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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-eighth session, 24–28 August 2020

Opinion No. 42/2020 concerning Truong Duy Nhat (Thailand and Viet Nam)*

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 42/22.
2. In accordance with its methods of work (A/HRC/36/38), on 22 May 2020 the Working Group transmitted to the Governments of Thailand and Viet Nam a communication concerning Truong Duy Nhat. The Government of Thailand did not reply to the communication. The Government of Viet Nam replied to the communication on 6 August 2020. Both States are parties 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,

* Seong-Phil Hong did not participate in the discussion of the present case.

or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Truong Duy Nhat is a 56-year-old citizen of Viet Nam. He is a journalist and blogger. He usually resides in Da Nang City, Viet Nam.

(a) Context

5. The source reports that Mr. Nhat is outspoken on issues of politics, corruption and governance. He is a regular contributor to Radio Free Asia's Vietnamese services blog, covering topics of public interest, including matters relating to corruption within the Government of Viet Nam and the potential for change in the country. His last communication with his editors at Radio Free Asia was in relation to the prospects for change in Viet Nam. He also comments on political issues and other public interest matters through a blog entitled *Mot Goc Nhin Khac* ("a different point of view").

6. According to the source, Mr. Nhat was already convicted and sentenced to prison for his work as a journalist. He was arrested in Viet Nam on 26 May 2013 and charged under article 258 of the Penal Code of 1999 with "abusing democratic freedoms to infringe upon the interests of the State and legitimate interest of organizations and citizens". He was sentenced to two years' imprisonment on 4 March 2014, and served his full sentence. The source claims that Mr. Nhat did not receive a fair trial, as he was not allowed to present evidence and the media were refused access to the courtroom. Concerns regarding Mr. Nhat's arrest, detention and conviction were raised in a communication by special procedures to the Government of Viet Nam on 12 August 2014.¹

7. Towards the end of 2018, Mr. Nhat wrote a number of articles critical of the Government. According to the source, in December 2018 he was subjected to increased surveillance and received information that he was likely to be arrested again. Mr. Nhat feared that the new cybersecurity law, which was going to be introduced in January 2019, would be used against popular bloggers and journalists to suppress criticism of the authorities. On 8 January 2019, he wrote an article criticizing the Government for bulldozing homes in Loc Hung without providing legal documents to the landowners.

8. The source reports that, on or around 16 January 2019, the police intensified its surveillance of Mr. Nhat and his home. At the same time, there were rumours that Mr. Nhat would publish other material that would be damaging to members of the Vietnamese Communist Party. Fearing that he would be arrested, on or around 17 January 2019, Mr. Nhat left Viet Nam and crossed into Thailand. He arrived in Thailand on or around 19 January 2019. He was travelling without any legal documentation, as he had previously been subjected to a travel ban by the Vietnamese authorities.

9. On 25 January 2019, Mr. Nhat went to the Bangkok branch of the Office of the United Nations High Commissioner for Refugees (UNHCR) to apply for refugee status. According to the source, on the same day, he received a number of telephone calls from an unknown Thai number, which may have been initiated by the Thai police. Mr. Nhat moved out of his hotel, concerned that he was under surveillance, and told a number of associates that he would be at Future Park Rangsit mall, Bangkok, the next day.

(b) Arrest in Thailand and transfer to Viet Nam

10. On 26 January 2019, at around 5.30 p.m., Thai police officers in plainclothes approached and detained Mr. Nhat in the iBerry Café at Future Park Rangsit mall. The source alleges that he was not shown an arrest warrant, nor was he told why he was being detained.

¹ See <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=18726>. The response from the Government of Viet Nam of 27 October 2014 is available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=31520>.

The Thai police officers brought him to the Public Kitchen V restaurant, where they sat and ate for a while, and then handed him over shortly after 8 p.m. to three Vietnamese State agents who forced him into a white Toyota van with Thai official licence plates. Mr. Nhat went missing after the van departed.

11. The source alleges that Mr. Nhat's abduction appears to be part of a trend in the region of forced and often unlawful return of refugees and asylum seekers. A number of countries, including Thailand and Viet Nam, are said to trade in political dissidents and individuals fleeing persecution with a view to supporting each other's regimes.

12. Following Mr. Nhat's disappearance, his family searched for him without success. Mr. Nhat's employer, Radio Free Asia, was also unaware of what had happened to him. A prominent human rights organization called on the Thai authorities to investigate his case, noting that he had come to Bangkok for the sole purpose of applying for political asylum.

13. According to the source, Mr. Nhat's arrest in Viet Nam took place on 28 January 2019 in Hanoi. No arrest warrant or detention warrant appears to have been provided. On that date, Mr. Nhat was transferred to the T16 Detention Camp in Hanoi, where he remains.

14. On 15 March 2019, a member of Mr. Nhat's family was contacted and informed by prison authorities that Mr. Nhat was in Viet Nam and was being held in the T16 Detention Camp. When the family member went to the camp on 20 March 2019, the prison authorities refused to allow a visit with Mr. Nhat on the basis that the investigation was still ongoing. The authorities provided the family member with a booklet giving permission to visit Mr. Nhat in future, but a visit was permitted for the first time only on 20 June 2019.

(c) Trial proceedings

15. The source reports that, due to the lack of transparency in the criminal proceedings brought against Mr. Nhat, the exact provisions of the criminal law with which he was charged remained unknown. Initially, he was thought to have been charged with corruption relating to a land fraud case while he was bureau chief at a newspaper in Da Nang City in the 1990s. As the police investigators were unable to prove those charges, on 24 July 2019 the Ministry of Public Security dropped them and formally changed the charges to abuse of position.

16. According to the source, Mr. Nhat was only permitted to meet with his lawyers twice prior to his trial. Each time, the visits lasted approximately 30 minutes and were heavily monitored by prison guards who were present inside the consultation room. As a result, there was no opportunity for him to speak openly about the specifics of the criminal case against him. He was not afforded the appropriate time or facilities to prepare his defence.

17. Mr. Nhat's trial took place on 9 March 2020 before the People's Court of Hanoi. The trial was initially due to take place on 28 February 2020 but was adjourned when the court was informed that only one of Mr. Nhat's lawyers had been notified of the trial date. The source alleges that, apart from Mr. Nhat's family member, the courtroom was closed to the general public, including his friends, other family members and the media. There was limited media coverage, as only a few reporters were permitted to follow the proceedings in a small room next to the courtroom through a live feed. The source also claims that the court ignored the submission of Mr. Nhat's legal team that the prosecution had failed to adduce any cogent evidence. Additionally, evidence presented by his legal team concerning his abduction and kidnapping in Thailand was not taken into account by the court.

18. After approximately four hours, Mr. Nhat was convicted and sentenced to 10 years' imprisonment under article 356 (3) of the Penal Code of 2015 for "abuse of power or position in performance of official duties".² Following the conclusion of the trial, Mr. Nhat was immediately taken back to the T16 Detention Centre. His lawyers have filed an appeal against his conviction and sentence and are currently awaiting a hearing date. A hearing date is not expected anytime soon due to the closure of the courts during the current global coronavirus disease (COVID-19) pandemic.

² Available from www.wipo.int/edocs/lexdocs/laws/en/vn/vn086en.pdf.

19. The source reports that Mr. Nhat remains in the T16 Detention Centre in difficult conditions that are compounded by the lack of adequate medical care, despite growing concern for his health during the COVID-19 pandemic. He is held in a small cell with two or three other prisoners. He has limited access to sunlight and is denied any books, religious items and items of clothing that his family has tried to send to the prison. He is confined to his cell for 24 hours a day and is not permitted to leave for exercise. While Mr. Nhat was only allowed to leave his cell to receive monthly visits from his family, those visits have been cancelled indefinitely since January 2020 due to the COVID-19 pandemic. Mr. Nhat has now been in detention for over 18 months since his arrest on 26 January 2019.

20. Concerns regarding Mr. Nhat's arrest and detention were raised on 18 April 2019 by special procedures in an urgent appeal sent to the Governments of Thailand and Viet Nam.³ The Working Group acknowledges the responses from the Government of Thailand dated 20 June 2019⁴ and from the Government of Viet Nam dated 30 January 2020.⁵

(d) Responsibility of Thailand for the transfer of Mr. Nhat

21. According to the source, Thailand is responsible for the transfer of Mr. Nhat, which carries with it the risk of arbitrary detention, as well as torture and denial of fair trial rights. The Thai authorities knew, or ought to have known, the real risk that Mr. Nhat would be subjected to the same incommunicado detention regime to which many other journalists, bloggers, political dissidents and human rights defenders have been subjected by the Vietnamese authorities. Arbitrary detention in Viet Nam is a systemic problem. The repeated use of arbitrary detention and denial of justice by the Government of Viet Nam were well known at the time of Mr. Nhat's transfer from Thailand.

22. It can reasonably be inferred that Thailand was aware, or should have been aware, that Mr. Nhat would be exposed to such abuses upon transfer from its territory. There was nothing to indicate that measures were taken to ensure that there would be no such risk or that such risk had been averted, as required by international law. Thailand failed to secure Mr. Nhat's rights and actively prevented him from exercising those rights. Vietnamese State agents could not have operated on Thai territory without the support and assistance of the Government of Thailand. Thailand authorized, organized and facilitated Mr. Nhat's apprehension and detention on Thai territory, and facilitated his quick departure to Viet Nam.

(e) Analysis of violations

23. The source submits that Mr. Nhat's detention is arbitrary under categories I, II and III.

(i) Category I

24. The source argues that there was no legal basis for Mr. Nhat's detention and rendition by the Thai authorities or his arrest and detention in Viet Nam. Mr. Nhat was arrested without a warrant and was not promptly charged. The law under which he was prosecuted is vague.

(f) Unlawful detention and rendition without being promptly informed of the charges

25. Mr. Nhat was unlawfully detained by the Thai police, subjected to rendition and then detained and arrested in Viet Nam. It appears that no arrest warrant was presented, suggesting that Mr. Nhat was not informed about the charges against him, in violation of article 9 (2) of the Covenant. The Human Rights Committee has interpreted the term "promptly" in article 9 (2) to mean within 48 hours, except in exceptional circumstances. The provisions of that article must be observed "even before formal charges have been asserted, so long as the person is arrested or detained on suspicion of criminal activity".⁶

³ See <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24536>; <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24537>.

⁴ Available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=34756>.

⁵ Available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=35138>.

⁶ General comment No. 35 (2014) on liberty and security of person, para. 32.

(g) Charges under a vague and overly broad provision

26. Under article 11 (2) of the Universal Declaration of Human Rights and article 15 (1) of the Covenant, individuals are entitled 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.⁷

27. Mr. Nhat was accused by Viet Nam of abusing his position, after having initially been accused of corruption. Article 356 (3) of the Penal Code is not sufficiently precise and cannot be considered “prescribed by law” and as “defined with sufficient precision” due to its vague and overly broad language. Mr. Nhat’s detention by both Thailand and Viet Nam is arbitrary under category I, in violation of article 11 (2) of the Universal Declaration of Human Rights and article 15 (1) of the Covenant.

(i) Category II

(h) Detention resulting from exercise of the right to freedom of expression

28. The source submits that Mr. Nhat was detained for exercising his right to freedom of expression under article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant. He is detained because of his reporting and activism in criticizing the Government of Viet Nam. Thailand facilitated this detention through its acts and omissions, which constitutes an interference with Mr. Nhat’s free speech rights.

29. Article 19 (3) of the Covenant requires that any restriction imposed on the right to freedom of expression must be provided by law, designed to achieve a legitimate aim and imposed in accordance with the requirements of necessity and proportionality. Mr. Nhat’s detention and rendition by Thailand and his arrest and detention in Viet Nam fail to satisfy these requirements.

30. First, in the present case, the restriction is not provided by law.⁸ For a legislative provision to be characterized as a law under article 19 (3) of the Covenant, it must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.⁹ Furthermore, the provision cannot confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.¹⁰ While Mr. Nhat was aware of the nature of the charges against him, which had changed in view of the impossibility of proving the allegations of corruption, the specific provisions of Vietnamese law remained unknown to him due to the lack of transparency in the proceedings.

31. The Working Group has recognized in numerous cases that the provisions of the Penal Code of Viet Nam are so vague and overly broad that their application could result in penalties being imposed on persons who had merely exercised their right to freedom of expression. In the absence of evidence of any action by Mr. Nhat that might constitute unlawful behaviour, and given the vagueness of article 356 (3) of the Penal Code, any conviction could not be regarded as consistent with international law. Mr. Nhat’s apprehension, rendition, arrest and detention were not provided by law and violate his right to freedom of expression.

32. Second, article 19 (3) of the Covenant requires that restrictions be imposed only for the achievement of a specified aim, namely respect for the rights or reputations of others, or the protection of national security, public order, public health or morals. This provision may never be invoked as a justification for the muzzling of any advocacy of multiparty democracy, democratic tenets and human rights. Under no circumstance can an attack on a person, because of the exercise of his or her freedom of expression, including such forms of

⁷ Ibid., para. 22.

⁸ Human Rights Committee, general comment No. 34 (2011) on the freedoms of opinion and expression, para. 22.

⁹ Ibid., para. 25. See also A/HRC/14/23, para. 79 (d).

¹⁰ Human Rights Committee, general comment No. 34, para. 25.

attack as arbitrary arrest, be compatible with article 19.¹¹ Mr. Nhat's detention and rendition by Thailand, and his arrest in Viet Nam, fail to satisfy this second requirement. Indeed, these actions were illegal under international law and were aimed at limiting his peaceful exercise of the right to freedom of expression, and therefore did not pursue a legitimate aim.

33. Moreover, the restriction does not meet the strict tests of necessity and proportionality. Any restriction must be the least intrusive instrument among those which might achieve their protective function.¹² Rendition from one State to another is one of the most intrusive and disproportionate means available to achieve any purported aim. On that basis alone, Thailand and Viet Nam fail to meet the third requirement of article 19 (3) of the Covenant.

34. The form of expression is relevant in assessing whether a restriction is proportionate.¹³ Some types of expression should never be subject to restriction, namely discussing government policies and political debate; reporting on human rights, government activities and corruption in government; engaging in election campaigns, peaceful demonstrations or political activities, including for peace or democracy; and expressing opinions and dissent.¹⁴ Mr. Nhat was detained by Thai and Vietnamese agents for reporting on corruption and incompetence in the Government of Viet Nam. The response from Viet Nam, assisted by Thailand, was unnecessary, disproportionate and unlawful.

(i) Detention resulting from exercising the right to take part in public affairs

35. The source submits that Mr. Nhat was detained for exercising his right to take part in the conduct of public affairs under article 21 of the Universal Declaration of Human Rights and article 25 of the Covenant. This guarantee encompasses the right of citizens in "exerting influence through public debate and dialogue with their representatives or through their capacity to organise themselves".¹⁵ No distinctions are permitted between citizens in the enjoyment of these rights.¹⁶ Only objective and reasonable restrictions on this freedom are permissible.¹⁷ The restrictions placed on Mr. Nhat are neither objective nor reasonable.

(i) Category III

(j) Right to a fair and public hearing by an independent and impartial tribunal

36. The independence and impartiality of a tribunal under article 14 (1) of the Covenant is an absolute right that is not subject to exception. All criminal trials must in principle be conducted orally and publicly, which ensures transparency and provides an important safeguard for the interests of the individual and society. Courts must make information regarding the time and venue of hearings available to the public and provide adequate facilities for the attendance of interested members of the public, within reasonable limits.¹⁸

37. Thailand violated Mr. Nhat's right to a fair and public hearing when it detained him on 26 January 2019 and, shortly thereafter, handed him over to Vietnamese agents without providing him with an opportunity to challenge his detention. Thailand knew, or ought to have known, that Mr. Nhat would not be allowed access to such a tribunal in Viet Nam. In addition, he was tried in circumstances that bring into question the impartiality and independence of the court in Viet Nam. The court ignored evidence presented by Mr. Nhat's legal team, as well as its submission that the prosecution had failed to adduce any cogent evidence.

¹¹ *Ibid.*, para. 23.

¹² *Ibid.*, para. 34. See also A/HRC/14/23, para. 79 (g) (iv).

¹³ Human Rights Committee, general comment No. 34, para. 34.

¹⁴ Human Rights Council resolution 12/16, para. 5 (p) (i). See also A/HRC/14/23, para. 81 (i).

¹⁵ Human Rights Committee, general comment No. 25 (1996) on participation in public affairs and the right to vote, para. 8.

¹⁶ Articles 2 (1) and 26 of the Covenant.

¹⁷ Human Rights Committee, general comment No. 25, para. 4.

¹⁸ *Ibid.*, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 28.

- (k) Right to equality before courts, to adequate time and facilities for the preparation of a defence and to communicate with counsel

38. The right to equality before courts and tribunals is intended to ensure equality of arms. This means that the same procedural rights are to be provided to all parties unless distinctions are based on law and can be justified on objective and reasonable grounds and do not entail actual disadvantage or other unfairness to the defendant.¹⁹

39. Principle 15 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that communication with counsel shall not be denied for more than a matter of days. Principle 18 provides that the right to communicate with legal counsel must be afforded without delay and may not be restricted save in exceptional circumstances specified by law. The right to access counsel without undue delay is also recognized in principle 7 of the Basic Principles on the Role of Lawyers, which provides that all persons arrested or detained shall have access to a lawyer not later than 48 hours from the time of arrest or detention.

40. Mr. Nhat was held incommunicado for approximately four months and was not allowed to instruct a lawyer. Furthermore, Mr. Nhat's lawyer was charged with tax evasion shortly after agreeing to represent him. The lawyer's office was raided and documents and other material removed. Following the raid, the Police Investigation Department of the Ministry of Public Security issued a notice barring him from representing Mr. Nhat.

41. Thailand violated Mr. Nhat's rights by facilitating his rendition when it knew, or ought to have known, that he would be denied a fair trial. Viet Nam violated Mr. Nhat's rights under article 11 of the Universal Declaration of Human Rights, articles 10 and 14 (1) and (3) (b) of the Covenant, and principles 11, 15 and 18 of the Body of Principles.

- (l) Right to communicate with the outside world

42. Principles 15 and 19 of the Body of Principles provide that communication with the outside world shall not be denied for more than a matter of days, and that a detainee has the right to be visited by and communicate with family members. The incommunicado detention of Mr. Nhat for four months clearly violates these principles. Mr. Nhat was transferred from Thailand, where he was applying for refugee status, to a prison in Hanoi and, apart from one family member, the rest of his family has been prevented from visiting him regularly.

- (m) Enforced disappearance and torture

43. International and regional human rights mechanisms have consistently recognized that enforced disappearance and detention amounts to torture.²⁰ Mr. Nhat was the subject of an act of rendition and held incommunicado for approximately four months. Mr. Nhat's secret, unacknowledged detention, undertaken with a view to removing him from the protection of the law, falls within the definition of enforced disappearance under international law.²¹

44. During his incommunicado detention, Mr. Nhat had no contact with, or access to, his family, lawyers or an independent court. After that period and until January 2020, he received visits from one family member. However, Mr. Nhat's visitation rights are de facto restricted, as he is detained so far from his hometown that he could only receive irregular visits. Moreover, he was restricted in what he could discuss during visits, which have been cancelled indefinitely since January 2020 due to the COVID-19 pandemic.

45. Incommunicado detention for an extended period is conducive to torture and may amount to torture itself, in violation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which Viet Nam is a State party. Even when the incommunicado detention ended, Mr. Nhat's visits were limited in practice. While

¹⁹ Ibid., para. 13.

²⁰ See, e.g., *Mojica v. Dominican Republic* (CCPR/C/51/D/449/1991), para. 5.7, and Inter-American Court of Human Rights, *Case of Velásquez Rodríguez v. Honduras*, judgment of 29 July 1988, para. 187.

²¹ A/HRC/16/48/Add.3 and Corr.1, para. 21.

information about his health is scarce, throughout July and August 2019 he was kept in a cell in 50-degree Celsius heat without any air conditioning or a fan.

Responses from the Governments

46. On 22 May 2020, the Working Group transmitted the allegations to the Governments of Thailand and Viet Nam under its regular communication procedure, requesting both Governments to provide detailed information by 21 July 2020 about Mr. Nhat's case. The Working Group also requested both Governments to clarify the legal provisions justifying his detention, as well as its compatibility with international human rights law. Moreover, the Working Group called upon Viet Nam to ensure Mr. Nhat's physical and mental integrity.

47. The Working Group regrets that it did not receive a response from the Government of Thailand. The Government of Thailand did not request an extension of time for its reply, as provided for in the Working Group's methods of work. The Working Group notes with concern that the Government of Thailand has not availed itself of the opportunity to respond to the allegations in the present case and that there have been several occasions in recent years in which it has not submitted a response.²² The Working Group urges Thailand to continue to engage constructively on allegations relating to the arbitrary deprivation of liberty.

Response from the Government of Viet Nam

48. The Government of Viet Nam requested an extension of the deadline for its response. The extension was granted with a new deadline of 7 August 2020.

49. In its response of 6 August 2020, the Government of Viet Nam stated that in 2004 Mr. Nhat was the regional chief of the *Đài Đoàn Kết* newspaper. During that time, he abused his authority by signing documents to purchase public land and the building thereon in Da Nang City to establish the newspaper's regional office. On 19 July 2004, the People's Committee of Da Nang sold the land and the building to the newspaper at a preferential price. Four months later, Mr. Nhat signed a contract to sell the premises to another company, which caused significant public financial losses.

50. On 16 January 2019, criminal proceedings were initiated against Mr. Nhat. After the decision to initiate the case was approved by the People's Supreme Procuracy, the authorities executed an arrest warrant against Mr. Nhat on 28 January 2019. The case against Mr. Nhat also involved other alleged offences relating to the management and use of State-owned property that resulted in losses. On 11 June 2019, the police informed Mr. Nhat's family of his arrest. Official notice of his arrest was not given before 11 June 2019 in order to facilitate the investigation and collection of evidence, in accordance with article 116 of the Criminal Procedure Code of 2015. On 20 June 2019, Mr. Nhat was permitted to receive a family visit at the temporary detention centre. Due to the COVID-19 pandemic, such visits have been cancelled since January 2020. The allegations relating to the incommunicado detention of Mr. Nhat, including that his family was prevented from visiting him, are inaccurate.

51. On 9 March 2020, the People's Court of Hanoi, a court of first instance, tried Mr. Nhat and sentenced him to 10 years' imprisonment for "abusing power and/or authority in performance of official duties" under article 356 of the Penal Code. The proceedings met a fair, public and transparent standard, and the court reviewed the offence in a comprehensive and objective manner. Two defence lawyers represented Mr. Nhat. Several foreign missions, including the Embassy of the United States of America in Hanoi and the Delegation of the European Union to Viet Nam, were invited to observe the trial. Mr. Nhat's family member attended the trial, as well as members of the public and a media contingent comprising radio and television reporters. Observers followed the proceedings in a viewing room as a preventive measure during the COVID-19 pandemic, including to protect the health of Mr. Nhat. Mr. Nhat filed an appeal to the Supreme People's Court.

²² Opinions No. 4/2019, No. 51/2017, No. 15/2015, No. 41/2014 and No. 19/2014. The Government of Thailand responded to the communications in relation to opinions No. 3/2018, No. 56/2017, No. 44/2016 and No. 35/2012.

52. The Government of Viet Nam rejects the allegation that the legal grounds for Mr. Nhat's arrest were based on a vague and overly broad provision. Article 356 of the Penal Code clearly stipulates the levels of property damage caused by the offences and their respective penalties. Mr. Nhat's prosecution was not related to any journalism activities or to the exercise of his rights to freedom of expression or to take part in the conduct of public affairs.

53. Mr. Nhat is being detained in the T16 Detention Centre under the responsibility of the Ministry of Public Security. He is in normal health. His rights have been ensured under Vietnamese law and in conformity with international human rights law, including in relation to family visits and the receipt of gifts, letters, books, newspapers and documents.

Further comments from the source

54. The source reiterated its allegations relating to Mr. Nhat's detention, including that his arrest took place without a legal basis, that he was detained incommunicado and did not receive a fair trial, and that he is being denied basic rights while detained.

Discussion

55. The present case involves two States and the Working Group will discuss the issues related to each State separately. In determining whether Mr. Nhat's detention is arbitrary, the Working Group has regard for 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 each Government to refute the allegations.²³

(a) Allegations against Thailand

56. In the absence of a response from the Government of Thailand, the Working Group will render the present opinion on the basis of all the information submitted, in conformity with paragraph 15 of its methods of work.

(i) Category I

57. The source alleges that no arrest warrant was presented when Mr. Nhat was arrested in Bangkok on 26 January 2019. According to the source, the Thai authorities also failed to inform Mr. Nhat of the reasons for his arrest and to promptly inform him of the charges. The Government of Thailand has not responded to these allegations.

58. According to article 9 (1) of the Covenant, no one shall be deprived of liberty except on such grounds and in accordance with such procedure as are established by law. Article 9 (2) provides that anyone who is arrested shall be informed, at the time of arrest, of the reasons for the arrest and shall be promptly informed of any charges. The Working Group considers that the source has provided credible information, which was not been rebutted by the Government of Thailand, that Mr. Nhat was arrested without an arrest warrant, in violation of article 9 (1).²⁴ Moreover, there is no information to suggest that Mr. Nhat was informed of the reasons for his arrest²⁵ or promptly informed of the charges, in violation of article 9 (2).

59. Furthermore, the Working Group considers that the Thai authorities were responsible for the disappearance of Mr. Nhat between 26 January and 15 March 2019 by handing him over to Vietnamese agents so that he could be returned to Viet Nam.²⁶ Enforced disappearance violates numerous substantive and procedural provisions of the Covenant,

²³ A/HRC/19/57, para. 68.

²⁴ It is not sufficient that there is a law authorizing the arrest. The authorities must invoke that legal basis and apply it through an arrest warrant (opinions No. 45/2019, para. 51; and No. 44/2019, para. 52).

²⁵ An arrest is arbitrary when carried out without informing the arrested person of the reasons for the arrest (opinions No. 46/2019, para. 51; and No. 10/2015, para. 34).

²⁶ A/HRC/16/48/Add.3 and Corr.1, para. 21; arts. 1–3 of the Declaration on the Protection of All Persons from Enforced Disappearance; and CAT/C/THA/CO/1, para. 14.

including articles 9 and 14, and constitutes a particularly aggravated form of arbitrary detention.²⁷ The Working Group refers this case to the Working Group on Enforced or Involuntary Disappearances.

60. As the Working Group has stated, international law regarding extradition provides procedures that must be observed by countries in returning individuals to face criminal proceedings in another country in order to ensure that their right to a fair trial is protected.²⁸ Those procedures have not been observed in the present case and the arrest, detention and transfer of Mr. Nhat did not meet any minimum international standards and had no legal basis.

61. The Working Group concludes that the Government of Thailand failed to establish the legal basis for Mr. Nhat's arrest and detention, and facilitated his forced transfer to Viet Nam in complete disregard of legal procedures resulting in his disappearance for nearly two months. Mr. Nhat's detention was arbitrary under category I.

(ii) Category II

62. The Working Group notes that Mr. Nhat has been outspoken on corruption and governance in Viet Nam, having been a contributor to blogs on political issues. In the Working Group's view, the Government of Thailand detained and facilitated the transfer of Mr. Nhat to Viet Nam at the request of the Government of Viet Nam. The Government of Thailand cannot escape responsibility for its part in facilitating the prosecution of Mr. Nhat for the legitimate exercise of his rights.

63. The Working Group concludes that Mr. Nhat's detention was arbitrary under category II, as it violates articles 19 and 21 (1) of the Universal Declaration of Human Rights and articles 19 and 25 (a) of the Covenant (see paras. 76–83 below).

(iii) Category III

64. Mr. Nhat was seized and handed over by the Thai authorities to Vietnamese State agents without a fair and public extradition hearing by an independent and impartial tribunal in Thailand. Involuntary expulsion to a foreign State without a hearing by judicial authorities cannot be in conformity with due process. Furthermore, Mr. Nhat had no access to legal counsel, as he was removed to Viet Nam in a matter of hours.

65. Individuals should not be expelled to another country when there are substantial grounds for believing that their life or freedom would be at risk.²⁹ The risk of arbitrary detention in the receiving State must be among the elements taken into consideration. In the present case, the Thai authorities knew, or ought to have known, the real risk that Mr. Nhat would be denied a fair trial, as other journalists, bloggers, political dissidents and human rights defenders in Viet Nam have been.³⁰ Yet, the Thai authorities allowed Vietnamese agents to operate on Thai territory and facilitated Mr. Nhat's apprehension and detention so that he could be forcibly transferred to Viet Nam, without any apparent regard for the risks and without assessing the charges and evidence against him.

66. Furthermore, the Government of Thailand did not avail itself of the option of resorting to the regular extradition procedure. This represents a violation of the principle of non-refoulement,³¹ which is serious given that Mr. Nhat had sought refugee status at the UNHCR Bangkok office the day before his arrest. While Thailand is not a party to the Convention

²⁷ Human Rights Committee, general comment No. 35, para. 17; opinions No. 6/2020, para. 43; and No. 5/2020, para. 74.

²⁸ Opinions No. 33/2020, para. 63; No. 23/2020, para. 58; No. 10/2019, para. 71; and No. 11/2018, para. 53.

²⁹ A/HRC/4/40, paras. 44–45.

³⁰ Opinions No. 16/2020, No. 15/2020, No. 45/2019, No. 44/2019, No. 9/2019, No. 8/2019 and No. 46/2018. See also CCPR/C/VNM/CO/3, paras. 25–30, 33–36, 41–42, 45–46 and 51–52; CAT/C/VNM/CO/1, paras. 16–17, 24–25 and 30–31.

³¹ Art. 8 of the Declaration on the Protection of All Persons from Enforced Disappearance. See also CCPR/C/THA/CO/2, paras. 27–28; and CAT/C/THA/CO/1, para. 20.

relating to the Status of Refugees, the obligation not to repatriate individuals who have reason to fear persecution is customary.³² The Government of Thailand also violated its obligation under article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and article 7 of the Covenant, not to return Mr. Nhat to a State where there are substantial grounds for believing that he would be in danger of torture, in this case enforced disappearance and incommunicado detention.³³

67. The Working Group finds that, by detaining and facilitating the transfer of Mr. Nhat, the Government of Thailand denied his fair trial rights under category III.

(iv) Category V

68. The Working Group finds that the Government of Thailand has, at the request of the Government of Viet Nam, arrested, detained and transferred Mr. Nhat on discriminatory grounds and that his detention was arbitrary under category V (see paras. 93–94 below).

(b) Concluding remarks

69. The Working Group considers that the Government of Thailand is responsible for its actions in the arrest, detention and transfer of Mr. Nhat to Viet Nam, as well as the violations of his rights in Viet Nam, discussed below. The Working Group urges the Government of Thailand to take all steps necessary to secure Mr. Nhat's immediate and unconditional release.

70. The Working Group would welcome the opportunity to conduct a country visit, noting that Thailand issued a standing invitation to all thematic special procedure mandate holders on 4 November 2011. The Working Group has discussed on several occasions the possibility of a country visit with representatives of the Permanent Mission of Thailand to the United Nations Office and other international organizations in Geneva, and will continue to seek a positive response.

(c) Allegations against Viet Nam

71. The Working Group thanks the source and the Government of Viet Nam for their submissions.

(i) Category I

72. The source alleges that no arrest or detention warrant was presented when Mr. Nhat was arrested in Hanoi on 28 January 2019, and that the Vietnamese authorities failed to promptly inform him of the charges. In its response, the Government of Viet Nam states that the authorities executed an arrest warrant against Mr. Nhat on 28 January 2019 but did not provide further information to support its assertion. The Working Group considers that the source has provided credible information, which has not been rebutted by the Government of Viet Nam, that Mr. Nhat was arrested in Viet Nam without an arrest warrant and without being given prompt notification of the charges, in violation of article 9 (1) and (2) of the Covenant.

73. The source further alleges that Mr. Nhat was disappeared from 26 January to 15 March 2019 and that he was held incommunicado for approximately four months with no access to his lawyers or family. While the Government of Viet Nam denies that Mr. Nhat was held incommunicado, it does not address his alleged disappearance. The Government of Viet Nam also states that Mr. Nhat was permitted to receive a family visit on 20 June 2019, which appears to support the source's allegation that he did not have contact until that point.

74. The Working Group considers that the source has established a credible case that Mr. Nhat was disappeared for nearly two months. As noted earlier, enforced disappearance violates numerous substantive and procedural provisions of the Covenant, including articles

³² A/HRC/13/42, para. 43.

³³ General Assembly resolution 68/156, para. 27, in which the Assembly reminded all States that prolonged incommunicado detention could constitute torture.

9 and 14, and constitutes a particularly aggravated form of arbitrary detention.³⁴ The Working Group refers the present case to the Working Group on Enforced or Involuntary Disappearances. Moreover, Mr. Nhat was held incommunicado for four months. In these circumstances, it is clear that Mr. Nhat was not brought promptly, or permitted to challenge his detention, before a judicial authority, in violation of article 9 (3) and (4) of the Covenant. Indeed, the earliest point at which the Government of Viet Nam refers to Mr. Nhat being presented to a court was at his trial on 9 March 2020. Holding persons incommunicado violates their right to challenge the lawfulness of their detention.³⁵ Given that Mr. Nhat was unable to challenge his detention before a court, his right to an effective remedy under article 8 of the Universal Declaration of Human Rights and article 2 (3) of the Covenant was violated. He was also placed outside the protection of the law, in violation of article 6 of the Universal Declaration of Human Rights and article 16 of the Covenant.

75. The Working Group concludes that the Government of Viet Nam failed to establish a legal basis for Mr. Nhat's arrest and detention, which is arbitrary under category I.

(ii) Category II

76. The source alleges that Mr. Nhat was detained as a result of peacefully exercising his rights to freedom of expression and to take part in the conduct of public affairs under articles 19 and 21 (1) of the Universal Declaration of Human Rights and articles 19 and 25 (a) of the Covenant. According to the source, Mr. Nhat was detained for reporting on corruption and incompetence in Viet Nam, including by writing articles criticizing the Government of Viet Nam.

77. The Government of Viet Nam argues that Mr. Nhat was detained for violating article 356 of the Penal Code, which criminalizes the conduct of an individual who "abuses his/her power or position in performance of official duties ... or infringes upon state interests, lawful rights and interests of another organization or individual". According to the Government of Viet Nam, Mr. Nhat violated this provision in 2004, when he caused significant losses in relation to the sale of public land.

78. The Working Group recalls that article 19 (2) of the Covenant provides that everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his or her choice. This right includes political discourse, commentary on public affairs, discussion of human rights and journalism.³⁶ It protects the holding and expression of opinions, including those which are critical of, or not in line with, government policy.³⁷

79. The Working Group considers that Mr. Nhat's conduct was a way of exercising his right to freedom of expression, as protected under international human rights law, and that he was detained for exercising that right. In reaching this conclusion, the Working Group notes that Mr. Nhat's arrest took place within weeks of his writing an article that criticized the Government of Viet Nam for bulldozing homes in Loc Hung without providing legal documents to the landowners. Moreover, if this case had simply involved an abuse of power, as the Government of Viet Nam claims, it is difficult to understand why it was necessary to forcibly transfer Mr. Nhat from Thailand, to disappear him for two months and to hold him incommunicado for four months. While the Government of Viet Nam states that official notice of Mr. Nhat's arrest was only given on 11 June 2019 in order to facilitate the investigation and collection of evidence, it does not explain why such measures were needed. It is also unclear why criminal proceedings were initiated against Mr. Nhat for an offence allegedly committed in 2004, some 15 years prior to his arrest. These factors suggest that Mr. Nhat's prosecution related to the exercise of his rights rather than any violation of the law.

³⁴ Human Rights Committee, general comment No. 35, para. 17. See also opinions No. 6/2020, para. 43; and No. 5/2020, para. 74.

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

³⁶ Human Rights Committee, general comment No. 34, para. 11.

³⁷ Opinions No. 8/2019, para. 55; and No. 79/2017, para. 55.

80. Moreover, Mr. Nhat's criticism of government policy through his blogs and journalism concerned matters of public interest. The Working Group considers that he was detained for exercising his right to take part in the conduct of public affairs under article 21 (1) of the Universal Declaration of Human Rights and article 25 (a) of the Covenant.³⁸

81. There is nothing to suggest that the permissible restrictions in articles 19 (3) and 25 of the Covenant apply in the present case. The Working Group was not convinced that prosecuting Mr. Nhat was necessary to protect a legitimate interest under these provisions, nor that his conviction and lengthy sentence were a proportionate response to his activities. Importantly, there is no evidence to suggest that Mr. Nhat's criticism of the Government incited violence, either directly or indirectly. The Human Rights Council has called upon States to refrain from imposing restrictions under article 19 (3) that are not consistent with international human rights law.³⁹ 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.

82. According to articles 1 and 6 (c) of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and to draw public attention to the observance of human rights.⁴⁰ Mr. Nhat was detained for the exercise of his rights under this Declaration. Detaining individuals on the basis of their activities as human rights defenders violates their right to equality before the law and equal protection of the law under article 7 of the Universal Declaration of Human Rights and article 26 of the Covenant.⁴¹

83. The Working Group concludes that Mr. Nhat's detention resulted from the peaceful exercise of his rights to freedom of expression and to take part in the conduct of public affairs and was contrary to article 7 of the Universal Declaration of Human Rights and article 26 of the Covenant. His detention is arbitrary under category II.⁴²

84. As the Working Group has emphasized, 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.⁴³ The language used in article 356 of the Penal Code, which criminalizes the abuse of power or position but provides no clear definition of those terms, lacks detail and may, as in the present case, proscribe the peaceful exercise of rights. The application of such a provision adds weight to the Working Group's conclusion that Mr. Nhat's detention falls within category II.

(iii) Category III

85. Given its finding that Mr. Nhat's detention is arbitrary under category II, the Working Group emphasizes that no trial should have taken place. That notwithstanding, Mr. Nhat was tried on 9 March 2020 and is currently awaiting an appeal hearing. The information submitted by the source discloses violations of Mr. Nhat's right to a fair trial.

86. The source alleges that Mr. Nhat was disappeared for nearly two months and held incommunicado for four months and that he was not allowed to instruct a lawyer during that time. Thereafter, he was only permitted to meet with his lawyers twice before his trial, with each visit lasting only 30 minutes and heavily monitored by prison guards present inside the meeting room. Mr. Nhat's lawyer was charged with tax evasion shortly after agreeing to represent him and has subsequently been barred from representing Mr. Nhat. In its response,

³⁸ Human Rights Committee, general comment No. 25, para. 8, in which the Committee noted that citizens may take part in the conduct of public affairs by exerting influence through public debate. See also opinions No. 16/2020 and 15/2020.

³⁹ Human Rights Council resolution 12/16, para. 5 (p).

⁴⁰ See also General Assembly resolution 74/146, para. 12.

⁴¹ Opinions No. 16/2020, No. 15/2020, No. 45/2019, No. 44/2019, No. 9/2019, No. 46/2018, No. 45/2018, No. 36/2018 and No. 35/2018.

⁴² CCPR/C/VNM/CO/3, paras. 25–26, 35–36, 41–42 and 45–46.

⁴³ Opinion No. 41/2017, paras. 98–101. See also opinion No. 62/2018, paras. 57–59.

the Government of Viet Nam states that Mr. Nhat had two lawyers representing him, but did not otherwise respond to the specific allegations.

87. 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 must be provided without delay.⁴⁴ The Working Group considers that the failure to provide Mr. Nhat with access to his lawyers from the outset, and the subsequent limitation of his meetings with counsel to 30 minutes, violated his right to adequate time and facilities for the preparation of his defence and to communicate with a lawyer of his choice as set out in article 14 (3) (b) of the Covenant. Legal consultations may be within sight but not within hearing of the authorities, and all communications with counsel must remain confidential.⁴⁵ 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 legal counsel during criminal proceedings in Viet Nam.⁴⁶

88. The actions allegedly taken against Mr. Nhat's lawyer are unacceptable. Lawyers must be able to carry out their functions effectively and independently, free from interference, intimidation, hindrance or harassment, and the failure to ensure that Mr. Nhat's counsel could do so violated article 14 (3) (b) and (d) of the Covenant.⁴⁷ The Working Group refers this case to the Special Rapporteur on the independence of judges and lawyers.

89. The source further alleges, and the Government of Viet Nam does not deny, that Mr. Nhat's trial before the People's Court of Hanoi on 9 March 2020 lasted only four hours. This was a very short hearing, particularly given the serious charge and the heavy penalty of 10 years' imprisonment imposed on Mr. Nhat. As the Working Group has observed,⁴⁸ a short trial for a serious criminal offence suggests that Mr. Nhat's guilt had been pre-determined, in violation of his right to the presumption of innocence enshrined in article 14 (2) of the Covenant.

90. In addition, the source claims that, apart from one of Mr. Nhat's family members, the courtroom was closed to the public, including Mr. Nhat's friends, other family members and the media. The Government of Viet Nam claims that, in addition to Mr. Nhat's family member, representatives of foreign diplomatic missions, members of the public and the media attended the trial, and that observers followed the proceedings in a viewing room as a preventive measure during the COVID-19 pandemic. While the Working Group emphasizes that the guarantee of a public hearing under article 14 (1) of the Covenant is an essential safeguard for a fair trial, it is unable to find that this provision was violated in the present case. According to the source and the Government of Viet Nam, only one of Mr. Nhat's family members was present at the trial. However, it is unclear whether this resulted in a trial that was not public, given that other groups appear to have been present, such as reporters. Both the source and the Government of Viet Nam provided information that media representatives were allowed to follow proceedings in a separate room, which appears to be a reasonable alternative measure during a pandemic.⁴⁹

91. Furthermore, the source alleges that the trial court ignored the submission of Mr. Nhat's legal team that the prosecution had failed to adduce any cogent evidence. Additionally, evidence presented by Mr. Nhat's legal team concerning his forced transfer

⁴⁴ A/HRC/30/37, annex, principle 9 and guideline 8; Human Rights Committee, general comment No. 35, para. 35.

⁴⁵ United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), rule 61 (1); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 18; A/HRC/30/37, annex, guideline 8.

⁴⁶ Opinions No. 16/2020, No. 15/2020, 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 CCPR/C/VNM/CO/3, paras. 25–26; and CAT/C/VNM/CO/1, paras. 16–17.

⁴⁷ A/HRC/30/37, annex, principle 9; opinion No. 14/2017, para. 58; and CCPR/C/VNM/CO/3, paras. 35–36.

⁴⁸ Opinions No. 15/2020, No. 45/2019, No. 44/2019, No. 46/2018, No. 45/2018, No. 36/2018 and No. 75/2017.

⁴⁹ Deliberation No. 11 (A/HRC/45/16, annex II, paras. 20–21), in which the Working Group noted that States must use alternative methods to secure a fair trial.

from Thailand was not taken into account by the court. While the Government of Viet Nam states that the trial was held in a fair manner and the offence was reviewed objectively, it did not specifically address this argument. In the absence of such rebuttal, the Working Group finds that Mr. Nhat's right to a fair hearing before an independent and impartial tribunal under article 14 (1) of the Covenant was violated. The Working Group includes this issue in its referral to the Special Rapporteur on the independence of judges and lawyers.

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

(iv) Category V

93. The Working Group considers that Mr. Nhat was targeted because of his peaceful activities, including his criticism of the Government of Viet Nam in relation to human rights issues such as corruption and poor governance. This is not the first time that Mr. Nhat has been targeted for these activities, as he had already served a two-year sentence imposed in 2014 for criticizing the authorities.⁵⁰ Moreover, in the discussion above concerning category II, the Working Group established that Mr. Nhat's detention resulted from the peaceful exercise of his rights under international law. When detention results 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.⁵¹

94. The Working Group finds that Mr. Nhat was deprived of his liberty on discriminatory grounds, that is, owing to his status as a human rights defender, and on the basis of his political or other opinion in seeking to hold the authorities to account. His deprivation of liberty violated articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant, and was arbitrary according to category V. The Working Group refers this case to the Special Rapporteur on the situation of human rights defenders.

95. Finally, the source states that Mr. Nhat was held incommunicado for four months and had no contact with, or access to, his family during this time. He was only permitted to meet with a family member for the first time on 20 June 2019. After that time until January 2020, he received visits from this family member, but the rest of his family was prevented from visiting. Moreover, Mr. Nhat's visitation rights are de facto restricted, as he is detained so far from his hometown that he could only receive irregular visits. Such visits have been cancelled indefinitely since January 2020 due to the COVID-19 pandemic. In its response, the Government of Viet Nam states that, on 20 June 2019 Mr. Nhat was permitted to receive a family visit, but that, due to the COVID-19 pandemic, such visits have been cancelled since January 2020. The Government denies restricting visits.

96. The Working Group considers that the restrictions placed on Mr. Nhat's contact with his family violated his right to contact with the outside world under rules 43 (3) and 58 (1) of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) and principles 15 and 19 of the Body of Principles. The COVID-19 pandemic must not be a reason to restrict family contact and the Government of Viet Nam should have arranged for alternative contact by telephone or online communication.⁵² In addition, detaining Mr. Nhat far from his hometown is inconsistent with principle 20 of the Body of Principles. The delay in providing notification of Mr. Nhat's arrest and location to his family violated principle 16 (1) of the Body of Principles.⁵³

97. The Working Group is concerned that Mr. Nhat remains in detention in difficult conditions that are compounded by a lack of adequate medical care despite the COVID-19 pandemic. He is reportedly held in a small cell with two or three other prisoners. He has limited access to sunlight and is denied books, religious items and clothing that his family has tried to send. He is confined to his cell for 24 hours a day without exercise. He has been

⁵⁰ CCPR/C/VNM/CO/3, paras. 25–26, 35–36 and 45–46.

⁵¹ Opinions No. 59/2019, para. 79; No. 13/2018, para. 34; and No. 88/2017, para. 43.

⁵² Deliberation No. 11 (A/HRC/45/16, annex II, paras. 20–21).

⁵³ CAT/C/VNM/CO/1, paras. 16–17.

kept in 50-degree Celsius heat without air conditioning. In its response, the Government of Viet Nam states that Mr. Nhat is in normal health and that his rights have been ensured, including in relation to the receipt of items, but provided no further information. The Working Group considers that the source has provided credible information that Mr. Nhat is detained in conditions contrary to the Nelson Mandela Rules.⁵⁴ Given that Mr. Nhat has been arbitrarily detained for over 18 months, the Working Group urges the Government of Viet Nam to immediately and unconditionally release him, and ensure that he receives medical care.

(d) Concluding remarks

98. The Working Group considers that the Government of Viet Nam is responsible for its action in detaining Mr. Nhat in Viet Nam, as well as jointly responsible with the Government of Thailand for the arrest, detention and forced transfer of Mr. Nhat to Viet Nam. Notably, the Government of Viet Nam did not address the circumstances of Mr. Nhat's forced transfer from Thailand.

99. The present case is one of many cases concerning arbitrary detention in Viet Nam.⁵⁵ These cases follow a familiar pattern of incommunicado detention; prosecution under vaguely worded offences for the peaceful exercise of human rights; denial of access to legal counsel; a brief closed trial at which due process is not observed; and denial of access to the outside world. This pattern indicates a systemic problem which, if it continues, may amount to a serious violation of international law.⁵⁶

100. The Working Group would welcome the opportunity to work constructively with the Government to address arbitrary detention. A significant period has passed since its last visit to Viet Nam in October 1994, and the Working Group considers that it is now an appropriate time to conduct another visit. On 11 June 2018, the Working Group reiterated earlier requests to the Government to undertake a country visit, and will continue to seek a positive response.⁵⁷

Disposition

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

With regard to Thailand, the deprivation of liberty of Truong Duy Nhat, being in contravention of articles 2, 3, 6, 7, 8, 9, 10, 11, 19 and 21 (1) of the Universal Declaration of Human Rights and articles 2 (1) and (3), 9, 14, 16, 19, 25 (a) and 26 of the International Covenant on Civil and Political Rights, was arbitrary and fell within categories I, II, III and V.

With regard to Viet Nam, the deprivation of liberty of Truong Duy Nhat, being in contravention of articles 2, 3, 6, 7, 8, 9, 10, 11, 19 and 21 (1) of the Universal Declaration of Human Rights and articles 2 (1) and (3), 9, 14, 16, 19, 25 (a) and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

102. The Working Group requests both Governments to take the steps necessary to remedy the situation of Mr. Nhat 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.

103. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be: (a) for the Government of Viet Nam to release Mr. Nhat immediately; and (b) for both Governments to accord Mr. Nhat an enforceable right to

⁵⁴ Rules 12–14, 23–27 and 66.

⁵⁵ Opinions No. 16/2020, No. 15/2020, No. 45/2019, No. 44/2019, No. 9/2019, No. 8/2019, No. 46/2018, No. 45/2018, No. 36/2018, No. 35/2018, No. 79/2017, No. 75/2017, No. 27/2017, No. 26/2017, No. 40/2016, No. 46/2015 and No. 45/2015.

⁵⁶ Opinion No. 47/2012, para. 22.

⁵⁷ CAT/C/VNM/CO/1, para. 46, in which the Committee against Torture recommended that the Government issue an invitation to the Working Group to conduct a country visit.

compensation and other reparations, in accordance with international law. In the current context of the global COVID-19 pandemic and the threat that it poses in places of detention, the Working Group calls upon the Government of Viet Nam to take urgent action to ensure Mr. Nhat's immediate release.

104. The Working Group urges both Governments to ensure a full and independent investigation of the circumstances surrounding the arbitrary detention of Mr. Nhat and to take appropriate measures against those responsible for the violation of his rights.

105. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers this case to the Working Group on Enforced or Involuntary Disappearances, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on the situation of human rights defenders, for appropriate action.

106. The Working Group requests both Governments to disseminate the present opinion through all available means and as widely as possible.

Follow-up procedure

107. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and both Governments to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

- (a) Whether Mr. Nhat has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Nhat;
- (c) Whether an investigation has been conducted into the violation of Mr. Nhat'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 Thailand and Viet Nam with their international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

108. The Governments are invited to inform the Working Group of any difficulties they 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.

109. The Working Group requests the source and the Governments 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.

110. 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.⁵⁸

[Adopted on 25 August 2020]

⁵⁸ Human Rights Council resolution 42/22, paras. 3 and 7.