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Human Rights Council
Working Group on Arbitrary Detention**Opinions adopted by the Working Group on Arbitrary Detention at its seventy-eighth session, 19-28 April 2017****Opinion No. 26/2017 concerning Nguyen Van Dai (Viet Nam)**

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 33/30 of 30 September 2016.

2. In accordance with its methods of work (A/HRC/33/66), on 30 January 2017 the Working Group transmitted to the Government of Viet Nam a communication concerning Nguyen Van Dai. The Government replied to the communication on 4 April 2017. 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).

Submissions

Communication from the source

4. Nguyen Van Dai is a 46-year-old lawyer, human rights defender and blogger. He is a citizen of Viet Nam, usually residing in Hanoi.
5. According to the source, Mr. Dai has faced harassment, surveillance, imprisonment and acts of violence for over 10 years for undertaking human rights work in Viet Nam. Prior to 2007, he worked as a human rights lawyer representing clients in court to defend their right to religious freedom.
6. In March 2007, Mr. Dai was charged and convicted of “conducting propaganda against the Socialist Republic of Viet Nam”, pursuant to article 88 of the Penal Code of Viet Nam and his licence to practise law was revoked. He was detained for eight years, from March 2007 until March 2015, both in prison and under house arrest. Mr. Dai continued his human rights work while under house arrest. In April 2013, he co-founded “Brotherhood for Democracy”, an organization that provides training to community members on their legal rights in Viet Nam.
7. From his release in March 2015 until his most recent arrest on 16 December 2015, Mr. Dai was involved in a campaign advocating stronger human rights protection in Viet Nam. He wrote extensively in blogs and on social media about the need for Viet Nam to transition from a one-party State to a multiparty democracy.
8. The source submits that, in the period 2015-2016, there was a growing crackdown by the Government of Viet Nam on human rights defenders, journalists and bloggers. In the weeks leading up to the arrest of Mr. Dai on 16 December 2015, he had experienced an escalation in harassment and violence. On 6 December 2015, Mr. Dai was reportedly beaten by masked men when returning home after leading a class to educate citizens about their human rights under the Constitution.
9. On 15 December 2015, the day before his arrest, Mr. Dai and others met with European Union delegates participating in the fifth round of the European Union and Viet Nam dialogue on human rights, in the spirit of the European Union-Vietnam Partnership and Cooperation Agreement that was signed in 2012.

Arrest and detention

10. According to the source, on 16 December 2015, at approximately 8.50 a.m., Mr. Dai was approached by plain clothes police officers shortly after he had left his house to attend the second day of the European Union-Vietnam dialogue on human rights. The police officers escorted him back to his house and, in the presence of his wife, arrested him. The source notes that the police officers read aloud an arrest warrant. The police proceeded to search the couple’s house and confiscated several of Mr. Dai’s belongings. According to the source, the police did not show a search warrant during the search and there was no indication that they were in possession of one, as required under article 141 of the Criminal Procedure Code of Viet Nam.
11. The police then transported Mr. Dai to Detention Centre B14 in Hanoi — also known as Thanh Liet Detention Centre — a pretrial detention centre commonly used to hold political detainees and detainees held on account of their religion.
12. The source notes that the Ministry of Public Security provided the family of Mr. Dai with a memorandum stating the names of the team who had carried out the arrest and search, the names of other witnesses and a list of confiscated items. The source states that, to the extent of its knowledge, no copy of the arrest warrant was provided.
13. Based on statements made by the Vietnamese officials at the time of Mr. Dai’s arrest, the source submits that the Government appears to rely on article 81 (a) of the Criminal Procedure Code, which provides for arrest in urgent cases “when there exist grounds to believe that such persons are preparing to commit very serious or exceptionally serious offences”. Under article 80 (2) of the Code, an arrest warrant must specify “the date, full name and post of the warrant issuers, the full name, address of the arrestee and the

reason for the arrest”. Furthermore, within 24 hours of arresting a person, the investigating bodies must take the person’s statement and issue a decision to keep the arrestee in custody or release him or her (see art. 83 (1) of the Code).

Incommunicado detention

14. According to the source, the Vietnamese authorities have been holding Mr. Dai in incommunicado detention since 16 December 2015 without providing any legal basis for his detention. It is not known whether Mr. Dai has been formally charged with an offence or is being detained pending investigation of an alleged offence.

15. The source notes that statements made by Vietnamese officials at the time of the arrest suggest that Mr. Dai may have been charged with, or is being investigated in relation to, an offence under article 88 of the Penal Code, which is punishable by up to 20 years of imprisonment. Article 88 criminalizes the following acts as “conducting propaganda against the Socialist Republic of Viet Nam”:

- (a) Propagating against, distorting and/or defaming the people’s administration;
- (b) Propagating psychological warfare and spreading fabricated news in order to foment confusion among people;
- (c) Making, storing and/or circulating documents and/or cultural products with contents against Viet Nam.

16. Article 88 of the Criminal Procedure Code provides that a person may be held in “temporary detention” during the investigation of an offence. For an “especially serious offence”, a person can be held in temporary detention for a period of up to 16 months, under article 120 of the Criminal Procedure Code.

17. According to the source, Mr. Dai has been denied access to a lawyer since his arrest. Three lawyers have reportedly applied to represent him but all have been refused the required defence counsel certificate. Under article 56 (4) of the Criminal Procedure Code, it is necessary for a defence counsel to be granted a defence counsel certificate by the investigating body, procuracy or court.

18. The source notes that Mr. Dai has also been denied access to his family since his arrest. Although his family is allowed to send food to him twice a month, they have no way of knowing if the food is reaching him or if it is adequate in the context of his circumstances.

19. According to the source, although the current state of Mr. Dai’s health is unknown, it is of great concern as he suffers from hepatitis B. It is not known whether he is receiving appropriate medical treatment for his condition. Furthermore, as mentioned above, Mr. Dai had been violently beaten 10 days prior to his arrest and he had not fully recovered from the attack when he was arrested. The source highlights that prisoners of conscience in Viet Nam are routinely denied medical care and some prisoners have reported being told by the authorities that they would not receive any medical treatment unless they confessed to their alleged crimes. The source notes the existence of numerous reports concerning the poor conditions and ill-treatment of political prisoners in detention centres in Viet Nam.

Legal framework

20. Viet Nam acceded to the International Covenant on Civil and Political Rights on 24 September 1982. The source submits that Viet Nam is also bound by the principles of the Universal Declaration of Human Rights, which have acquired the status of customary international law, as well as by the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

21. Article 69 of the Constitution of Viet Nam guarantees the right to freedom of expression, thought, religion and association. However, the source notes that the guarantee is rendered meaningless by domestic legislation, which expressly limits the right to freedom of expression. Article 1 of the 1999 Mass Media Law requires all Vietnamese media to serve as “the mouthpiece of Party organizations”. The source considers that restrictions on online media are of even greater severity. Decree No. 72 of 2011 restricts the anonymity of

sources and excludes bloggers from press freedom protections. Internet service providers are legally required to block access to websites that are considered politically unacceptable.

22. In addition to restrictive media and Internet laws, the source highlights that articles 79 (intent to overthrow the people's administration) and 88 (conducting propaganda against the State) of the Penal Code are frequently invoked to imprison bloggers and activists for the peaceful exercise of their right to freedom of expression. The source quotes opinion 40/2016, in which the Working Group on Arbitrary Detention urged the Government of Viet Nam to bring article 79 and other provisions, which it described as "vague and overly broad and ... used to restrict the exercise of human rights", in conformity with the State's commitments under international human rights law. Despite that opinion, the source notes that Viet Nam has not taken any steps to repeal or amend article 88 of the Penal Code nor other laws criminalizing free expression.

23. Similarly, the source considers that, although the Constitution guarantees the right to a fair trial (art. 31) and prohibits arbitrary detention (art. 20), Viet Nam engages in systematic interference with those fundamental rights and has imposed significant limitations on their exercise.

24. The source asserts that the detention of Mr. Dai constitutes an arbitrary deprivation of his liberty under categories II and III.

Arbitrary detention under category II

25. The source submits that the detention of Mr. Dai is a violation of his right to freedom of opinion and expression. According to the source, the purpose of the arrest and detention of Mr. Dai was to punish him for exercising his rights under article 19 of the Covenant, to silence him by imposing an additional period of detention and to deter others from speaking out against the State. Mr. Dai has been vocal in expressing his views on democracy and the state of human rights in Viet Nam for more than 10 years. He had previously been subject to attacks, arrest and detention. In the nine months prior to his arrest, Mr. Dai actively pursued a campaign for the protection of human rights in Viet Nam. He expressed views and opinions on democracy and other political issues relating to human rights in a range of forums.

26. The source submits that the arrest and detention of Mr. Dai fail to satisfy the requirements of article 19 (3) of the Covenant, which requires any restriction imposed on the right to freedom of expression to be "provided by law", designed to achieve a legitimate aim and meet the requirements of necessity and proportionality.

27. The source considers that there is no legal basis for the restriction of Mr. Dai's right to freedom of expression. Notwithstanding that position, the source submits that an arrest and/or detention on the basis of a charge under article 88 of the Penal Code would not satisfy the "provided by law" requirement under article 19 (3) of the Covenant. In paragraph 25 of its general comment No. 34 (2011) on freedoms of opinion and expression, the Human Rights Committee states that, for a legislative provision to be characterized as a "law", it must be formulated with sufficient precision to enable an individual to regulate his conduct accordingly and the provision cannot confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. According to the source, article 88 of the Penal Code is overly broad as to prevent both foreknowledge of the prohibited acts and an effective defence and therefore fails to meet the test of "provided by law". There is no objective test by which to determine whether an individual's conduct constitutes "distortion" of the people's administration or "psychological warfare" under article 88 of the Penal Code.

28. The source also considers that the arrest and detention of Mr. Dai do not achieve a legitimate aim under article 19 (3) of the Covenant. The source recalls that, according to paragraph 23 of general comment No. 34, "paragraph 3 may never be invoked as a justification for the muzzling of any advocacy of multiparty democracy, democratic tenets and human rights. Nor, under any circumstance, can an attack on a person, because of his exercise of his or her freedom of opinion or expression, including such forms of attack as arbitrary arrest ... be compatible with article 19."

29. The source highlights that article 19 (3) requires that any restriction be necessary and proportionate to the achievement of the stated aim(s). According to paragraph 34 of general comment No. 34, they must be the “least intrusive instrument amongst those which might achieve their protective function”. Notwithstanding its position that the arrest and detention of Mr. Dai was not carried out with a view to achieving a legitimate aim, the source submits that, even if the restriction was in pursuit of a legitimate aim, the measures adopted were disproportionate. The Human Rights Committee has emphasized that the type of expression is highly relevant in assessing whether a restriction is proportionate. Some types of expressions, such as discussion of government policies and reporting on human rights, should never be subject to restrictions (see Human Rights Council resolution 12/16, para. 5 (p) (i)).

30. Finally, the source considers that the detention of Mr. Dai constitutes arbitrary detention under category II because his deprivation of liberty results from the exercise of his right to freedom of opinion and expression (art. 19 of the Covenant and art. 19 of the Universal Declaration of Human Rights).

31. The source submits that the detention of Mr. Dai is a violation of his right to take part in the conduct of public affairs. According to the source, Mr. Dai is being detained as a result of his work providing human rights education to members of the community and advocating for political change to protect and improve the human rights situation in the country. The source considers that those restrictions are neither objective nor reasonable.

32. Therefore, the source considers that the detention of Mr. Dai also constitutes arbitrary detention under category II because his deprivation of liberty results from the exercise of his right to take part in the conduct of public affairs (art. 25 of the Covenant and art. 21 of the Universal Declaration of Human Rights).

Arbitrary detention under category III

33. The source submits that the detention of Mr. Dai is arbitrary under category III, as it violates his right to a fair trial, particularly his right to be informed promptly of the nature and cause of the charge and be tried without undue delay.

34. According to the source, Mr. Dai has been detained incommunicado since his arrest on 16 December 2015. The source notes that Mr. Dai has not been informed of the alleged criminal act(s) underpinning the charge or accusations against him, his trial date, the reason for or the likely duration of his detention, nor has he been brought before a court to consider his pretrial release. Pretrial detention has been reportedly imposed on Mr. Dai without a public hearing or any evidence being provided of risks of flight, interference with evidence and/or the recurrence of crime nor has a determination been made that detention is the only way to prevent the established risk(s).

35. The source considers that the detention of Mr. Dai under such conditions is a clear violation of his right to be informed promptly of the nature and cause of the charge against him and of his right to be tried without undue delay (art. 14 (3) (a) and (b) of the Covenant, art. 11 of the Universal Declaration of Human Rights and principles 10 and 11 of the Body of Principles). It is also contrary to article 48 (2) (a) of the Criminal Procedure Code of Viet Nam, which provides that a person held in custody has the right to be informed of the reasons for his or her custody.

36. The source submits that the detention of Mr. Dai is also a violation of the right to adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing without restriction. According to the source, Mr. Dai has been denied any access to legal counsel, in violation of article 14 (3) (b) of the Covenant, article 11 of the Universal Declaration of Human Rights and principles 11, 15 and 18 of the Body of Principles.

37. The source recalls that article 14 (3) (b) of the Covenant provides that the required guarantees for a fair hearing include adequate time and facilities for the preparation of a defence and the right of the accused to communicate with counsel of his or her own choosing. The source highlights that the Body of Principles provide that communication with counsel “shall not be denied for more than a matter of days” (principle 15) and that the

right to communicate with legal counsel is exercisable “without delay ... [and] may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order” (principle 18). The right to access to counsel without delay is also recognized in the Basic Principles on the Role of Lawyers, which provide that access to a lawyer shall not be later than 48 hours from the time of arrest or detention (principle 7).

38. According to the source, the current detention of Mr. Dai also contravenes the following rights contained in the Criminal Procedure Code of Viet Nam: the right of detainees and persons held in custody to “defend by themselves or ask other persons to defend them” (arts. 11 and 48 (2) (d)); and the right of a defence counsel to “meet the persons kept in custody; to meet the accused or defendants being under temporary detention” (art. 58 (2) (f)).

39. The source submits that the detention of Mr. Dai is also a violation of the right to communicate with the outside world, particularly with his family. The source notes that prison officials have denied visitation requests by the family of Mr. Dai, who has not seen his family since his arrest on 16 December 2015. The source submits that the detention of Mr. Dai under such conditions is a clear violation of principles 15 and 19 of the Body of Principles, which provide that communication with the outside world, particularly with family, “shall not be denied for more than a matter of days” (principle 15) and that a detained or imprisoned person shall have the right to be visited by and communicate with members of his family in particular, and be given adequate opportunity to communicate with the outside world (principle 19). The source highlights that in opinion 33/2013, the Working Group on Arbitrary Detention determined that incommunicado detention was a clear violation of principles 15 and 19 of the Body of Principles.

40. On 6 January 2016, the Special Rapporteurs on the promotion and protection of the right to freedom of opinion and expression, on the rights to freedom of peaceful assembly and of association and on the situation of human rights defenders addressed a joint urgent appeal to the Government of Viet Nam (see A/HRC/32/53, p. 43, VNM 3/2015). They expressed serious concern about the alleged physical assault of Mr. Dai and three other individuals by police officers on 6 December 2015, and about the arrest and detention of Mr. Dai on 16 December 2015. They highlighted that the arrest and detention of Mr. Dai appeared to be in retaliation for his cooperation with representatives of the European Union in the context of the annual European Union-Viet Nam human rights dialogue.

Response from the Government

41. On 30 January 2017, the Working Group transmitted the allegations of the source to the Government of Viet Nam through its communication procedure. The Working Group requested the Government to provide detailed information, by 30 March 2017, about the current situation of Mr. Dai and any comments on the allegations of the source.

42. The response of the Government to the regular communication was received by the Working Group on 4 April 2017, that is, after the deadline given by the Working Group. The Government had not requested an extension of the deadline in accordance with paragraph 16 of the Working Group’s methods of work. As such, the Working Group considers that the response in the present case was late. Given the failure on the part of the Government to request an extension of the deadline, the Working Group is unable to accept the response as having been presented in a timely manner. Nonetheless, as indicated in paragraphs 15 and 16 of its methods of work and in conformity with its usual practice, the Working Group may render an opinion on the basis of the information submitted by the source and all the information obtained in relation to a given case.

Further information from the source

43. On 6 April 2017, the Working Group transmitted the Government’s response to the source for further comments. The source submitted a reply on 18 April 2017.

Discussion

44. In the absence of a timely response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

45. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a *prima facie* case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68).

46. The Working Group notes that witnesses stated that an arrest warrant for Mr. Dai was read aloud at the time of his arrest. However, since his arrest on 16 December 2015, Mr. Dai remains in detention without any charges brought against him. Holding Mr. Dai without any charges means that Mr. Dai has been effectively deprived of the possibility to challenge his detention as the State has not officially invoked any reasons for his continued detention.

47. The Working Group, in its deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law, has unequivocally stated that the prohibition of arbitrary detention is part of customary international law and, constitutes a *jus cogens* norm (see A/HRC/22/44, para. 51). For a State to be able to claim that its detention of an individual is not arbitrary, it must invoke a legal basis for the detention of the said individual in an official manner. In the present case, Mr. Dai has spent over sixteen months in detention without any official charges brought against him. The Working Group therefore concludes that the detention of Mr. Dai falls under category I as it lacks any legal basis.

48. The present case also raises the issue of the compatibility of article 88 of the 1999 Penal Code of Viet Nam¹ with the rights to freedom of opinion and expression, freedom of peaceful assembly and freedom of association that are enshrined in international human rights law, including the Universal Declaration of Human Rights and the Covenant . Article 88 of the Penal Code states as follows:

Article 88. Conducting propaganda against the Socialist Republic of Viet Nam

1. Those who commit one of the following acts against the Socialist Republic of Viet Nam shall be sentenced to between three and twelve years of imprisonment:

(a) Propagating against, distorting and/or defaming the people's administration;

(b) Propagating psychological warfare and spreading fabricated news in order to foment confusion among people;

(c) Making, storing and/or circulating documents and/or cultural products with contents against the Socialist Republic of Viet Nam.

2. In the case of committing more serious crimes, the offenders shall be sentenced to between ten and twenty years of imprisonment.

49. The Working Group has repeatedly stated in its jurisprudence, including in opinions relating to Viet Nam, that even when the arrest and detention of a person is carried out in conformity with national legislation, the Working Group is mandated to ensure that the detention is also consistent with international human rights law.²

¹ The primary basis for the deprivation of liberty in Viet Nam is the Penal Code and Criminal Procedure Code. In November 2015, the National Assembly of Viet Nam adopted amendments to the 1999 Penal Code and the 2003 Criminal Procedure Code. However, in June 2016, the authorities announced that they had discovered "technical errors" in both laws and postponed their entry into force until the errors have been corrected. Therefore, the 1999 Penal Code and the 2003 Criminal Procedure Code were in force at the time of the adoption of the present opinion.

² See, for example, opinions No. 42/2012, No. 46/2011 and No. 13/2007.

50. The Working Group has considered the application of article 88 of the Penal Code in numerous cases of deprivation of liberty in recent years.³ In fact, a similar case concerning article 88 of the Penal Code is being considered by the Working Group at the present session.⁴

51. In all those cases, the Working Group found that the provisions of article 88 of the Penal Code were so vague and overly broad that their application could result in penalties being imposed on persons who had merely exercised their legitimate rights to freedom of opinion or expression. The Working Group also pointed out that the Government did not allege or provide evidence of any violent action on the part of the petitioners and that, in the absence of such information, their charges and convictions under article 88 could not be regarded as consistent with the Universal Declaration of Human Rights or the Covenant. Furthermore, in its report on its visit to Viet Nam in October 1994, the Working Group noted that vague and imprecise national security laws did not distinguish between violent acts that might constitute a threat to national security and the peaceful exercise of the right to freedom of opinion and of expression (see E/CN.4/1995/31/Add.4, paras. 58-60). It requested the Government to amend its laws to clearly define offences relating to national security and to state what was prohibited without any ambiguity.

52. In the present case, the Working Group considers that Mr. Dai's activity as human rights defender and blogger falls within the boundaries of his rights to freedom of opinion and expression, peaceful assembly and association that are protected by articles 19 and 20 of the Universal Declaration of Human Rights and articles 19, 21 and 22 of the Covenant. In the absence of any convincing information indicating that Mr. Dai had engaged in violent activity, or that his work directly resulted in violence or was a threat to national security, the Working Group concludes that his arrest and detention were intended to restrict his activity as a human rights defender.

53. Furthermore, the Working Group notes that the Government may not claim the legitimate restrictions provided for in article 19 (3) of the Covenant. In paragraph 23 of its general comment No. 34, the Human Rights Committee states that "paragraph 3 may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights. Nor, under any circumstance, can an attack on a person, because of the exercise of his or her freedom of opinion or expression, including such forms of attack as arbitrary arrest, torture, threats to life and killing, be compatible with article 19". In addition, in its resolution 12/16, the Human Rights Council calls on States to refrain from imposing restrictions which are not consistent with article 19 (3) of the Covenant, including restrictions on discussion of government policies and political debate; reporting on human rights; peaceful demonstrations or political activities, and expression of opinion and dissent.

54. The Working Group notes that there is wide-ranging concern about the application of national security legislation in Viet Nam to restrict the exercise of human rights. In the universal periodic review of Viet Nam in February 2014, 39 recommendations were made to improve the enjoyment of the rights to freedom of opinion and expression, peaceful assembly and association in Viet Nam. Several of them related specifically to the review and repeal of vague provisions on national security offences in the Penal Code, including article 88, the release of political prisoners, protection of human rights defenders and the need to implement the opinions of the Working Group on Arbitrary Detention (see A/HRC/26/6, paras. 143.4, 143.34, 143.115-118 and 143.144-176).

55. Moreover, on 6 January 2016, the Special Rapporteurs on the promotion and protection of the right to freedom of opinion and expression, on the rights to freedom of peaceful assembly and of association and on the situation of human rights defender sent a joint urgent appeal to the Government in relation to Mr. Dai (see para. 40 above).

³ See, for example, opinions No. 26/2013, No. 27/2012, No. 24/2011, No. 6/2010, No. 1/2009 and No. 1/2003.

⁴ Opinion No. 27/2017.

56. In calling upon the Government to take measures to guarantee Mr. Dai's right to personal security and ensure that he was not arbitrarily deprived of his liberty, the Special Rapporteurs noted that such attacks appeared to be increasingly used in the country as a means of intimidating human rights defenders to discourage them from peacefully exercising their rights to freedoms of expression and peaceful assembly to conduct their legitimate activities.

57. The Working Group considers that Mr. Dai is being detained for the legitimate exercise of his rights under articles 19 and 20 of the Universal Declaration of Human Rights and articles 19, 21 and 22 of the Covenant. Therefore, in its view, his deprivation of liberty falls within category II. Moreover, the repetitive and systematic harassment, assault and detention of Mr. Dai by the Vietnamese authorities for more than 10 years, which was alleged by the source and not contested by the Government, indicate that Mr. Dai's present detention is part of a pattern of persecution for his activities as a human rights defender. Accordingly, his case falls within category V.

58. The Working Group also considers that the source's allegations disclose violations of Mr. Dai's right to a fair trial under articles 9, 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant. More specifically, Mr. Dai has now been held in detention for over sixteen months and was not brought promptly before a judge, as required by article 9 (3) of the Covenant. In addition, during his detention, neither Mr. Dai nor his family has had an opportunity to challenge the lawfulness of his detention, contrary to article 9 (4) of the Covenant.

59. The Working Group recalls that, according to the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Rights of Anyone Deprived of their Liberty to Bring Proceedings before a Court, the right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserve legality in a democratic society (see A/HRC/30/37, paras. 2-3).

60. The Working Group also recalls that, according to article 9 (3) of the Covenant, pretrial detention should be the exception, rather than the rule; it should be as short as possible; and it should not be mandatory for all defendants charged with certain offences.⁵ As stated by the Human Rights Committee in paragraph 38 of its general comment No. 35 (2015) on liberty and security of person, pretrial detention 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 — *inter alia*, bail — would render detention unnecessary in a particular case.

61. No such assessment has been done in Mr. Dai's case as he was not brought before a court by the authorities. In fact, the authorities have already detained Mr. Dai beyond the initial four-month period provided for by Vietnamese law during which a person may be detained for investigation. The ability of the authorities to extend a detention order for up to 16 months without judicial review of the detention, if they deem it necessary in order to continue the investigation, is not consistent with article 9 (3) of the Covenant.

62. The Working Group notes that Mr. Dai has been held *incommunicado* for over 16 months. Not only has the Working Group consistently held that holding a person *incommunicado* breaches his or her right to challenge the lawfulness of the detention before a judge,⁶ but articles 10 and 11 of the Universal Declaration of Human Rights also implicitly confirm the impermissibility of *incommunicado* detention. In addition, the Committee against Torture has made it clear that *incommunicado* detention creates conditions that may lead to the violations of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (see A/54/44, para. 182 (a)), while the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has consistently stated that the use of *incommunicado* detention is unlawful (see for example, A/54/426, para. 42; and A/HRC/13/39/Add.5, para. 156). Furthermore, in

⁵ See, for example, opinions No. 40/2016, No. 46/2015 and No. 45/2015.

⁶ See, for example, opinions No. 56/2016, No. 53/2016 and No. 10/2017.

paragraph 35 of its general comment No. 35, the Human Rights Committee states that incommunicado detention that prevents prompt presentation before a judge inherently violates article 9 (3) of the Covenant.

63. The Working Group points out that incommunicado detention is also a violation of Mr. Dai's right to contact with the outside world as set out in applicable standards such as the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) (rules 58 and 61) and of the Body of Principles (principles 15, 18 and 19). The argument put forward by the Government that Mr. Dai has had three visits from his wife during his 16 months of incommunicado detention and has therefore had contact with the outside world, is misplaced.

64. Furthermore, the denial of representation by a lawyer constitutes a violation of article 14 (3) (b) of the Covenant, principle 17.1 of the Body of Principles, as well as principle 9 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Rights of Anyone Deprived of their Liberty to Bring Proceedings before a Court.

65. The Working Group therefore concludes that those violations of the right to a fair trial are of such gravity as to give Mr. Dai's deprivation of liberty an arbitrary character according to category III.

66. The Working Group also expresses its concern about the health of Mr. Dai, who suffers from hepatitis B, for which he needs medical care and treatment. The Working Group reminds the Government of Viet Nam that, in accordance with article 10 (1) of the Covenant, all persons deprived of their liberty must be treated with humanity and with respect for the inherent dignity of the human person. That includes the provision of proper medical care to those in detention. The Working Group calls upon the Government to release Mr. Dai immediately and to ensure that he receives the necessary medical attention after his release.

67. This case is one of several cases that have been brought before the Working Group in recent years concerning the arbitrary deprivation of liberty of persons in Viet Nam.⁷ The Working Group recalls that under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of the rules of international law may constitute crimes against humanity.⁸ The Working Group would welcome the opportunity to engage constructively with the Government to address issues such as the vague and imprecise provisions regarding national security offences and crimes, and the denial of fair trial rights, which continue to result in the arbitrary deprivation of liberty in Viet Nam.

68. On 15 April 2015, the Working Group sent a request to the Government of Viet Nam to undertake a country visit to follow up its visit to Viet Nam in October 1994. In its response of 23 June 2015, the Government informed the Working Group that it planned to invite other special procedure mandate holders who had made earlier requests to visit, but that it would consider issuing an invitation to the Working Group at an appropriate time. Given the ongoing expressions of concern relating to the arbitrary deprivation of liberty in Viet Nam, it would seem that now is an appropriate time for the Government to work with international human rights mechanisms to bring its laws and practices into conformity with the Universal Declaration of Human Rights and the Covenant.

Disposition

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

The deprivation of liberty of Nguyen Van Dai, being in contravention of articles 9, 10, 11, 19 and 20 of the Universal Declaration of Human Rights and of articles 9,

⁷ See, for example, opinions No. 27/2017, No. 26/2013, No. 27/2012, No. 24/2011, No. 6/2010, No. 1/2009 and No. 1/2003.

⁸ See, for example, opinion No. 47/2012, para. 22.

14, 19, 21 and 22 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

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

71. The Working Group considers that, taking into account all the circumstances of the case, especially the risk of irreparable harm to Mr. Dai's health and physical integrity, the appropriate remedy would be to release Mr. Dai immediately, and accord him an enforceable right to compensation and other reparations, in accordance with international law.

Follow-up procedure

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

73. 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.

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

75. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.⁹

[Adopted on 25 April 2017]

⁹ See Human Rights Council resolution 33/30, paras. 3 and 7.