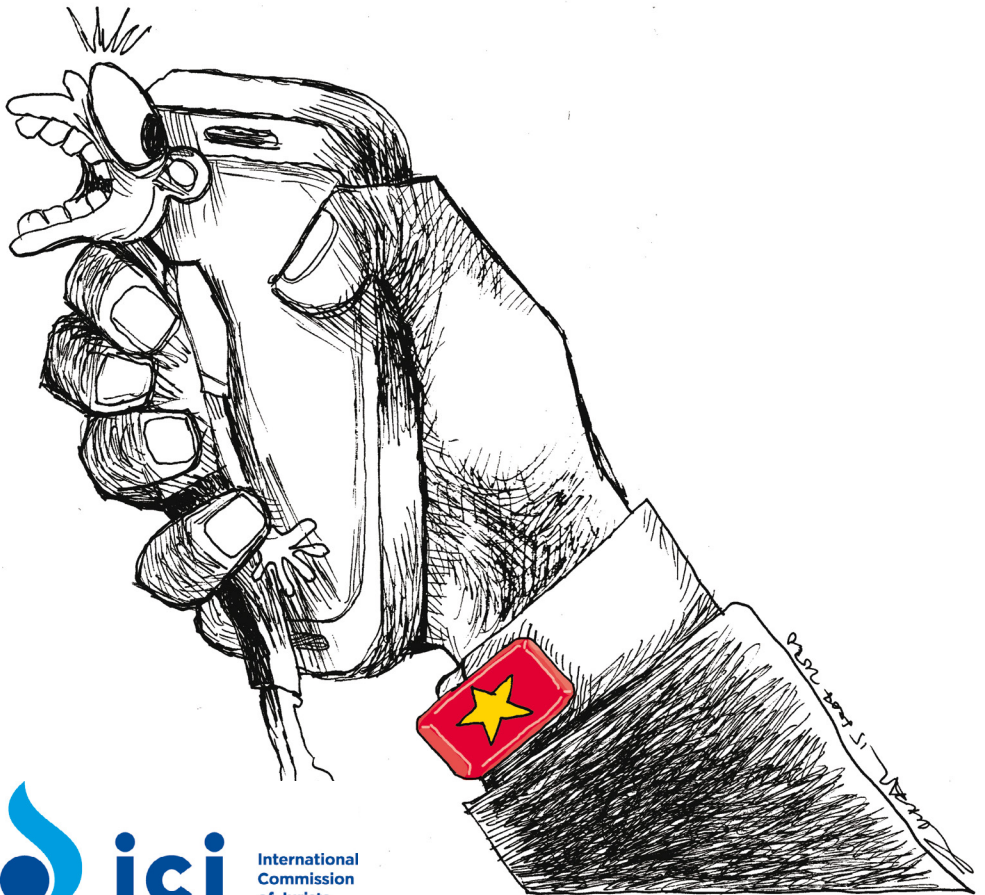


Dictating the Internet: Curtailing Free Expression and Information Online in Vietnam



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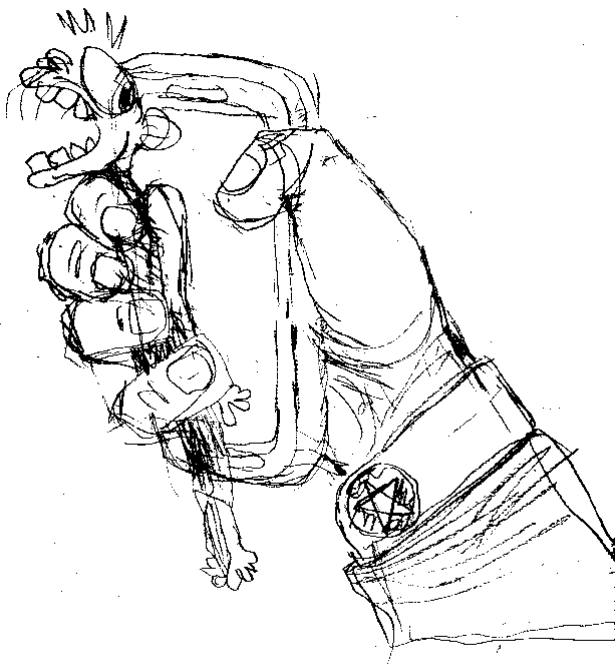
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Dictating the Internet: Curtailing Free Expression and Information Online in Vietnam



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Executive Summary

In December 2019, the International Commission of Jurists released its [report](#) entitled '*Dictating the Internet: Curtailing Free Expression, Opinion and Information Online in Southeast Asia*', which mapped out a pattern of abuse by governments across Southeast Asia, using and abusing the law to restrict freedom of expression, opinion and information of individuals online. In a regional analysis of laws and case studies across ten countries, the report traced decades-long trends of States crafting and implementing non-human rights compliant laws to control and moderate content online in violation of human rights and fundamental freedoms.

In this briefing paper, the ICJ focuses its analysis particularly on one of those countries, **Vietnam**. This paper contains an update on its deteriorating human rights environment online and tracks how the authorities have increasingly abused laws and the legal system to violate the rights to free expression, opinion and information online, and piled pressure on technological companies to comply with their demands for online censorship through the imposition of onerous rules and penalties. Within the context of the COVID-19 pandemic, expression and information online have also been disproportionately curtailed purportedly to protect public health.

This paper monitors cases which have continued to emerge in 2020 – the latest in a worsening trend of State abuse of power online – highlighting cases which reflect how infringement of the rights to freedom of expression, opinion and information online is often accompanied by violation of other rights, including the rights to liberty and security of the person, fair trial, association, assembly, security, life and health. The Dong Tam dispute and trial is highlighted as an emblematic case study.

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I. Background

Since its reunification in 1975, Vietnam has been governed by the Communist Party of Vietnam (CPV). The Vietnamese Government has for decades imposed undue and arbitrary restrictions on freedom of expression, opinion and information by effectively controlling all media, including the press, television, radio and other publications. By subjecting any independent perceived criticism or information it otherwise wishes to suppress to harsh censorship, the Government has, in multiple instances, effectively choked the flow of information of public interest to its general population.¹ In its 2020 World Press Freedom Index, press freedom monitor Reporters Without Borders placed Vietnam at 175 out of 180 countries, highlighting the dire situation of the rights to free expression, opinion and information in the country and noting violations of these rights online as well as offline.²

In recent years, efforts by State authorities to expand censorship and control of expression and information to the online sphere have become rampant and blatant, as more individuals turn to the internet and social media to access and share opinions and information amidst a State-controlled media environment. Limitations on freedom of expression are often advanced and justified on the basis of “national security”, particularly through the establishment and

¹ Recent news articles on the control of domestic media and journalists include, for example, Faras Ghani, ‘Fear and paranoia’: How Vietnam controls its media’, *Al Jazeera*, 20 May 2019, Available at: <https://www.aljazeera.com/news/2019/05/paranoia-vietnam-controls-media-190516111503764.html>; David Hutt, ‘All is well, according to Vietnam’s media’, *Asia Times*, 1 March 2019, Available at: <https://asiatimes.com/2019/03/all-is-well-according-to-vietnams-media/>

² Reporters Without Borders, ‘Vietnam: State violence v. bloggers and journalists’, Available at: <https://rsf.org/en/ranking>; <https://rsf.org/en/vietnam>; See also HRW World Report, 2020.

enforcement of overbroad criminal offences in domestic law. These laws contemplate severe penalties for the mere exercise of the rights to free expression and information. They cover such offences as “disruption of national security” or “public order”, “undermining national unity”, “abusing democratic freedoms” or “conducting propaganda against the State”.³ In addition to criminal prosecution, the police, State security forces and non-State actors said to be linked to Government authorities have allegedly carried out physical attacks, violence and other tactics of intimidation against alleged transgressors, including travel bans or house evictions.⁴

Key observations in 2019 report

In a 2019 report, *'Dictating the Internet: Curtailing Free Expression, Opinion and Information Online in Southeast Asia'* (“*Dictating the Internet*”), the ICJ mapped how repression of expression and information online in Vietnam mirrors decades-long State policy and practice of imposing similar egregious restrictions offline. Such repression has intensified in recent years through the repurposing of older

³ See ICJ, *'Dictating the Internet: Curtailing Free Expression, Opinion and Information Online in Southeast Asia'*, December 2019 (‘ICJ *Dictating the Internet* Report, 2019’), Available at: <https://www.icj.org/southeast-asia-icj-launches-report-on-increasing-restrictions-on-online-speech/>. The report looked at laws aiming to purportedly protect national security which have been abusively interpreted and implemented in not only Vietnam, but also other countries in Southeast Asia, such as Laos and Myanmar, see pp. 85 to 95. See also Amnesty International, *'Prisoners of Conscience in Viet Nam'*, 13 May 2019 (‘AI Prisoners of Conscience Report, 2019’), Available at: <https://www.amnesty.org/download/Documents/ASA4103032019ENGLISH.pdf>

⁴ For systematic documentation of multiple cases of harassment and intimidation of human rights defenders, see The 88 Project’s case database, Available at: <https://the88project.org/database/>; See also Human Rights Watch, *'2020 World Report: Vietnam Events of 2019'* (‘HRW World Report, 2020’), Available at: <https://www.hrw.org/world-report/2020/country-chapters/vietnam>

laws and imposition of more contemporary, internet-specific legal frameworks to throttle civic space online. These efforts have been enabled and supported by targeted State efforts to surveil, monitor and attack information and users online, including through a military cyber unit and national cyber-monitoring centre. Under the administration of then-President Tran Dai Quang, there was an intensified crackdown on expression and information online, which continued following his death in 2018.⁵ Amnesty International reported a spike of 97 “prisoners of conscience” in 2018 to 128 in 2019, while Human Rights Watch documented that in 2019 alone, by September, 11 individuals had been convicted for alleged expression-related offences.⁶

Prosecution of online expression has been facilitated by recent amendments to existing laws which were already non-human rights compliant. In January 2018, amendments to Vietnam’s 2015 Penal Code came into effect, retaining hefty penalties from the 1999 Penal Code for national security-related provisions which had been widely abused to curtail expression or opinions deemed critical of the regime.⁷ A newly-incorporated article 117 criminalizing the “making,

⁵ He passed away in September 2018. See Mike Ives, ‘Tran Dai Quang, Hard-Line Vietnamese President, Dies at 61’, *New York Times*, 21 September 2018, Available at: <https://www.nytimes.com/2018/09/21/obituaries/tran-dai-quang-dead.html>

⁶ ICJ *Dictating the Internet* Report, 2019, p. 89; Amnesty International uses the characterization “prisoners of conscience” to refer to persons who have not used or advocated violence but are imprisoned because of who they are (based on sexual orientation, ethnic, national or social origin, language, birth, colour, sex or economic status) or what they believe (religious, political or other conscientiously held beliefs). See Amnesty International, ‘Detention and Imprisonment’, Available at: <https://www.amnesty.org/en/what-we-do/detention/>

⁷ These include articles 116, 118 and 331 of the new Penal Code, which criminalize the “sabotaging of national solidarity”, “disruption of security” and “abusing of democratic freedoms to infringe upon the interests of the State”. The AI Prisoners of Conscience Report highlighted that the implementation of amendments to the Penal Code in 2018 had resulted in increased prosecutions of online expression under the law. See ICJ *Dictating the Internet* Report, 2019, pp. 89, 90.

storing, distributing or disseminating of materials” that “oppose the State” also came into force, widening the remit of the law to sharing of information online, including on social media platforms.⁸ Article 117 further imposed a penalty of up to 20 years’ imprisonment, one of the most severe punishments provided for under the Penal Code.⁹ As will be seen in cases highlighted in this report, since its introduction, this provision has been increasingly abused by Vietnamese authorities to target political expression on online platforms. The coming into force of Vietnam’s Law on Cybersecurity in January 2019 raised concerns of a further intensification of surveillance and censorship of expression and information online, as the law stipulated penalties for companies providing services online which do not comply with the official limitations on permissible content online.¹⁰

Emergent trends in 2020

Following the release of its 2019 report, the ICJ has observed the continuation of a deteriorating trend of individuals being investigated, charged, prosecuted and imprisoned merely for expressing their opinions or for sharing information online deemed impermissible by the authorities. In the lead-up to the CPV’s 13th Party Congress scheduled for January 2021, the State’s crackdown on voices of critical dissent, particularly online, has worsened. By December 2020, multiple arrests of independent journalists, bloggers and users and moderators of Facebook accounts or groups posting information deemed critical of the regime have been reported.¹¹ The Vietnamese non-governmental organization Defend the Defenders estimated that, as of 30 September

⁸ ICJ *Dictating the Internet* Report, 2019, pp. 88 to 90.

⁹ *Ibid.*

¹⁰ ICJ *Dictating the Internet* Report, 2019, pp. 127 to 132.

¹¹ ICJ communications with partners. See cases highlighted in this paper.

2020, at least 258 individuals were in prison for human rights advocacy and activism, expressing views critical of the government or for otherwise exercising their rights to freedom of expression, association, peaceful assembly and religion and belief.¹²

In addition, two emerging concerns require specific attention. First, concerted efforts by the State to constrict civic space online has increasingly involved both pressure on and effective co-opting of technological (“tech”) companies and online networks in implementing the Government’s vision for censorship and content control online. The social media company Facebook, in particular, has allowed State censorship on its platform to retain its consumer base, in line with its profit-driven mode of operation. In 2020, Decree No. 15/2020/ND-CP also came into force, imposing further obligations on social networking sites to comply with State regulations on permitted expression and information online.

Secondly, amidst the COVID-19 pandemic, the State has invoked public health as a justification to further restrict freedom of expression and access to information online. While extraordinary and effective measures are required to combat an unprecedented health crisis and protect the right to health, it is apparent that the Government has imposed limitations on online expression and information that are unnecessary and disproportionate, in contravention of international human rights law.

¹² These included individuals in pre-trial detention and 230 individuals convicted of apparently politically motivated charges. Defend the Defenders adopts Amnesty International’s characterization of “prisoners of conscience”. Defend the Defenders, ‘Defend the Defenders’ Latest Statistics: Vietnam Holds 258 Prisoners of Conscience’, 2 October 2020, Available at: <https://www.vietnamhumanrightsdefenders.net/2020/10/02/defend-the-defenders-latest-statistics-vietnam-holds-258-prisoners-of-conscience/>

II. International law and standards

International human rights law and standards anchor the analysis in this report of efforts by the Vietnamese State – legislative, executive or otherwise – to monitor, delimit and censor online content to the detriment of human rights both online and offline. This section sets out key international legal standards governing the rights to freedom of expression, opinion, information, privacy, health, association and participation, amongst others, to provide the starting point for analysis.¹³

i. Rights to freedom of expression, opinion and information

Article 19 of International Covenant on Civil and Political Rights (ICCPR) – to which Vietnam is a State party – guarantees the right of each individual to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas through any media and regardless of frontiers. Article 19 of the ICCPR specifically provides that:

"1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of

¹³ See also ICJ *Dictating the Internet* Report, 2019, section II.

frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.”

The UN Human Rights Committee, the body tasked with interpreting and supervising the implementation of the ICCPR, has clarified that the rights to freedom of expression and opinion form the “foundation” of a free society in ensuring the “transparency and accountability” crucial to ensure the promotion and protection of many other rights.¹⁴ Towards this end, States must protect and promote the freedom to engage in “political discourse, commentary on public affairs, discussion of human rights, journalism and religious discourse”, including through non-verbal means and “electronic and internet-based modes of expression”.¹⁵ The Committee has further provided guidance that, within today’s context of a “global network” established through “internet and mobile based electronic information dissemination systems”, States should take steps to protect the crucial function of independent media online as well as offline to ensure “free communication of information and ideas...

¹⁴ UN Human Rights Committee, ‘General Comment No. 34’, 12 September 2011, CCPR/C/GC/34 (‘CCPR/C/GC/34’), paras 2, 3.

¹⁵ CCPR/C/GC/34, para 11.

between citizens, candidates and elected representatives” and to “inform public opinion”.¹⁶

Both treaty and non- treaty-based standards have affirmed that international law and standards apply online as they do offline. In July 2018, the UN Human Rights Council adopted by consensus a Resolution affirming that “the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one’s choice, in accordance with articles 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights”.¹⁷ In June 2011, a Joint Declaration on Freedom of Expression and the Internet issued by the former UN Special Rapporteur on freedom of expression and three rapporteurs with similar mandates from Africa, the Americas and Europe, affirmed that the right to freedom of expression applies to the internet, and that restrictions are “only acceptable if they comply with established international standards, including that they are provided for by law, and that they are necessary to protect an interest which is recognized under international law.”¹⁸

¹⁶ CCPR/C/GC/34, paras 13, 15, 16.

¹⁷ UN Human Rights Council, ‘The promotion, protection and enjoyment of human rights on the Internet’, 4 July 2018, UN Doc No. A/HRC/38/L.10/Rev.1, p3.

¹⁸ United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, ‘Joint Declaration on Freedom of Expression and the Internet’, 1 June 2011 (‘Joint Declaration on Freedom of Expression and the Internet’), para 1a. Available at: <https://www.osce.org/fom/78309?download=true>

Principles of legality, legitimacy, necessity, proportionality

The test provided for under article 19(3) of the ICCPR therefore applies to online as well as offline expression. Article 19(3) provides that rights protected under article 19 may only be “subject to certain restrictions” as provided by law and necessary for a legitimate purpose such as ensuring respect of the rights or reputations of others, or protecting national security, public order or public health or morals. These principles of legality and legitimacy dictate that laws imposing restrictions on the rights to free expression and opinion must be promulgated with enough precision to enable individuals to adjust their conduct accordingly; provide guidance to those charged with implementing the laws to ensure they can clearly ascertain which types of expression fall under restrictions and which do not and not allow for “unfettered discretion for the restriction of freedom of expression on persons charged with its execution”; and do not contravene international human rights law or standards.¹⁹ Any restriction must be applied without discrimination on any status basis.

Any restriction must also, in the express terms of article 19(3), meet the principles of necessity and proportionality, even where the restriction is pursued for a legitimate purpose. The UN Human Rights Committee has clarified that the test of necessity entails that limitations must not be imposed where protection can be provided through other measures that are less restrictive, while the test of proportionality ensures that limitations are proportionate to their function, not be overboard and are the “least intrusive instrument amongst others to achieve their protective function”.²⁰

¹⁹ CCPR/C/GC/34, paras 25, 26.

²⁰ CCPR/C/GC/34, paras 33 to 35.

The State's obligation to respect, protect and fulfil the rights to free expression, opinion and information online and offline must be upheld by all branches of the State – executive, legislative and judicial – and other public or governmental bodies. It also extends to protection for individuals from "any acts by private persons or entities that would impair the enjoyment of the freedoms ... to the extent (they) are amenable to application between private persons or entities".²¹ This obligation further entails that these rights are protected under domestic law, including provision for remedies when the rights are violated.²² In this respect, "harassment, intimidation or stigmatization of a person, including arrest, detention, trial or imprisonment" solely for the exercise of free expression rights amounts to a violation and "any form of effort to coerce the holding or not holding of any opinion" is prohibited under the ICCPR.²³

Obligations to protect that may restrict expression and opinion

Article 20 of the ICCPR expressly provides for permitted restrictions on the rights under article 19 where States are not only allowed, but have obligations, to enforce limitations. Article 20 specifically provides that:

"1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

²¹ CCPR/C/GC/34, para 7.

²² CCPR/C/GC/34, para 8.

²³ CCPR/C/GC/34, paras 9, 10.

Articles 19 and 20 of the ICCPR, however, are “compatible with and complement each other” and limitations provided for under article 20 must comply with article 19(3) and be justified “in strict conformity” with article 19.²⁴ Legal prohibitions detailed under article 20 must therefore be implemented in strict compliance with the principles of legality, legitimacy, necessity and proportionality. In a report released in October 2019 focusing on regulation of hate speech online, the former UN Special Rapporteur on freedom of expression reemphasized that, in the online sphere as offline, domestic laws to combat hate speech or incitement to violence must adhere to the “requirements of legality, necessity and proportionality, and legitimacy” and to “robust public participation”, taking guidance from articles 19 and 20 of the ICCPR, along with the International Convention on the Elimination of All Forms of Racial Discrimination and the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.²⁵

ii. Right to privacy

Article 12 of the UDHR and article 17 of the ICCPR protect the right of every individual against arbitrary or unlawful interference with his or her privacy.²⁶ In a resolution on “The right to privacy in the digital age”, the UN General Assembly

²⁴ CCPR/C/GC/34, paras 50, 52.

²⁵ Report of the Special Rapporteur on the promotion and protection of the freedom of opinion and expression, A/74/486, 9 October 2019 (‘A/74/486’), para 57(b).

²⁶ Article 17 of the ICCPR reads “1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks”.

in 2013 recognized the right as “one of the foundations of a democratic society”, and a pre-requisite to the free and independent exercise of the rights to expression and opinion.²⁷ The resolution also noted that technological advancement had expanded the capacity of States, non-State actors and corporations to collate, surveil and intercept data in ways which violated the right to privacy amongst other rights, and affirmed that States were obliged under international human rights law to prevent these violations committed in the context of digital communications.²⁸

The UN Human Rights Committee and Human Rights Council have both affirmed that the principles of legality, legitimacy, necessity and proportionality apply to the right to privacy in the same manner as they do to freedom of expression and other fundamental freedoms. In September 2013, the *Necessary and Proportionate International Principles on the Application of Human Rights to Communications Surveillance* were launched at the UN Human Rights Council, reaffirming that the principles of legality, legitimacy, necessity and proportionality were equally relevant and enforceable online as well as offline, particularly with regard to communications surveillance technologies and techniques.²⁹ These principles, developed through broad consultations between privacy, security, human rights and digital rights experts across the

²⁷ UN General Assembly, ‘The right to privacy in the digital age’, A/RES/68/167 (‘A/RES/68/167’), 18 December 2013, Available at: <https://undocs.org/A/RES/68/167>

²⁸ A/RES/68/167.

²⁹ Necessary and Proportionate International Principles on the Application of Human Rights to Communications Surveillance, May 2014, Available at: <https://necessaryandproportionate.org/principles>; The ICJ is also a signatory to these Principles. In his 2014 report following on from resolution 68/167, the UN Office of the High Commissioner for Human Rights referred to the Necessary and Proportionate Principles, reiterating that the “overarching principles of legality, necessity and proportionality” apply to limitations on the right to privacy online. See A/HRC/27/37, para 23.

world, were adopted by more than 400 organizations globally. A final version was adopted in May 2014.

iii. Rights to freedom of association, peaceful assembly and political participation

The rights to freedom of association, peaceful assembly and political participation protected respectively under articles 21, 22 and 25 of the ICCPR are also engaged in online expression, communications and information-sharing. The ICCPR provides that restrictions to be placed on these rights must also comply with the principles of legality, legitimacy, necessity and proportionality, in expressly providing that:

"Article 21 – The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the 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.

Article 22 –

1. Everyone shall have the right to freedom of association with others ...

2. 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.

Article 25 – Every citizen shall have the right and the opportunity, without ... unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives.”

The same principle of non-discrimination applies to these rights, as described above.

The rights to free expression, opinion, information and privacy often concurrently engage the rights to peaceful assembly, freedom of association and political participation within the context of communications online. In September 2020, the UN Human Rights Committee adopted General Comment No. 37 on the right to peaceful assembly under article 21, which observed the impacts of surveillance technologies on these rights equally, and provided guidance that the tests for restrictions on freedom of expression should underlie restrictions on the operation of information dissemination systems which enable the free exercise of association and assembly rights online:

“(G)iven that emerging communications technologies offer the opportunity to assemble either wholly or partly online and often play an integral role in organizing, participating in and monitoring physical gatherings, interference with such communications can impede assemblies. While surveillance technologies can be used to detect threats of violence and thus to protect the public, they can also infringe on the right to privacy and other rights of participants and bystanders and have a chilling effect. Moreover, there is increased private ownership and other forms of control of publicly accessible spaces and communication platforms. Considerations such as these need

to inform a contemporary understanding of the legal framework that article 21 requires. ...

Many associated activities happen online or otherwise rely upon digital services. Such activities are also protected under article 21. States parties must not, for example, block or hinder Internet connectivity in relation to peaceful assemblies. The same applies to geotargeted or technology-specific interference with connectivity or access to content. States should ensure that the activities of Internet service providers and intermediaries do not unduly restrict assemblies or the privacy of assembly participants. Any restrictions on the operation of information dissemination systems must conform with the tests for restrictions on freedom of expression.”³⁰

Human rights defenders

The UN Declaration on Human Rights Defenders provides for particular protections for human rights defenders, affirming that States must put in place legislative, administrative and other measures to ensure protection of their rights to association, assembly and political participation, along with their expression and privacy rights, not only offline but also online.³¹

³⁰ UN Human Rights Committee, 'General Comment No. 37 on Article 21: the right to peaceful assembly', 17 September 2020 ('CCPR/C/GC/37'), paras 10, 34, Available at:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11

³¹ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, A/RES/53/144, December 1998, Available at:

<https://www.ohchr.org/Documents/Issues/Defenders/Declaration/declaration.pdf>

iv. Right to health

Access to information is an element of the right to health as protected under the International Covenant on Economic, Social and Cultural Rights (ICESCR) – to which Vietnam is a State party – and entails health-related information accessibility to all without discrimination. Within the context of the COVID-19 pandemic, articles 12(1) and 12(2)(c) to (d) of the ICESCR provide a framework of legal obligations which Vietnam, as a State party, is bound to respect:

"1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: ...

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness."

The UN Committee on Economic, Social and Cultural Rights (CESCR) – the body mandated to interpret and provide guidance on article 12 – has confirmed that accessibility of health facilities, goods and services to all individuals without discrimination is a crucial element of the article 12 right, including access to information as an "integral component of the right to health".³² This includes "the right to seek, receive

³² UN Committee on Economic, Social and Cultural Rights, 'CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)', 11 August 2000, UN Doc. No. E/C.12/2000/4 ('GC No. 14'), paras

and impart information and ideas concerning health issues”, without infringing upon the right to maintain privacy and confidentiality of health-related data.³³

Protection of the right to health therefore obliges Vietnam as a State party to ensure non-discriminatory and universal access to health-related information; allow people to seek, receive and share ideas concerning health issues; abstain from “censoring, withholding or intentionally misrepresenting” health-related information; and refrain from obstructing people’s participation in health-related matters.³⁴ These obligations assume even greater importance in the midst of a public health emergency. Thus the ESCR Committee has indicated that COVID-19-related information must be provided by State authorities on a “regular basis, in an accessible format and in all local and indigenous languages” as a measure to combat false information on the virus and to “reduce the risk of transmission of the virus.”³⁵ The State is also obliged to ensure affordable internet services, necessary technology for effective information dissemination, and refrain from shutting down or otherwise limiting access to the internet.

The former UN Special Rapporteur on freedom of expression further highlighted that, amidst the context of COVID-19, the State must: (i) ensure access to information held by

3, 11, 21 – 23, 34 – 37, 44, Available at: <https://www.refworld.org/pdfid/4538838d0.pdf>

³³ GC No. 14, para 12(b).

³⁴ GC No. 14, paras 3, 12(b), 34, 35, 44, 50; See also ICJ, ‘Living Like People Who Die Slowly: The Need for Right to Health Compliant COVID-19 Responses’, September 2020 (‘ICJ Global COVID-19 report 2020’), pp. 24 to 25, Available at: <https://www.icj.org/wp-content/uploads/2020/09/Universal-Global-Health-COVID-19-Publications-Reports-Thematic-Reports-2020-ENG.pdf>

³⁵ UN Committee on Economic, Social and Cultural Rights, ‘Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights’, 17 April 2020, UN Doc. No. E/C.12/2020/1, para 18, Available at: <https://undocs.org/E/C.12/2020/1>; See also ICJ Global COVID-19 report 2020, pp.104 to 105.

authorities relating to the crisis, including an obligation to “provide information that is as accurate as possible” and “clear and honest guidance” to enable not only the State to understand the concerns of the public but also individuals to ascertain how to manage their fears – limiting such information-sharing is detrimental for this feedback process; (ii) maintain access to the internet for all; (iii) promote and protect independent media so that the public can adequately exercise their right to information to “take appropriate steps to protect themselves and their communities”; (iv) control the spread of false information on the virus online, without infringing on rights protected under article 19 of the ICCPR; and (v) ensure health surveillance to manage the crisis protects the right to privacy.³⁶

The ICJ considers that, given human rights concerns regarding prosecution and attribution of criminal intent or liability to COVID-19 transmission or exposure, and the undermining of public health outcomes by deterring individuals from seeking testing or health services due to fear and stigma, States should refrain from criminalizing COVID-19 transmission or exposure.³⁷ Rather, States like Vietnam should concentrate efforts on enacting effective, evidence- and rights-based interventions in their COVID-19 responses, reverting to more coercive measures only as a last resort, and coupled with due process safeguards to ensure compliance with international law.³⁸

³⁶ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, ‘Disease pandemics and the freedom of opinion and expression’, 23 April 2020, UN Doc. No. A/HRC/44/49 (‘A/HRC/44/49’) available at: <https://undocs.org/A/HRC/44/49>.

³⁷ Nina Sun and Livio Zilli, ‘COVID-19 Symposium: The Use of Criminal Sanctions in COVID-19 Responses – Exposure and Transmission, Part I’, *Opinio Juris*, Available at: <http://opiniojuris.org/2020/04/03/covid-19-symposium-the-use-of-criminal-sanctions-in-covid-19-responses-exposure-and-transmission-part-i/>

³⁸ Nina Sun and Livio Zilli, ‘COVID-19 Symposium: The Use of Criminal Sanctions in COVID-19 Responses – Enforcement of Public Health Measures,

As will be shown below in this paper, many of the measures taken by the Vietnamese authorities to prevent, prohibit and prosecute the alleged “spread of false information” online relating to the COVID-19 virus also arbitrarily and unduly interfere with the enjoyment of the rights protected under article 19 of the ICCPR by imposing hefty fines on individuals for disseminating such information, and subjecting others to criminal investigation. The principles of non-discrimination, legality, legitimacy, necessity and proportionality therefore equally apply within this context not only to protect free expression and privacy, but also the right to health.³⁹

Vietnam’s extension of measures to clamp down on free expression and information online under the guise of protecting health and security is reflective of worrying regional and global trends of authoritarian State responses to the pandemic. In June 2020, the UN High Commissioner for Human Rights, Michelle Bachelet, expressed alarm at measures taken by multiple countries in Asia to tighten censorship of expression amidst the pandemic and called for measures to meet the principles of legality, necessity and proportionality in line with international law – highlighting Vietnam as a case of concern, along with eleven other countries.⁴⁰ Former UN Special Rapporteur on freedom of

Part II’, *Opinio Juris*, Available at: <http://opiniojuris.org/2020/04/03/covid-19-symposium-the-use-of-criminal-sanctions-in-covid-19-responses-enforcement-of-public-health-measures-part-ii/>

³⁹ See, for example, CCPR/C/GC/34; CCPR/C/GC/37; UN Human Rights Committee, ‘General Comment No. 29: Article 4: Derogations during a State of Emergency’, 31 August 2001, CCPR/C/21/Rev.1/Add.11; UN Human Rights Committee, ‘CCPR General Comment No. 27: Article 12 (Freedom of Movement)’, 2 November 1999, CCPR/C/21/Rev.1/Add.9; 1985 Siracusa Principles on the Limitations and Derogation Provisions in the International Covenant on Civil and Political Rights, Available at: <https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf>; See also ICJ Global COVID-19 report 2020, pp. 18 to 20.

⁴⁰ OHCHR, ‘Asia: Bachelet alarmed by clampdown on freedom of expression during COVID-19’, 3 June 2020, Available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25920&LangID=E>

expression, David Kaye, similarly warned that there could be “a parallel epidemic of authoritarian and repressive measures following close (behind) a health epidemic”, particularly in “environments of censorship (and) repression of dissent” – such as Vietnam.⁴¹ He reiterated the need for government measures to comply with the principles of legality, necessity and proportionality, which should “not simply be discarded” in the midst of a health emergency and which in fact “apply with great force because they also advance public health policies.”⁴²

v. UN Guiding Principles on Business and Human Rights

The UN Guiding Principles on Business and Human Rights (‘UNGPs’) sets out guidelines for States and corporations – including tech companies – to protect against, prevent and remedy human rights violations committed in the context of business operations.⁴³ A framework for business and human rights which rests on three pillars underlies these principles: (i) the State’s duty to protect against human rights violations; (ii) the corporate responsibility to respect human rights; and (iii) greater access to effective remedy – judicial or non-judicial – by victims of violations.⁴⁴

⁴¹ A/HRC/44/49, para 4.

⁴² A/HRC/44/49, para 16.

⁴³ These principles built on a framework for business and human rights proposed by the Special Representative to Secretary-General, John Ruggie, and approved by the UN Human Rights Council in 2008.

⁴⁴ OHCHR, UN Guiding Principles on Business and Human Rights, HR/PUB/11/04, 2011 (‘UNGPs’), Available at: https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf

The UNGPs clarify that States retain a primary duty to bring into effect appropriate and effective laws, policies and regulations to ensure protection against rights violations online, even with respect to the exercise of rights on platforms regulated entirely by private tech companies. This duty also extends to taking necessary and appropriate measures to ensure that where violations occur, victims have access to effective and adequate remedy through judicial mechanisms or other administrative, legislative or regulatory means. While tech companies have obligations to protect human rights in the course of their business operations and provide effective and adequate remedy for any violations, States are obliged to exercise an overarching oversight and regulatory role to ensure that companies comply with these obligations.

With respect to the duties of business enterprises, the UNGPs provide that all companies, including tech companies, have a responsibility to “respect human rights”, which “exists independently of States’ abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations”.⁴⁵ This includes obligations to “avoid infringing on human rights”, including the rights to freedom of expression and information and other rights including to association and privacy online; to “avoid causing or contributing to adverse human rights impacts through their own activities”; and to “take adequate measures” to “prevent, mitigate or remediate” such impacts, including putting in place “policies and due diligence processes” to ensure rights are respected.⁴⁶

⁴⁵ UNGPs, pp. 13 to 18.

⁴⁶ *Ibid.*

III. Role of online platforms and tech companies in shrinking civic space online

In Vietnam, where traditional media is tightly controlled and censored in line with Party narratives, individuals have increasingly relied on the internet – particularly social media platforms – to exercise their rights to expression and information. While access to selected international news websites – including the *BBC*, *Voice of Asia* and *Radio Free Asia*, independent blogging platforms, and independent information-sharing websites – such as *Dan Luan* and *Luat Khoa* – have been blocked or otherwise interrupted by State authorities on various internet service providers (ISPs), information flows on foreign-operated online platforms which are constant, dynamic and subject to foreign content moderation have proven harder to be circumscribed by party doctrine or regulations.⁴⁷ Popular social media platforms such as Facebook and YouTube have been used by activists, political dissidents and human rights defenders to conduct advocacy, disseminate independent news, and share views of diverse matters of public interest and concern, including at times those critical of the government. Notably, Vietnamese-language internet traffic and activity in the Deep and Dark Web has also reportedly increased, with intelligence company

⁴⁷ Dr. Le Hong Hiep, Fellow at ISEAS, notes that “(i)nternational social media platforms such as Facebook and YouTube... appear to be likely targets of Vietnamese censors. This is all the more plausible since many political activists and anti-government groups turn to popular social media platforms to air their views after their websites or blogs are blacklisted by the Vietnamese government. Indeed, in 2008-2010, when Facebook was still new to most Vietnamese users, it was blocked—but only temporarily. As of September 2019, most international social media platforms, including Facebook, YouTube, Twitter, Pinterest, and Instagram, are freely accessible in Vietnam.” See Le Hong Hiep, ‘The Political Economy of Social Media in Vietnam’, *ISEAS – Yusof Ishak Institute*, 27 September 2019 (‘Le Hong Hiep, *ISEAS*’) Available at: https://www.iseas.edu.sg/images/pdf/ISEAS_Perspective_2019_77.pdf

IntSights noting underground forums operating with daily activity of 10,000 users or more as of late 2019.⁴⁸

A rise in the popularity of use of online platforms by individuals has been paralleled by government efforts to arbitrarily interfere with and restrict civic space online. The authorities, including legislators, the police and prosecutors, have increasingly persecuted individual users for political content on social media platforms, while piling more pressure on companies and networks to remove what is deemed impermissible content off their platforms – either through prescribing penalties for non-compliance under problematic legal frameworks or employing other non-legal methods of corporate persuasion. These measures are supported by intensified efforts not only by the Ministry of Information and Communications, but also the State’s armed forces to surveil and police user activity and content online, in violation of not only the rights to free expression and information, but also privacy.

i. Persecution of individual users of online platforms

In an attempt to gain greater control over information shared online and to silence perceived dissenting voices, the authorities have cracked down on individual users of online platforms. In 2017, former President Tran Dai Quang⁴⁹ called for harsher penalties against “hostile forces” using the

⁴⁸ Jason Thomas, ‘Cyber warfare in Vietnam’, *The ASEAN Post*, 4 October 2019, Available at: <https://theaseanpost.com/article/cyber-warfare-vietnam>; Jai Vijayan, ‘Vietnam Rises as Cyberthreat’, *Dark Reading*, 6 May 2019, Available at: <https://www.darkreading.com/attacks-breaches/vietnam-rises-as-cyberthreat-/d/d-id/1334890>

⁴⁹ Notably, Tran Dai Quang was Minister of Public Security, leading Vietnam’s security and intelligence body prior to the presidency.

internet to allegedly coordinate campaigns which “undermined the prestige of the leaders of the party and the state”, and emphasized that the Government had to focus on controlling information on online networks “to prevent bad and dangerous content”.⁵⁰ Following the appointment of CPV chief Nguyen Phu Trong to the presidency after Quang’s death, the crackdown on disfavoured expression online has continued.⁵¹

In the *Dictating the Internet* report, the ICJ noted the cases of 15 individuals within the last four months of 2019 alone who had been arrested, charged and convicted for disseminating information on Facebook deemed critical of the government under articles 117 and article 331 of the 2015 Penal Code for alleged “making, storing, or disseminating information against the State” or “abuse of democratic freedoms to infringe upon the interests of the State”.⁵² Since then, from January to December 2020, the ICJ has monitored more than 30 similar cases⁵³ of legal harassment against individuals for merely exercising their rights to expression

⁵⁰ Mi Nguyen, Matthew Tostevin, ‘Vietnam president demands tougher control of internet content’, *Disruptive.Asia*, 21 August 2017, Available at: <https://disruptive.asia/vietnam-president-control-internet/>

⁵¹ TIME quoted activist musician Mai Khoi stating, “Before he was the president he was already the most powerful man in Vietnam and under his leadership many people were sent to jail ... How can I think now he will give us more freedom?” See Charlie Campbell, ‘Vietnam Begins Life Under New Strongman President Nguyen Phu Trong’, *TIME*, 24 October 2018, Available at: <https://time.com/5432855/nguyen-phu-trong-vietnam-president/>

⁵² ICJ *Dictating the Internet* Report, 2019, pp. 91 to 94, documenting the cases of Le Van Sinh, Nguyen Van Cong Em, Nguyen Quoc Duc Vuong, Nguyen Van Phuoc, Pham Xuan Hao, Nguyen Nang Tinh and Nguyen Ngoc Anh, and noting the cases of Nguyen Chi Vung, Pham Van Diep, Vo Hoang Trung, Doan Viet Hoan, Ngo Xuan Thanh, Nguyen Dinh Khue, Huynh Thi To Nga and Huynh Minh Tam.

⁵³ Alongwith the cases named in this report, the ICJ continues to monitor the cases of Dinh Van Phu, arrested in January; Vu Phong arrested in April; Nguyen Thi Cam Thuy and Vu Tien Chi arrested in June; Nguyen Van Nghiem, sentenced to six years’ imprisonment in June for alleged violation of article 117 of 2015 Penal Code; and Truong Duy Nhat, sentenced by the People’s Court of Hanoi to ten years’ imprisonment in March, in suspected retaliation for his online journalism.

and information on online platforms, particularly social media networks. Amidst the COVID-19 pandemic, individuals have also been targeted under COVID-19-related regulations, along with national security-related criminal provisions. (see *Section III* below)

The Government's widespread practice of overbroadly invoking "national security" as a justification to target and silence activists and human rights defenders is evident from several key cases. In April 2020, activist **Dinh Thi Thu Thuy** was arrested in Hau Giang province for alleged violation of article 117 of the 2015 Penal Code. State media reported that she had "since 2018, opened many Facebook accounts to edit, post, and shared hundreds of materials that propagandize, distort, and smear the honor of the leaders of the Party and State; provoking oppositional thoughts; spreading false news that cause confusion for people in order to oppose the Communist Party of Vietnam and the State of the Socialist Republic of Vietnam".⁵⁴ As of August 2020, she had been held incommunicado for four months,⁵⁵ after which her pre-trial detention was extended for another four months for the police investigation, in apparent violation of her right to liberty as protected under article 9 of the ICCPR.⁵⁶ Thuy had participated in peaceful demonstrations against the Government and often posted information critical of the regime on her Facebook page.

⁵⁴ HRW, 19 June 2020; An Hai, 'Vietnam Blogger Crackdown Continues with Harsh Supreme Court Ruling, More Arrests', VOA, 22 April 2020 ('VOA, 22 April 2020') Available at: <https://www.voanews.com/press-freedom/vietnam-blogger-crackdown-continues-harsh-supreme-court-ruling-more-arrests>

⁵⁵ A period of incommunicado detention for approximately four months during investigation has been commonly reported with respect to cases of human rights defenders. ICJ communications with partners.

⁵⁶ Defend the Defenders, 'Hau Giang Police Extend Investigation Period against Local Activist Dinh Thi Thu Thuy', 19 August 2020, Available at: <https://www.vietnamhumanrightsdefenders.net/2020/08/19/hau-giang-police-extend-investigation-period-against-local-activist-dinh-thi-thu-thuy/>

Also in April, the People’s Court of Nghe An Province sentenced teacher **Nguyen Nang Tinh** to 11 years’ imprisonment under article 117 of the 2015 Penal Code, after he was arrested for posts he made on Facebook deemed critical of the regime, including a video of him teaching students a popular song “Give back to the people.”⁵⁷ In the same month, the Court also sentenced **Phan Cong Hai** to five years’ imprisonment under article 117 of the 2015 Penal Code for Facebook posts deemed critical of the regime, following a two-hour trial during which he allegedly had no legal representation – in apparent violation of his right to a fair trial protected under article 14 of the ICCPR.⁵⁸ In Can Tho province, **Chung Hoang Chuong** was sentenced to one-and-a-half years’ imprisonment by the People’s Court of Ninh Kieu District for alleged “abuse of democratic freedoms” under article 331 of the 2015 Penal Code, in connection with Facebook posts that had alleged police brutality in a land rights dispute (see *vi. Case of Dong Tam dispute* below), and criticized the State in its handling of the Formosa environmental disaster.⁵⁹

Articles 117 and 331 of the 2015 Penal Code have also been abused in attempts to censor journalists and political commentators. Between May and June 2020, journalists **Pham Chi Thanh**, **Nguyen Tuong Thuy** and **Le Huu Minh**

⁵⁷ The 88 Project, ‘Nguyen Nang Tinh’, Available at: <https://the88project.org/profile/376/nguyen-nang-tinh/>; An Hai, ‘Vietnam Blogger Crackdown Continues with Harsh Supreme Court Ruling, More Arrests’, VOA, 22 April 2020 (‘VOA, 22 April 2020’) Available at: <https://www.voanews.com/press-freedom/vietnam-blogger-crackdown-continues-harsh-supreme-court-ruling-more-arrests>

⁵⁸ The 88 Project, ‘Phan Cong Hai’, Available at: <https://the88project.org/profile/384/phan-cong-hai/>

⁵⁹ The 88 Project, ‘Chung Hoang Chuong’, Available at: <https://the88project.org/profile/465/chung-hoang-chuong/>; On the Formosa environmental disaster, see Doan Trang, ‘Timeline: The Formosa Environmental Disaster’, *The Vietnamese*, 8 November 2017, Available at: <https://www.thevietnamese.org/2017/11/timeline-the-formosa-environmental-disaster/>

Tuan – co-founder, vice-president and member of the **Independent Journalists Association of Vietnam (IJAVN)** respectively – were arrested for alleged violation of article 117 of the 2015 Penal Code in relation to journalistic articles which they had published online.⁶⁰ Their arrests came after **Pham Chi Dung**, chairperson of IJAVN, was arrested in November 2019, also for alleged violation of article 117⁶¹ and **Le Anh Hung**, IJAVN member, was arrested in July 2018 for alleged “abuse of democratic freedoms” in violation of article 331 of the 2015 Penal Code.⁶² As of early December 2020, all remain in pre-trial detention awaiting trial, including Le Anh Hung who has been forcibly committed to a psychiatric facility during which time he has alleged mistreatment by hospital staff.⁶³ The ICJ has also been informed that as of 1 December 2020, Pham Chi Thanh had been similarly

⁶⁰ The 88 Project, ‘Pham Chi Thanh’, Available at: <https://the88project.org/profile/486/pham-chi-thanh/>; The 88 Project, ‘Nguyen Tuong Thuy’, Available at: <https://the88project.org/profile/294/nguyen-tuong-thuy/>; The 88 Project, ‘Le Huu Minh Tuan’, Available at: <https://the88project.org/profile/490/le-huu-minh-tuan/>

⁶¹ On 30 June, the ICJ and five other organizations sent open letters to the Prime Minister of Vietnam and the European Union (EU) calling for the immediate and unconditional release of human rights defenders, Pham Chi Dung, Nguyen Tuong Thuy and Le Huu Minh Tuan. See ICJ, ‘Vietnam: Authorities must release Dr. Phạm Chí Dũng, Nguyễn Tường Thụy and Lê Hữu Minh Tuấn and cease harassment of journalists’, 30 June 2020 (‘ICJ et. al, 30 June 2020’) Available at: <https://www.icj.org/vietnam-authorities-must-release-dr-pham-chi-dung-nguyen-tuong-thuy-and-le-huu-minh-tuan-and-cease-harassment-of-journalists/>

⁶² The 88 Project, ‘Le Anh Hung’, Available at: <https://the88project.org/profile/157/le-anh-hung/>

⁶³ ICJ communications with partners; Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Working Group on Arbitrary Detention; the Special Rapporteur in the field of cultural rights; 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, Joint Allegation Letter, AL VNM 3/2020, 17 September 2020 (‘JAL VNM 3/2020’), Available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?qId=25542>

committed to a mental health facility.⁶⁴ The **Liberal Publishing House**, an independent publisher, and its members have also faced harassment by State authorities.⁶⁵ In February 2019, soon after it was launched, its Facebook page was subjected to apparently State-backed cyber-attacks which led to its account being closed down, and in November 2019 its website reported cyber-attacks.⁶⁶ On 17 September 2020, five Special Procedures mandate holders of the UN Human Rights Council sent a Joint Letter to the Government, part of which reads:

"We express our grave concern relating to the reported criminalisation, harassment and intimidation of journalists, workers or supporters of the Independent Journalists Association of Viet Nam (IJAVN) and the Liberal Publishing House (LPH), as well as at the intimidation of their family members. These individuals appear to have been targeted solely for having exercised their right to freedom of expression and association, and defense of human rights. We express alarm at the continued use of lengthy pre-trial

⁶⁴ ICJ communications with partners.

⁶⁵ Liberal Publishing House (LPH) was awarded on 3 June the 2020 Prix Voltaire Award by the International Publishers' Association. In the morning of 3 June, two Ministry of Public Security officers met with co-founder Pham Doan Trang's 80-year-old mother, questioned her on Trang's whereabouts, and retrieved from her a statement that Trang had "produced and distributed anti-State material". In July 2020, Trang announced her formal resignation from LPH, citing increased harassment by authorities against her, her colleagues and organization. She noted the arrest and alleged torture of a courier who had transported LPH books in May 2020, and harassment of LPH members. The 88 Project, 'Pham Doan Trang', Available at:

<https://the88project.org/profile/286/pham-doan-trang/>; Harassment of dozens of other individuals in connection to LPH has also been reported. CIVICUS, 'Repression of Liberal Publishing House, Journalists and Online Critics Escalates in Vietnam', 30 July 2020, Available at:

<https://monitor.civicus.org/updates/2020/07/30/repression-liberal-publishing-house-journalists-and-online-critics-escalates-vietnam/>

⁶⁶ Human Rights Watch, 'Vietnam: Stop Intimidation and Harassment of Independent Publishing House', 27 November 2019, Available at: <https://www.hrw.org/news/2019/11/27/vietnam-stop-intimidation-and-harassment-independent-publishing-house>

*detention, and often incommunicado detention or forced psychiatric detention, on vaguely worded provisions of the Penal Code, such as article 117 ... which seem to be used against individuals who have simply exercised their right to freely express opinions and impart information.*⁶⁷

Independent commentators who have used social media platforms to bring to light human rights violations have also similarly faced severe retaliation by the State, through abuse of Penal Code provisions. In June 2020, **Huynh Anh Khoa** and **Nguyen Dang Thuong**, moderators of a Facebook group titled “Economic-Political Discussion”, which had been a forum for discussing political, social and economic affairs in Vietnam, were arrested and detained for alleged violation of article 331 of the 2015 Penal Code.⁶⁸ In July 2020, the People’s Court of Lam Dong Province sentenced **Nguyen Quoc Duc Vuong** to eight years’ imprisonment under article 117 of the 2015 Penal Code, for allegedly livestreaming 110 hours of video content and 366 posts on Facebook account amounting to “anti-State propaganda”.⁶⁹ Vuong had often commented on issues such as corruption and land rights on his Facebook account, where he had thousands of followers, and had participated in peaceful demonstrations against the

⁶⁷ The Special Rapporteurs on freedom of expression; cultural rights; freedom of peaceful assembly and association; human rights defenders; and the Working Group on Arbitrary Detention submitted the letter. JAL VNM 3/2020.

⁶⁸ Human Rights Watch, ‘Vietnam: Crackdown on Peaceful Dissent Intensifies’, 19 June 2020, Available at: <https://www.hrw.org/news/2020/06/19/vietnam-crackdown-peaceful-dissent-intensifies>; The group reportedly had a following of 46,000 Facebook users but was closed down after the arrest of its two managers. Radio Free Asia, ‘Vietnamese Police Arrest Two Facebook Users Linked to Popular Discussion Group’, 17 June 2020, Available at: <https://www.rfa.org/english/news/vietnam/group-06172020170945.html>

⁶⁹ The 88 Project, ‘Nguyen Duc Quoc Vuong’, Available at: <https://the88project.org/profile/425/nguyen-duc-quoc-vuong/>; Reuters, ‘Vietnam jails Facebook user for 8 years over ‘anti-state’ posts’, 7 July 2020, Available at: <https://nypost.com/2020/07/07/vietnam-jails-facebook-user-for-8-years-over-anti-state-posts/>

Government.⁷⁰ In August 2020, **Nguyen Thi Tuyet Dieu** was arrested and detained incommunicado for police investigation into charges under article 117 of the 2015 Penal Code for allegedly using Facebook accounts “Tuyet Dieu Babel” and “Tran Thi Tuyet Dieu Journalist”, and YouTube channel, “Tuyet Dieu Tran”, to share hundreds of articles and videos “distorting Party policies” and “defaming communist leaders”. Formerly a journalist with State-run Phu Yen newspaper, Dieu worked on issues of corruption and rights violations after leaving the paper. She had been reportedly harassed by authorities and had once allegedly been kidnapped by Nghe An provincial police. Her pre-trial detention is expected to last for at least four months until the end of 2020.⁷¹

ii. Use of non-human rights compliant laws to pressure companies and platforms into compliance

The Government has also intensified pressure on tech companies and online networks to comply with its efforts to carve out boundaries of permitted expression online, by bringing into force laws which stipulate onerous penalties for non-compliance. These include the Law on Cybersecurity (“LOCS”)⁷² and Decree No. 15/2020/ND-CP (“Decree No.

⁷⁰ Ibid.

⁷¹ Defend the Defenders, ‘One More Vietnamese Facebooker Arrested and Charged with “Conducting Anti-state Propaganda” As Ruling Communist Party Prepares Its 13th National Congress’, 23 August 2020, Available at:

<https://www.vietnamhumanrightsdefenders.net/2020/08/22/one-more-vietnamese-facebooker-arrested-and-charged-with-conducting-anti-state-propaganda-as-ruling-communist-party-prepares-its-13th-national-congress/>

⁷² Law on Cybersecurity (‘LOCS’) [Vietnamese], Available at:

<https://www.dataquidance.com/jurisdiction/vietnam>; English translation of the LOCS, Available at: <https://www.economica.vn/Content/files/LAW%20%26%20REG/Law%20on%20Cyber%20Security%202018.pdf>

15”).⁷³ These laws expand restrictions to civic space online, by replicating overbroad national security-related language which has been abused by governmental authorities for decades to criminalize free expression and information offline.

Law on Cybersecurity

In the *Dictating the Internet* report, the ICJ highlighted serious concerns about the LOCS which came into force in January 2019 to “protect national security” and combat “information in cyberspace with contents being propaganda against the Socialist Republic of Vietnam”.⁷⁴ The LOCS compels companies which provide services online to operate in accordance with the Government’s determination – particularly that of the Ministry of Public Security, together with the Ministry of Information and Communications and the Ministry of National Defence – of what online content is permissible and what is not. The LOCS requires that the companies “delete or prevent the sharing of information” which comprise “distortion or defamation of the people’s administrative authorities.” It also requires that they “cease” providing services to any individual user or organization who purportedly releases information online amounting to “propaganda” or which “disrupts security”.⁷⁵ The law applies to all “enterprises providing services on telecom networks, the Internet and other added value services on cyberspace

⁷³ English translation of Decree No. 15/2020/ND-CP: Penalties For Administrative Violations Against Regulations on Postal Services, Telecommunications, Radio Frequencies, Information Technology and Electronic Transactions, Available at: <https://vanbanphapluat.co/decree-15-2020-nd-cp-penalties-for-administrative-violations-against-regulations-on-postal-services>

⁷⁴ See LOCS, articles 1, 3, 6, 16; see also ICJ *Dictating the Internet* Report, 2019, p. 127.

⁷⁵ See LOCS, articles 16, 26; see also ICJ *Dictating the Internet* Report, 2019, pp. 127 to 132.

and system administrators”, drawing within its scope a vast range of online service providers. These include large companies, such as Facebook and Google and smaller networks, such as online accommodation booking or shopping portals.⁷⁶

The LOCS also provides for a potentially wide scope of penalties against breaches of the law, where disciplinary action, administrative penalty, criminal prosecution and compensation payment may be prescribed by authorities in accordance with their unfettered determination of “the nature and seriousness of the breach”.⁷⁷ Companies or networks which fall under the law are also required to store users’ data locally, and provide data on their users to the Cybersecurity Task Force under the Ministry of Public Security or a competent agency under the Ministry of Information and Communications where requested, potentially violating their users’ right to privacy.⁷⁸

⁷⁶ ICJ *Dictating the Internet* Report, 2019, pp. 128 to 129.

⁷⁷ See LOCS, article 9.

⁷⁸ See LOCS, article 26. In December 2019, a Draft Decree Guiding the Implementation of Law on Cybersecurity providing guidance on and regulating, inter alia, data localization and protection was released for industry and public consultation. The status of the draft regulations is currently unclear. See for further context, Asia Internet Coalition, ‘Comments on Outline of Draft Decree on Personal Data Protection’, Available at: <https://aicasia.org/wp-content/uploads/2020/02/AIC-Comments-on-Outline-of-Draft-Decree-on-Personal-Data-Protection-EN.pdf>; Baker & McKenzie, ‘Vietnam: Draft Decree on Personal Data Protection’, 1 April 2020, Available at: <https://www.bakermckenzie.com/en/insight/publications/2020/04/draft-decree-on-personal-data-protection>; Tilleke & Gibbins, ‘Update on the Implementation of Vietnam’s New Cybersecurity Law and Status of Implementing Decrees’, 18 December 2019, Available at: <https://www.tilleke.com/resources/update-implementation-vietnam%E2%80%99s-new-cybersecurity-law-and-status-implementing-decrees#:~:text=Technology-Update%20on%20the%20Implementation%20of%20Vietnam's%20New,and%20Status%20of%20Implementing%20Decrees&text=Vietnam's%20new%20Cybersecurity%20Law%20was,enforceable%20from%20the%20effective%20date.>

Decree No. 15/2020/ND-CP

In April 2020, Decree No. 15/2020/ND-CP (“Decree No. 15”) came into force, intensifying State regulation of social media networks through national security-related administrative violations and onerous penalties.⁷⁹ Article 100 imposes fines between 50 to 70 million VND (approx. USD 2,130 to USD 3000) on “organizations or enterprises establishing social networking sites” that “store or deliver fake or false information” which “do not match the national interests”, which are “not conformable with the national good traditions and customs” or which “distort, slander or damage the prestige, honor and dignity of organizations or individuals”.⁸⁰ These overbroad provisions allow for potential censoring of platforms which fail to control information online in accordance with the Government’s regulations on speech, and censorship of opinions, other expression or information deemed to “distort the prestige” of the authorities and Government officials.

Companies are also compelled to provide to the authorities user data in potential violation of users’ privacy. Fines of between 30 million to 50 million VND (approx. USD 1,290 to USD 2,155) are prescribed for failure of social media networks to “provide private or personal information of service users involved in violations against law at the request of competent authorities”, “operate a server in Vietnam to serve the inspection, retention and provision of information

⁷⁹ English translation of Decree No.: 15/2020/ND-CP on Penalties For Administrative Violations Against Regulations On Postal Services, Telecommunications, Radio Frequencies, Information Technology And Electronic Transactions (‘Decree No. 15’), Available at: <https://vanbanphapluat.co/decree-15-2020-nd-cp-penalties-for-administrative-violations-against-regulations-on-postal-services>; See also, Tilleke & Gibbins, ‘New Penalties for Posting Fake News on Social Networks’, 8 April 2020, Available at: <https://www.lexology.com/library/detail.aspx?q=ecb7abfe-19c2-412d-95a3-0db81e32722a>

⁸⁰ Decree No. 15, Article 100 (3).

at the request of a competent authority”, “retain information on accounts, log-in/log-out times, IP addresses of users and logs of handling of published information” or for “committing a violation involving content management”.⁸¹ Companies which fall afoul of the law can have their license suspended for up to 12 months and their domain names forcibly revoked.⁸²

Decree No. 15 tightens restrictions not only on companies but on individual users. Article 101 imposes fines between 10 million to 20 million VND (approx. USD 430 to USD 860) for users of social networks who “provide or share fake or false information” which “distort or damage the prestige, honour and dignity of authorities” or who provide or share information “not conformable with national good traditions and customs”.⁸³ The fines reach up to between 20 million to 30 million VND (approx. USD 860 to USD 1,290) for disclosure of information amounting to “state secrets”, but which are not severe enough to incur criminal penalties.⁸⁴ Enforced removal of such prohibited information is provided for under the law.⁸⁵

While combating misinformation online is a legitimate policy concern, these recent laws do not appear to have been passed for that purpose in good faith. They violate the principles of legality and legitimate purpose, as vague and overbroad provisions do not enable individuals or networks to be able to clearly define what information can violate “national interests” or “good traditions” and regulate their conduct accordingly. These provisions also allow for unfettered discretion of authorities in determining who “distorts the people’s government” or acts “against the State”

⁸¹ Decree No. 15, Article 100 (2).

⁸² Decree No. 15, Articles 100 (4), (5).

⁸³ Decree No. 15, Article 101 (1).

⁸⁴ Decree No. 15, Article 101 (2).

⁸⁵ Decree No. 15, Article 101 (3).

online. The stipulation of severe penalties for vaguely worded crimes further violates the principle of proportionality. These shortcomings, at the very least, require independent, impartial and effective oversight, redress and accountability mechanisms to ensure that the laws are not invoked in violation of fundamental rights, and that when such violations do occur, individuals and organizations are able to seek and be provided with effective remedies and reparations. These mechanisms are absent, heightening concerns that these laws will be wielded in a non-human rights compliant manner against companies, networks and their individual users.⁸⁶

iii. Increasing State surveillance and policing on online platforms

Along with applying ill-conceived laws to harass individuals and pressure tech companies and online networks, the Government has used other non-legal tactics to ensure State control of speech and content online. These include establishing a military task force and a national cyber-monitoring centre to surveil and police online platforms, and engaging in surveillance activities targeting disfavoured expression online.

In December 2017, the People's Army of Vietnam revealed the existence of a 10,000- strong cyber warfare unit, known informally as "Force 47" (*Luc luong 47*), made of "red and competent" personnel to fight "the information war" on the internet.⁸⁷ This came after former President Quang made a

⁸⁶ See also ICJ *Dictating the Internet* Report, 2019, p. 130.

⁸⁷ Colonel General Nguyen Trong Nghia, Deputy Chairman of the General Political Department of the People's Army of Vietnam made these comments, noting also that Vietnam should "stay ready to fight against wrongful views in every second, minute and hour." *Tuoi Tre News*, "Vietnam has 10,000-strong

call to combat “hostile forces” online, and current President Trong called on the military to undertake “more fierce actions on the ideological front” to “protect the Party, the regime, to resolutely repudiate wrong views and distorted allegations”.⁸⁸ Members of Force 47 operate independently or jointly to monitor and study information online, report sites or accounts deemed unfavourable to the authorities, attack users or accounts which spread undesirable information online, “counter wrong viewpoints”,⁸⁹ disseminate pro-State views, and engage as “internet polemicists” where necessary.⁹⁰ They have also set up State-aligned pages or channels on popular platforms such as Facebook and YouTube, where they amplify pro-State messaging.⁹¹

In recent years, human rights defenders and civil society activists have reported recurring instances of attacks through cyberbullying or pro-Government messaging on social media platforms by accounts apparently linked to Force 47, for disseminating information that failed to toe the Party line.⁹² In a section below, this paper analyses an emblematic case

‘cyber troop’: general’, 26 December 2017, Available at: <https://tuoitrenews.vn/news/politics/20171226/vietnam-has-10000strong-cyber-troop-general/43326.html>; ICJ *Dictating the Internet* Report, 2019, p. 130.

⁸⁸ Nguyen The Phuong, ‘The Truth About Vietnam’s New Military Cyber Unit’, *The Diplomat*, 10 January 2018 (*The Diplomat*, Jan 2018’) Available at: <https://thediplomat.com/2018/01/the-truth-about-vietnams-new-military-cyber-unit/>

⁸⁹ Col. Gen. Nguyen stated, “The Central Military Commission is very interested in building up a standing force to counter the wrong viewpoints”, during a conference on “propaganda activities”. John Reed, ‘Vietnam army reveals 10,000-strong cyber warfare unit’, *Financial Times*, 26 December 2017, Available at: <https://www.ft.com/content/ef924a6e-ea14-11e7-bd17-521324c81e23>

⁹⁰ *The Diplomat*, Jan 2018; Le Hong Hiep, *ISEAS*, p5; Adam Bemma, ‘Vietnam’s battalions of ‘cyber-armies’ silencing online dissent’, *Al Jazeera*, 17 January 2020 (*AJ*, Jan 2020’) Available at: <https://www.aljazeera.com/news/2020/01/vietnam-battalions-cyber-armies-silencing-online-dissent-200116235037858.html>

⁹¹ Le Hong Hiep, *ISEAS*, p5; *AJ*, Jan 2020.

⁹² ICJ communications with partners.

where Force 47 actively targeted users releasing information on Facebook on a deadly clash between State authorities and villagers in Hanoi's Dong Tam commune. Members of Force 47 also actively countered comments by other individual users and accounts on Facebook who expressed anger or dissatisfaction about the State's heavy-handed response in the dispute.

Along with the deployment of Force 47, other surveillance and regulatory measures have been undertaken by the authorities to curtail speech and information online. In October 2018, the Minister of Information and Communications Nguyen Manh Hung introduced a cyber-monitoring "National Centre on Supervising Information" which would be able to concurrently "analyse, evaluate and categorize" 100 million items of information online.⁹³ The Centre would reportedly use social listening tools to monitor and map out information trends on social media platforms, particularly with respect to information that is "toxic" or "consequential to regime security".⁹⁴ In unveiling the Centre, the minister noted that "(i)t is necessary to legally punish those who publish wrong information on social media... we cannot leave this front unmanned".⁹⁵ In a related development a couple of months later, in December, the Journalists' Association of Vietnam increased restrictions on the freedom of its journalists to impart information on social media platforms, by introducing a code of conduct for social media use dictating that its journalists not post news, images or comments that "run counter to" the State.⁹⁶

⁹³ Straits Times, 'Vietnam rolls out web monitor to control 'false information'', 1 November 2018 ('*Straits Times*, Nov 2018') Available at: <https://www.straitstimes.com/asia/vietnam-rolls-out-web-monitor-to-control-false-information>

⁹⁴ Le Hong Hiep, *ISEAS*, p5.

⁹⁵ *Straits Times*, Nov 2018.

⁹⁶ Associated Free Press, 'Vietnam's cyber-security law takes effect amid criticism', *Straits Times*, 2 January 2019, Available at:

Supporting cyberespionage and surveillance activities to target expression online

State-supported cyberespionage and surveillance activities targeting dissent online have also been reported. In January 2014, the Electronic Frontier Foundation (EFF), a non-profit civil liberties organization, noted cyber-spies' use of malware and remote access tools to spy on "journalists, activists, dissidents, and bloggers" from at least late 2009, including malware attacks in 2013 on the EFF itself, the Associated Press and Vietnamese bloggers.⁹⁷ In May 2017, Silicon Valley-based cybersecurity services provider FireEye reported evidence of cyberespionage actors "aligned with Vietnamese state interests" known as "OceanLotus" or "APT 32" targeting Vietnamese dissidents and journalists as well as private sector companies.⁹⁸ These included activities in 2014 to combat "dissident activity among the Vietnamese diaspora in Southeast Asia", 2015 and 2016 malware attacks on Vietnamese media outlets, and evidence in 2017 that the group was "likely targeting members of the Vietnam diaspora in Australia".⁹⁹ In November 2017, Volexity, a cybersecurity services provider based in Washington D.C. which is said to work closely with various human rights and civil society organizations, similarly documented OceanLotus campaigns

<https://www.straittimes.com/asia/vietnams-cyber-security-law-takes-effect-amid-criticism>; See also ICJ *Dictating the Internet* Report, 2019, p. 130.

⁹⁷ This included the targeting of a Vietnamese blogger based in California, "which led to the compromise of her blog and the invasion of her private life." Eva Galperin and Morgan Marquis-Boire, 'Vietnamese Malware Gets Very Personal', *Electronic Frontier Foundation*, 19 January 2014, Available at: <https://www.eff.org/deeplinks/2014/01/vietnamese-malware-gets-personal>

⁹⁸ Nick Carr, 'Threat Research- Cyber Espionage is Alive and Well: APT32 and the Threat to Global Corporations', *FireEye*, 14 May 2017 ('*FireEye*, May 2017') Available at: <https://www.fireeye.com/blog/threat-research/2017/05/cyber-espionage-apt32.html>; See also Max Metzger, 'Ocean Lotus Group/APT 32 identified as Vietnamese APT group', *SC Media*, 23 May 2017 ('*SC Media*, May 2017') Available at: <https://www.scmagazineuk.com/ocean-lotus-group-apt-32-identified-vietnamese-apt-group/article/1474614>

⁹⁹ *FireEye*, May 2017.

compromising more than 80 Vietnamese websites linked to “human rights, civil society, news/media, individual bloggers (or) religion”.¹⁰⁰

Research from these organizations suggest that individuals and organizations have been targeted in a narrow and concentrated manner purely for what is deemed anti-Government activities. Notably, the FireEye senior manager who authored its work on Vietnam observed that OceanLotus “accessed personnel details and other data from organisations that would be of very little use to any party other than the Vietnamese government.”¹⁰¹ In May 2018, the editor of a popular independent website featuring Vietnamese news and commentary detailed her experience, which is telling of the intensity of attacks such online platforms face.¹⁰² Following the launch of her site in July 2017, it registered “hits from 575,000 unique IP addresses”, which she attributed to targeting by the cyber-police, and emails from readers stating that they had found it increasingly harder to access or stay logged on the site.¹⁰³ In November 2017, the site was said to have confronted two major denial of service attacks, while she noted that “Hanoi trolls” were urging Facebook to block their site’s account on the basis that they were spreading false information online.¹⁰⁴

¹⁰⁰ Dave Lassalle, Sean Koessel and Steven Adair, ‘OceanLotus Blossoms: Mass Digital Surveillance and Attacks Targeting ASEAN, Asian Nations, the Media, Human Rights Groups, and Civil Society’, *Volexity*, 6 November 2017, Available at: <https://www.volexity.com/blog/2017/11/06/oceanlotus-blossoms-mass-digital-surveillance-and-exploitation-of-asean-nations-the-media-human-rights-and-civil-society/>

¹⁰¹ *SC Media*, May 2017.

¹⁰² David Brown, ‘Vietnam Tightens the Screws on the Internet’, *Asia Sentinel*, 5 May 2018, Available at: <https://www.asiasentinel.com/p/vietnam-tightens-screws-internet>

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

iv. Increasing pressure on tech companies to remove online content

To tighten the screws of control of content on foreign-owned online platforms, the Government has not only introduced onerous provisions under the LOCS and Decree No. 15 to compel compliance by tech companies, but also increased pressure in the form of administrative requests to companies to moderate content on their platforms in line with Party policy. These measures are intertwined; stringent obligations placed on companies under domestic laws raise the stakes for companies to comply with requests which violate privacy, free expression and information in order to protect themselves from government sanctions.

The Government has increasingly pressured technological companies with its requests to remove content on their platforms deemed impermissible by State authorities. In July 2017, Vietnam's Ministry of Information and Communications successfully requested tech companies Google and Facebook to remove some 3,367 clips with what they identified as "bad and poisonous content" and more than 600 accounts that they said were violating content restrictions from their platforms.¹⁰⁵ In December 2017, the ministry reported that Facebook had removed 159 "anti-government accounts" which "defamed or criticized Vietnam's leaders (or) spread propaganda against the government and the ruling Communist Party", and that 4,500 out of 5,000 requests by the Government to remove "videos containing bad or toxic content" on YouTube had been complied with by Google.¹⁰⁶

¹⁰⁵ ICJ *Dictating the Internet* Report, 2019, p. 131.

¹⁰⁶ Vo Hai, 'Facebook removes 159 anti-government accounts at Vietnam's request: official', *VN Express International*, 22 December 2017, Available at:

In June 2019, the ministry warned users and companies to refrain from placing advertisements on videos hosted by YouTube which allegedly promote “anti-State propaganda”, noting that it had found approximately 55,000 “harmful” YouTube videos, of which 8,000 were removed following requests from Vietnamese authorities.¹⁰⁷ The Minister of Information and Communications noted that as of August 2019, Facebook had removed some 200 links on its platform to articles with “anti-State content” and that the company was restricting access to “increasing amounts” of content on its platform, in particular more than 70 percent of restriction requests from the Government up from the previous amount of approximately 30 percent.¹⁰⁸

Meanwhile, in its Transparency Report, Facebook noted, in the last six months of 2018, it had restricted 1553 posts and three profiles in Vietnam – a massive increase from 265 “restrictions” in the first half of 2018 and only 22 “restrictions” in the second half of 2017. Even as in 2019, the number of “restrictions” fell back down to 198, this number remains a significant increase from 2017.¹⁰⁹ While the 2017 “restrictions” had been made pursuant to “private reports related to defamation”, “restrictions” in 2018 were made

<https://e.vnexpress.net/news/news/facebook-removes-159-anti-government-accounts-at-vietnam-s-request-official-3688612.html>

¹⁰⁷ ICJ *Dictating the Internet* Report, 2019, p. 131.

¹⁰⁸ Dien Luong, ‘Facebook: Vietnam’s Fickle Partner-in-Crime’, *The Diplomat*, 9 July 2020, Available at: <https://thediplomat.com/2020/07/facebook-vietnams-fickle-partner-in-crime/>; Thu Huong Le, ‘Ministry requests Facebook to authenticate accounts in Vietnam’, *KrAsia*, 15 August 2019, Available at: <https://kr-asia.com/ministry-requests-facebook-to-authenticate-accounts-in-vietnam>

¹⁰⁹ On what a “restriction” entails, Facebook notes that “When something on Facebook or Instagram is reported to us as violating local law, but doesn’t go against our Community Standards, we may restrict the content’s availability in the country where it is alleged to be illegal. We receive reports from governments and courts, as well from non-government entities such as members of the Facebook community and NGOs. This report details instances where we limited access to content based on local law.” Available at: <https://transparency.facebook.com/content-restrictions>

mostly “in response to reports” from the Ministry of Public Security and Ministry of Information and Communications’ Authority of Broadcasting and Electronic Information (ABEI).¹¹⁰ “Restrictions” in the latter half of 2018 and 2019 largely concerned *“anti-state content, content opposing the Communist Party and Government of Vietnam, content related to the promotion of unauthorized public demonstrations, defamation of public officials, and the spread of false information.”*¹¹¹ (emphasis added)

Given the ubiquity of Facebook as the most used social media platform by people in Vietnam to exercise their rights to free expression and information, this development raises serious concern that the Vietnamese Government is failing to promote, protect and fulfill the free exercise of these rights online, and in fact violating them for political means. It also necessitates deeper consideration of the pertinent role Big Tech companies play in Vietnam’s digital ecosystem, and their increasing complicity in enabling State-directed censorship online.

v. Role of “Big Tech”

The major transnational companies of the telecommunications sector, commonly referred to as “Big Tech companies”, function both as platform service providers – effectively facilitating the exercise of the rights to freedom of expression and information online – and as mammoth

¹¹⁰ Data available at: <https://transparency.facebook.com/content-restrictions/country/VN>

¹¹¹ *Ibid.*

private corporations which earn increasing profits from their expanding consumer base in Vietnam.

Big Tech companies Facebook and Alphabet Inc. – which owns Google and YouTube – merit specific attention.¹¹² As of July 2019, Vietnam ranked seventh of all countries with the highest number of users of Facebook globally, with approximately 63 million users in country.¹¹³ Meanwhile, as of 2019, Google held some 94 percent of the total market share of search engines across Vietnam, with government data revealing that as of August 2019, the country was hosted in some 62 million Google accounts.¹¹⁴ As of June 2020, it was estimated that Facebook accounted for 64.17% of all social media usage in Vietnam, with YouTube following behind at 16.2%.¹¹⁵ Vietnam is a key Asian market for Facebook and Alphabet Inc. In 2018, it was estimated 70% of total digital advertising revenue in Vietnam amounting to approximately USD 550 million went to both companies.¹¹⁶ With the total number of internet users estimated to grow over the coming years,¹¹⁷ maintaining if not enlarging their

¹¹² On “Big Tech” companies, see Nicolas Lekkas, ‘The Big Five Tech Companies: Infographic & History’, *Growth Rocks*, 27 March 2020, Available at: <https://growthrocks.com/blog/big-five-tech-companies-acquisitions/>

¹¹³ Statista, ‘Leading countries based on Facebook audience size as of April 2020’, 24 April 2020, Available at: <https://www.statista.com/statistics/268136/top-15-countries-based-on-number-of-facebook-users/>

¹¹⁴ Statista, ‘Market share of search engines across Vietnam from 2010 to 2019’, February 2020, Available at: <https://www.statista.com/statistics/954433/vietnam-market-share-of-search-engines/>; Phong Nguyen, ‘Vietnam’s social media crowd swells with new entrant to take on Facebook, Google’, *Reuters*, 17 September 2019, Available at: <https://www.reuters.com/article/us-vietnam-cybersecurity/vietnams-social-media-crowd-swells-with-new-entrant-to-take-on-facebook-google-idUSKBN1W20NH>

¹¹⁵ Stat Counter, ‘Social Media Stats Viet Nam - June 2019 - June 2020’, June 2020, Available at: <https://gs.statcounter.com/social-media-stats/all/vietnam>

¹¹⁶ Pearson, *Reuters*, 2020.

¹¹⁷ Statista, ‘Number of internet users in Vietnam from 2017 to 2023’, 5 June 2020, Available at: <https://www.statista.com/statistics/369732/internet-users-vietnam/>

share of the market and consumer base in Vietnam is a key objective of not only these companies, but others seeking to tap into its expanding digital economy.¹¹⁸

In seeking to maintain their market share and consumer base, and also to prevent incurring penalties for their operations, Big Tech companies have increasingly complied with demands by the Government to limit free expression and information online, including silencing human rights defenders on their platforms. In January 2019, popular artist-activist Do Nguyen Mai Khoi noted to Al Jazeera that Facebook had “recently locked activists out of their accounts and deleted their posts”, while “YouTube ha(d) removed (her) song, We Want, (which) now can't be viewed inside Vietnam”.¹¹⁹ In May 2019, in an open letter to Facebook, 11 civil society organizations criticized Facebook for intermittently blocking user access to the page of political organization Viet Tan and removing posts of independent blogger Bui Thanh Hieu,¹²⁰ calling on the company to “ensure that it does not become complicit in the human rights violations of authoritarian governments such as

¹¹⁸ On Vietnam’s digital economy, see for eg. Ousmane Dione, ‘Digital Economy in Vietnam: Building the Foundations for Future Growth’, *World Bank Blogs*, 5 February 2020 (‘Dione, *World Bank Blogs*, 2020’) Available at: <https://blogs.worldbank.org/eastasiapacific/digital-economy-vietnam-building-foundations-future-growth>; CSIRO, ‘Vietnam’s Future Digital Economy Towards 2030 And 2045’, May 2019 (‘CSIRO report, 2019’) Available at: <https://research.csiro.au/aus4innovation/foresight/>

¹¹⁹ Adam Bemma, ‘The singer raising her voice against Vietnam's new cyber-law’, *Al Jazeera*, 1 January 2019, Available at: <https://www.aljazeera.com/news/2018/12/singer-raising-voice-vietnam-cyber-law-181231002449253.html>; Notably, Mai Khoi was awarded the Vaclav Havel International Prize for Creative Dissent in 2018, see People in Need, ‘Mai Khoi, A Vietnamese Artist And Dissident, Awarded The 2018 Václav Havel International Prize’, 4 June 2018, Available at: <https://www.clovekvtisni.cz/en/mai-khoi-a-vietnamese-artist-and-dissident-awarded-the-2018-vaclav-havel-international-prize>

¹²⁰ On Bui Thanh Hieu, who writes as “Nguoi Buon Gio”, see: RSF, ‘Dissident exile stops blogging because family in Vietnam is being hounded’, 2 March 2020, Available at: <https://rsf.org/en/news/dissident-exile-stops-blogging-because-family-vietnam-being-hounded>

Vietnam's".¹²¹ In December 2018, press freedom monitor Reporters Without Borders (RSF) reported that Facebook had "repeatedly deleted posts" and "blocked the accounts" of human rights defenders for alleged violations of Facebook's "Community Standards" regime,¹²² documenting 23 cases of dissident exiles living in Germany, including those of Bui Thanh Hieu and journalist Trung Khoa Le.¹²³ In an emblematic case highlighted below, it can be seen how Facebook's restrictions of content from activist blogger Bui Van Thuan effectively resulted in censorship of an individual seeking to bring to light human rights violations occurring in Vietnam.

Furthermore, in April 2020, following sustained pressure from the Government, Facebook agreed to increase censorship of "anti-State content" on its platform. For approximately seven weeks, Reuters news agency reported that State-owned telecommunications companies had disabled Facebook's local servers, resulting in the platform being inaccessible periodically. Facebook thereafter released a statement that the company had "reluctantly complied" with State requests to "restrict access to content which it has deemed to be illegal", noting that "the action was taken to place significant pressure on us to increase our compliance with legal takedown orders when it comes to content that our users in

¹²¹ Access Now, Article 19, Destination Justice, Electronic Frontier Foundation, Equality Labs, Horizontal, Next Billion Network, Reporters Without Borders, Southeast Asian Press Alliance, Viet Tan and WITNESS, 'Open Letter to Facebook on World Press Freedom Day 2019: Don't Give in to Censorship in Vietnam', 3 May 2019, Available at: <https://viettan.org/en/facebook-open-letter-wpfd/>

¹²² On Facebook's Community Standards policies, see: <https://www.facebook.com/communitystandards/>

¹²³ RSF, 'Vietnam: How Facebook is being abused to silence critics in Germany', 21 December 2018, Available at: <https://rsf.org/en/news/vietnam-how-facebook-being-abused-silence-critics-germany>

Vietnam see.”¹²⁴ The company defended this apparent capitulating by indicating that “that does not mean we will be complying with every request that the government sends us”, even as it had committed to “restricting significantly more content.”¹²⁵ Facebook claimed that it had “taken this action to ensure (its) services remain available and usable for millions of people in Vietnam, who rely on them every day.”¹²⁶ Facebook, of course, also relies those millions of people for its business interests. As a former public policy advisor at Facebook, Dipayan Ghosh, observed, “the calculus with Vietnam is clear: It’s to maintain service in a country that has a huge population and in which Facebook dominates the consumer internet market, or else a competitor may step in ... The thought process for the company is not about maintaining service for free speech. It’s about maintaining service for the revenue.”¹²⁷

In August 2020, it was reported that Facebook had again received instructions from the Government to increase the volume of restrictions of “critical posts” on its platform, with a Facebook officer noting that, “that request came with some threats about what might happen if we didn’t”, including shutting down Facebook entirely in Vietnam.¹²⁸ The officer

¹²⁴ James Pearson, ‘Exclusive: Facebook agreed to censor posts after Vietnam slowed traffic – sources’, *Reuters*, 22 April 2020 (‘Pearson, *Reuters*, 2020’), Available at: <https://www.reuters.com/article/us-vietnam-facebook-exclusive-idUSKCN2232JX>

¹²⁵ *Ibid.*

¹²⁶ Linh Nguyen, ‘Vietnamese Activists React to Facebook Taking Down “Anti-state” Posts’, *The Vietnamese*, 17 May 2020 (‘Linh Nguyen, *The Vietnamese*, 2020’) Available at: <https://www.thevietnamese.org/2020/05/vietnamese-activists-react-to-facebook-taking-down-anti-state-posts/>

¹²⁷ David S. Cloud, Shashank Bengali, ‘Facebook touts free speech. In Vietnam, it’s aiding in censorship’, *Los Angeles Times*, 22 October 2020 (‘Cloud, Bengali, *LA Times*, 2020’) Available at:

<https://www.latimes.com/world-nation/story/2020-10-22/facebook-censorship-suppress-dissent-vietnam>

¹²⁸ Straits Times, ‘Vietnam threatens to shut down Facebook over censorship requests’, 19 November 2020, Available at:

<https://www.straitstimes.com/asia/east-asia/vietnam-threatens-to-shut-down-facebook-over-censorship-requests>

also observed that the company had been subjected to a “14-month-long negative media campaign” by State media prior to the request.¹²⁹ While Facebook had reportedly resisted the Government request, it is evident that increasing State pressure on the company to comply with proposed censorship measures and the company’s profit-driven mode of operation do not inspire optimism that the platform will operate in a human rights-centric manner online.

Civil society organizations have thus called for content moderation systems and policies of online platforms to be re-evaluated to provide for greater protection of human rights defenders, civil society activists and independent journalists. In April 2018, more than 50 civil society organizations highlighted in an open letter to Facebook that its algorithms, systems for removal of content, and its Community Standards policies were being manipulated by Force 47 to “silence human rights activists and citizen journalists” on the platform, calling on Facebook to revise its systems to better protect individuals from cyber-attacks and other disingenuous activities of the cyber-troops online.¹³⁰

Responsibilities of tech companies to protect human rights

While States have the primary obligations under international law to respect and protect human rights, including with respect to the conducting of businesses that might interfere with human rights, as noted above in *Section II*, companies themselves also have responsibilities of human rights

¹²⁹ Ibid.

¹³⁰ They noted that Facebook’s system to automatically remove content that received a high number of complaints was being abused by Force 47. See Mai Nguyen, ‘Vietnam activists question Facebook on suppressing dissent’, *Reuters*, 10 April 2018, Available at: <https://www.reuters.com/article/us-facebook-privacy-vietnam/vietnam-activists-question-facebook-on-suppressing-dissent-idUSKBN1HH0DO>

protection as provided for under the UNGPs. Within the context of Vietnam, tech companies should push back against increasing State pressure and coercion to ensure that they meet their duty to respect human rights online.

Human Rights Watch, for one, criticized Facebook's decision in April to restrict more content in response to the Government's throttling of access to the platform, noting that "Facebook has set a terrible precedent by caving to the government of Vietnam's extortion ... (n)ow other countries know how to get what they want from the company, to make them complicit in violating the right to free speech."¹³¹ It further called for greater accountability and transparency in the company's decision-making process, seeking publicization of human rights impact assessments conducted by the company, explanation of how the company intends to provide remedy for victims of its content restriction actions, and clarification of future strategies to prevent the company from "becoming a censorship proxy for other authoritarian governments in the future."¹³²

Big Tech companies, because of their outsize dominance of the digital sphere in Vietnam and resulting economic power, are well placed both to resist pressure to undermine the human rights of their users and to promote human rights practices. They may also, however, provide platforms which significantly enhance restrictions of free expression and information online. The dominance of Big Tech platforms within the digital ecosphere in Vietnam was evident when in 2016, the Government blocked access to Facebook and parts of content on Instagram and YouTube for weeks in the midst of massive protests emerging from an environmental

¹³¹ Human Rights Watch, 'Vietnam: Facebook, Pressured, Censors Dissent', 23 April 2020, Available at: <https://www.hrw.org/news/2020/04/23/vietnam-facebook-pressured-censors-dissent>

¹³² Ibid.

disaster.¹³³ Access was, however, restored as the State presumably calculated that the platforms were too popular to be entirely eliminated, risking the ire of a large proportion of its population. Even as State pressure on these companies can be immense, it appears Big Tech has the clout of popularity to push back.

Other technical, political and economic factors underpin the predominance of foreign Big Tech platforms in Vietnam. As academic Nguyen The Phuong succinctly noted, “(p)ut simply, Vietnam does not have enough money and technical expertise to build a web blocking system as overbearing and effective as China’s so-called Great Firewall.”¹³⁴ Academic Le Hong Hiep similarly observed that Vietnam’s smaller market and weaker technological development capacities mean developing local social media platforms is “risky and unattractive”.¹³⁵ Thus, despite the emergence of local alternatives to Facebook and YouTube, these have barely impacted on the popularity of global platforms.¹³⁶

¹³³ Sarah Perez, ‘Facebook blocked in Vietnam over the weekend due to citizen protests’, *Tech Crunch*, 18 May 2016, Available at: <https://techcrunch.com/2016/05/17/facebook-blocked-in-vietnam-over-the-weekend-due-to-citizen-protests/>; For examples of the proliferation of protest-related content on Facebook, YouTube and other social media platforms, see Doan Trang, ‘Timeline: The Formosa Environmental Disaster’, *The Vietnamese*, 8 November 2017, Available at: <https://www.thevietnamese.org/2017/11/timeline-the-formosa-environmental-disaster/>

¹³⁴ Nguyen The Phuong, ‘The Truth About Vietnam’s New Military Cyber Unit’, *The Diplomat*, 10 January 2018 (‘Nguyen The Phuong, *The Diplomat*, 2018’) Available at: <https://thediplomat.com/2018/01/the-truth-about-vietnams-new-military-cyber-unit/>

¹³⁵ Le Hong Hiep, ‘The Political Economy of Social Media in Vietnam’, *ISEAS – Yusof Ishak Institute*, 27 September 2019 (‘Le Hong Hiep, ISEAS, 2019’) Available at: <https://www.iseas.edu.sg/articles-commentaries/iseas-perspective/201977-the-political-economy-of-social-media-in-vietnam-by-le-hong-hiep/>

¹³⁶ Phuong Nguyen, ‘Vietnam’s social media crowd swells with new entrant to take on Facebook, Google’, *Reuters*, 17 September 2019, Available at: <https://www.reuters.com/article/us-vietnam-cybersecurity/vietnams-social-media-crowd-swells-with-new-entrant-to-take-on-facebook-google-idUSKBN1W20NH>

Furthermore, Le Hong Hiep noted that banning Big Tech platforms could hurt Vietnam's aim to appear to be a liberal, modern economy and strain ties with the United States, where the headquarters of Big Tech companies are based and with whom Vietnam aims to strengthen economic relationships.¹³⁷ He also observed that Vietnamese officials themselves had utilized Facebook to expand their political and personal agendas.¹³⁸ The Government is also cognizant of the role of Big Tech in enhancing the economy – it supports the growth of small and medium enterprises which primarily advertise and market to younger and more affluent consumers through social media platforms – and in encouraging the growth of its digital economy.¹³⁹

Given the predominance and popularity of their platforms and the sheer volume of information shared across Vietnamese society through these media, the need for Big Tech platforms to meet their responsibilities to respect human rights is urgent. Failure to do so has resulted in their platforms contributing to the expansion of human rights violations against individuals in Vietnam. This is particularly pertinent with respect to human rights defenders, who increasingly use online platforms to conduct rights research, advocacy and information-sharing. Threats such as infringements of their digital security, privacy and dignity from online attacks and smear campaigns, often worsen pressure and intimidation faced offline and directly lead to real physical risks to their security. Women human rights defenders also face gender-based discrimination and security threats online. In a report released in 2019, the UN Special Rapporteur on the situation of human rights defenders highlighted that women human

¹³⁷ Le Hong Hiep, ISEAS, 2019.

¹³⁸ *Ibid.*

¹³⁹ Disruptive.Asia, 'Vietnam govt struggles to control social media dissidents', 31 August 2017, Available at: <https://disruptive.asia/vietnam-social-media-dissidents/>; Nguyen The Phuong, *The Diplomat*, 2018; see also Dione, *World Bank Blogs*, 2020; CSIRO report, 2019.

rights defenders faced higher risks of being targeted for shaming, attacks on honour, threats of sexual violence, verbal abuse and doxxing – where private information about a person is disseminated online without her consent.¹⁴⁰

In multiple cases highlighted in this report, including the case of Dong Tam dispute as will be described below, rights limitations online directly led to offline violations of other rights, including through threats to safety and life, harassment, arrests and detention. Noting the lack of safety provided by Facebook, some Vietnamese human rights defenders have reduced their use of the platform and recommended the use of other social media platforms instead for advocacy.¹⁴¹

vi. Case of Dong Tam dispute

The case of the Dong Tam protests is emblematic of the key role tech companies and online platforms play to expand exercise of the rights to free expression and information in Vietnam, and corresponding State interference to limit these rights both online and offline, including by pressurizing Big Tech to comply with the regime’s determination of what permitted speech entails.

¹⁴⁰ Report of the UN Special Rapporteur on the situation of human rights defenders, A/HRC/40/60, 10 January 2019, Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/004/97/PDF/G1900497.pdf?OpenElement>

¹⁴¹ Linh Nguyen, *The Vietnamese*, 2020.

Background

On 9 January 2020, approximately 3000 police officers entered the village of Dong Tam in northern Vietnam in the early hours of the morning and launched a raid involving the use of flash grenades, rubber bullets and tear gas on a village of about 10,000 residents.¹⁴² This followed a dispute between many of the village's residents and authorities which had been simmering for years following the lease of village land to a military-owned company. During the course of the operation, 85-year-old Le Dinh Kinh, said to be the "spiritual leader" of the village, and three police officers were killed.¹⁴³ Twenty-nine villagers were arrested following the operation, held incommunicado in pre-trial detention, and denied access to and contact with their family members.¹⁴⁴ Eventually and prior to their trial, several of the 29 individuals were allowed to meet with their lawyers.¹⁴⁵

On 7 September 2020, the trial began before the People's Court of Hanoi to hear murder charges against 25 individuals and charges for alleged activities against public order against four others. The ICJ was informed that family members of the detained individuals had not been informed via court letter of the trial and the authorities monitored the residences of some relatives prior to the trial in an attempt to prevent them from

¹⁴² ICJ communications with partners; The Dong Tam Task Force recorded witness testimonies of police officers "rushing into the village using flash grenades, firing tear gas, shooting rubber bullets, and beating villagers." The Dong Tam Task Force, 'Fighting Over Senh Field: A Report on the Dong Tam Village Attack', 9 February 2020 ('Dong Tam Attack report') p4, Available at: <https://baotienqdan.com/wp-content/uploads/2020/10/Dong-Tam-Report.pdf>

¹⁴³ ICJ communications with partners; Dong Tam Attack report, pp. 4, 7.

¹⁴⁴ ICJ communications with partners; See also UCA News, 'Lawyers meet detained victims of Vietnam land clash', 4 March 2020, Available at: <https://www.ucanews.com/news/lawyers-meet-detained-victims-of-vietnam-land-clash/87375>

¹⁴⁵ ICJ communications with partners.

attending court.¹⁴⁶ As of 7 September, more than ten relatives of detained individuals were themselves held without charge ahead of the trial.¹⁴⁷ Reports of intimidation of lawyers representing the detainees also emerged, including allegations of plain-clothed officers monitoring and following them outside of the court and near their law offices.¹⁴⁸

On 14 September 2020, after a four-day trial,¹⁴⁹ the People's Court of Hanoi delivered the verdict, convicting Le Dinh Cong and Le Dinh Chuc, the sons of village leader Le Dinh Kinh, of murder and sentencing them to death, in violation of the right to life.¹⁵⁰ Le Dinh Doanh was also convicted of murder and sentenced to life imprisonment, while three other defendants convicted of murder were sentenced to prison for between 12

¹⁴⁶ These included reports of plain-clothed officers standing outside the homes of relatives, the day prior to and the first day of the trial. ICJ communications with partners.

¹⁴⁷ This included Trinh Ba Khiem, father of one of the detained individuals, Trinh Ba Tu, who was detained and questioned by the police in the morning of the first day of the trial, before being released to return home after the hearing was over. His home was thereafter monitored for the duration of the trial. ICJ communications with partners.

¹⁴⁸ ICJ communications with partners.

¹⁴⁹ Reports by observers evidenced discrepancies at trial which may amount to fair trial rights violations. The trial opened with a documentary-like film produced by the Ministry of Public Security which illustrated the State's narrative of the dispute and showed clips of defendants making admissions of guilt. Multiple videos of "confessions" of the defendants, evidencing signs of ill-treatment and indications that the "confessions" were obtained unlawfully and therefore not admissible under international law, were also played in court, in apparent contravention of the right to not be compelled to "confess" guilt. International observers who were allowed to attend the trial were sat in a side room, rather than the main court room, where hearings were observed via television, which reportedly lost reception at intervals when defendants or their lawyers were speaking. ICJ communications with partners; See also David Brown, 'Vietnam's Dong Tam Incident: the Curtain Falls', *Asia Sentinel*, 14 September 2020, Available at: <https://www.asiasentinel.com/p/vietnams-dong-tam-incident-the-curtain>

¹⁵⁰ The ICJ opposes capital punishment in all cases without exception, as the ICJ considers that the death penalty constitutes a violation of the right to life and the right not to be subjected to cruel, inhuman or degrading punishment.

and 16 years.¹⁵¹ Twenty-three others were convicted of charges of obstructing justice, with nine incurring prison sentences between three and six years and fourteen sentenced to between 15 and 36 months' probation.¹⁵² The main defendants were also ordered to compensate the family of each police officer who had died VND 116 million (approx. USD 4,985) and provide child support for the children of the deceased officers until the age of 18.¹⁵³

Limitation of rights online in connection to incident

As with most cases in Vietnam, given the control of mainstream media outlets by the State, information regarding the Dong Tam raid was released by villagers and activists primarily on social media platforms, particularly Facebook, in attempts to bring to light human rights violations. In the days following the incident, information regarding the police operation – notably eyewitness accounts, images, reports and critical commentary

¹⁵¹ Bui Viet Hieu was sentenced to 16 years in prison; Nguyen Van Tuyen 12 years in prison; and Nguyen Quoc Tien 13 years in prison. ICJ communications with partners.

¹⁵² Nguyen Van Quan, Le Dinh Uy and Le Dinh Quang were sentenced to 5 years in prison; Bui Thi Noi, 6 years; Bui Thi Duc, Nguyen Thi Set, Tran Thi La and Nguyen Thi Lua, 3 years suspended sentence; Bui Van Tien, 5 years; Nguyen Van Due, 3 years; Le Dinh Quan, 5 years suspended sentence; Bui Van Nien, 3 years suspended sentence; Bui Van Tuan, 3 years; Trinh Van Hai, 3 years; Nguyen Xuan, 3 years suspended sentence; Mai Thi Phan, 30 months suspended sentence; Dao Thi Kim, 24 months suspended sentence; Le Thi Loan, 30 months suspended sentence; Nguyen Van Trung, 18 months suspended sentence; Le Dinh Hien, 15 months suspended sentence; Bui Viet Tien, 15 months suspended sentence; Nguyen Thi Dung, 15 months suspended sentence; and Tran Thi Phuong, 15 months suspended sentence. ICJ communications with partners.

¹⁵³ Will Nguyen, 'Recap: Sentencing in the Dong Tam Trial', *The Vietnamese*, 15 September 2020, Available at: <https://www.thevietnamese.org/2020/09/recap-sentencing-in-the-dong-tam-trial/>.

questioning State media's depiction of the operation – circulated widely on social media.

The Dong Tam Task Force, a civil society group formed to record and monitor the case, recorded that residents of Dong Tam village had posted information on Facebook of a potential raid even before the operation occurred, and a few key activists had provided live updates on the attacks calling on users to “save Dong Tam”.¹⁵⁴ Hours before police officers entered the village, the internet and phone lines were reportedly cut, in an apparent attempt by the authorities to prevent information flowing out or into the village.¹⁵⁵ Activists who had committed to live-reporting any attack on the village were also targeted – Bui Thi Minh Hang was reportedly arrested on the day of the raid by approximately 50 police officers and held in a police station throughout the day.¹⁵⁶

Information relating to the incident was also circulated on social media by relatives of villagers. For example, days after the incident, Du Thi Thanh, wife of Le Dinh Kinh, released a video on Facebook alleging that she had been beaten by security forces who intended to force a confession that she had attacked the authorities using grenades.¹⁵⁷ Similarly, in August, Trinh Ba Khiem, father of one of the detained individuals, Trinh Ba Tu, posted information online via Facebook video that his son had been on hunger strike in

¹⁵⁴ Dong Tam Attack report, p25.

¹⁵⁵ Dong Tam Attack report, pp. 4, 25.

¹⁵⁶ Other activists who were targeted included Trinh Ba Phuong who was arrested and detained, and Phan Van Bach, whose case is noted below. Dong Tam Attack report, p25.

¹⁵⁷ Dong Tam Attack report, p16.¹⁵⁸ Upon visiting Cham Mat detention center in Hoa Binh province where his son was being held, Khiem was refused visitation. ICJ communications with partners.

prison for about 20 days to protest ill-treatment in detention.¹⁵⁸

Retaliation by State forces to combat information spreading on social media on the incident was swift, and evidenced co-opting of Facebook to ensure censorship of undesirable activity on the platform. Several individuals who had released information on Facebook in attempts to bring to light violations reported targeting of their accounts by both the State and the company for censorship. Activist blogger **Bui Van Thuan**, who had warned that the authorities would react in the Dong Tam case and, in a 7 January Facebook post, strongly criticized the Government's approach to land rights issues, noted that his account had been blocked by Facebook on 8 January, just before the police raid was launched on the village.¹⁵⁹ His Facebook account was thereafter suspended for three months, with the company informing him that the suspension could be made permanent on the basis that it had "confirmed that you are not eligible to use Facebook."¹⁶⁰ Notably, as of 2019, Thuan – who had amassed a following of about 20,000 users on the platform – had already experienced Facebook's blocking of some of his posts relating to land rights issues. Thuan further alleged that, after his account was blocked, he had made multiple appeals to the company to reinstate his account which were ignored, and an intermediary who had spoken with staff at Facebook was told that the Ministries of Public Security and Information and Communications "had put him on a blacklist".¹⁶¹ In September 2020, nearly nine months after his account had

¹⁵⁸ Upon visiting Cham Mat detention center in Hoa Binh province where his son was being held, Khiem was refused visitation. ICJ communications with partners.

¹⁵⁹ Thuan had called Government leaders "land robbers (who) will do everything, however cruel it is, to grab the people's land" in his post, see Cloud, Bengali, *LA Times*, 2020.

¹⁶⁰ Cloud, Bengali, *LA Times*, 2020.

¹⁶¹ *Ibid.*

been suspended, following pressure by civil society, Facebook reinstated his account, noting it had been a “mistake”.¹⁶²

Other activists reported similar experiences of reactionary measures not only from the State but also Facebook, in response to their attempts to release information on the platform relating to the incident. **Phan Van Bach** – who had a following of approximately 23,000 followers on Facebook and had posted regularly on the Dong Tam dispute – noted that on the day of the raid, individuals who appeared to be police officers turned up at his residence, and that upon noticing them, he made a post on Facebook stating “The party’s devils are outside my house.”¹⁶³ Soon after, his account was restricted for alleged violation of Facebook’s Community Standards.¹⁶⁴

In similar accounts of restrictions based on Community Standards, **Nguyen Van Hai**, an exiled dissident, reported that after he had posted a video on his Facebook account in January of Le Dinh Kinh’s dead body, his post was blocked with a note that the video violated Facebook’s policy of prohibition of violent content on its platform. He was thereafter informed after attempts to re-post the video that it could lead to his account being shut down.¹⁶⁵ Activist **La Viet Dung** also noted that despite trying nine times to post a video of the return of Le Dinh Kinh’s body to his family on Facebook, the video was deleted on each attempt, and he was warned by Facebook’s administration team of permanent account deactivation.¹⁶⁶

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Facebook reportedly did not respond to questions posed about Bach by Cloud and Bengali; Cloud, Bengali, *LA Times*, 2020

¹⁶⁵ Cloud, Bengali, *LA Times*, 2020.

¹⁶⁶ Dong Tam Attack report, p24.

Irrespective of whether or not the posts violated Facebook's content policies, the company did not appear to have taken a meaningful assessment as to whether the content deleted was necessary to advance "political discourse, commentary on public affairs and discussion of human rights" and "inform public opinion" – in line with guidance from the UN Human Rights Committee. Particularly within this context of a charged debate, it was essential that the platform had transparently and publicly provided clarification that its limitations on the rights to free expression and information of the stated users had been deemed necessary and proportionate.

Reports of State-directed internet "trolls" and what appeared to be Force 47 cyber-troopers utilizing and manipulating Facebook's algorithms and systems to shut down content critical of the Government also emerged surrounding the Dong Tam incident. These include "*du luan vien*", or "public opinion shapers", reportedly recruited from the public to promote pro-Government messaging on online platforms.¹⁶⁷ In Phan Van Bach's case, the Dong Tam Task Force alleged the shut-down of his Facebook account had been instigated by mass-reporting of his account to Facebook by State-directed internet trolls; similarly Nguyen Van Hai had reported his post of Le Dinh Kinh's body being inundated by trolls before it was restricted on the platform.¹⁶⁸

Reports also emerged that soon after the operation began, multiple accounts – many of which were new accounts created with apparently false names – began spamming posts and comments on Facebook to provide the narrative that the police had attacked "terrorists" in the village.¹⁶⁹ As individuals

¹⁶⁷ The hiring of *du luan vien* was reportedly referred to in a 2016 document by the CPV. Cloud, Bengali, *LA Times*, 2020.

¹⁶⁸ Dong Tam Attack report, p25; Cloud, Bengali, *LA Times*, 2020.

¹⁶⁹ Dong Tam Attack report, p25.

across Vietnam increasingly utilized the platform to seek more information about the dispute, dozens of Facebook users reported restrictions on their activity, including automated responses which read: "Due to legal requirements in your country, we have restricted access to your profile on Facebook. This means that other people in your country cannot see your profile and may not be able to interact with you over Messenger."¹⁷⁰ Vietnamese civil society have alleged restrictions on Facebook had been incited by *du luan vien*, Force 47 cyber-troopers or other State-linked "trolls" flooding the online platform with complaints against the activities of individual users to curb the spread of information relating to the Dong Tam incident on the platform.¹⁷¹

Meanwhile, the ICJ has monitored the arrest and detention of individuals by the authorities for sharing information online relating to the dispute under article 117 of the 2015 Penal Code in apparent State retaliation – through abuse of criminal legal provisions against human rights defenders attempting to bring to light rights violations.¹⁷² Land rights activists **Can Thi Theu**,¹⁷³ **Trinh**

¹⁷⁰ CIVICUS, 'Online Debate on Dong Tam Incident Followed By Pandemic Silenced By Vietnam Authorities', 7 April 2020 ('CIVICUS, April 2020'), Available at: <https://monitor.civicus.org/updates/2020/04/07/online-debate-dong-tam-incident-followed-pandemic-silenced-vietnam-authorities/>

¹⁷¹ Ibid. CIVICUS also reported that in a seemingly related incident, the YouTube channel of Radio Free Asia's Vietnamese service incurred a penalty from YouTube for allegedly violating its community guidelines, though no further explanation was provided. This prevented the news outlet from uploading videos or livestreaming for seven days, although the restriction was subsequently lifted.

¹⁷² See cases highlighted in this paper; see also Radio Free Asia, 'Vietnam Arrests Four For Sharing Info on Dong Tam Police Raid', 24 June 2020, Available at: <https://www.rfa.org/english/news/vietnam/dong-tam-06242020181006.html>

¹⁷³ Can Thi Theu was arrested and convicted in 2014 and 2016 for her action in connection with land rights activism, and spent nearly three years in prison. She is the mother of **Trinh Ba Phuong** and **Trinh Ba Tu**. The 88 Project, 'Can Thi Theu', Available at: <https://the88project.org/profile/41/can-thi-theu/>; Ba Do, An Phuoc, 'Vietnam arrests five for 'distorted' anti-government propaganda', *VN Express International*, 25 June 2020, Available at: <https://e.vnexpress.net/news/news/vietnam-arrests-five-for-distorted-anti-government-propaganda-4121004.html>

Ba Phuong,¹⁷⁴ **Trinh Ba Tu**,¹⁷⁵ and **Nguyen Thi Tam** were arrested for sharing information on Facebook reporting on the Dong Tam raid.¹⁷⁶ **Nguyen Quang Vinh**¹⁷⁷ was arrested for blogging about the dispute outside of the platform. All were charged with “making, storing, distributing or disseminating materials” amounting to “anti-State propaganda” in violation of the Penal Code. Noting the apparently politically-motivated nature of their charges, and given the trend of abuse by the State of this legal provision to harass and silence human rights defenders evident in multiple other cases, the ICJ expresses serious concerns regarding their prospects for a fair trial.

¹⁷⁴ Trinh Ba Phuong reported that police had cut the internet connection in his area and broken into his house to arrest him. Relatives alleged Phuong, his brother and mother were allegedly beaten during the house search. Police also reportedly confiscated books by writer Pham Doan Trang, co-founder of Liberal Publishing House. The 88 Project, ‘Trinh Ba Phuong’, Available at: <https://the88project.org/profile/449/trinh-ba-phuong/>; Defend the Defenders, ‘Update: Four Activists Detained for Advocating for Dong Tam Land Petitioners’, 24 June 2020 (‘DtD, 24 June 2020’) Available at: <https://www.vietnamhumanrightsdefenders.net/2020/06/24/four-activists-detained-for-advocating-for-dong-tam-land-petitioners/>

¹⁷⁵ As of 26 August, the ICJ was informed the Trinh Ba Tu had been on hunger strike in prison for 20 days. ICJ communications with partners; The 88 Project, ‘Trinh Ba Tu’, Available at: <https://the88project.org/profile/464/trinh-ba-tu/>; DtD, 24 June 2020.

¹⁷⁶ Ba Do, An Phuoc, ‘Vietnam arrests five for ‘distorted’ anti-government propaganda’, *VN Express International*, 25 June 2020, Available at: <https://e.vnexpress.net/news/news/vietnam-arrests-five-for-distorted-anti-government-propaganda-4121004.html>

¹⁷⁷ He was arrested for articles posted on his blog page “chuyentrangoto” relating to the Dong Tam dispute. The 88 Project, Available at: <https://the88project.org/?cat=-1>

IV. COVID-19

With the advent of COVID-19, Vietnamese authorities have unduly used the pandemic as justification to further tighten controls on expression and information shared online. Even as there is no doubt that the pandemic constitutes a global and national crisis, with dire consequences for the right to health and other rights, preventing and addressing these consequences requires robust protective action from the Government, which has obligations to protect as well as fulfill all rights.

Among the required urgent and effective State responses, curtailing false or misleading information online about the spread of the virus is a necessary measure of protection for the rights to health and life. These measures must be implemented in accordance with the rule of law, and also protect the rights to free expression, opinion, information and privacy among others.¹⁷⁸ However, such regulation and oversight of information online must not be abused to violate other rights, including the essence of the right to freedom of information. In Vietnam, measures to censor and restrict expression and information online on the purported basis of controlling false information relating to the virus have evidently violated the principles of legality, legitimacy, necessity and proportionality in breach of the State's legal obligations under the ICCPR and ICESCR.

Expanding an existing trend of targeting expression on online platforms, State authorities have imposed disproportionately harsh penalties on individuals who are alleged to have spread

¹⁷⁸ See also ICJ, 'Southeast Asia: States must respect and protect rights in combating misinformation online relating to COVID-19', 1 April 2020, Available at: <https://www.icj.org/southeast-asia-states-must-respect-and-protect-rights-in-combating-misinformation-online-relating-to-covid-19/>

false information on the virus on social media. In most cases, non-human rights compliant legal frameworks, including the ones referred to above, were wielded to investigate, charge and penalize users. By April 2020, information from the Ministry of Public Security revealed that more than 650 individual users of Facebook had been summoned during the first three months of 2020 to police stations about allegedly false information on COVID-19 shared on the platform, for “working sessions” after which they admitted to the dissemination of such false information, their posts were deleted and they signed pledges not to reoffend.¹⁷⁹ These included 146 individuals who were fined.¹⁸⁰

In certain cases where fines were imposed for the posting of false information online on the justification that they were aimed at protecting the right to health, they appeared to be disproportionate. In February 2020, three prominent artists – **Ngo Thanh Van, Dam Vinh Hung** and **Cat Phuong** – were fined VND 10 million (approx. USD 430) for posting false information relating to the virus online.¹⁸¹ All three also published public apologies in apparent compliance with directions from Ho Chi Minh City’s Department of Information

¹⁷⁹ Robbie Harb, ‘Vietnam bans posting fake news online’, *The Register*, 2 April 2020 (‘The Register, April 2020’) Available at: https://www.theregister.com/2020/04/02/vietnam_bans_posting_fake_news/; Amnesty International, ‘Viet Nam: Facebook must cease complicity with government censorship’, 22 April 2020 (‘Amnesty Intl, April 2020’), Available at: <https://www.amnesty.org/en/latest/news/2020/04/viet-nam-facebook-cease-complicity-government-censorship/>; Anthony Nguyen, ‘Vietnam’s Government Is Using COVID-19 to Crack Down on Freedom of Expression’, *Slate*, 8 May 2020, Available at: <https://slate.com/technology/2020/05/vietnam-coronavirus-fake-news-law-social-media.html>

¹⁸⁰ Amnesty Intl, April 2020.

¹⁸¹ Trung Son, ‘Three celebrities cough up \$430 each for fake coronavirus posts’, *VN Express International*, 12 February 2020 (‘VN Express, 12 February 2020’) Available at: <https://e.vnexpress.net/news/life/culture/three-celebrities-cough-up-430-each-for-fake-coronavirus-posts-4054019.html>; See also CIVICUS, April 2020.

and Communications.¹⁸² While actress Ngo Thanh Van had reportedly posted on her online fan page that flights into Vietnam from Wuhan, China were still running as of 30 January, when flights had been suspended as of 29 January, actress Cat Phuong had reportedly posted on her Facebook page that COVID-19 had spread to District 1 of Ho Chi Minh City when it had not.¹⁸³ Singer Dam Vinh Hung, meanwhile, had reportedly stated that two Chinese nationals infected by the virus had died in a hospital when they were, at the time, still undergoing medical treatment.¹⁸⁴ The authorities noted their actions would “badly affect social order”, particularly given their popularity online, and that they were given less severe punishment as they had moved quickly to remove the false information.¹⁸⁵ The authorities appeared not, however, to have assessed whether the individuals had posted the information in good faith and without malicious intent and to avoid punitive sanctions in view of protecting their rights to free expression and information.

Even where alleged spreading of “false information” in these cases could have had wider and more influential impact due to the artists’ fan base, timely and clear rebuttals by Governmental authorities would likely have adequately advanced public health aims while respecting the rights to free expression and information. Even assuming that the penalties imposed on them were intended to address the important public health objective, the means employed by the State were clearly not necessary and proportionate to that end. In the midst of an emergency where individuals can react in fear and panic, and spread information without verification but without ill intent, heavy-handed tactics to muzzle expression and information online only serve to

¹⁸² VN Express, 12 February 2020.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

exacerbate panic and fear. They also are not tailored to counter fear-mongering or spreading of false information through less conspicuous means such as through private or personal chats on online platforms.

Furthermore, as a general principle, even “false” information is protected under the right to freedom of expression, in the absence of a specific serious harm with the element of malice, ill intent or recklessness. Even where an individual releases factually false information on social media platforms, adverse consequences can be effectively addressed by expanding on existing accurate and regular reporting from trusted health authorities, which would also have been a more rights-compliant and efficient method to counter any “negative impact on social order” that authorities alleged the false statements invoked.¹⁸⁶

In March 2020, driver **Nguyen Van Dung** was fined VND 10 million (approx. USD 430) for stating in a Facebook post that Ho Chi Minh City would be “locked down” for 14 days from 28 March. Authorities noted that while the Prime Minister had informed cities to prepare for a lockdown scenario, banned gatherings of more than 20 people and ordered the closure of non-essential businesses until 15 April, a lockdown order had not at the time been formally passed.¹⁸⁷ Given the nature of the Prime Minister’s announcement and the possibility that an ordinary member of public could have mistaken it as a formal lockdown order, it is difficult to see the statement as malicious or intentionally deceptive. It was therefore non-compliant with the right to freedom of expression for the authorities to have adopted punitive measures in this circumstance. Instead, Nguyen Van Dung could have been

¹⁸⁶ VN Express, 12 February 2020; VN Express, 30 March 2020.

¹⁸⁷ Quoc Thang, ‘Saigon man fined for spreading lockdown fake news’, *VN Express International*, 30 March 2020 (‘VN Express, 30 March 2020’) Available at: <https://e.vnexpress.net/news/news/saigon-man-fined-for-spreading-lockdown-fake-news-4076928.html>

requested to issue a correction, with the authorities themselves providing clarification on Government measures instead.

A focus on clarification from authorities would have also been a more appropriate response with respect to the cases of **Nguyen Thi Hoa, Dang Thi Thu Sen** and the owner of Facebook account '**Vuong Huyen Tui**' who were each fined VND 7.5 million (approx. USD 324) for posting on their social media accounts what was later deemed a false statement by authorities. The post referred to a statement that had allegedly been made by Deputy Prime Minister Vu Duc Dam warning people to stay away from Danang province, stating a new wave of cases had been reported there.¹⁸⁸

Notably, the aim of protecting against “negative impact on social order” is in itself overbroad and can infringe on the principles of legality and legitimacy, as COVID-19-specific limitation measures need to be strictly necessary towards protecting public health. In July 2020, the Vietnamese rights monitoring organization, the 88 Project, highlighted the cases of three teachers who were issued fines of VND 10 million (approx. USD 430) in Ha Giang province for posting online comments that “the outbreak is out of control!”, along with pictures of individuals in quarantine. The charge was that they had caused “unnecessary panic to the public.” A doctor was also reportedly fined in Can Tho province for stating “Can Tho has its first case. The residents should enhance their immunity system by eating more vitamins and mineral-rich

¹⁸⁸ Defend the Defenders, ‘Three Facebookers Fined for Posting Fake Statement of Senior Official Regarding Covid-19 Pandemic’, 29 July 2020, Available at: <https://www.vietnamhumanrightsdefenders.net/2020/07/29/three-facebookers-fined-for-posting-fake-statement-of-senior-official-regarding-covid-19-pandemic/>

food.”¹⁸⁹ In April 2020, **Pham Van Hai**, in Thai Nguyen province, was convicted and imprisoned for six months for “illegal provision or use of information on computer networks or telecommunications networks” under article 288 of the 2015 Penal Code following posts he had made on social media alleging that there had been a COVID-related death in his province but which had been “concealed” by the Government.¹⁹⁰ In these cases, the response of the authorities appeared not to be narrowly limited to its protective obligation, but rather an unnecessary and disproportionate response resulting in impairments of the rights of freedom of expression and information of the individuals who were sanctioned.

Individuals who have analysed, criticized or merely commented online on the Government’s responses to COVID-19 have also been targeted for censorship, while in other cases, individuals who have sought to disseminate information on the virus not accessible through State media outlets have been subject to disproportionate and illegitimate penalties. In May 2020, **Ma Phung Ngoc Phu** was sentenced by the People’s Court of Ninh Kieu District to nine months’ imprisonment under article 331 of the 2015 Penal Code for alleged “abuse of democratic freedoms”. He had been arrested in April on accusations of “sharing” 14 posts by other Facebook users. In one such post Phu had stated: “There is news that one person has passed away from coronavirus in

¹⁸⁹ The 88 Project, ‘Vietnam in COVID-19: Normalizing a police state?’, 3 June 2020 (‘The 88 Project, 3 June 2020’), Available at:

<https://the88project.org/vietnam-in-covid-19-normalizing-a-police-state/>

¹⁹⁰ Pham Du, ‘Man jailed for posting false news on Covid-19 death’, *VN Express International*, 23 April 2020, Available at:

<https://e.vnexpress.net/news/news/man-jailed-for-posting-false-news-on-covid-19-death-4088977.html>; The offence carries a maximum of seven years’ imprisonment. English translation of 2015 Penal Code available at: <https://www.wipo.int/edocs/lexdocs/laws/en/vn/vn086en.pdf>

Vietnam, why do no news outlets talk about this?”.¹⁹¹ In March 2020, Defend the Defenders reported that Facebook user **Dang Nhu Quynh** had been summoned by the Ministry of Public Security for questioning, after he was accused of circulating more than 200 articles relating to COVID-19 online. The ministry reportedly announced on its website that he could face charges of “abusing democratic freedoms” under article 331 of the 2015 Penal Code which provides for a maximum penalty of seven years’ imprisonment.¹⁹² Some human rights defenders have contended that his dissemination of information online was accurate, and faster than State agencies.¹⁹³

Without drawing any conclusions about these particular cases as a whole, it should be clear that the particular statements outlined above amount to opinions and expression that are protected under article 19 of the ICCPR which provides for the rights to “hold opinions without interference” and “freely seek, receive and impart information and ideas, regardless of frontiers, through any media”. There does not appear any grounds under the exceptions provided for under the Covenant to restrict, much less punish, this expression, as it would not be strictly necessary to serve a legitimate public health purpose. On the contrary, particularly in the midst of a health emergency, there is a particularly compelling need

¹⁹¹ The 88 Project, ‘Ma Phung Ngoc Phu’, Available at: <https://the88project.org/profile/469/ma-phung-ngoc-phu-/>; Defend the Defenders, ‘Vietnamese Facebooker Probed for “Abuse of Democratic Freedom” for Posting on COVID-19’, 11 April 2020, Available at: <https://www.vietnamhumanrightsdefenders.net/2020/04/11/vietnamese-facebooker-probed-for-abuse-of-democratic-freedom-for-posting-on-covid-19/>

¹⁹² Defend the Defenders, ‘Vietnamese Well-known Facebooker Threatened with Heavy Punishment For Disseminating News on Covid-19’, 28 March 2020, Available at: <https://www.vietnamhumanrightsdefenders.net/2020/03/28/vietnamese-well-known-facebooker-threatened-with-heavy-punishment-for-posting-on-covid-19/>

¹⁹³ Ibid.

to allow for access to information in a non-discriminatory manner and permit individuals to share information and critically analyse State responses to the crisis in the interests of public health and safety. Amidst a pandemic, protecting rights to free expression and information are important not only to promote the rights in themselves, but also to advance human rights broadly – particularly the rights to health and life.

V. Recommendations

Since the release of the ICJ's *Dictating the Internet* report in December 2019, the ICJ has observed a retrogressive trend of assaults on the rights of persons online. Affected individuals have been subject to harassment, investigation, criminal charges, prosecution, and imprisonment and have been effectively chilled from exercising their rights to free expression and information on online platforms, including where such content is aimed at protection of the rights to health and life amidst the COVID-19 pandemic. In 2020, Governmental authorities have invoked already non-human rights compliant laws and the legal system to aggressively target any perceived criticism of the Government or its policies, while piling pressure on technological companies to comply with its demands for censorship through the imposition of onerous legal rules and penalties and non-legal political pressure. Increased State-supported surveillance and policing of online platforms risk further narrowing of an already restricted civic space online.

In light of the issues and challenges highlighted above in this briefing paper, the ICJ makes the following recommendations to the Vietnamese Government, including the National Assembly, and where appropriate responsible executive agencies, including but not limited to the Ministry of Public Security, Ministry of Information and Communications and Ministry of National Defence:

- Adopt and implement the recommendations of the UN Special Rapporteur on freedom of expression towards protecting and promoting rights online, including the rights to freedom of expression,

information and privacy, as provided for in the Rapporteur's reports to the UN Human Rights Council and UN General Assembly on 'Freedom of expression, states and the private sector in the digital age' (2016); 'Contemporary challenges to freedom of expression' (2016); 'The role of digital access providers' (2017); 'Online content regulation' (2018); 'Artificial Intelligence technologies and implications for the information environment' (2018); 'Surveillance and human rights' (2019) and 'Disease pandemics and the freedom of opinion and expression' (2020);

Recommendations in these reports, reproduced in the *Annex* below, ground and inform the following recommendations:

- Repeal or substantially amend criminal law provisions that serve to criminalize or unduly restrict the rights to expression, opinion and information online as well as offline, including but not limited to articles 116, 117, 118 and 331 of the 2015 Penal Code, so that they are in line with Vietnam's international legal obligations;
- Repeal or amend all laws and administrative and regulatory provisions where State authorities or agencies are conferred wide ranging powers to determine penalties for overbroad offences of alleged "disruption of national security" or "public order", "undermining national unity", "abusing democratic freedoms" or "conducting propaganda against the State", to bring them in line with Vietnam's international legal obligations;

- Amend all laws and administrative and regulatory provisions to ensure that any restriction to online expression or content may only be undertaken pursuant to an order by an independent and impartial judicial authority applying grounds for such restriction that are in accordance with international law and standards, including the principles of due process and the standards of non-discrimination, legality, legitimacy, necessity and proportionality – In this regard it is the judiciary and not companies or State authorities that are the final arbiters of what constitutes protected expression under law;¹⁹⁴
- Repeal or amend all laws and administrative regulatory provisions which allow for proactive monitoring and filtering of online content, facilitate pre-publication censorship and unduly restrict the rights to expression, opinion, information and privacy online, including but not limited to the Law on Cybersecurity and Decree No. 15/2020/ND-CP, to bring them in line with international law and standards;¹⁹⁵
- Refrain from pressuring or influencing technological companies to remove content by users off online platforms which are deemed impermissible by the State, in line with Vietnam’s obligations to protect, promote and fulfil the rights to freedom of expression, opinion, information and privacy online under international law;

¹⁹⁴ See UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 6 April 2018, A/HRC/38/35 (‘A/HRC/38/35’), paras 65 to 69.

¹⁹⁵ Ibid.

- Refrain from using either legal tools to impose undue influence or pressure to curtail freedom of expression and information online, such as the wielding of non-human rights compliant laws against technological companies including but not limited to the Law on Cybersecurity and Decree No. 15/2020/ND-CP, or non-legal methods of pressure, including but not limited to the shutting off of access to online servers or otherwise throttling access to online media platforms;
- In adopting laws, administrative regulations and policies in respect of regulation of expression and information online, establish a participatory process to receive input from the general public, including civil society, academics, lawyers, technology experts and other independent policy advisers or technical experts. In line with the principle of transparency, publicize detailed reports on all content-related requests from State authorities issued to individuals, technological companies, internet intermediaries and internet service providers, and relevant updates or further information on requests;¹⁹⁶
- Drop all charges against individuals, including those named in this report, facing prosecution for alleged violation of non-human rights compliant laws in the exercise of their rights to freedom of expression and information online. With respect to the cases of convicted individuals, quash their convictions, and with respect to individuals in pre-trial detention, cease investigation of their cases – All persons held in pre-trial detention or imprisoned on conviction in such cases should be immediately released;

¹⁹⁶ Ibid.

- Cease harassment of all individuals for merely exercising their rights to free expression and information online, through the abuse of laws and administrative regulations or physical harassment such as physical attacks, surveillance or monitoring in violation of their rights to bodily integrity, security, health and privacy. In particular:
- Cease surveillance or monitoring efforts which interfere with or chill the exercise of the rights to freedom of expression, information and privacy online, including by disbanding “Force 47” and withdrawing engagement of cyberespionage or cyber-sleuthing capabilities to illegitimately surveil and attack individuals online in contravention of Vietnam’s international legal obligations;
- Ensure that all information about how personal data and information collected in State surveillance measures is handled, stored, disseminated and used by State and non-State authorities is communicated in a clear, transparent, regular and accessible manner, to all individuals without discrimination;¹⁹⁷
- Refrain in particular from criminalizing expression or information online transmitted by individuals regarding COVID-19 transmission or exposure and concentrate efforts on enacting effective, evidence- and rights-based interventions in COVID-19 responses.

¹⁹⁷ Ibid.

In light of the issues and challenges highlighted above in this briefing paper, the ICJ also urges technological companies, particularly Big Tech companies Facebook and Alphabet Inc., in light of their dominance of the digital market, to adopt the recommendations of the UN Special Rapporteur on freedom of expression as detailed above and:

- Publicly affirm commitment to respect and protect human rights, and affirm that they will apply international human rights law and standards, and not the domestic laws of different States or non-human rights compliant corporate policies, in line with the prescriptions of the UN Guiding Principles on Business and Human Rights and other industry-specific human rights guidelines developed by civil society, such as the Global Network Initiative;¹⁹⁸
- Accordingly amend internal content moderation and regulation standards to reflect international human rights standards, in particular with respect to the rights to freedom of expression, opinion, information and privacy;¹⁹⁹
- Adopt and implement effective safeguard mechanisms to monitor and ensure their products and services are compliant with international human rights law and standards, including contractual clauses that prohibit the customization, targeting, servicing or other use of mechanisms which impair human rights, incorporating design features to flag,

¹⁹⁸ See A/HRC/38/35, paras 70 to 72.

¹⁹⁹ Ibid.

prevent or mitigate misuse, and human rights audit processes;²⁰⁰

- Publicly publish detailed transparency reports on all content-related requests issued by the Vietnamese authorities or Government-linked bodies, including Government requests for takedown of content, and the company's measures in response;²⁰¹
- Promptly report any abuse of products or services in violation of international human rights law and standards to international oversight bodies, including the mechanisms of the United Nations and in particular relevant Special Procedures mandates of the Human Rights Council, and establish independent and effective grievance mechanisms to ensure redress and accountability for victims of rights abuses on their platforms;²⁰²
- Take all necessary and lawful measures to ensure their platforms do not cause, contribute to or become complicit in human rights abuses, including by ensuring that corporate partnership arrangements respect human rights obligations and seek to mitigate any adverse rights impacts;²⁰³
- Engage with and solicit genuine inputs from the Vietnamese public, civil society, academics, lawyers

²⁰⁰ See UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 28 May 2019, A/HRC/41/35 ('A/HRC/41/35'), paras 66 to 69.

²⁰¹ See UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 11 May 2016, A/HRC/32/38, paras 87 to 90.

²⁰² See A/HRC/41/35, paras 66 to 69.

²⁰³ See UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 30 March 2017, A/HRC/35/22, paras 82 to 83.

and other independent policy advisers or technical experts to ensure full understanding of the human rights context in Vietnam and support considerations of appropriate legal or administrative regulatory frameworks governing expression and information online in accordance with international human rights law and standards.

VI. Annex

Key recommendations by the UN Special Rapporteur on freedom of expression as provided for in the Rapporteur's reports to the UN Human Rights Council and UN General Assembly are produced below for ease of reference, in chronological order:

2016 Report: 'Freedom of expression, states and the private sector in the digital age' (A/HRC/32/38)

"82. The information and communication technology sector is always in rapid development, continually upgrading technology, digitizing everyday life. As a result, addressing legal and policy issues with an eye to current normative gaps involves some risk of failing to address trends that are only now emerging or have yet to emerge. This is a natural feature of the digital age, but even with rapid change in technology, the digital environment will continue to be animated by persistent threats to freedom of opinion and expression. These threats include government dominance of, or attempts to dominate, sources of information, using tools of censorship against online services and infrastructure; the struggle of businesses to promote their products and services in environments that are hostile to freedom of expression; the failures of many business enterprises to ensure the promotion and protection of rights in their pursuit of commercial interests; and the often contradictory demands of individuals that business entities provide them not only with security but also convenience, connectivity and community. As the project of exploring information and communication technology responsibilities moves forward, the Special Rapporteur will be looking to experts in the field — in Government, the private sector, civil society, the technical community, academia — to help him conduct analysis and reporting that respond both to the current issues

at the intersection of technology and freedom of expression and to long-term features of the digital age.

83. The Special Rapporteur strongly encourages all stakeholders — whether State actors, private sector enterprises or civil society organizations and individuals — to take an active part in the development of the forthcoming projects. He particularly encourages stakeholders from less developed countries and vulnerable communities to share perspectives on the impact that the information and communication technology sector may have on the enjoyment of rights and the role that States may play in either interfering with or advancing those rights.

84. Even though this project is at its early stages, it is nonetheless critical that States and private actors take steps to ensure respect for the freedom of opinion and expression. These steps should include, at a minimum, the following, with further analysis to follow throughout the Special Rapporteur's mandate.

States

85. States bear a primary responsibility to protect and respect the right to exercise freedom of opinion and expression. In the information and communication technology context, this means that States must not require or otherwise pressure the private sector to take steps that unnecessarily or disproportionately interfere with freedom of expression, whether through laws, policies, or extralegal means. Any demands, requests and other measures to take down digital content or access customer information must be based on validly enacted law, subject to external and independent oversight, and demonstrate a necessary and proportionate means of achieving one or more aims under article 19 (3) of the International Covenant on Civil and

Political Rights. Particularly in the context of regulating the private sector, State laws and policies must be transparently adopted and implemented.

86. Governments must also adopt and implement laws and policies that protect private development and the provision of technical measures, products and services that advance freedom of expression. They must ensure legislative, policymaking and other relevant norm-setting processes concerning rights and restrictions on the Internet in order to provide the private sector, civil society, the technical community and academia meaningful opportunities for input and participation.

Private sector

87. States place undeniable pressures on the private information and communication technology sector that often lead to serious restrictions on the freedom of expression. The private sector, however, also plays independent roles that may either advance or restrict rights, a point the Human Rights Council well understood by adopting the Guiding Principles on Business and Human Rights in 2011 as general guidance in that field. Private entities should be evaluated on the steps they take both to promote and undermine freedom of expression, even in hostile environments unfriendly to human rights.

88. Among the most important steps that private actors should take is the development and implementation of transparent human rights assessment procedures. They should develop and implement policies that take into account their potential impact on human rights. Such assessments should critically review the wide range of private sector activities in which they are engaged, such as the formulation and enforcement of terms of service and community

standards on users' freedom of expression, including the outsourcing of such enforcement; the impact of products, services and other commercial initiatives on users' freedom of expression as they are being developed, including design and engineering choices, and plans for differential pricing of or access to Internet content and services; and the human rights impact of doing business with potential government customers, such as the operation of telecommunication infrastructure or the transfer of content-regulation or surveillance technologies.

89. It is also critical that private entities ensure the greatest possible transparency in their policies, standards and actions that implicate the freedom of expression and other fundamental rights. Human rights assessments should be subject to transparent review, in terms of their methodologies, their interpretation of legal obligations and the weight that such assessments have on business decisions. Transparency is important across the board, including in the context of content regulation, and should include the reporting of government requests for takedowns.

90. Beyond adoption of policies, private entities should also integrate commitments to freedom of expression into internal policymaking, product engineering, business development, staff training and other relevant internal processes. The Special Rapporteur will aim to explore policies and the full range of implementation steps in a number of ways, including through company visits.

International organizations and multi-stakeholder processes

91. As the present report has shown, many international organizations play a role in information and communication technology governance processes. It is critical that such organizations provide meaningful public access to policies,

standards, reports and other information concerning Internet governance created or generated by the organization and/or its membership, including through facilitating access to free online resources and public education initiatives. More generally, the multi-stakeholder process for Internet governance has been an important driver for policies supportive of freedom of expression. With that in mind, international organizations should ensure meaningful civil society participation in policymaking and other standard-setting processes, including through increasing the presence of technical experts sensitive to human rights concerns.”

2016 Report: 'Contemporary challenges to freedom of expression' (A/71/373)

“57. (a) Review and, where necessary, revise national laws. National legislation increasingly adopts overly broad definitions of key terms, such as terrorism, national security, extremism and hate speech, that fail to limit the discretion of executive authorities. Legislation often limits the role of judicial or independent and public oversight. Proponents often give limited demonstration of how new legal rules are necessary to protect legitimate interests and proportionately address specific threats, and the legislative process often limits public engagement and debate. I would urge all States considering new legislation to ensure that their laws meet these requirements, and I encourage States to implement regular public oversight of laws that implicate freedom of expression to ensure that they meet the tests of legality, legitimacy and necessity. Where possible, States should not only adopt legal frameworks but also implement training, particularly among independent oversight bodies, of the principles of freedom of expression;

(b) Engage with special procedures of the Human Rights Council. As has been shown in the present report, while the

response rate to communications is quite low, several States engage with the mandate holder in good faith. Engagement with communications and invitations to conduct country missions add significant value to the work of the mandate holder, since they allow us to seek an understanding of why States pursue certain policies (and, where those policies are adverse to freedom of expression, a possibility of encouraging officials to adopt other measures);

(c) Support or establish regional or subregional monitoring. Several regions have developed or are developing independent approaches to supporting freedom of expression. The Inter-American Commission on Human Rights, the African Commission on Human and People's Rights and the Organization for Security and Cooperation in Europe have established monitoring mechanisms on the basis of norms that are consistent with the international and regional standards. Human rights courts serve as critical watchdogs in these regions, including subregional courts such as the East African Court of Justice and the Court of Justice of the Economic Community of West African States. At this time, however, no such monitors — expert-oriented or judicial — exist in the Middle East and North Africa or Asia. I strongly encourage States, in collaboration with United Nations and regional political bodies and civil society, to begin the process of developing independent monitoring mechanisms in those regions that do not currently enjoy them on the basis of international standards. I also strongly encourage civil society actors to make active use of the existing regional and global mechanisms, whether through supportive fact-finding and reporting or litigation, and to develop approaches to creating regional monitoring. The Special Rapporteur stands ready to support such efforts;

(d) Support independent media and civic space. In the face of State repression of reporting, it is critical that States

make an extra effort to support independent voices in the media and civil society at large. At a minimum, I encourage States to avoid imposing restrictions on reporting and research that may be seen to criticize the Government and its policies or to share information about sensitive subjects, including terrorism. States should especially avoid imposing obstacles, such as accreditation procedures or penalties through defamation lawsuits or intermediary liability, that undermine independent media. At the same time, those with the means — such as private donors and foundations — should make a special effort to support independent media and to foster strong scrutiny of media conglomerations that squeeze out the less well-financed outlets;

(e) State leadership. One of the most disappointing aspects of the current situation for freedom of expression is that many States with strong histories of support for freedom of expression — in law and in their societies — have considered measures liable to abuse in their own countries or to misuse when applied elsewhere. In particular, Governments pursuing new policies to enhance surveillance or to limit Internet security should reconsider those efforts, as they often fail to meet the tests of necessity and proportionality. I strongly urge all States to consider that attacks on security on the Internet pose long-term threats not only to freedom of expression but also to national security and public order itself.”

2017 Report: 'The role of digital access providers' (A/HRC/35/22)

“76. Individuals depend on digital access to exercise fundamental rights, including freedom of opinion and expression, the right to life and a range of economic, social and cultural rights. They also regularly face obstacles to access: from shutdowns to surveillance. The present report

is largely concerned with the obstacles that deny, deter or exclude expression through blunt reliance on digital censorship. The present report has not addressed other serious obstacles — such as the lack of adequate connectivity infrastructure, high costs of access imposed by government, gender inequality, and language barriers — that also may constitute forms of censorship. Much of it therefore focuses on the roles and obligations of States. But States increasingly exercise censorship through the private sector. The report has aimed not only to address the constraints on State action under human rights law but also the principles that private actors should observe in respecting human rights. Key recommendations, already highlighted in the analysis above, are set out below.

States and the Human Rights Council

77. The Human Rights Council, in its resolution 32/13, condemned unequivocally measures to intentionally prevent or disrupt access to or dissemination of information online in violation of international human rights law, and called upon all States to refrain from and cease such measures. This condemnation, which is critical to the Council's promotion of human rights online, should be supplemented and specified. Intentional prevention or disruption of access includes any action that shuts down or renders ineffective access to telecommunications networks, mobile services, social media platforms and so forth. Future work of the Council that clarifies the rules that apply to digital access, as outlined in this report, would advance the right to freedom of opinion and expression online.

78. It is also critical for the Council and States to draw the connections between privacy interference and freedom of expression. To be sure, interferences with privacy must be assessed on their own merits under article 17 of the

International Covenant on Civil and Political Rights and other norms of human rights law. But certain interferences — such as overbroad requests for user data and third party retention of such data — can have both near- and long-term deterrent effects on expression, and should be avoided as a matter of law and policy. At a minimum, States should ensure that surveillance is authorized by an independent, impartial and competent judicial authority certifying that the request is necessary and proportionate to protect a legitimate aim.

79. The Special Rapporteur is particularly concerned about reports of threats and intimidation of companies, their employees and their equipment and infrastructure. Also, the Council's emphasis on the important role — and need for protection — of the private sector deserves consideration. States should review all activities to obtain network access to ensure that they are lawful, necessary and proportionate, paying particular attention to whether these activities are the least intrusive means for protecting a legitimate aim.

80. The protective role that States may exercise over the private sector can only go so far. They should not be promoting the economic gain of private entities over users' rights to freedom of opinion and expression. Thus, States should prohibit attempts to assign priority to certain types of Internet content or applications over others for payment or other commercial benefits.

81. The intersection of State behaviour and corporate roles in the digital age remains somewhat new for many States. One profitable way forward, at both the international and domestic levels, would involve the development of national action plans on business and human rights in order to establish meaningful avenues for all categories of the digital access industry to identify and address their respective human rights impacts.

Private actors

82. For years now, individuals and companies within the digital access sector have understood that they play an essential role in the vast expansion of access to information and communications services. They are in a business in which the model for success should involve expanding access, efficiencies, diversity and transparency. They should take the principles identified in the present report as tools to strengthen their own roles in advancing users' rights to freedom of expression. In this spirit, in addition to high-level policy commitments to human rights, the industry should allocate appropriate resources towards the fulfilment of these commitments, including due diligence, rights-oriented design and engineering choices, stakeholder engagement, strategies to prevent or mitigate human rights risks, transparency and effective remedies. In doing so, the design and implementation of corporate human rights accountability measures should draw on both internal and external expertise, and ensure meaningful input from customers and other affected rights holders, civil society and the human rights community.

83. This is not to say that private companies do not face pressures. They do. But when States request corporate involvement in censorship or surveillance, companies should seek to prevent or mitigate the adverse human rights impacts of their involvement to the maximum extent allowed by law. In any event, companies should take all necessary and lawful measures to ensure that they do not cause, contribute or become complicit in human rights abuses. Arrangements with corporate partners should be structured to ensure that all parties uphold their human rights responsibilities. Companies should also seek to build leverage in pre-existing business relationships to prevent or mitigate adverse human rights impacts."

**2018 Report: 'Online content regulation'
(A/HRC/38/35)**

“64. Opaque forces are shaping the ability of individuals worldwide to exercise their freedom of expression. This moment calls for radical transparency, meaningful accountability and a commitment to remedy in order to protect the ability of individuals to use online platforms as forums for free expression, access to information and engagement in public life. The present report has identified a range of steps, include the following.

Recommendations for States

65. States should repeal any law that criminalizes or unduly restricts expression, online or offline.

66. Smart regulation, not heavy-handed viewpoint-based regulation, should be the norm, focused on ensuring company transparency and remediation to enable the public to make choices about how and whether to engage in online forums. States should only seek to restrict content pursuant to an order by an independent and impartial judicial authority, and in accordance with due process and standards of legality, necessity and legitimacy. States should refrain from imposing disproportionate sanctions, whether heavy fines or imprisonment, on Internet intermediaries, given their significant chilling effect on freedom of expression.

67. States and intergovernmental organizations should refrain from establishing laws or arrangements that would require the “proactive” monitoring or filtering of content, which is both inconsistent with the right to privacy and likely to amount to pre-publication censorship.

68. States should refrain from adopting models of regulation where government agencies, rather than judicial authorities, become the arbiters of lawful expression. They should avoid delegating responsibility to companies as adjudicators of content, which empowers corporate judgment over human rights values to the detriment of users.

69. States should publish detailed transparency reports on all content-related requests issued to intermediaries and involve genuine public input in all regulatory considerations.

Recommendations for ICT companies

70. Companies should recognize that the authoritative global standard for ensuring freedom of expression on their platforms is human rights law, not the varying laws of States or their own private interests, and they should re-evaluate their content standards accordingly. Human rights law gives companies the tools to articulate and develop policies and processes that respect democratic norms and counter authoritarian demands. This approach begins with rules rooted in rights, continues with rigorous human rights impact assessments for product and policy development, and moves through operations with ongoing assessment, reassessment and meaningful public and civil society consultation. The Guiding Principles on Business and Human Rights, along with industry-specific guidelines developed by civil society, intergovernmental bodies, the Global Network Initiative and others, provide baseline approaches that all Internet companies should adopt.

71. The companies must embark on radically different approaches to transparency at all stages of their operations, from rule-making to implementation and development of “case law” framing the interpretation of private rules. Transparency requires greater engagement with digital rights

organizations and other relevant sectors of civil society and avoiding secretive arrangements with States on content standards and implementation.

72. Given their impact on the public sphere, companies must open themselves up to public accountability. Effective and rights-respecting press councils worldwide provide a model for imposing minimum levels of consistency, transparency and accountability to commercial content moderation. Third-party non-governmental approaches, if rooted in human rights standards, could provide mechanisms for appeal and remedy without imposing prohibitively high costs that deter smaller entities or new market entrants. All segments of the ICT sector that moderate content or act as gatekeepers should make the development of industry-wide accountability mechanisms (such as a social media council) a top priority.”

2018 Report: 'Artificial Intelligence technologies and implications for the information environment' (A/73/348)

“Recommendations for States

62. When procuring or deploying AI systems or applications, States should ensure that public sector bodies act consistently with human rights principles. This includes, inter alia, conducting public consultations and undertaking human rights impact assessments or public agency algorithmic impact assessments prior to the procurement or deployment of AI systems. Particular attention should be given to the disparate impact of such technologies on racial and religious minorities, political opposition and activists. Government deployment of AI systems should be subject to regular audits by external, independent experts.

63. States should ensure that human rights are central to private sector design, deployment and implementation of AI systems. This includes updating and applying existing regulation, particularly data protection regulation, to the AI domain, pursuing regulatory or co regulatory schemes designed to require businesses to undertake impact assessments and audits of AI technologies and ensuring effective external accountability mechanisms. Where applicable, sectoral regulation of particular AI applications may be necessary and effective for the protection of human rights. To the extent that such restrictions introduce or facilitate interferences with freedom of expression, States should ensure that they are necessary and proportionate to accomplish a legitimate objective in accordance with article 19 (3) of the Covenant. AI-related regulation should also be developed through extensive public consultation involving engagement with civil society, human rights groups and representatives of marginalized or underrepresented end users.

64. States should create a policy and legislative environment conducive to a diverse, pluralistic information environment. This includes taking measures to ensure a competitive field in the AI domain. Such measures may include the regulation of technology monopolies to prevent the concentration of AI expertise and power in the hands of a few dominant companies, regulation designed to increase interoperability of services and technologies, and the adoption of policies supporting network neutrality and device neutrality.

Recommendations for companies

65. All efforts to elaborate guidelines or codes on ethical implications of AI technologies should be grounded in human rights principles. All private and public development and

deployment of AI should provide opportunities for civil society to comment. Companies should reiterate in corporate policies and technical guidance to engineers, developers, data technicians, data scrubbers, programmers and others involved in the AI life cycle that human rights responsibilities guide all of their business operations and that ethical principles can assist by facilitating the application of human rights principles to specific situations of AI design, deployment and implementation. In particular, the terms of service of platforms should be based on universal human rights principles.

66. Companies should make explicit where and how AI technologies and automated techniques are used on their platforms, services and applications. The use of innovative means to signal to individuals when they are subject to an AI-driven decision-making process, when AI plays a role in displaying or moderating content or when individuals' personal data may be integrated into a dataset that will be used to inform AI systems is critical to giving users the notice necessary to understand and address the impact of AI systems on their enjoyment of human rights. Companies should also publish data on content removals, including how often removals are contested and challenges to removals are upheld, as well as data on trends in content display, alongside case studies and education on commercial and political profiling.

67. Companies must prevent and account for discrimination at both the input and output levels of AI systems. This involves ensuring that teams designing and deploying AI systems reflect diverse and non-discriminatory attitudes and prioritizing the avoidance of bias and discrimination in the choice of datasets and design of the system, including by addressing sampling errors, scrubbing datasets to remove discriminatory data and putting in place

measures to compensate for such data. Active monitoring of discriminatory outcomes of AI systems is also essential.

68. Human rights impact assessments and public consultations should be carried out during the design and deployment of new AI systems, including the deployment of existing systems in new global markets. Public consultations and engagement should occur prior to the finalization or roll-out of a product or service, in order to ensure that they are meaningful, and should encompass engagement with civil society, human rights defenders and representatives of marginalized or underrepresented end users. The results of human rights impact assessments and public consultations should themselves be made public.

69. Companies should make all AI code fully auditable and should pursue innovative means for enabling external and independent auditing of AI systems, separately from regulatory requirements. The results of AI audits should themselves be made public.

70. Individual users must have access to remedies for the adverse human rights impacts of AI systems. Companies should put in place systems of human review and remedy to respond to the complaints of all users and appeals levied at AI-driven systems in a timely manner. Data on the frequency at which AI systems are subject to complaints and requests for remedies, as well as the types and effectiveness of remedies available, should be published regularly.”

**2019 Report: 'Surveillance and human rights'
(A/HRC/41/35)**

66. *For States:*

(a) States should impose an immediate moratorium on the export, sale, transfer, use or servicing of privately developed surveillance tools until a human rights-compliant safeguards regime is in place;

(b) States that purchase or use surveillance technologies ("purchasing States") should ensure that domestic laws permit their use only in accordance with the human rights standards of legality, necessity and legitimacy of objectives, and establish legal mechanisms of redress consistent with their obligation to provide victims of surveillance-related abuses with an effective remedy;

(c) Purchasing States should also establish mechanisms that ensure public or community approval, oversight and control of the purchase of surveillance technologies;

(d) States that export or permit the export of surveillance technologies ("exporting States") should ensure that the relevant government agencies solicit public input and conduct multi-stakeholder consultations when they are processing applications for export licences. All records pertaining to export licences should be stored and made available to the greatest extent possible. They should also establish safe harbours for security research and exempt encryption items from export control restrictions;

(e) Exporting States should join the Wassenaar Arrangement and abide by its rules and standards to the extent that these are consistent with international human rights law;

(f) States participating in the Wassenaar Arrangement should develop a framework by which the licensing of any technology would be conditional upon a national human rights review and companies' compliance with the Guiding Principles on Business and Human Rights. Such a framework could be developed through a specially established human rights working group. Additionally, they should set clear and enforceable guidelines on transparency and accountability with respect to licensing decisions, surveillance-related human rights abuses and the treatment of digital vulnerabilities.

67. *For companies:*

(a) Private surveillance companies should publicly affirm their responsibility to respect freedom of expression, privacy and related human rights, and integrate human rights due diligence processes from the earliest stages of product development and throughout their operations. These processes should establish human rights by design, regular consultations with civil society (particularly groups at risk of surveillance), and robust transparency reporting on business activities that have an impact on human rights;

(b) Companies should also put in place robust safeguards to ensure that any use of their products or services is compliant with human rights standards. These safeguards include contractual clauses that prohibit the customization, targeting, servicing or other use that violates international human rights law, technical design features to flag, prevent or mitigate misuse, and human rights audits and verification processes;

(c) When companies detect misuses of their products and services to commit human rights abuses, they should

promptly report them to the relevant domestic, regional or international oversight bodies. They should also establish effective grievance and remedial mechanisms that enable victims of surveillance-related human rights abuses to submit complaints and seek redress.

68. For the United Nations: the Organization, particularly the Human Rights Council, should create a working group or cross-mandate task force to monitor and provide recommendations on trends in, and individual cases of, human rights abuses facilitated by digital surveillance.

69. For all stakeholders: States, the private sector, civil society and other relevant stakeholders should establish co-regulatory initiatives that develop rights-based standards of conduct for the private surveillance industry and implement these standards through independent audits, and learning and policy initiatives.”

2020 Report: 'Disease pandemics and the freedom of opinion and expression' (A/HRC/44/49)

“58. “How can you have an opinion if you are not informed?” In 11 words, the political philosopher Hannah Arendt summed up the theory connecting article 19 (1) of the International Covenant on Civil and Political Rights, which protects everyone’s right to hold opinions without interference, with the guarantee, in article 19 (2), of everyone to seek, receive and impart information and ideas of all kinds, regardless of frontiers and through any media. She also noted: “If everybody always lies ... nobody believes anything any longer. ... And a people that no longer can believe anything cannot make up its mind. It is deprived not only of its capacity to act but also of its capacity to think and to judge. And with such a people you can then do what you please.”

59. Hannah Arendt knew of what she spoke. A scholar of totalitarianism forced to flee Nazi Germany, she presented intersecting and fundamental principles of human rights law – the rights to opinion, expression, access to information, autonomy, self-governance – in much the way that the Covenant and the Universal Declaration of Human Rights promote democratic values and protect human life. While she had in mind the kind of propaganda that facilitates authoritarianism, her point extends to all nature of government practices that interfere with the individual's ability to develop informed opinions and to take action consistent with those opinions. At this particular moment in history, we all can see exactly what she had in mind, and why the drafters of the Covenant, and of the Declaration 20 years before it, believed it essential to guarantee expression. The Inter-American Court of Human Rights has echoed this essential principle connecting expression to opinion:

Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. ... It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.

60. In a nutshell, the premise underlying freedom of opinion and expression strongly supports appropriate public health responses to COVID-19. The freedom to share information and ideas empowers individuals and communities, human development and democratic self-governance. In certain circumstances, information saves lives. By contrast, lies and propaganda deprive individuals of autonomy, of the capacity to think critically, of trust in themselves and in sources of information, and of the right to engage in the kind of debate that improves social conditions.

Worst of all, censorship can kill, by design or by negligence. These are the principles that have led States, in multiple instruments across human rights law and the political organs of the United Nations, to emphasize government's obligation to enable, promote and protect robust and independent media and provide reliable information to the public, which extends to affirmative government information strategies concerning voting, health and other essential services and fundamental rights.

61. Public health authorities worldwide have called for social distancing and other difficult measures to ensure that health systems have the capacity to care for the sick. This is a determination made on the basis of science and experience in public health. In order for it to work – in order for the public, generally speaking, to consent to such hardships – individuals must trust that the information the orders are based on are rooted in evidence and commitment to the public's interest. An environment dominated by censorship, the root of which is distrust of the public's capacity to think critically, is toxic to public support. By contrast, an approach that treats all members of the public as capable of understanding complicated information, that treats them as partners in an uncertain and frightening moment in global history, is conducive to the kind of social solidarity necessary for turning the tide against exponential infection growths, and ultimately giving health authorities the space and time to develop the kinds of interventions that can protect public health for the long term.

62. The present report will not include a step-by-step set of recommendations as is typical. Instead, it contains a plea to all Governments to treat those within their jurisdictions – and indeed, given the global nature of the pandemic, those without – with the dignity and respect demanded by international human rights law. In moral terms, that requires

an attitude of democratic participation, and a willingness to engage the public with generosity and understanding, in the hard steps that individuals are being asked to take: separation from loved ones, lonely deaths, loss of employment, education and social intercourse, and the deprivation of cultural or religious activities that help billions of people enjoy meaningful lives.

63. In legal terms, ensuring the dignity and respect owed all individuals entails:

(a) Being honest with people and giving them access to information in way they can consume, in a way that promotes non-discrimination;

(b) Enabling all individuals genuine access to the tools of communication necessary to learn about the public health crisis and the steps necessary to protect themselves and, if they are health-care workers (formally or informally), to care for others;

(c) Strongly promoting and protecting, and refraining from interference with, the independent media's role of informing the public and holding officials accountable for their statements and actions;

(d) Ensuring that people have the tools to confront and correct disinformation, and in particular avoiding taking the kinds of steps that will deter the sharing of critical information at a time of crisis;

(e) Doing what is necessary to trace the development of the disease – but only what is necessary. The law is flexible enough to tolerate errors and inadvertent overreach at a time of crisis, but it is not so flexible as to condone the discretion to conduct surveillance without oversight, without limit and

without resort to fundamental principles of legality and necessity;

(f) Ensuring accountability, such that no State is free to use this public health crisis for unlawful purposes beyond the scope of the health threat.”

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October 2020 (for an updated list, please visit www.icj.org/commission)

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