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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eightieth session, 20-24 November 2017

Opinion No. 79/2017 concerning Can Thi Theu (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/36/38), on 11 August 2017, the Working Group transmitted to the Government of Viet Nam a communication concerning Can Thi Theu. The Government replied to the communication on 12 October 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. Ms. Theu is a 54-year-old Vietnamese national. She usually resides in Hanoi. She is a farmer, land rights activist and human rights defender.

5. According to the source, in 2007, Ms. Theu's family farm in Duong Noi (a village outside Hanoi) was confiscated by the State, her farm buildings were demolished and her ponds destroyed. The farm had a reported market value of 31 million dong (approximately \$1,366) per m², but Ms. Theu was only paid compensation of 200,000 dong (approximately \$9) per m². This amounted to 0.6 per cent of the true value of the farm. Since then, Ms. Theu has actively campaigned for land rights in Viet Nam, calling for the payment of adequate compensation when land is acquired by the Government.

6. The source submits that Ms. Theu has also worked as a human rights defender, campaigning for the release of imprisoned human rights activists. She has joined peaceful demonstrations against police violence and on environmental issues, such as the campaign against the discharge of toxic waste from the Formosa steel plant. In 2016, Ms. Theu received the Viet Nam Human Rights Award from the Viet Nam Human Rights Network.

7. The source alleges that Ms. Theu has been repeatedly targeted by the authorities because of her activism. For example:

(a) In 2014, Ms. Theu was arrested while attempting to document the activities of the State security forces. On 25 April 2014, the State security forces attempted to confiscate land from residents who had not been paid any compensation. Ms. Theu recorded and photographed the incident, attempting to keep a record as security force officials struck civilians with sticks and batons. However, her camera was forcibly confiscated and she was beaten unconscious. Ms. Theu and her husband were arrested and charged with resisting persons in the performance of their official duties under article 257 of the Penal Code, and were both sentenced to 15 months' imprisonment.

(b) After her release in 2015, Ms. Theu was heavily fined for causing public disorder through her activism. Despite those fines, Ms. Theu continued to protest against land seizures and inadequate compensation for farmers. In January 2016, she was detained for demonstrating against the attempted seizure by the local government of farms in the vicinity of Hanoi and was interrogated and threatened by the police.

(c) Between February and April 2016, Ms. Theu continued to lead protests outside government agencies and the embassy of the United States of America in Hanoi. On 8 April 2016, Ms. Theu participated in a peaceful demonstration in front of the Vietnamese Ministry of Natural Resources and Environment, demanding the release of a human rights lawyer who had been accused of conducting propaganda against the State and had been held incommunicado since his arrest in December 2015. Ms. Theu was holding a banner calling on the Government of Viet Nam to repeal article 88 of the Penal Code, as well as another banner requesting the immediate release of the human rights lawyer. Ms. Theu was arrested, taken to a police station and subjected to death threats by police officials, before being released.

8. The source reports that the police used force and detained protestors in order to curb the demonstration of 8 April 2016. Some of the protestors lay down in the street in response to police violence. Although the authorities alleged that this act obstructed the flow of traffic, observers noted that the disruption had already begun by the time of the incident and was caused by the presence of a police vehicle.

9. Against this background, the source alleges that, on 10 June 2016, approximately 70 police officers raided Ms. Theu's home. According to the source, this action was carried out in response to Ms. Theu's involvement in the demonstration of 8 April 2016. Ms. Theu was charged with causing public disorder under article 245 (1) of the Penal Code. The police handcuffed Ms. Theu, searched her home and confiscated her mobile telephone.

10. The source further alleges that, following her arrest on 10 June 2016, Ms. Theu was held incommunicado and was unable to meet with her lawyer for 12 days. On 5 August 2016,

she was formally charged with causing public disorder under article 245 (1) of the Penal Code. The source notes that, while many other individuals participated in the demonstration of 8 April 2016, Ms. Theu is the only demonstrator known to have been arrested and prosecuted for being involved in the gathering. According to the source, the police claimed that they could not investigate cases involving other protesters.

11. According to the indictment prepared by the police, Ms. Theu behaved in an inciteful and extreme manner, including brandishing banners calling for the release of a human rights lawyer. The police also alleged that Ms. Theu obstructed officials attempting to contain protesters and that she staged a lie-down protest, persuading other members of the public to join in. These actions had a significant impact on public order. The source reports that the police relied upon camera footage of Ms. Theu as evidence and also cited witness statements and camera footage showing the build-up of traffic at the time of the demonstration. In the indictment, the police concluded that Ms. Theu had repeatedly caused public disorder, had failed to learn from past incidents and had resisted officials in the course of their duties. The police further concluded that Ms. Theu should be harshly punished, in order to serve as an example to others.

12. On 20 September 2016, more than three months after she was initially detained, Ms. Theu was tried by Dong Da District People's Court. The source alleges that the trial was conducted under maximum security and access to the court for Ms. Theu's relatives was limited. Two of Ms. Theu's relatives and a number of other supporters were held at Ha Dong police station, approximately 15 km from the court, in order to prevent them from attending the hearing. The source refers to reports that they were beaten by police.

13. The source submits that, at the trial, the prosecution cited Ms. Theu's previous criminal record and called for a harsher penalty than would usually be imposed, seeking a sentence of 18–22 months' imprisonment.

14. Based on witness statements and camera footage, the Court found that Ms. Theu had participated in the demonstration, displayed banners bearing slogans and lain down on the street causing a traffic jam. According to the judgment, Ms. Theu's acts posed a threat to wider society, caused public disorder, disrupted the operations of national agencies and fomented discontent. As a result, the Court found Ms. Theu guilty of causing public disorder under article 245 (1) of the Penal Code and sentenced her to 20 months' imprisonment.

15. According to the source, Ms. Theu served her period of pretrial detention and the first few months of her sentence in Detention Facility No. 1 in Hanoi, which is notorious for its poor conditions. The source cites reports that indicate that practices such as beatings, strip searches and denial of health care are common at the facility.

16. On 30 November 2016, an appellate court in Hanoi heard an appeal filed on behalf of Ms. Theu. The court rejected the appeal and upheld her 20-month sentence. The source submits that the appeal hearing was also carried out under maximum security. The authorities deployed a large number of police officers, plainclothes agents and soldiers to block areas near the court, preventing Ms. Theu's family and supporters from attending the hearing. When Ms. Theu's relatives and other activists tried to gather near the court, the police detained them and took them to different police stations, including Phuc Xa police station. The source alleges that these individuals were handcuffed, tortured and only released after the hearing had ended. Two days after her appeal hearing, a relative was able to visit Ms. Theu in detention.

17. In December 2016, shortly after the appellate court upheld her sentence, Ms. Theu was moved from Detention Facility No. 1 in Hanoi to Gia Trung prison in Gia Lai. This facility is located approximately 1,200 km from Hanoi, where Ms. Theu's family resides, making visits more difficult.

18. The source states that, despite her imprisonment, Ms. Theu continues to be a vocal critic of the Government and an advocate for fair treatment of farmers through her writing from prison. However, she has been in poor health throughout her detention, particularly after the 13-day hunger strike that she undertook at the beginning of her detention and that resulted in her hospitalization. The source reports that, on 22 June 2016, during the first meeting between Ms. Theu and her lawyer, she was unable to stand on her own and had to use a

wheelchair. The source alleges that this rapid deterioration of Ms. Theu's health has been exacerbated by the fact that the authorities have not permitted her family to visit or to send her medication. Ms. Theu remains in detention in Gia Lai. She has now been held in detention for nearly 18 months, since her arrest on 10 June 2016.

19. The source submits that Ms. Theu's deprivation of liberty is arbitrary according to categories II and III of the categories applied by the Working Group.

20. In relation to category II, the source submits that Ms. Theu was arrested and detained for protesting against the arrest and detention of human rights defenders. Ms. Theu's arrest and continuing detention are therefore a direct result of her exercise of the right to freedom of expression, as protected by article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant, to which Viet Nam has been a party since 1982.

21. The source submits that article 19 (3) of the Covenant provides specific cumulative criteria that must be met before interference with the right to freedom of expression can be justified under international law. First, any restriction on the right must be provided by law. Second, the restriction must be necessary for "respect of the rights or reputations of others" or for the "protection of national security or of public order (*ordre publique*), or of public health or morals". Third, the restriction must comply with the strict test of necessity and proportionality. The source observes that the actions interfering with Ms. Theu's right to freedom of expression cannot be justified on any of these three grounds.

22. According to the source, article 245 (1) of the Penal Code states that anyone found guilty of fomenting public disorder in a way that causes serious consequences or who has already been administratively sanctioned for such acts or sentenced for such offences shall be sentenced to a fine of between 1 million dong and 10 million dong, or up to two years' non-custodial reform, or between three months' and two years' imprisonment.

23. The source argues that this provision falls far short of the standard of sufficient precision, as set down by the Human Rights Committee.¹ The terms "foment", "public disorder", and "serious consequences" used in article 245 (1) are not defined, and there is no guidance or clarity regarding the actions that would fall within these terms. The imprecise drafting of article 245 (1) of the Penal Code therefore leaves the provision open to arbitrary application.

24. Furthermore, while the protection of public order is one of the legitimate aims listed under article 19 (3) of the Covenant, the arrest and detention of Ms. Theu cannot be justified on this basis. Ms. Theu has been charged with and convicted of involvement in a peaceful demonstration, during which she was alleged to have raised banners and to have lain down in the street. The source submits that, during the criminal proceedings against Ms. Theu, the Dong Da District Police and the Dong Da District People's Court failed to provide any evidence that public disorder had resulted or could have resulted from these activities. The source concludes that the involvement of Ms. Theu in the demonstration of 8 April 2016 amounts to the legitimate exercise of her right to freedom of expression to promote human rights and democracy in Viet Nam, and that her penalization regarding the demonstration cannot be for the purpose of protecting public order or any other legitimate aim under article 19 (3) of the Covenant.

25. Moreover, the source submits that the arrest and detention of Ms. Theu for 20 months amounts to a violation of her right to freedom of expression under article 19 of the Covenant, as it is a disproportionate response to the peaceful exercise of this right. The source notes that the disproportionate nature of the custodial sanction is compounded by the fact that it has been applied to dissuade other civil society activists, human rights defenders and the general public from exercising their right to freedom of expression in a manner similar to that adopted by Ms. Theu.

26. The source also submits that Ms. Theu's deprivation of liberty resulted from the exercise of her right to freedom of peaceful assembly, which is protected by article 20 of the Universal Declaration of Human Rights and article 21 of the Covenant. As the Human Rights

¹ See *Leonardus Johannes Maria de Groot v. The Netherlands* (CCPR/C/54/D/578/1994), para. 4.2.

Council has stressed, individuals should be able to express their grievances through peaceful protest without fear of being arbitrarily arrested.² Any restriction on the right to freedom of peaceful assembly will amount to a violation of that right if it fails to meet the same three cumulative requirements applicable to interferences with the right to freedom of expression under article 19 of the Covenant. The source submits that the arrest and detention Ms. Theu does not meet these criteria.

27. According to the source, article 245 (1) of the Penal Code is vague, imprecise and overly broad, making it impossible for an individual to determine with sufficient certainty what kind of activities would be penalized under the provision. Additionally, the provision is open to arbitrary abuse by those charged with its enforcement. The authorities have not provided any specific evidence of how Ms. Theu's involvement in the demonstration constituted a real threat to public order or to national security.

28. Finally, the source claims that the imposition of a custodial sanction was not the least intrusive measure available under article 245 (1) of the Penal Code, as it is one of the severest penalties that can be imposed under Vietnamese criminal law. In this case, the Court sentenced Ms. Theu to 20-months' imprisonment in order to deter others from participating in peaceful demonstrations critical of the Government. The source concludes that this will most likely have a profoundly chilling effect on the right of peaceful assembly in Viet Nam.

29. In relation to category III, the source observes that the treatment of Ms. Theu by the authorities, both during her period of pretrial detention and at the trial itself, violated her right to a fair and public hearing by a competent, independent and impartial tribunal, as provided for by article 10 of the Universal Declaration of Human Rights and article 14 (1) of the Covenant. Specifically, the source submits that there were violations of Ms. Theu's rights to a public hearing, to an independent and impartial tribunal, to access legal assistance and to communication with the outside world.

30. The source submits that, according to article 14 (1) of the Covenant, criminal hearings must be conducted orally and in public, subject only to the limited exceptional circumstances set out in that provision. Ms. Theu's hearings, both at first instance and on appeal, were carried out under maximum security and measures were adopted to prevent certain members of the public from attending. Supporters of Ms. Theu were detained and beaten on the days of the trial and the appeal hearings. Two relatives, who were invited to attend the first instance trial, were held at Ha Dong police station, 15 km from the court. On the day of the appeal, these relatives, along with 50 other individuals, were arrested on their way to court and were beaten.

31. Moreover, Ms. Theu has not been tried by an independent and impartial tribunal in accordance with article 14 (1) of the Covenant, given the extent of the control and influence exercised by the executive branch of the Government over the courts in Viet Nam.

32. The source also argues that Ms. Theu has not been granted adequate facilities for preparing and presenting her defence. She was not provided with prompt access to legal counsel of her own choosing, contrary to article 14 (3) (b) of the Covenant. She was not afforded access to a lawyer until 12 days after her arrest. The Government provided no justification for such a significant delay in granting access to legal assistance, and there is no indication that the delay was necessary in order to maintain security and good order. Moreover, Ms. Theu's ability to pursue domestic remedies with the relevant legal and administrative authorities has been limited due to the significant restrictions on her access to a lawyer. Late access to legal representation has also impeded the preparation of her defence.

33. Finally, Ms. Theu's right to communicate with the outside world has been violated. During the first 12 days of her detention, Ms. Theu was held incommunicado. A relative was only permitted to visit Ms. Theu two days after her sentence was upheld on appeal. Following her appeal, Ms. Theu was transferred in December 2016 to a remote detention facility at Gia Lai, a move which has further restricted the possibility of regular visits from legal counsel, family and friends.

² See Human Rights Council resolution 19/35, tenth preambular paragraph.

Communications from special procedure mandate holders

34. The Working Group notes that Ms. Theu was the subject of two communications addressed to the Government on 16 August and 4 October 2016 by several United Nations special procedure mandate holders.

35. In the urgent appeal of 16 August 2016, the special procedure mandate holders referred to multiple occasions since April 2014 when Ms. Theu has allegedly been targeted by the authorities for her activism and human rights work in the defence of land rights in Viet Nam. They expressed serious concern regarding the alleged arbitrary arrest and detention of Ms. Theu since 10 June 2016, as well as her deteriorating health while in detention. The special procedure mandate holders also noted with great concern that the criminalization of the rights to freedom of expression and peaceful assembly was likely to have a chilling effect on civil society and human rights defenders.³ As noted in the urgent appeal, according to paragraph 23 of the Working Group's methods of work, the Government is required to respond separately to an urgent appeal and to a regular communication.

36. In the allegation letter of 4 October 2016, the special procedure mandate holders raised similar issues to those contained in the earlier urgent appeal. In addition, they expressed concern in relation to the 12 day-period during which Ms. Theu was detained without access to a lawyer, which severely hindered the guarantees of due process at a critical stage of the criminal procedure. Further concern was expressed at the alleged denial of Ms. Theu's access to medical treatment and family visits.⁴

37. The Working Group acknowledges the reply of the Government to both the urgent appeal and the allegation letter, which was received on 13 April 2017.⁵ In its response, the Government confirmed that, on 9 June 2016, the Investigation Division of the Dong Da District Police, Hanoi, initiated a criminal case against Ms. Theu and issued an arrest warrant for investigation purposes against her for causing public disorder under article 245 of the Penal Code. On 20 September 2016, the Dong Da District People's Court opened the first instance trial of Ms. Theu and, after hearings, sentenced her to 20 months' imprisonment for causing public disorder under article 245 (1) of the Penal Code.

38. The Government states that the arrest of Ms. Theu on 10 June 2016 for causing public disorder was fully in compliance with the laws of Viet Nam and with international human rights law, including the principle of *ne bis in idem*. Ms. Theu's detention is not arbitrary. The offence committed by Ms. Theu was a self-evident fact. The process of Ms. Theu's arrest and detention pending investigation was public and transparent. From 25 July 2015 to 10 June 2016, Ms. Theu had, on 25 occasions, organized, encouraged and incited others to conduct marches and illegal demonstrations that caused insecurity and disorder at the offices of government agencies in Hanoi. The police had records of administrative sanctions being imposed in Ms. Theu's regard for causing public disorder on four occasions.

39. In addition, although Ms. Theu had been administratively sanctioned by the competent authorities on 8 April 2016, together with other members of the public from Duong Noi Ward and other provinces and cities, she organized a demonstration to file a complaint with the Ministry of Natural Resources and Environment in Hanoi. The Government reports that Ms. Theu met with a high-ranking ministry official but then proceeded, along with a number of other individuals, to unfurl banners, shout slogans and lay down in the street. This action blocked the road, obstructing the flow of traffic for several hours.

³ The urgent appeal of 16 August 2016 was sent by the Working Group on Arbitrary Detention, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on the situation of human rights defenders. Available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=3304>.

⁴ The allegation letter of 4 October 2016 was sent by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the rights to freedom of peaceful assembly and of association, the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on the independence of judges and lawyers. Available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=3355>.

⁵ Available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=59345>.

40. The Government also states that, after conducting an inquiry, the Investigation Division of the Dong Da District Police initiated criminal proceedings against Ms. Theu on 9 June 2016, issuing an arrest warrant and detention order in her regard under article 245 (1) of the Penal Code. The following day, the police arrested Ms. Theu in the village of Kim Quan, Yen Thuy District, Hoa Binh Province. The local authorities witnessed and recorded in writing the seizure of her mobile telephone as evidence during the inquiry. Thus, Ms. Theu was arrested and detained for violating the law and not for campaigning on the issue of land ownership or exercising her right to freedom of assembly or association.

41. According to the Government, during her period of pretrial detention, Ms. Theu was guaranteed all the rights enjoyed by detainees. The authorities fully implemented the laws and regulations relating to detention conditions and ensured Ms. Theu's safety and physical and mental health. When Ms. Theu went on a hunger strike to protest against her arrest and asked to meet with a lawyer, she was informed of the regulations governing pretrial detention. She was examined by medical staff on a daily basis. On 22 June 2016, Ms. Theu met with investigators in the presence of her two counsels.⁶ During this meeting, Ms. Theu was cooperative and answered the investigators' questions. Subsequently, she agreed to abandon her hunger strike. Ms. Theu was in sufficiently good health to be able to participate in all stages of the criminal proceedings initiated in her regard.

42. The Government emphasizes that Ms. Theu's right to a fair trial has been fully ensured and that due procedure had been followed in full compliance with the law. On 5 August 2016, the Investigation Division of the Dong Da District Police informed Ms. Theu and her lawyers of the conclusions of its inquiry. On 5 September 2016, the Dong Da District People's Court issued its decision to bring Ms. Theu to first instance criminal trial. On 20 September 2016, the Court opened Ms. Theu's trial. All the hearings were held publicly in line with due procedure. Ms. Theu's two lawyers participated in all the hearings to defend her rights. After an adversarial process, the Court concluded that Ms. Theu had caused serious disorder, obstructed traffic and impeded the operations of State agencies in the locality. Given that this was not her first offence, the Court sentenced Ms. Theu to 20 months' imprisonment under article 245 (1) of the Penal Code.

Response from the Government

43. On 11 August 2017, the Working Group transmitted the source's allegations to the Government under its regular communication procedure. The Working Group requested the Government to provide detailed information by 11 October 2017 regarding Ms. Theu's current situation, including any comments on the source's allegations. The Working Group also requested the Government to clarify the factual and legal grounds invoked by the authorities to justify her continued deprivation of liberty, as well as their compatibility with domestic legislation and the obligations of Viet Nam obligations under international human rights law.

44. The Government replied to the regular communication on 12 October 2017, one day after the expiry of the time limit set. The Government had not requested an extension of the time limit in accordance with paragraph 16 of the methods of work of the Working Group. The response of the Government in this case is therefore considered to be late and, given the failure to request an extension of the time limit, the Working Group cannot accept the response as if it had been presented within the time limit. The Working Group determined that it was not necessary to send the response to the source for further comment in this case.

45. However, as indicated in paragraphs 15 and 16 of the methods of work of the Working Group and in conformity with its practice, the Working Group may render an opinion on the basis of all the information it has obtained. Although not obliged to do so, the Working Group has decided, in rendering its opinion, to take into account the information received from the

⁶ The Government states that, on 22 June 2016, Ms. Theu was interviewed by investigators in the presence of her two counsels. Given that there is no other reference in the reply of the Government to Ms. Theu meeting with her lawyers, it appears that this was the first such meeting.

Government in response to the above-mentioned urgent appeal and allegation letter.⁷ This information is similar to that provided by the Government in its late response to the regular communication.

Discussion

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

47. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has presented 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. The Government can meet this burden of proof by producing documentary evidence in support of its claims.⁸ Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations (see A/HRC/19/57, para. 68).

48. In the present case, the Working Group finds that the source has established a credible *prima facie* case. The source has provided the original texts of the indictment against Ms. Theu and the first instance judgment of the Dong Da District People's Court, as well as translations of those documents into English. These documents confirm many of the facts, dates and events leading up to Ms. Theu's arrest and subsequent trial reported by the source and therefore lend credibility to the source's case. The response of the Government to the urgent appeal and allegation letter (as well as its late response to the regular communication) also confirm the source's allegations in several key respects. This includes the fact, agreed on by both parties, that Ms. Theu was convicted under article 245 (1) of the Penal Code for participating in a demonstration on 8 April 2016, carrying banners and causing a traffic jam by lying down in the street.

49. Both the source and the Government state that Ms. Theu was arrested on 10 June 2016 and that her trial commenced on 20 September 2016. There is no indication in the information provided by either party that Ms. Theu was brought before the courts during the three-month period between her arrest and trial. This amounts to a violation of Ms. Theu's right to be brought promptly before a judge under article 9 (3) of the Covenant. While the exact meaning of "promptly" may vary in each case, the delay in bringing a detainee before a judge should not exceed a few days from the time of arrest.⁹ Moreover, Ms. Theu was held *incommunicado* for 12 days after her arrest. As the Working Group has consistently argued, holding persons *incommunicado* violates their right to challenge the lawfulness of detention before a court under article 9 (4) of the Covenant (see, for example, opinions No. 46/2017 and No. 45/2017). The Working Group considers that judicial oversight of detention is a fundamental safeguard of personal liberty¹⁰ and is essential in ensuring that detention has a legal basis. Given that Ms. Theu was unable to challenge her detention, her right to an effective remedy under article

⁷ According to paragraph 16 of its methods of work, the Working Group may render an opinion on the basis of all the information it has obtained. In the present case, in order to give the Government every opportunity to respond to the source's allegations, the Working Group has exercised its discretion to take into account the information submitted by the Government in response to the urgent appeal and allegation letter. See also opinion No. 48/2016, in which the Working Group took a similar approach.

⁸ See opinion No. 41/2013, in which the Working Group states that the source of a communication and the State party do not always have equal access to the evidence and frequently the State party alone has the relevant information. In that case, the Working Group recalled that where it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he was entitled, the burden to prove the negative fact asserted by the applicant is on the public authority, because the latter is "generally able to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law ... by producing documentary evidence of the actions that were carried out". The Working Group cites *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, *Merits, Judgment*, I.C.J. Reports 2010, p. 639, at para. 55, p. 661.

⁹ See Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, para. 33.

¹⁰ See United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (A/HRC/30/37, para. 3).

8 of the Universal Declaration of Human Rights and article 2 (3) of the Covenant was also violated.

50. In the absence of a judicial determination of the lawfulness of Ms. Theu's deprivation of liberty, the Working Group finds that there was no legal basis established for her arrest and detention under articles 9 (3) and (4) of the Covenant. The Working Group therefore concludes that her deprivation of liberty was arbitrary and falls within category I of the categories applied by the Working Group.

51. Further, the source alleges that Ms. Theu has been deprived of her liberty solely for exercising her rights to freedom of expression and peaceful assembly by participating in the demonstration on 8 April 2016. The Government, on the other hand, argues that Ms. Theu's arrest and detention were completely unrelated to the exercise of her fundamental freedoms and that she has been imprisoned for violating Vietnamese law (namely, article 245 of the Penal Code, which the Government states complies fully with international human rights law). As the Working Group has repeatedly stated in its jurisprudence, even when the detention of a person is carried out in conformity with national legislation, the Working Group must ensure that the detention is also consistent with the relevant provisions of international law (see, for example, opinions No. 42/2012, No. 46/2011 and No. 13/2007).

52. The Working Group has considered the application of national security and public order provisions of the Penal Code in Viet Nam on numerous occasions.¹¹ In all of these cases, the Working Group found that vague and overly broad provisions of the Penal Code were used to impose penalties on individuals who had merely exercised their rights to freedom of expression and peaceful assembly. The Working Group came to a similar conclusion in its report following a visit to Viet Nam in October 1994, noting that vague and imprecise national security offences did not distinguish between violent acts posing a potential threat to national security and the peaceful exercise of fundamental freedoms.¹² It requested the Government to amend its laws in order to clearly define offences relating to national security and to state what was prohibited without any ambiguity.

53. In the present case, Ms. Theu was sentenced under article 245 (1) of the Penal Code which states that anyone found guilty of fomenting public disorder in a way that causes serious consequences or who has already been administratively sanctioned for such acts or sentenced for such offences shall be sentenced to a fine of between 1 million dong and 10 million dong, or up to two years' non-custodial reform, or between three months' and two years' imprisonment.

54. In the view of the Working Group, article 245 (1) is vague, overly broad and open to arbitrary application. It is not clear what activities amount to fomenting public disorder. The provision does not distinguish between acts of public disorder and the peaceful exercise of the rights to freedom of expression and assembly and potentially encompasses a wide range of conduct. Indeed, in the first instance judgment, the Court found that Ms. Theu's actions had caused people to feel discontent and could therefore be penalized, which suggests that there is a low threshold for conduct falling under the provision. In opinion No. 45/2015, the Working Group considered the application of article 245 to an individual detained for participating in a peaceful protest and noted that the vagueness and possible expansive application of this provision raised concerns about its compatibility with the relevant norms of international law (para. 15).

55. The Working Group considers that Ms. Theu's conduct while peacefully participating in the demonstration on 8 April 2016 falls within the boundaries of the freedom of expression as protected by article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant. Her actions during the demonstration included carrying a banner requesting the Government to repeal article 88 of the Penal Code, a provision which the Working Group

¹¹ See, for example, opinions No. 26/2013, No. 27/2012 and No. 46/2011 in relation to article 79 of the Penal Code. See also the cases cited in footnote 12 in relation to article 88 of the Penal Code. The source notes that although the Penal Code was amended in November 2015, the National Assembly did not make any amendments to the substance of the text.

¹² See E/CN.4/1995/31/Add.4, paras. 58–60.

has, on numerous occasions, found to be in violation of international human rights law.¹³ She also carried a banner calling for the release of a human rights defender whose deprivation of liberty was found to be arbitrary by the Working Group.¹⁴ The Working Group recalls that the holding and expression of opinions, including those which are critical of, or not in line with, official government policy, are protected under international human rights law.

56. Similarly, by participating in the demonstration of 8 April 2016, Ms. Theu was exercising her right to freedom of peaceful assembly under article 20 of the Universal Declaration of Human Rights and article 21 of the Covenant.¹⁵ According to the first instance judgment, Ms. Theu's participation in the protest resulted in the obstruction of traffic and disruption of the work of agencies in the area over a period of three hours. The Working Group recalls that a certain level of disruption to ordinary life caused by assemblies, including disruption of traffic, annoyance and even harm to commercial activities, must be tolerated if the right is not to be deprived of substance.¹⁶

57. The restrictions on the freedom of expression and peaceful assembly permitted under articles 19 (3) and 21 of the Covenant do not apply in the present case. While the Government made brief reference to the limitations found in article 19 (3) of the Covenant, it did not demonstrate how Ms. Theu's participation in a demonstration constituted a real threat to public order, nor why the imposition of a 20-month sentence was a necessary and proportionate response to the temporary obstruction of traffic. In paragraph 5 (p) of its resolution 12/16, the Human Rights Council calls on States to refrain from imposing restrictions that are not consistent with international human rights law, including restrictions on discussion of government policies and political debate; reporting on human rights; peaceful demonstrations, and expression of opinion and dissent. Moreover, in paragraph 23 of its general comment No. 34 (2011) on the freedoms of opinion and expression, the Human Rights Committee has stated:

States parties should put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression. Paragraph 3 may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights. [Footnote omitted.] 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.

58. In addition, according to the United Nations Declaration on Human Rights Defenders, everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels and to meet or assemble peacefully for the purpose of promoting and protecting human rights.¹⁷ The source clearly demonstrates that Ms. Theu was detained for the exercise of her rights under the Declaration as a human rights defender. The Working Group has determined that detaining individuals on the basis of their activities as human

¹³ See, for example, opinions Nos. 27/2017, 26/2017, 26/2013, 27/2012, 24/2011, 6/2010, 1/2009 and 1/2003.

¹⁴ See opinion No. 26/2017. The translated trial judgment indicates that Ms. Theu was also carrying banners calling for the release of other human rights defenders.

¹⁵ While the Special Rapporteur on the rights to freedom of peaceful assembly and of association acknowledged the reply of the Government to the urgent appeal and allegation letter, he expressed serious concern that the actions taken against Ms. Theu were linked to the legitimate exercise of her rights to freedom of expression and assembly. See A/HRC/35/28/Add.3, para. 406.

¹⁶ See A/HRC/31/66, para. 32.

¹⁷ See articles 1 and 5 (a) of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (General Assembly resolution 53/144, annex). See also General Assembly resolution 70/161 on human rights defenders in the context of the Declaration, para. 8, in which the Assembly calls upon States to take concrete steps to prevent and put an end to the arbitrary arrest and detention of human rights defenders, and in this regard strongly urges the release of persons detained or imprisoned, in violation of the obligations and commitments of States under international human rights law, for exercising their human rights and fundamental freedoms.

rights defenders violates their right to equality before the law and equal protection of the law under article 7 of the Universal Declaration of Human Rights and article 26 of the Covenant (see for example opinions No. 16/2017 and No. 45/2016).

59. The Working Group concludes that Ms. Theu's deprivation of liberty resulted from the exercise of her rights to freedom of expression and peaceful assembly, and was contrary to article 7 of the Universal Declaration of Human Rights and article 26 of the Covenant. Her deprivation of liberty was therefore arbitrary and falls within category II of the categories applied by the Working Group.

60. Given its finding that the deprivation of liberty of Ms. Theu was arbitrary under category II, the Working Group wishes to emphasize that no trial of Ms. Theu should have taken place. However, Ms. Theu was tried by the Dong Da District People's Court in September 2016, and the Working Group considers that her right to a fair trial was violated during that trial and the subsequent appeal hearing.¹⁸

61. Ms. Theu's trial at first instance on 20 September 2016 and her appeal hearing on 30 November 2016 were not open to the public, in contravention of article 10 of the Universal Declaration of Human Rights and article 14 (1) of the Covenant. Both the trial and appeal hearings were conducted under maximum security. Ms. Theu's relatives and supporters (including 50 individuals who attempted to attend the appeal hearing) were held at police stations away from the court, beaten and tortured and subsequently released after the trial and appeal hearings. In its response to the urgent appeal and allegation letter, the Government asserted that all the hearings were held publicly in line with due procedure. The Government made a similar assertion in its late response to the regular communication, denying that Ms. Theu's relatives were beaten and held away from the court and noting that some individuals could not attend the hearings due to limited seating capacity. However, the Government did not provide any evidence (such as witness affidavits, minutes recorded by the court clerk, reports from independent observers, media reports, photographs, a seating plan of the courtroom) to demonstrate that the hearings were in fact open to the public, including Ms. Theu's family and supporters, and that limited seating capacity prevented some individuals from attending. There is also no evidence that any of the exceptions set out in article 14 (1) of the Covenant were used as grounds for barring the public from attending the trial and appeal hearings and the Government did not advance any arguments to that effect.

62. Furthermore, the maximum security measures adopted at Ms. Theu's trial and appeal hearing undermined her right to be presumed innocent under article 11 (1) of the Universal Declaration of Human Rights and article 14 (2) of the Covenant. These measures included the deployment of a large number of police officers, plainclothes agents and soldiers to block areas near the court during the appeal hearing. It is not clear why the trial of an individual charged with an offence involving the obstruction of traffic would require such significant security measures. As the Human Rights Committee has stated, defendants should not be presented to the court in a manner indicating that they may be dangerous criminals, as this undermines the presumption of innocence.¹⁹

63. The source alleges that Ms. Theu was arrested on 10 June 2016 and was not afforded access to her lawyers until 12 days later, on 22 June 2016. In its response to the urgent appeal and allegation letter (as well as in its late response to the regular communication) the Government appears to acknowledge that Ms. Theu only met with her lawyers for the first time on 22 June 2016. While the Working Group notes that Ms. Theu first met with her lawyers almost three months before her trial commenced on 20 September 2016, the Government provided no explanation or justification for the initial delay in Ms. Theu's contact with her lawyers. The Government also failed to provide any information to rebut the source's assertion that this delay limited Ms. Theu's ability to pursue domestic remedies with the relevant legal and administrative authorities and to prepare an adequate defence. The delay thus amounted to a violation of Ms. Theu's right to adequate time and facilities for the

¹⁸ The Working Group takes note of the source's argument that Ms. Theu's right to be tried by an independent and impartial tribunal was violated, but considers that the source has not demonstrated a violation in this particular case.

¹⁹ See Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 30. See also opinion No. 40/2016, para. 41.

preparation of her defence and to communicate with counsel of her own choosing under articles 10 and 11 (1) of the Universal Declaration of Human Rights and article 14 (3) (b) of the Covenant. Principle 9 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court states that all persons deprived of their liberty shall have the right to legal assistance by counsel of their choice, at any time during their detention, including immediately after the moment of apprehension.

64. The source also alleges, and the Government did not deny, that Ms. Theu was held incommunicado for the first 12 days of her detention. She had no contact with her family for nearly six months from her arrest on 10 June 2016 until two days after her sentence had been upheld on appeal, that is, 2 December 2016. After her unsuccessful appeal, Ms. Theu was transferred in December 2016 to a detention facility located 1,200 km away from her family and friends. The Government asserted in its late response to the regular communication that such a transfer to a remote detention facility is completely regular under Vietnamese law, without providing any explanation of why it was necessary. The Government also asserted that Ms. Theu has received a number of visits, including from her son, and has made telephone calls to her family during her detention at Gia Lai, but provided no evidence (such as visitor logs or telephone records) in support of this claim.

65. These circumstances strongly suggest a concerted effort by the authorities to impose additional suffering on Ms. Theu by denying her contact with family and friends. This treatment also appears to have affected Ms. Theu's ability to challenge her detention before a court and to coordinate her defence. The Working Group finds that Ms. Theu's incommunicado detention violated articles 9, 10 and 11 (1) of the Universal Declaration of Human Rights and article 9 of the Covenant. Moreover, the ongoing limitation of contact with her family amounts to a violation of the right to have contact with the outside world under rules 43 (3) and 58 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) and principles 15, 19 and 20 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

66. The Working Group concludes that these violations of the right to a fair trial are of such gravity as to give the deprivation of liberty of Ms. Theu an arbitrary character according to category III of the categories applied by the Working Group.

67. Further, the Working Group considers that Ms. Theu was targeted because of her status as a human rights defender. Ms. Theu is a prominent activist who has defended land rights and called for the authorities to address human rights violations since 2007. In 2016, this work was acknowledged by an award from the Viet Nam Human Rights Network. Over the last four years, Ms. Theu has been subjected to systematic harassment and intimidation by the authorities for her work, including being beaten unconscious, threatened with death, imprisoned for 15 months and fined under administrative sanctions imposed by the police.²⁰

68. Ms. Theu's most recent 20-month sentence fits into this pattern of persecution. As the judgment of the Dong Da District People's Court acknowledges, Ms. Theu was one of 50 members of the public from Hanoi and other provinces who gathered to protest on 8 April 2016, but she was the only person prosecuted for participating in the demonstration, ostensibly because the police could not investigate the other cases. The authorities went to great lengths to ensure that Ms. Theu was punished, including by deploying 70 police officers to arrest her and by employing maximum security measures during her trial and appeal hearings. In the indictment, the investigating police concluded that Ms. Theu must be harshly punished to make an example of her and similar wording was repeated by the court of first instance in its judgment. Moreover, Ms. Theu's disproportionately heavy sentence appears to have been imposed to send a message to human rights defenders that they must cease their work or face penalties.

69. For these reasons, the Working Group finds that Ms. Theu was deprived of her liberty on discriminatory grounds, that is, due to her status as a human rights defender. Her

²⁰ The late response of the Government states that the police had records of administrative sanctions (fines) being imposed in Ms. Theu's regard for causing public disorder on four occasions from September 2015 to April 2016.

deprivation of liberty was arbitrary according to category V of the categories applied by the Working Group. The Working Group refers this case to the Special Rapporteur on the situation of human rights defenders for further investigation.

70. The Working Group wishes to express its concern about Ms. Theu's health, given that she was reported to be in a serious condition during the early stages of her detention while on hunger strike. The source also reported that Ms. Theu's deteriorating health was exacerbated by the fact that she was denied access to medication sent by her family. The Government stated in its response to the urgent appeal and allegation letter that medical staff examined Ms. Theu every day. The Government also asserted in its late response to the regular communication that, since Ms. Theu's transfer to Gia Lai, she has been regularly examined by health professionals. According to the Government, this care includes being diagnosed with degenerative lumbar spine disease and receiving the necessary treatment including supplements provided by her family. However, the Government provided no evidence of this assertion, such as medical records. According to article 10 (1) of the Covenant and rules 1 and 24 of the Nelson Mandela Rules, all persons deprived of their liberty must be treated with humanity and with respect for their inherent dignity and should enjoy the same standards of health care that are available in the community. Given that Ms. Theu is now at the end of a 20-month sentence²¹ that was imposed in contravention of international human rights law, the Working Group calls on the Government to immediately and unconditionally release her.

71. This case is one of several brought before the Working Group in recent years concerning the arbitrary deprivation of liberty of persons in Viet Nam.²² The Working Group recalls that under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of fundamental rules of international law, may constitute crimes against humanity.²³ The Working Group would welcome the opportunity to engage constructively with the Government to address issues such as the use of imprecise provisions of the Penal Code to prosecute individuals for the peaceful exercise of their rights and the denial of fair trial rights, which continue to result in the arbitrary deprivation of liberty in Viet Nam.

72. On 15 April 2015, the Working Group sent a request to the Government to undertake a country visit, as a follow up to its earlier 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 already requested visits, but that it would consider issuing an invitation to the Working Group at the appropriate time. On 6 April 2017, the Working Group reiterated its request for a country visit and awaits a positive response. Given that the human rights record of Viet Nam will be subject to review during the third cycle of the Universal Periodic Review in January 2019, an opportunity exists for the Government to enhance its cooperation with the special procedure mandate holders and to bring its laws into conformity with international human rights law.

Disposition

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

The deprivation of liberty of Can Thi Theu, being in contravention of articles 2, 3, 7, 8, 9, 10, 11 (1), 19 and 20 of the Universal Declaration of Human Rights and of articles 2, 9, 14, 19, 21 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

74. The Working Group requests the Government of Viet Nam to take the steps necessary to remedy the situation of Ms. Theu without delay and bring it into conformity with the

²¹ The transcript of the first instance judgment states that Ms. Theu's 20-month sentence runs from the date of her arrest on 10 June 2016. She has now served almost 18 months of that sentence. The Government confirmed in its late response to the regular communication that Ms. Theu is due to complete her sentence on 8 February 2018.

²² See, for example, opinions Nos. 27/2017, 26/2017, 40/2016, 46/2015, 45/2015, 33/2013, 26/2013, 42/2012, 27/2012, 46/2011, 24/2011, 6/2010 and 1/2009.

²³ See, for example, opinion No. 47/2012, para. 22.

relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

75. The Working Group considers that, taking into account all the circumstances of the case, in particular the risk of harm to Ms. Theu's health, the appropriate remedy would be to release Ms. Theu immediately and accord her an enforceable right to compensation and other reparations, in accordance with international law. The Working Group urges the Government to withdraw all charges against Ms. Theu in relation to her peaceful human rights activism.

76. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Ms. Theu and to take appropriate measures against those responsible for the violation of her rights.

77. The Working Group requests the Government to bring its laws, including any equivalent of article 245 in the revised Penal Code, into conformity with the recommendations made in the present opinion and with the commitments made by Viet Nam under international human rights law.

78. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers this case to the Special Rapporteur on the situation of human rights defenders for appropriate action. The Working Group also encourages the Government to incorporate the Model Law for the Recognition and Protection of Human Rights Defenders into its domestic legislation and to ensure its implementation.²⁴

Follow-up procedure

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

80. 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.

81. 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.

²⁴ The Model Law was developed in consultation with more than 500 human rights defenders from around the world and 27 human rights experts. It is available at: www.ishr.ch/sites/default/files/documents/model_law_full_digital_updated_15june2016.pdf.

82. 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.²⁵

[Adopted on 22 November 2017]

²⁵ See Human Rights Council resolution 33/30, paras. 3 and 7.