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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its ninety-third session, 30 March–8 April 2022

Opinion No. 13/2022 concerning Chau Van Kham (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 work¹ on 15 December 2022 the Working Group transmitted to the Government of Viet Nam a communication concerning Chau Van Kham. The Government replied to the communication on 1 March 2022. The State is 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).

* In accordance with paragraph 5 of the Working Group's methods of work, Leigh Toomey did not participate in the discussion of the case.

¹ [A/HRC/36/38](#).

Submissions

Communication from the source

4. Chan Van Kham was born in 1949. He is a citizen of Australia. He is a retired banker and usually resides in Australia.

5. The source explains that Mr. Van Kham entered Viet Nam from Cambodia on 13 January 2019. Once in Viet Nam, he reportedly met with a member of a pro-democracy organization and travelled to Ho Chi Minh City with a motorbike.

6. According to the source, Mr. Van Kham was arrested on 13 January 2019, at a hotel in Ho Chi Minh City, Viet Nam, by the Ho Chi Minh City police. Reportedly, no arrest warrant or other decision by a public authority was presented at the time of the arrest.

7. The source reports that Mr. Van Kham was arrested for “terrorism to oppose the people’s government” and charged under article 113 of the 2015 Vietnamese Penal Code. The source alleges that Mr. Van Kham was charged with terrorism for the sole reason that he was a member of Viet Tan, a pro-democracy group described by the United Nations as “a peaceful organization advocating for democratic reform”. The source notes that Mr. Van Kham’s detention was ordered by the People’s Court of Ho Chi Minh City.

8. Reportedly, Mr. Van Kham had been in pretrial detention for 10 months, from 13 January to 11 November 2019, when he was tried alongside five others, found guilty, sentenced to 12 years’ imprisonment for terrorism and fined for entering the country on a false document. Allegedly, his trial only lasted four and a half hours and Mr. Van Kham was not advised of the evidence against him before the trial.

9. According to the source, Mr. Van Kham was moved around between prisons without his embassy being informed. The source notes that he was held in Ho Chi Minh prison until February 2020. In February 2020, when a relative attended the prison, he was no longer an inmate there, but prison authorities refused to disclose where he had been moved until late June 2020. In June 2020, his relative was told he was detained in Thu Duc prison, three hours away from Ho Chi Minh City, where he is reportedly still detained. The source notes that Mr. Van Kham has been detained in harsh conditions, especially given that he is 71 years old and subject to a host of medical issues.

10. The source further explains that although Mr. Van Kham was arrested in January 2019, it was not until October 2019 that authorities allowed him to meet with his defence lawyer for the first time. Reportedly, Mr. Van Kham was able to meet with his lawyer for a second and final time in November 2019, three days before his trial. The source reports that both meetings took place in the presence of police officers, which prevented Mr. Van Kham from having a private, privileged conversation with his lawyer and from benefiting from adequate time and resources to properly prepare his defence. In this regard, the source adds that neither Mr. Van Kham nor his lawyer were ever informed of the specific charges against him or of the evidence supporting those charges.

11. Furthermore, the source explains that despite not being laid out in any Vietnamese law, in practice no detainees or prisoners held on politically motivated charges are allowed private access to legal counsel or family visits. All meetings allegedly occur in the presence of the police, making it impossible for detainees to talk about possible abuses in detention or legal strategies without fear of retaliation from the Government.

12. The source discloses that, on 2 March 2020, Mr. Van Kham’s conviction and sentence were affirmed on appeal.

Legal analysis

13. The source argues that Mr. Van Kham’s arrest and detention are arbitrary given that: (i) Mr. Van Kham was deprived of his liberty as a result of the exercise of his rights or freedoms guaranteed by the Universal Declaration of Human Rights and the corresponding rights guaranteed under the International Covenant on Civil and Political Rights; (ii) international norms relating to the right to a fair trial have been totally or partially ignored;

and (iii) Mr. Van Kham was deprived of his liberty for reasons of discrimination based on his political or other opinion.

i. Exercise of the rights or freedoms guaranteed by the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights

14. The source alleges that the detention of Mr. Van Kham violates his right to freedom of opinion and freedom of thought and conscience, protected under articles 18 and 19, respectively, of the Universal Declaration of Human Rights. In this regard, the source submits that Mr. Van Kham is a prisoner of conscience who was arrested and tried not for anything he did but rather because of his beliefs in democracy for the people of Viet Nam.

15. The source adds that such violations are incompatible with articles 2 and 7 of the Universal Declaration of Human Rights, which protect Mr. Van Kham's right to be free from discrimination based on his belief in democracy. The source further contends that Mr. Van Kham was denied freedom of movement within Viet Nam because of his pro-democracy views, in violation of article 13 of the Universal Declaration of Human Rights.

16. Additionally, the source submits that the prosecution and imprisonment of Mr. Van Kham for his advocacy of the right to take part in the government of Viet Nam, directly or through freely chosen representatives, constitute a violation of article 21 of the Universal Declaration of Human Rights.

ii. International norms relating to the right to a fair trial

17. The source also alleges that Mr. Van Kham's right to a fair trial has been totally or partially ignored, in violation of articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights.

18. In this regard, the source contends that Mr. Van Kham was denied his right to appear before an objective tribunal. The source notes that all Vietnamese judges are required to be members of the Communist Party of Viet Nam and are bound to make a decision favourable to the Communist Party. Accordingly, the source submits that they cannot be described as forming an objective and fair tribunal. As a result, the source concludes that Mr. Van Kham did not benefit from being tried before a fair and objective tribunal, and that his case was pre-determined before it began.

19. In regard to Mr. Van Kham's ability to prepare his defence, the source alleges that neither Mr. Van Kham nor his counsel were informed of the evidence against Mr. Van Kham, nor of the true nature of the allegations against him. As a result, they were unable to present evidence to properly counter such allegations. Furthermore, the source reiterates that Mr. Van Kham was arrested in January 2019 but was not allowed to meet with his defence counsel until October 2019. Reportedly, Mr. Van Kham met with his lawyer a second and final time in November 2019, three days before the trial. The source reports that none of these meetings were private or confidential, in violation of Mr. Van Kham's right to consult privately with his lawyer and to have adequate time and resources to properly prepare his defence.

20. The source also submits that Mr. Van Kham's trial only lasted four and a half hours, which suggests that the verdict was pre-determined. In addition, the source reports that Mr. Van Kham was tried alongside five defendants and that the court barely had enough time to carry out routine procedures, including reading the names and charges, and listening to the presentation of evidence and the defence's arguments in a fair and unbiased manner.

21. According to the source, despite the serious nature of the charges against Mr. Van Kham, the indictment did not allege any violence or attempted violence by him or his co-defendants. Instead, the court allegedly pointed to evidence of his affiliation and activities with Viet Tan in Australia, where the group operates openly and lawfully, despite being labelled by Viet Nam as a terrorist organization for either political or ideological reasons. It is reported that in the indictment, the Vietnamese authorities did not identify any violent act committed by any member of Viet Tan – much less any evidence of acts that would generally be considered as constituting terrorism, such as killing or causing serious harm to civilians, or intending to do so – for political or ideological reasons. In this regard, the source argues that Mr. Van Kham was convicted as it was alleged that he held a senior position in Viet Tan,

even though Viet Tan is a non-violent pro-democracy group. As a result, the source submits that Mr. Van Kham's arrest was arbitrary and violated article 9 of the Universal Declaration of Human Rights.

22. It is alleged that, during Mr. Van Kham's trial, no independent witness was produced and that, consequently, his conviction rests solely on reports of the Government of Viet Nam, reports which neither Mr. Van Kham nor his attorneys had the opportunity to challenge. Further, the source notes that Mr. Van Kham provided evidence that he was not involved in any violence or displays of force. Allegedly, this was the only live evidence during his trial and was ignored or not given its due weight. The source argues that potential mitigating circumstances were not properly taken into account by the trial and appeal courts. In this regard, the source underlines Mr. Van Kham's lengthy sentence of 12 years' imprisonment, despite the lack of evidence as to his involvement in any actual violence and despite his previous good character.

23. The source concludes that Mr. Van Kham's trial violated his fair trial rights and that his conviction was based on improper evidence. The source also submits that Mr. Van Kham's right to be presumed innocent under article 11 of the Universal Declaration of Human Rights was violated by the lack of public access to the trial and the lack of guarantees required for his defence to be advanced properly. In addition, the source contends that Mr. Van Kham's right to an effective remedy by a competent national tribunal, under article 8 of the Universal Declaration of Human Rights, was violated given the biased nature of the judiciary; the lack of any proper provision applied in relation to the burden and standard of proof; the inadequate time and resources available to Mr. Van Kham in preparation for his trial; and the lack of advance notice to Mr. Van Kham and his lawyer regarding the evidence against him.

24. In addition, the source submits that the Criminal Procedure Code of Viet Nam contravenes international human rights standards insofar as article 173 (5) of the Code stipulates that government prosecutors can hold suspects accused of national security crimes in detention, and article 74 of the Code permits prosecutors to restrict the access of suspects to legal counsel until after an investigation is concluded. The source asserts that, in practice, this allows authorities to detain those accused of violating national security laws in police custody, without access to a lawyer, for as long as they want.

iii. Deprivation of liberty based on discriminatory grounds

25. Finally, the source argues that Mr. Van Kham has been deprived of his liberty for reasons of discrimination based on his political or other opinion, which resulted in ignoring the equality of human rights. In this regard, the source submits that Mr. Van Kham is currently detained in Viet Nam solely because of his membership in Viet Tan, a non-violent group whose sole mission is to push for democracy in Viet Nam.

Response from the Government

26. On 15 December 2021, the Working Group transmitted the allegations from the source to the Government of Viet Nam under its regular communication procedure. The Working Group requested the Government to provide detailed information by 14 February 2022 about the current situation of Mr. Van Kham. The Working Group also requested the Government to clarify the legal provisions justifying his detention, as well as its compatibility with the obligations of Viet Nam under international human rights law. Moreover, the Working Group called upon the Government to ensure Mr. Van Kham's physical and mental integrity.

27. On 10 February 2021, the Government requested an extension in accordance with paragraph 16 of the methods of work, which was granted with a new deadline of 1 March 2022.

28. The Government submits that the information and allegations mentioned in the communication were not accurate. The Government argues that Mr. Van Kham was arrested because he violated the laws of Viet Nam, not for his "democratic views". The competent authorities reportedly investigated, prosecuted and adjudicated Mr. Van Kham's case with full respect for the country's laws, which is consistent with international conventions to which Viet Nam is a party. According to the Government, the rights of Mr. Van Kham were

ensured in accordance with the country's laws throughout the investigation, prosecution, adjudication and execution of the judgment.

29. The Government submits that, as affirmed many times in the replies of Viet Nam to communications from the Working Group, the Viet Nam Reform Revolutionary Party, or Viet Tan, is not a "a peaceful organization advocating for democratic reform" but a terrorist group established by an ex-Commodore of the old Saigon Administration in 1982 in Thailand. The objective of this organization is reportedly to overthrow Viet Nam using many methods, including rebellion activities and directly threatening national security, safety and public order. The Government submits that Viet Tan has recruited and trained its members to use weapons and explosives; disseminated instructions on the Internet on how to make "Molotov cocktail"; organized online training courses on methods and skills of terrorism and sabotage; and directed its members to bring people and weapons illegally into Viet Nam in order to set up "secret hideouts", provoke protests and riots, undermine security and wage terrorist activities in Viet Nam. Allegedly, Viet Tan has also established groups that attack journalists who report on its illegal activities. The Government submits that its competent authorities have prevented and neutralized the plots of Viet Tan many times.

30. According to the Government, due to the above-mentioned dangerous activities of Viet Tan, the Ministry of Public Security classified Viet Tan as a terrorist group on 4 October 2016, and declared that all those who participate in organizing, propagandizing, luring and inciting others to participate in, sponsor or receive sponsorship from Viet Tan, attend training courses organized by Viet Tan or place themselves under the direction of Viet Tan would be viewed as accomplices of terrorism and as terrorism sponsors and would be punished under the laws of Viet Nam.

31. The Government submits that Mr. Van Kham joined Viet Tan in Australia in June 2010.

32. The Government reports that Mr. Van Kham illegally entered Viet Nam on 11 January 2019, under the direction of Do Hoang Diem (the President of Viet Tan), to examine, assess and organize training for sabotage activities. On that date, Mr. Van Kham reportedly moved to Ho Chi Minh City after crossing Ha Tien International Border Gate, and used a fake identity document (containing the name Chung Chinh Phi) to rent a room in a hotel in Ho Chi Minh City. According to the Government, Mr. Van Kham contacted other members of Viet Tan to research locations in Ho Chi Minh City, recruit and provide money to members of Viet Tan; to assign the task of researching the Viet Nam-Cambodia border; and to make fake documents to support the plan of Viet Tan to infiltrate Viet Nam.

33. The Government submits that Mr. Van Kham's activities, which included luring and training other persons to participate in Viet Tan in order to conduct terrorism and sabotage, fall under the offence of "terrorism to oppose the people's government" under article 113 of the Criminal Code of 2015. As a result, the competent authorities of Viet Nam arrested Mr. Van Kham and his accomplices in accordance with the country's legal provisions. According to the Government, Mr. Van Kham admitted his offence during the investigative process.

34. The Government explains that the Vietnamese competent authorities ensure the rights of the persons in temporary detention or custody in accordance with the law on temporary detention and custody. According to the Government, Viet Nam has a coordination mechanism among the relevant ministries and agencies to execute the temporary detention or custody order to ensure that the competent agencies of the Ministry of Public Security act in a way that is consistent with the country's laws and to protect the rights of persons in temporary detention or custody. In addition, persons in temporary detention and custody can observe whether or not their rights are being respected and can appeal through their lawyers or competent authorities when they find that their rights have been violated.

35. The Government submits that Mr. Van Kham's right to access legal representation was ensured. After arresting him, the competent authorities of Viet Nam reportedly informed him of his rights, including the right to defend himself or be defended by a lawyer or another person, in accordance with Vietnamese criminal procedure. According to article 74 of the Criminal Procedure Code of 2015, when the confidentiality of investigations into a national security breach is vital, the competent authorities are authorized to restrict access to defence counsels until after the investigation has ended.

36. The Government notes that Mr. Van Kham met his relatives, and received gifts, money and medicine from a family member on 22 February and 6 June 2019. Reportedly, Mr. Van Kham receives gifts, money and medicine from his relatives every month, in accordance with the country's laws.

37. After Mr. Van Kham's prosecution, on 28 January 2019, seven staff members of the Australian Consulate-General in Ho Chi Minh City held a consular meeting with him. At the meeting, staff members of the Australian Consulate-General were informed of Mr. Van Kham's violations of the laws of Viet Nam, his health situation and the conditions of his detention. In the spirit of transparency and straightforwardness, representatives of the Australian Consulate-General in Viet Nam have held 12 consular meetings with Mr. Van Kham, in accordance with the laws and international practices of Viet Nam, and they have been updated on his conditions of detention, his health situation and the protection of his rights.

38. The Government rejects the allegations that Mr. Van Kham's trial violated his right to a fair trial by a competent, independent and impartial court, and that his conviction was based on improper evidence. The Government submits that Mr. Van Kham's rights were ensured in compliance with article 14 of the Covenant.

39. Furthermore, the Government submits that article 4 of the Vietnamese Constitution of 2015 recognizes that the Communist Party of Viet Nam is the force leading the State and society, that the Party submits to the supervision of the people and that it is accountable to the people for its decisions. According to the Government, Viet Nam conforms to the rule of law and operates in accordance with legal principles, and every activity of the Communist Party of Viet Nam falls within the framework of the laws.

40. The Government contends that, when adjudicating, courts operate on the basis of and in compliance with legal provisions. Furthermore, the Government explains that judges are selected and appointed through a strict process: candidates to be appointed as judges must first meet high standards regarding ethics, professional qualifications, adjudication experience and training. In addition, candidates must sit an examination to be appointed as a judge. In order to be promoted to a higher level, a judge must sit another examination. While performing their duties, judges are required to comply with the law.

41. The Government submits that the independence of the courts is ensured in Viet Nam. In particular, institutional independence is ensured through the examination; through supervision among legislative, administrative and judicial branches; and through the lack of illegal interference into the adjudication process. In order to guarantee financial independence, the budget for the court must be approved by the General Assembly. Finally, the internal independence of courts is clearly provided in the law on the organization of the people's courts. When adjudicating, courts are independent of higher-level courts. They comply only with the law and apply the Supreme Court's guidelines for uniform application of the law.

42. In addition, judges are provided with guarantees of their judicial independence, including administrative independence, financial independence, a first term of 5 years and a possible second term of 10 years upon reappointment. Furthermore, judges are entitled to priority policies regarding salary, allowances and other benefits. The life, honour, prestige and dignity of judges and their relatives are also guaranteed. The Government notes that judges are trained to improve their professional qualifications and the process to select and appoint judges is very strict.

43. Regarding Mr. Van Kham's trial, the Government reports that the People's Court of Ho Chi Minh City held the first instance trial of Mr. Van Kham on 11 November 2019. After considering documents, evidence collected from the investigation process and verified at the Court, witness testimonies, the opinion of procurators and the parties' oral arguments before the Court, the trial panel sentenced Mr. Van Kham to 12 years in jail on the charge of "terrorism to oppose the people's administration". The Government explains that Mr. Van Kham will be deported as soon as he finishes his jail term. According to the Government, the High People's Court in Ho Chi Minh City held an appellate trial on 2 March 2020 and affirmed the first instance trial court's judgment.

44. The Government submits that the case of Mr. Van Kham was adjudicated in the course of a public and fair trial by a competent, independent and impartial court in accordance with the law. His rights were ensured, including the right to equality in making arguments and providing evidence, assessing evidence and requesting clarification of the nature of the case. The Government further argues that Mr. Van Kham and his lawyers were allowed to present their views during the trial, which was attended by the Australian Consular-General. The Government adds that Mr. Van Kham's right to contact his lawyer was ensured throughout the preparation for the first instance and appellate trials.

45. The Government rejects the allegation that the trial was too short and contends that the duration of the trial is consistent with the objective facts of the case. Reportedly, the trial was concluded after procedures were completed.

46. The Government further submits that as with other offenders, Mr. Van Kham's rights were ensured in compliance with the law, including his rights to food, clothing, life, health care, consular assistance, and his rights to have his relatives visit and to receive gifts and letters.

47. According to the Government, Mr. Van Kham is currently serving his sentence at Thu Duc Detention Centre, Ham Tan District, Binh Thuan Province. Reportedly, he is not working too much as a result of his age, and his health situation is normal and meets the standards for him to serve his sentence. The Government notes that, if he serves his sentence with good behaviour, Mr. Van Kham is entitled to the leniency of the law, such as the consideration of a sentence reduction.

Additional comments from the source

48. The source notes that the Government bears the burden of proof to rebut the allegations and that it has failed to do so. It resubmits that the detention of Mr. Van Kham is arbitrary and that he should be released immediately.

49. The source reiterates that Viet Tan is a non-violent organization committed to democracy using non-violent means. In this regard, it explains that Viet Tan is a legal organization in Australia, North America and the European Union, and recalls the Working Group's previous findings regarding the detention of organization members. The source also stresses that United Nations bodies have described Viet Tan as a peaceful organization advocating for democratic reform, and that they have criticized as arbitrary numerous convictions of Viet Tan members. The source contends that the Government has not put forward any evidence to support its allegations that Viet Tan is a terrorist group or that Mr. Van Kham took part in any activities that can properly be described as terrorism or sabotage.

50. The source observes that the Government's allegations against Mr. Van Kham in its response are different from those in the indictment. The source submits that this discrepancy supports the fact that Mr. Van Kham's conviction was pre-determined and not based on any evidence before the Court. The source also argues that it constitutes a violation of Mr. Van Kham's right to know the allegations against him in order to properly prepare his defence, in violation of article 14 of the Covenant.

51. The source notes that the Government fails to demonstrate that Mr. Van Kham was brought before a Court so that it could authorize his detention. The source contends that the detention of Mr. Van Kham for 10 months, during almost the entirety of which he was denied access to a lawyer, as a result of the decision of the People's Procuracy and the Ministry of Public Security, without him being brought before a Court and without any individualized review of his situation or consideration of alternatives to detention, constitutes a clear breach of article 9 (3) of the Covenant.

52. Regarding Mr. Van Kham's access to a lawyer, the source notes that Mr. Van Kham was charged with a serious offence for which he was ultimately sentenced to 12 years' imprisonment. The source submits that allowing him only two very short consultations with his lawyers, carried out in the presence of police officers, violates his rights to communicate privately with his counsel, to have adequate access to his lawyer and to have adequate time and resources to properly prepare his defence, under article 14 of the Covenant.

53. The source notes that the Government does not deny the short duration of Mr. Van Kham's trial, and recalls the Working Group's past findings that a short trial for a serious criminal offence suggests a defendant's guilt and that the appropriate penalty has been determined prior to the hearing.² The source submits that the short duration of Mr. Van Kham's trial constitutes a further denial of his right to be presumed innocent and have his case properly considered on its merits. According to the source, the appeal hearing was of similar length and the result of that hearing was also pre-determined.

54. The source notes that Mr. Van Kham was accused of carrying out acts and being a member of a group aimed at bringing down the Vietnamese Communist Party. According to the source, Mr. Van Kham's case could therefore not be objectively and impartially adjudicated by judges required to be members of the Communist Party and who, even if they were minded to act independently, would be under pressure to decide against the defendant. The source adds that the judges' lack of impartiality is accentuated by the fact that judges in Viet Nam do not benefit from life-long tenure and can be removed arbitrarily. The source notes that the Human Rights Committee has expressed concern on this matter, stating that the procedures for the selection of judges as well as their lack of security of tenure, combined with the possibility of taking far-reaching disciplinary measures against judges, exposes them to political pressure and jeopardizes their independence and impartiality.³

55. Furthermore, the source denies the Government's allegations that Mr. Van Kham was convicted after the Court considered relevant evidence and documents collected from the investigation process and verified by the Court, testimony of witnesses, opinions of procurators, and results of oral arguments before the Court. The source submits that no witnesses were called to testify about Mr. Van Kham's actions and that Mr. Van Kham and his lawyer were not able to challenge the evidence. Reportedly, Mr. Van Kham gave evidence in his own defence, which was ignored by the Court. The source concludes that this constitutes a further indication that Mr. Van Kham's conviction was pre-determined.

56. Finally, the source reiterates that Mr. Van Kham was deprived of his liberty on discriminatory grounds, owing to his status as a human rights defender and democracy activist, and because of his political or other opinion, in violation of articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant.

Discussion

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

58. In determining whether the deprivation of liberty of Mr. Van Kham is arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has presented a prima facie case for breach of the international law constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations.⁴

Category I

59. The Working Group will first consider whether there have been violations under category I, which concerns deprivation of liberty without legal basis.

60. The source submits that Mr. Van Kham was arrested on 13 January 2019 and that no arrest warrant or other decision by a public authority was presented at the time of the arrest.

61. The Government submits that the competent authorities of Viet Nam arrested Mr. Van Kham and his accomplices in accordance with the country's legal provisions but does not specify if an arrest warrant was presented at the time of the arrest. The Working Group considers that the source has presented a credible prima facie case that the authorities did not

² Opinions No. 46/2018, No. 45/2018, No. 36/2018 and No. 75/2017.

³ [CCPR/CO/75/VNM](#).

⁴ [A/HRC/19/57](#), para. 68.

present an arrest warrant at the time of Mr. Van Kham's arrest.⁵ Moreover, in a series of recent cases, the Working Group has found that an arrest warrant was not presented at the time of the arrest, suggesting that the source's claims are credible.⁶

62. The Working Group finds that Mr. Van Kham was arrested without an arrest warrant, in violation of article 9 (1) of the Covenant. It is not sufficient that there is a law that authorizes the arrest. The authorities must invoke that legal basis and apply it through an arrest warrant.⁷

Pretrial detention

63. The source submits that Mr. Van Kham was in pretrial detention for 10 months, from 13 January to 11 November 2019. Article 9 (3) of the Covenant provides that it is not to be the general rule that persons awaiting trial are to be detained in custody. The Working Group recalls the Human Rights Committee's view that pretrial detention should be an exception and as short as possible, and must be based on an individualized determination that it is reasonable and necessary, taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime. Courts must examine whether alternatives to pretrial detention, such as bail, electronic bracelets or other conditions, would render detention unnecessary in the particular case.⁸

64. In the present case, taking into account all circumstances, the Working Group concludes that an individualized determination of Mr. Van Kham's circumstances was absent and, as a result, his detention lacked a legal basis and was ordered in violation of article 9 (3) of the Covenant. In reaching this conclusion, the Working Group notes that the Government did not submit any information to suggest that such a determination took place or to rebut the source's submissions.

65. While the source does not make any submission on whether Mr. Van Kham was brought before a judge to challenge his pretrial detention, the Working Group recalls the right to be brought promptly before a judicial authority to challenge detention, within 48 hours of the arrest, barring absolutely exceptional circumstances, as per the international standard set out in the Working Group's jurisprudence.⁹ The right to bring proceedings before a court so that the court may decide without delay on the lawfulness of detention is protected by article 9 of the Universal Declaration of Human Rights, article 9 (3) of the Covenant and principles 11, 32 and 37 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

66. Judicial oversight of deprivation of liberty is a fundamental safeguard of personal liberty and is essential in ensuring that detention has a legal basis.¹⁰ As the Working Group has found, the inability to challenge detention before a court also violates the right to an effective remedy under article 8 of the Universal Declaration of Human Rights and article 2 (3) of the Covenant, placing the individual outside the protection of the law, in violation of the 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.

67. The source also submits that in February 2020, when a relative attended the prison, Mr. Van Kham was no longer an inmate and prison authorities refused to disclose information as to where he had been moved until late June 2020. The Government does not refute this

⁵ Opinion No. 45/2018, paras. 40–42.

⁶ Opinions No. 40/2021, para. 62; No. 36/2021 para. 68; 45/2019, para. 50; No. 44/2019, para. 51; No. 9/2019, para. 29; No. 8/2019, para. 49; No. 46/2018, para. 48; No. 45/2018, para. 40; No. 36/2018, para. 39; No. 35/2018, para. 26; and No. 75/2017, para. 35.

⁷ Opinions No. 45/2019, para. 51; No. 44/2019, para. 52; No. 46/2018, para. 48; and No. 36/2018, paras. 39–40.

⁸ Human Rights Committee, general comment No. 35 (2014), para. 38.

⁹ Opinions No. 57/2016, paras. 110–111; No. 2/2018, para. 49; No. 83/2018, para. 47; No. 11/2019, para. 63; and No. 30/2019, para. 30.

¹⁰ Opinions No. 35/2018, para. 27; No. 83/2018, para. 47; No. 32/2019, para. 30; No. 33/2019, para. 50; No. 44/2019, para. 54; No. 45/2019, para. 53; No. 59/2019, para. 51; and No. 65/2019, para. 64; and the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, para. 3.

allegation. The Working Group finds that for this duration, Mr. Van Kham was forcibly disappeared. Enforced disappearance constitutes a particularly aggravated form of arbitrary detention, in violation of article 9 (1) of the Covenant and article 6 of the Universal Declaration of Human Rights.¹¹ The Working Group refers the present case to the Working Group on Enforced or Involuntary Disappearances.

68. For these reasons, the Working Group considers that the deprivation of liberty of Mr. Van Kham lacks a legal basis and is thus arbitrary, falling under category I.

Category II

69. The source submits that the detention of Mr. Van Kham violates his rights to freedom of thought and conscience and freedom of expression and opinion under articles 18 and 19 of the Covenant. In this regard, the source submits that Mr. Van Kham is a prisoner of conscience who was arrested and tried not for anything he did, but rather because of his beliefs in democracy for the people of Viet Nam. Additionally, the source submits that the prosecution and imprisonment of Mr. Van Kham for his advocacy of the right to take part in the government of Viet Nam, directly or through freely chosen representatives, constitute a violation of article 21 of the Universal Declaration of Human Rights. The source further contends that Mr. Van Kham was denied freedom of movement within Viet Nam because of his pro-democracy views, in violation of article 13 of the Universal Declaration of Human Rights. The Government submits that he was arrested, detained and convicted because he violated domestic law and not for his “democratic views”. The Government contends that Mr. Van Kham was arrested, detained and convicted in relation to his activities as a key member of Viet Tan, which the Government has designated as a terrorist group.

70. The Working Group find the source’s allegations to be convincing and notes that the Government’s references to Mr. Van Kham’s membership to this group in Australia, where the organization is legal, adds credence to this argument. Indeed, the source submits that despite the serious nature of the charges, the indictment did not allege any violence or attempted violence by Mr. Van Kham or his Vietnamese co-defendants. Instead, the court reportedly pointed to evidence of his affiliation and activities with Viet Tan in Australia where it operates openly and lawfully, though Viet Nam labels it a terrorist organization.

71. The source submits that the Government has submitted no evidence to the Court to support its conclusion that Mr. Van Kham’s activities, which included luring and training other persons to participate in Viet Tan in order to conduct terrorism and sabotage, fall under the offence of “terrorism to oppose the people’s government” under article 113 of the Criminal Code of 2015.

72. The Working Group has previously found that mere association with Viet Tan does not justify detention,¹² noting that posting material about State policy on social media and joining and establishing various associations do not amount to acts of inciting others to cause public disorder or violence.¹³ The Working Group recalls that the Office of the United Nations High Commissioner for Human Rights has described Viet Tan as a peaceful organization advocating for democratic reform.¹⁴

73. Article 19 of the Covenant protects the holding and expression of opinions, including those which are not in line with government policy.¹⁵ The Human Rights Committee has emphasized that the form of expression is highly relevant in assessing whether a restriction is proportionate. As stipulated by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, certain types of expression should never be subject to restrictions such as discussion of government policies, and *political activities*,

¹¹ See opinions No. 5/2020, No. 6/2020, No. 11/2020 and No. 13/2020. See also Human Rights Committee, general comment No. 35, para. 17.

¹² Opinions No. 27/2017, para. 36; No. 40/2016, para. 38; and No. 46/2011, paras. 20–21.

¹³ Opinions No. 36/2021, para. 81; No. 45/2018, para. 48; No. 27/2017, para. 36; No. 40/2016, para. 38; and No. 46/2011, paras. 20–21.

¹⁴ See <https://news.un.org/en/story/2013/01/429682>.

¹⁵ Opinions No. 8/2019, para. 55; and No. 79/2017, para. 55.

including for peace or democracy (emphasis added).¹⁶ In addition, in its resolution 12/16, the Human Rights Council has called upon States to refrain from imposing restrictions that are not consistent with article 19 (3) of the Covenant.

74. The Working Group considers that Mr. Van Kham's conduct falls within the right to freedom of conscience and belief, and freedom of opinion and expression protected under articles 18 and 19 of the Covenant and articles 18 and 19 of the Universal Declaration of Human Rights. There is nothing to suggest that the permissible restrictions of these rights as set out in the Covenant apply in the present case. The Working Group is not convinced that prosecuting Mr. Van Kham is necessary to protect a legitimate interest protected under these articles, nor that Mr. Van Kham's arrest and detention constitute a necessary or proportionate response to his peaceful activities. The source notes that Mr. Van Kham provided evidence during this trial that he was not involved in any violence or force. Importantly, there is nothing to suggest, as alleged by the Government, that he committed "terrorism to oppose the people's administration".

75. The right to take part in the conduct of public affairs is protected by article 25 (a) of the Covenant and article 21 of the Universal Declaration of Human Rights. The Human Rights Committee has defined this conduct to include exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. The right to take part in the conduct of public affairs must apply equally to all citizens, irrespective of their political opinions, and can only be restricted by a reasonable and objective measure.¹⁷

76. The Working Group concludes that Mr. Van Kham's detention resulted from the peaceful exercise of his rights to freedom of conscience and belief and freedom of opinion and expression, as well as 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. For these reasons, the Working Group finds that Mr. Van Kham's arrest and detention are arbitrary under category II. The Working Group is therefore of the opinion that the deprivation of liberty of Mr. Van Kham is arbitrary, falling under category II, as it violates articles 18, 19, 25 and 26 of the Covenant and articles 7, 13, 18, 19 and 21 of the Universal Declaration of Human Rights.

77. The Working Group refers this case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

Category III

78. Given its finding that the deprivation of liberty of Mr. Van Kham is arbitrary under category II, the Working Group wishes to emphasize that no trial should have taken place.

79. However, according to the Government, a trial panel sentenced Mr. Van Kham to 12 years in jail on the charge of "terrorism to oppose the people's administration". An appellate court confirmed the trial judgment on 2 March 2020. In the light of the trials that have taken place, the Working Group will now consider whether the alleged violations of the right to a fair trial and due process were grave enough to give Mr. Van Kham's deprivation of liberty an arbitrary character, such that it falls within category III.

Right to appear before an objective tribunal

80. While the Government raises numerous arguments to demonstrate the independence of the judiciary in Viet Nam, the source contends that Mr. Van Kham was denied his right to appear before an objective tribunal. It also notes that all Vietnamese judges are required to be members of the Communist Party of Viet Nam and are bound to make a decision favourable to the Communist Party, which means they cannot be objective. Given the serious allegations made by the source on the independence of the judiciary in Viet Nam, the

¹⁶ A/HRC/14/23, para. 81 (i).

¹⁷ Human Rights Committee, general comment No. 25, paras. 3–4 and 8.

Working Group refers this case to the Special Rapporteur on the independence of judges and lawyers.¹⁸

Legal assistance

81. The source contends that Mr. Van Kham was arrested in January 2019 but was not allowed to meet with his defence counsel until October 2019. The Working Group recalls that 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 shall be provided without delay.¹⁹

82. In addition, the source submits that the Criminal Procedure Code of Viet Nam contravenes international human rights standards insofar as article 173 (5) of the Code stipulates that government prosecutors can hold suspects accused of national security crimes in detention, and article 74 of the Code allows prosecutors to restrict their access to legal counsel until after an investigation has been concluded. The Government confirms that according to article 74, the competent authorities are authorized, when the confidentiality of investigations into national security breach is vital, to restrict access to defence counsels until after the investigation has ended.

83. The Working Group finds that the failure to provide Mr. Van Kham access to a lawyer during the investigation violated his right to have 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.²⁰

84. The Working Group finds that the Government has breached Mr. Van Kham's right to legal assistance at all times, which is inherent in the right to liberty and security of person as well as the right to a fair and public hearing by a competent, independent and impartial tribunal established by law, in accordance with article 14 (1) and (3) (b) and (d) of the Covenant and articles 3, 9, 10 and 11 (1) of the Universal Declaration of Human Rights, as well as principles 15, 17 and 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and principles 1, 5, 7, 8, 21 and 22 of the Basic Principles on the Role of Lawyers.²¹ The Working Group considers that these violations substantially undermined Mr. Van Kham's capacity to defend himself in the judicial proceedings.²²

85. The Government argues that the trial concluded after procedures had been completed and that Mr. Van Kham's right to contact his lawyer was guaranteed throughout the preparation for the first instance and appellate trials. The source, however, submits that Mr. Van Kham met with his lawyer a second and final time in November 2019, three days before the trial. The source reports that none of the meetings between Mr. Van Kham and his lawyer were private or confidential, in violation of Mr. Van Kham's right to consult privately with his lawyer and to have adequate time and resources to properly prepare his defence. The Working Group recalls that privacy and confidentiality of communications between legal counsel and detainee are protected under article 14 (3) (b) of the Covenant and principles 15, 17 and 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and finds that Mr. Van Kham's rights were violated in this regard. The Working Group notes that this case is another example of instances when legal representation was denied or limited for individuals facing serious charges, suggesting that

¹⁸ Opinion No. 36/2020, paras. 42 and 72.

¹⁹ 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; Human Rights Committee, general comment No. 35, para. 35; A/HRC/48/55, para. 56; and A/HRC/45/16, paras. 50–55. See also A/HRC/27/47, para. 13.

²⁰ CCPR/C/VNM/CO/3, paras. 25–26 and 35–36; and opinions No. 36/2020, para. 70; and No. 11/2021, para. 84.

²¹ A/HRC/29/26/Add.2, para. 56; and opinion No. 18/2021, para. 59.

²² 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.

there is a systemic failure to provide access to counsel during criminal proceedings in Viet Nam.²³

Right to equality before courts and tribunals and fair trial rights

86. The source submits that no independent witnesses were produced at trial and that Mr. Van Kham's conviction rests solely on the reports of the Government of Viet Nam, which he or his legal team did not have the opportunity to challenge. On Mr. Van Kham's ability to prepare his defence, the source alleges that neither he nor his counsel were informed of the evidence against Mr. Van Kham, nor of the true nature of the allegations against him. As a result, they were unable to present evidence to properly counter such allegations. Reportedly, although Mr. Van Kham gave evidence that he was not involved in any violence or force, and this constituted the only live evidence in his trial, it was ignored or not given its due weight. The Government argues that Mr. Van Kham's rights were ensured, including the right to equality in making arguments and providing evidence, assessing evidence and requesting clarification of the nature of the case. It submits that Mr. Van Kham and his lawyers were allowed to present their views at trial.

87. The Working Group finds the source's submissions credible, and recalls that the Human Rights Committee, in its general comment No. 32, stated that there is a strict obligation to respect the right of accused persons to have witnesses admitted that are relevant for the defence and to be given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings.²⁴

88. The right to an independent and impartial tribunal is set out in article 10 of the Universal Declaration of Human Rights and article 14 (1) of the Covenant. The Working Group recalls that the Human Rights Committee has noted that the requirement of competence, independence and impartiality of a tribunal under article 14 (1) of the Covenant is an absolute right that is not subject to any exception.²⁵ The Committee has further observed that the tribunal must also appear impartial to a reasonable observer.²⁶

89. The source submits that Mr. Van Kham was found guilty, sentenced to 12 years' imprisonment for terrorism and fined for entering the country on a false document. The source also submits that the trial lasted only four and a half hours, and Mr. Van Kham was tried alongside five other individuals. The source argues that the verdict was pre-determined and that the court barely had enough time to carry out routine procedures or listen to the defence's arguments in a fair and unbiased manner. The Government denies that the trial was too short, arguing that the period of the trial is consistent with the objective facts of the case. The Working Group notes that the Government does not refute the length of the trial and observes that this would leave 45 minutes per defendant, thus raising serious concerns about the proper application of the presumption of innocence in terms of the time needed to listen to the presentation of evidence and defence arguments in a fair and unbiased manner.²⁷ As the Working Group has previously noted, a short trial for a serious criminal offence that carries a lengthy sentence indicates that Mr. Van Kham's guilt had been determined prior to the trial.²⁸ The Working Group finds that these factors also constitute a denial of Mr. Van Kham's right to the presumption of innocence guaranteed under article 14 (2) of the Covenant and article 11 (1) of the Universal Declaration of Human Rights.

90. The source argues that Mr. Van Kham was not advised of the evidence against him before the trial, that the trial violated his fair trial rights and that his conviction was based on improper evidence. Furthermore, the source notes the lack of any proper provision applied in relation to the burden and standard of proof, the inadequate time and resources available to Mr. Van Kham in preparation for his trial and the lack of advance notice of the evidence against Mr. Van Kham to either him or his lawyer. While the Government denies these

²³ 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.

²⁴ Human Rights Committee, general comment No. 32 (2007), para. 39.

²⁵ *Ibid.*, para. 19.

²⁶ *Ibid.* See also opinion No. 12/1994.

²⁷ Opinions No. 46/2018, No. 45/2018, No. 36/2018 and No. 75/2017.

²⁸ See, for example, opinions No. 36/2018 and No. 75/2017.

allegations, the Working Group is persuaded by the source's detailed submissions on these issues. For these reasons, the Working Group finds that Mr. Van Kham's right to a fair trial and due process under article 14 (1) of the Covenant was violated by the lack of public access to the trial and guarantees required for his defence to be advanced properly. In addition, it finds that Mr. Van Kham's right to an effective remedy by a competent national tribunal, under article 8 of the Universal Declaration of Human Rights and article 2 (3) of the Covenant, were violated.

91. According to articles 9 (3) and 14 (3) (c) of the Covenant, anyone arrested or detained on a criminal charge is entitled to trial within a reasonable time and without undue delay. Any period of pretrial detention must remain exceptional and must never be of excessive length.²⁹ Given the Working Group's finding that Mr. Van Kham's detention was arbitrary under category II because it resulted from the peaceful exercise of his rights, any delay in trying his case is unreasonable.³⁰ The Working Group considers that Mr. Van Kham's pretrial detention of 10 months is unacceptably long, and in violation of articles 9 (3) and 14 (3) (c) of the Covenant.

Good behaviour as mitigation

92. The source argues that potential mitigating circumstances were not properly taken into account by the trial and appeal courts. In this regard, the source underlines Mr. Van Kham's lengthy sentence of 12 years' imprisonment, despite the lack of evidence as to his involvement in any actual violence and despite his previous good character. The Government does not address this issue directly.

93. While the Working Group considers that it is entitled to assess the proceedings of the court and the law itself to determine whether they meet international standards,³¹ it has consistently refrained from taking the place of the national judicial authorities or acting as a kind of supranational tribunal when it is urged to review the application of domestic law by the judiciary.³² The Working Group recalls that it cannot substitute itself for national courts; therefore, the question of how mitigating circumstances should have been taken into account by the national authorities falls outside the Working Group's mandate.³³

94. For the reasons enumerated above, the Working Group concludes that the above-mentioned violations of Mr. Van Kham's right to a fair trial and due process are of such gravity as to render his deprivation of liberty arbitrary under category III. The Working Group refers the case to the Special Rapporteur on the independence of judges and lawyers.

Category V

95. Finally, the source argues that Mr. Van Kham has been deprived of his liberty for reasons of discrimination owing to his status as a human rights defender and democracy activist.

96. The Working Group has observed an apparent pattern in Viet Nam of harassing and detaining human rights defenders for their work.³⁴ It notes the Human Rights Committee's concluding observations concerning Viet Nam, in which the Committee expressed its concern at reports that persons, particularly human rights defenders, activists and religious leaders, may face arbitrary arrests, detention and incommunicado detention without charges.³⁵

97. The Working Group finds credible the source's submission that Mr. Van Kham's arrest, conviction and sentence were an attempt to silence his activity, which is expressly protected by international law. As a result, in the discussion above concerning category II,

²⁹ A/HRC/39/45/Add.2, para. 36.

³⁰ Opinions No. 10/2021, para. 78; No. 16/2020, para. 77; and No. 8/2020, para. 75.

³¹ Opinions No. 33/2015; No. 15/2017; and No. 60/2019, para. 125.

³² See, e.g., opinions No. 40/2005, No. 35/2019 and No. 60/2019.

³³ Opinion No. 60/2019, para. 127.

³⁴ Opinions No. 45/2019, No. 44/2019, No. 9/2019, No. 46/2018, No. 45/2018, No. 36/2018, No. 35/2018, No. 79/2017, No. 75/2017 and No. 27/2017. See also *CCPR/C/VNM/CO/3*, para. 25.

³⁵ *CCPR/C/VNM/CO/3*, para. 25.

the Working Group established that Mr. Van Kham's detention resulted from the peaceful exercise of his fundamental freedoms. 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.³⁶

98. The Working Group thus finds that Mr. Van Kham's deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on political or other opinion, owing to his status as a human rights defender. 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 under category V. The Working Group refers the case to the Special Rapporteur on the situation of human rights defenders.

Concluding remarks

99. Although the Government maintains that Mr. Van Kham is in good health, the Working Group remains concerned by the source's submission that Mr. Van Kham, who is 71 years old, is subject to a host of medical issues.

100. The Working Group recalls that according to article 10 (1) of the Covenant and rules 1, 24, 27 and 118 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), all persons deprived of their liberty must be treated with humanity and with respect for their inherent dignity, including by being allowed to enjoy the same standards of health care that are available in the community. In particular, rule 27 (1) requires that all prisons ensure prompt access to medical attention in urgent cases, and that prisoners who need specialized treatment or surgery be transferred to specialized institutions or civil hospitals. The Working Group refers the present case to the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and the Independent Expert on the enjoyment of all human rights by older persons.

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

Disposition

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

The deprivation of liberty of Chau Van Kham, being in contravention of articles 2, 3, 6, 7, 8, 9, 10, 11, 18, 19 and 21 of the Universal Declaration of Human Rights and articles 2, 9, 14, 16, 18, 19, 25 and 26 of the International Covenant on Civil and Political Right is arbitrary and falls within categories I, II, III and V.

103. The Working Group requests the Government of Viet Nam to take the steps necessary to remedy the situation of Mr. Van Kham 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.

104. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Van Kham 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 unconditional release of Mr. Van Kham.

³⁶ Opinion No. 40/2021, para. 90; No. 11/2021, para. 87; No. 59/2019, para. 79; No. 13/2018, para. 34; and No. 88/2017, para. 43.

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

106. 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 situation of human rights defenders, the Working Group on Enforced or Involuntary Disappearances, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Rapporteur on the independence of judges and lawyers and the Independent Expert on the enjoyment of all human rights by older persons, for appropriate action.

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

Follow-up procedure

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

109. 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.

110. 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.

111. 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.³⁷

[Adopted on 31 March 2022]

³⁷ See Human Rights Council resolution 42/22, paras. 3 and 7.