

**PETITION TO:**

**UNITED NATIONS WORKING GROUP ON ARBITRARY DETENTION**

Chair-Rapporteur: Mr. José Guevara (Mexico)

Vice-Chairperson: Ms. Leigh Toomey (Australia)

Vice-Chairperson: Ms. Elina Steinerte (Latvia)

Mr. Seong-Phil Hong (Republic of Korea)

Mr. Sètondji Adjovi (Benin)

**HUMAN RIGHTS COUNCIL UNITED NATIONS GENERAL ASSEMBLY**

**In the Matter of**

**Pham Thi Doan Trang**

Citizen of the Socialist Republic of Vietnam

v.

**Government of the Socialist Republic of Vietnam**

Submitted by

Kurtuluş Baştımaz

Eymir Mah. Sapanca Gölü Caddesi, C253 Blok No:8/ANKARA/TURKEY

## URGENT ACTION BASIS

If convicted, she could face up to 20 years in prison, Amnesty International said, warning that she faced serious danger in official custody. “Pham Dan Trang faces an imminent risk of torture and other-ill treatment at the hands of the Vietnamese authorities. She must be immediately and unconditionally released,” said Amnesty International’s Deputy Regional Director for Campaigns, Ming Yu Hah, in a statement.<sup>1</sup>

In August 2018, Trang was among at least four activists who were attacked after policemen stormed into a cafe and broke up dissident singer Nguyen Tin’s “Memory of Saigon” show. She was then taken by police to an unknown road outside the city and “beaten further to the point of disfiguring her face,” friends said at the time. In those attacks, Trang suffered multiple bruises, nausea, and dizziness and was later diagnosed with a concussion. Friends who tried to visit her in the hospital were harassed and beaten, the New York-based Human Rights Watch said at the time.<sup>2</sup>

Woman human rights defender Pham Thi Doan Trang was arrested on 6 October 2020 for her peaceful activism. Facing up to 20 years in prison, she is currently being held incommunicado and **is at grave risk of torture**. A published author, journalist and organizer, Doan Trang has struggled tirelessly to promote human rights and has inspired a generation of activists in Viet Nam. In recent years, Doan Trang has been subjected to repeated harassment, intimidation and attacks, including incidents of gender-based violence, arbitrary detention, and assault. The Vietnamese authorities must release Pham Thi Doan Trang immediately and unconditionally as she is a prisoner of conscience.<sup>3</sup>

The deaths in prison, including the two most recent cases: Dao Quang Thuc, 60, teacher and human rights defender, arrested in 2017, sentenced in 2018 to 13 years in prison, died on 10 December 2019 « as a result of a cerebral hemorrhage and pulmonary infection » . Doan Dinh Nam, 68, Buddhist scholar and human rights defender, arrested in 2012 and sentenced in 2013 to 16 years in prison, died on 5 October 2019 « of renal failure »<sup>4</sup>

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<sup>1</sup> see : <https://www.voanews.com/press-freedom/rights-groups-deplore-arrest-vietnam-writer-and-activist-pham-doan-trang>

<sup>2</sup> Id

<sup>3</sup> See: <https://www.amnesty.org/en/documents/asa41/3284/2020/en/>

<sup>4</sup> <https://pen-international.org/news/pham-doan-trang-arrested>

## **QUESTIONNAIRE TO BE COMPLETED BY PERSONS ALLEGING ARBITRARY ARREST OR DETENTION**

### **I. IDENTITY**

**1. Family name:** Doan Trang

**2. First name:** Pham

**3. Sex:** Female

**4. Birth date:** May 27, 1978

**5. Nationality:** Vietnamese

**6. (a) Identity document (if any):** Unknown

**(b) Issued by:**

**(c) On (date):**

**(d) No.:**

**7. Profession and/or activity (if believed to be relevant to the arrest/ detention):** Writer, Journalist, Blogger, co- founder of the Publishing house

**8. Address of usual residence**

### **II. ARREST**

**1. Date of arrest:** October 6, 2020

**2. Place of arrest (as detailed as possible):** at her home in Ho Chi Minh City

**3. Forces who carried out the arrest or are believed to have carried it out:** The Investigation Bureau of the Ha Noi Police.

**4. Did they show a warrant or other decision by a public authority?** No

**5. Authority who issued the warrant or decision:** Thái Nguyên Police Investigation Security Agency.

**6. Relevant legislation applied (if known):** Charged with Article 117 of the Vietnam's Criminal Code with "making, storing, distributing or disseminating information, documents and items against the Socialist Republic of Vietnam and Doan Trang is charged with "conducting propaganda against the Socialist Republic of Vietnam" under Article 88 of the 1999 Penal Code,

### **III. DETENTION**

**1. Date of detention:** Arrested October 6, 2020, and was charged Article 117 of the Vietnam's Criminal Code with "making, storing, distributing or disseminating information, documents and items against the Socialist Republic of Vietnam.

**2. Duration of detention (if not known, probable duration):** From October 6, 2020 to the date of the communication.

**3. Forces holding the detainee under custody:** State of the Socialist Republic of Vietnam.

**4. Places of detention (indicate any transfer and present place of detention):** Detention Center No. 1 in Hanoi's Tu Liem District, where she is currently being detained incommunicado

**5. Authorities that ordered the detention:** People's Court of the Ho Chi Minh City Province.

**6. Reasons for the detention imputed by the authorities:** PhaM was charged under Article 117 of the Vietnam's Criminal Code. The Vietnamese Penal Code of 2017 for conducting propaganda against the Government of the Socialist Republic of Vietnam.

**7. Relevant legislation applied (if known):** Article 117 of the Vietnam's Criminal Code Doan Trang is charged with "conducting propaganda against the Socialist Republic of Vietnam" under Article 88 of the 1999 Penal Code.

#### **IV. DESCRIBE THE CIRCUMSTANCES OF THE ARREST AND/OR THE DETENTION AND INDICATE PRECISE REASONS WHY YOU CONSIDER THE ARREST OR DETENTION TO BE ARBITRARY**

##### **A. STATEMENT OF FACTS**

Part 1 of this section describes the Socialist Republic of Vietnam ("Vietnam" or "Government") and its history of human rights abuses, including the violation of basic human rights such as opinion, press, religion, association and particularly the right to speak freely in dissent of the governing party. The Communist Party of Vietnam ("CPV") also has shown a propensity for using the criminal code to arbitrarily detain journalists and others who speak out against its regime<sup>5</sup>

Part 2 of this section presents the case of Pham, a young citizen-journalist and blogger and writer in Vietnam who was wrongfully detained on October 6, 2020 of conducting propaganda against the Government.

##### **1. Background on Vietnam**

##### **a. Political, legal and social background on Vietnam**

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<sup>5</sup> See generally HUMAN RIGHTS WATCH, Vietnam: End Attacks on Activists and Bloggers - Pattern of Thuggish Assaults Against Rights Campaigners Across Country (June 18, 2017), <https://www.hrw.org/news/2017/06/18/vietnam-end-attacks-activists-and-bloggers>.

Vietnam has been an authoritarian one-party communist state since the CPV came into power in the 1970s<sup>6</sup> Despite being bound by several human rights treaties, including the International Covenant on Civil and Political Rights (the “ICCPR”), Vietnam routinely violates its citizens’ most basic human rights, including freedom of speech, opinion, assembly, press, religion, and association<sup>7</sup> in particular by detaining individuals who speak against the interests of the Government and the CPV<sup>8</sup> The Government routinely restricts citizens’ political rights, particularly their right to change their government through free and fair elections and has inadequately protected citizens’ due process rights, notably failing to protect against arbitrary detention<sup>9</sup>

## **b. The Government’s Interference with Freedom of Expression**

The Government has suppressed its citizens’ freedom of expression through its detention of journalists<sup>10</sup> In its 2018 World Press Freedom Index, Reporters Without Borders ranked Vietnam 175 out of 180 countries for press freedom and reported that, because the Government controls all of the mainstream media in the country, bloggers and citizen-journalists are the only source of independent information.<sup>11</sup> Vietnam is also consistently ranked among the countries that most censor journalists according to the Committee to Protect Journalists (“CPJ”).<sup>12</sup> CPJ noted in its 2015 report that the Government instructs editors and regularly jails those who report on sensitive topics.

In the past decade, the Government passed several laws and ordinances that restrict both personal and media freedom of expression, particularly in the context of electronic communications and online postings. The 2015 Law on Cyber Information Security, Decree 72 in 2013, and Decree 174 in 2014 impose fines on anyone criticizing the Government, defaming Government leaders, or “spreading propaganda” on social media<sup>13</sup> The Law on the Press, which went into effect in 2017, dictates that the press should “propagandize and disseminate, and contribute to the protection of, the line and policies of the Party...and build and promote socialist democracy, strengthen the great national unity bloc, and build and protect the socialist Fatherland of Vietnam<sup>14</sup>

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<sup>6</sup> See generally Vietnam’s Human Rights Defenders, Human Rights Watch (2010) <https://www.hrw.org/news/2010/03/23/vietnams-human-rights-defenders> and See <https://www.hrw.org/asia/vietnam>. 4 See <https://www.hrw.org/asia/vietnam>

<sup>7</sup> See <https://www.hrw.org/asia/vietnam>

<sup>8</sup> HUMAN RIGHTS WATCH, Vietnam: End Attacks on Activists and Bloggers - Pattern of Thuggish Assaults Against Rights Campaigners Across Country (June 18, 2017), <https://www.hrw.org/news/2017/06/18/vietnam-end-attacksactivists-and-bloggers>

<sup>9</sup> UNITED STATES DEPARTMENT OF STATE, Bureau of Democracy, Human Rights and Labor, Vietnam 2017 Human Rights Report, 18, available at <https://www.state.gov/documents/organization/277375.pdf> (hereinafter “State Department 2017 Report”).

<sup>10</sup> HUMAN RIGHTS WATCH, Vietnam - Human Rights In A Season Of Transition: Law and Dissent in the Socialist Republic of Vietnam (August 1995), <https://www.hrw.org/reports/1995/Vietnam2.htm> (hereinafter “HRW 1995 Report”)

<sup>11</sup> REPORTERS WITHOUT BORDERS, 2018 World Press Freedom Index, <https://rsf.org/en/ranking>.

<sup>12</sup> COMMITTEE TO PROTECT JOURNALISTS, 10 Most Censored Countries (2015), <https://cpj.org/2015/04/10-mostcensore-countries.php#6>.

<sup>13</sup> FREEDOM HOUSE, Freedom in the World 2017: Vietnam, available at <https://freedomhouse.org/report/freedomworld/2017/vietnam>

<sup>14</sup> Law on the Press, No. 103/2016/QH13, art. 1 (2016), available at [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=447052](http://www.wipo.int/wipolex/en/text.jsp?file_id=447052)

### **c. Lack of Due Process Protections in Vietnam**

Even though the Vietnamese Constitution calls for the presumption of innocence, a timely, fair and public trial, the right to representation by a lawyer and the right to present a defense against the charges, these protections are not available to defendants in practice.<sup>15</sup> Prisoners are systematically subjected to lengthy pre-trial detention and frequently held incommunicado before their trials, denied visits from family or attorneys, while being at risk of torture.<sup>16</sup> Trials of human rights activists in Vietnam consistently fail to meet international standards of fairness. The police often intimidate defendants into confessions, limit access to trials for family members, and have not allowed defendants to adequately prepare a defense for trial<sup>17</sup> The U.S. State Department has confirmed that the due process issues in Vietnam were among the country's most significant human rights problems<sup>18</sup>

### **d. Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment**

Prisoners in Vietnam are frequently subjected to physical and mental forms of torture and ill-treatment<sup>19</sup> International observers have noted a pattern of physical abuse, torture and coerced confessions during arrest, police investigations, and detention. Activists have been robbed, beaten and received death threats from security officials, including being assaulted by other prisoners at the instruction of prison officials while in custody. In addition to the physical torture, prisoners of conscience were held incommunicado for long periods, were denied medical treatment, and were re-located to prisons very far from their families, in order to mentally intimidate them into confessions<sup>20</sup>

### **e. Prison Conditions in Vietnam**

Conditions for detainees in Vietnam often fail to meet minimum international standards. Torture and corporal punishment are common but are rarely investigated by authorities. Prisons are often overcrowded and unsanitary, and inmates have extremely poor nutrition and lack of access to medical care, sometimes even being deprived of medical treatment to force "confessions".<sup>21</sup> Former prisoners have detailed frequent instances of torture, injections with unknown drugs, long stretches of solitary confinement, attacks from other inmates incited by

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<sup>15</sup> THE CONSTITUTION OF THE SOCIALIST REPUBLIC OF VIETNAM, 2013, translation available at International Institute for Democracy and Electoral Assistance, [http://www.constitutionnet.org/sites/default/files/tranlation\\_of\\_vietnams\\_new\\_constitution\\_enuk\\_2.pdf](http://www.constitutionnet.org/sites/default/files/tranlation_of_vietnams_new_constitution_enuk_2.pdf) ; see also HRW 1995 Report

<sup>16</sup> See generally UN Working Group on Arbitrary Detention, Opinion No. 75/2017 UN Doc. A/HRC/WGAD/2017/75 (2017); see also State Department 2017 Report, *supra* note 6; UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMM'R, "UN rights experts condemn Viet Nam for incommunicado detention of blogger 'Mother Mushroom'" (March 8, 2017), available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21318&LangID=E>.

<sup>17</sup> Human Rights Watch, World Report 2018: Vietnam Country Summary (January 2018), available at <https://www.hrw.org/world-report/2018/country-chapters/vietnam> (hereinafter "HRW 2018 Vietnam Report")

<sup>18</sup> UNITED STATES DEPARTMENT OF STATE, Bureau of Democracy, Human Rights and Labor, Vietnam 2016 Human Rights Report, available at <https://www.state.gov/documents/organization/265598.pdf>

<sup>19</sup> Amnesty International, Inside Viet Nam's secretive and torturous world of 'prisons within prisons' (2016) <https://www.amnesty.org/en/latest/news/2016/07/the-secretive-world-of-viet-nam-torturous-prisons/>

<sup>20</sup> State Department 2017 Report.

<sup>21</sup> *Id*

the prison officials, and other acts that violate international laws prohibiting ill-treatment.<sup>22</sup> Amnesty International conducted a study in which it interviewed 18 former prisoners of conscience from Vietnam, examining the ill-treatment of the prisoners in the Vietnamese criminal justice system<sup>23</sup> The horrifying stories from this report include frequent instances of torture, injections with unknown drugs, long stretches of solitary confinement, attacks from other inmates incited by the prison officials, and other acts that violate international laws prohibiting ill-treatment of prisoners.

## **2. Arbitrary Detention of Pham**

### **a. Background and Arrest of Pham**

Ms. Pham Thi Doan Trang, author, blogger, journalist, and pro-democracy activist. She is the editor of the online magazine *Luât Khoa* and the founder of the Liberal Publishing House. As a journalist, she contributes regularly to several independent news sites. As an author, she wrote many books, including one defending the rights of Vietnam's LGBT communities. She was awarded the Reporters Without Borders 2019 Press Freedom Prize for Impact.

on October 6, 2020, at about 11.30 pm, Ms. Pham Thi Doan Trang was arrested by the police at her home in Ho Chi Minh City and subsequently charged with “making, storing, distributing or disseminating information, documents and items against the Socialist Republic of Vietnam” under Article 117 of the Vietnam’s Criminal Code. If convicted, she could face up to 20 years in prison. She was later transferred to Detention Center No. 1 in Hanoi’s Tu Liem District, where she is currently being detained incommunicado. Ms. Trang has had no access to a lawyer since her arrest.

Ms. Trang’s arrest occurred a few hours after the annual US-Vietnam Human Rights Dialogue in Hanoi. The meeting addressed several human rights issues, including the rule of law, freedom of expression and association, religious freedom, and labour rights.

This is not the first time Ms. Pham Thi Doan Trang has been arrested for the legitimate exercise of her right to freedom of opinion and expression. Since 2009, Ms. Trang has been subjected to arbitrary arrests, violent physical attacks, and other acts of harassment by the authorities on numerous occasions. She was first arrested in August 2009 in for her advocacy against China-backed bauxite mining projects in Vietnam. In May 2016, police arrested her in Ninh Binh Province to prevent her from attending a meeting with then-US President Barack Obama in Hanoi. In February and May 2018, she was briefly detained by police on two separate occasion. In August 2018, she was severely beaten by the police because of her activities as an online journalist.

According to Article 74 of the Criminal Procedure Code, “the head of the Procuracy is authorized, when confidentiality of investigations into national security breach is vital, to sanction defense counsels’ engagement in legal proceedings after investigations end.”

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<sup>22</sup> AMNESTY INTERNATIONAL, Inside Viet Nam’s secretive and torturous world of ‘prisons within prisons’ (July 12, 2016), <https://www.amnesty.org/en/latest/news/2016/07/the-secretive-world-of-viet-nam-torturous-prisons/>

<sup>23</sup> Id

Articles 88 and 117 fall under the national security chapter of the Penal Code, and therefore access to lawyers is not guaranteed. Even if a lawyer is granted permission to assist Doan Trang, his or her access to the accused, in practice, is not always guaranteed.

Family visitation, according to Article 22 of the Law on Temporary Detention and Custody, depends on the decision of the head of the detention facility. If the investigative agency requests the detention facility not allow the detainee to meet with relatives, the facility head may accept the request, and Doan Trang will not be able to see her family before trial. It's highly unlikely the facility head would reject such a request by the police.

## **b. Current Status**

The People's Procuracy of Ha Noi will issue an indictment prosecuting Doan Trang. The trial will be conducted by the People's Court of Ha Noi, a provincial-level court. After the trial, if Doan Trang appeals, the case will go up to the People's High Court in Ha Noi, a tribunal higher than provincial level and lower than the supreme level. Usually, political cases stop after the appellate. There is no chance that the case will be brought to the People's Supreme Court, the highest tribunal of the land, as it requires motions filed by either the prosecutor general or the chief justice, both controlled by the very ruling Communist Party that wants to silence critics to protect their monopoly.

## **B. LEGAL ANALYSIS**

Pham's arrest and detention is arbitrary<sup>24</sup> under Categories I, II and III as established by the UN Working Group on Arbitrary Detention (the "Working Group"). The detention is arbitrary under Category I because it is impossible to invoke any legal basis justifying his deprivation of liberty and continued detention. The detention is arbitrary under Category II because it resulted from Pham's peaceful exercise of his right to freedom of expression. The detention is arbitrary under Category III because the Government's detention and prosecution of Phan failed to meet minimum international standards of due process.

### **1. Deprivation of Liberty Under Category I**

A detention violates Category I when it is clearly impossible to invoke any legal basis justifying the deprivation of liberty. The Working Group has found detentions arbitrary under Category I when some of the following violations are present: (1) when the government has held an individual incommunicado for a period of time; (2) when the government has arrested an

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<sup>24</sup> An arbitrary deprivation of liberty is defined as any "depriv[ation] of liberty except on such grounds and in accordance with such procedures as are established by law." International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16), at 52, UN Doc. A/6316 (1966), 999 UNT.S. 171, entered into force on March 23, 1976, at art. 9(1). Such a deprivation of liberty is specifically prohibited by international law. *Id.* "No one shall be subjected to arbitrary arrest, detention or exile." Universal Declaration of Human Rights, G.A. Res. 217A (III), UN Doc. A/810, at art. 9, (1948). "Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law..." Body of Principles for the Protection of Persons under Any Form of Detention or Imprisonment, G.A. Res. 47/173, 43 UN GAOR Supp. (No. 49) at 298, UN Doc. A/43/49 (hereinafter "Body of Principles"), at Principle 2



individual without a warrant and without judicial authorization for such deprivation of liberty; and (3) when vague laws are used to prosecute individuals<sup>25</sup>

Pham was held incommunicado for two months and was never brought before a judge to adjudicate the legality of his pre-trial detention. In addition, she was convicted under Article 88 of the 1999 Penal Code, prohibiting anti-state propaganda, which is a law too vague to properly provide a legal basis for prosecution as well as under Article 117 of the 2015 Penal Code (revised in 2017).

**a. Pham was Held Incommunicado and Never Given Access to Judicial Review of her Detention**

Article 9(3) of the ICCPR calls for “anyone arrested or detained on a criminal charge [to] be brought promptly before a judge or other officer authorized by law to exercise judicial power . . .” This obligation for a habeas corpus hearing “without delay” is reiterated in Article 9(4) of the ICCPR.

The Human Rights Committee has determined that incommunicado detention inherently violates Article 9(3) of the ICCPR.<sup>62</sup> This guarantee not only serves as a check on arbitrary detention, but also provides an important safeguard for other related rights, such as freedom from torture<sup>26</sup> The prohibition against incommunicado detention is also articulated by Principle 15 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (“Body of Principles”), which prohibits the denial of communication between a detainee and his family or counsel for more than a few days.<sup>27</sup>

Pham was arrested on October 6, 2020. He was never brought before a judge to confirm the legal basis for his arrest or his continuing pre-trial detention. Pham’s indictment for the offense of conducting propaganda against the government was not issued yet. Since her detention Phan was held entirely incommunicado, where she was not permitted to receive any family visits during her detention. She was not allowed to see his defense lawyer either.

**b. Vietnam’s Criminal Code is Overly Broad and Vague**

Article 15(1) of the ICCPR<sup>28</sup> and Article 11(2) of the Universal Declaration of Human Rights (“UDHR”)<sup>29</sup> both guarantee individuals the right to know what the law is and what conduct violates the law. These articles protect citizens from prosecution for any criminal offense

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<sup>25</sup> See, e.g., Bettar v. Morocco, Working Grp. on Arbitrary Detention, Commc’n No. 3/2013, paras. 30-314 (April 30, 2013); 61 Individuals v. United Arab Emirates, Working Grp. on Arbitrary Detention, Commc’n No. 60/2013, para. 22 (November 22, 2013).

<sup>26</sup> Id. at para. 34. Other rights that may be at risk are those guaranteed by Articles 6, 7, 10 and 14 of the ICCPR.

<sup>27</sup> Body of Principles, supra note 60, at Principle 15.

<sup>28</sup> International Covenant on Civil and Political Rights, G.A. Res 2200A (XXI), 21 UN GAOR Supp. (No. 16), UN Doc. A/6316 (1966), 999 UNT.S. 171 (March 23, 1976) at art. 9(1) (hereinafter “ICCPR”) (“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.”).

<sup>29</sup> United Nations General Assembly, Universal Declaration of Human Rights 73, Res 217 A (III), 3rd session, A/RES/217 A (December 10 1948) at art. 11(2), available at <http://www.un-documents.net/a3r217a.htm> (“No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.”).

“which did not constitute a[n] [] offense, under national or international law, at the time when it was committed.” The Human Rights Committee states that “[a]ny substantive grounds for arrest or detention must be prescribed by law and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application<sup>30</sup> In addition, the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism has explained that the standard for legal certainty requires framing laws “in such a way that [...] the law is adequately accessible so that the individual has a proper indication of how the law limits his or her conduct; and [that] the law [be] formulated with sufficient precision so that the individual can regulate his or her conduct.”<sup>31</sup>

Article 88 of the 1999 Penal Code defines the crime of “conducting propaganda” so vaguely as to make it impossible for any individual to reasonably foresee what behavior is criminal. The relevant section of the Article reads as follows:

Article 88. Conducting propaganda against the Socialist Republic of Vietnam:

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

- a) Propagating against, distorting and/or defaming<sup>32</sup> the peoples administration;
- b) Propagating psychological warfare and spreading fabricated news in order to foment confusion among people;
- c) Making, storing and/or circulating documents and/or cultural products with contents against the Socialist Republic of Vietnam.<sup>33</sup>

No instruction is given as to what constitutes defaming the administration, propagating psychological warfare, fomenting confusion, or documents/products that are against the Government. There is no intent component and no measure of what a prosecutor must prove to convict.

Article 88 of the Penal Code lacks any plain meaning and gives individuals no fair notice of what conduct is prohibited. For Phan and others, Article 88 of the 1999 Penal Code has resulted in arbitrary prosecutions for acts that are both unforeseeable as criminal and protected under the ICCPR, the UDHR, and other international norms and standards. Concerned UN member countries recommended that Vietnam repeal or amend Article 88, among other provisions in the 1999 Penal Code, in order to prevent those provisions from being applied in an “arbitrary manner to impede freedom of opinion and expression, including on the Internet<sup>34</sup> The same is valid for Article 117 of Penal Code. Because this crime of “conducting propaganda” is so

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<sup>30</sup> General Comment No. 35, supra note 62.

<sup>31</sup> Scheinin, M, Commission on Human Rights, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, 62nd session (December 28, 2005) at para. 46, available at <http://www.refworld.org/docid/441181f10.html>; Human Rights Council, Report of the United Nations High Commissioner for Human Rights on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, 28th session, A/HRC/28/28 (December 19, 2014), available at <http://www.refworld.org/docid/54f86a2e4.html>, para 48.

<sup>32</sup> Defaming” is not defined anywhere in the Vietnam Penal Code.

<sup>33</sup> Vietnam Penal Code of 1999, available at <http://un-act.org/publication/view/viet-nam-penal-code-1999/>.

<sup>34</sup> UN Human Rights Council, “Report of the Working Group on the Universal Periodic Review: Vietnam,” UN Doc. A/HRC/26/6; 143.151 – 143.152 (April 2, 2014) available at <https://documents-ddsny.un.org/doc/UNDOC/GEN/G14/129/10/PDF/G1412910.pdf?OpenElement>.

vague, such provision cannot supply the legal basis for detention resulting from conviction on such charge.

## **2. Deprivation of Liberty Under Category II**

Deprivation of liberty is arbitrary under Category II when it results from the exercise of the rights or freedoms guaranteed by Articles 7, 13, 14, 18, 19, 20, and 21 of the UDHR and Articles 12, 18, 19, 21, 22, 25, 26, and 27 of the ICCPR<sup>35</sup>. This case meets the requirements of Category II because Phan's detention is a result of his exercise of his fundamental freedoms of opinion, expression, and association guaranteed by the UDHR and the ICCPR.

### **a. Pham Was Convicted for Exercising Her Freedoms of Opinion and Expression**

The freedoms of opinion and expression are protected by international instruments and include the freedom to seek, receive, and impart information of all kinds, either orally or in writing<sup>36</sup>. Article 19(2) of the ICCPR provides that "everyone shall have the right to freedom of expression."<sup>37</sup> Article 19 of the UDHR provides an analogous guarantee of freedom of opinion and expression<sup>38</sup>. The Human Rights Committee has clarified that Article 19 of the ICCPR "protects all forms of expression and the means of their dissemination"<sup>39</sup>. This includes "all forms of audio-visual as well as electronic and internet-based modes of expression."<sup>40</sup> Article 19 of the ICCPR is of special importance for human rights defenders<sup>41</sup> and journalists working on reporting of human rights abuses are explicitly recognized as human rights defenders.<sup>42</sup> The Working Group has confirmed the right of human rights defenders "to investigate, gather information regarding and report on human rights violations."<sup>43</sup> The Human Rights Committee has also specifically recognized that Article 19(2) protects the work of journalists<sup>44</sup> and "includes the right of individuals to criticize or openly and publicly evaluate their Government without fear of interference or punishment."<sup>45</sup>

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<sup>35</sup> [ny.un.org/doc/UNDOC/GEN/G14/129/10/PDF/G1412910.pdf?OpenElement](http://ny.un.org/doc/UNDOC/GEN/G14/129/10/PDF/G1412910.pdf?OpenElement). 72 Human Rights Council, Methods of Work of the Working Group on Arbitrary Detention, U.N. Doc. A/HRC/30/69, para. 8(b) (August 4, 2015) (hereinafter "Methods").

<sup>36</sup> *Id*

<sup>37</sup> ICCPR at art. 19(2). As noted above, Vietnam acceded to the ICCPR in 1982 and entered no reservations to this provision

<sup>38</sup> UDHR at art. 19.

<sup>39</sup> Human Rights Committee, General Comment No. 34: Article 19: Freedoms of opinion and expression, UN Doc. CCPR/C/G/34 at para. 12 (September 12, 2011) (hereinafter "General Comment No. 34")

<sup>40</sup> *Id*

<sup>41</sup> Human rights defenders are individuals who promote and protect all human rights through peaceful means without discrimination. Human rights defenders can join groups of people with or without structure, or organizations such as associations or foundations. Anyone, regardless of their occupation, can be a human rights defender; they are defined primarily by what they do rather than their profession. See generally, Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, G.A. Resolution 53/144, U.N. Doc. A/RES/53/144 (March 8, 1998)

<sup>42</sup> See, e.g., UNITED NATIONS SPECIAL RAPPORTEUR ON THE SITUATION OF HUMAN RIGHTS DEFENDERS, "Who is a Defender," available at <http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Defender.aspx>.

<sup>43</sup> Hassan Ahmed Hassan Al-Diqqi v. United Arab Emirates, United Nations Working Group on Arbitrary Detention, Opinion No. 8/2009, UN Doc. A/HRC/13/30/Add.1, para. 18 (2010).

<sup>44</sup> Movlonov et. al. v. Uzbekistan, UN Human Rights Committee, Communication No. 1334/2004, U.N. Doc. CCPR/C/95/D/1334/2004 (March 19, 2009)

<sup>45</sup> De Morais v. Angola, UN Human Rights Committee, Communication No. 1128/2002, U.N. Doc. CCPR/C/83/D/1128/2002, para. 6.7 (March 29, 2005).

In fact, the imprisonment of human rights defenders for speech-related reasons is subject to heightened scrutiny; the Working Group has recognized the necessity to “subject interventions against individuals who may qualify as human rights defenders to particularly intense review.”<sup>46</sup> This “heightened standard of review” by international bodies is especially appropriate where there is a “pattern of harassment” by national authorities targeting such individuals.<sup>47</sup>

In the present case, the Government arbitrarily detained and prosecuted Pham as a direct result of her speech in his capacity as a citizen journalist. First, the charge of “conducting propaganda” under Article 88 of the 1999 Penal Code violates an individual’s freedom of expression because it vaguely criminalizes a broad swath of speech and information-sharing acts. Thus, no matter whether the underlying factual allegations are true, the Government has deprived Pham of her liberty under a law which is itself incompatible with right to freedom of expression guaranteed under the UDHR and ICCPR.

Furthermore, Pham was targeted for her independent reporting; her detention thus violated her right to freedom of expression both de jure and de facto. Pham posted articles on blogs and social media pages which reported on instances of corruption and advocated for plural democracy, military depoliticisation, free elections and press freedoms. Many of the documents presented at trial were writings that Pham collected and published as a citizen journalist in order to share these articles and books with others. Pham’s arrest, conviction and lengthy sentence, was an attempt by the Government to silence her and punish her for sharing pro-democracy and anticorruption information as an independent reporter, an activity which is expressly protected as free expression. The Government’s detention of Pham for her critical expression also fits directly into the Government’s well-documented pattern of attacking and attempting to silence journalists through arbitrary detention.

#### **b. The Vietnam Government Detained Pham Because She Exercised Her Rights to Freedom of Association**

Article 20(1) of the UDHR provides that “[e]veryone has the right to freedom of peaceful assembly and association.” Article 22(1) of the ICCPR provides that “[e]veryone shall have the right to freedom of association with others . . .” The Human Rights Council has specifically called for states to fully respect and protect the rights of all individuals to associate freely, especially for persons espousing minority or dissenting views and human rights defenders<sup>48</sup>

In General Comment No. 25 to the ICCPR, the Human Rights Committee noted that “the right to freedom of association, including the right to form and join organizations and associations concerned with political and public affairs, is an essential adjunct to the rights protected by Article 25 [right to participate in public affairs].”<sup>49</sup> Similarly, Vietnamese law ensures the right

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<sup>46</sup> Nega v. Ethiopia, UN Working Group on Arbitrary Detention, Opinion No. 62/2012, U.N. Doc.

A/HRC/WGAD/2012/62, para. 39 (November 21, 2012); see also, Sotoudeh v. Islamic Republic of Iran, UN Working Group on Arbitrary Detention, Opinion No. 21/2011, U.N. Doc. A/HRC/WGAD/2011/21, para. 29

<sup>47</sup> Group on Arbitrary Detention, Opinion No. 21/2011, U.N. Doc. A/HRC/WGAD/2011/21, para. 29 (January 27, 2011). 84 Bialiatki v. Belarus, United Nations Working Group on Arbitrary Detention, Opinion No. 39/2012, para. 43, (November 23, 2012).

<sup>48</sup> G.A Res. 15/21, ¶ 1, U.N. Doc. A/HRC/RES/15/21 (Oct. 6, 2010), <https://documents-ddsny.un.org/doc/UNDOC/GEN/G10/166/98/PDF/G1016698.pdf?OpenElement>.

<sup>49</sup> General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25), ¶ 26, Human Rights Comm., 57th Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.7 (Aug. 27, 1996), (hereinafter “General Comment No. 25).

to freedom of association. Article 25 of the Constitution affirms that citizens have the right to “assemble, form associations and hold demonstrations.”<sup>50</sup>

Contrary to these international standards, the Government has criminalized and imprisoned individuals for associating with other journalists and political organizations that are critical of the Government, as evidenced by the treatment of Pham who attended in a meeting on human rights after which she was detained on the grounds of anti-state propaganda.

Pham has the right to associate with political groups of her choice and express her political opinions through such organizations, the Government has persecuted her as a means to punish her involvement and communications with these people and organizations that are critical of the Government. By punishing Pham for her communications and associations with pro-democracy bloggers, Vietnam has violated Pham’s right to freedom of association in violation of Article 20(1) of the UDHR, Article 22(1) of the ICCPR, and Article 25 of Vietnam’s own constitution.

### **3. Deprivation of Liberty Under Category III**

Pham’s arrest and detention is arbitrary under Category III. A deprivation of liberty is arbitrary under Category III where “the total or partial non-observance of the international norms relating to the right to a fair trial, spelled out in the UDHR 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.”<sup>51</sup> The minimum international standards of due process applicable in this case are established by the ICCPR, the UDHR, the Body of Principles, and the UN Standard Minimum Rules for the Treatment of Prisoners (“Mandela Rules”).<sup>52</sup> The Vietnamese Constitution also guarantees certain due process rights, including the right not to be arrested without a prior authorization (Article 20), the right to a presumption of innocence (Article 31(1)), the right to a prompt, impartial and public trial for anyone charged with a criminal offense (Article 31(2)), and the right to the assistance of defense counsel (Article 31(4)).

#### **a. Vietnam Violated Phan’s Right to Habeas Corpus and His Right to Release Pending Trial**

Under Article 9(3) of the ICCPR, a detainee shall “be brought promptly before a judge or other officer authorized by law to exercise judicial power” to challenge the legality of his continued detention (right to habeas corpus, also incorporated in Article 9(4) for non-criminal defendants).<sup>53</sup> The Human Rights Committee has interpreted the term “promptly” to be within about 48 hours, except in exceptional circumstances<sup>54</sup> and has noted that this right shall be observed “even before formal charges have been asserted, so long as the person is arrested or detained on suspicion of criminal activity.”<sup>55</sup> Moreover, incommunicado detention inherently violates Article 9(3) of the ICCPR.<sup>56</sup> The right to habeas corpus is reiterated in Principles 4, 11,

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<sup>50</sup> THE CONSTITUTION OF THE SOCIALIST REPUBLIC OF VIETNAM, 2013, translation available at International Institute for Democracy and Electoral Assistance, [http://www.constitutionnet.org/sites/default/files/tranlation\\_of\\_vietnams\\_new\\_constitution\\_enuk\\_2.pdf](http://www.constitutionnet.org/sites/default/files/tranlation_of_vietnams_new_constitution_enuk_2.pdf).

<sup>51</sup> Methods, supra note 72, at para. 8(c).

<sup>52</sup> Id. at paras. 7(a), (b).

<sup>53</sup> ICCPR, art. 9(4) (“Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful”).

<sup>54</sup> General Comment No. 35, supra note 62, at para. 33.

<sup>55</sup> Id. at para. 32.

<sup>56</sup> Id. at para. 35.

32(1) and 37 of the Body of Principles<sup>57</sup> Aside from acting as a check on arbitrary detention, these provisions also safeguard other related rights such as freedom from torture<sup>58</sup>

In addition to the right to habeas corpus, Article 9(3) of the ICCPR also enshrines the right to an individual's release pending trial, providing that "[i]t shall not be the general rule that persons awaiting trial shall be detained in custody." The Human Rights Committee has found that "[d]etention pending trial must be based on an individualized determination that [such detention] is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime . . . Pretrial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances."<sup>59</sup> Principles 38 and 39 of the Body of Principles further confirm that, except in special cases, a criminal detainee is entitled to release pending trial<sup>60</sup>

For more than two months since her arrest, Pham was never brought before a judge to determine the legality of her arrest and continuing detention. Although the Information and Communication Department did not issue its determination regarding whether the Postings constituted propaganda and Phan was not formally indicted until the date of communication, Pham was held in detention without access to her family or an attorney throughout this entire period. There was never any bail hearing or any publicly-released individualized determination made about why such extended pre-trial detention was proper. In short, Pham's entire pre-trial detention period was completely unauthorized by any judicial officer.

By refusing to bring Pham promptly before a judge to challenge the legality of her detention, and by denying her release pending trial, Vietnam violated Article 9(3) and 9(4) of the ICCPR, and Principles 11, 32, 37, 38 and 39 of the Body of Principles.

#### **b. Vietnam Violated Phan's Right to be Visited by Family and to Communicate with the Outside World**

Principle 19 of the Body of Principles provides that "detained or imprisoned persons shall have the right to be visited by and to correspond with, in particular, members of his family . . . subject to reasonable conditions and restrictions as specified by law or lawful regulations." Similarly, this right is protected by the Mandela Rules, notably Rule 43 stating that "[d]isciplinary sanctions or restrictive measures shall not include the prohibition of family contact," Rule 58 stating that "[p]risoners shall be allowed, under necessary supervision, to communicate with their family and friends at regular intervals," and Rule 106 stating that "[s]pecial attention shall be paid to the maintenance and improvement of such relations between a prisoner and his or her family as are desirable in the best interests of both."

As set forth in section A.2.b, Pham was held incommunicado for over two months after her arrest and his family was prohibited from meeting with her during the entire period of his pre-trial detention. By detaining Pham incommunicado for over two months prior to her trial, Vietnam violated Principle 19 of the Body of Principles as well as Rules 43, 58, and 106 of the Mandela Rules.

#### **c. Vietnam Violated Phan's Right to be Tried Without Undue Delay**

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<sup>57</sup> Body of Principles, supra note 60.

<sup>58</sup> General Comment No. 35, supra note 62, at para. 34. Other rights that may be at risk are those guaranteed by Articles 6, 7, 10 and 14 of the ICCPR. Id. at para. 35.

<sup>59</sup> Id. at para. 38

<sup>60</sup> Body of Principles, supra note 60.

Article 14(3)(c) of the ICCPR guarantees that every defendant shall have the right to “be tried without undue delay.” “An important aspect of the fairness of a hearing is its expeditiousness,”<sup>61</sup> and “in cases where the accused are denied bail by the court, they must be tried as expeditiously as possible.”<sup>62</sup> In addition, this right “relates not only to the time between the formal charging of the accused and the time by which a trial should commence, but also the time until the final judgement on appeal.”<sup>63</sup> The right to be tried without undue delay is reiterated by the Body of Principles<sup>64</sup> and the same is guaranteed in Article 31 of the Vietnamese Constitution as well.

Pham was arrested on October 6, , 2020, and his trial did not take place until the date of communication. More than two months elapsed before Phan was arrested, and during this time, she was held in custody at the Police detention center. Vietnam did not provide any explanation that Pham’s case might have necessitated such delay nor does it seem that any such circumstances exist. The need for trial without undue delay was exacerbated by the fact that, as mentioned above, Pham was never given a bail hearing and was forced to remain in detention for the entire two months before her trial. As such, Vietnam violated Article 14(3)(c) of the ICCPR, Principle 38 of the Body of Principles, and Article 31 of the Vietnamese Constitution

#### **d. Vietnam Violated Phan’s Right to Communicate with and Have Assistance of Counsel**

Articles 14(3)(d) and 14(3)(b) of the ICCPR guarantee that an individual may “defend himself in person or through legal assistance of his own choosing” and “have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing.” Such guarantee “requires that the accused is granted prompt access to counsel,”<sup>65</sup> the Human Rights Committee notes that “[c]ounsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality”<sup>66</sup> Principle 18(3) of the Body of Principles further provides for the right of a detainee to be assisted by and communicate with his legal counsel “without delay or censorship and in full confidentiality,”<sup>67</sup> and that such right “may not be suspended or restricted save in exceptional circumstances.”<sup>68</sup>

In the current case, Pham was not allowed to meet with her lawyer since her detention. And thus Vietnam has thus violated (and continues to violate) Article 14(3)(b) of the ICCPR and Principle 18(3) of the Body of Principles.

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<sup>61</sup> HUMAN RIGHTS COMMITTEE, General Comment No. 32: Article 14 (Right to Equality Before Courts and Tribunals and to Fair Trial), U.N. Doc. CCPR/C/GC/32, para. 27 (August 23, 2007) (hereinafter “General Comment No. 32”).

<sup>62</sup> Id. at para. 35.

<sup>63</sup> Id.

<sup>64</sup> Body of Principles, supra note 60, at Principle 38.

<sup>65</sup> Id. at para. 32.

<sup>66</sup> General Comment No. 32, at para. 34.

<sup>67</sup> Body of Principles, at principle 18(3)

<sup>68</sup> Id.