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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its ninety-fourth session, 29 August–2 September 2022

Opinion No. 40/2022 concerning Tran Duc Thach (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 4 April 2022 the Working Group transmitted to the Government of Viet Nam a communication concerning Tran Duc Thach. The Government replied to the communication on 30 June 2022. The State 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](#).

Submissions

Communication from the source

4. Tran Duc Thach is a citizen of Viet Nam. He usually resides at Dien Tan commune, Dien Chau District, Nghe An Province, Viet Nam. He was 69 years old at the time of his arrest.

5. Mr. Thach is a poet, author and human rights advocate. He is a co-founder of the Brotherhood for Democracy, an organization which has a stated goal of defending human rights and promoting the building of a democratic and just society for Viet Nam.

a. Arrest and trial proceedings

6. According to the source, Mr. Thach was harassed continuously by the Nghe An Provincial Police in the lead-up to his arrest in 2020.

7. On 23 April 2020, around 20 plain-clothes officers, reportedly from the security branch of the police department of Nghe An Province, arrived at Mr. Thach's home at around 9 a.m. with a search warrant. Although the search warrant was read aloud, the member of Mr. Thach's family present was unable to view its details. The police searched Mr. Thach's home, confiscating several of his personal belongings, including a laptop, a satellite phone, a cell phone, what appeared to be an unopened package, and personal documents. The police proceeded to arrest Mr. Thach. However, the arrest warrant was given to Mr. Thach's family member one day after his arrest, at 5 p.m. on 24 April 2020, by police security. The search and arrest warrant had been issued by the Investigation Security Agency of the Nghe An Provincial Police. Mr. Thach was charged with violating article 109 of the Penal Code of 2015, which punishes "carrying out activities aimed at overthrowing the people's administration".

8. Following Mr. Thach's arrest, no information was provided to Mr. Thach's family by police security regarding what happened to him.

9. Reportedly, Mr. Thach was detained at the Nghi Kim Detention Centre in Nghe An Province following his arrest on 23 April 2020.

10. According to the source, on 8 July 2020, a public security officer came to Mr. Thach's house and told the family member present there to go to Division 4, Nghi Phu Ward, Vinh City, Nghe An Province the following day to meet Mr. Thach. The family member declined to go without written proof. On 9 July, the Investigation Security Agency sent a subpoena summoning the family member to Division 4, Nghi Phu Ward, to meet Mr. Thach on 10 July. The family member took issue with the details of the document because a subpoena is for those charged with a crime; an invitation document should have been sent instead.

11. On 21 September 2020, the Chief Procurator of the People's Procuracy of Nghe An Province issued an indictment against Mr. Thach, deciding to prosecute him before the People's Court of Nghe An Province for the crime of "activities aimed at overthrowing the people's administration" as specified in clause 1, article 109 of the Penal Code of 2015 (amended and supplemented in 2017).

12. In or around September or October 2020, Mr. Thach's lawyer was able to see him for the first time, in preparation for his trial in November 2020. No communication between Mr. Thach and the lawyer had occurred prior to that date. When the lawyer went to the prison the day before Mr. Thach's trial set for 30 November 2020, prison officials told him that Mr. Thach was too sick and that the trial would be moved to December. Mr. Thach was able to see his lawyer on 14 December 2020, the day before his trial actually took place.

13. On 15 December 2020, after a trial lasting no more than three hours, the People's Court of Nghe An Province found Mr. Thach guilty of "activities aimed at overthrowing the people's administration" as specified in clause 1, article 109 of the Penal Code of 2015 (amended and supplemented in 2017). The source submits that Mr. Thach was sentenced to 12 years in prison and three years of probation, merely for his Facebook posts condemning the corruption and human rights violations perpetrated by the Government of Viet Nam.

14. According to the source, the case was aimed solely at preventing political pluralism and multiparty ideologies in Viet Nam, because Mr. Thach's behaviour was not dangerous and did not contradict the Constitution. Mr. Thach admitted to the activities that were described in the indictment, but said that they had not been done with the aim of overthrowing the Government. Rather, he had only wanted to help build a better society according to his own understanding. Additionally, the judge of the People's Court did not allow Mr. Thach's defence team to copy case documents used at trial, hampering his defence.

15. On 24 March 2021, the Supreme People's Court in Hanoi rejected Mr. Thach's appeal against his 12-year prison term, following a short trial in which his lawyer was not allowed to argue his case. Mr. Thach himself was not notified about the trial until a few days prior to it taking place.

16. Reportedly, in May 2021, Mr. Thach's family member was able to visit him at the Nghi Kim Detention Centre in Nghe An Province.

17. Following the judgment on appeal, Mr. Thach was transferred from the Nghi Kim Detention Centre in Nghe An Province to Prison Camp 5 in Thong Nhat ward, Thanh Hoa Province. His family was never notified of the transfer. On 8 June 2021, his family member drove 40 kilometres to bring him supplies, only to be told on arrival of Mr. Thach's transfer the week before to Prison Camp 5 in Thanh Hoa Province. When asked why the family had not been informed, the authorities responded that they had sent the information to the local precinct police. By law, local precinct police must notify the family if their family member is moved from one detention facility to another. However, at the local precinct, the family member was advised that the transfer information papers had never been received. Even after the visit, the family member was not notified whether the authorities received the transfer information papers. The family member complained about this on Facebook and continued to post about Mr. Thach's case.

18. At the time of the source's submission, Mr. Thach was able to call home for 10 minutes and receive up to 5 kilograms of supplies each month. His family has been unable to visit him for nine months due to restrictions related to the coronavirus disease (COVID-19) pandemic, therefore his monthly supplies are currently sent by post.

b. Analysis of violations

19. The source argues that the arrest and detention of Mr. Thach are arbitrary under categories I, II and III of the Working Group.

i. Category I

20. The source submits that a detention violates category I when it is clearly impossible to invoke any legal basis justifying the deprivation of liberty, and recalls that the Working Group has found detentions arbitrary under category I when the government has held an individual incommunicado for a period of time and/or when vague laws have been used to prosecute an individual.²

Mr. Thach was held incommunicado for a period of several months

21. The source recalls that the Human Rights Committee has determined that incommunicado detention inherently violates article 9 (3) of the International Covenant on Civil and Political Rights.³ The guarantee enshrined in article 9 (3) serves as a check on arbitrary detention but also provides an important safeguard for other rights, such as freedom from torture. Principle 15 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment prohibits the denial of communication between a detainee and his family or counsel for more than a few days. Mr. Thach was not permitted to see his family member until three months after being taken into detention. He was not permitted to consult with his attorney until six months after his arrest. Both of these communication restrictions resulted in incommunicado detention, which constitutes a

² See, for example, opinion No. 3/2013, paras. 30–31.

³ Human Rights Committee, general comment No. 35 (2014), para. 35.

violation of category I. Furthermore, Mr. Thach appeared emaciated while in detention and had problems with his blood pressure.

The Penal Code of Viet Nam is vague and overly broad

22. The source submits that article 15 (1) of the Covenant and article 11 (2) of the Universal Declaration of Human Rights guarantee individuals the right to know what the law is and what conduct violates the law. “Any substantive grounds for arrest or detention must be prescribed by law and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application.”⁴

23. The source notes that article 109 (originally article 79) of the Penal Code of 2015 defines the crime of “carrying out activities aimed at overthrowing the people’s administration” so vaguely as to make it impossible for any individual to reasonably foresee and anticipate what behaviour is criminal. No instruction or clarification is provided as to what the term “activities” constitutes. Article 109 lacks any plain meaning and does not give individuals fair notice of what conduct is prohibited. Mr. Thach was arbitrarily prosecuted under article 109 for his Facebook posts condemning corruption by the Government of Viet Nam. His postings on Facebook are acts which are both unforeseeable as criminal, and protected under the Covenant, the Universal Declaration of Human Rights, and other international norms and standards. Because the law is so vague as to be meaningless, it cannot support the basis for Mr. Thach’s detention and conviction.

ii. Category II

24. The source argues that Mr. Thach’s detention is a direct result of the exercise of his fundamental freedoms of opinion, expression and association, thus meeting the requirements of category II.

25. The source recalls that freedom 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”. 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, including all forms of audiovisual as well as electronic and Internet-based modes of expression.⁵

26. Article 19 of the Covenant is of special importance for human rights defenders, and international law explicitly recognizes that citizen journalists who report on human rights abuses are to be treated as human rights defenders. The source recalls that the Working Group has confirmed the right of human rights defenders to investigate, gather information regarding and report on human rights violations.⁶ The Human Rights Committee has also 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”.⁷ The imprisonment of human rights defenders for speech-related reasons is subject to heightened scrutiny.⁸ This “heightened standard of review” by international bodies is especially appropriate where there is a “pattern of harassment” by national authorities targeting such individuals.⁹

27. The source submits that the Government arbitrarily detained and prosecuted Mr. Thach under article 109 of the Penal Code of 2015 as a direct result of his Facebook posts criticizing corruption in government and human rights abuses in the country. Thus, the Government has deprived Mr. Thach of liberty under a law that is incompatible with the

⁴ Human Rights Committee, general comment No. 35 (2014), para. 22. The source also refers to E/CN.4/2006/98, para. 46; and A/HRC/28/28, para. 48.

⁵ See the Committee’s general comment No. 34 (2011), para. 12.

⁶ Opinion No. 8/2009, para. 18.

⁷ *Marques de Morais v. Angola* (CCPR/C/83/D/1128/2002), para. 6.7.

⁸ Opinions No. 62/2012, para. 39; and No. 21/2011, para. 29.

⁹ Opinion No. 39/2012, para. 43.

rights to freedom of opinion and expression guaranteed by the Universal Declaration of Human Rights and the Covenant.

28. The source also argues that Mr. Thach was imprisoned for his social media interaction, violating his rights to freedom of opinion and expression both de jure and de facto. Mr. Thach's arrest, conviction and lengthy sentences were an attempt by the Government to silence and punish him for sharing his pro-democracy views, an activity which is expressly protected by international law, and for being a co-founder of the Brotherhood for Democracy, a civil society group that has been repeatedly targeted by authorities for its activism. The Brotherhood for Democracy has a stated goal "to defend human rights recognized by the Constitution of Viet Nam and international conventions" and "to promote the building of a democratic, progressive, civilized and just society for Viet Nam".

Restrictions

29. According to the source, article 20 of the Covenant requires States to prohibit "propaganda for war" and "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence". However, the Human Rights Committee has confirmed that limitations on expression that a State attempts to justify on the basis of article 20 of the Covenant must also comply with article 19 (3).¹⁰ Pursuant to article 19 (3) of the Covenant, freedoms of expression and opinion may be restricted only as necessary either for respect of the rights and reputations of others, or for the protection of national security or public order, or of public health or morals. The Human Rights Committee has emphasized the narrowness of the limitations 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.¹¹

30. The source refers to article 22 (2) of the Covenant and recalls that any limitation on the freedoms of expression and association must meet a strict test of justification.¹² According to the Human Rights Committee, a permissible limitation must: (a) be provided by law; (b) be for the protection of national security, public order, or public health and morals; and (c) be necessary to achieve one of these enumerated purposes.¹³

31. The source argues that the limitation on Mr. Thach's freedoms of expression and association fails to meet the second requirement; the Government's restrictions on his rights to freedom of expression and freedom of association was not for a proper purpose. Mr. Thach's social media reporting did not call directly or indirectly for violence, nor could it reasonably be considered to threaten national security, public order, public health or morals, or the rights or reputations of others. Rather, the Government was merely using the veil of "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 and discussion of human rights have been explicitly recognized as protected speech.¹⁴

32. The source notes that despite such international guarantees of the right to free expression, the Government arbitrarily detained and prosecuted Mr. Thach as a direct result of his opinions on Facebook. His advocacy was political and fell within the protections of article 19 of the Covenant and article 19 of the Universal Declaration of Human Rights. Because Mr. Thach's advocacy is a protected expression under article 19 (2) of the Covenant which does not fall within the exceptions contained in article 19 (3), Mr. Thach's continued detention is arbitrary under category II. Mr. Thach's advocacy via social media can also be seen in his articles published in *To Quoc* magazine. However, Mr. Thach had also been arrested in September 2008 and in October 2009, deemed guilty by the court of engaging in propaganda against the State, under article 88 of the Penal Code of 1999, and had been sentenced to three years of imprisonment. His previous encounter with law enforcement authorities demonstrates that he was wrongfully accused of distorting the truth, even though expression of his views is protected under article 19 (2) of the Covenant.

¹⁰ See the Committee's general comment No. 34 (2011), para. 50.

¹¹ *Ibid.*, para. 21.

¹² *Park v. Republic of Korea* (CCPR/C/64/D/628/1995), para. 10.3.

¹³ *Shin v. Republic of Korea* (CCPR/C/80/D/926/2000), para. 7.2.

¹⁴ Human Rights Committee, general comment No. 34 (2011), para. 11.

iii. Category III

33. The source submits that Mr. Thach's arrest and detention is arbitrary under category III.

Right to habeas corpus and release pending trial

34. Under article 9 (3) of the Covenant, a detainee is to be brought promptly before a judge or other officer authorized by law to exercise judicial power in order to challenge the legality of his or her continued detention (in exercise of the right of habeas corpus, which is also incorporated in article 9 (4) in respect of defendants in non-criminal proceedings). The Human Rights Committee has interpreted the term "promptly" to mean within about 48 hours, except in exceptional circumstances, and has noted that this right is to be observed even before formal charges have been asserted, so long as the person is arrested or detained on suspicion of criminal activity.¹⁵ Moreover, incommunicado detention inherently violates article 9 (3) of the Covenant.¹⁶ The right of habeas corpus is reiterated in principles 4, 11, 32 (1) and 37 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. These provisions also safeguard other rights, such as freedom from torture.¹⁷

35. Article 9 (3) of the Covenant also enshrines the right to an individual's release pending trial. The Human Rights Committee has found that detention pending trial must be based on an individualized determination that such detention 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, and that pretrial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances.¹⁸ Principles 38 and 39 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment confirm that, except in special cases, a criminal detainee is entitled to release pending trial.

36. The source argues that Mr. Thach was never brought before a judge to determine the legality of his arrest and continuing detention. There was never a bail hearing or any publicly released individualized determination made about why such extended pretrial detention was necessary. Mr. Thach's entire pretrial detention period was completely unauthorized by any judicial officer. By refusing to bring Mr. Thach promptly before a judge to challenge the legality of his detention and by denying him release pending trial, the Government violated article 9 (3) and (4) of the Covenant and principles 11, 32, 37, 38 and 39 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

Right to family visits

37. The source argues that Mr. Thach was held incommunicado for many months after his arrest, during which time he was prohibited from meeting with his family, even when he was hospitalized for a week for high blood pressure. By detaining him incommunicado prior to his trial, and by prohibiting visits from his family, the Government violated principle 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and rules 43, 58 and 106 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).

Right to be tried without undue delay

38. The source recalls that article 14 (3) (c) of the Covenant guarantees that every defendant has the right to be tried without undue delay. "An important aspect of the fairness of a hearing is its expeditiousness", and "in cases where the accused are denied bail by the court, they must be tried as expeditiously as possible".¹⁹ This right "relates not only to the

¹⁵ See the Committee's general comment No. 35 (2014), para. 32.

¹⁶ *Ibid.*, para. 35.

¹⁷ *Ibid.*, para. 34.

¹⁸ *Ibid.*, para. 38.

¹⁹ Human Rights Committee, general comment No. 32 (2007), paras. 27 and 35.

time between the formal charging of the accused and the time by which a trial should commence, but also the time until the final judgement on appeal”.²⁰ The right is reiterated in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment²¹ and in article 31 of the Constitution of Viet Nam. The reasonable amount of time in which a trial must be held must be “assessed in the circumstances of each case, taking into account mainly the complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the administrative and judicial authorities”.²²

39. The source submits that the first instance trial date for Mr. Thach was originally scheduled for 30 November 2020 but was cancelled without warning. When Mr. Thach’s family arrived at court on that date, they were told that the trial had been rescheduled due to Mr. Thach “not being fit to stand trial”. The next day, his relative was allowed to visit Mr. Thach, who advised that he had been hospitalized for a week for high blood pressure. At the three-hour trial on 15 December 2020, Mr. Thach’s attorney argued that he had not been allowed to review materials related to his client, that the prosecution had violated trial procedures and failed to produce any incriminating evidence or witnesses, and that some of the charges predated article 109 of the Penal Code of 2015 and therefore should be thrown out. During this entire time, Mr. Thach was held in custody. Mr. Thach was never provided with any explanation as to why his trial necessitated such a delay. The need for trial without undue delay was exacerbated by the fact that Mr. Thach was never given a bail hearing and was forced to remain in detention for the entire time before trial, much of which was incommunicado. By refusing to provide Mr. Thach a bail hearing, and by unnecessarily delaying his trial, the Government violated article 14 (3) (c) of the Covenant, principle 38 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and article 31 of the Constitution of Viet Nam.

Right to communicate with counsel

40. The source submits that Mr. Thach was held incommunicado and deprived of his right to prompt access to counsel. More than six months after his arrest, Mr. Thach was allowed to meet with his lawyer, even though his investigation period had previously ended. The judge refused the request by Mr. Thach’s lawyer request to copy case documents used at trial. Consequently, the Government violated 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 Imprisonment, rule 119 of the Nelson Mandela Rules and article 31 of the Constitution of Viet Nam.

Right to a fair hearing

41. The source recalls the guarantees set out in article 14 of the Covenant.²³ Article 14 (3) (e) of the Covenant and articles 7 and 10 of the Universal Declaration of Human Rights guarantee the same rights.

42. According to the source, the duration of Mr. Thach’s trial was very short, lasting fewer than three hours, which establishes clearly that his guilt had been determined prior to the hearing, thus denying him the right to the presumption of innocence guaranteed under article 14 (2) of the Covenant. By denying Mr. Thach a fair hearing, the Government violated his rights under article 14 of the Covenant and articles 7 and 10 of the Universal Declaration of Human Rights.

43. The source argues that Mr. Thach’s arrest, trial and pretrial confinement have been characterized by flagrant violations of his due process rights. Any appeal of his conviction would not result in his release or a lighter sentence, which was apparent when his appeal was denied.

²⁰ Ibid., para. 35.

²¹ Principle 38.

²² Human Rights Committee, general comment No. 32 (2007), para. 35.

²³ Ibid., para. 13.

Response from the Government

44. On 4 April 2022, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government to provide detailed information by 3 June 2022 about the current situation of Mr. Thach. 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. Thach's physical and mental integrity.

45. On 30 May 2022, the Government requested an extension of time in accordance with paragraph 16 of the Working Group's methods of work and was granted a new deadline of 3 July 2022.

46. In its reply dated 30 June 2022, the Government submits that Mr. Thach, along with others, established the Brotherhood for Democracy organization, determined its operations, attracted many individuals in many localities throughout the country to participate in the organization, and associated with many anti-Vietnamese terrorists to operate with the aim of overthrowing the people's Government and changing the political regime in Viet Nam.

47. It submits that Mr. Thach and his accomplices took advantage of their democratic freedoms to intentionally publish many articles with false and slanderous content to distort the activities of State agencies, distorting the history of the struggle for the independence and reunification of Viet Nam, mutilating and distorting information to create a false image of the operations of the State of Viet Nam, and inciting anti-government sentiment. According to the Government, these acts are designed to weaken the core pillars of society which are the foundation of stability and peace, by creating instability, threatening the strength of the people's Government and infringing on national security.

48. Despite warnings and reminders, Mr. Thach continued to commit his illegal acts. According to the Government, the arrest and trial of Mr. Thach are necessary to ensure the strictness of Vietnamese laws. The Government submits that his criminal acts were comprehensively, fully, objectively and independently reviewed by judicial authorities in two first instance trials and in the appeal trial, with sufficient evidence.

49. The Government believes that the consideration of an individual's actions should be based on the nature of the actions, not on general statements about "promoting democracy" and "protecting human rights".

50. Each country has different requirements for protecting national security and social order, and for safety. Respect for each country's sovereignty is one of the most important principles in international relations. For Viet Nam, ensuring national security and social order is not just about stopping and preventing violent acts or threats of violence. Existing threats to national security stemming from non-violent activities such as reporting fake news, misinformation, misrepresentation and the distortion of information is a reality that is taking place in Viet Nam and many other countries. The Government submits that it is necessary to handle acts of reporting false information, and distortion of information in many different forms, that are aimed at defaming and lowering the honour and reputation of organizations or individuals, in order to ensure a clean, civilized and responsible information environment.

51. The Government submits that the authorities fully implemented the procedures as prescribed in the Criminal Procedure Code, notifying the prosecution decision, the arrest warrant and the search warrant, with the participation of local authorities and witnesses, fully expressed in minutes with certified signatures of the parties involved. These procedural decisions were approved by the People's Procuracy – the judicial body authorized by the State of Viet Nam to supervise criminal proceedings to ensure their legality. This is fully consistent with article 9 (3) of the Covenant.

52. The Government also submits that Mr. Thach's rights while in detention have been fully guaranteed, as prescribed in the Law on Enforcement of Custody and Temporary Detention. It submits that he met relatives four times, received gifts, food and cash 15 times, had regular medical check-ups and was given medicines (to treat colitis, gout and high blood pressure caused by his old age). Additionally, Mr. Thach's relatives have sent medicines to him twice, according to a prescription from the General Hospital of Nghe An Province.

Currently, Mr. Thach's health is stable, he is able to serve the sentence, and he has received all three doses of the coronavirus disease (COVID-19) vaccine.

53. In accordance with article 74 of the Criminal Procedure Code, in regard to cases where it is necessary to keep the investigation secret where the case involves an infringement upon national security, the competent People's Procuracy issued a decision to allow defence counsels to participate in proceedings from the end of the investigation period. After the investigation had concluded, on 5 November 2020 and 23 March 2021, the Detention Centre allowed the defence counsel for Mr. Thach to visit him in accordance with the law. During the proceedings, the court staff created all the favourable conditions for Mr. Thach's defence counsel to access and study the case file. In national security cases, permission to copy documents belonging to the group of top secret documents falls under the jurisdiction of the Chief Justice of the High People's Court and the Chief Justice of the Provincial People's Court.

54. The trial of Mr. Thach was held in accordance with the procedures specified in the Criminal Procedure Code, with a full process of litigation, deliberation and sentencing. Mr. Thach and his defence counsel were guaranteed the full exercise of their defence rights. The length of the trial depends on the process of clarifying the evidence and on the defendant's conduct in accordance with the law. There is no provision of international law that prescribes the required length of a trial. Therefore, the allegation that Mr. Thach's crimes were determined before the trial took place based solely on trial time is unfounded.

55. The Government submits that the right to freedom of expression as enshrined in the Universal Declaration of Human Rights and the Covenant²⁴ is not an absolute right and is subject to certain limitations set forth by law. There is no provision of international human rights law that allows an individual to use the right to freedom of expression to provide false and misleading information with the aim of infringing upon the reputation and the legitimate rights and interests of organizations and individuals in the society. Each individual must be aware of his or her responsibilities and obligations when exercising democratic freedoms, including freedom of expression.

56. Viet Nam encourages citizens to give opinions on development undertakings and policies and the formulation of laws, to participate in criticizing and pointing out errors in State management, and to denounce corruption, and complain about human rights violations by civil servants – in many direct and indirect forms, through the press, the media and social networks. Viet Nam has handled many complaints from the people of violations committed by civil servants, in the above forms. However, the exercise of the above-mentioned democratic freedoms needs to comply with the provisions of the law, based on a constructive spirit and factual and verifiable information.

Further comments from the source

57. On 30 June 2022, the Government's reply was transmitted to the source for further comments, which the source submitted on 12 July 2022. The source argues that in its response, the Government of Viet Nam only provided general denials to claims made by Mr. Thach, which furthermore do not reflect the reality in Viet Nam. The source augments its submissions on the exercise of Mr. Thach's fundamental rights and fair trial rights and reiterates its position that the arrest and detention of Mr. Thach is arbitrary under categories I, II and III.

Discussion

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

59. In determining whether Mr. Thach's deprivation of liberty was 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 international law constituting arbitrary detention, the burden of proof should be understood to rest upon the

²⁴ See art. 19 (3).

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.²⁵

Category I

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

61. The source argues that Mr. Thach was not brought before a judge to determine the legality of his arrest and pretrial detention, which were unauthorized by any judicial officer. Neither did Mr. Thach have a bail hearing. The Government does not specifically refute these allegations.

62. 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, in accordance with the international standard set out in the Working Group's jurisprudence.²⁶ The right to bring proceedings before a court so that the court may decide without delay on the lawfulness of the 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.

63. Judicial oversight of deprivation of liberty is a fundamental safeguard of personal liberty and is essential in ensuring that detention has a legal basis.²⁷ 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.

64. Article 9 (3) of the Covenant provides that "it shall not be the general rule that persons awaiting trial shall be detained in custody". The Working Group recalls the Human Rights Committee's view that pretrial detention should be an exception and be 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 or other conditions, would render detention unnecessary in the particular case.²⁸ The Working Group notes that the Government did not submit any specific information to suggest that such a determination took place or to rebut the source's submissions.

65. In the present case, considering all the circumstances, the Working Group concludes that an individualized determination of Mr. Thach'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 and principles 38 and 39 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

66. The source submits that following his arrest on 23 April 2020, Mr. Thach was held incommunicado for several months and was not permitted to see his family members until three months after his arrest. The Government argues that Mr. Thach's rights in detention were fully respected but does not deny that he was held incommunicado. It also submits that he met relatives four times, without stating when this occurred. Considering the specificity of the source's submissions, in contrast to those of the Government, the Working Group is

²⁵ [A/HRC/19/57](#), para. 68.

²⁶ 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.

²⁷ Opinions 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 [A/HRC/30/37](#) (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.

²⁸ Human Rights Committee, general comment No. 35 (2014), para. 38.

convinced that Mr. Thach was held incommunicado. It recalls that holding persons incommunicado prevents prompt presentation before a judge as provided in article 9 (3) of the Covenant²⁹ and violates the right under article 9 (4) to challenge the lawfulness of the detention before a court.³⁰

67. The source submits that Mr Thach's right to family visits was violated. The Government, in its response, indicates the number of visits – four – but does not state when these visits took place. The Working Group notes the Government's submissions that Mr. Thach received food, money and gifts, but observes that this does not satisfy the right to communicate with the outside world. The Working Group recalls that a detainee must also be allowed to communicate with and receive visits from family members. Restrictions and conditions in regard to such contact must be reasonable. As the Human Rights Committee has observed, giving prompt and regular access to family members, as well as to independent medical personnel and lawyers, is an essential and necessary safeguard for the prevention of torture and for protection against arbitrary detention and infringement of personal security.³¹

68. Accordingly, the Working Group finds that the right of Mr. Thach to contact with the outside world was denied, in violation of rule 58 of the Nelson Mandela Rules³² and principles 15, 16 (1) and 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which acknowledge that an individual must not be arrested or transferred without the chance to notify (or without the authorities being required to notify) family members or other appropriate persons about his or her whereabouts. The Working Group notes the source's submission that following the appeal judgment, Mr. Thach was transferred to a detention facility in another province, but notes that his family was not notified about this. The Government does not refute this allegation.

69. Finally, the Working Group notes that the Government does not deny that Mr. Thach was convicted of "carrying out activities aimed at overthrowing the people's administration" under article 109 of the Penal Code of 2015 (article 79 of the former Penal Code of 1999). The Working Group considers that the provision under which Mr. Thach was convicted is so vague and overly broad that it was impossible to invoke a legal basis for his detention. The Working Group has raised the issue of prosecution under vague and overly broad laws with the Government on numerous occasions, noting in its previous opinions that article 109 of the Penal Code does not satisfy the principle of legality.³³ The principle of legality requires that laws be formulated with sufficient precision so that the individual can access and understand the law, and regulate his or her conduct accordingly.³⁴ Mr. Thach could not have foreseen that peaceful activities such as using social media to criticize government policy would amount to criminal conduct under this provision.

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

Category II

71. The source alleges that Mr. Thach's detention is arbitrary under category II because the Government arbitrarily detained and prosecuted Mr. Thach under article 109 of the Penal Code as a direct result of his Facebook posts criticizing corruption and human rights abuses. The Government denies this, arguing that he was convicted because he had violated article 109 of the Penal Code.

²⁹ Ibid., para. 35.

³⁰ Opinions No. 25/2021, No. 45/2019, No. 44/2019, No. 9/2019 and No. 35/2018.

³¹ See the Committee's general comment No. 35 (2014), para. 58; and opinion No. 84/2020, para. 69.

³² Opinions No. 35/2018, para. 39; No. 44/2019, paras. 74–75; and No. 45/2019, para. 76.

³³ Opinions No. 45/2019, para. 54; No. 9/2019, para. 39; No. 46/2018, para. 62; No. 36/2018, para. 51; and No. 35/2018, para. 36. See also [CCPR/C/VNM/CO/3](#), paras. 45–46. On 20 June 2017, the National Assembly enacted a revised Penal Code, which came into force on 1 January 2018. Art. 79 was renumbered and remains in effect as art. 109 in the revised Code.

³⁴ See, for example, 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.

72. The Working Group considers that charges and convictions under article 109 of the Penal Code for the peaceful exercise of rights cannot be regarded as consistent with the Covenant or the Universal Declaration of Human Rights. The Working Group has considered the application of vague and overly broad provisions in the country's criminal laws, including article 109 of the Penal Code, in numerous opinions.³⁵

73. In May 2017, the United Nations country team in Viet Nam recommended the repeal or revision of numerous articles of the Penal Code, among them article 109, on the basis of their incompatibility with human rights obligations under the Covenant. Along with other provisions, article 109 was highlighted as being vague and broad and not defining which actions or activities were prohibited, nor the constitutive elements of the offences thereunder. The country team in Viet Nam also noted that these provisions did 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 directly fall under the rights to freedom of expression, opinion, assembly and religion, as well as participation in public life, and which, as such, should be guaranteed and protected in accordance with international human rights law.³⁶

74. The Human Rights Committee has called on 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.³⁷ It found that the vague and broadly formulated offences in various articles of the Penal Code, including article 109, 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 – for instance, arbitrary arrests and detention, and unfair trials and criminal convictions, including of human rights defenders, journalists, bloggers and lawyers, for criticizing State authorities or policies, including online.³⁸

75. The freedom of expression guaranteed under article 19 of the Covenant includes the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers, and this right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, including political opinions.³⁹ Article 19 (2) of the Covenant protects the holding and expression of opinions, including those which are not in line with government policy.⁴⁰ 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 Human Rights Council, certain types of expression should never be subject to restrictions – such as discussion of government policies, and political activities, including for peace or democracy.⁴¹ The Council has called upon States to refrain from imposing restrictions under article 19 (3) that are not consistent with international human rights law.⁴²

76. Considering Mr. Thach's role as a human rights advocate, the Working Group recalls that, 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.⁴³

³⁵ See opinions No. 11/2021, No. 40/2021, No. 81/2020, No. 45/2019 and No. 44/2019; 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 See <https://vietnam.un.org/en/14681-un-recommendations-2015-penal-code-and-criminal-procedural-code-viet-nam>. See also Human Rights Council resolution 19/36, in particular para. 16 (c).

³⁷ CCPR/C/VNM/CO/3, para. 46.

³⁸ Ibid., para. 45 (a) and (d).

³⁹ Human Rights Committee, general comment No. 34 (2011), para. 11.

⁴⁰ Opinions No. 8/2019, para. 55; and No. 79/2017, para. 55.

⁴¹ A/HRC/14/23, para. 81 (i).

⁴² Human Rights Council resolution, para. 5 (p).

⁴³ General Assembly resolution 53/144, annex, arts. 1 and 6 (c). See also General Assembly resolution 74/146, para. 12.

The Working Group has confirmed the right of human rights defenders to investigate, gather information regarding and report on human rights violations.⁴⁴ The Human Rights Committee has specifically recognized that article 19 (2) of the Covenant 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.⁴⁵ The imprisonment of human rights defenders for speech-related reasons is subject to heightened scrutiny; the Working Group has recognized the necessity of subjecting interventions against individuals who may qualify as human rights defenders to particularly intense review.⁴⁶ This “heightened standard of review” by international bodies is especially appropriate where there is a “pattern of harassment” by national authorities targeting such individuals.⁴⁷

77. The permitted restrictions to this right may relate either to respect for the rights or reputations of others or to the protection of national security, public order (*ordre public*) or public health or morals. As the Human Rights Committee has stipulated: “Restrictions are not allowed on grounds not specified in paragraph 3, even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.”⁴⁸

78. The Working Group finds credible the source’s allegation that Mr. Thach is also being punished for the exercise of his right to freedom of association, namely being the co-founder of the Brotherhood for Democracy, a civil society group repeatedly targeted by the authorities. The Working Group has previously found that posting material about State policy on social media and joining and establishing various associations does not amount to acts of inciting others to cause public disorder or violence.⁴⁹

79. The limitations on these rights and freedoms permitted under the Universal Declaration of Human Rights and the Covenant do not apply in the present case. The Government did not present any argument or evidence to the Working Group to invoke any of these limitations, nor did it demonstrate why bringing charges against Mr. Thach was a legitimate, necessary and proportionate response to his online activities. Importantly, there is nothing to suggest, as alleged by the Government, that the purpose of his peaceful Facebook posts was to overthrow the people’s administration.

80. In this regard, the Working Group recalls that in the Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda, adopted in Vienna on 3 March 2017, several experts stated that general prohibitions on the dissemination of information based on vague and ambiguous ideas, including false news or information, were incompatible with international standards for restrictions on freedom of expression and should be abolished.⁵⁰

81. Considering the plethora of relevant international human rights standards, the Working Group considers that Mr. Thach’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. His detention is therefore arbitrary and falls under category II. 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.

⁴⁴ Opinion No. 8/2009, para. 18; and [A/HRC/13/30/Add.1](#), para. 18.

⁴⁵ *Marques de Morais v. Angola* (CCPR/C/83/D/1128/2002), para. 6.7.

⁴⁶ Opinions No. 62/2012, para. 39; No. 21/2011, para. 29; and No. 82/2021, para. 69.

⁴⁷ Opinions No. 39/2012, para. 43; and No. 21/2011, para. 29.

⁴⁸ See the Committee’s general comment No. 34 (2011), para. 22.

⁴⁹ Opinions No. 13/2022, para. 72; No. 36/2021, para. 81; No. 45/2018, para. 48; No. 27/2017, para. 36; and No. 40/2016, para. 38.

⁵⁰ Available at <https://www.ohchr.org/Documents/Issues/Expression/JointDeclaration3March2017.doc>, para. 2 (a).

Category III

82. Given its finding that the deprivation of liberty of Mr. Thach is arbitrary under category II, the Working Group wishes to emphasize that no trial should have taken place. However, Mr. Thach has been tried and convicted and his appeal has been denied. In the light of the above, 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. Thach's deprivation of liberty an arbitrary character, such that it falls within category III.

83. The source contends that Mr. Thach's right to communicate with legal counsel was violated, noting he was held incommunicado and was denied access to counsel for six months after his arrest. The Government refers to article 74 of the Criminal Procedure Code, which is applied in cases where it is necessary to keep the investigation secret for cases involving infringement upon national security, noting that after the investigation had concluded, on 5 November 2020 and 23 March 2021, the defence counsel was permitted to visit Mr. Thach.

84. 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 is to be provided without delay.⁵¹ The Working Group finds that the failure to provide Mr. Thach with access to a lawyer during the investigation violated his right under article 14 (3) (b) of the Covenant to have adequate time and facilities to prepare his defence. Any legislation that purports to remove the right to counsel is inherently contrary to international human rights standards.⁵² The Working Group notes that the present 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.⁵³ The Working Group finds that Mr. Thach's right to legal assistance at all times, which is inherent in the right to liberty and security of person, has been breached by the Government.

85. The source also submits that the judge refused the request by Mr. Thach's lawyer to copy case documents used in the trial. The Government argues that during the proceedings, the court staff created all the favourable conditions for Mr. Thach's defence counsel to access and study the case file, and notes that permission to copy documents in national security cases belonging to the group of top secret documents falls under the jurisdiction of the Chief Justice of the High People's Court and the Chief Justice of the Provincial People's Court.

86. Every individual deprived of liberty has the right to access material related to their detention. Nonetheless, the disclosure of information may be restricted if such a restriction is necessary and proportionate in pursuing a legitimate aim, such as protecting national security, and if the State has demonstrated that less restrictive measures would be unable to achieve the same result, such as providing redacted summaries that clearly pointed to the factual basis for the detention.⁵⁴ The Government has not demonstrated this. Mere reference to the entities with jurisdiction to address this issue is insufficient. As such, the Working Group finds violations of article 14 (1) and (3) (b) of the Covenant on the right to a fair hearing and to adequate time and facilities for the preparation of a defence.⁵⁵

87. The source argues that Mr. Thach was not afforded his right to be tried without undue delay, given that almost eight months elapsed between the date of his arrest (23 April 2020) and the date of his trial (15 December 2020). The Government has not disputed this period.

88. Under 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. The

⁵¹ [A/HRC/30/37](#), annex, principle 9 and guideline 8; Human Rights Committee, general comment No. 35 (2014), para. 35; [A/HRC/48/55](#), para. 56; and [A/HRC/45/16](#), paras. 50–55. See also [A/HRC/27/47](#), para. 13.

⁵² [CCPR/C/VNM/CO/3](#), paras. 25–26 and 35–36; and opinions No. 36/2020, para. 70; No. 11/2021, para. 84; and No. 82/2021, para. 74.

⁵³ Opinions No. 82/2021, No. 45/2019, No. 44/2019, No. 9/2019 and No. 46/2018. See also [CAT/C/VNM/CO/1](#), paras. 16–17.

⁵⁴ [A/HRC/30/37](#), annex, principle 12 and guidelines 11 and 13. See also opinion No. 85/2021, para. 84.

⁵⁵ Opinions No. 18/2018, para. 53; and No. 78/2018, paras. 78–79.

reasonableness of any delay in bringing a case to trial must be assessed in the circumstances of each case, taking into account the complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the authorities.⁵⁶ The Human Rights Committee has stated that an important aspect of the fairness of a hearing is its expeditiousness, and that in cases where the accused is denied bail by the court, he or she must be tried as expeditiously as possible.⁵⁷ The delay in the present case was exacerbated as Mr. Thach was not given a bail hearing and his detention was not reviewed by a judicial authority, as discussed above. Given the Working Group's finding that Mr. Thach'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.⁵⁸ The Working Group considers that Mr. Thach's pretrial detention of almost eight months is unacceptably long and is in violation of articles 9 (3) and 14 (3) (c) of the Covenant and principle 38 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

89. The Working Group considers that these violations of due process and fair trial rights substantially undermined Mr. Thach's capacity to defend himself in the judicial proceedings.⁵⁹

90. The source submits that the brevity of his trial (less than three hours) indicates that Mr. Thach's guilt was predetermined. The Government does not refute the length of the trial but refutes the claim that Mr. Thach's guilt was predetermined, arguing that there is no provision of international law that prescribes the required length of a trial. As the Working Group has noted previously, a short trial for a serious criminal offence which carries a heavy sentence (12 years of imprisonment and 3 years of probation in the present case) supports the conclusion that Mr. Thach's guilt was determined prior to the trial.⁶⁰ This conclusion is reinforced in the present case, which involved a trial for a criminal offence relating to national security, which by the Government's own admission was so serious as to necessitate confidentiality and the denial of legal counsel until the completion of investigations. The Working Group finds that these factors also constitute a denial of Mr. Thach's right to the presumption of innocence, guaranteed in article 14 (2) of the Covenant and article 11 (1) of the Universal Declaration of Human Rights.

91. For the reasons enumerated above, the Working Group concludes that the above-mentioned violations of Mr. Thach's right to a fair trial and due process are of such gravity as to render his deprivation of liberty arbitrary under category III.

Category V

92. In addition, the Working Group considers that Mr. Thach has been deprived of his liberty for reasons of discrimination, owing to his status as a human rights advocate. He was targeted because of his Facebook posts that were critical of the Government. The Working Group recalls the source's submission that he was continually harassed until his arrest in 2020. His prosecution and imprisonment are consistent with a pattern of harassment against him, as evidenced by his prior conviction under article 88 of the Penal Code of 1999, which the Working Group has repeatedly found to be so vague and broad as to not have a legal basis.⁶¹

93. The discrimination faced by Mr. Thach reflects a broader pattern in Viet Nam of harassing and detaining human rights defenders for their work⁶² that the Working Group has observed. It notes the Human Rights Committee's concluding observations on Viet Nam, in which the Committee expressed its concerns at reports that persons, particularly human rights

⁵⁶ Human Rights Committee, general comment No. 35 (2014), para. 37, and general comment No. 32 (2007), para. 35. See also [CCPR/C/VNM/CO/3](#), paras. 35–36.

⁵⁷ See the Committee's general comment No. 32 (2007), paras. 27–35.

⁵⁸ Opinions No. 10/2021, para. 78; No. 16/2020, para. 77; and No. 8/2020, para. 75.

⁵⁹ [A/HRC/30/37](#), annex, principle 9 and guideline 8 (paras. 12, 15, 67 and 71).

⁶⁰ Opinions No. 75/2017, No. 36/2018 and No. 82/2021.

⁶¹ Opinions No. 81/2020, paras. 62 and 66; and No. 11/2021, para. 67.

⁶² Opinions No. 13/2022, No. 40/2021, No. 36/2021, No. 11/2021, No. 81/2020, No. 16/2020, No. 45/2019, No. 44/2019 and No. 9/2019. See also [CCPR/C/VNM/CO/3](#), para. 25.

defenders, activists and religious leaders, may face arbitrary arrests, detention and incommunicado detention without charges.⁶³

94. In this context, the Working Group finds that Mr. Thach's arrest, conviction and sentence were an attempt to silence his activity that is expressly protected by international law. As such, in the discussion above concerning category II, the Working Group established that Mr. Thach's detention had 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.⁶⁴

95. The Working Group thus finds that Mr. Thach'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

96. Although the Government maintains that Mr. Thach is in good health, the Working Group remains concerned by the source's submission that Mr. Thach, who is 71 years old, has a host of medical issues. According to article 10 (1) of the Covenant and rules 1, 24, 27 and 118 of the Nelson Mandela Rules, all persons deprived of their liberty must be treated with humanity and dignity, including receiving appropriate medical care.⁶⁵ States should treat detainees over 60 years of age and those with underlying health conditions as being vulnerable to COVID-19, refraining from holding them in facilities where the risk to their life is heightened and implementing early release schemes whenever possible.⁶⁶ The Working Group refers the present case to the Independent Expert on the enjoyment of all human rights by older persons.

97. The present case is one of a number of cases brought before the Working Group in recent years concerning the arbitrary deprivation of liberty of persons, particularly human rights defenders, in Viet Nam.⁶⁷ Many of these cases follow a familiar pattern of arrest that does not comply with international norms, lengthy detention pending trial with no access to judicial review, denial of access to legal counsel, incommunicado detention, prosecution under vaguely worded criminal offences for the peaceful exercise of human rights, a brief closed trial at which due process is not observed, disproportionate sentencing, and denial of access to the outside world. The Working Group is concerned that 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.⁶⁸

98. 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

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

⁶³ CCPR/C/VNM/CO/3, para. 25. See also General Assembly resolution 53/144, annex, arts. 1 and 6 (c); and General Assembly resolution 74/146, para. 12.

⁶⁴ Opinions No. 59/2019, para. 79; No. 13/2018, para. 34; No. 40/2021, para. 90; No. 11/2021, para. 87; and No. 82/2021, para. 84.

⁶⁵ Opinion No. 26/2017, para. 66.

⁶⁶ See the Working Group's deliberation No. 11 (A/HRC/45/16, annex II), paras. 15–16.

⁶⁷ For example, opinions No. 44/2019, No. 9/2019, No. 8/2019, No. 46/2018 and No. 45/2018.

⁶⁸ Opinion No. 47/2012, para. 22.

The deprivation of liberty of Tran Duc Thach, being in contravention of articles 2, 3, 6, 7, 8, 9, 10, 11, 19 and 20 of the Universal Declaration of Human Rights and articles 2, 9, 14, 16, 19, 22 and 26 of the International Covenant on Civil and Political Rights is arbitrary and falls within categories I, II, III and V.

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

101. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Thach 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 and unconditional release of Mr. Thach.

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

103. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the rights to freedom of peaceful assembly and of association, the Special Rapporteur on the situation of human rights defenders and the Independent Expert on the enjoyment of all human rights by older persons, for appropriate action.

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

Follow-up procedure

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

106. 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.

107. 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.

108. 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.⁶⁹

[Adopted on 29 August 2022]

⁶⁹ Human Rights Council resolution 42/22, paras. 3 and 7.