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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-ninth session, 23–27 November 2020

Opinion No. 81/2020 concerning Ho Van Hai (Viet Nam)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 42/22.
2. In accordance with its methods of work (A/HRC/36/38), on 23 July 2020, the Working Group transmitted to the Government of Viet Nam a communication concerning Ho Van Hai. The Government replied to the communication on 22 October 2020. Viet Nam 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

a. Context

4. Ho Van Hai is a citizen of Viet Nam who was granted permanent resident status in the United States of America for 10 years. Born in Viet Nam in 1964, Mr. Ho is a medical doctor who runs a private clinic, Asia Polyclinic, located in P. Linh Tay Ward, Thu Duc District, Ho Chi Minh City. He also serves as the president of the Go West Foundation, a non-governmental organization that he founded in 2014 to provide assistance to young Vietnamese people seeking to obtain scholarships from Western universities and higher learning institutions. In addition, he is a blogger. He has written articles promoting education.

5. Mr. Ho wrote about the policies of the Government of Viet Nam on social media platforms. His online commentary covered a range of political issues, although his primary focus was the handling of environmental issues. Subsequent to the industrial toxic spill at the Formosa Ha Tinh Steel Company factory in April 2016, which affected multiple provinces in central Viet Nam, Mr. Ho, on his blog and personal social media page, joined other environmental activists and organizations in criticizing the government response, proposing peaceful protests and civil reform and calling for the Government's accountability.

b. Arrest and pretrial detention

6. According to the source, Mr. Ho had planned to travel to the United States in November 2016. Prior to his scheduled flight, however, he was arrested by officers of the Ho Chi Minh City Police Department on 2 November 2016, while he was at Asia Polyclinic.

7. The source informs the Working Group that the police searched his computer and found 36 articles which allegedly disseminated "anti-State information". Local authorities claimed that Mr. Ho had been "caught in the act of distributing information and materials with anti-State content on the Internet".

8. The source informed the Working Group that Mr. Ho was charged under article 88 of the Criminal Code of 1999, as amended in 2009, for "conducting propaganda against the State". It was alleged by the authorities that Mr. Ho had disseminated distorted information that had caused the public to lose trust in the Government. Furthermore, police officials stated that they had been monitoring Mr. Ho's online activities prior to his arrest.

9. Immediately following Mr. Ho's arrest, he was detained and held in Phan Dang Luu detention centre while he was being investigated. In December 2017, Mr. Ho was transferred from Phan Dang Luu detention centre to Chi Hoa prison, without any prior notice. Given the sudden nature of the transfer, Mr. Ho was unable to take his personal belongings with him, which meant that he subsequently had to sleep on a tiled floor without a mat for at least three weeks.

c. Trial proceedings and appeal

10. On 1 February 2018, Mr. Ho was tried and convicted in the Ho Chi Minh City People's Court. The trial, which was conducted in secret and closed to the public, lasted just one day. His family was only informed of the trial two days before it began, and only two of his close family members were permitted to attend. Owing to his family's lack of resources, Mr. Ho did not have a lawyer at the trial. At the end of the trial, he was sentenced to four years' imprisonment, to be followed by two years of house arrest.

11. On 3 March 2018, the Senior People's Court in Ho Chi Minh City accepted Mr. Ho's appeal, and the case was due to be heard on 19 June 2018. The appeal was scheduled to be heard in public, however, on 19 June 2018, Mr. Ho's family was informed that the trial would be delayed for a few days. They later learned that the hearing would be delayed indefinitely. No reasons were provided for the postponement. Mr. Ho was not made aware that it had been postponed, given that he did not have a lawyer or access to information in Chi Hoa prison.

12. According to the source, Mr. Ho was detained in Chi Hoa prison in Ho Chi Minh City in harsh conditions. Mr. Ho suffers from several chronic health problems, including

gingivitis, high blood pressure and diabetes. Those health problems were reportedly exacerbated during his time in Chi Hoa prison. Furthermore, Mr. Ho did not receive sufficient food or the correct medication to monitor and control his health conditions.

13. The source indicates that, although Mr. Ho was not directly tortured, he lived in fear that he would receive such treatment. The source also indicates that Phan Dang Luu detention centre and Chi Hoa prison are known for very poor conditions of detention and for acts of torture perpetrated against prisoners. That resulted in Mr. Ho suffering from psychological pressure. The source informs the Working Group that, on 17 April 2020, Mr. Ho was released from Chi Hoa prison and is currently continuing to serve two years of house arrest as a part of his sentence.

d. Analysis of violations

14. The source submits that Mr. Ho's arrest and detention was arbitrary under categories I, II and III of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

i. Category I

15. The source alleges that Mr. Ho's detention was arbitrary because he was held incommunicado, was arrested without judicial authorization for such deprivation of liberty, was prosecuted under vague laws and was prosecuted under laws used to target or silence critics of the Government.

16. The source argues that, in violation of article 9 (3) and (4) of the Covenant, Mr. Ho was not brought promptly before a judge or other judicial officer and was denied a trial within a reasonable time and release following his arrest. Although Mr. Ho was arrested on 2 November 2016, his trial did not begin until 15 months later, on 1 February 2018. Furthermore, the source notes that his trial was held in secret and was closed to the public. Mr. Ho's family was informed of the trial only two days before it began, and only two of his close relatives were allowed to attend. Mr. Ho's family did not have the resources to hire a lawyer, so he did not have a lawyer at trial.

17. On appealing his conviction, Mr. Ho was not brought promptly before a judge or other judicial officer within a reasonable time. On 3 March 2018, the Senior People's Court in Ho Chi Minh City accepted the case for Mr. Ho's appeal, but, on 19 June 2018, the date of his hearing, Mr. Ho's family was told that it would be deferred for a few days. They subsequently learned that the case had been deferred indefinitely. The court did not provide an explanation for the postponement.

18. The source submits that, in violation of article 9 (1) of the Covenant and Vietnamese domestic law, a warrant was not presented at the time the police arrested Mr. Ho. His arrest instead occurred spontaneously after the police searched his computer and found 36 articles that they considered to be "anti-State information". The source argues that that chain of events amounts to a deprivation of liberty without judicial authorization.

19. The source posits that, in violation of article 15 (1) of the Covenant, Mr. Ho was sentenced to four years' imprisonment, followed by two years of house arrest under article 88 of the Criminal Code. Article 88 thereof criminalizes conducting propaganda against the State and has, according to the source, been criticized by human rights organizations for being vague and susceptible to abuse by the authorities. The source also notes that article 88 does not provide individuals with a proper indication of how the law limits their conduct. Rather than providing sufficient precision so that an individual can regulate his or her conduct, article 88 is vague and has been used to prosecute individuals without sufficient justification.

ii. Category II

20. The source submits that Mr. Ho's detention was arbitrary because he was arrested, detained and convicted for exercising his freedom of expression. The source notes that, while restrictions on that right can apply under certain circumstances, such circumstances are absent in the present case.

21. The source submits that, in violation of article 19 of the Covenant and article 19 of the Universal Declaration of Human Rights, the authorities arbitrarily detained and prosecuted Mr. Ho as a direct result of his exercising his right to freedom of expression.

22. The source submits that the charge of “conducting propaganda” under article 88 of the Criminal Code is a violation of an individual’s freedom of expression, because it vaguely criminalizes a broad swath of speech and information-sharing acts. Mr. Ho was charged thereunder for conducting propaganda against the State. Whether the underlying factual allegations are true or not, the authorities have deprived Mr. Ho of his liberty under a law that is itself incompatible with the right to freedom of expression guaranteed under the Universal Declaration of Human Rights and the Covenant.

23. Furthermore, the source argues that, in addition to the fact that Mr. Ho was convicted under a law that violated his right to freedom of expression, he was specifically targeted for his blogging that was critical of the Government. Therefore, his detention violated his right to freedom of expression both de jure and de facto. The Ho Chi Minh City Police Department alleged that Mr. Ho disseminated “distorted” information that caused the public to lose trust in the Government. It is clear to the source that the Government targeted Mr. Ho for detention as retaliation for his online posts criticizing the Government and its response to the environmental disaster at the Formosa Ha Tinh Steel Company factory.

24. Although article 19 of the Covenant provides limited exceptions for national security, public safety and public order, the source argues that the narrow limitations do not apply in the present case. Although the Government claimed that Mr. Ho’s detention was based on his conducting propaganda against the State, as might be considered appropriately banned under articles 19 and 20 of the Covenant, in actuality, none of Mr. Ho’s online postings called directly or indirectly for any violence or could reasonably be considered to threaten national security, public order, public health or morals or the rights or reputations of others. The Government was instead using the term “conducting propaganda” as a pretext to silence criticism against it, which is not an acceptable purpose under article 19 (3) of the Covenant.

iii. Category III

25. The source claims that Mr. Ho’s arrest and detention was arbitrary, given that there was a total or partial non-observance of the international norms relating to the right to a fair trial in the present case.

26. The source specifies that, in violation of article 14 (3) (c) of the Covenant, Mr. Ho’s trial did not commence until 15 months after his arrest. Mr. Ho was arrested on 2 November 2016, and his trial did not begin until 1 February 2018. During that time, he was transferred from Phan Dang Luu detention centre to Chi Hoa prison, in early December 2017.

27. On 3 March 2018, the Senior People’s Court in Ho Chi Minh City accepted the case for Mr. Ho’s appeal. The appeal was scheduled to be heard at the Senior People’s Court in Ho Chi Minh City on 19 June 2018. However, on 19 June, Mr. Ho’s family was told that the hearing would be delayed for a few days. They subsequently learned that it had been delayed indefinitely. The court did not provide an explanation as to why the case was postponed.

28. The source submits that, in violation of article 14 (3) (b) and (d) of the Covenant, principle 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and rule 119 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), Mr. Ho was not provided with the assistance of legal counsel. His family did not have the resources to hire a lawyer and so he did not have one at trial.

29. According to the source, in violation of article 14 (1) and (3) (e) of the Covenant and articles 7 and 10 of the Universal Declaration of Human Rights, Mr. Ho was not given a fair and public hearing. His trial was reportedly held in secret and closed to the public. His family was informed of the trial only two days before it began, and only two close relatives were allowed to attend. Mr. Ho’s appeal was initially accepted and scheduled to be heard in public at the Senior People’s Court in Ho Chi Minh City on 19 June 2018. However, the hearing was delayed indefinitely, without explanation.

30. The source submits that, in violation of articles 7, 10 and 14 of the Covenant, articles 1, 4 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 5 of the Universal Declaration of Human Rights, principles 1, 6 and 21 of the Body of Principles and rules 1 and 43 of the Nelson Mandela Rules, Mr. Ho was subjected to inhuman treatment.

31. More specifically, the source notes that, despite his chronic health problems, Mr. Ho was transferred without notice from Phan Dang Luu detention centre to Chi Hoa prison and was unable to take his belongings with him. He was therefore forced to sleep on a tiled floor without a mat for at least three weeks. At Chi Hoa prison, Mr. Ho was detained with approximately 10 other prisoners, a situation that was stressful for him and put his life in danger. In addition, the psychological pressures at Chi Hoa prison negatively affected Mr. Ho. At Chi Hoa prison, he lived in fear of receiving the death penalty. He was not directly tortured by the police, but prisoners are often intimidated while in prison.

32. The source claims that, in violation of principle 24 of the Body of Principles and rules 22 (1) and 27 (1) of the Nelson Mandela Rules, the Government did not provide Mr. Ho with the medical care that he needed. He has had several chronic health problems, which were exacerbated in prison. Mr. Ho's health conditions could have been easily controlled with the proper medication, but he was unable to receive such medication or the proper care. Due to the conditions of detention, Mr. Ho's health rapidly deteriorated. He was also unable to receive food or medical supplies from his family.

Response from the Government

33. On 23 July 2020, the Working Group transmitted the source's allegations to the Government under its regular communication procedure, requesting the Government to provide detailed information by 22 September 2020 about the current situation of Mr. Ho.

34. On 11 September 2020, the Government requested an extension of the deadline for its response. The extension was granted, with a new deadline of 22 October 2020.

35. In its response of 22 October 2020, the Government denied the source's allegations.

36. The Government asserts that, on 1 February 2018, the People's Court of Ho Chi Minh City held the trial and sentenced Mr. Ho to four years' imprisonment and two years under house arrest, for the offence of conducting propaganda against the State under article 88 of the Criminal Code.

37. The arrest and trial of Mr. Ho were carried out on sound legal grounds, with full respect for Vietnamese law, and consistent with the international conventions to which Viet Nam is a party. During legal proceedings against Mr. Ho, including prosecution, trial and enforcement of the court's judgment, the respective competent authorities of Viet Nam ensured that the legitimate rights of the accused according to Vietnamese law were observed. According to the Government, Mr. Ho admitted his offence and refused to use the service of defence lawyers. He also made an application requesting leniency.

38. The Government refutes the allegations made in the communication, describing them as inaccurate and drawn mostly from unsubstantiated sources, and indicates that they do not reflect the nature of the present case. The Government maintains that the arrest and trial of Mr. Ho cannot be said to amount to arbitrary detention in any sense.

39. According to the Government, no one in Viet Nam is arrested, prosecuted or made to undergo trial for exercising their fundamental freedoms. The consistent policies and guiding legal principles of Viet Nam recognize, respect and promote human rights, including the right to freedom of expression.

40. The Government submits that, consistent with article 19 (3) of the Covenant, article 25 of the Constitution of Viet Nam of 2013 proclaims that there is freedom of the press and that citizens have the right to freedom of speech and the right of access to information, the right to assembly, the right to association and the right to hold demonstrations. The exercise of those rights are however subject to conditions prescribed by law in case of necessity for reasons of national defence, national security, social order and safety, social morality and community well-being (article 14 (2)).

41. The rights of detainees are totally recognized and protected as prescribed in the Law on the Execution of Criminal Judgments and the Law on Enforcement of Custody and Temporary Detention. The Law on the Execution of Criminal Judgments provides for a regime of health care for inmates, including an initial health examination upon their entry into detention facilities and regular quarterly medical check-ups. In addition, Decree No. 117/2011/ND-CP of 15 December 2011 elaborates on the management of prisoners and allowances, such as for food, clothing, accommodations, health care and family visits, and circular No. 07/2018/TT-BCA of 12 February 2018 of the Ministry of Public Security provides more specific guidance on the conditions for and the frequency of family visits and receiving care packages, correspondence and external communications.

42. During his detention, the rights of Mr. Ho as prescribed by the above-mentioned legal documents of Viet Nam were ensured. He was not subjected to torture or discrimination and was ensured his right to health care, as prescribed by the laws of Viet Nam. There was no evidence proving the link of Mr. Ho's health situation and his detention conditions. He was released from prison before the completion of his sentence.

43. In additional information submitted, the Government maintains that the allegations made in the communication concerning Mr. Ho are inaccurate, mostly drawn from unverified sources and were a distortion of the facts. According to the Government, Mr. Ho was prosecuted for violating Vietnamese law, not for "the exercise of the right to freedom of expression".

44. The Government reiterated that Mr. Ho was searched and arrested by the police on 2 November 2016 for possessing and disseminating inaccurate and slanderous articles, which injured the reputation of individuals and organizations of the State. According to State sources, Mr. Ho had uploaded 36 articles of the kind prohibited under the law in Viet Nam. The information also compromised national security, social order and safety, contrary to the law. His trial for the crime of conducting propaganda against the State under article 88 of the Criminal Code was publicly and transparently conducted by an independent and competent court. On 1 February 2018, at the first instance trial, Mr. Ho admitted his crime, made statements honestly, following which he was convicted. He was subsequently sentenced to four years' imprisonment and two years under probation. Those events were reported by the Vietnamese press.

45. The Government maintains that, from the time of his arrest through to trial, conviction and sentencing, Mr. Ho's right to due process was observed under both Vietnamese law and treaties to which Viet Nam is a party. In particular, the search and arrest warrants were approved by the People's Procuracy and were witnessed by representatives of the administration and people at Mr. Ho's residence, with those who undertook the arrest and Mr. Ho himself signing them. He did not submit any complaint about the investigation or the exercise of his rights during his temporary detention. The Government does not agree with the assertion that the arrest of Mr. Ho was inconsistent with the law and that he was arbitrarily detained. It also points out that Mr. Ho was released from prison before he completed his sentence and was, at the time of the Government's reply, out of custody.

46. The Government's position is that its competent authorities found that Mr. Ho's acts could not be considered to have been done in exercise of the right to freedom of expression. Furthermore, during the investigation, Mr. Ho admitted his crime, applied for leniency and refused to use the service of defence lawyers.

47. The Government asserts that there is no basis for Mr. Ho to live in fear, given that the death sentence is inapplicable to the kind of offence for which he was convicted. The Government assured the Working Group that, in Viet Nam, no one is arrested, prosecuted or put on trial for exercising fundamental freedoms, given that the country recognizes, respects and promotes human rights, including the right to freedom of expression. Article 25 of the Constitution expressly guarantees freedom of the press and citizens the right to freedom of speech, the right to access to information, the right to assembly, the right to association and the right to hold demonstrations. The exercise of those rights is subject to exceptions on the basis of national security, social order and safety, social morality and community well-being.

48. After being arrested, Mr. Ho was detained at the temporary detention centre of the Investigation Agency of the Ho Chi Minh City Police Department. Because the temporary

detention centre was disbanded, Mr. Ho was subsequently transferred to Chi Hoa detention centre. During the whole process of detention, he had access to food, clothing and accommodations. The Government dismisses as “inaccurate” the information contained in the communication that Mr. Ho had to sleep on a tiled floor without a mat for at least three weeks.

49. It also dismisses the claim that Mr. Ho did not see his family, stating that he met his relatives seven times and received gifts from them on 16 occasions. There was neither torture nor intimidation of Mr. Ho during his incarceration, and no complaint or appeal was received by the authorities from either Mr. Ho or his relatives in respect of his conditions of detention. The Government further asserts that Chi Hoa detention centre conducted health examinations on Mr. Ho regularly and provided medicine to treat high blood pressure and gingivitis on six occasions. In addition, the competent authorities do not recognize that his diseases worsened. The Government denies that the conditions of detention at the Phan Dang Luu detention centre and Chi Hoa detention centre were deplorable.

50. The Government restated that, on 17 April 2020, Mr. Ho was released from prison on humanitarian grounds, before the completion of his sentence. He is now at his residence, under a probation process as a result of the judgment of the court of first instance, not under house arrest.

Additional comments from the source

51. The source notes that the Government did not provide any substantive evidence to rebut the allegations. The Government made unsubstantiated claims in response to the descriptions of the violations under categories I, II and III of the arbitrary detention categories referred to by the Working Group, which were set out in the petition. Because the Government failed to provide factual evidence refuting the violations set out in the petition, it has not met its burden of proof.

Discussion

52. The Working Group thanks the source and the Government for their submissions.

53. In determining whether the deprivation of liberty of Mr. Ho was arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has presented a prima facie case for breach of the international law constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source’s allegations (A/HRC/19/57, para. 68).

54. As preliminary issue, the Working Group notes that Mr. Ho was in fact released about six months before the end of the full sentence and is said by the source to be currently under house arrest. Although the source has not described the conditions of house arrest, which prevents the Working Group from assessing whether Mr. Ho is currently detained, the Working Group nevertheless notes that, in accordance with paragraph 17 (a) of its methods of work, it reserves the right to render an opinion, on a case-by-case basis, on whether or not the deprivation of liberty was arbitrary, notwithstanding the release of the person concerned. In the present case, the Working Group considers that the allegations made by the source are extremely serious and that Mr. Ho has spent a long time in prison. Therefore, it will proceed to consider the facts of the case.

a. Category I

55. According to the source, Mr. Ho endured pretrial detention for about 15 months. He was arrested on 2 November 2016, but was tried only on 1 February 2018. There is nothing to suggest that, between the time of his arrest and his trial, Mr. Ho was brought before any judicial authority to review the legality of his detention. The Government asserts that Mr. Ho’s arrest warrant was approved by the People’s Procuracy and was witnessed by representatives of the administration and people at Mr. Ho’s residence. The Working Group considers that the Government could have provided more information on the matter.

56. Even if it is accepted that Mr. Ho's arrest warrant was approved by the Procuracy, that fact in itself does not make an otherwise arbitrary pretrial detention regular. While the Government has argued that the arrest and detention were carried out strictly in accordance with national law, the Working Group recalls that it has repeatedly stated in its jurisprudence that, even when the detention of a person is carried out in conformity with national legislation, the Working Group must ensure that the detention is also consistent with the relevant provisions of international law.¹ In its jurisprudence, the Working Group has held that the Procuracy is not an independent judicial authority and does not satisfy the criteria of article 9 of the Covenant.² Accordingly, the Working Group finds that Mr. Ho's pretrial detention was undertaken in the absence of judicial review of its legality, in violation of his right to be brought promptly before a judicial authority under article 9 (3) of the Covenant.³

57. Furthermore, in accordance with article 9 (3) of the Covenant, pretrial detention should be the exception, rather than the norm, and should be ordered for the shortest period of time possible.⁴ Liberty is recognized under article 9 (3) of the Covenant as the core consideration, with detention as an exception thereto.⁵ Detention pending trial must therefore be based on an individualized determination that it is reasonable and necessary for such purposes as to prevent flight, interference with evidence or the recurrence of crime.⁶ According to the information furnished to the Working Group in the present case, Mr. Ho intended to travel to the United States, where he has permanent resident status. There is, however, no suggestion from the Government that by that scheduled travel he had intended to flee from prosecution.

58. Moreover, in the present case, there was clearly no personalized reflection on Mr. Ho's circumstances, nor was there any consideration of alternatives to detention while he was held in pretrial detention. The lack of judicial review of his pretrial detention for appropriateness lacks legal justification.

59. The source made general allegations in relation to incommunicado detention, submitting that Mr. Ho was held incommunicado during his pretrial detention, from the time of his arrest on 2 November 2016 until his trial on 1 February 2018, that during that time he was transferred from Phan Dang Luu detention centre to Chi Hoa prison, in early December 2017, that his family appeared not to have had access to him and were informed of the trial only two days before it began and that he was also unable to receive food or medical supplies from his family. In denying the allegations, the Government indicated that Mr. Ho had in fact met his relatives seven times and received gifts from them on 16 occasions. No specific details of the times or the occasions were furnished, however. Consequently, the Working Group is inclined to accept the source's version that Mr. Ho was held incommunicado during his pretrial detention.

60. The Working Group has repeatedly asserted that holding persons incommunicado violates their right to contest the legality of their detention before a court or tribunal under article 9 (4) of the Covenant.⁷ Judicial oversight of any detention is a central safeguard for personal liberty⁸ and is critical for ensuring that detention has a legitimate basis. Given the

¹ See, e.g., opinions No. 46/2011, No. 42/2012, No. 50/2017, No. 79/2017, No. 1/2018, No. 20/2018, No. 37/2018 and No. 50/2018.

² E/CN.4/1995/31/Add.4, para. 57 (c); and opinions No. 75/2017, para. 48; No. 35/2018, para. 37; No. 46/2018, para. 50; No. 44/2019, para. 53; and No. 45/2019, para. 52. See also opinions No. 15/2020 and No. 16/2020; Human Rights Committee, general comment No. 35 (2014), para. 32; CCPR/C/VNM/CO/3, para. 26; and CAT/C/VNM/CO/1, paras. 24–25.

³ In reaching this conclusion, the Working Group reiterates that, although prolonged pretrial detention may be permitted under the Criminal Procedure Code of 2003 of Viet Nam and through other legislative provisions, such as the Procuracy allowing the approval of arrest warrants, they are not a substitute for the right to judicial review of a detention and are consequently inconsistent with international human rights law.

⁴ A/HRC/19/57, sect. III.A.

⁵ *Ibid.*, para. 54.

⁶ Human Rights Committee, general comment No. 35 (2014), para. 38.

⁷ Opinions No. 45/2017, No. 46/2017, No. 35/2018, No. 9/2019, No. 44/2019, No. 45/2019, No. 15/2020 and No. 16/2020.

⁸ A/HRC/30/37, para. 3; and CAT/C/VNM/CO/1, para. 24.

circumstances of Mr. Ho's pretrial incarceration, he was unable to challenge his detention before a court. Consequently, his right to an effective remedy under article 8 of the Universal Declaration of Human Rights and article 2 (3) of the Covenant was violated. He was also placed outside the protection of the law, in violation of his right to be recognized as a person before the law under article 6 of the Universal Declaration of Human Rights and article 16 of the Covenant.

61. The source submits that the charge of "conducting propaganda" under article 88 of the Criminal Code, which Mr. Ho faced, violates an individual's freedom of expression in that it vaguely criminalizes speech and information-sharing acts. The source argued that that charge deprived Mr. Ho of his liberty under a law that is itself incompatible with the right to freedom of expression guaranteed under the Universal Declaration of Human Rights and the Covenant. The Government admits to the existence of the offence of conducting propaganda against the State under article 88 of the Criminal Code.

62. The Working Group views the provision under which Mr. Ho was convicted as being vague and overly broad. "Conducting propaganda" while one is exercising the fundamental freedom of expression requires that at the very least there is clarity in the parameters of conduct constituting the offence, taking into account the freedom of expression. The Working Group has previously made it clear that prosecution under vague and overly broad laws offend the principle of legality, including specific findings that article 88 of the Criminal Code does not satisfy that principle.⁹ The principle entails that laws be framed with sufficient precision so that the individual can gain access to and understand them, so as to enable him or her to regulate his or her conduct accordingly.¹⁰ Mr. Ho could not reasonably foresee that the exercise of his freedom of expression to communicate ideas through his peaceful activities of using social media to criticize Government policy in relation to the industrial toxic spill at the Formosa Ha Tinh Steel Company factory, proposing peaceful protest, civil reform and government accountability would amount to criminal conduct under that provision.

63. For those reasons, the Working Group finds that the Government failed to establish a legal basis for Mr. Ho's detention. His detention was therefore arbitrary under category I.

b. Category II

64. The source submits that Mr. Ho's detention was arbitrary, because he was arrested, detained and convicted for exercising his freedom of expression in circumstances which did not fall within permissible derogations of fundamental liberties. The arrest and detention was, according to the source, in violation of article 19 of the Covenant and article 19 of the Universal Declaration of Human Rights. The source also contends that, in addition to the fact that Mr. Ho was convicted under a law that violated his right to freedom of expression, he was specifically targeted for his blogging activities expressing views that were critical of the Government. The Government targeted him for detention in retaliation for his online posts criticizing the Government and its response to the environmental disaster at the Formosa Ha Tinh Steel Company factory.

65. While noting the limitations placed on fundamental rights and freedoms under article 19 of the Covenant, on the basis of national security, public safety and public order, the source argues that those narrow limitations do not apply in the present case. Although the Government put forth the justification that the detention was on the grounds of securing national interest and security, in reality, none of Mr. Ho's activities could reasonably be considered as threatening to national security, public order, public health or morals or the rights or reputations of others. The Government bears the burden of establishing that Mr. Ho's activities could reasonably be considered to have been a threat to national security,

⁹ Opinions No. 46/2011, para. 22; No. 27/2012, para. 41; No. 26/2013, para. 68; No. 40/2016, para. 36; No. 35/2018, para. 36; No. 36/2018, para. 51; No. 46/2018, para. 62; No. 9/2019, para. 39; No. 45/2019, para. 54; and No. 15/2020, para. 58. See also CCPR/C/VNM/CO/3, paras. 45–46.

¹⁰ Opinion No. 41/2017, paras. 98–101. See also opinion No. 62/2018, paras. 57–59; and Human Rights Committee, general comment No. 35 (2014), para. 22.

public order, public morality or other such grounds. On the basis of the information submitted, the Working Group is of the view that that burden has not been met.

66. The Working Group considers that charges and convictions under article 88 of the Criminal Code of Viet Nam for the peaceful exercise of rights cannot be regarded as consistent with the Universal Declaration of Human Rights or the Covenant.¹¹ The Working Group notes with regret that, with regard to the vague and imprecise national security offences that do not distinguish between violent acts capable of threatening national security and the peaceful exercise of the right to freedom of opinion and expression, its position has remained unchanged since its visit to Viet Nam undertaken in October 1994.¹²

67. In that regard, the Working Group shares and reiterates the concern of the Human Rights Committee regarding the excessive restrictions imposed by the Government of Viet Nam on the freedom of peaceful assembly and public meetings, including on human rights. The Working Group is equally concerned about allegations of the disproportionate use of force and arbitrary arrest by law enforcement officials to disrupt demonstrations, including those related to labour rights, land dispossession and the ecological disaster at the Formosa Ha Tinh Steel Company plant.¹³

68. The Working Group notes that article 19 (2) of the Covenant provides that everyone has the right to freedom of expression; that right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his or her choice. That right includes political discourse, commentary on public affairs, discussion of human rights and journalism.¹⁴ It protects the holding and expression of opinions, including those which are critical of, or not in line with, government policy.¹⁵ The Working Group considers that Mr. Ho's conduct fell within the right to freedom of opinion and expression protected under article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant and that he was detained for exercising those rights. In reaching this conclusion, the Working Group takes note of the Government's assertion that Mr. Ho's social media posts amounted to conducting propaganda against the Government of Viet Nam.

69. Mr. Ho's criticism of government policy through his commentary on social media concerned matters of public interest. The Working Group considers that he was detained for exercising his right to take part in the conduct of public affairs under article 21 (1) of the Universal Declaration of Human Rights and article 25 (a) of the Covenant.¹⁶

70. There is nothing to suggest that the permissible restrictions on the above rights set out in articles 19 (3) and 25 of the Covenant apply in the present case. The Working Group was not convinced that prosecuting Mr. Ho was necessary to protect a legitimate interest under those provisions, nor that Mr. Ho's conviction and sentence were proportionate responses to his activities. There is no evidence to suggest that Mr. Ho's criticism of the Government called directly or indirectly for violence or could reasonably be considered to threaten national security, public order, public health or morals or the rights or reputations of others. The Human Rights Council has called upon States to refrain from imposing restrictions under article 19 (3) that are not consistent with international human rights law.¹⁷ The Working Group refers the present case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

71. According to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and

¹¹ See opinions No. 46/2011; No. 27/2012; No. 26/2013; No. 40/2016; No. 35/2018; No. 36/2018; No. 46/2018; No. 9/2019; and No. 45/2019. See also A/HRC/41/7, paras. 38.73 and 38.171.

¹² E/CN.4/1995/31/Add.4, sect. III.B.1.b.3. See also CCPR/C/VNM/CO/3, para. 45 (d).

¹³ CCPR/CO/75/VNM, para. 21.

¹⁴ Human Rights Committee, general comment No. 34 (2011), para. 11.

¹⁵ Opinions No. 79/2017, para. 55; and No. 8/2019, para. 55.

¹⁶ Human Rights Committee, general comment No. 25 (1996), para. 8; and opinions No. 46/2011; No. 42/2012; No. 26/2013; No. 40/2016; No. 35/2018; No. 36/2018; No. 45/2018; No. 46/2018; No. 9/2019; No. 44/2019; No. 45/2019; No. 15/2020; and No. 16/2020.

¹⁷ Human Rights Council resolution 12/16, para. 5 (p).

Fundamental Freedoms, everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and to draw public attention to the observance of human rights.¹⁸ The source has demonstrated that Mr. Ho was detained for the exercise of his rights under that Declaration. The Working Group has determined that detaining individuals on the basis of their activities as human rights defenders violates their right to equality before the law and equal protection of the law under article 7 of the Universal Declaration of Human Rights and article 26 of the Covenant.¹⁹

72. The Working Group concludes that Mr. Ho's detention resulted from the peaceful exercise of the right to freedom of opinion and expression, as well as the right to take part in the conduct of public affairs, and was contrary to article 7 of the Universal Declaration of Human Rights and article 26 of the Covenant. His detention was therefore arbitrary under category II.

c. Category III

73. Given its finding that Mr. Ho's incarceration was arbitrary under category II, the Working Group underscores that no trial of Mr. Ho should have taken place. However, he was tried on 1 February 2018, convicted and sentenced. The information submitted by the source reveals violations of Mr. Ho's right to a fair trial.

74. The source alleges that Mr. Ho's arrest and detention was arbitrary owing to the failure to observe the international norms relating to the right to a fair trial. The violation alleged relates to article 14 (3) (c) of the Covenant. Mr. Ho's trial did not commence until 15 months after his arrest. The source submits that, in violation of article 14 (3) (b) and (d) of the Covenant, principle 18 of the Body of Principles and rule 119 of the Nelson Mandela Rules, Mr. Ho was not provided with the assistance of legal counsel. His family did not have the resources to hire a lawyer and so he did not have one at trial.

75. According to the source, there was also a violation of article 14 (1) and (3) (e) of the Covenant and articles 7 and 10 of the Universal Declaration of Human Rights, given that Mr. Ho was not given a fair and public hearing. The trial was reportedly held in secret and closed to the public. His family was informed of the trial only two days before it began, and only two close relatives were allowed to attend. In addition, in violation of articles 7, 10 and 14 of the Covenant, articles 1, 4 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 5 of the Universal Declaration of Human Rights, principles 1, 6 and 21 of the Body of Principles and rules 1 and 43 of the Nelson Mandela Rules, Mr. Ho was subjected to inhuman treatment.

76. The source detailed the chronic health problems of Mr. Ho, his sudden transfer from a detention centre to a prison and the reportedly deplorable conditions in which he was kept, which induced psychological stress and endangered his life. The source also noted that, in violation of principle 24 of the Body of Principles and rules 22 (1) and 27 (1) of the Nelson Mandela Rules, the Government did not provide Mr. Ho with the medical care he needed.

77. The Working Group concludes that Mr. Ho was not accorded his right to be tried without undue delay, given that more than 15 months had elapsed between his arrest on 2 November 2016 and his trial on 1 February 2018. The information provided by the Government confirms the dates of arrest and trial. Although the reasonableness of any delay in bringing a case to trial is dependent upon the circumstances of each specific case, taking into account the complexity of the case, the conduct of the accused and the manner in which the matter was handled by the authorities,²⁰ there is nothing in the information furnished by either the source or the Government to suggest that there were any factors that could have justified the delayed commencement of Mr. Ho's trial. That delay was therefore in violation

¹⁸ General Assembly resolution 53/144 annex, articles 1 and 6 (c). See also General Assembly resolution 74/146, para. 12.

¹⁹ Opinions No. 75/2017; No. 79/2017; No. 35/2018; No. 36/2018; No. 45/2018; No. 46/2018; No. 9/2019; No. 44/2019; No. 45/2019; No. 15/2020; and No. 16/2020.

²⁰ Human Rights Committee, general comment No. 35 (2014), para. 37; and general comment No. 32 (2007), para. 35.

of articles 9 (3) and 14 (3) (c) of the Covenant. As already noted, Mr. Ho should never have been detained in the first place for the peaceful exercise of his rights under international human rights law. The delay in bringing his case to trial was unacceptable²¹ and only compounded the transgression of the provisions of the Covenant referred to above.

78. Mr. Ho was facing a serious charge of conducting propaganda against the State, which carries a penalty of lengthy imprisonment. The Government alleges that the conduct of Mr. Ho was capable of adversely affecting national security. The source and the Government concur that the trial of Mr. Ho lasted only one day. The Government indicates that Mr. Ho confessed his guilt and sought leniency and was convicted on that basis.

79. The source, however, asserts that, following his conviction, Mr. Ho had in fact appealed the conviction, that, on 3 March 2018, the Senior People's Court in Ho Chi Minh City accepted the case and that the appeal was due to be heard on 19 June 2018. Furthermore, that appeal was scheduled to be heard in public. However, on 19 June 2018, Mr. Ho's family was informed that the trial would be delayed for a few days, and they later learned that the trial would be delayed indefinitely. No reasons were provided for that postponement. The Government indicates in its response that the appeal hearing was suspended because Mr. Ho withdrew the appeal application. The Working Group finds the statements of the Government on the issue of the appeal to be contradictory. The Working Group is therefore inclined to believe the narrative of the source that an appeal had been launched against the conviction. That in turn negates the claim that there was an admission of guilt on the part of Mr. Ho during the first trial.

80. The very short first trial of Mr. Ho was conducted in one day, notwithstanding the serious national security charge brought against him. As the Working Group has previously noted,²² a short trial for a serious criminal offence would seem to suggest predetermination of the guilt of the subject prior to the hearing, in violation of the right to the presumption of innocence under article 11 (1) of the Universal Declaration of Human Rights and article 14 (2) of the Covenant.

81. With regard to the right to counsel, the source submits that, in violation of article 14 (3) (b) and (d) of the Covenant, principle 18 of the Body of Principles and rule 119 of the Nelson Mandela Rules, Mr. Ho was not provided with the assistance of legal counsel. His family did not have the resources to hire a lawyer and so he did not have one at trial. The Government, however, maintains that, during the investigation, Mr. Ho admitted his guilt, applied for leniency and refused to use the service of a defence lawyer. What the Government does not indicate is whether it notified Mr. Ho or his family of the procedure for appointing legal counsel and how to file the required paperwork.

82. The Working Group remains unconvinced by the Government's submissions on the absence of counsel to represent Mr. Ho, given the seriousness of the charge he was facing. The right to legal assistance applies from the moment of deprivation of liberty and in all settings of detention, including criminal justice, immigration detention, administrative detention, detention in health-care settings (including in the context of public health emergencies) and detention in the context of migration. That is essential to preserving the right of all those deprived of their liberty to challenge the legality of detention, which is a peremptory norm of international law. Therefore, the right to legal assistance must be ensured from the moment of deprivation of liberty and, in the context of the criminal justice setting, prior to questioning by the authorities. All persons deprived of their liberty must be made aware of their right to legal assistance from the moment of detention and should have access to legal aid services if they cannot afford such assistance themselves.²³

83. The failure to provide Mr. Ho with immediate access to a lawyer following his arrest and to ensure that he had adequate time to meet with his lawyer violated his right to adequate

²¹ Opinion No. 46/2019, para. 63. See also opinions No. 15/2020; and No. 16/2020.

²² Opinions No. 75/2017; No. 36/2018; No. 45/2018; No. 46/2018; No. 44/2019; No. 45/2019; and No. 15/2020.

²³ A/HRC/45/16, para. 51; A/HRC/30/37, principle 9 and guideline 8; and Human Rights Committee, general comment No. 35 (2014), para. 35. See also opinion No. 16/2020, paras. 75–76.

time and facilities to prepare his defence under article 14 (3) (b) and (d) of the Covenant. Any legislation or procedure that purports to remove the right to counsel or to delay it until after the investigation phase is inherently contrary to international human rights standards.²⁴

84. In addition, the source alleges that, in violation of article 14 (1) of the Covenant and article 10 of the Universal Declaration of Human Rights, Mr. Ho was not given a fair and public hearing, his trial having been delayed and reportedly taking place in secret and closed to the public. The Government, however, claims that the trial was publicly and transparently conducted by an independent and competent court and that the proceedings were reported by the press.

85. The Working Group is satisfied that the source has established that Mr. Ho's trial did not meet the standards of a fair and public hearing by a competent, independent and impartial tribunal, in violation of article 10 of the Universal Declaration of Human Rights and article 14 (1) of the Covenant. There was no information to suggest that any of the exceptions to the right to a public hearing set out in article 14 (1) of the Covenant applied in the present case. Furthermore, the delayed appeals hearing was in violation of article 14 (5) of the Covenant.

86. The Working Group has taken note of the source's allegations that, despite Mr. Ho's chronic health problems, he was transferred to a prison where he was forced to sleep on a tiled floor without a mat for at least three weeks and that he was detained with approximately 10 other prisoners, a situation that was not only stressful for him but also put his life in danger and occasioned psychological pressures. The source confirms that Mr. Ho was not directly tortured but that prisoners are often intimidated while in prison. The Working Group is therefore unable to reach a conclusion on those allegations, all of which were denied by the Government.

87. The Working Group concludes that the violations of the right to a fair trial were of such gravity as to give Mr. Ho's detention an arbitrary character under category III.

88. The Working Group registers its concern about allegations of violations of fair trial guarantees for detainees, especially in cases involving human rights defenders, political activists and individuals accused of crimes related to national security, including the denial of the right to legal assistance, access to a lawyer of their choice and a trial within a reasonable time and insufficient time and facilities to prepare their defence.²⁵

d. Category V

89. The Working Group considers that Mr. Ho was targeted because of such peaceful activities as joining with other environmental activists and organizations in criticizing the State's response to the chemical spill at the Formosa Ha Tinh Steel Company factory in 2016. As the Working Group has previously observed, there appears to be a pattern in Viet Nam of detaining activists who have attempted to raise awareness about the environmental disaster at the Formosa Ha Tinh Steel Company factory.²⁶ Moreover, in the discussion above concerning category II, the Working Group established that Mr. Ho's detention resulted from the peaceful exercise of his rights under international law. When a detention results from the active exercise of civil and political rights, there is a strong presumption that the detention also constitutes a violation of international law on the grounds of discrimination based on political or other views.²⁷

90. The Working Group finds that Mr. Ho was deprived of his liberty on discriminatory grounds, owing to his status as a human rights defender, and on the basis of his political or other opinion in seeking to hold the authorities to account for their actions. His deprivation of liberty was in violation of articles 2 and 7 of the Universal Declaration of Human Rights

²⁴ CCPR/C/VNM/CO/3, paras. 25–26 and 35–36.

²⁵ *Ibid.*, para. 35.

²⁶ Opinions No. 79/2017; No. 27/2017; No. 35/2018; No. 45/2018; No. 46/2018; No. 9/2019; No. 44/2019; and No. 45/2019.

²⁷ Opinions No. 88/2017, para. 43; No. 13/2018, para. 34; and No. 59/2019, para. 79.

and articles 2 (1) and 26 of the Covenant and falls within category V. The Working Group refers the present case to the Special Rapporteur on the situation of human rights defenders.

e. Concluding remarks

91. The Working Group observes that the present case is one of several cases that have been referred to the Working Group in recent years regarding arbitrary detention in Viet Nam.²⁸ The cases follow a similar pattern of extended detention pending trial with no access to judicial review, incommunicado detention, prosecution under vaguely worded criminal offences for the peaceful exercise of human rights, the denial of access to legal counsel, a brief closed trial at which due process is not observed, disproportionately harsh sentencing and the denial of access to the outside world. That pattern indicates a systemic problem with arbitrary detention in Viet Nam which, if it continues, may amount to a serious violation of international law.²⁹

92. The Working Group welcomes any opportunity to work constructively with the Government to address arbitrary detention. A significant period has passed since the Working Group's previous visit to Viet Nam in October 1994. The Working Group considers that it is now an appropriate time to conduct another visit. On 11 June 2018, the Working Group reiterated earlier requests to the Government to undertake a country visit, and it will continue to seek a positive response.

Disposition

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

The deprivation of liberty of Ho Van Hai, being in contravention of articles 2, 3, 6, 7, 8, 9, 10, 11, 19 and 21 (1) of the Universal Declaration of Human Rights and articles 2 (1) and (3), 9, 14, 16, 19, 25 (a) and 26 of the International Covenant on Civil and Political Rights, was arbitrary and falls within categories I, II, III and V.

94. The Working Group requests the Government of Viet Nam to take the steps necessary to remedy the situation of Mr. Ho without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

95. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to accord Mr. Ho an enforceable right to compensation and other reparations, in accordance with international law.

96. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary detention of Mr. Ho and to take appropriate measures against those responsible for the violation of his rights.

97. The Working Group requests the Government to bring its laws, particularly article 88 of the Criminal Code, into conformity with the recommendations made in the present opinion and with the commitments made by Viet Nam under international human rights law.

98. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the situation of human rights defenders, for appropriate action.

99. The Working Group requests the Government to disseminate the present opinion through all available means and as widely as possible.

²⁸ Opinions No. 45/2015; No. 46/2015; No. 40/2016; No. 26/2017; No. 27/2017; No. 75/2017; No. 79/2017; No. 35/2018; No. 36/2018; No. 45/2018; No. 46/2018; No. 8/2019; No. 9/2019; No. 44/2019; No. 45/2019; No. 15/2020; and No. 16/2020.

²⁹ Opinion No. 47/2012, para. 22.

Follow-up procedure

100. 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 compensation or other reparations have been made to Mr. Ho;
- (b) Whether an investigation has been conducted into the violation of Mr. Ho's rights and, if so, the outcome of the investigation;
- (c) 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;
- (d) Whether any other action has been taken to implement the present opinion.

101. 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.

102. The Working Group requests the source and the Government to provide the above-mentioned information within six months of the date of 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.

103. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has 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.³⁰

[Adopted on 26 November 2020]

³⁰ Human Rights Council resolution 42/22, paras. 3 and 7.