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Human Rights Council Working Group on Arbitrary Detention

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

Opinion No. 75/2017 concerning Tran Thi Nga (Viet Nam)

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

2. In accordance with its methods of work (A/HRC/36/38), on 31 August 2017, the Working Group transmitted to the Government of Viet Nam a communication concerning Tran Thi Nga. The Government replied to the communication on 6 November 2017. 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. Ms. Tran Thi Nga (also known as Thuy Nga) is a 40-year-old Vietnamese national. She is a resident of Phu Ly, Ha Nam Province, Viet Nam.

5. According to the source, Ms. Nga is a well-known labour and land rights activist in Viet Nam. As a migrant worker in the Republic of Korea, she witnessed many abuses against Vietnamese migrants. As a result, she decided to found Vietnamese Women for Human Rights, a group that aims to support Vietnamese migrants abroad. Ms. Nga's activities have also included monitoring land seizures by the authorities and participating in peaceful anti-Chinese demonstrations relating to the South China Sea.

6. The source alleges that, as a prominent activist in Viet Nam, Ms. Nga has suffered regular harassment and intimidation. She has also been a victim of reprisals taken by the authorities. For example:

(a) In May 2013, Ms. Nga was prevented from travelling to a human rights rally in Hanoi and was abducted with one of her children, beaten and robbed by police officers;

(b) In May 2014, Ms. Nga received several death threats, and leaflets in which she was falsely accused of adultery were distributed in front of her home. The leaflets also contained threats of assault against Ms. Nga and her children. The source claims that when Ms. Nga reported the incidents to the police, they were very reluctant to help and did nothing to protect her and her young boys;

(c) On 25 May 2014, as Ms. Nga, accompanied by her two young children, was returning home from a visit to a prominent Vietnamese blogger who had recently spoken on human rights at the White House in Washington, D.C., she was attacked and beaten with metal pipes by a group of five undercover police officers. In the attack, she sustained serious injuries to her knee, arm and back and a broken leg. She had surgery and received physical therapy but still had to use crutches and a walking stick for several months after the attack;

(d) On 29 August 2015, Ms. Nga and three other human rights defenders were physically attacked by police officers and other unidentified individuals in the Central Highlands Province of Lam Dong after celebrating the release from prison of a Vietnamese human rights journalist. The journalist had returned home to begin three years of house arrest following his four years in prison. Half an hour after departing, the buses on which Ms. Nga and other guests were travelling home were stopped. Approximately 30 plainclothes police officers and several unidentified individuals forcibly boarded the buses and physically and verbally attacked Ms. Nga and other guests.

7. The source also reports that the local authorities had harassed Ms. Nga for months before her arrest, preventing her on several occasions from leaving her house or going shopping for food. In addition, individuals believed to be acting as proxies for the authorities threw fermented shrimp sauce into Ms. Nga's home, sometimes hitting her children. In the days before her arrest, Ms. Nga had complained of increasing intimidation by the police. According to the source, for example, they had surrounded her home and physically blocked her from leaving. The source claims that the police also prevented a neighbour from taking Ms. Nga's two young sons to the city to buy them food.

8. It was against that backdrop that on 21 January 2017, according to the source, Ms. Nga and her partner and father of her two young sons, Mr. Phan Van Phong, were arrested by the Ha Nam police in their family home in the city of Phú Lý. The police searched the home and confiscated a number of items. During the arrest, the police separated the two young children from their parents. The police took Ms. Nga and Mr. Phong into custody, leaving the two children unattended until their grandparents arrived. Mr. Phong was released a few days later and is currently taking care of the children.

9. According to the source, since Ms. Nga's arrest, her family has received no notification or official court documents indicating the reasons for her arrest, despite reports in the official media that an arrest warrant had been prepared.

10. The source indicates that Ms. Nga was charged under article 88 of the 1999 Vietnamese Penal Code with using the Internet to spread propaganda videos and writings critical of the Government of Viet Nam. Article 88 offences are considered “national security offences” and carry sentences of 3 to 20 years’ imprisonment. Furthermore, the source notes that, pursuant to articles 119 and 120 of the 2003 Code of Criminal Procedure, Ms. Nga could be held in detention for the duration of the investigation of her case without being allowed access to a lawyer or visits from her family members, including her children.

11. On 2 February 2017, Mr. Phong went to the Ha Nam police station to make enquiries about Ms. Nga’s situation and seek permission to visit her. The police apparently ignored his request. No one, according to the source, has been able to visit Ms. Nga since her arrest or obtain information about her whereabouts, situation or health.

12. The source submits that the deprivation of liberty of Ms. Nga falls within categories II and III of the Working Group’s categories of arbitrary detention.

13. In relation to category II, the source submits that prior to her arrest, Ms. Nga peacefully exercised her fundamental right to criticize the Government, its policies and actions. According to the source, Ms. Nga has never carried out any activity that might be considered to be violent or an actual threat to the national security of Viet Nam, and her arrest and detention cannot be considered anything but a form of punishment. The deprivation of liberty of Ms. Nga was the direct result of her exercise of her right to freedom of opinion and expression, guaranteed by article 19 of the Universal Declaration of Human Rights, which states that that right includes the “freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”, and article 19 of the Covenant. The source asserts that the protection of free expression must include the right to express a dissenting political opinion. The source also quotes the Human Rights Committee’s statement that the right to freedom of expression under article 19 (2) of the Covenant includes “the right of individuals to criticize or openly and publicly evaluate their Governments without fear of interference or punishment.”¹

14. In addition, the source notes that the Government, referring to restrictions of the right to freedom of expression provided for in article 19 of the Covenant, has previously asserted that national security offences, such as those under article 88 of the Penal Code, “are absolutely in compliance with standards of international law”.² According to article 19 (3) of the Covenant, restrictions may be invoked when they are necessary for respect of the rights or reputations of others or for the protection of national security or of public order (*ordre public*), or of public health or morals. However, while the right to freedom of expression is not absolute, article 88 of the Penal Code does not provide any legitimate grounds for the restriction of the right to freedom of expression. The source argues that national security cannot be invoked freely as a blanket excuse for restrictions of rights and freedoms. Although there is no precise definition of “threats to national security” in international law, such threats should involve actual and direct threats or use of force against the existence of the nation, its territorial integrity or political independence, not hypothetical threats or local and relatively isolated threats to or infringements on law and order.³

15. The source also argues that the domestic legal framework under which Ms. Nga is being prosecuted does not comply with the international standards relating to freedom of expression and the possible restriction thereof. Article 88 is broad and vague and does not contain any provisions — namely, restrictions that are clearly prescribed by law, strictly necessary, proportional to the protection of the right and for a legitimate purpose — establishing grounds for restricting this fundamental right.⁴

¹ See *Rafael Marques de Morais v. Angola* (CCPR/C/83/D/1128/2002), para. 6.7.

² See opinion No. 27/2012, para. 35.

³ In that regard, the sources refers to the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, paras. 29–30.

⁴ See Human Rights Committee, general comment No. 34 (2011) on the freedoms of opinion and expression, para. 22.

16. Finally, the source highlights that the Working Group has previously determined that broad criminal law provisions, which criminalize “taking advantage of democratic freedoms and rights to abuse the interests of the State, are inherently inconsistent with any of the rights and liberties guaranteed by the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights”,⁵ to which Viet Nam has been a party since 1982. In addition, the source notes that, in its report on its visit to Viet Nam in 1994, the Working Group emphasized that arrest and detention pursuant to vague criminal law provisions could result in penalties being imposed not only on persons using violence for political ends, but also on persons who have merely exercised their legitimate right to freedom of opinion or expression.⁶

17. In relation to category III, the source submits that the deprivation of liberty of Ms. Nga violates a number of international norms relating to the right to a fair trial, as established in articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant. They include the right to challenge the lawfulness of detention, enshrined in article 9 (4) of the Covenant, the right to have adequate time and facilities for the preparation of one’s defence and to communicate with counsel, enshrined in article 14, and the right to be tried without undue delay, also enshrined in article 14. The source submits that the right to a fair trial also requires that an accused person have access to legal representation during police questioning and in the course of pretrial detention.⁷

18. According to the source, articles 58, 119 and 120 of the 2003 Code of Criminal Procedure regulate the investigation and related pretrial detention of an individual during criminal proceedings. These provisions allow a person who is charged with “extremely serious” national security crimes to be detained “until completion of the investigation” — that is, indefinitely. Decisions on whether to extend pretrial detention are made every four months by the Chairman of the Supreme People’s Procuracy. Detainees are not entitled to challenge the decisions or request independent judicial review of the necessity thereof. In practice, in so-called national security cases, prolonged detention until the date of the trial is systematic. The source submits that those provisions clearly violate article 9 (4) of the Covenant.

19. Furthermore, although article 31 (4) of the Constitution of Viet Nam provides that anyone who is arrested, held in custody or temporarily detained has the right to defend him or herself in person or choose defence counsel or another person to defend him or her, Ms. Nga has been denied access to counsel since her arrest on 21 January 2017. Her right to challenge her detention, which the authorities have not justified, has thus been violated. According to the source, in order to maintain the secrecy of the investigation of national security offences, the Chairman of the Supreme People’s Procuracy has the authority to allow defence lawyers to participate in the procedure once the investigation has been brought to a close.

20. As a result of those provisions, anyone charged with a national security offence may be kept in pretrial detention, without contact with a lawyer or family and without the possibility of challenging the detention, until a few days before his or her trial; in other words, such persons may be detained indefinitely. While such situations may be lawful domestically, they are blatant violations of the international standards relating to legal and procedural safeguards during criminal proceedings. In Ms. Nga’s case, those violations give her detention an arbitrary character.

21. The source also stresses that, in accordance with articles 58, 119 and 120 of the 2003 Code of Criminal Procedure, Ms. Nga’s family was denied permission to visit her in the six months following her arrest and not given information about her whereabouts or health. The source notes with concern that Ms. Nga could be denied all outside contact throughout her time in pretrial detention, which may last up to two years. The source also notes that prolonged incommunicado detention is considered by the Committee against Torture and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

⁵ See opinion No. 27/2012, para. 38.

⁶ See E/CN.4/1995/31/Add.4, para. 58.

⁷ See *Temur Toshev v. Tajikistan* (CCPR/C/101/D/1499/2006), para. 6.7.

to be conducive to torture and in some cases even tantamount to torture. Prolonged incommunicado detention is also a violation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which Viet Nam has been a party since 2015.

Response from the Government

22. On 31 August 2017, 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 on Ms. Nga's current situation by 30 October 2017. The Working Group also requested the Government to clarify the legal provisions justifying her continued deprivation of liberty and state whether it was of the view that they were compatible with the country's obligations under international human rights law. Moreover, the Working Group called upon the Government to provide for Ms. Nga's health and safety.

23. On 26 October 2017, the Government sought a one-month extension of the deadline for its response to the regular communication. As the request was made only shortly before the opening of the Working Group's eightieth session, the Working Group extended the deadline to 7 November 2017.

24. The Government responded to the regular communication on 6 November 2017. In its response, the Government stated that Ms. Nga had lived in Taiwan Province of China from 2003 to 2008. The Government alleges that during that period Ms. Nga joined a local branch of Việt Tân, a terrorist organization, in which she was possibly radicalized.

25. The Government states that, on 25 January 2017, the Security Investigation Agency of the Ha Nam police issued warrants for the arrest of Ms. Nga and the search of her home. She was arrested and placed in temporary detention on charges of distributing "propaganda against the State" under article 88 of the Penal Code. The arrest and search were carried out in accordance with the law, and all decisions were approved by the People's Procuracy.

26. According to article 120 of the Code of Criminal Procedure, a person detained for investigation of extremely serious breaches of national security may be placed in temporary detention for up to four months, a period that can be renewed once by the provincial office of the People's Procuracy. The Government states that, pursuant to a decision of the People's Procuracy of Ha Nam Province, Ms. Nga was held in temporary detention from the date of her arrest to the date of her trial, a period of six months and five days. Her temporary detention did not exceed the limit provided by law or constitute a violation of article 9 (4) of the Covenant. During her temporary detention, Ms. Nga had access to health care and medical consultations. Her condition is normal. She was also allowed to receive visits from her family in accordance with article 89 of the Code of Criminal Procedure and Decree No. 98/2002/ND-CP of 27 November 2002. Ms. Nga's family members did not request to visit her, but they sent supplies on 11 occasions between February and September 2017.

27. Furthermore, the Government notes that, pursuant to article 58 of the Code of Criminal Procedure, the Director General of the Supreme People's Procuracy may decide to authorize the participation of defence counsel in legal proceedings only at the conclusion of the investigation phase. That provision guarantees the confidentiality of investigations of national security offences. At the conclusion of the investigation of Ms. Nga's case, she exercised her right to be represented by counsel of her choice and had adequate time and facilities for the preparation of her defence.

28. On 25 July 2017, Ms. Nga was tried by the People's Court of Hà Nam Province, a court of first instance. The Government asserts that the trial was conducted publicly and in compliance with relevant laws and that three lawyers defended Ms. Nga. She was sentenced to nine years' imprisonment followed by five years of house arrest in accordance with article 88 of the Penal Code. She is currently in temporary detention in Hà Nam Detention Centre pending the hearing of her appeal. She has access to counsel. The Government concludes that the arrest, investigation, detention and trial were carried out in accordance with the law and that Ms. Nga's rights have been respected and protected.

29. According to the Government, Ms. Nga was placed in detention not because she publicly criticized the administration and exercised fundamental freedoms but because she violated Vietnamese law. The Government alleges that Ms. Nga fabricated, edited and published many documents on social media that contained false information. She deliberately disseminated those documents to deceive others about the sociopolitical situation in Viet Nam and create a distorted view of the policies of the State with a view to sowing panic, arousing suspicion, undermining national unity and inciting people to overthrow the Government.

30. The Government further alleges that Ms. Nga encouraged and directed illegal gatherings to disturb public security and order. Although she has been fined on many occasions for disturbing public order, Ms. Nga continued to commit illegal acts, causing trouble to the people in her neighbourhood. The Government notes that the Ha Nam police received nine complaints about Ms. Nga from people living near her. Her deliberate and systematic recidivism has threatened national security, adversely affected local security and order and severely hindered the activities of public agencies, local businesses and other neighbours of hers.

31. The Government notes that human rights, including the freedom of expression, are recognized in the Constitution of Viet Nam and in the law and are guaranteed in practice. However, Vietnamese law also prohibits acts that threaten national security and public order and infringe upon the interests of the State or of organizations and individuals. One such prohibition is contained in article 88 of the Penal Code, which is in full conformity with international human rights law. The Government refers to article 19 (3) of the Covenant, which provides that the exercise of the right to freedom of expression may be subject to certain restrictions when necessary to protect national security, public order or public health or morals.

Further information from the source

32. On 8 November 2017, the Government's response was sent to the source for comment. The source was requested to respond no later than 13 November 2017 in order for the case to be considered by the Working Group at its eightieth session. The source did not respond.⁸

Discussion

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

34. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has presented a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. The Government can meet this burden of proof by producing documentary evidence in support of its claims.⁹ Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations.¹⁰

35. The source alleges that Ms. Nga was arrested on 21 January 2017 without official notification of the reasons for the arrest, such as an arrest warrant. In its response, the Government asserted that on 25 January 2017, the Security Investigation Agency of the Ha Nam police issued warrants for the arrest of Ms. Nga and the search of her home and that the arrest and search were conducted in accordance with the law. The Government could have

⁸ On 25 August 2017 and again on 16 and 18 October 2017, the Working Group requested the source to provide an update on Ms. Nga's situation, particularly in relation to her trial in July 2017. The source did not provide further information or updates.

⁹ See opinion No. 41/2013, in which the Working Group noted that the source of a communication and the Government did not always have equal access to the evidence and that it was often the Government alone that had the relevant information. In that case, the Working Group also noted that where it was alleged that a person had not been afforded certain procedural guarantees to which he or she was entitled, the burden to prove the negative fact asserted by the applicant was on the public authority, because the latter was generally able to demonstrate, by producing documentary evidence, that it had followed the appropriate procedures and applied the guarantees required by law.

¹⁰ See A/HRC/19/57, para. 68.

presented a copy of the arrest warrant but did not do so. The Working Group therefore finds that Ms. Nga was arrested without a warrant and that she was not informed at the time of the reasons for her arrest, in violation of article 9 (2) of the Covenant. As the Working Group has previously stated, in order for a deprivation of liberty to have a legal basis, it is not sufficient for there to be a law authorizing the arrest. The authorities must invoke that legal basis and apply it to the circumstances of the case through an arrest warrant (see, for example, opinions No. 46/2017, No. 6/2017, No. 1/2017 and No. 28/2016).

36. Moreover, according to the source, articles 58, 119 and 120 of the 2003 Code of Criminal Procedure allow persons charged with national security offences under the Penal Code to be detained, without the possibility of judicial review, until completion of the investigation, which can take an indeterminate length of time. In its response, the Government confirms that Ms. Nga was in temporary detention from the date of her arrest to the date of her trial — a total of six months and five days — but argues that her detention did not exceed the limit provided by law or constitute a violation of article 9 (4) of the Covenant. As a result of those provisions of the Code of Criminal Procedure, Ms. Nga was in pretrial detention for more than six months after her arrest, and she was unable to bring proceedings before a court to determine without delay the lawfulness of her detention, contrary to article 9 (4) of the Covenant. The Working Group considers that judicial oversight of deprivation of liberty is a fundamental safeguard of personal liberty¹¹ and that it is essential to ensuring that detention has a legal basis (see, for example, opinions No. 46/2017 and No. 28/2016). Any legislative provision that purports to deny the right to judicial review of detention is inconsistent with international human rights law. Given that Ms. Nga was unable to challenge her detention, her 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.

37. As Ms. Nga was arrested without a warrant and 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 her arrest and detention. The Working Group therefore concludes that her detention falls within category I of its categories of arbitrary detention.

38. Furthermore, the source alleges that Ms. Nga has been deprived of her liberty for no reason other than her exercise of her right to freedom of opinion and expression. The Government, on the other hand, argues that the arrest and detention of Ms. Nga were completely unrelated to her exercise of her fundamental freedoms and that she was imprisoned for violating Vietnamese law (namely, article 88 of the Penal Code). 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 international human rights law (see, for example, opinions No. 42/2012, No. 46/2011 and No. 13/2007).

39. Ms. Nga was charged with and convicted of posting videos and written material on the Internet critical of government policies and actions on human rights issues. Under article 88 of the Penal Code,¹² producing or distributing propaganda hostile to the State, including defaming the people's administration, spreading fabricated news with a view to causing confusion and creating or circulating cultural content harmful to the State, carry punishments of 3 to 12 years' imprisonment. Persons found guilty of more serious propaganda offences are liable to 10 to 20 years' imprisonment.

40. The Working Group has considered the application of article 88 of the Penal Code in numerous cases of deprivation of liberty in Viet Nam in recent years (see, for example, opinions No. 27/2017, No. 26/2017, No. 26/2013, No. 27/2012, No. 24/2011, No. 6/2010, No. 1/2009 and No. 1/2003). In those cases, the Working Group found that article 88 is so vague and broad that it could result in penalties being imposed on persons who have merely

¹¹ 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.

¹² Deprivation of liberty in Viet Nam is regulated primarily by the 1999 Penal Code and the 2003 Code of Criminal Procedure. According to the source, both Codes were amended in November 2015, but due to "technical errors", they have required further revision by the National Assembly. The source states that article 88 and other articles mentioned in the submission are retained in the revised Codes, although they are numbered differently.

exercised their legitimate rights to freedom of opinion or expression. The Working Group also pointed out in those cases that the Government did not provide evidence of any violent action on the part of the petitioners and that in the absence of such information, the charges and convictions under article 88 could not be regarded as consistent with the Universal Declaration of Human Rights or the Covenant. The Working Group came to a similar conclusion in its report on its visit to Viet Nam in October 1994, noting that vague and imprecise national security offences do not distinguish between violent acts capable of threatening national security and the peaceful exercise of the right to freedom of opinion and expression.¹³

41. In addition to the Working Group's findings, there is widespread concern in the international community about the use of national security legislation in Viet Nam to restrict the exercise of human rights, the rights to freedom of expression and opinion in particular. 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 (Viet Nam), several of which relate to the review and repeal of vague national security offences in the Penal Code (including article 88), 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.¹⁴

42. Moreover, the use of article 88 of the Penal Code to silence human rights defenders has become so troubling that in a press briefing held on 28 July 2017, a spokesperson for the Office of the United Nations High Commissioner for Human Rights called upon the Vietnamese authorities to immediately release all those detained in connection with their exercise of their rights to freedom of expression and amend the overly broad and ill-defined laws that were used — on pretext of national security — to stifle dissent. In her statement to the press, the spokesperson referred specifically to Ms. Nga's case.¹⁵

43. The Working Group considers that Ms. Nga's activities in sharing her views through videos and written materials posted on the Internet are protected by article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant. There is no evidence indicating that she had engaged in violent activity or that the expression of her views resulted in violence. Indeed, the only violence came from the authorities and other unknown persons acting on their behalf, whose attempts to intimidate, threaten and harm Ms. Nga and her children appear to have been intended to prevent her from exercising her fundamental rights. Even if Ms. Nga is affiliated with the Việt Tân, as alleged by the Government, the Working Group has repeatedly found that membership of this group alone does not justify deprivation of liberty (see, for example, opinions No. 40/2016, No. 26/2013 and No. 46/2011).

44. While the Government made brief reference to the restrictions provided for in article 19 (3) of the Covenant, it did not demonstrate how Ms. Nga's activities constituted a threat to national security or why the imposition of a nine-year sentence was a necessary and proportionate response to the posting of information on the Internet. In any event, in paragraph 5 (p) of its resolution 12/16, the Human Rights Council calls upon States to refrain from imposing restrictions that are not consistent with article 19 (3), including restrictions on discussion of government policies and political debate; reporting on human rights; peaceful political activities; and expression of opinion and dissent. Moreover, as the Human Rights Committee has stated in general comment No. 34 (2011) on the freedoms of opinion and expression (para. 23):

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

¹³ See E/CN.4/1995/31/Add.4, paras. 58–60.

¹⁴ See A/HRC/26/6, paras. 143.4, 143.34, 143.115–118, 143.144–171 and 143.173.

¹⁵ Available from

www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21921&LangID=E.

45. In addition, according to articles 1 and 5 (a) of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, 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.¹⁶ The source's allegations clearly demonstrate that Ms. Nga was detained for the exercise of her rights under the Declaration as a human rights defender. The Working Group has determined that detaining individuals on the basis of their activities as human rights defenders violates their right to equality before the law and equal protection of the law under article 7 of the Universal Declaration of Human Rights and article 26 of the Covenant (see, for example, opinions No. 16/2017 and No. 45/2016).

46. The Working Group concludes that the deprivation of liberty of Ms. Nga was due solely to the peaceful exercise of her rights to freedom of opinion and expression and was contrary to article 7 of the Universal Declaration of Human Rights and article 26 of the Covenant. Her deprivation of liberty therefore falls within category II of the Working Group's categories of arbitrary detention.

47. Given its finding that the deprivation of liberty of Ms. Nga was arbitrary under category II, the Working Group wishes to emphasize that no trial of Ms. Nga should have taken place. However, she was subjected to a one-day trial on 25 July 2017, and the Working Group considers that grave violations of her right to a fair trial occurred before and during that trial.

48. The source alleges that Ms. Nga was held in pretrial detention for more than six months, in accordance with articles 58, 119 and 120 of the 2003 Code of Criminal Procedure. The Working Group recalls that according to article 9 (3) of the Covenant, pretrial detention should be the exception rather than the rule, and as short as possible. In the present case, there appears to have been no individualized review of Ms. Nga's situation or consideration of alternatives to pretrial detention, such as bail, a shortcoming that constitutes a breach of article 9 (3) of the Covenant. There has also been no independent judicial oversight of Ms. Nga's case, and the Procuracy, as the Working Group noted in its report on its visit to Viet Nam in 1994, is not an independent judicial authority.¹⁷ If Ms. Nga could not be tried within a reasonable time, she was entitled to release under article 9 (3) of the Covenant.

49. In addition, the source alleges that Ms. Nga was detained incommunicado from the time of her arrest on 21 January 2017 to her one-day trial on 25 July 2017, a period of more than six months. The Government states that Ms. Nga's family was allowed to visit her but did not request to do so. However, it has provided no evidence for that assertion (such as a copy of the relevant Decree granting visitation rights or affidavits from Ms. Nga's family or detention officials). As the Working Group has consistently argued, holding persons incommunicado is not permitted under international human rights law because it violates the right to challenge the lawfulness of detention before a court (see, for example, opinions No. 45/2017, No. 56/2016 and No. 53/2016). Furthermore, prolonged incommunicado detention creates the conditions that may lead to violations of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and may itself constitute torture or ill-treatment.¹⁸ The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has also argued that the use of incommunicado detention is prohibited under international law.¹⁹

50. The incommunicado detention of Ms. Nga violated articles 9, 10 and 11 (1) of the Universal Declaration of Human Rights and article 9 of the Covenant. Moreover,

¹⁶ See also General Assembly resolution 70/161, para. 8, in which the Assembly called upon States to take concrete steps to prevent and put an end to the arbitrary arrest and detention of human rights defenders, and in that regard strongly urged the release of persons detained or imprisoned, in violation of the obligations and commitments of States under international human rights law, for exercising their human rights and fundamental freedoms.

¹⁷ See E/CN.4/1995/31/Add.4, para. 57 (c).

¹⁸ See *Official Records of the General Assembly, Fifty-fourth session, Supplement No. 44 (A/54/44)*, para. 182 (a). See also General Assembly resolution 68/156, para. 27.

¹⁹ See A/HRC/13/39/Add.5, para. 156.

incommunicado detention for over six months effectively placed Ms. Nga outside the protection of the law, in violation of her 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 (see, for example, opinions No. 47/2017 and No. 46/2017). Denying Ms. Nga and her family contact with each other for more than six months also amounts to a violation of the right to contact with the outside world under rules 43 (3) and 58 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) and principles 15, 16 and 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

51. Furthermore, denying Ms. Nga access to her lawyers for more than six months, including during the pretrial investigation, violated her right to legal assistance guaranteed by articles 10 and 11 (1) of the Universal Declaration of Human Rights and article 14 (3) (b) of the Covenant. As stated by the Working Group in principle 9 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, all persons deprived of their liberty have the right to legal assistance by counsel of their choice at any time during their detention, including immediately after the moment of apprehension. Article 58 of the Code of Criminal Procedure allows the Director General of the Supreme People's Procuracy to authorize the participation of defence counsel in legal proceedings at the conclusion of the investigation phase alone, in violation of international human rights law. The limited access to legal assistance in Ms. Nga's case was particularly serious given that she was convicted and sentenced to nine years' imprisonment and a further five years of house arrest after having had very little opportunity to prepare her defence.

52. Finally, the Working Group notes that the source did not respond to its requests to provide an update on Ms. Nga's first instance trial on 25 July 2017. However, according to paragraph 16 of its methods of work, the Working Group is entitled to render an opinion on the basis of all the information it has obtained. In the present case, that information includes the press briefing, mentioned above, given by a spokesperson from the Office of the United Nations High Commissioner for Human Rights.

53. The Working Group is of the view that this information indicates that there were prima facie violations of Ms. Nga's rights during her trial, including of (a) her right to a public hearing under article 14 (1) of the Covenant and (b) her right to trial by an independent and impartial tribunal and the presumption of innocence under article 14 (1) and (2), as the People's Court in Ha Nam reached what appeared to be a preordained verdict after a one-day trial in a case involving a serious national security offence.

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

55. Furthermore, the Working Group considers that Ms. Nga was targeted because of her status as a human rights defender — indeed, as a prominent activist involved in several high-profile activities, including founding a group to support Vietnamese migrants, peaceful protests relating to the South China Sea and attending events with fellow high-profile human rights defenders. In addition, the information presented by the source clearly demonstrates that Ms. Nga has been subject to systematic harassment, intimidation and threats by the authorities over the last five years and that her recent conviction was part of a pattern of persecution she had endured for her work as a human rights defender.²⁰ It was very unlikely that Ms. Nga would have been detained had she not been a human rights defender. The disproportionately heavy sentence imposed on Ms. Nga appeared to be intended to send a message to human rights defenders that they must cease their work or face serious penalties.

56. The Working Group therefore finds that Ms. Nga was deprived of her liberty on discriminatory grounds — that is, because of her status as a human rights defender. Her deprivation of liberty was arbitrary according to category V of the categories applied by the

²⁰ The Government states that the source's submission did not reflect the nature of the incidents involving Ms. Nga and alleges that she has caused disorder in her community. However, it did not provide any convincing information or documentary evidence to support those assertions.

Working Group. The Working Group refers the case to the Special Rapporteur on the situation of human rights defenders for further investigation.

57. In conclusion, the Working Group wishes to make three further observations on this case. First, the source has provided information regarding the arrest of Mr. Phong, who was arrested together with Ms. Nga on 21 January 2017 at their family home. Mr. Phong was arrested without an arrest warrant or any explanation of the reasons for his arrest but was released a few days later. While the Working Group was not asked to consider his situation, and the Government was not requested to respond to any allegations in relation to him, the Working Group regards his arrest and deprivation of liberty as a matter of serious concern that should be subject to further investigation by the authorities.

58. Second, the Working Group is alarmed at the appalling treatment of Ms. Nga's two young children by the Vietnamese authorities, particularly the police, as outlined in the source's submission. Over the past five years, Ms. Nga's children have endured extremely traumatic events, including being kidnapped with their mother, witnessing several serious assaults of their mother and receiving threats themselves. The children have also been prevented from going out to obtain food and had fermented shrimp sauce thrown on them and their home. The police left the children unattended in the family home when they took Ms. Nga and Mr. Phong into custody, and the children were not permitted to see their mother during the six months and more she spent in pretrial detention. Using a mother's innocent children to dissuade her from engaging in legitimate human rights activities, or to punish her for them, is unacceptable. It is the responsibility of the Government to protect Ms. Nga, Mr. Phong and their children, and the Working Group urges the Government to conduct a thorough investigation into those alleged incidents and prosecute the offenders.

59. Third, this case is one of several that has been brought before the Working Group in recent years concerning the arbitrary deprivation of liberty in Viet Nam.²¹ 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.²² The Working Group would welcome the opportunity to engage constructively with the Government to address issues such as the vague and imprecise provisions regarding national security offences and the denial of due process, which continue to result in the arbitrary deprivation of liberty in Viet Nam.

60. On 15 April 2015, the Working Group sent the Government of Viet Nam a request for an invitation to undertake a country visit in follow-up to its visit of October 1994. In its response, dated 23 June 2015, the Government informed the Working Group that it planned to invite other special procedure mandate holders who had already requested to visit but that it would consider extending an invitation to the Working Group at an appropriate time. On 6 April 2017, the Working Group reiterated its request for a country visit. A positive response is expected. The upcoming review of the human rights record of Viet Nam during the third cycle of the universal periodic review in January 2019 will provide an opportunity for the Government of Viet Nam to enhance its cooperation with the special procedures and bring its laws into conformity with international human rights law.

Disposition

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

The deprivation of liberty of Tran Thi Nga, being in contravention of articles 2, 3, 6, 7, 8, 9, 10, 11 (1) and 19 of the Universal Declaration of Human Rights and of articles 2, 9, 14, 16, 19 and 26 of the Covenant, is arbitrary and falls within categories I, II, III and V.

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

²¹ See, for example, opinions No. 27/2017, No. 26/2017, No. 40/2016, No. 46/2015, No. 45/2015, No. 33/2013, No. 26/2013, No. 42/2012, No. 27/2012, No. 46/2011, 24/2011, No. 6/2010 and No. 1/2009.

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

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

63. The Working Group considers that, taking into account all the circumstances of the case, including the risk of harm to the well-being of her children, the appropriate remedy would be to release Ms. Nga immediately and accord her an enforceable right to compensation and other reparations, in accordance with international law.

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

65. The Working Group also urges the Government to bring its laws, including the equivalent of article 88 of the revised Penal Code and provisions in the Code of Criminal Procedure relating to pretrial detention and access to counsel, into conformity with the recommendations made in the present opinion and with the commitments made by Viet Nam under international human rights law.

66. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers this case to the Special Rapporteur on the situation of human rights defenders for appropriate action. The Working Group also encourages the Government to incorporate the Model Law for the Recognition and Protection of Human Rights Defenders into its domestic legislation and ensure its implementation.²³ In view of the previous alleged acts of violence committed by the police and others against Ms. Nga, the Working Group also refers the case to the Special Rapporteur on violence against women, its causes and consequences, for further investigation and appropriate action.

Follow-up procedure

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

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

68. 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.

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

70. 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,

²³ 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 from www.ishr.ch/sites/default/files/documents/model_law_full_digital_updated_15june2016.pdf.

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.²⁴

[Adopted on 21 November 2017]

²⁴ See Human Rights Council Resolution 33/30, paras. 3 and 7.