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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-eighth session, 19-28 April 2017

Opinion No. 27/2017 concerning Nguyen Ngoc Nhu Quynh (Viet Nam)

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

2. In accordance with its methods of work (A/HRC/33/66), on 31 January 2017 the Working Group transmitted to the Government of Viet Nam a communication concerning Nguyen Ngoc Nhu Quynh. The Government replied to the communication on 13 April 2017. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Nguyen Ngoc Nhu Quynh (hereafter Ms. Quynh) is a 37-year-old Vietnamese citizen, residing in Nha Trang, Viet Nam. She is a single mother and works as a freelance tour guide to support her two young children, her 60-year-old mother and her 90-year-old grandmother, who all live with her.

5. According to the source, Ms. Quynh is a human rights defender and blogger. She is a campaigner and a coordinator and the co-founder of the Vietnamese Bloggers Network, an independent, non-registered civil society group that promotes citizen journalism and freedom of the press in Viet Nam. Since 2006, Ms. Quynh has been blogging under the pen name “Me Nam” (Mother Mushroom), sharing her opinions on social, economic, political and human rights issues via social media. In addition to her online writing, Ms. Quynh often organizes and participates in advocacy activities on government transparency, State accountability, environmental protection and other issues that are of public interest. In 2015, she received the Civil Rights Defender of the Year award from Civil Rights Defenders, a Stockholm-based international human rights non-governmental organization.

6. The source reports that, prior to her arrest, Ms. Quynh had been targeted for her human rights activities and faced harassment from the authorities on a number of occasions:

(a) In September 2009, Ms. Quynh was arrested and detained for 10 days in Nha Trang, under article 258 of the Penal Code for “abusing democratic freedoms to infringe upon the interests of the State”. According to the source, she had to quit her job in a government-run tourism company under pressure from the police.

(b) In May 2013, Ms. Quynh participated in a peaceful public gathering to distribute copies of the Universal Declaration of Human Rights and release green balloons carrying the slogan “Our human rights need to be protected” along Nha Trang central beach. She was arrested and detained for one and a half days, during which she was questioned about her personal social media account. The Public Security of Nha Trang, Khanh Hoa province, imposed a fine of approximately US\$ 66 on Ms. Quynh for her social media posts.

(c) In February 2014, Ms. Quynh was detained and threatened by local authorities after she had organized a public student forum in Nha Trang to discuss a historical dispute between Viet Nam and China that had taken place in 1979.

(d) On 29 July 2014, Ms. Quynh was stopped by the police in Nha Trang on her way to a seminar organized by the Australian Embassy in Hanoi. She was detained and brought to the People’s Security Investigation Bureau in Khanh Hoa province and her personal property was confiscated.

(e) On 25 July 2015, Ms. Quynh was severely beaten by the security police while peacefully participating in a global hunger strike to mark the final stage of the “We Are One” human rights campaign. She was kicked and punched in the face, which caused severe bleeding, and later held in detention for 12 hours at the People’s Public Security Station in Loc Tho Ward, Nha Trang.

(f) On 25 October 2015, Ms. Quynh was kidnapped by the police as she was about to take a flight from Nha Trang to Saigon. At least 20 security police officers took part in that operation. The source alleges that eight police officers pushed Ms. Quynh to the ground, using excessive force, and violently grabbed her phone. She was then forced into a vehicle and detained in a holding unit in Phuoc Dong village, 20 kilometres away from central Nha Trang. She had several open wounds. The source states that this was the fifth time since 2014 that she was detained, harassed or assaulted;

(g) On 15 May 2016, four police officers physically assaulted Ms. Quynh in the main lobby of the New World Hotel in Saigon, as she was on her way to join a protest to protect the environment. She was taken to the Security Police Station in Nha Trang and detained for 27 hours. Several days later, on 23 May 2016, the police again detained Ms. Quynh after she was seen holding a sign, “Why did fish die?” to express her concern over

the mass water pollution along Nha Trang beaches, allegedly caused by toxic waste discharge from the Formosa steel plant in Ha Tinh in April 2016. The source states that Ms. Quynh's family had also been harassed by authorities in an attempt to prevent her from participating in protests against the Formosa steel plant.

7. On the morning of 10 October 2016, Ms. Quynh accompanied the mother of a fellow human rights activist to Song Lo prison, south of Nha Trang. Ms. Quynh was helping the woman to file a request to see her son, who had been sentenced in August 2016 to three years' imprisonment under article 88 of the Penal Code for online activism. His mother had not been permitted to see him since his arrest on 27 November 2015.

8. According to the source, the police arrested Ms. Quynh and the woman outside the prison at around 10 a.m. Ms. Quynh was handcuffed and taken back to her home in Nha Trang, where the police conducted a search until 3 p.m. A large number of police officers were deployed in that operation. Local activists tried to approach the house, but were prevented from doing so by police officers who blocked the surrounding area. Ms. Quynh's two young children, her mother and her grandmother were in the house during the search. When the search was concluded, the police took Ms. Quynh away in handcuffs. Ms. Quynh asked her mother to contact her lawyer and announced that she would go on a hunger strike in detention until she was permitted to speak to him.

9. During the search of Ms. Quynh's home, the police read out a detention order and announced that she would be detained pending investigation of the charge against her. One officer told Ms. Quynh's mother during the search that Ms. Quynh would be detained for one and a half years (18 months) pending investigation. Her family asked to see the official detention order, but the authorities refused to provide a copy.

10. The source states that the notification of the arrest and detention dated 10 October 2016 and stamped with the official seal of the Public Security Bureau of Khanh Hoa province was mailed to Ms. Quynh's family and received on 12 October 2016. The notification indicates that Ms. Quynh was arrested and charged with violating article 88 (1) of the Penal Code for "conducting propaganda against the Socialist Republic of Viet Nam". The source notes that article 88 falls under the "national security" chapter of the Penal Code and that individuals facing charges under that chapter are subject to considerably more stringent legal restrictions, imposed at the discretion of the authorities, on their due process rights.

11. According to the source, the police statement (dated 11 October 2016 and posted on the official website of the Khanh Hoa Police Department) confirms the arrest and detention of Ms. Quynh. It states that the decision was approved by the provincial Procuracy. It also states that from 2012 to the present, Ms. Quynh used various social media pages and accounts to "regularly write, upload and share articles and video content that distort the line and policies of the Party and State laws, denigrate individuals, and affect the reputation of agencies and organizations". More specifically, the document refers to Ms. Quynh's responsibility for a document entitled "Stop police killing civilians — SKC."

12. On 10 October 2016, a television broadcast on the People's Security Television, the official channel of the Ministry of Public Security, reported that the evidence found in Ms. Quynh's home included cardboard placards with messages such as "No to Formosa", "Fish Need Clean Water" and "People Need Transparency". It was also mentioned that the police had found a report entitled "Stop police killing of citizens", which contained information on 31 individuals who were found dead while in police custody.

13. On 10 and 11 October 2016, the State-controlled media outlet, Tuoi Tre News, published an article in Vietnamese and in English on the arrest of Ms. Quynh. The article referred to the police investigation of "400 Facebook articles" allegedly written by Ms. Quynh, which the police found to be "a pessimistic, one-sided view that caused public confusion and affected the people's faith [in the State]". The article also referred to the "Stop police killing civilians — SKC" document. The police was quoted as having stated that the document as "an abuse of democratic freedoms to agitate the people to turn against the State and the regime, causing detriment to national security and social safety and order".

14. According to the source, previous arrests and trials of human rights defenders suggest that the State media coverage of such events is closely aligned with the Government's official position and appears to be an element of the Government's communication strategy in handling politically motivated cases against human rights defenders.

15. The notification of Ms. Quynh's arrest and detention stated that she was being held by the Public Security Bureau at the Khanh Hoa Provincial Police Detention Centre. On 12 October 2016, Ms. Quynh's mother sent a written request to the Khanh Hoa Police Detention Centre seeking approval for a lawyer to act as Ms. Quynh's counsel. On the morning of 17 October 2016, the police summoned Ms. Quynh's mother to a "working session", during which they read out a decision purportedly issued by the Procuracy denying Ms. Quynh's request to meet with her lawyer. The police told Ms. Quynh's mother that access to legal counsel was not permitted during the investigation. The source states that the police refused to provide a copy of the decision. However, the copy that the police had was allegedly dated 10 October 2016, the day of Ms. Quynh's arrest, and signed by the Deputy Head of the Procuracy of Khanh Hoa province.

16. The source notes that Ms. Quynh's lawyer filed an application to represent her, but the Government has not responded. According to the law, the authorities must provide an explanation for denial of access to a lawyer. However, despite several attempts to obtain an explanation, Ms. Quynh's lawyer has still not received a reply nor has he been permitted to visit Ms. Quynh in prison since her arrest on 10 October 2016. Furthermore, to date, Ms. Quynh has not been presented before a judge.

17. The source alleges that Ms. Quynh has been detained incommunicado since her arrest on 10 October 2016 and notes that 10 February 2017 marked the four-month period that the authorities can legally detain a person for investigation. After the initial period of detention, the authorities can extend a detention order, if they deem it necessary, to continue the investigation for up to 16 months.

18. The source further alleges that Ms. Quynh is being denied family visits. Her mother tried to visit her in prison on several occasions to bring food and medicine for her existing ailments, but the authorities refused to let her see Ms. Quynh. On her most recent attempt, the prison guards accepted the food and medicine and told her that they would be given to Ms. Quynh. Her mother requested a confirmation note from Ms. Quynh that she had received the package. She was later given a note that the guards claimed was signed by Ms. Quynh. It is not clear whether it was Ms. Quynh's signature on the note or whether she had signed the note under duress, as the signature appears to be unsteady. The source has no information as to whether Ms. Quynh has been able to access medical care while in prison. Prior to her arrest, Ms. Quynh was suffering from ulcers and abdominal pain, for which she needed medical treatment.

19. The source adds that Ms. Quynh's oldest child has been seriously affected psychologically by her arrest, as she had witnessed her mother being dragged away in handcuffs while some 50 security police officers searched their home. She has been seeing a child psychologist. Moreover, Ms. Quynh's entire immediate family has been under considerable strain caring for her young children.

20. The source submits that the arrest and continued detention of Ms. Quynh is arbitrary. The source points to the police statement dated 11 October 2016 as evidence that Ms. Quynh has been deprived of her liberty as a result of the exercise of her right to freedom of expression that is guaranteed by article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant. The source refers to article 25 of the Constitution of Viet Nam, which provides for freedom of speech and freedom of the press, the right to assembly, the right to association and the right to demonstrate. Furthermore, article 30 of the Constitution provides for the right of all persons to lodge complaints about illegal acts by State and non-State actors and to be protected from reprisals. The source argues that the application of certain provisions in the Penal Code and the Criminal Procedure Code in Ms. Quynh's case negates those constitutional protections.

21. The source also submits that Ms. Quynh has been denied the right to a fair trial. Her arrest and continued detention violate article 31 (4) of the Constitution, which provides that

a person who is arrested, held in custody, temporarily detained, charged with a criminal offence, investigated, prosecuted or brought to trial has the right to defend him or herself in person or to be represented by a defence counsel or other person of his or her choice.

22. In addition, the source submits that certain provisions of the 2003 Criminal Procedure Code are inconsistent with international norms relating to the right to liberty and security of person and the right to a fair trial under articles 9 and 14 of the Covenant. Articles 119 and 120 of the 2003 Criminal Procedure Code (and articles 172 and 173 of the 2015 amended Criminal Procedural Code) state the time frame for investigation and related pretrial detention. According to those provisions, a person charged with “extremely serious” national security crimes, including crimes defined in article 88 of the Penal Code, can be detained for investigation for as long as 16 months (that is, four extensions of the four-month period decided by the Procuracy). Under the 2015 amended Criminal Procedure Code, the Chairman of the Supreme People’s Procuracy has the power to extend the detention period indefinitely “until the investigation is completed”.

23. The source also notes that article 58 of the 2003 Criminal Procedure Code (art. 74 of the 2015 amended Code) provides that “in case of necessity to keep secret the investigation of the crimes of infringing upon national security, the Chairmen of Procuracies shall decide to allow defence counsels to participate in the procedure from the time of termination of the investigation.” The source states that family members can also be denied access to persons charged with national security crimes and that a person charged with national security crimes cannot appeal the detention, nor have its necessity reviewed by any court.

24. The source concludes that, taken together, the relevant provisions of the 2003 Criminal Procedure Code allow a person accused of having committed a national security offence under the Penal Code to be detained incommunicado for more than two years. The authorities need only claim to be investigating or continuing to investigate a case in order to exercise this discretion. The source observes that United Nations treaty bodies, special procedure mandate holders and the United Nations High Commissioner for Human Rights have repeatedly warned that incommunicado detention for an extended period of time, without access to family members and to legal counsel, significantly increases the risks of torture and may amount to torture itself, in violation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which Viet Nam has been a party since 2015.

25. The source emphasizes that Vietnamese human rights defenders and civil society groups, international human rights groups, concerned Governments and United Nations human rights experts and bodies have repeatedly raised concerns about article 88 and other provisions of the Penal Code and the Criminal Procedure Code of Viet Nam. The source argues that those provisions are vaguely worded and grant broad discretionary powers to the authorities to restrict human rights protected under the Constitution and under international human rights law. The provisions allow the authorities to charge, try and sentence persons who are peacefully exercising those rights. The source submits that such restrictive legal provisions do not meet the strict tests of legality, legitimacy, proportionality and necessity under the Covenant and other international instruments.

26. Finally, the source notes that, for several years, vocal activists and bloggers have been charged, prosecuted and imprisoned under article 88 of the Penal Code, with many kept in prolonged pretrial detention and convicted in trials that failed to meet international standards. It recalls that the Working Group has rendered multiple opinions or sent several communications with other special procedure mandate holders regarding individuals who have been arrested, prosecuted and/or imprisoned under article 88 of the Penal Code in recent years.

27. The Working Group notes that Ms. Quynh has now been held in pretrial detention for over six months since her arrest on 10 October 2016.

Response from the Government

28. On 31 January 2017, the Working Group transmitted the allegations from the source to the Government, through its regular communication procedure. The Working Group requested the Government to provide by 31 March 2017 detailed information about the

current situation of Ms. Quynh, as well as any comments it may wish to make about the source's allegations. The Working Group also requested the Government to clarify the factual and legal grounds invoked by the authorities to justify her continued detention and to provide details regarding the conformity of her deprivation of liberty and the apparent lack of fair judicial proceedings with both domestic legislation and international human rights standards, including the legal obligations of the State under the human rights treaties that it has ratified.

29. The Government did not reply to the communication until 13 April 2017, that is, after the deadline given by the Working Group. The Government did not request an extension of the deadline in accordance with paragraph 16 of the Working Group's methods of work. As such, the Working Group considers that the Government's response in this case is late. Given the failure on the part of the Government to request an extension of the deadline, as provided for in paragraph 16 of its methods of work, the Working Group is unable to accept the response as being presented in a timely manner. Nonetheless, as indicated in paragraphs 15 and 16 of the Working Group's methods of work and in conformity with its usual practice, the Working Group may render an opinion on the basis of the information submitted by the source and all the information obtained in relation to a given case. However, the Working Group does not consider it necessary to send the Government's late response to the source for further comments.

Discussion

30. In the absence of a timely response from the Government, the Working Group has decided to render its opinion on the basis of the information submitted by the source, in conformity with paragraph 15 of its methods of work.

31. The Working Group has, in its jurisprudence, established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof rests upon the Government, if it wishes to refute the allegations (see A/HRC/19/57, para. 68), especially given that the source of a communication and the Government do not always have equal access to the evidence and frequently the Government alone has the relevant information. The Government can meet this burden of proof by producing documentary evidence in support of its claims.¹ In its response, which was submitted after the deadline, the Government claims that Ms. Quynh was arrested and detained for suspected commission of criminal offences under article 88 of the Penal Code, rather than for the exercise of her rights to freedom of opinion and expression. The Government refers to various provisions in Vietnamese laws and generally denies the source's claims and asserts that lawful procedures had been followed. The Working Group does not consider those statements sufficient to rebut the specific allegations made by the source.

32. The present case raises the issue of the compatibility of article 88 of the 1999 Penal Code of Viet Nam² with the rights to freedom of opinion and expression, freedom of peaceful assembly and freedom of association that are enshrined in international human rights law, including the Universal Declaration of Human Rights and the Covenant. Article 88 of the Penal Code states as follows:

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

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

¹ See opinion No. 41/2013, paras. 27-28; and *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, *Merits, Judgment*, I.C.J Reports 2010, p. 661, para. 55.

² The primary basis for the deprivation of liberty in Viet Nam is the Penal Code and the Criminal Procedure Code. In November 2015, the National Assembly of Viet Nam adopted amendments to the 1999 Penal Code and the 2003 Criminal Procedure Code. However, in June 2016, the authorities announced that they had discovered “technical errors” in both laws and postponed their entry into force until the errors have been corrected. Therefore, the 1999 Penal Code and the 2003 Criminal Procedure Code were in force at the time of the adoption of the present opinion.

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

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

33. The Working Group has repeatedly stated in its jurisprudence, including in opinions relating to Viet Nam, that, even when the arrest and detention of a person is carried out in conformity with national legislation, in conformity with its mandate, it is required to ensure that the detention is also consistent with international human rights law.³

34. The Working Group has considered the application of article 88 of the Penal Code in numerous cases of deprivation of liberty in Viet Nam in recent years.⁴ Another similar case involving article 88 of the Penal Code is under consideration by the Working Group at the present session.⁵

35. In all those cases, the Working Group found that the provisions of article 88 of the Penal Code were so vague and overly broad that their application could result in penalties being imposed on persons who have merely exercised their legitimate rights to freedom of opinion or expression. It also pointed out that the Government did not allege or provide evidence of any violent action on the part of the petitioners and that, in the absence of such information, their charges and convictions under article 88 could not be regarded as consistent with the Universal Declaration of Human Rights or the Covenant. Furthermore, in its report on its visit to Viet Nam in October 1994, the Working Group noted that vague and imprecise national security laws did not distinguish between violent acts that might constitute a threat to national security and the peaceful exercise of the right to freedom of opinion and expression.⁶ It requested the Government to amend its laws in order to clearly define offences relating to national security and to state what was prohibited without any ambiguity.

36. In the present case, the Working Group considers that Ms. Quynh's blogging and sharing of her opinions on human rights issues via social media and her activities as an environmental advocate fall within the boundaries of opinion and expression and peaceful assembly and association that are protected by articles 19 and 20 of the Universal Declaration of Human Rights and articles 19, 21 and 22 of the Covenant. In the absence of any convincing information indicating that Ms. Quynh had engaged in violent activity, or that her work directly resulted in violence or is a threat to national security, the Working Group concludes that her arrest and detention was intended to restrict her activities as a human rights defender. It is clear from the police statement dated 11 October 2016 that Ms. Quynh was detained in order to restrict the dissemination of information through her online and offline activities that was critical of the Government and which drew attention to issues of current interest. In fact, the document allegedly in her possession relating to stopping police killing of civilians suggests a desire to put an end to violence, not to cause it. Moreover, in its response, the Government claims, without supporting evidence, that Ms. Quynh had been participating in the dissident organization, *Nguoi Viet Yeu Nuoc*, since 2009, that she was sponsored by the terrorist group, *Viet Tan*, to disseminate materials that distorted the truth and incited people and that she planned a “street revolution” to

³ See, for example, opinions No. 42/2012, para. 29; No. 46/2011, para. 22; and No. 13/2007, para. 29.

⁴ See, for example, opinions No. 26/2013, No. 27/2012, No. 24/2011, No. 6/2010, No. 1/2009 and No. 1/2003.

⁵ See opinion No. 26/2017.

⁶ See E/CN.4/1995/31/Add.4, paras. 58-60.

overthrow the Government. The Working Group considers that mere association with the organization, Viet Tan, does not justify her detention.⁷

37. The Government did not submit any information to the effect that any of the permitted restrictions on freedom of expression, peaceful assembly or association set out in articles 19 (3), 21 and 22 (2) of the Covenant apply in the present case. The Human Rights Council in its resolution 12/16 called upon States to refrain from imposing restrictions that are not consistent with article 19 (3) of the Covenant, including restrictions on discussion of government policies and political debate; reporting on human rights; peaceful demonstrations or political activities, and expression of opinion and dissent.

38. The Working Group notes that there is wide-ranging concern about the application of national security legislation in Viet Nam to restrict the exercise of human rights. During the universal periodic review of Viet Nam in February 2014, 38 recommendations were made to improve the enjoyment of freedom of opinion and expression, peaceful assembly and association in Viet Nam. Several of them related specifically to the review and repeal of vague provisions on national security offences in the Penal Code, including article 88, the release of political prisoners, protection of human rights defenders and the need to implement the opinions of the Working Group on Arbitrary Detention.⁸

39. Moreover, the application of provisions, such as article 88 of the Penal Code, to silence human rights defenders and others exercising their rights has become so troubling that the High Commissioner for Human Rights issued a press release on the issue, in which specific reference was made to Ms. Quynh's case. The High Commissioner urged the Government of Viet Nam to abide by its obligations under human rights law and to drop the charges against Ms. Quynh and to release her immediately.⁹

40. In a joint communication sent to the Government, the Special Rapporteurs on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, on the rights to freedom of peaceful assembly and of association, on the promotion and protection of the right to freedom of opinion and expression, on the situation of human rights defenders and on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes reiterated the High Commissioner's call to release Ms. Quynh.¹⁰

41. The Working Group considers that Ms. Quynh is being detained solely for her legitimate exercise of her rights under articles 19 and 20 of the Universal Declaration of Human Rights and articles 19, 21 and 22 of the Covenant. Ms. Quynh has been subject to repetitive and systematic harassment, assault and detention by the authorities for almost eight years, and her present detention is part of a pattern of persecution for her activities as a human rights defender and environmental advocate. Accordingly, her case falls within category II of the categories applied by the Working Group.

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

43. The Working Group recalls that, according to article 9 (3) of the Covenant, pretrial detention should be the exception, not the rule; it should be as short as possible and should not be mandatory for all defendants charged with a particular offence.¹¹ As stated by the Human Rights Committee in its general comment No. 35 (2014) on liberty and security of person, pretrial detention must be based on an individualized determination that it is

⁷ See, for example, the discussions in opinions No. 40/2016, No. 26/2013 and No. 46/2011.

⁸ See A/HRC/26/6, paras. 143.4, 143.34, 143.115-118 and 143.144-176.

⁹ See <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20679&LangID=E>.

¹⁰ See <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21318&LangID=E>.

¹¹ See also opinions No. 40/2016, No. 46/2015 and No. 45/2015.

reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime. Courts must examine whether alternatives to pretrial detention — *inter alia*, bail — would render detention unnecessary in the particular case (para. 38).

44. No such assessment has been done in Ms. Quynh's case as she was not brought before a court by the authorities. In fact, the authorities appear to have no intention of allowing Ms. Quynh to seek release, given the statement made by the officer during the search of Ms. Quynh's home on 10 October 2016 that she would be detained for one and a half years pending investigation. Moreover, the authorities have already detained Ms. Quynh beyond the initial four-month period provided for by Vietnamese law during which a person may be detained for investigation. The ability of the authorities to extend a detention order for up to 16 months, without judicial review of the detention if they deem it necessary in order to continue the investigation, is not consistent with article 9 (3) of the Covenant.

45. The source alleges that a person charged with "national security" crimes under the Penal Code cannot challenge the detention nor have its necessity reviewed by any court. The Working Group recalls that this is not consistent with article 9 (4) of the Covenant. The Working Group reaffirmed in the Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (A/HRC/30/37, annex) (hereafter, the Basic Principles and Guidelines) that the right provided for by article 9 (4) to bring proceedings before a court to determine the lawfulness of his or her detention is a fundamental safeguard of personal liberty and is an absolute, non-derogable right (para. 3). However, in the present case, Ms. Quynh has not had access to her lawyer or to her family for over six months nor has she had any accessible and effective means of bringing proceedings before a court, in violation of principle 10 of the Basic Principles and Guidelines.

46. In addition, despite several attempts by Ms. Quynh's family and lawyer to ensure that she has access to legal counsel, the authorities continue to deny Ms. Quynh her right to legal representation, in violation of article 14 (3) (b) of the Covenant. Ms. Quynh's mother was informed by the police, when she attempted to secure a lawyer for her daughter, that access to legal counsel was not permitted during the investigation period and there has been no response to the applications made by Ms. Quynh's lawyer to represent her. The Working Group considers the denial of access to a lawyer to be particularly serious in the present case, given that Ms. Quynh may be sentenced to between 3 and 12 years' imprisonment under article 88 (1) of the Penal Code. The Government stated in its response that Ms. Quynh would be able to communicate with her lawyer after the investigation has been completed. However, that clearly does not meet international standards, as Ms. Quynh is entitled to legal assistance at all stages of her detention.¹²

47. The Working Group notes that Ms. Quynh has been held incommunicado for over six months, in violation of her right to contact with the outside world as set out in applicable international standards, such as the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)¹³ (see rules 58 and 61) and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment¹⁴ (see principles 15, 18 and 19). The Government has asserted that Ms. Quynh is not allowed to receive family visits under applicable Vietnamese legislation because the case involves national security. The Working Group points out that this is not consistent with the above-mentioned international human rights standards.

48. The Working Group therefore concludes that those violations of the right to a fair trial are of such gravity as to give Ms. Quynh's deprivation of liberty an arbitrary character and fall under category III of the categories applied by the Working Group.

¹² See A/HRC/30/37, annex, principle 9.

¹³ General Assembly resolution 70/175, annex.

¹⁴ General Assembly resolution 43/173, annex.

49. The Working Group is particularly concerned about the health of Ms. Quynh, who suffers from ulcers and abdominal pain, for which she needs medical treatment. The Working Group reminds the Government of Viet Nam that, in accordance with article 10 (1) of the Covenant, all persons deprived of their liberty must be treated with humanity and with respect for the inherent dignity of the human person. That includes the provision of proper medical care to those in detention. The Working Group calls upon the Government to immediately release Ms. Quynh and to ensure that she receives the necessary medical attention after her release. The Working Group is deeply concerned about the psychological integrity of Ms. Quynh's family, given the strain involved in caring for Ms. Quynh's young children in her absence, as well as the trauma experienced in particular by her oldest child owing to the police search of her home and her mother's detention.

50. This case is one of several cases that has been brought before the Working Group in recent years concerning the arbitrary deprivation of liberty of persons in Viet Nam.¹⁵ The Working Group recalls that under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of the rules of international law, may constitute crimes against humanity.¹⁶ The Working Group would welcome the opportunity to engage constructively with the Government to address issues such as the vague and imprecise provisions regarding national security offences and crimes, and the denial of fair trial rights, which continue to result in the arbitrary deprivation of liberty in Viet Nam.

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

Disposition

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

The deprivation of liberty of Nguyen Ngoc Nhu Quynh, being in contravention of articles 9, 10, 11, 19 and 20 of the Universal Declaration of Human Rights and of articles 9, 14, 19, 21 and 22 of the Covenant, is arbitrary and falls within categories II and III.

53. The Working Group requests the Government of Viet Nam to take the steps necessary to remedy the situation of Ms. Quynh without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the Covenant.

54. The Working Group considers that, taking into account all the circumstances of the case, in particular the risk of harm to Ms. Quynh's health and to the psychological well-being of her family, the appropriate remedy would be to release Ms. Quynh immediately, and accord her an enforceable right to compensation and other reparations, in accordance with international law.

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

¹⁵ See, for example, opinions No. 26/2017, No. 26/2013, No. 27/2012, No. 24/2011, No. 6/2010, No. 1/2009 and No. 1/2003.

¹⁶ See, for example, opinion No. 47/2012, para. 22.

56. The Working Group also urges the Government, as part of its ongoing revision of the Penal Code and the Criminal Procedure Code, to bring article 88 of the Penal Code into conformity with the recommendations made in the present opinion and with the commitments made by Viet Nam under international human rights law.

Follow-up procedure

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

- (a) Whether Nguyen Ngoc Nhu Quynh has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to her;
- (c) Whether an investigation has been conducted into the violation of Nguyen Ngoc Nhu Quynh rights and, if so, the outcome of the investigation;
- (d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Viet Nam with its international obligations, in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

58. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

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

60. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.¹⁷

[Adopted on 25 April 2017]

¹⁷ See Human Rights Council resolution 33/30, paras. 3 and 7.