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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-second session, 20–24 August 2018

Opinion No. 45/2018 concerning Hoang Duc Binh (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 Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 11 May 2018, the Working Group transmitted to the Government of Viet Nam a communication concerning Hoang Duc Binh. The Government replied to the communication on 23 July 2018. 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

4. Hoang Duc Binh is a 35-year-old citizen of Viet Nam who resides in Nghe An Province. According to the source, Mr. Binh is a construction engineer in a public company belonging to the Defence Department and is a human rights activist.

5. In 2014, Mr. Binh started to use his social media account to express his opinions about the situation in Viet Nam, particularly regarding actions taken by the Government. The source reports that he joined a group called No U Sai Gon that aims to hold the Government accountable for its actions, especially with regard to its policies on the relationship between China and Viet Nam.

6. In 2015, Mr. Binh became a member of the Viet Nam Labour Movement, an independent organization that promotes and raises awareness of employee empowerment, workers' rights and free and independent trade unions. On 25 December 2016, the police in Hoa Thanh Ward, Tan Phu District, arrested Mr. Binh. He had been disseminating leaflets in Ho Chi Minh City on the right to an independent labour union. The source states that the leaflets included a quote from the Prime Minister of Viet Nam supporting that right.

7. According to the source, the authorities detained Mr. Binh and confiscated 3,000 leaflets belonging to Viet Labour. A dozen activists gathered at Hoa Thanh police station to demand Mr. Binh's release. The source alleges that the police detained and used violence against these activists, causing severe injuries. All the activists were released in the early morning of the following day, except Mr. Binh, who was released that afternoon with multiple severe injuries. The source adds that the police continued to harass activists in Ho Chi Minh City.

8. In 2016, in the context of the Formosa environmental disaster on the central coast of Viet Nam, Mr. Binh travelled frequently to the affected area to provide legal support and action plans for local people suffering from the consequences of the disaster.

Arrest and detention

9. On 15 May 2017, Mr. Binh was arrested while he was on his way to Vinh City in Nghe An Province with a group of environmentalist activists. He was in a car with a Catholic priest who is well known for his work on environmental issues. The car was stopped in the centre of the Dien Chau District by a group of police officers in uniform and unidentified persons in civilian clothes. The source alleges that Mr. Binh was violently removed from the car by the police and taken away. According to the source, the police used cellular telephone blockers so that the arrest could not be broadcast live by witnesses or pictures of the arrest sent to others.

10. Later that day, the authorities of Nghe An Province announced that there was an arrest order for Mr. Binh, which had been issued by the People's Procuracy two days earlier. According to the arrest order, Mr. Binh was facing charges under articles 330 and 331 of the Penal Code for "resisting persons in the performance of their official duties" and "abusing democratic freedoms to infringe upon the interests of the State, the legitimate rights and interests of organisations and/or citizens".¹

11. The source claims that after his arrest, Mr. Binh was initially detained in Dien Chau District in Nghe An Province, where he was forced to sign a confession statement. He was subsequently transferred to Hanoi in June 2017 and is currently detained at the B14 prison. The source explains that Mr. Binh's family only learned of the transfer when they went to Nghe An Province on 15 June 2017 to bring him supplies.

¹ According to the source, at the time of Mr. Binh's arrest, those offences were found in articles 257 and 258 of the 1999 Penal Code. However, the Penal Code was revised in November 2015 and the new version adopted in May 2017. The offences were retained in the new Penal Code, but were renumbered as articles 330 and 331.

12. In July 2017, the authorities added a further charge under article 143 of the Penal Code (now article 388) of “destroying or deliberately damaging property” to the two existing charges against Mr. Binh. The source indicates that no further details were provided by the authorities of any of the acts that allegedly amounted to the crimes committed by Mr. Binh.

13. Given that Mr. Binh was not under investigation for a national security offence, he was able to receive visits from his lawyer on a regular basis. While he was not permitted to receive visits from his family members, they were able to provide him with food and medicine.

14. According to the source, the authorities did not present any reason to justify Mr. Binh’s pretrial detention. The source notes that it is a standard and systematic procedure to place accused persons in pretrial detention during an investigation in Viet Nam. Pretrial detention during the investigation phase is permitted under article 120 of the Criminal Procedure Code. No further information is required from the authorities to justify the need for pretrial detention, which violates international standards requiring that pretrial detention be ordered only as measure of last resort to prevent flight, the commission of further offences, or interference with the course of justice by the accused person. Moreover, the source states that there is no possibility of having the lawfulness of pretrial detention reviewed by an independent judicial authority.

15. The source reports that the authorities extended Mr. Binh’s pretrial detention and investigation period. He remained under investigation until 6 January 2018. In January 2018, his trial was rescheduled just before it was supposed to begin.

Trial, sentencing and appeal

16. On 6 February 2018, Mr. Binh was tried and sentenced to two seven-year prison sentences for “opposing officials on duty” under article 330 of the Penal Code and “abusing democratic freedoms to infringe state interests” under article 331. His total sentence is therefore 14 years’ imprisonment.

17. The source alleges that on the day of the trial, 10 of Mr. Binh’s family members were taken away by the police while they were on their way to the courthouse. According to the source, the family members were taken to the police station, brutally beaten by plainclothes police and their cellular telephones were confiscated. One family member was beaten so badly that he fainted. Other family members asked the police to allow him to go to hospital, but their request was denied. Mr. Binh’s family was not allowed to see him until March 2018.

18. On 24 April 2018, Mr. Binh’s appeal against the judgment of the trial court was heard. His appeal was denied and his sentence was upheld.

19. Mr. Binh has now been in detention for over 15 months since his arrest on 15 May 2017. The source submits that the provisions of the legislation that were applied in his case are inherently inconsistent with international human rights law, and that the arrest, investigation and prosecution of Mr. Binh, while carried out in accordance with domestic legal provisions, was clearly in violation of recognized international standards. His detention is therefore arbitrary under categories II, III and V.

Category II: exercise of fundamental rights

20. The source submits that Mr. Binh’s arrest and detention were directly linked to his legitimate exercise of the rights to freedom of expression and peaceful assembly.

21. According to the source, Mr. Binh’s peaceful activities in support of workers and communities affected by the Formosa environmental disaster are protected under international human rights law by articles 19 and 20 of the Universal Declaration of Human Rights and articles 19 and 21 of the Covenant. The source submits that Mr. Binh has the right to criticize or question the policies and actions of the Government and the political

system, to call peacefully for changes to the trade union system and respect for human rights, and to seek government accountability and just compensation for victims of an environmental crisis.²

22. In addition, the source argues that article 331 of the Vietnamese Penal Code limits the exercise of the right to freedom of expression in a manner that is incompatible with international standards. According to article 19 (3) of the Covenant, that freedom can only be restricted in a democratic society when it is necessary to protect national security, public health or public order, and only in a proportional manner. Article 331 does not pursue any legitimate objective by restricting the freedom of expression and is not proportional with the respect for freedom of expression. Moreover, article 331 does not define what constitutes an “abuse of democratic freedom” and amounts to a blanket restriction of the freedom of expression and other basic freedoms, since the determination of whether an offence has been committed is left to the discretion of the authorities. The provision is vague and overly broad, and cannot be the basis for regulating one’s conduct and identifying what behaviour is prohibited.

Category III: due process rights

23. The source submits that Mr. Binh’s detention is arbitrary because it violates multiple international norms relating to the right to liberty and security, as well as the right to a fair trial, as enshrined in articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant.

24. Despite the guarantees of a fair trial provided in the Constitution, Mr. Binh was denied access to a court following his arrest. The lawfulness of his pretrial detention was not considered by an independent court at any time and there is no procedure available to allow for such a review under Vietnamese law. Furthermore, no grounds were adduced by the authorities to justify Mr. Binh’s pretrial detention.

Category V: discrimination

25. The source submits that, in light of the intensified crackdown instigated by the Vietnamese authorities against human rights activists, particularly those working on issues related to the Formosa environmental disaster, Mr. Binh’s arrest and detention amount to a reprisal for his peaceful work. His detention is part of a pattern of persecution of human rights defenders in Viet Nam.

Communication from special procedures mandate holders

26. Mr. Binh was the subject of a joint urgent appeal addressed to the Government by a number of special procedures mandate holders on 21 February 2018.³ The Working Group acknowledges the response received from the Government on 25 April 2018.⁴

27. The special procedures mandate holders requested the Government to comment on numerous allegations, including concerns that the legal basis on which the conviction of Mr. Binh rests was unlawful under international law because it criminalized the legitimate exercise of freedom of expression. The experts also expressed concern at the repeated use of loosely defined offences to penalize human rights defenders who were involved in the protests provoked by the Formosa environmental disaster.

28. In its response, the Government noted that Mr. Binh had a record of breaking the law. He had been arrested and convicted for offences under Vietnamese law, not for the exercise of fundamental freedoms. Moreover, his trial was in accordance with national legislation and the international obligations of Viet Nam. Finally, the Government outlined

² See *Marques de Morais v. Angola*, (CCPR/C/83/D/1128/2002), para. 6.7. See also Human Rights Committee, general comment No. 34 on the freedoms of opinion and expression, para. 23.

³ See

<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=23672>.

⁴ See <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=87450>.

measures that it had taken to address the discharge of toxic waste by the Formosa plant in Ha Tinh.

Response from the Government to the regular communication

29. On 11 May 2018, the Working Group transmitted the allegations from the source to the Government under its regular communication procedure. The Working Group requested the Government to provide detailed information by 10 July 2018 about Mr. Binh's current situation. The Working Group also requested the Government to clarify the legal provisions justifying his continued detention and its compatibility with the obligations of Viet Nam under international human rights law. The Working Group called upon the Government to ensure the physical and mental integrity of Mr. Binh.

30. On 9 July 2018, the Government requested an extension of the deadline for its response, which was granted until 24 July 2018. The Government responded on 23 July 2018.

31. In its response, the Government states that the source's allegations are untrue. Mr. Binh was arrested and tried for his violations of the law, not for the exercise of his human rights. Prior to his most recent arrest, Mr. Binh had a history of breaking the law. On 25 December 2015, Mr. Binh was fined for violating regulations in the field of press and publishing. However, he did not pay the fine and fled to Nghe An Province.

32. According to the Government, Mr. Binh regularly published and shared false information about State policy on social media from Nghe An Province. Mr. Binh was also Vice-President of the illegal Viet Nam Labour Movement. In addition, he took advantage of the Formosa environmental disaster by establishing the Association of Central Fishermen, aimed at inciting local people and fishermen to disrupt security and order.

33. The Government explains that on 14 February 2017, Mr. Binh intentionally parked his vehicle in the middle of a major road in Dien Chau District, inciting others to cause public disorder and traffic disruption. The Government alleges that the group led by Mr. Binh damaged four cars and injured 12 police officers. On 2 April 2017, Mr. Binh and other individuals incited people to attack a police patrol team in Ha Tinh, injuring one police officer. They surrounded the residence of the police chief, destroying property and disturbing local security and order. Mr. Binh used his mobile telephone to record the events and post them on social media, adding false comments aimed at inciting hatred of the police. He committed the offences of "resisting a person on public duty" and "abusing the rights to freedom and democracy to infringe upon the interests of the State, and the rights and interests of organizations and other individuals" under articles 257 and 258 (now articles 330 and 331) of the Criminal Code.⁵

34. On 15 May 2017, the Police Investigation Security Agency under the Department of Public Security of Nghe An Province detained Mr. Binh for three months to investigate the matter. On 16 May 2017, a group of people blocked a major road, causing severe traffic congestion. The Government alleges that the group held several local government officials hostage and committed acts of disturbance at the Dien Chau District police station.

35. The Government further asserts that Mr. Binh's detention was carried out in compliance with national law and the international obligations of Viet Nam. His first instance and appellate hearings were both held in public and were conducted fairly and transparently. Based on the evidence, the courts convicted Mr. Binh of two offences under articles 257 and 258 of the Criminal Code, resulting in a total punishment of 14 years' imprisonment. The sentence commenced from Mr. Binh's date of detention on 15 May 2017. Throughout the criminal proceedings, Mr. Binh's rights were fully ensured. He met with his lawyer on 4 occasions, received a medical examination and treatment on 14 occasions and received 3 visits from family members, who brought supplies. On 5 May 2018, Mr. Binh wrote a letter to the detention centre to express his gratitude for the care,

⁵ The Government provided links to three online media reports on Mr. Binh's "illegal acts". The reports are in Vietnamese and it is not clear what acts are allegedly illegal and how Mr. Binh is involved.

encouragement and assistance he had received and for the full realization of his rights under the law. He is currently serving his sentence and his health is normal.

36. Finally, the Government states that the acts committed by Mr. Binh, including seriously disturbing public order, attacking and injuring persons on duty and causing damage to property, must be punished in any legal system. In any event, in the light of article 19 of the Covenant, a person is allowed to exercise his or her right to freedom of expression provided that it does not involve violent acts or the dissemination of false information, or incitement to disturbing public order. The limitations on the exercise of human rights are determined by Vietnamese law solely for the purpose of promoting the general welfare in a democratic society and protecting the rights and freedoms of others.

Further comments from the source

37. The Government's response was sent to the source for further comment. The source did not provide any further comments or information.

Discussion

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

39. In determining whether Mr. Binh's deprivation of liberty is 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 requirements 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 (see A/HRC/19/57, para. 68).

40. In the present case, the source alleges that the police did not present a warrant or other decision by a public authority at the time of Mr. Binh's arrest on 15 May 2017. According to the source, later that day the authorities of Nghe An Province announced that there was an arrest order for Mr. Binh, which had been issued by the People's Procuracy two days earlier.⁶ The Government did not challenge those allegations. The Working Group considers that it is not sufficient that the authorities announced that an arrest order had been issued by the Procuracy two days before Mr. Binh's arrest. An order for Mr. Binh's arrest or other decision by a public authority should actually have been presented at the time of his arrest.

41. The Working Group recalls that, according to article 9 (1) of the Covenant, no one shall be deprived of his or her liberty except on such grounds and in accordance with such procedure as are established by law. Therefore, for deprivation of liberty to be considered lawful and not arbitrary, established legal procedures and guarantees must be respected. In the present case, Mr. Binh was arrested without an arrest order or warrant and without being informed at that time of the reasons for his arrest, in violation of article 9 (2) of the Covenant. As the Working Group has stated, in order for a deprivation of liberty to have a legal basis, it is not sufficient that there is a law which may authorise the arrest. The authorities must invoke that legal basis and apply it to the circumstances of the case through an arrest warrant.⁷

42. In addition, the source alleges that although the charges were stated in the arrest order announced by the police on the day of Mr. Binh's arrest, no further details were provided by the authorities of the underlying acts that allegedly amounted to the crimes committed by Mr. Binh. Although it had the opportunity to do so, the Government did not deny this allegation. The Working Group considers that the lack of an explanation as to what criminal acts Mr. Binh had allegedly committed strengthens its conclusion that he was arrested and detained without a legal basis and in violation of article 9 (2) of the Covenant.

⁶ The source states that arrest warrants and arrest orders are used in Viet Nam. An arrest order is an official document publicizing the fact that a person is wanted by the authorities and requiring any public official to arrest the wanted person.

⁷ See, for example, opinions No. 46/2017, No. 75/2017, No. 35/2018 and No. 36/2018.

As the Human Rights Committee noted in its general comment No. 35 (2014) on liberty and security of person, the reasons given for an arrest must include not only the general legal basis of the arrest, but also enough factual specifics to indicate the substance of the complaint, such as the wrongful act (para. 25).

43. Furthermore, according to the source, the lawfulness of Mr. Binh's pretrial detention was not considered by an independent court at any time, as there is no procedure available to allow for such a review under Vietnamese law. As a result, Mr. Binh was held in pretrial detention for nearly nine months after his arrest without an independent judicial determination of the lawfulness of his detention and without any individualized review of his situation or consideration of alternatives to pretrial detention, contrary to article 9 (3) and (4) of the Covenant. The Government did not challenge this allegation in its response. The Working Group considers that judicial oversight of deprivation of liberty is a fundamental safeguard of personal liberty⁸ and that it is essential to ensuring that detention has a legal basis.⁹ Mr. Binh was unable to challenge his detention and his right to an effective remedy under article 8 of the Universal Declaration of Human Rights and article 2 (3) of the Covenant was also violated.

44. Given that Mr. Binh was arrested without an arrest order or warrant and without being informed of the reasons or basis for his arrest, and was held in pretrial detention without a judicial determination of the lawfulness of that detention, the Working Group finds that there was no legal basis for his arrest and detention. His deprivation of liberty is therefore arbitrary under category I.

45. The source alleges that Mr. Binh has been deprived of his liberty solely for exercising his rights under the Universal Declaration of Human Rights and the Covenant, rather than for the violation of Vietnamese law. As the Working Group has repeatedly stated in its jurisprudence, even when the detention of a person is carried out in conformity with national legislation, the Working Group must ensure that the detention is also consistent with the relevant provisions of international law.¹⁰

46. The Working Group notes that Mr. Binh was charged and convicted under articles 330 and 331 of the Vietnamese Penal Code. According to the source, article 331 of the Penal Code (formerly article 258) states:

“Article 258. Abusing democratic freedoms to infringe upon the interests of the State, the legitimate rights and interests of organisations and/or citizens.

1. Those who abuse the rights to freedom of speech, freedom of press, freedom of belief, religion, assembly, association and other democratic freedoms to infringe upon the interests of the State, the legitimate rights and interests of organizations and/or citizens, shall be subject to warning, non-custodial reform for up to three years or a prison term of between six months and three years.

2. Committing the offence in serious circumstances, the offenders shall be sentenced to between two and seven years of imprisonment.”

47. The Working Group has considered the application of the broadly-worded provisions of the Vietnamese Penal Code on numerous occasions.¹¹ In those cases, the Working Group determined that criminal provisions were vague and overly broad if they could result in penalties being imposed on individuals who had merely exercised their rights under international law. The Working Group also pointed out in those cases that the Government had not provided evidence of any violent action on the part of the petitioners and that in the absence of such information, the charges and convictions could not be regarded as consistent with the Universal Declaration of Human Rights or the Covenant.

⁸ See United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, para. 3.

⁹ See, for example, opinions No. 28/2016 and No. 46/2017.

¹⁰ See, for example, opinions No. 13/2007, No. 46/2011, No. 42/2012, No. 75/2017 and No. 79/2017.

¹¹ See, for example, opinions No. 26/2017, No. 27/2017, No. 75/2017, No. 79/2017, No. 35/2018 and No. 36/2018. See also opinions No. 7/1998, No. 1/2009, No. 24/2011 and No. 27/2012 (discussing article 258 of the Vietnamese Penal Code or its previous equivalent provisions).

The Working Group came to a similar conclusion in its report following a visit to Viet Nam in October 1994, noting that vaguely worded offences did not distinguish between violent acts and the peaceful exercise of fundamental freedoms (E/CN.4/1995/31/Add.4, paras. 58–60). It requested the Government to amend its laws in order to clearly define such offences and to state what was prohibited without any ambiguity.

48. In the present case, the Government claims that Mr. Binh's activities incited others to commit acts of public disorder and violence, but did not elaborate on how his actions amounted to incitement. The Working Group considers that posting material about State policy on social media, joining and establishing various associations, such as the Viet Nam Labour Movement or the Association of Central Fishermen, and blocking a major road with a vehicle do not amount to acts of inciting others to cause public disorder or violence. Similarly, the Government claims that Mr. Binh incited others to cause traffic disruption and that he led a group that damaged cars, injured police officers and destroyed property. However, the Government did not point to any specific words or conduct by Mr. Binh or provide any evidence to support those assertions. There is also no evidence to demonstrate that Mr. Binh was involved in or incited the alleged taking of hostages or acts of disturbance on 16 May 2017, the day after he was taken into custody. As a result, the Government has not rebutted the source's prima facie credible allegations.

49. The Working Group finds that the arrest, detention, conviction and sentencing of Mr. Binh were due to his peaceful activities in expressing his views on social media, his membership of groups that call for respect for human rights and his assistance to victims of the Formosa environmental disaster. Mr. Binh's activities in calling for government accountability falls within the boundaries of the freedom of expression protected by article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant.¹² Similarly, the Working Group finds that through his involvement with No U Sai Gon and the Viet Nam Labour Movement, Mr. Binh was exercising his right to freedom of association under article 20 of the Universal Declaration of Human Rights and article 22 of the Covenant.¹³ Finally, the Working Group is also of the view that Mr. Binh was engaging in advocacy relating directly to government policies in Viet Nam and was deprived of his liberty as a result of exercising his right to take part in the conduct of public affairs under article 21 of the Universal Declaration of Human Rights and article 25 of the Covenant.¹⁴

50. The permitted restrictions on the freedom of expression, association and the right to take part in the conduct of public affairs under articles 19 (3), 22 (2) and 25 of the Covenant do not apply in the present case. The Government refers to article 19 in its submission, stating that the freedom of expression does not apply to violent acts, the dissemination of false information or incitement to disturbing public order. However, the Government did not present any evidence to the Working Group to invoke any of the restrictions, nor did it demonstrate why bringing charges against Mr. Binh was a legitimate, necessary and proportionate response to his activities. In any event, the Human Rights Council in its resolution 12/16 called on States to refrain from imposing restrictions which are not consistent with international human rights law, including restrictions on discussion of government policies and political debate; reporting on human rights; peaceful demonstrations; and expression of opinion and dissent (para. 5 (p)). Moreover, as the Human Rights Committee has stated: "States parties should put in place effective measures

¹² The Working Group has found in several cases concerning Viet Nam that blogging and publishing material online falls within the right to freedom of expression under international law. See, for example, opinions No. 20/2003, No. 19/2004, No. 13/2007, No. 1/2009, No. 27/2012, No. 33/2013, No. 27/2017 and No. 36/2018.

¹³ The Working Group has found in cases relating to Viet Nam that the arrest and detention of individuals because of their association with pro-democracy groups is arbitrary. See, for example, opinions No. 6/2010 and No. 42/2012.

¹⁴ According to the Human Rights Committee, citizens may take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. See general comment No. 25 (1996) on participation in public affairs and the right to vote, para. 8. See also opinions No. 13/2007, No. 46/2011, No. 42/2012, No. 26/2013 and No. 40/2016.

to protect against attacks aimed at silencing those exercising their right to freedom of expression. Paragraph 3 may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights. Nor, under any circumstance, can an attack on a person, because of the exercise of his or her freedom of opinion or expression, including such forms of attack as arbitrary arrest, torture, threats to life and killing, be compatible with article 19.”¹⁵

51. In addition to the Working Group’s findings, there is widespread concern in the international community about the use of legislation in Viet Nam to restrict the exercise of human rights. That concern is reflected in at least 35 of the recommendations contained in the 2014 report of the Working Group on the Universal Periodic Review on Viet Nam, several of which relate to the review and repeal of vague offences in the Penal Code (including former article 258 of the Penal Code), the release of political prisoners and protection of human rights defenders, and the need for Viet Nam to implement the opinions of the Working Group on Arbitrary Detention.¹⁶

52. Furthermore, 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 Fundamental Freedoms (Declaration on Human Rights Defenders), “everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels”, to communicate with non-governmental organizations, and to have effective access in the conduct of public affairs.¹⁷ The source’s allegations demonstrate that Mr. Binh was detained for the exercise of his rights under the Declaration as a human rights defender. The Working Group has determined that detaining individuals on the basis of their activities as human 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.¹⁸

53. The Working Group concludes that Mr. Binh’s deprivation of liberty resulted from the exercise of his rights to freedom of expression and of association, and 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 deprivation of liberty was therefore arbitrary and falls within category II. The Working Group refers this matter to the Special Rapporteurs on the promotion and protection of the right to freedom of opinion and expression, and on the rights to freedom of peaceful assembly and of association.

54. As noted earlier, the Working Group considers that the provisions applied to Mr. Binh, particularly article 331 of the Penal Code, are vague and overly broad. Article 331 does not define what constitutes an “abuse of democratic freedom” and leaves the determination of whether an offence has been committed entirely to the discretion of the authorities. As the Working Group has previously stated, the principle of legality requires that criminal laws be formulated with sufficient precision for the individual to be able to access and understand the law, and regulate his or her conduct accordingly.¹⁹ In the present case, the application of a vague and overly broad provision adds weight to the Working Group’s conclusion that Mr. Binh’s deprivation of liberty falls within category II. The Working Group considers that, in some circumstances, laws may be so vague and overly broad that it is impossible to invoke a legal basis justifying the deprivation of liberty.

55. Given its finding that the deprivation of liberty of Mr. Binh was arbitrary under category II, the Working Group wishes to emphasize that no trial of Mr. Binh should have taken place. However, he was tried and sentenced on 6 February 2018 and his appeal was heard on 24 April 2018. The Working Group considers that his right to a fair trial was violated prior to and during the trial and subsequent appeal hearing.

¹⁵ See Human Rights Committee, general comment No. 34, para. 23.

¹⁶ See A/HRC/26/6, paras. 143.4, 143.34, 143.115–118, 143.144–171 and 143.173.

¹⁷ See also General Assembly resolution 70/161, para. 8.

¹⁸ See, for example, opinions No. 26/2017, No. 75/2017, No. 79/2017, No. 35/2018 and No. 36/2018.

¹⁹ See, for example, opinion No. 41/2017, paras. 98–101.

56. The Working Group notes that Mr. Binh's trial and appeal hearings lasted only one day and that a very heavy penalty of 14 years' imprisonment was imposed and confirmed after such brief hearings. As the Working Group has noted, a trial of only one day for serious criminal offences suggests that Mr. Binh's guilt had been determined prior to the hearings.²⁰ In those circumstances, the Working Group considers that Mr. Binh was denied the presumption of innocence guaranteed by article 11 (1) of the Universal Declaration of Human Rights and article 14 (2) of the Covenant.

57. The source also alleges that Mr. Binh was forced to sign a confession statement during his initial detention in Dien Chau District, Nghe An Province. The Government did not respond to the allegation. The Working Group recalls that the burden is on the Government to prove that the statement made by Mr. Binh was given freely,²¹ and it has not done so in the present case. Accordingly, the Working Group finds that the source has established a prima facie violation of Mr. Binh's right not to be compelled to confess guilt guaranteed by article 14 (3) (g) of the Covenant.

58. Finally, the source alleges that Mr. Binh was denied contact with and visits from his family between his arrest on 15 May 2017 and March 2018. The source also alleges that Mr. Binh was transferred to Hanoi in June 2017 without notification to his family. In its response, the Government asserted that Mr. Binh had had three visits from his family, but provided no evidence in support of this statement. The Working Group finds that these limitations on Mr. Binh's contact with his family violated his right to have contact with the outside world under principles 15, 16 (1) and 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and rules 43 (3), 58 (1) and 68 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).

59. The Working Group concludes that these violations of the right to a fair trial are of such gravity as to give the deprivation of liberty of Mr. Binh an arbitrary character according to category III.

60. Furthermore, the Working Group considers that Mr. Binh was targeted because of his activities as a human rights defender, including his membership of No U Sai Gon and the Viet Nam Labour Movement, and his work supporting communities affected by the Formosa environmental disaster. In its response, the Government confirmed that Mr. Binh was sentenced to 14 years' imprisonment consisting of two seven-year sentences under articles 330 and 331 of the Vietnamese Penal Code, which is the maximum sentence for each of these offences.²² It appears that the disproportionately heavy sentence was intended to send a message to human rights defenders that they must cease their work or face severe penalties. Moreover, Mr. Binh's arrest and detention on 15 May 2017 was not the first time that he had been detained for his human rights work. As the source alleges and the Government confirmed, Mr. Binh was previously fined in relation to disseminating leaflets, in what appears to be a pattern of using the law to curtail his peaceful advocacy.

61. In addition, there appears to be a broader pattern in Viet Nam of detaining human rights defenders for their work, particularly activists who have participated in protests or attempted to raise awareness about issues relating to the Formosa Steel Plant. The Working Group has made several findings to this effect in recent years and finds the present case to be another example of the use of detention to silence human rights defenders.²³ A number of special procedures mandate holders recently called upon the Government to release activists detained for protesting the discharge of chemicals by the Formosa Steel Plant in Ha Tinh in April 2016, making specific reference to Mr. Binh's case.²⁴

²⁰ See, for example, opinions No. 75/2017, No. 36/2018 and No. 46/2018.

²¹ See Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 41.

²² In its submission, the source quotes former articles 257 and 258 (now articles 330 and 331) of the Penal Code. According to the source, each of those articles provide for a maximum penalty of seven years' imprisonment when the offence is committed in serious circumstances.

²³ See, for example, opinions No. 27/2017, No. 79/2017, No. 35/2018 and No. 46/2018.

²⁴ See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22696&LangID=E.

62. For those reasons, the Working Group finds that Mr. Binh was deprived of his liberty on discriminatory grounds, that is, owing to his status as a human rights defender. His deprivation of liberty is arbitrary according to category V. The Working Group refers the present case to the Special Rapporteur on the situation of human rights defenders for further consideration. Furthermore, given Mr. Binh's work in offering legal support to communities affected by the Formosa waste spill, the Working Group also refers this matter to the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes and the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.

63. The Working Group wishes to express its serious concern regarding the source's allegations that on the day of Mr. Binh's trial, 10 of his family members were taken to the police station, brutally beaten by plainclothes police and their cellular telephones confiscated. One family member was beaten so badly that he fainted but was not permitted to go to hospital. The Government did not deny the allegations. It is the responsibility of the Government to protect its citizens, including those who were merely on their way to Mr. Binh's trial and the Working Group urges the Government to conduct a thorough investigation into the alleged incidents and to prosecute the offenders.

64. The present case is one of several cases brought before the Working Group in recent years concerning the arbitrary deprivation of liberty of persons in Viet Nam.²⁵ The Working Group notes that many of the cases involving Viet Nam follow a familiar pattern of lengthy pretrial detention with no access to judicial review and often without legal counsel; charges and prosecution under vaguely worded criminal offences; a very brief closed trial and appeal at which basic due process has not been observed; and denial of access to the outside world and to medical treatment. Although the Government repeatedly asserts in its responses to communications from the Working Group and others that its procedures are in accordance with domestic legislation, that does not change the fact that the Government is in grave violation of its international human rights obligations. 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.²⁶

65. The Working Group would welcome the opportunity to engage constructively with the Government to address issues such as the use of vague and overly broad provisions in the Penal Code to prosecute individuals for the peaceful exercise of their rights, which continues to result in the arbitrary deprivation of liberty in Viet Nam.

66. On 11 June 2018, the Working Group reiterated earlier requests to the Government to undertake a country visit and awaits a positive response. Given that the human rights record of Viet Nam will be subject to review during the third cycle of the universal periodic review in January 2019, an opportunity exists for the Government to enhance its cooperation with the special procedures and to bring its laws into conformity with international human rights law.

Disposition

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

The deprivation of liberty of Hoang Duc Binh, being in contravention of articles 2, 7, 8, 9, 10, 11 (1), 19, 20 and 21 (1) of the Universal Declaration of Human Rights and articles 2 (1) and (3), 9, 14, 19, 22, 25 (a) and 26 of the Covenant, is arbitrary and falls within categories I, II, III and V.

68. The Working Group requests the Government of Viet Nam to take the steps necessary to remedy the situation of Mr. Binh without delay and bring it into conformity

²⁵ See, for example, opinions No. 1/2009, No. 6/2010, No. 46/2011, No. 27/2012, No. 33/2013, No. 45/2015, No. 40/2016, No. 75/2017 and No. 36/2018.

²⁶ See, for example, opinion No. 47/2012, para. 22.

with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the Covenant.

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

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

71. The Working Group requests the Government to bring its laws, particularly article 331 of the revised Penal Code, into conformity with the recommendations made in the present opinion and with the commitments made by Viet Nam under international human rights law.

72. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the rights to freedom of peaceful assembly and of association, the Special Rapporteur on the situation of human rights defenders, the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes and the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, for appropriate action.

73. The Working Group encourages the Government to incorporate the Model Law for the Recognition and Protection of Human Rights Defenders into its domestic legislation and to ensure its implementation.²⁷

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

Follow-up procedure

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

76. 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.

77. 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

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

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.

78. 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.²⁸

[Adopted on 21 August 2018]

²⁸ See Human Rights Council resolution 33/30, paras. 3 and 7.