

PETITION TO:

UNITED NATIONS WORKING GROUP ON ARBITRARY DETENTION

Chair-Rapporteur: Mr. José Guevara (Mexico)
Vice-Chairperson: Ms. Leigh Toomey (Australia)
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**HUMAN RIGHTS COUNCIL
UNITED NATIONS GENERAL ASSEMBLY**

In the Matter of

Phan Kim Khanh
Citizen of the Socialist Republic of Vietnam

v.

Government of the Socialist Republic of Vietnam

Petition for Relief Pursuant to Resolutions 1991/42, 1994/32, 1997/50, 2000/36, 2003/31, 6/4, 15/18, 24/7¹

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¹ Resolutions 1991/41, 1994/32, 1997/50, 2000/36, and 2003/31 were adopted by the UN Commission on Human Rights to extend the mandate of the Working Group on Arbitrary Detention. The Human Rights Council, which “assume[d]... all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights...” pursuant to UN General Assembly Resolution 60/251, GA Res. 60/251, March 15, 2006, at ¶ 6, later extended the mandate through Resolutions 6/4, 15/18, and 24/7.

**QUESTIONNAIRE TO BE COMPLETED BY PERSONS ALLEGING ARBITRARY
ARREST OR DETENTION**

I. IDENTITY

1. **Family name:** Phan
2. **First name:** Kim Khanh
3. **Sex:** Male
4. **Birth date:** June 5, 1993
5. **Nationality:** Vietnamese
6. (a) **Identity document (if any):** Unknown
(b) **Issued by:**
(c) **On (date):**
(d) **No.:**
7. **Profession and/or activity (if believed to be relevant to the arrest/ detention):**
Student in international relations at the International Faculty of Thái Nguyên University.
8. **Address of usual residence:** Ward 5, Yen Tap commune, Cam Phe district, Phu Tho province.

II. ARREST

1. **Date of arrest:** March 21, 2017
2. **Place of arrest (as detailed as possible):** Offices of OtVina Software Co (based on the campus of Thái Nguyên University).
3. **Forces who carried out the arrest or are believed to have carried it out:** Thái Nguyên Police Investigation Security Agency.
4. **Did they show a warrant or other decision by a public authority?** No, a copy of an emergency arrest warrant was later sent to Phan's family after his arrest.
5. **Authority who issued the warrant or decision:** Thái Nguyên Police Investigation Security Agency.
6. **Relevant legislation applied (if known):** Charged with violating points (a) and (c) of Article 88 of the Penal Code of 1999: "(a) Propagating distorting or defaming the people's administration" and "(c) Producing, storing and circulating documents and / or cultural products with contents against the State of the Socialist Republic of Vietnam".

III. DETENTION

1. **Date of detention:** Arrested March 21, 2017, formally charged on March 22, 2017; convicted and sentenced on October 25, 2017.
2. **Duration of detention (if not known, probable duration):** From March 21, 2017 to the date of the communication. Sentenced to imprisonment for 6 years, starting on March 21, 2017.

3. **Forces holding the detainee under custody:** State of the Socialist Republic of Vietnam.
4. **Places of detention (indicate any transfer and present place of detention):** Prior to trial Phan was held at Thái Nguyên Province Police detention center. Following the trial Phan was held at Ba Sao prison in Ha Nam province.
5. **Authorities that ordered the detention:** People’s Court of Thái Nguyên Province.
6. **Reasons for the detention imputed by the authorities:** Phan was charged under Article 88 (a) and (c) of the Vietnamese Penal Code of 1999 for conducting propaganda against the Government of the Socialist Republic of Vietnam.
7. **Relevant legislation applied (if known):** Article 88 (a) and (c); Article 46 (p) and (s); Article 48 (g) and Article 33 of the Vietnamese Penal Code of 1999.

IV. DESCRIBE THE CIRCUMSTANCES OF THE ARREST AND/OR THE DETENTION AND INDICATE PRECISE REASONS WHY YOU CONSIDER THE ARREST OR DETENTION TO BE ARBITRARY

A. STATEMENT OF FACTS

Part 1 of this section describes the Socialist Republic of Vietnam (“Vietnam” or “Government”) and its history of human rights abuses, including the violation of basic human rights such as opinion, press, religion, association and particularly the right to speak freely in dissent of the governing party. The Communist Party of Vietnam (“CPV”) also has shown a propensity for using the criminal code to arbitrarily detain journalists and others who speak out against its regime.²

Part 2 of this section presents the case of Phan, a young citizen-journalist and blogger in Vietnam who was wrongfully detained on March 21, 2017 and subsequently wrongfully convicted on October 25, 2017 of conducting propaganda against the Government.

1. Background on Vietnam

a. Political, legal and social background on Vietnam

Vietnam has been an authoritarian one-party communist state since the CPV came into power in the 1970s.³ Despite being bound by several human rights treaties, including the International Covenant on Civil and Political Rights (the “ICCPR”), Vietnam routinely violates its citizens’ most basic human rights, including freedom of speech, opinion, assembly, press, religion, and association,⁴ in particular by detaining individuals who speak against the interests of the Government and the CPV.⁵ The Government routinely restricts citizens’ political rights, particularly their right to change their government through free and fair elections and has inadequately

² See generally HUMAN RIGHTS WATCH, Vietnam: End Attacks on Activists and Bloggers - Pattern of Thuggish Assaults Against Rights Campaigners Across Country (June 18, 2017), <https://www.hrw.org/news/2017/06/18/vietnam-end-attacks-activists-and-bloggers>.

³ See generally Vietnam’s Human Rights Defenders, Human Rights Watch (2010) <https://www.hrw.org/news/2010/03/23/vietnams-human-rights-defenders> and See <https://www.hrw.org/asia/vietnam>.

⁴ See <https://www.hrw.org/asia/vietnam>.

⁵ HUMAN RIGHTS WATCH, Vietnam: End Attacks on Activists and Bloggers - Pattern of Thuggish Assaults Against Rights Campaigners Across Country (June 18, 2017), <https://www.hrw.org/news/2017/06/18/vietnam-end-attacks-activists-and-bloggers>.

protected citizens' due process rights, notably failing to protect against arbitrary detention.⁶

b. The Government's Interference with Freedom of Expression

The Government has suppressed its citizens' freedom of expression through its detention of journalists.⁷ In its 2018 World Press Freedom Index, Reporters Without Borders ranked Vietnam 175 out of 180 countries for press freedom and reported that, because the Government controls all of the mainstream media in the country, bloggers and citizen-journalists are the only source of independent information.⁸ Vietnam is also consistently ranked among the countries that most censor journalists according to the Committee to Protect Journalists ("CPJ").⁹ CPJ noted in its 2015 report that the Government instructs editors and regularly jails those who report on sensitive topics.

In the past decade, the Government passed several laws and ordinances that restrict both personal and media freedom of expression, particularly in the context of electronic communications and online postings. The 2015 Law on Cyber Information Security, Decree 72 in 2013, and Decree 174 in 2014 impose fines on anyone criticizing the Government, defaming Government leaders, or "spreading propaganda" on social media.¹⁰ The Law on the Press, which went into effect in 2017, dictates that the press should "propagandize and disseminate, and contribute to the protection of, the line and policies of the Party...and build and promote socialist democracy, strengthen the great national unity bloc, and build and protect the socialist Fatherland of Vietnam."¹¹

c. Lack of Due Process Protections in Vietnam

Even though the Vietnamese Constitution calls for the presumption of innocence, a timely, fair and public trial, the right to representation by a lawyer and the right to present a defense against the charges, these protections are not available to defendants in practice.¹² Prisoners are systematically subjected to lengthy pre-trial detention and frequently held *incommunicado* before their trials, denied visits from family or attorneys, while being at risk of torture.¹³

⁶ UNITED STATES DEPARTMENT OF STATE, Bureau of Democracy, Human Rights and Labor, Vietnam 2017 Human Rights Report, 18, available at <https://www.state.gov/documents/organization/277375.pdf> (hereinafter "State Department 2017 Report").

⁷ HUMAN RIGHTS WATCH, Vietnam - Human Rights In A Season Of Transition: Law and Dissent in the Socialist Republic of Vietnam (August 1995), <https://www.hrw.org/reports/1995/Vietnam2.htm> (hereinafter "HRW 1995 Report").

⁸ REPORTERS WITHOUT BORDERS, 2018 World Press Freedom Index, <https://rsf.org/en/ranking>.

⁹ COMMITTEE TO PROTECT JOURNALISTS, 10 Most Censored Countries (2015), <https://cpj.org/2015/04/10-mostcensored-countries.php#6>.

¹⁰ FREEDOM HOUSE, Freedom in the World 2017: Vietnam, available at <https://freedomhouse.org/report/freedomworld/2017/vietnam>.

¹¹ Law on the Press, No. 103/2016/QH13, art. 1 (2016), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=447052.

¹² THE CONSTITUTION OF THE SOCIALIST REPUBLIC OF VIETNAM, 2013, translation available at International Institute for Democracy and Electoral Assistance, http://www.constitutionnet.org/sites/default/files/tranlation_of_vietnams_new_constitution_enuk_2.pdf; see also HRW 1995 Report.

¹³ See generally UN Working Group on Arbitrary Detention, Opinion No. 75/2017 UN Doc. A/HRC/WGAD/2017/75 (2017); see also State Department 2017 Report, *supra* note 6; UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMM'R, "UN rights experts condemn Viet Nam for incommunicado detention of blogger 'Mother Mushroom'" (March 8, 2017), available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21318&LangID=E>.

Trials of human rights activists in Vietnam consistently fail to meet international standards of fairness. The police often intimidate defendants into confessions, limit access to trials for family members, and have not allowed defendants to adequately prepare a defense for trial.¹⁴ The U.S. State Department has confirmed that the due process issues in Vietnam were among the country's most significant human rights problems.¹⁵

d. Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment

Prisoners in Vietnam are frequently subjected to physical and mental forms of torture and ill-treatment.¹⁶ International observers have noted a pattern of physical abuse, torture and coerced confessions during arrest, police investigations, and detention. Activists have been robbed, beaten and received death threats from security officials, including being assaulted by other prisoners at the instruction of prison officials while in custody. In addition to the physical torture, prisoners of conscience were held *incommunicado* for long periods, were denied medical treatment, and were re-located to prisons very far from their families, in order to mentally intimidate them into confessions.¹⁷

e. Prison Conditions in Vietnam

Conditions for detainees in Vietnam often fail to meet minimum international standards. Torture and corporal punishment are common but are rarely investigated by authorities. Prisons are often overcrowded and unsanitary, and inmates have extremely poor nutrition and lack of access to medical care, sometimes even being deprived of medical treatment to force "confessions".¹⁸ Former prisoners have detailed frequent instances of torture, injections with unknown drugs, long stretches of solitary confinement, attacks from other inmates incited by the prison officials, and other acts that violate international laws prohibiting ill-treatment.¹⁹

Amnesty International conducted a study in which it interviewed 18 former prisoners of conscience from Vietnam, examining the ill-treatment of the prisoners in the Vietnamese criminal justice system.²⁰ The horrifying stories from this report include frequent instances of torture, injections with unknown drugs, long stretches of solitary confinement, attacks from other inmates incited by the prison officials, and other acts that violate international laws prohibiting ill-treatment of prisoners.

¹⁴ Human Rights Watch, World Report 2018: Vietnam Country Summary (January 2018), available at <https://www.hrw.org/world-report/2018/country-chapters/vietnam> (hereinafter "HRW 2018 Vietnam Report").

¹⁵ UNITED STATES DEPARTMENT OF STATE, Bureau of Democracy, Human Rights and Labor, Vietnam 2016 Human Rights Report, available at <https://www.state.gov/documents/organization/265598.pdf>

¹⁶ Amnesty International, *Inside Viet Nam's secretive and torturous world of 'prisons within prisons'* (2016) <https://www.amnesty.org/en/latest/news/2016/07/the-secretive-world-of-viet-nam-torturous-prisons/>

¹⁷ State Department 2017 Report.

¹⁸ *Idem*.

¹⁹ AMNESTY INTERNATIONAL, *Inside Viet Nam's secretive and torturous world of 'prisons within prisons'* (July 12, 2016), <https://www.amnesty.org/en/latest/news/2016/07/the-secretive-world-of-viet-nam-torturous-prisons/>

²⁰ *Id.*

2. Arbitrary Detention of Phan

a. Background and Arrest of Phan

Phan is from the Yen Tap commune, a remote village about two hours northwest of Hanoi. He studied at Thái Nguyên University where he was active in student life, and involved in the University's Student Association and the organisation of University events. Phan was one of 10 students to receive a scholarship to attend a Young Southeast Asian Leaders Initiative training course at the U.S. Embassy.²¹ Before Phan's arrest, he was working as the head of the marketing department for OtVina Software Co., a software company in Thái Nguyên.²² Phan has no prior criminal record.²³

On March 21, 2017, the Thái Nguyên Police Investigation Security Agency (the "Investigation Agency") came to Phan's workplace at OtVina Software Co., allegedly acting upon a report made by a "member of the public."²⁴ The Investigation Agency conducted an inspection at Phan's office, where they searched his laptop and confiscated objects and documents (including his identity card, laptop, mobile phone, visa cards and other effects and belongings). On the same day, investigators conducted an "urgent inspection" of Phan's residence where they also confiscated objects and documents, including Phan's handwritten letters, credit cards, and other personal effects.²⁵

The examination of Phan's laptop purportedly revealed that he helped administer two websites, www.baothamnhung.com²⁶ and www.vietnamweek.net, two Facebook accounts ("Binh Minh account" and "Khanh Phan account"), three Facebook pages ("Corruption Report", "Vietnam Week", "Democracy TV"), two YouTube accounts ("Vietnamonline" and "Vietbaotv") and five email boxes (together, the "Pages"). The Investigation Agency determined that the contents of Phan's laptop contained many "articles, comments, pictures, and video clips whose content constituted propaganda against the Socialist Republic of Vietnam."²⁷ However, most of the Pages cannot be located and are believed to have been deleted by the Government after Phan's arrest. The exception is the Corruption Report website, www.baothamnhung.com, which appears to be a professional or semi-professional blog. The website still actively posts a wide variety of articles about politics, the economy, the environment, etc.²⁸

Phan was arrested that same day from his office, though he was never presented with a search warrant or informed of the charges raised against him. A copy of an emergency arrest warrant was later sent to Phan's family after his arrest.²⁹ On March 22, 2017, Phan was formally charged with violating parts (a) and (c) of Article 88 of the 1999 Penal Code.

²¹ <https://the88project.org/2017/10/13/profile-of-phan-kim-khanh/>.

²² Sentence No.: 59/2017/HSST, page 3.

²³ *Id.* at page 1.

²⁴ *Id.* at page 3.

²⁵ *Id.*

²⁶ Meaning "Corruption Report." <http://baothamnhung.com/>.

²⁷ Sentence No.: 59/2017/HSST, page 3.

²⁸ See Bao Tham Nhung [The Corruption Report] available at <http://baothamnhung.com/>.

²⁹ Interview Response from AC, May 1, 2019.

On March 28, 2017, the Investigation Agency issued “Decision No. 3”, asking the Ministry of Information and Communication to assess the content of eleven articles printed from Phan’s computer for “signs of propaganda against the Government and using abusive speech and defaming the reputation of the leaders of the Party and the Government in 11 articles.”³⁰ On May 22, 2017, the Ministry of Information and Communication issued its assessment, claiming that each of the 11 articles printed from Phan’s computer contained “propaganda against the Government of the Socialist Republic of Vietnam.”³¹ However, the Ministry of Information and Communication only determined that one of the reviewed articles was actually written by Phan and could not determine the authorship of the other ten articles.

b. Pre-trial Detention

Phan was held in detention from the time of his arrest in March 2017 until his trial in October 2017. The court never held a bail hearing or issued a ruling that Phan should remain in prison until his trial.³² Phan did not appear before a judge during the entire time of his detention until his trial on October 25, 2017.

Throughout the majority of Phan’s seven-month pre-trial detention he was held *incommunicado*. He was not allowed to see his family until the day of his trial³³ and was not permitted to speak with his attorney until September 20, 2017.³⁴ Prior to this date, the Investigation Agency refused to grant Phan’s lawyer, Ha Huy Son, a defense counsel certificate.³⁵

On April 10, 2017, Phan’s lawyer received a handwritten document allegedly from Phan in which he “confessed” to the charges against him and refused assistance of defense counsel.³⁶ However, the police threatened Phan during his detention and advised him to admit his guilt in order to receive a reduced sentence.³⁷ Phan’s attorney was not allowed to speak with Phan before this confession was obtained, or for several months afterwards. Phan later complained to his family that he had been verbally threatened by police.³⁸ International human rights organizations have noted that it is common in Vietnam for criminal confessions to be fabricated or coerced by the Vietnamese police.³⁹

On May 4, 2017 the Government-run news outlet, Nguyen Tan Dung reported that Phan “acknowledged the crime of conducting activities against the Socialist Republic of Vietnam” and even reported that the websites that Phan had created were managed by “terrorist organizations and some foreign reactionary organizations.”⁴⁰ The article also stated that “the arrest of Phan Kim Khanh is absolutely true to the process, procedures and demonstrates the strictness of Vietnamese law.”

³⁰ Sentence No.: 59/2017/HSST, pages 6-7.

³¹ *Id.* at 7.

³² Interview Response from AC, May 1, 2019.

³³ Letter from PVD, May 10, 2019.

³⁴ <https://the88project.org/2017/10/13/profile-of-phan-kim-khanh/>.

³⁵ <https://the88project.org/2017/05/18/update-on-phan-kim-khanh-two-months-into-detention/>.

³⁶ *Id.*

³⁷ Interview Response from AC, May 1, 2019.

³⁸ *Id.*

³⁹ <https://the88project.org/2017/05/18/update-on-phan-kim-khanh-two-months-into-detention/>.

⁴⁰ “Vi sao Phan Kim Khanh bị bắt?” (“Why was Phan Kim Khanh Arrested?”), Nguyễn Tấn Dũng (May 4, 2017), <https://nguyentandung.org/vi-sao-phan-kim-khanh-bi-bat.html>.

On August 28, 2017 the prosecutor issued a “sentencing report,” recommending charges under Article 88, over five months after Phan’s arrest.

Once Phan’s attorney was able to speak with him in prison, six months after his arrest, contact was limited to an hour at a time and all conversations between Phan and his attorney were monitored by the police.⁴¹

c. Prosecution of Phan

On October 25, 2017, Phan was tried in the People’s Court of Thái Nguyên Province (the “Court”) and, after only a four hour hearing, was convicted for the crime of conducting propaganda against the Government under Article 88 of the 1999 Penal Code.⁴²

Only Phan’s father was allowed to attend the trial; Phan’s mother and sister were turned away.⁴³ There was strict security at the trial to prevent Phan’s family, friends, and activists from attending.⁴⁴

The evidence cited by the Court in support of Phan’s conviction included the websites, articles, and social media posts found on Phan’s computer. Phan’s writings advocated for plural democracy, military de-politicization, free elections, and press freedom.⁴⁵ There is no evidence that Phan advocated violence or aggression against the Government. In its Sentence No.: 59/2017/HSST (the “Judgment”), the Court stated that Phan used the internet to learn about “the Pluralism and Multi-Party system, military depoliticisation, freedom of election and non-censorship on the press” and that he had “edited, revised and posted more than 5,000 newsletters, articles, pictures and video clips, the content of which constituted propaganda, distorted the guidelines and policies of the Party and Government, affecting the reputation of agencies and organizations, causing confusion among the public, affecting the public trust in socialism, the leadership of the Party, Congress and Government.”⁴⁶ Phan admitted in court to have run the blogs, but said that his main purpose was to fight corruption, and that he did not know that reporting on corruption constituted a crime.⁴⁷

In its assessment of the articles posted on the Pages, the Court relied on the determination made by the Information and Communication Department that each of the articles contained propaganda against the Government.⁴⁸

The Court also stated that Phan “had established contact with several reactionary, opposing factors inside the country and overseas to discuss, exchange information, and co-administer the websites” including with Nguyen Van Hai, a Vietnamese blogger who was sentenced to 12 years imprisonment for conducting anti-state

⁴¹ Interview Response from AC, May 1, 2019.

⁴² Sentence No.: 59/2017/HSST; Letter from PVD, May 10, 2019.

⁴³ <https://www.rfa.org/english/news/vietnam/blogger-10252017154340.html>.

⁴⁴ <http://www.vietnamhumanrightsdefenders.net/2017/10/25/vietnam-pro-democracy-activist-anti-corruption-campaigner-sentenced-to-six-years-in-prison/>.

⁴⁵ <Http://www.vietnamhumanrightsdefenders.net/2017/10/25/vietnam-pro-democracy-activist-anti-corruption-campaigner-sentenced-to-six-years-in-prison/>.

⁴⁶ Sentence No.: 59/2017/HSST, page 3.

⁴⁷ <https://www.seattletimes.com/nation-world/vietnam-jails-student-activist-for-anti-state-propaganda/>.

⁴⁸ Sentence No.: 59/2017/HSST, page 5.

propaganda in 2012 and released in 2014⁴⁹ and Tran Buu Tho,⁵⁰ a member of the Viet Tan organization,⁵¹ a US-based organization the Vietnamese government considers to be a terrorist organization.⁵² The Court found that Phan was supported by people from the Viet Tan when creating the websites www.baothamnhung.com⁵³ and www.vietnamweek.net.

In its Judgment, the Court stated that Phan had also been in contact with Nguyen Van Dai and had joined an online training programme to learn about “the left-wing media” and “non-violent resistance”, which had the purpose of “gaining experience of setting up propaganda against the Government using the media”.

After the four hour trial, Phan was convicted and sentenced to six to seven years in prison and three to four years of house arrest.⁵⁴

After Phan’s conviction he was returned to prison in Thái Nguyên and was not allowed to have any contact with his lawyer or his family.⁵⁵ On January 10, 2018, Phan was transferred to Ba Sao Prison in Ha Nam, although Phan’s family was never notified of the transfer until they received a letter from him.⁵⁶

d. Current Status

Phan sought to submit an appeal against his conviction a few days after he was convicted, but prison officials have refused to mail Phan’s appeal request.⁵⁷ In February 2019, Phan submitted a complaint questioning why the authorities had not submitted his appeal request. Since the complaint, the prison authorities have badly mistreated him and threatened him with solitary confinement or withholding supplies if he does not stop seeking to challenge his conviction.⁵⁸

Phan’s health has badly deteriorated since his conviction, and due to the mistreatment he is facing in prison, Phan’s family is concerned that his life may be in danger.⁵⁹

B. LEGAL ANALYSIS

Phan’s arrest and detention is arbitrary⁶⁰ under Categories I, II and III as established by the UN Working Group on Arbitrary Detention (the “Working Group”). The detention is

⁴⁹ <https://www.bbc.co.uk/news/world-asia-29718654>.

⁵⁰ Sentence No.: 59/2017/HSST, page 5.

⁵¹ <https://viettan.org/en/>.

⁵² <https://www.theguardian.com/world/2016/oct/07/vietnam-viet-tan-terrorists-dissent>.

⁵³ Meaning “Corruption Report.” <http://baothamnhung.com/>.

⁵⁴ Sentence No.: 59/2017/HSST, page 9.

⁵⁵ Letter from PVD, May 10, 2019.

⁵⁶ *Id.*

⁵⁷ Radio Free Asia, Vietnamese Prison Refuses to Mail Jailed Activist’s Appeal Request (April 2, 2019) available at <https://www.rfa.org/english/news/vietnam/phan-kim-khanh-appeal-04022019165256.html>.

⁵⁸ Letter from PVD, May 10, 2019.

⁵⁹ *Id.*; see also Radio Free Asia, Vietnamese Prison Refuses to Mail Jailed Activist’s Appeal Request (April 2, 2019) available at <https://www.rfa.org/english/news/vietnam/phan-kim-khanh-appeal-04022019165256.html>; COMMITTEE TO PROTECT JOURNALISTS, Phan Kim Khan (March 21, 2017) available at <https://cpj.org/data/people/phan-kim-khanh/index.php>.

⁶⁰ An arbitrary deprivation of liberty is defined as any “depriv[ation] of liberty except on such grounds and in accordance with such procedures as are established by law.” *International Covenant on Civil and Political Rights*, G.A. Res 2200A (XXI), 21 UN GAOR Supp. (No. 16), at 52, UN Doc. A/6316 (1966), 999 UNT.S. 171, entered into force on March 23, 1976, at art. 9(1). Such a deprivation of liberty is specifically prohibited by international law. *Id.* “No one

arbitrary under Category I because it is impossible to invoke any legal basis justifying his deprivation of liberty and continued detention. The detention is arbitrary under Category II because it resulted from Phan’s peaceful exercise of his right to freedom of expression and association. The detention is arbitrary under Category III because the Government’s detention and prosecution of Phan failed to meet minimum international standards of due process.

1. Deprivation of Liberty Under Category 1

A detention violates Category I when it is clearly impossible to invoke any legal basis justifying the deprivation of liberty. The Working Group has found detentions arbitrary under Category I when some of the following violations are present: (1) when the government has held an individual *incommunicado* for a period of time; (2) when the government has arrested an individual without a warrant and without judicial authorization for such deprivation of liberty; and (3) when vague laws are used to prosecute individuals.⁶¹

Phan was held *incommunicado* for six months and was never brought before a judge to adjudicate the legality of his pre-trial detention. In addition, he was convicted under Article 88 of the 1999 Penal Code, prohibiting anti-state propaganda, which is a law too vague to properly provide a legal basis for prosecution.

a. Phan was Held *Incommunicado* and Never Given Access to Judicial Review of his Detention

Article 9(3) of the ICCPR calls for “anyone arrested or detained on a criminal charge [to] be brought promptly before a judge or other officer authorized by law to exercise judicial power” This obligation for a *habeas corpus* hearing “without delay” is reiterated in Article 9(4) of the ICCPR.

The Human Rights Committee has determined that *incommunicado* detention inherently violates Article 9(3) of the ICCPR.⁶² This guarantee not only serves as a check on arbitrary detention, but also provides an important safeguard for other related rights, such as freedom from torture.⁶³ The prohibition against *incommunicado* detention is also articulated by Principle 15 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (“Body of Principles”), which prohibits the denial of communication between a detainee and his family or counsel for more than a few days.⁶⁴

Phan was arrested on March 21, 2017. He was never brought before a judge to confirm the legal basis for his arrest or his continuing pre-trial detention. A week after Phan’s arrest, on March 28, 2017, the Investigation Agency requested the

shall be subjected to arbitrary arrest, detention or exile.” *Universal Declaration of Human Rights*, G.A. Res. 217A (III), UN Doc. A/810, at art. 9, (1948). “Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law...” *Body of Principles for the Protection of Persons under Any Form of Detention or Imprisonment*, G.A. Res. 47/173, 43 UN GAOR Supp. (No. 49) at 298, UN Doc. A/43/49 (*hereinafter* “Body of Principles”), at Principle 2.

⁶¹ See, e.g., *Bettar v. Morocco*, Working Grp. on Arbitrary Detention, Commc’n No. 3/2013, paras. 30-314 (April 30, 2013); *61 Individuals v. United Arab Emirates*, Working Grp. on Arbitrary Detention, Commc’n No. 60/2013, para. 22 (November 22, 2013).

⁶² HUMAN RIGHTS COMMITTEE, *General Comment No. 35: Article 9 (Liberty and Security of Person)*, U.N. Doc. CCPR/C/GC/35, (December 16, 2014) at para. 35 (*hereinafter* “General Comment No. 35”).

⁶³ *Id.* at para. 34. Other rights that may be at risk are those guaranteed by Articles 6, 7, 10 and 14 of the ICCPR.

⁶⁴ Body of Principles, *supra* note60, at Principle 15.

Information and Communication Department to assess the content found on Phan’s computer for signs of “propaganda against the Government.” The Information and Communication Department did not issue its findings until May 22, 2017, two months after Phan’s arrest. In this time there was no formal hearing for Phan to challenge the Information and Communication Department’s findings or challenge the legality of his arrest and prolonged detention. Phan’s indictment for the offense of conducting propaganda against the government was not issued until August 28, 2017, nearly five months after his arrest. The court never held a hearing or made an individualized determination regarding Phan’s detention during this time. The first time that Phan had access to a judge was at his trial on October 25, 2017 – seven months and four days after his arrest. Moreover, during the first six months of his detention Phan was held entirely *incommunicado*, where he was not permitted to receive any family visits during his detention. He was finally allowed to see his defense lawyer on September 20, 2017, a month before his trial.

Phan was held without access to the outside world for over six months and never given an opportunity to challenge the legality of his arrest and detention, therefore there was no legal basis for his deprivation of liberty and pre-trial detention.

b. Vietnam’s Criminal Code is Overly Broad and Vague

Article 15(1) of the ICCPR⁶⁵ and Article 11(2) of the Universal Declaration of Human Rights (“UDHR”)⁶⁶ both guarantee individuals the right to know what the law is and what conduct violates the law. These articles protect citizens from prosecution for any criminal offense “which did not constitute a[n] [] offense, under national or international law, at the time when it was committed.” The Human Rights Committee states that “[a]ny 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.”⁶⁷ In addition, the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism has explained that the standard for legal certainty requires framing laws “in such a way that [...] the law is adequately accessible so that the individual has a proper indication of how the law limits his or her conduct; and [that] the law [be] formulated with sufficient precision so that the individual can regulate his or her conduct.”⁶⁸

⁶⁵ *International Covenant on Civil and Political Rights*, G.A. Res 2200A (XXI), 21 UN GAOR Supp. (No. 16), UN Doc. A/6316 (1966), 999 UNT.S. 171 (March 23, 1976) at art. 9(1) (*hereinafter* “ICCPR”) (“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.”).

⁶⁶ United Nations General Assembly, *Universal Declaration of Human Rights* 73, Res 217 A (III), 3rd session, A/RES/217 A (December 10 1948) at art. 11(2), available at <http://www.un-documents.net/a3r217a.htm> (“No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.”).

⁶⁷ General Comment No. 35, *supra* note 62.

⁶⁸ Scheinin, M, Commission on Human Rights, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, 62nd session (December 28, 2005) at para. 46, available at <http://www.refworld.org/docid/441181f10.html>; Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, 28th session, A/HRC/28/28 (December 19, 2014), available at <http://www.refworld.org/docid/54f86a2e4.html>, para 48.

Article 88 of the 1999 Penal Code defines the crime of “conducting propaganda” so vaguely as to make it impossible for any individual to reasonably foresee what behavior is criminal. The relevant section of the Article reads as follows:

Article 88. Conducting propaganda against the Socialist Republic of Vietnam:

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

- a) Propagating against, distorting and/or defaming⁶⁹ the peoples 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 Vietnam.⁷⁰

No instruction is given as to what constitutes defaming the administration, propagating psychological warfare, fomenting confusion, or documents/products that are against the Government. There is no intent component and no measure of what a prosecutor must prove to convict.

Article 88 of the Penal Code lacks any plain meaning and gives individuals no fair notice of what conduct is prohibited. For Phan and others, Article 88 of the 1999 Penal Code has resulted in arbitrary prosecutions for acts that are both unforeseeable as criminal and protected under the ICCPR, the UDHR, and other international norms and standards. Concerned UN member countries recommended that Vietnam repeal or amend Article 88, among other provisions in the 1999 Penal Code, in order to prevent those provisions from being applied in an “arbitrary manner to impede freedom of opinion and expression, including on the Internet.”⁷¹ Because this crime of “conducting propaganda” is so vague, such provision cannot supply the legal basis for detention resulting from conviction on such charge.

2. Deprivation of Liberty Under Category II

Deprivation of liberty is arbitrary under Category II when it results from the exercise of the rights or freedoms guaranteed by Articles 7, 13, 14, 18, 19, 20, and 21 of the UDHR and Articles 12, 18, 19, 21, 22, 25, 26, and 27 of the ICCPR.⁷² This case meets the requirements of Category II because Phan’s detention is a result of his exercise of his fundamental freedoms of opinion, expression, and association guaranteed by the UDHR and the ICCPR.

a. Phan Was Convicted for Exercising His Freedoms of Opinion and Expression

The freedoms of opinion and expression are protected by international instruments and include the freedom to seek, receive, and impart information of all kinds, either

⁶⁹ “Defaming” is not defined anywhere in the Vietnam Penal Code.

⁷⁰ Vietnam Penal Code of 1999, available at <http://un-act.org/publication/view/viet-nam-penal-code-1999/>.

⁷¹ UN Human Rights Council, “Report of the Working Group on the Universal Periodic Review: Vietnam,” UN Doc. A/HRC/26/6; 143.151 – 143.152 (April 2, 2014) available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/129/10/PDF/G1412910.pdf?OpenElement>.

⁷² Human Rights Council, *Methods of Work of the Working Group on Arbitrary Detention*, U.N. Doc. A/HRC/30/69, para. 8(b) (August 4, 2015) (*hereinafter* “Methods”).

orally or in writing.⁷³ Article 19(2) of the ICCPR provides that “everyone shall have the right to freedom of expression.”⁷⁴ Article 19 of the UDHR provides an analogous guarantee of freedom of opinion and expression.⁷⁵ The Human Rights Committee has clarified that Article 19 of the ICCPR “protects all forms of expression and the means of their dissemination.”⁷⁶ This includes “all forms of audio-visual as well as electronic and internet-based modes of expression.”⁷⁷

Article 19 of the ICCPR is of special importance for human rights defenders⁷⁸ and journalists working on reporting of human rights abuses are explicitly recognized as human rights defenders.⁷⁹ The Working Group has confirmed the right of human rights defenders “to investigate, gather information regarding and report on human rights violations.”⁸⁰ The Human Rights Committee has also specifically recognized that Article 19(2) protects the work of journalists⁸¹ and “includes the right of individuals to criticize or openly and publicly evaluate their Government without fear of interference or punishment.”⁸² In fact, the imprisonment of human rights defenders for speech-related reasons is subject to heightened scrutiny; the Working Group has recognized the necessity to “subject interventions against individuals who may qualify as human rights defenders to particularly intense review.”⁸³ This “heightened standard of review” by international bodies is especially appropriate where there is a “pattern of harassment” by national authorities targeting such individuals.⁸⁴

In the present case, the Government arbitrarily detained and prosecuted Phan as a direct result of his speech in his capacity as a citizen journalist. First, the charge of “conducting propaganda” under Article 88 of the 1999 Penal Code violates an individual’s freedom of expression because it vaguely criminalizes a broad swath of speech and information-sharing acts. Thus, no matter whether the underlying factual allegations are true, the Government has deprived Phan of his liberty under a law which is itself incompatible with right to freedom of expression guaranteed under the UDHR and ICCPR.

⁷³ *Id.*

⁷⁴ ICCPR at art. 19(2). As noted above, Vietnam acceded to the ICCPR in 1982 and entered no reservations to this provision.

⁷⁵ UDHR at art. 19.

⁷⁶ Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of opinion and expression*, UN Doc. CCPR/C/G/34 at para. 12 (September 12, 2011) (*hereinafter* “General Comment No. 34”).

⁷⁷ *Id.*

⁷⁸ Human rights defenders are individuals who promote and protect all human rights through peaceful means without discrimination. Human rights defenders can join groups of people with or without structure, or organizations such as associations or foundations. Anyone, regardless of their occupation, can be a human rights defender; they are defined primarily by what they do rather than their profession. *See generally, Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, G.A. Resolution 53/144, U.N. Doc. A/RES/53/144 (March 8, 1998).

⁷⁹ *See, e.g., UNITED NATIONS SPECIAL RAPORTEUR ON THE SITUATION OF HUMAN RIGHTS DEFENDERS*, “Who is a Defender,” available at <http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Defender.aspx>.

⁸⁰ *Hassan Ahmed Hassan Al-Diqqi v. United Arab Emirates*, United Nations Working Group on Arbitrary Detention, Opinion No. 8/2009, UN Doc. A/HRC/13/30/Add.1, para. 18 (2010).

⁸¹ *Movlonov et. al. v. Uzbekistan*, UN Human Rights Committee, Communication No. 1334/2004, U.N. Doc. CCPR/C/95/D/1334/2004 (March 19, 2009).

⁸² *De Morais v. Angola*, UN Human Rights Committee, Communication No. 1128/2002, U.N. Doc. CCPR/C/83/D/1128/2002, para. 6.7 (March 29, 2005).

⁸³ *Nega v. Ethiopia*, UN Working Group on Arbitrary Detention, Opinion No. 62/2012, U.N. Doc. A/HRC/WGAD/2012/62, para. 39 (November 21, 2012); *see also, Sotoudeh v. Islamic Republic of Iran*, UN Working Group on Arbitrary Detention, Opinion No. 21/2011, U.N. Doc. A/HRC/WGAD/2011/21, para. 29 (January 27, 2011).

⁸⁴ *Bialitski v. Belarus*, United Nations Working Group on Arbitrary Detention, Opinion No. 39/2012, para. 43, (November 23, 2012).

Furthermore, Phan was targeted for his independent reporting; his detention thus violated his right to freedom of expression both *de jure* and *de facto*. Phan posted articles on blogs and social media pages which reported on instances of corruption and advocated for plural democracy, military depoliticisation, free elections and press freedoms. Many of the documents presented at trial were writings that Phan collected and published as a citizen journalist in order to share these articles with others. Phan's arrest, conviction and lengthy sentence, was an attempt by the Government to silence him and punish him for sharing pro-democracy and anti-corruption information as an independent reporter, an activity which is expressly protected as free expression. The Government's detention of Phan for his critical expression also fits directly into the Government's well-documented pattern of attacking and attempting to silence journalists through arbitrary detention.

Considering this history and the deprivation of free expression inflicted against Phan for sharing writings that reported on instances of corruption, and his public advocacy for free elections and free press, it is clear that the Government targeted Phan for detention as a means of reprimanding him for his political opinions, for his independent reports that advocated for democracy and against corruption, and for his sharing the work of other anti-corruption writers.

b. The Vietnam Government Detained Phan Because He Exercised His Rights to Freedom of Association

Article 20(1) of the UDHR provides that “[e]veryone has the right to freedom of peaceful assembly and association.” Article 22(1) of the ICCPR provides that “[e]veryone shall have the right to freedom of association with others . . .” The Human Rights Council has specifically called for states to fully respect and protect the rights of all individuals to associate freely, especially for persons espousing minority or dissenting views and human rights defenders.⁸⁵ In General Comment No. 25 to the ICCPR, the Human Rights Committee noted that “the right to freedom of association, including the right to form and join organizations and associations concerned with political and public affairs, is an essential adjunct to the rights protected by Article 25 [right to participate in public affairs].”⁸⁶ Similarly, Vietnamese law ensures the right to freedom of association. Article 25 of the Constitution affirms that citizens have the right to “assemble, form associations and hold demonstrations.”⁸⁷

Contrary to these international standards, the Government has criminalized and imprisoned individuals for associating with other journalists and political organizations that are critical of the Government, as evidenced by the treatment of Phan's communications with bloggers Nguyen Van Hai and Tran Buu Tho and other members of the Viet Tan. The Court stated in its Judgment that “Phan connected with some members of the ‘Viet Tan,’ an organization whose principle is to abolish the Communist Party and Socialism in Vietnam, and this organization

⁸⁵ G.A. Res. 15/21, ¶ 1, U.N. Doc. A/HRC/RES/15/21 (Oct. 6, 2010), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/166/98/PDF/G1016698.pdf?OpenElement>.

⁸⁶ *General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25)*, ¶ 26, Human Rights Comm., 57th Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.7 (Aug. 27, 1996), (*hereinafter* “General Comment No. 25”).

⁸⁷ THE CONSTITUTION OF THE SOCIALIST REPUBLIC OF VIETNAM, 2013, *translation available at* International Institute for Democracy and Electoral Assistance, http://www.constitutionnet.org/sites/default/files/tranlation_of_vietnams_new_constitution_enuk_2.pdf.

has its headquarters overseas.”⁸⁸ Though Phan has the right to associate with political groups of his choice and express his political opinions through such organizations, the Government has persecuted him as a means to punish his involvement and communications with these people and organizations that are critical of the Government.

By punishing Phan for his communications and associations with pro-democracy bloggers and members of the Viet Tan organization, Vietnam has violated Phan’s right to freedom of association in violation of Article 20(1) of the UDHR, Article 22(1) of the ICCPR, and Article 25 of Vietnam’s own constitution.

c. None of the Restrictions to Freedom of Expression and Association Enumerated Under Articles 19(3) and 22(2) of the ICCPR Apply to Phan’s Prosecution and Detention

Article 20 of the ICCPR requires states to prohibit “propaganda for war” and “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”⁸⁹ However, the Human Rights Committee has confirmed that limitations on expression that a state attempts to justify on the basis of Article 20 must also comply with Article 19(3) of the ICCPR.⁹⁰ Pursuant to Article 19(3) of the ICCPR, freedoms of expression and opinion may only be restricted as necessary for either the respect of the rights and reputations of others or the protection of national security or public order, health, or morals.⁹¹ The Human Rights Committee has emphasized the narrowness of the limitations set forth in Article 19(3) of the ICCPR by noting that “when a State party imposes [a limitation] on the exercise of freedom of expression, [it] may not put in jeopardy the right itself”⁹²

Article 22(2) of the ICCPR provides that: “No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.” Any limitation on the freedoms of expression and association “must meet a strict test of justification.”⁹³ As guidance, the Human Rights Committee has established three requirements for any limitation on the right to freedom of expression and association. A permissible limitation must be (1) “provided by law,” (2) for the protection of national security, public order, or public health and morals, and (3) “necessary” to achieve one of these enumerated purposes.⁹⁴

In this case, the limitation on Phan’s freedom of expression and association fails to meet the second requirement; the Government’s restrictions on Phan’s right to

⁸⁸ Sentence No.: 59/2017/HSST, page 12.

⁸⁹ ICCPR, at art. 20.

⁹⁰ General Comment No. 34, *supra* note 76, at para. 50.

⁹¹ ICCPR, at art. 19(3).

⁹² General Comment No. 34, *supra* note 76, at para. 21.

⁹³ *Park v. Republic Korea*, Communication No. 628/1995, U.N. Doc. CCPR/C/64/D/628/1995, para. 10.3 (*adopted* October 20, 1998).

⁹⁴ *Shin v. Republic of Korea*, Communication No. 926/2000, U.N. Doc. CCPR/C/80/D/926/2000, para. 7.3 (*adopted* March 16, 2004).

freedom of expression and association was not for a proper purpose. Although the Government claimed that his detention was based on his “conducting propaganda”—as might be considered appropriately banned under Article 20 of the ICCPR—in actuality none of Phan’s reports or online postings called directly or indirectly for violence or could reasonably be considered to threaten national security, public order, public health or morals, or the rights or reputations of others. Rather, the Government was merely using the veil of “conducting propaganda” as a pretext to silence criticism, which is not an acceptable purpose under Article 19(3) of the ICCPR. To the contrary, political discourse, journalism and discussion of human rights have all been explicitly recognized as protected speech.⁹⁵

Despite such international guarantees for the right to free speech, the Government arbitrarily detained and prosecuted Phan as a direct result of his speech. His reporting and postings are political and fall under the protections of Articles 19 of the ICCPR and UDHR. Thus, because Phan’s reporting and critical online postings are protected expression under Article 19(2) and because the limitation on these do not fall within the narrow exceptions contained in Articles 19(3), his continued detention is arbitrary pursuant to Category II.

3. Deprivation of Liberty Under Category III

Phan’s arrest and detention is arbitrary under Category III. A deprivation of liberty is arbitrary under Category III where “the total or partial non-observance of the international norms relating to the right to a fair trial, spelled out in the UDHR 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.”⁹⁶ The minimum international standards of due process applicable in this case are established by the ICCPR, the UDHR, the Body of Principles, and the UN Standard Minimum Rules for the Treatment of Prisoners (“Mandela Rules”).⁹⁷ The Vietnamese Constitution also guarantees certain due process rights, including the right not to be arrested without a prior authorization (Article 20), the right to a presumption of innocence (Article 31(1)), the right to a prompt, impartial and public trial for anyone charged with a criminal offense (Article 31(2)), and the right to the assistance of defense counsel (Article 31(4)).

a. Vietnam Violated Phan’s Right to *Habeas Corpus* and His Right to Release Pending Trial

Under Article 9(3) of the ICCPR, a detainee shall “be brought promptly before a judge or other officer authorized by law to exercise judicial power” to challenge the legality of his continued detention (right to *habeas corpus*, also incorporated in Article 9(4) for non-criminal defendants).⁹⁸ The Human Rights Committee has interpreted the term “promptly” to be within about 48 hours, except in exceptional circumstances,⁹⁹ and has noted that this right shall be observed “even before formal charges have been asserted, so long as the person is arrested or detained on suspicion of criminal activity.”¹⁰⁰ Moreover, *incommunicado* detention inherently violates Article 9(3) of the ICCPR.¹⁰¹ The right to *habeas corpus* is reiterated in Principles 4, 11, 32(1) and 37 of the Body of Principles.¹⁰² Aside from acting as a

⁹⁵ General Comment No. 34, *supra* note 76, at para. 11.

⁹⁶ Methods, *supra* note 72, at para. 8(c).

⁹⁷ *Id.* at paras. 7(a), (b).

check on arbitrary detention, these provisions also safeguard other related rights such as freedom from torture.¹⁰³

In addition to the right to *habeas corpus*, Article 9(3) of the ICCPR also enshrines the right to an individual's release pending trial, providing that "[i]t shall not be the general rule that persons awaiting trial shall be detained in custody." The Human Rights Committee has found that "[d]etention pending trial must be based on an individualized determination that [such detention] is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime . . . Pretrial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances."¹⁰⁴ Principles 38 and 39 of the Body of Principles further confirm that, except in special cases, a criminal detainee is entitled to release pending trial.¹⁰⁵

For more than seven months between his arrest on March 21, 2017 and his trial on October 25, 2017, Phan was never brought before a judge to determine the legality of his arrest and continuing detention. Although the Information and Communication Department did not issue its determination regarding whether the Postings constituted propaganda until May 22, 2017 and Phan was not formally indicted until August 28, 2017, Phan was held in detention without access to his family or an attorney throughout this entire period. There was never any bail hearing or any publicly-released individualized determination made about why such extended pre-trial detention was proper. In short, Phan's entire pre-trial detention period was completely unauthorized by any judicial officer.

By refusing to bring Phan promptly before a judge to challenge the legality of his detention, and by denying him release pending trial, Vietnam violated Article 9(3) and 9(4) of the ICCPR, and Principles 11, 32, 37, 38 and 39 of the Body of Principles.

b. Vietnam Violated Phan's Right to be Visited by Family and to Communicate with the Outside World

Principle 19 of the Body of Principles provides that "detained or imprisoned persons shall have the right to be visited by and to correspond with, in particular, members of his family . . . subject to reasonable conditions and restrictions as specified by law or lawful regulations." Similarly, this right is protected by the Mandela Rules, notably Rule 43 stating that "[d]isciplinary sanctions or restrictive measures shall not include the prohibition of family contact," Rule 58 stating that "[p]risoners shall be allowed, under necessary supervision, to communicate with their family and friends at regular intervals," and Rule 106 stating that "[s]pecial

⁹⁸ ICCPR, art. 9(4) ("Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful").

⁹⁹ General Comment No. 35, *supra* note 62, at para. 33.

¹⁰⁰ *Id.* at para. 32.

¹⁰¹ *Id.* at para. 35.

¹⁰² Body of Principles, *supra* note 60.

¹⁰³ General Comment No. 35, *supra* note 62, at para. 34. Other rights that may be at risk are those guaranteed by Articles 6, 7, 10 and 14 of the ICCPR. *Id.* at para. 35.

¹⁰⁴ *Id.* at para. 38.

¹⁰⁵ Body of Principles, *supra* note 60.

attention shall be paid to the maintenance and improvement of such relations between a prisoner and his or her family as are desirable in the best interests of both.”

As set forth in section A.2.b, Phan was held *incommunicado* for over six months after his arrest in March 2017 and his family was prohibited from meeting with him during the entire period of his pre-trial detention. His defense lawyer was only finally able to see him on September 20, 2017, a month before his trial. By detaining Phan *incommunicado* for over six months prior to his trial, Vietnam violated Principle 19 of the Body of Principles as well as Rules 43, 58, and 106 of the Mandela Rules.

c. Vietnam Violated Phan’s Right to be Tried Without Undue Delay

Article 14(3)(c) of the ICCPR guarantees that every defendant shall have the right to “be tried without undue delay.” “An important aspect of the fairness of a hearing is its expeditiousness,”¹⁰⁶ and “in cases where the accused are denied bail by the court, they must be tried as expeditiously as possible.”¹⁰⁷ In addition, this right “relates not only to the time between the formal charging of the accused and the time by which a trial should commence, but also the time until the final judgement on appeal.”¹⁰⁸ The right to be tried without undue delay is reiterated by the Body of Principles,¹⁰⁹ and the same is guaranteed in Article 31 of the Vietnamese Constitution as well.

The reasonable amount of time in which a trial must be held must be “assessed in the circumstances of each case, taking into account mainly the complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the administrative and judicial authorities.”¹¹⁰ Further, “in cases where the accused are denied bail by the court, they must be tried as expeditiously as possible.”¹¹¹

Phan was arrested on March 21, 2017, and his trial did not take place until October 25, 2017. More than seven months elapsed before Phan was tried, and during this time, he was held in custody at the Thái Nguyên Province Police detention center. Vietnam did not provide any explanation that Phan’s case might have necessitated such delay nor does it seem that any such circumstances exist. The need for trial without undue delay was exacerbated by the fact that, as mentioned above, Phan was never given a bail hearing and was forced to remain in detention for the entire seven months before his trial. As such, Vietnam violated Article 14(3)(c) of the ICCPR, Principle 38 of the Body of Principles, and Article 31 of the Vietnamese Constitution.

d. Vietnam Violated Phan’s Right to Communicate with and Have Assistance of Counsel

¹⁰⁶ HUMAN RIGHTS COMMITTEE, *General Comment No. 32: Article 14 (Right to Equality Before Courts and Tribunals and to Fair Trial)*, U.N. Doc. CCPR/C/GC/32, para. 27 (August 23, 2007) (*hereinafter* “General Comment No. 32”).

¹⁰⁷ *Id.* at para. 35.

¹⁰⁸ *Id.*

¹⁰⁹ Body of Principles, *supra* note 60, at Principle 38.

¹¹⁰ General Comment No. 32, *supra* note 106, at para. 30.

¹¹¹ *Id.* at para. 35.

Articles 14(3)(d) and 14(3)(b) of the ICCPR guarantee that an individual may “defend himself in person or through legal assistance of his own choosing” and “have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing.” Such guarantee “requires that the accused is granted prompt access to counsel,”¹¹² and that “State parties should permit and facilitate access to counsel for detainees in criminal cases from the outset of their detention.”¹¹³ Principle 18 of the Body of Principles further provides for the right of a detainee to communicate and consult with his legal counsel, and Rule 119 of the Mandela Rules also provides for the right to access legal advice. Likewise, the Vietnamese Constitution guarantees a detained or criminally charged individual’s right to choose a defense counsel.

Phan was deprived of his right to communicate with counsel and to prepare a defense. Phan was held *incommunicado* for six months after his arrest and was not permitted access to a lawyer or his family. The Investigation Agency refused to grant Phan’s lawyer a defense counsel certificate for the first six months that Phan was detained prior to trial. Phan was not able to communicate with his defense attorney or plan a defense until he met with his attorney for the first time on September 20, 2017, one month before his trial. While the Court asserts that Phan refused assistance of counsel, his alleged refusal was not communicated directly between Phan and the attorney but through communications sent from the Court. Given that Phan never publicly announced his desire to reject counsel or spoke with his attorney about this decision, the credible allegations that Phan was threatened and coerced to confess, and the pattern, noted in section A.1.c, of Vietnam commonly denying assistance of counsel to defendants, it is highly likely that Phan’s “refusal” of legal services was involuntary or the result of torture or other undue pressure. There is credible evidence that Vietnam violated Articles 14(3)(b) and 14(3)(d) of the ICCPR, Principle 18 of the Body of Principles, Rule 119 of the Mandela Rules, and Article 31 of the Vietnamese Constitution.

e. Vietnam Violated Phan’s Right to Confidentiality with Counsel

In commenting on Article 14(3)(b) of the ICCPR, which guarantees an accused criminal the right to communicate with counsel,¹¹⁴ the Human Rights Committee notes that “[c]ounsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality.”¹¹⁵ Principle 18(3) of the Body of Principles further provides for the right of a detainee to be assisted by and communicate with his legal counsel “without delay or censorship and in full confidentiality,”¹¹⁶ and that such right “may not be suspended or restricted save in exceptional circumstances.”¹¹⁷

As explained in section A.2.b above, before the pre-trial hearing, in the instances where Phan was allowed to meet with counsel, these meetings were always held in presence of prison authorities and limited to short, one hour meetings (without any

¹¹² *Id.* at para. 32.

¹¹³ *Id.* at para. 34.

¹¹⁴ ICCPR, at art. 14(3)(b): “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: [...] (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing”.

¹¹⁵ General Comment No. 32, at para. 34.

¹¹⁶ Body of Principles, at principle 18(3).

¹¹⁷ *Id.*

justification).¹¹⁸ Vietnam has thus violated (and continues to violate) Article 14(3)(b) of the ICCPR and Principle 18(3) of the Body of Principles.

f. Vietnam Violated Phan’s Right to a Presumption of Innocence and Right not to be Compelled to Testify Against Himself or to Confess Guilt

Article 14(2) of the ICCPR provides that “[e]veryone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law.” Article 11(1) of the UDHR and Principle 36(1) of the Body of Principles also guarantee this right, as do Article 31(1) of the Vietnamese Constitution and Article 13 of the Vietnamese Criminal Procedure Code. The presumption of innocence is “fundamental to the protection of human rights” and requires that “the accused has the benefit of doubt, and [] that persons accused of a criminal act must be treated in accordance with this principle.”¹¹⁹ Such presumption of innocence creates a “duty for all public authorities to refrain from prejudging the outcome of the trial, e.g. by abstaining from making public statements affirming the guilt of the accused. . . . The media should avoid news coverage undermining the presumption of innocence.”¹²⁰

Article 14(3)(g) of the ICCPR guarantees the right not to be compelled to testify against oneself or to confess guilt. Article 60(2) of the Vietnamese Criminal Procedure Code also provides that a person facing criminal charges may not be obligated to testify against themselves or admit guilt. Moreover, Principle 21(1) of the Body of Principles specifically provides that “it shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess [...]” Furthermore, Principle 21(2) the Body of Principles guarantees that “no detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgment.”

Here, before his trial, Phan was coerced to confess to running the blogs which were critical of the Government under pressure from the Investigation Agency, as described in section A.2.b. While in detention, the Investigation Agency threatened Phan and offered a reduced sentence in exchange for a confession, both of which impaired Phan’s capacity of decision and judgment in making his “confession.” Additionally, the Government exerted further pressure on Phan to sign a “confession” by holding him *incommunicado* for six months.

Moreover, the Government widely publicized Phan’s guilt months before his conviction. As discussed in section A.2.b, Phan’s “confession” was publicized over Government-run media. On May 4, 2017 an article was published by a Government-run news outlet reporting that Phan “acknowledged the crime of conducting activities against the Socialist Republic of Vietnam” and even reporting that the websites that Phan had created were managed by “terrorist organizations and some foreign reactionary organizations.”¹²¹

¹¹⁸ Interview Response from AC, May 1, 2019.

¹¹⁹ General Comment No. 32, *supra* note 106, at para. 30.

¹²⁰ *Id.*

¹²¹ Vì sao Phan Kim Khánh bị bắt? (“Why was Phan Kim Khanh Arrested?”), Nguyễn Tấn Dũng (May 4, 2017), <https://nguyentandung.org/vi-sao-phan-kim-khanh-bi-bat.html>.

By threatening and coercing Phan to confess guilt, Vietnam violated Article 14(3)(g) of the ICCPR, Principle 21(1) of the Body of Principles and Article 60(2) of the Vietnamese Criminal Procedure Code. By publicly releasing a statement that Phan had admitted his guilt, Vietnam treated Phan's guilt as a foregone conclusion prior to his trial, and thereby violated Phan's right to presumption of innocence under Article 14(2) of the ICCPR, Article 11(1) of the UDHR, Principles 21(1) and 36(1) of the Body of Principles, Article 31(1) of the Vietnamese Constitution and Article 13 of the Vietnamese Criminal Procedure Code.

g. Vietnam Violated Phan's Right to a Fair and Public Hearing

Article 14(1) of the ICCPR guarantees the right "to a fair and public hearing." This is an "absolute requirement . . . not capable of limitation." One of the key tenets of a fair hearing is the principle of equality of arms, which requires that both parties have the same procedural rights and, specifically, that "each side be given the opportunity to contest all the arguments and evidence adduced by the other party."¹²² Notably, Article 14(3)(e) of the ICCPR provides that every defendant shall have the right "[t]o examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him." Articles 7 and 10 of the UDHR also guarantee these rights.

The Human Rights Committee has emphasized the importance of a public hearing as it "ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large."¹²³ Moreover, a public hearing requires not just that some individuals unconnected with the proceedings are permitted into the courtroom; rather the hearing must be open to the general public, including media, without limiting entrance to a select group of people.¹²⁴ The Vietnamese Constitution also require a public hearing, with an exception for "special cases" requiring "protection of state secrets, conformity with fine customs and traditions of the nation, protection of minors, or protection of private life and at the legitimate request of an involved party," for which a court may hold a closed hearing.

Phan's trial was neither fair nor public, and there was no legitimate reason to treat his case as a "special case" requiring a closed hearing. As discussed in more detail in section A.2.c above, although Phan was permitted to speak in his defense, the duration of his trial was very short, lasting only four hours. The entire trial, which resulted in a lengthy six-year prison sentence, lasted only four hours, suggesting that the court did not fairly consider all evidence and that the trial was rather used to provide a legal seal of imprimatur on the Government's persecution of Phan.

Moreover, only Phan's father was permitted to enter the courtroom. Other members of Phan's family as well as members of the public were forbidden from entering the courtroom to attend Phan's trial. Accordingly, the trial was effectively closed to the public. Although Article 14(1) of the ICCPR does allow for parts of a hearing to be closed "for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the

¹²² General Comment No. 32, *supra* note 106, at para. 13.

¹²³ *Id.* at para. 28.

¹²⁴ *Id.* at para. 29.

parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”, no such reasons were applicable to Phan’s case. There was nothing in the court’s consideration of his reporting or social media postings that would threaten morals, public order, national security, his private life or the interests of justice. In fact, the court never even attempted to provide a justification for holding a closed trial.

By preventing Phan from presenting his case fully and from challenging the prosecution’s evidence and by refusing to hold a public trial, Vietnam violated Phan’s rights to a fair and public trial and to challenge the evidence against him, in violation of Article 14(1) and 14(3)(e) of the ICCPR, Articles 7 and 10 of the UDHR, and Articles 31 and 103 of the Vietnamese Constitution.

h. Vietnam Violated Phan’s Right to Appeal His Conviction

Article 14(5) of the ICCPR states that “everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to the law.” The right to appeal guaranteed by Article 14(5) of the ICCPR “imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case.”¹²⁵ Such a review must consider not just the formal or legal aspects of the conviction, but also the facts of the case, including the allegations against the convicted person and the evidence submitted at trial, as referred to in the appeal.¹²⁶ Furthermore, Article 331 of the 2015 Criminal Procedure Code of Vietnam grants defendants the right to appeal against judgments of courts of first instance. Article 332 states that if a defendant is in detention, the warden of the detention facility must enable the execution of the defendant’s right to appeal by forwarding the written appeal to the proper court.

Phan submitted a formal petition to appeal his conviction, but the officials in the Thái Nguyên’s detention center did not forward Phan’s appeal to the Appellate Court and forced him to abandon his appeal.¹²⁷ Neither the detention center nor the appellate court has acknowledged Phan’s petition for an appeal and has refused to provide Phan’s family with any notice or acknowledgement of Phan’s appeal petition.¹²⁸ Phan has even been threatened with solitary confinement if he does not cease his attempts to appeal his conviction.¹²⁹ By denying Phan a genuine review of his case and a reasoned appeal of the charges against him, Vietnam has violated Article 14(5) of the ICCPR.

i. Vietnam Violated Phan’s Right to Freedom from Torture and Cruel, Inhumane or Degrading Treatment

Article 7 of the ICCPR guarantees that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Article 10(1) of the ICCPR further provides that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” The right

¹²⁵ General Comment No. 32, *supra* note 106, at ¶ 48.

¹²⁶ *Id.*

¹²⁷ Radio Free Asia, Vietnamese Prison Refuses to Mail Jailed Activist’s Appeal Request (April 2, 2019) available at <https://www.rfa.org/english/news/vietnam/phan-kim-khanh-appeal-04022019165256.html>.

¹²⁸ Vietnamese Political Prisoner Database, <https://vietnamprisoners.info/prisoner/33/phan-kim-khanh>.

¹²⁹ Interview Response from AC, May 1, 2019.

to freedom from torture and cruel, inhuman or degrading treatment or punishment is reiterated by Articles 1, 4 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), to which Vietnam is party, Article 5 of the UDHR, Principle 1 and 6 of the Body of Principles, and Rules 1 and 43 of the Mandela Rules. The Vietnamese Constitution also prohibits “torture, violence, coercion, corporal punishment or any form of treatment harming his or her body and health or offending his or her honour and dignity.”

Article 14(3)(g) of the ICCPR specifically prohibits the infliction of physical or mental pain or suffering by a public official with the intention to coerce a confession. International law’s particular concern with torture as an interrogatory tool is further reflected in the definition of torture in CAT, which defines the term as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession,” as well as in Principle 21(2) the Body of Principles, which guarantees that “no detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgment.” Moreover, any imposition of suffering that is not severe enough to qualify as torture still constitutes cruel, inhuman or degrading treatment, which term “should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental,” pursuant to Principle 6(1) of the Body of Principles.

Here, Phan was subjected to cruel, inhuman or degrading treatment by law enforcement authorities during both pre-trial and post-trial detention periods. Before trial, Phan was threatened by interrogators who were obtaining his “confession.” Additionally, Phan continues to suffer threats, abuse and mistreatment while in detention following his conviction. The police have threatened to place Phan in solitary confinement and his life may be in danger due to the threats and mistreatment that he continues to receive while imprisoned. By torturing or abusing Phan, Vietnam has violated Articles 7, 10(1), and 14(3)(g) of the ICCPR, Article 5 of the UDHR, Articles 1, 4 and 16 of the CAT, Principles 1, 6 and 21(2) of the Body of Principles, Rules 1 and 43 of the Mandela Rules, and Article 20 of the Vietnamese Constitution.

V. INDICATE INTERNAL STEPS, INCLUDING DOMESTIC REMEDIES, TAKEN ESPECIALLY WITH THE LEGAL AND ADMINISTRATIVE AUTHORITIES, PARTICULARLY FOR THE PURPOSE OF ESTABLISHING THE DETENTION AND, AS APPROPRIATE, THEIR RESULTS OR THE REASONS WHY SUCH STEPS OR REMEDIES WERE INEFFECTIVE OR WHY THEY WERE NOT TAKEN.

Phan prepared a petition to appeal his conviction, which he requested to submit to the Appellate Court, but the officials in the Thái Nguyên detention center refused to submit Phan’s petition to the appellate court and have forced him to abandon his appeal, despite his desire to appeal this conviction. Phan will submit a formal complaint to the Appellate Court due to the detention center’s refusal to acknowledge his petition to appeal and the lack of response regarding his request to appeal his conviction.

In addition, as described in detail above, Phan's arrest, trial and pre- and post-trial confinement have been characterized by flagrant violations of Phan's due process rights. It is extremely unlikely that any appeal of his conviction would result in his release or lighter sentence, but might rather lead to retaliation against Phan.

VI. FULL NAME AND ADDRESS OF THE PERSON(S) SUBMITTING THE INFORMATION (TELEPHONE AND FAX NUMBER, IF POSSIBLE).

Freedom Now is a non-profit, non-governmental organization that works to free individual prisoners of conscience through focused legal, political and public relations advocacy efforts. Freedom Now, in collaboration with Dechert LLP, has been retained by Phan as his international counsel.

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