[11] CCPR/C/83/D/1128/2002, para. 6.7.

[12] Opinion No. 62/2012, para. 39; and No. 21/2011, para. 29.

[13] Opinion No. 39/2012, para. 45.

Covenant provides that everyone shall have the right to freedom of association with others. The Human Rights Council has specifically called on States to fully respect and protect the rights of all individuals to associate freely, especially for persons espousing minority or dissenting views and human rights defenders.[14] In its general comment No. 25 (1996), the Human Rights Committee noted that "the right to freedom of association, including the right to form and join organizations and associations concerned with political and public affairs, is an essential adjunct to the rights protected by article 25".

27. The source notes that, similarly, national law ensures the right to freedom of association. Article 25 of the Constitution affirms that citizens have the right to "assemble, form associations and hold demonstrations".

28. The source submits that contrary to these standards, the authorities have criminalized and imprisoned individuals for associating with other journalists and political organizations that are critical of the Government, as evidenced by the treatment of Mr. Tuan and his association with the Independent Journalists' Association of Viet Nam.

29. The source concludes that even if Mr. Tuan has the right to associate with a group of journalists and to express his political opinions through such organizations, the authorities have persecuted him to punish his involvement with individuals and organizations critical of the Government. The source submits that by punishing Mr. Tuan for his communication and association with the Independent Journalists' Association of Viet Nam and members of that organization, the Government has violated Mr. Tuan's right to freedom of association in violation of article 20 (1) of the Universal Declaration of Human Rights, article 22 (1) of the Covenant and article 25 of the Constitution.

30. The source also notes that none of the restrictions to freedom of expression and association enumerated under articles 19 (3) and 22 (2) of the Covenant apply to Mr. Tuan's prosecution and detention. It recalls that under article 19 (3) of the Covenant, freedoms of expression and opinion may only be restricted as necessary either for respect of the rights and reputations of others or for the protection of national security or public order, health or morals. The Human Rights Committee has emphasized the narrowness of the limitations set forth in article 19 (3) of the Covenant by noting that when a State party imposes a limitation on the exercise of freedom of expression, it may not put in jeopardy the right itself.[15]

31. Article 22 (2) of the Covenant provides that "no restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right." Any limitation on the freedoms of expression and association "must meet a strict test of justification".[16]

32. As guidance, the Human Rights Committee has established three requirements for any limitation on the right to freedom of expression and association. A permissible limitation must be: (a) provided by law; (b) for the protection of national security, public order, or public health and morals; and (c) necessary to achieve one of these enumerated purposes.[17]

33. The source argues that in the present case, the limitation on Mr. Tuan's freedom of expression and association fails to meet the second requirement, as the restriction to his right to freedom of expression and association was not for a proper purpose. Although the authorities reportedly claimed that his detention was based on his opposing the State or conducting propaganda – as might be considered appropriately banned under article 20 of the Covenant – the source submits that in reality none of Mr. Tuan's reports or online postings or publications 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.

[14] See the Council's resolution 15/21.
[15] General comment No. 34 (2011), para. 21.
[16] CCPR/C/64/D/628/1995, para. 10.3.
[17] CCPR/C/80/D/926/2000, para. 7.3.

34. The source asserts that the Government was using the reasoning of opposing the State or conducting propaganda as a pretext to silence criticism, which is not an acceptable purpose under article 19 (3) of the Covenant. To the contrary, political discourse, journalism and discussion of human rights have all been explicitly recognized as protected speech.[18]

35. The source states that despite such international guarantees for the right to free speech, the authorities have arbitrarily detained and prosecuted Mr. Tuan as a direct result of his articles. His reporting and postings are political and fall under the protections of article 19 of the Covenant and article 19 of the Universal Declaration of Human Rights. Thus, because Mr. Tuan's reporting and critical postings are protected expression under article 19 (2) of the Covenant and because the limitation on these do not fall within the narrow exceptions contained in article 19 (3), his continued detention is arbitrary pursuant to category II, concludes the source.

iii. Category III

36. In relation to category III, the source notes that since the first day of his detention, Mr. Tuan has not been brought before a judge and that there has not yet been a trial. Furthermore, Mr. Tuan was not allowed to communicate with his family. Mr. Tuan's lawyer only had a chance to communicate with him for the first time on 11 November 2020. According to the information received, Mr. Tuan's first trial hearing will take place four months after the date of the communication. The source concludes that, accordingly, Mr. Tuan's right to appeal has been violated.

37. The source recalls article 14 (5) of the Covenant, which states that everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. The right to appeal guaranteed by article 14 (5) of the Covenant imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case.[19] Such a review must consider not just the formal or legal aspects of the conviction, but also the facts of the case, including the allegations against the convicted person and the evidence submitted at trial, as referred to in the appeal.

38. The source also notes that article 331 of the Criminal Procedure Code of 2015 grants defendants the right to appeal against judgments of courts of first instance. Article 332 states that if a defendant is in detention, the warden of the detention facility must enable the execution of the defendant's right to appeal by forwarding the written appeal to the proper court.

39. In the context of Mr. Tuan's right to communicate with and have the assistance of legal counsel, the source further quotes article 14 (3) (b) and (d) of the Covenant, which guarantees that an individual may "defend himself in person or through legal assistance of his own choosing" and "have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing". Such guarantee requires that the accused be granted prompt access to counsel and that States parties permit and facilitate access to counsel for detainees in criminal cases from the outset of their detention.

40. Moreover, the source notes that principle 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment further provides for the right of a detainee to communicate and consult with his legal counsel, and that rule 119 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) also provides for the right to access legal advice. Likewise, the Constitution guarantees a detained or criminally charged individual's right to choose a defence counsel.

41. The source reiterates the fact that Mr. Tuan was deprived of his right to communicate with counsel and to prepare a defence. After his arrest, he was not permitted access to a lawyer or his family, and was only able to meet his lawyer for the first time on 11 November 2020. The source concludes that article 14 (3) (b) and (d) of the Covenant, principle 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or

[18] Human Rights Committee, general comment No. 34 (2011), para. 11.
[19] Human Rights Committee, general comment No. 32 (2007), para. 48.

Imprisonment, rule 119 of the Nelson Mandela Rules and article 31 of the Constitution of Viet Nam have therefore been violated.

42. Finally, the source emphasizes the fact that Mr. Tuan's right to be visited by family members and to communicate with the outside world has also been violated. It notes principle 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which provides that detained or imprisoned persons shall have the right to be visited by and to correspond with, in particular, members of their family, subject to reasonable conditions and restrictions as specified by law or lawful regulations. Similarly, this right is protected in the Nelson Mandela Rules, notably rule 43 which states that disciplinary sanctions or restrictive measures shall not include the prohibition of family contact, rule 58 which states that prisoners shall be allowed, under necessary supervision, to communicate with their family and friends at regular intervals, and rule 106 which states that special attention shall be paid to the maintenance and improvement of such relations between a prisoner and his or her family as are desirable in the best interests of both.

43. The source concludes that, as Mr. Tuan was not allowed to communicate with the outside world and was not permitted visits by his family, the authorities violated principle 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment as well as rules 43, 58 and 106 of the Nelson Mandela Rules.

Response from the Government

44. On 9 December 2020, the Working Group transmitted the source's allegations to the Government under its regular communication procedure, requesting the Government to provide any information regarding the case by 8 February 2021, and in particular, information on the allegations made, both in respect of the facts and the applicable legislation.

45. On 4 February 2021, the Government requested an extension of the deadline for its response. The extension was granted, with a new deadline of 8 March 2021.

46. In its response, dated 8 March 2021, the Government emphasizes that Mr. Tuan's arrest, investigation and prosecution were not for the exercise of fundamental freedoms but because he had violated Vietnamese law. It submits that criminal proceedings were conducted on sound legal grounds, while respecting Vietnamese law and Mr. Tuan's legitimate rights. It refutes the allegations made in the communication, as being mostly drawn from unverified sources and based on preconceived ideas about Viet Nam.

47. The Government submits that on 12 June 2020, Ho Chi Minh City police arrested and temporarily detained Mr. Tuan in order to investigate the crime of "creating, storing, distributing or propagating information, documents and materials against the State of the Socialist Republic of Viet Nam" according to article 117 of the Penal Code.

48. The Government asserts that the arrest of Mr. Tuan was conducted in accordance with the law. On 8 June 2020, Ho Chi Minh City police made a decision to prosecute and issued a temporary detention warrant and a search warrant against Mr. Tuan. After the decision and the warrants had been approved by the People's Procuracy of Ho Chi Minh City, on 12 June 2020, Ho Chi Minh City police arrested Mr. Tuan. His arrest was in conformity with due process regarding criminal proceedings set forth in the law of Viet Nam. The arrest process was noted in the files of the competent authorities and was reported publicly by the mass media.

49. The Government submits that Mr. Tuan was arrested because he had violated Vietnamese law, not for the exercise of the fundamental freedoms. The investigations by the police suggested that Mr. Tuan and his accomplices had colluded with one another to post many articles that distorted the truth, affected the rights and reputations of other people, incited individuals to rise up and overthrow the Government, incited hatred and extremism, and misled people with regard to the socioeconomic situation with a view to causing public anxiety and social instability. Article 19 (3) of the Covenant provides clearly that the right to freedom of expression may be subject to certain restrictions but that these shall only be such as are provided by law and are necessary for respect of the rights or reputations of others.

50. On 15 October 2020, the investigative phase of the case ended. On 5 January 2021, the People's Court of Ho Chi Minh City, at first instance, tried Mr. Tuan and his accomplices

and sentenced Mr. Tuan to 11 years of imprisonment and 3 years of probation, under article 117 (2) of the Penal Code of 2015. He is currently serving his prison sentence and his health is normal.

51. This trial was held publicly and in accordance with the legal provisions of Viet Nam (including oral arguments at the trial, and the ideas presented by the accused and their defence lawyers). The trial was attended by defence lawyers of the accused, family members of the accused, journalists and representatives of foreign missions in Viet Nam. At the trial, the accused admitted their crimes as stated in the charges laid by the competent authorities and did not submit any complaint about their treatment during the temporary detention.

Ensuring the rights of the accused

52. The Government refutes the allegation that the trial of Mr. Tuan was delayed. It submits that after completing the investigation, on 5 January 2021, a public trial was held and the rights of Mr. Tuan were ensured.

53. It also refutes the allegation that Mr. Tuan was deprived of communication with his defence lawyers. According to article 74 of the Criminal Procedure Code of 2015, for national security offences the head of the People's Procuracy has the authority to allow defence lawyers to take part in legal proceedings after the investigative phase is over. This rule was put in place to ensure the necessary confidentiality of investigations regarding an ongoing case. After the investigative phase is over, the accused and the defence lawyers will be allowed to make the preparations for their defence at the trial, for example by accessing and copying documents relevant to the case, and there will be no limitation on the number and length of meetings between the accused and defence lawyers. Pursuant to article 74 of the Criminal Procedure Code, the People's Procuracy of Ho Chi Minh City made the decision about the time when Mr. Tuan's defence lawyers would be allowed to participate in the legal proceedings. After the investigative phase was over, the defence lawyers were allowed to make their preparations for defence of the rights of Mr. Tuan, as provided by the law; his defence lawyers attended the first instance trial.

54. Similarly, as the investigation phase of this case was still ongoing, the competent authorities only allowed Mr. Tuan's family members to send supplies and gifts to him; requests for family visits during this phase could not be met in order to avoid impacts on the ongoing investigations. Mr. Tuan was provided with adequate food, accommodation and health care; he is in a normal state of health. At the trial, Mr. Tuan did not submit any complaint about the treatment during his temporary detention; therefore, the allegations regarding torture, the obtaining of testimony by duress, being held incommunicado and restriction of the rights of the accused during the investigation process are groundless.

55. The Government refutes as totally inaccurate the allegations that Viet Nam has adopted laws to restrict the rights to freedom of speech and freedom of the press. The rights to freedom of speech and freedom of the press are stipulated in the Constitution. In particular: (a) article 25 of the Constitution of 2013 expressly guarantees that "citizens have the right to freedom of speech and freedom of the press, and have the right of access to information, the right to assembly, the right to association and the right to demonstration"; (b) chapter 2 of the Law on the Press, of 2016, provides concrete stipulations on freedom of the press; (c) chapter 15 of the Penal Code of 2015 provides rules on dealing with criminal offences against personal liberty and citizens' rights to freedom, including article 167 which elaborates on infringements on freedom of speech and freedom of the press and on citizens' right of access to information and right to protest; and (d) the Law on Complaints of 2011 and the Law on Denunciations of 2018 and many other relevant laws protect the rights of citizens when their rights are infringed upon, including by acts of harassment or menace.

56. The Government submits that the exercise of the right to freedom of speech carries with it the responsibility to respect the law of the country and the rights and legitimate interests of individuals, organizations and society. These are consistent with international conventions in the field of human rights to which Viet Nam is a party, including the Covenant, specifically article 19 (3).

57. In respect of article 117 of the Penal Code of 2015, on the basis of the road map for reforms of the Vietnamese judiciary to comply with the Constitution of 2013, the National

Assembly adopted the Amendments to the Penal Code (which came into force on 1 January 2018). In this regard, the provisions covering the criminal acts of conducting propaganda against the Socialist Republic of Viet Nam (art. 88 of the Penal Code of 1999) were clarified and amended to become the crime of making, possessing or spreading information, materials and items for the purpose of opposing the State of the Socialist Republic of Viet Nam (art. 117 of the Penal Code of 2015). At the same time, the acts constituting this crime were added to and clarified.

Further comments from the source

58. The source notes that the Government did not provide any substantive evidence to rebut the allegations. Because the Government has failed to provide information that would refute the violations set out under categories I, II and III, it has not met its burden of proof.

Discussion

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

60. In determining whether Mr. Tuan's detention was arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations.[20]

Category I

61. The source submits that following his arrest, Mr. Tuan was detained incommunicado, and his detention was not subjected to judicial review. Mr. Tuan was not brought before any judicial authority to review the legality of his detention from the time of his arrest on 12 June 2020 until his trial which, according to the Government, commenced on 5 January 2021. The Government asserts that it followed due process of the criminal proceedings set out in the law of Viet Nam, and that the decision to prosecute Mr. Tuan as well as the requisite warrants were approved by the People's Procuracy of Ho Chi Minh City.

62. While the Government has argued that his arrest and detention were carried out strictly in accordance with national law, the Working Group recalls that it has repeatedly stated in its jurisprudence that, even when the detention of a person is carried out in conformity with national legislation, the Working Group must ensure that the detention is also consistent with the relevant provisions of international law.[21] Accordingly, the Working Group finds that Mr. Tuan's pretrial detention was undertaken in the absence of judicial review of its legality, in violation of his right to be brought promptly before a judicial authority under article 9 (3) of the Covenant.[22] Furthermore, in accordance with article 9 (3) of the Covenant, pretrial detention should be the exception, rather than the norm, and should be ordered for the shortest period of time possible.[23] Liberty is recognized under article 9 (3) of the Covenant as the core consideration, with detention as an exception thereto.[24]

63. The Working Group and other human rights mechanisms have stated that holding persons incommunicado violates their right to challenge the lawfulness of detention before a court under article 9 (3)[25] and (4) of the Covenant.[26] Mr. Tuan was held in incommunicado

[20] A/HRC/19/57, para. 68.

[21] See, for example, opinions No. 46/2011, No. 42/2012, No. 50/2017, No. 79/2017, No. 1/2018, No. 20/2018, No. 37/2018 and No. 50/2018.

[22] Opinion No. 81/2020, para. 56. The Working Group reiterates that although prolonged pretrial detention may be permitted under the Criminal Procedure Code of 2003 of Viet Nam and by means of other legislative provisions, such as the Procuracy approving arrest warrants, these are not a substitute for the right to judicial review of a detention and are consequently inconsistent with international human rights law.

[23] A/HRC/19/57, sect. III.A.

[24] Ibid., para. 54.

[25] Human Rights Committee, general comment No. 35 (2014), para. 35.

[26] Opinions No. 45/2019, No. 44/2019, No. 9/2019, No. 35/2018, No. 46/2017 and No. 45/2017.

detention from the time of his arrest on 12 June 2020 until he met with his lawyer for the first time on 11 November 2020, according to the source and as accepted by the Government. Judicial oversight of detention is a fundamental safeguard of personal liberty[27] and is essential in ensuring that detention has a legal basis. Given that Mr. Tuan 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 has been 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. Incommunicado detention, especially during the early stage of an investigation, is an environment conducive to torture, and cruel and inhuman treatment, as it may be used to coerce the individual to confess to the commission of the alleged crimes and admit guilt.[28] It may also be considered as amounting in itself to a form of torture or ill-treatment, prohibited under article 7 of the Covenant and articles 1 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[29]

64. The Government submits that Mr. Tuan was arrested and detained under article 117 of the Penal Code of 2015 for creating, storing, distributing or propagating information, documents and materials against the State.

65. The source submits that article 117 defines the crime so vaguely as to make it impossible for any individual to reasonably foresee what behaviour is criminal and does not give individuals fair notice of what conduct is prohibited. The source concludes that there is no intent component and no measure of what a prosecutor must prove in order to convict. Mr. Tuan was arbitrarily arrested and prosecuted for acts that are both unforeseeable as criminal and are protected under the Covenant, the Universal Declaration of Human Rights and other international norms and standards.

66. The Government asserts that the provisions of article 88 on the crime of conducting propaganda against the Socialist Republic of Viet Nam, of the Penal Code of 1999, were clarified and amended to become the crime of making, possessing or spreading information, materials and items for the purpose of opposing the State of the Socialist Republic of Viet Nam (art. 117 of the Penal Code of 2015) and that the acts constituting this crime were added to and clarified.

67. The Working Group considers that the charge on which Mr. Tuan was detained is so vague that it is impossible to invoke a legal basis for his detention. The Working Group finds that despite the amendments to article 88 noted by the Government, article 88, and article 117 of the Penal Code of 2015, are sufficiently similar, because at their core, both articles criminalize the spreading of information against the State. The Working Group has on several occasions raised with the Government the issue of prosecution under vague penal laws.[30] The principle of legality requires that laws be formulated with sufficient precision so that individuals can access and understand the law, and regulate their conduct accordingly.[31] Article 117 of the Penal Code of 2015 does not meet this standard. It is incompatible with article 11 (2) of the Universal Declaration of Human Rights and article 15 (1) of the Covenant and cannot be considered as "prescribed by law" and "defined with sufficient precision" due to its vague and overly broad language.[32] The Human Rights Committee has called upon Viet Nam to urgently take all necessary steps, including revising legislation, to end violations of

[27] 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.

[28] General Assembly resolution 68/156, para. 27. See A/56/156, para. 39 (f); and Human Rights Committee, general comment No. 35 (2014), paras. 35 and 56.

[29] Human Rights Committee, general comment No. 35 (2014), para. 35; and A/56/156, para. 39 (f).

[30] Opinions No. 15/2020, para. 58; No. 45/2019, para. 54; No. 44/2019, para. 55; No. 9/2019, para. 39; No. 8/2019, para. 54; No. 46/2018, para. 62; No. 36/2018, para. 51; No. 35/2018, para. 36; No. 79/2017, para. 54; No. 75/2017, para. 40; No. 27/2017, para. 35; No. 26/2017, para. 51; No. 40/2016, para. 36; No. 45/2015, para. 15; No. 26/2013, para. 68; No. 27/2012, para. 41; No. 24/2011, para. 24; No. 20/2003, para. 19; No. 13/1999, para. 12; No. 27/1998, para. 9; and No. 21/1997, para. 6.

[31] Opinion No. 41/2017, paras. 98–101. See also opinion No. 62/2018, paras. 57–59; and Human Rights Committee, general comment No. 35 (2014), para. 22.

[32] Human Rights Committee, general comment No. 34 (2011), para. 25.

the right to freedom of expression relating to vague and broadly formulated offences in various articles of the Penal Code, including article 117.[33] Mr. Tuan could not have foreseen that exercising his rights to freedom of expression and opinion to communicate ideas through the peaceful activity of using social media to blog and make online postings would amount to criminal conduct under article 117.

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

Category II

69. The Government argues that Mr. Tuan was arrested for violating Vietnamese law, namely article 117 of the Penal Code of 2015. The Government claims that Mr. Tuan and his accomplices colluded with one another to post many articles that distorted the truth, affected the rights and reputations of other people, incited individuals to rise up and overthrow the Government, incited hatred and extremism, and misled people with regard to the socioeconomic situation with a view to causing public anxiety and social instability.

70. The source alleges that Mr. Tuan was detained as a result of him exercising his fundamental freedoms of opinion, expression and association guaranteed by the Universal Declaration of Human Rights and the Covenant. The source claims that the authorities arbitrarily detained and prosecuted Mr. Tuan as a direct result of him publishing in a journalistic capacity. The source emphasizes that article 19 of the Covenant is of special importance for human rights defenders and that journalists working on the reporting of human rights abuses are explicitly recognized as human rights defenders.

71. Mr. Tuan, who publishes under the name "Le Tuan", is a member of the Independent Journalists' Association of Viet Nam and covers daily news for Viet Nam Toi Bao, a news website affiliated with the association. Prior to his detention, Mr. Tuan published articles on Viet Nam-China relations, democracy and politics. He is the fourth journalist affiliated with the Independent Journalists' Association of Viet Nam to be arrested and charged, since late 2019, under article 117 of the Penal Code.[34] The source submits that the Government arrested, detained and prosecuted Mr. Tuan in connection with an ongoing investigation into a fellow journalist and member of the Independent Journalists' Association of Viet Nam, who has been held in detention without trial since November 2019. Prior to his detention, Mr. Tuan was summoned at least four times by the police to answer questions relating to his fellow journalist. Mr. Tuan reportedly did not cooperate.

72. The Working Group considers that charges and convictions under article 117 of the Penal Code of 2015 for the peaceful exercise of rights cannot be regarded as consistent with the Universal Declaration of Human Rights or the Covenant. The Working Group has considered the application of vague and overly broad provisions of criminal laws of Viet Nam in numerous opinions.[35] The Working Group came to a similar conclusion during its visit to Viet Nam in October 1994, noting that vague national security provisions do not distinguish between violent acts capable of threatening national security and the peaceful exercise of rights.[36]

73. In May 2017, the United Nations country team in Viet Nam recommended the repeal or revision of numerous articles of the Penal Code of 2015, among them article 117, on the basis of its incompatibility with human rights obligations under the Covenant.[37] Along with other provisions, article 117 was highlighted as being vague and broad and not defining which actions or activities are prohibited, nor the constitutive elements of offences thereunder. Therefore, individuals are not able to regulate their actions and behaviours accordingly, as required under the principle of legal certainty, which is essential for the rule

[33] CCPR/C/VNM/CO/3, paras. 45 (a) and 46.

[34] While the source in its submission refers to the Penal Code of 1999, it appears to be referring to the Penal Code of 2015 which contains article 117.

[35] 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, 38.175, 38.177, 38.183–184, 38.187–191 and 38.196–198.

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

[37] See https://vietnam.un.org/en/14681-un-recommendations-2015-penal-code-and-criminal-procedural-code-viet-nam.

of law.[38] The country team in Viet Nam also noted that these provisions do not differentiate between the use of violent means, which should be prohibited, and legitimate peaceful activities of protest, expression of one's opinion, including criticism of the Government's policies and actions, or advocacy for any kind of changes, including to the political system, which come directly under the rights to freedom of expression, opinion, assembly and religion, as well as to participation in public life, and which as such should be guaranteed and protected in accordance with international human rights law (see arts. 18, 19, 21 and 25 of the Covenant).[39]

74. The Human Rights Committee has called upon Viet Nam to end violations of the right to freedom of expression, offline and online, and to ensure that restrictions do not go beyond the strictly defined limitations set forth in article 19 of the Covenant.[40] It found that the vague and broadly worded offences in various articles, including article 117 of the Penal Code, and their use to curtail freedom of opinion and expression, and the definition of certain crimes related to national security to encompass legitimate activities such as exercising the right to freedom of expression, do not appear to comply with the principles of legal certainty, necessity and proportionality.[41]

75. Article 19 (2) of the Covenant provides that "everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice". This right includes political discourse, commentary on public affairs, discussion of human rights, and journalism.[42] It protects the holding and the expression of opinions, including those which are not in line with government policy.[43] The exercise of freedom of expression on the Internet, in the present case through social media, presents significant differences compared to traditional means of communication. For example, the distribution and receipt of information through the Internet is faster, more extensive and more easily accessed locally and globally.[44]

76. The Working Group considers that Mr. Tuan's conduct falls within the rights to freedom of opinion, expression and association protected under articles 19 and 20 of the Universal Declaration of Human Rights and articles 19 and 22 of the Covenant, and that he was detained for exercising those rights. Mr. Tuan's reporting on social media concerned matters of public interest. The Working Group considers that he was detained for exercising his right to take part in the conduct of public affairs under article 21 (1) of the Universal Declaration of Human Rights and article 25 (a) of the Covenant.[45]

77. There is nothing to suggest that the permissible restrictions on these rights set out in articles 19 (3) and 22 (2) of the Covenant apply in the present case. The Working Group is not convinced that prosecuting Mr. Tuan is necessary to protect a legitimate interest under the Covenant, nor that Mr. Tuan's arrest and detention is a proportionate response to his peaceful activities. Importantly, there is nothing to suggest that, as stated by the Government, Mr. Tuan and his accomplices colluded with one another to post articles that distorted the truth, affected the rights and reputations of other people, incited individuals to rise up and

[38] Human Rights Council resolution 19/36 "recalls that the interdependence between a functioning democracy, strong and accountable institutions, transparent and inclusive decision-making and effective rule of law is essential for a legitimate and effective Government that is respectful of human rights". In para. 16 (c) of the same resolution, the Council calls upon States to strengthen the rule of law by "ensuring that a sufficient degree of legal certainty and predictability is provided in the application of the law, in order to avoid any arbitrariness".

[39] See https://vietnam.un.org/en/14681-un-recommendations-2015-penal-code-and-criminal-procedural-code-viet-nam.

[40] CCPR/C/VNM/CO/3, para. 46.

[41] Ibid., para. 45 (a).

[42] Human Rights Committee, general comment No. 34 (2011), para. 11.

[43] Opinions No. 8/2019, para. 55; and No. 79/2017, para. 55.

[44] Opinions No. 80/2019, para. 93; and No. 39/2019, paras. 93–96. See also E/CN.4/2006/7, para. 36.

[45] Citizens may take part in the conduct of public affairs by exerting influence through public debate; see Human Rights Committee, general comment No. 25 (1996), para. 8; and opinions No. 46/2011; No. 42/2012; No. 26/2013; No. 40/2016; No. 35/2018; No. 36/2018; No. 45/2018; No. 46/2018; No. 9/2019; No. 44/2019; No. 45/2019; No. 15/2020 and No. 16/2020.

overthrow the Government, incited hatred and extremism, or misled people with regard to the socioeconomic situation with a view to causing public anxiety and social instability.

78. 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.[46] 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.

79. 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 (Declaration on Human Rights Defenders), 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.[47] The Working Group has confirmed the right of human rights defenders "to investigate, gather information regarding and report on human rights violations".[48] The Human Rights Committee has also specifically recognized that article 19 (2) protects the work of journalists and "includes the right of individuals to criticize or openly and publicly evaluate their Government without fear of interference or punishment".[49] The imprisonment of human rights defenders for speech-related reasons is subject to heightened scrutiny; the Working Group has recognized the necessity to subject interventions against individuals who may qualify as human rights defenders to particularly intense review.[50] This heightened standard of review by international bodies is especially appropriate where there is a pattern of harassment by national authorities targeting such individuals.[51]

80. The source has demonstrated that Mr. Tuan was detained for the exercise of his rights under the Declaration on Human Rights Defenders in promoting democracy and constitutional rights. The Working Group has determined that detaining individuals on the basis of their activities as human rights defenders violates their right to equality before the law and to equal protection of the law under article 7 of the Universal Declaration of Human Rights and article 26 of the Covenant.[52]

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

Category III

82. Given its finding that Mr. Tuan's detention was arbitrary under category II, the Working Group wishes to emphasize that no trial of Mr. Tuan should have taken place. However, according to the Government, on 5 January 2021 the People's Court of Ho Chi Minh City sentenced Mr. Tuan to 11 years of imprisonment and 3 years of probation and he is currently serving his sentence. The Working Group considers that his right to a fair trial was violated.

83. The source alleges that Mr. Tuan has not had adequate access to his lawyer, noting the Government's confirmation that Mr. Tuan's lawyers were only allowed to participate in

[46] Human Rights Council resolution 12/16, para. 5 (p).

[47] General Assembly resolution 53/144, annex, arts.1 and 6 (c). See also General Assembly resolution 74/146, para. 12.

[48] Opinion No. 8/2009, para. 18.

[49] *De Morais v. Angola* (CCPR/C/83/D/1128/2002), para. 6.7.

[50] Opinions No. 62/2012, para. 39; and No. 21/2011.

[51] Opinion No. 39/2012, para. 43. The Working Group also notes that Mr. Tuan and other journalists were the subject of an allegation letter sent by the Working Group and other special procedure mandate holders on 17 September 2020, available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25542. The Working Group acknowledges the Government's response of 28 December 2020.

[52] 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.

the proceedings after 15 October 2020, when the investigation was completed. On 11 November 2020, Mr. Tuan had the opportunity to communicate with his lawyer for the first time. The Government asserts that due to confidentiality concerns that pertain to national security offences, which were relevant to the investigation of Mr. Tuan, defence lawyers were only able to take part in the proceedings after the investigation phase was complete, in accordance with article 74 of the Criminal Procedure Code of 2015. It asserts that his defence lawyers were allowed to prepare to defend Mr. Tuan, and attended the first instance trial. In relation to Mr. Tuan's right to appeal, while the source has made this argument, it did not provide sufficient information to substantiate this claim.

84. All persons deprived of their liberty have the right to legal assistance by counsel of their choice at any time during their detention, including immediately after their apprehension, and such access is to be provided without delay.[53] The failure to provide Mr. Tuan with access to a lawyer during the investigation violated his right to adequate time and facilities to prepare his defence under article 14 (3) (b) of the Covenant. Any legislation that purports to remove the right to counsel is inherently contrary to international human rights standards.[54] Even if such legislative provisions were acceptable, the Government has not provided an adequate explanation of why Mr. Tuan's case was so serious as to justify denial of access to legal counsel during the investigation, or any information about how the investigation might have been affected had Mr. Tuan met with his lawyer. This case is another example of legal representation being denied or limited for individuals facing serious charges, suggesting that there is a systemic failure to provide access to counsel during criminal proceedings in Viet Nam.[55]

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

Category V

86. In addition, the Working Group considers that Mr. Tuan was targeted because of his activities as a journalist and human rights defender. The sources notes that prior to his arrest in a coffee shop in a home owned by a member of Mr. Tuan's family, approximately 30 plain-clothed and 10 uniformed police officers forced the closure of the coffee shop, covered all internal security cameras with black nylon bags and cut off the Wi-Fi. It is unclear why the arrest of 1 individual would require 40 police officers. The Working Group finds that the circumstances of his arrest are consistent with a pattern of targeting of Mr. Tuan. The source also submits that the Government arrested, detained and prosecuted Mr. Tuan in connection with an ongoing investigation into a fellow journalist and member of the Independent Journalists' Association of Viet Nam, who has been held in detention without trial since November 2019. Prior to his detention, Mr. Tuan was summoned at least four times by the police to answer questions relating to this fellow member of the journalist association. Mr. Tuan reportedly did not cooperate with the police.

87. There appears to be a pattern in Viet Nam of detaining human rights defenders for their work, and this case is another example.[56] Moreover, in the discussion above concerning category II, the Working Group established that Mr. Tuan'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.[57]

[53] 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, principle 9 and guideline 8; and Human Rights Committee, general comment No. 35 (2014), para. 35.

[54] CCPR/C/VNM/CO/3, paras. 25–26 and 35–36.

[55] 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. See also CAT/C/VNM/CO/1, paras. 16–17.

[56] 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, paras. 25 and 45 (d).

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

88. For these reasons, the Working Group finds that Mr. Tuan was deprived of his liberty on discriminatory grounds, that is, owing to his status as a human rights defender, and on the basis of his political or other opinion. His detention violates articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant, and is arbitrary according to category V. The Working Group refers the present case to the Special Rapporteur on the situation of human rights defenders.

Concluding remarks

89. According to the source, Mr. Tuan has not been permitted to contact his family during this detention. The restrictions placed on Mr. Tuan's contact with his family have violated his right to contact with the outside world under rules 43 (3) and 58 (1) of the Nelson Mandela Rules and principles 15 and 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. While the Government states that Mr. Tuan received supplies from his family, the Working Group finds that these cannot substitute for his right to correspond with his family and receive visits from them.

90. The present case is one of many cases brought before the Working Group in recent years concerning arbitrary detention in Viet Nam.[58] These cases follow a familiar pattern of arrest that does not comply with international norms, which is manifested in the circumstances of the arrest, lengthy detention pending trial with no access to judicial review, denial or limiting of access to legal counsel, incommunicado detention, prosecution under vaguely worded criminal offences for the peaceful exercise of human rights, and denial of access to the outside world. This pattern indicates a systemic problem with arbitrary detention in Viet Nam which, if it continues, may amount to a serious violation of international law.[59]

91. The Working Group welcomes any opportunity to work constructively with the Government to address arbitrary detention. A significant period has passed since the Working Group's last visit to Viet Nam in October 1994. 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

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

> The deprivation of liberty of Le Huu Minh Tuan, being in contravention of articles 2, 6, 7, 8, 11, 19, 20 and 21 (1) of the Universal Declaration of Human Rights and articles 2, 9, 14, 15 (1), 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.

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

94. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Tuan 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. Tuan.

95. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Tuan and to take appropriate measures against those responsible for the violation of his rights.

[58] Opinions No. 81/2020, No. 16/2020, 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.

[59] Opinion No. 47/2012, para. 22.

96. The Working Group urges the Government to bring its laws, particularly article 117 of the Penal Code of 2015, into conformity with the recommendations made in the present opinion and with the commitments made by Viet Nam under international human rights law.

97. 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 and the Special Rapporteur on the situation of human rights defenders, for appropriate action.

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

Follow-up procedure

99. 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. Tuan has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Tuan;

(c) Whether an investigation has been conducted into the violation of Mr. Tuan's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of 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.

100. 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.

101. 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.

102. 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.[60]

[*Adopted on 6 May 2021*]

[60] Human Rights Council resolution 42/22, paras. 3 and 7.