

# Lawyers' Rights Watch Canada

NGO in Special Consultative Status with the Economic and Social Council of the United Nations  
Promoting human rights by protecting those who defend them

www.lrwc.org – lrwc@portal.ca – Tel: +1 604 736 1175 – Fax: +1 604 736 1170  
3220 West 13<sup>th</sup> Avenue, Vancouver, B.C. CANADA V6K 2V5

Monday, July 4, 2016

Zeid Ra'ad Al Hussein, UN High Commissioner for Human Rights,  
Office of the UN High Commissioner for Human Rights  
Palais des Nations  
CH-1211 Geneva 10, Switzerland  
Email: [InfoDesk@ohchr.org](mailto:InfoDesk@ohchr.org)

Dear High Commissioner for Human Rights, **Zeid Ra'ad Al Hussein**;

## **Re: Arbitrary Arrest and Incommunicado Detention of Nguyễn Văn Đài**

*Lawyers' Rights Watch Canada (LRWC) is a committee of Canadian lawyers and others who promote human rights and the rule of law through advocacy, education and research. LRWC is an NGO in Special Consultative Status with the Economic and Social Council (ECOSOC) of the United Nations (UN).*

### **Overview**

LRWC remains gravely concerned with Viet Nam's illegal treatment of human rights lawyer **Nguyễn Văn Đài**. The 16 December 2015 arrest of **Nguyễn Văn Đài**, and his incommunicado detention since the date of arrest, violate international human rights laws and Viet Nam's international human rights obligations and put **Nguyễn Văn Đài** at grave risk of torture and other prohibited treatment at the hands of Vietnamese authorities. This treatment coupled with the nature of the charges levied against him have irremediably compromised his rights to a fair trial. LRWC called on the Government of Viet Nam, by letter dated 10 January 2016, for the immediate release of **Nguyễn Văn Đài**, the withdrawal of charges and remediation for his arbitrary detention and unlawful treatment.

LRWC now calls directly on the Office of the High Commissioner of Human Rights to intervene to persuade the Government of Viet Nam to immediately and unconditionally release **Nguyễn Văn Đài** and to withdraw the charges against him and to provide remediation for this wrongful arrest and detention as required by law.

**Nguyễn Văn Đài** is a lawyer and the founder of the Brotherhood for Democracy. He is well known for his contributions to peaceful human rights education and advocacy—work specifically protected by United Nations (UN) instruments including the *Universal Declaration of Human Rights* (UDHR),<sup>1</sup> the *International Covenant on Civil and Political Rights* (ICCPR)<sup>2</sup>

<sup>1</sup> *Universal Declaration of Human Rights* (UDHR), adopted 10 Dec. 1948, online <http://www.un.org/en/documents/udhr/index.shtml>.

<sup>2</sup> *International Covenant on Civil and Political Rights* (ICCPR), 16 Dec. 1966, U.N. Doc. A/6316, 999 U.N.T.S. 171, entered into force 23 March 1976, (Accession by Viet Nam, 24 Sep 1982), online <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.

and the *Declaration on Human Rights Defenders*.<sup>3</sup> Prior to his arrest he was engaged in essential legal and human rights advocacy. He is not known to have engaged in any advocacy activities not protected by the above-mentioned instruments or in any activities that could reasonably be considered criminal.

The arrest and detention of **Nguyễn Văn Đài** appears to be in reprisal for his lawful exercise of internationally protected rights to expression, association and participation in the conduct of public affairs, and his efforts to provide legal representation and to “promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels” (Declaration art. 1).

### **Legal Background**

Viet Nam is a signatory to the ICCPR and the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD)<sup>4</sup> and is bound by its obligations under those Conventions. As a member of the United Nations, Viet Nam is expected to comply with and respect the UDHR and the various principles, guidelines, standards and recommendations adopted by the UN General Assembly and other prominent international organizations relating to rights to liberty, pre-trial detention and fair trial, as well as relevant rules of customary international law relating to arbitrary arrest and detention. As a member of the UN Human Rights Council, Viet Nam has further agreed and is mandated to “uphold the highest standards in the promotion and protection of human rights, [and] shall fully cooperate with the Council...during [its] term of membership.”<sup>5</sup> As a signatory to the ICCPR, Viet Nam is obligated to ensure that persons within its territory are free from arbitrary arrest and detention as guaranteed by UDHR, Articles 3 and 9; ICCPR, Article 9(1); Body of Principles, Principles 9, 12, 13, 36(2); and *The Tokyo Rules*, Rule 3.

### **Arbitrary Detention and Unlawful Treatment of Nguyễn Văn Đài**

In March 2007, **Nguyễn Văn Đài** was arrested and charged under Article 88 of the *Penal Code*, and served four years’ imprisonment and four years’ house arrest. Following his release from prison in 2011, **Nguyễn Văn Đài** continued to advocate for human rights in Viet Nam. He founded the Brotherhood for Democracy in 2013, and after doing so his house was bugged by police.<sup>6</sup>

After his release from house arrest in 2015, **Nguyễn Văn Đài** continued his peaceful human rights education and advocacy work. On 6 December 2015, he was beaten by masked men when returning home from leading a class to educate citizens about their human rights under the Vietnamese constitution. Later in December, **Nguyễn Văn Đài** and the Brotherhood for Democracy organized a series of human rights forums in Hanoi and Saigon to mark Human Rights Day commemorating adoption by the UN General Assembly of the UDHR, though police prevented him from attending to speak.

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<sup>3</sup> UN General Assembly, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms: resolution / adopted by the General Assembly*, 8 March 1999, A/RES/53/144.

<sup>4</sup> *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD), adopted 21 December 1965, entered into force 4 January 1969, 660 U.N.T.S. 195, (Accession by Viet Nam, 9 June 1982), online <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>.

<sup>5</sup> Resolution adopted by the General Assembly, A/RES/60/251, 3 April 2006 at para. 9.

<sup>6</sup> FIDH, “Arrest and arbitrary detention of Mr. Nguyen Van Dai, a human rights lawyer and well-known defender of religious freedom” (18 December 2015), online <https://www.fidh.org/en/issues/human-rights-defenders/arrest-and-arbitrary-detention-of-mr-nguyen-van-dai-a-human-rights>.

On 15 December 2015, **Nguyễn Văn Đài** and others met with European Union (EU) delegates to the fifth round of the annual EU-Vietnam Dialogue on Human Rights. En route to meeting with EU officials on 16 December 2015, police arrested **Nguyễn Văn Đài** and searched his house, confiscating computers and storage devices.

Vietnamese authorities say that **Nguyễn Văn Đài** has been charged with offences under Article 88 of the *Penal Code*. Vietnamese officials are believed to rely on the combined effect of Article 81 of the *Criminal Procedures Code* and Article 88 of the *Penal Code* as authority for the arrest of Nguyễn Văn Đài. Offences under Article 88 of the *Penal Code* are considered by Article 8 of the *Penal Code* as ‘very serious’ offences because they carry a maximum sentence of between 10 and 20 years depending on the section relied upon. Article 81 of the *Criminal Procedures Code* authorizes the arrest and detention of any person believed to be “preparing to commit very serious or exceptionally serious offences”. *Penal Code*, Article 88 offences are:

- propagating against, distorting and/or defaming the people’s administration,
- propagating psychological warfare and spreading fabricated news in order to foment confusion among people, and
- making, storing and/or circulating documents and/or cultural products with contents against the Socialist Republic of Vietnam.

The offences bear a sentence of 3 to 12 years of imprisonment. Article 88.1 mandates that offenders committing ‘more serious crime’ be sentenced to 10 to 20 years of imprisonment.

The UN Human Rights Council, recognizing that these provisions violate internationally protected rights, accepted the recommendations that Viet Nam “take steps to amend its Penal Code to ensure that it cannot be applied in an arbitrary manner to prevent freedom of expression” and to “[r]epeal or modify the Penal Code relating to national security particularly Articles 79, 88 and 258, in order to prevent those articles from being applied in an arbitrary manner to impede freedom of opinion and expression”.<sup>7</sup>

Authorities have given no reason for the detention of **Nguyễn Văn Đài** other than citing Article 88 of the *Penal Code* and Article 81 of the *Criminal Procedure Code*. Authorities have released no evidence or allegations supporting this or other criminal charges.

Although Vietnamese authorities apparently rely on the *Criminal Procedure Code* Article 81 coupled with Article 88 of the *Penal Code* as the legal authority to arrest and detain **Nguyễn Văn Đài**, the arrest did not comply with the requirements of the *Criminal Procedure Code* in the following respects:

1. there were no grounds to believe that **Nguyễn Văn Đài** was preparing to commit a ‘very serious offence’ as required by Article 81.1.a;
2. there was no identification by a victim of, or witness to, commission of a ‘very serious offense’ as required by Article 81.1.b; and
3. there was no evidence that **Nguyễn Văn Đài** was likely to escape or attempt to escape or destroy evidence and therefore no authority under Article 81.1 (b) and (c) to arrest **Nguyễn Văn Đài** to prevent him from escaping or destroying evidence.

In addition it is not known if:

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<sup>7</sup> UN General Assembly, Report of the Working Group on the Universal Periodic Review Viet Nam, A/HRC/26/6, 2 April 2014, paras. 143.150 and 143.152.

1. the arrest warrant was ordered by heads or deputy heads of investigating bodies as required by Article 81.2;
2. the warrant complied with Article 80.2 as required by Article 81.3; and
3. the prosecutor approved the arrest warrant, interviewed **Nguyễn Văn Đài**, or, within 12 hours or otherwise, approved the arrest, as mandated by Article 81.4.

Since being arrested on 16 December 2015, **Nguyễn Văn Đài** has been held incommunicado. He has been denied any access to a lawyer and visits by friends, family and colleagues. Those concerned about him are without information as to his safety, health and whereabouts. Although the family is allowed to send food for **Nguyễn Văn Đài** twice a month, they have no way of knowing if the food is reaching him or is adequate within the context of his circumstances. While sending letters to the prison (believed to be B14) is allowed, there is no way of knowing if letters are being received by him. **Nguyễn Văn Đài** has Hepatitis B and it is not known if he is receiving treatment as and when needed for this condition. **Nguyễn Văn Đài** has not, to the knowledge of family and lawyers, been brought before a court for determination of his right to the presumption of innocence and pre-trial release and there has never been a determination by a competent tribunal that his detention is justified by an established risk of flight from the court, tampering with evidence or recurrence of the offences charged coupled with the determination that detention is the only means to prevent the established risks. Under the ICCPR, the duty to bring a detainee promptly before a judicial authority applies regardless of whether a detainee requests it.<sup>8</sup>

The denial of access to counsel and the incommunicado detention together with other due process denials have irreparably prejudiced the rights of **Nguyễn Văn Đài** to a fair trial.

The arrest and detention of **Nguyễn Văn Đài** appears to be maliciously intended to suppress and punish the peaceful exercise of:

1. freedoms of opinion and expression, guaranteed by UDHR art. 19, ICCPR art. 19;
2. freedoms of peaceful assembly and association, guaranteed by UDHR art. 20, ICCPR art. 21 and 22;
3. the right to take part in the conduct of public affairs guaranteed by UDHR art. 21, ICCPR art. 25.2(1); and
4. equality before the law and the equal protection of the law, guaranteed by UDHR art. 10, ICCPR art. 26.

The arrest and detention of **Nguyễn Văn Đài** constitute continuing violations of the rights recognized and guaranteed by the ICCPR, the UDHR, the Declaration on Human Rights Defenders (Declaration) and the Basic Principles on the Role of Lawyers (Basic Principles). The rights and freedoms being violated include the following:

1. Liberty as guaranteed by UDHR art. 3, ICCPR art. 9.1;
2. Pre-trial release as guaranteed by UDHR art. 3, 8, 9, ICCPR art. 9.3;
3. The presumption of innocence as guaranteed by UDHR art. 11, ICCPR art. 14.2;
4. Freedom from arbitrary arrest and detention as guaranteed by UDHR art. 9, ICCPR art. 9.1;
5. Timely access to independent legal representation as guaranteed by ICCPR art. 14.3 (b), the Basic Principles, art. 8;

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<sup>8</sup> HR Committee, Concluding Observations: Republic of Korea, CCPR/C/79/Add.114, 1 November 1999, at para. 13.

6. Access to a competent, independent and impartial tribunal to determine rights, including rights to release and remediation of rights violations, as guaranteed by UDHR art. 10, 11, ICCPR art. 14, 9.3, 9.5;
7. Be informed promptly and in detail of the nature and cause of the charges as guaranteed by UDHR art. 11.1, ICCPR art. 9.2, 14.3 (a);
8. Time and facilities to prepare a defence and communicate with counsel guaranteed by ICCPR art. 14.3 (b); and
9. Freedom from torture and cruel, inhuman and degrading punishment or treatment, guaranteed by ICCPR, art. 7, 10, and UDHR, art. 5.

### **The Treatment of Human Rights Defenders in Viet Nam**

The Constitution of the Socialist Republic of Viet Nam (“the Constitution”) protects the right to participate in public affairs<sup>9</sup> and the right to freedom of expression, thought, religion and association.<sup>10</sup> Despite these Constitutional protections, Viet Nam has, in recent years, been found to have increasingly suppressed fundamental rights and imposed significant limitations on free expression, subjecting pro-democracy and human rights activists to harassment, arbitrary arrest and detention. A compilation by the UN Office of the High Commissioner of Human Rights of the findings of treaty bodies, special procedures, and other relevant official UN documents prepared by the Human Rights Council Working Group on the Universal Periodic Review, for the 2009 First Periodic Review of Viet Nam,<sup>11</sup> included the following submissions:

- The Special Rapporteur on the right to freedom of opinion and expression transmitted allegations concerning imprisonment of authors of articles on democracy.<sup>12</sup>
- The Special Representative of the Secretary-General on human rights defenders transmitted allegations concerning attacks, arrests and imprisonment of pro-democracy and human rights activists, who were allegedly ill-treated while in detention.<sup>13</sup>
- In 2007, the Working Group on Arbitrary Detention found a case of arbitrary detention, motivated by an individual’s peaceful dissemination through the Internet of ideas and opinions advocating political openness and democracy.<sup>14</sup>
- The Human Rights Committee (HR Committee) was concerned by reports of the extensive limitations on the right to freedom of expression in the media and the fact that the Press Law does not allow for the existence of privately owned media. It recommended Viet Nam to put an end to restrictions on freedom of expression and that the press laws should be brought into compliance with article 19 of the ICCPR.<sup>15</sup> The HR Committee recommended that Viet Nam ensure that no persons are subjected to arbitrary restriction of their liberty and that all persons deprived of their liberty are promptly brought before a judge or other officer authorized to exercise judicial power by law, and that they can only be deprived of their liberty on the basis of a judgment based on law, as required by article 9, paragraphs 3 and 4, of the ICCPR.<sup>16</sup> Moreover, the HR Committee recommended providing information in respect of all the institutions in which persons are

<sup>9</sup> *Constitution of the Socialist Republic of Viet Nam* (15 April 1992), Article 53, online <http://www.unhcr.org/refworld/docid/3ae6b573c.html>.

<sup>10</sup> *Ibid*, Articles 69-70.

<sup>11</sup> A/HRC/WG.6/5/VNM/2, 16 March 2009, online [http://lib.ohchr.org/HRBodies/UPR/Documents/Session5/VN/A\\_HRC\\_WG6\\_5\\_VNM\\_2\\_E.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session5/VN/A_HRC_WG6_5_VNM_2_E.pdf).

<sup>12</sup> *Ibid*, para. 38, referencing: E/CN.4/2006/55/Add.1, paras. 1110; A/HRC/7/14/Add.1, paras. 734-736.

<sup>13</sup> *Ibid*, referencing: E/CN.4/2006/55/Add.1, para. 1111; A/HRC/7/14/Add.1, paras. 737-741; E/CN.4/2006/95/Add.1, para. 597; A/HRC/4/37/Add.1, paras. 726, 729 and 730; A/HRC/7/28/Add.1, paras. 2015-2029.

<sup>14</sup> *Ibid*, para. 39, referencing: A/HRC/7/4/Add.1, opinion No. 13/2007, pp. 92-96.

<sup>15</sup> *Ibid*, para. 40, referencing: CCPR/CO/75/VNM, para 18.

<sup>16</sup> *Ibid*, para. 27, referencing: CCPR/CO/75/VNM, para. 8.

held against their will, the number and names of the institutions and the number of inmates in each and whether these are remand or convicted prisoners.<sup>17</sup>

In its 2013 World Report, Human Rights Watch states:

The Vietnam government systematically suppresses freedom of expression, association, and peaceful assembly, and persecutes those who question government policies, expose official corruption, or call for democratic alternatives to one-party rule. Police harass and intimidate activists and their family members. Authorities arbitrarily arrest activists, hold them incommunicado for long periods without access to legal counsel or family visits, subject them to torture, and prosecute them in politically pliant courts that mete out long prison sentences for violating vaguely worded national security laws.<sup>18</sup>

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#### Repression of Rights Activists

During 2012, the Vietnam government used vaguely defined articles in the penal code that criminalize exercise of civil and political rights to send at least 33 activists to prison and arrest at least another 34 political and religious advocates.

At least 12 other rights campaigners detained in 2011 were still being held, awaiting trial at this writing. Rights activists continue to suffer from intrusive police surveillance, interrogation, monetary fines, and restrictions on domestic and international travel. Police use temporary house arrest to prevent them from participating in protests or attending trials of other bloggers and activists. In a number of instances in 2012, unidentified thugs have assaulted dissidents and police have done little or nothing to investigate.

In a recent report, *Silenced Voices: Prisoners of Conscience in Viet Nam*,<sup>19</sup> Amnesty International finds that

human rights defenders and other activists in Viet Nam are typically at risk of arbitrary arrest and lengthy detention for speaking out or thinking differently. Over the years, hundreds have been arrested, charged, detained or imprisoned through the use of restrictive laws, or spurious charges.

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Prisoners of conscience in Viet Nam face arbitrary pre-trial detention for several months, are held incommunicado without access to family and lawyers, and are subsequently sentenced after unfair trials to prison terms ranging from two to 20 years or even, in some cases, life imprisonment. Many are held in harsh conditions amounting to cruel, inhuman or degrading treatment, with some of them subjected to torture and other ill-treatment, such as beatings by security officials or other prisoners.<sup>20</sup>

A number of declarations of arbitrary detention relating to political activists in Viet Nam have been made by the UN Working Group on Arbitrary Detention in the 2012 reported opinion concerning Le Cong Dinh, Tran Huynh Duy Thuc, Nguyen Tien Trung, and Le

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<sup>17</sup> *Ibid*, referencing: CCPR/CO/75/VNM, para. 12.

<sup>18</sup> Human Rights Watch, *World Report 2012: Vietnam*, p. 382, online <http://www.hrw.org/world-report/2013>.

<sup>19</sup> Amnesty International, *Silenced Voices: Prisoners of Conscience in Viet Nam* (2013), online <http://www.trust.org/item/20131107121444-4aqei/asa410072013en-1.pdf>.

<sup>20</sup> *Ibid*, p. 5.

Thang Long, four Vietnamese nationals arrested and charged with circulating propaganda against Vietnam.<sup>21</sup> The detainees allege they were arrested for peacefully expressing the need for political reform and convicted and imprisoned without a fair trial. The detainees allege, among other things, denial of access to the trial to their families, journalists, and others; lack of an impartial judicial panel; and denial of the ability to provide defense and to cross-examine witnesses. The government responded that the trials and appeals were carried out in compliance with law and that the punishments are in compliance with international law. In finding the government in contravention of articles 9, 19 and 21 of the ICCPR, falling within arbitrary detention category II, the Working Group held that

the criminal provisions that gave rise to the charge against the four individuals and their subsequent conviction by the court cannot be regarded as consistent with the relevant provisions of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The Working Group recalls that the holding and expressing of opinions, including those which are not in line with official Government policy, are protected under article 19 of the International Covenant on Civil and Political Rights.<sup>22</sup>

The WGAD, in its November 2013 Opinion ([A/HRC/WGAD/2013](#)), concluded that lawyer and human rights activist and commentator Le Quoc Quan had been held incommunicado for two months when first arrested and thereby deprived of timely access to his lawyer and his right to a fair trial and that his detention was arbitrary. The WGAD recommended that the Government of Viet Nam immediately release him or ensure a trial conducted in strict compliance with ICCPR requirements and provide reparation. In the case of **Nguyễn Văn Đài**, the wording of the charges under Article 88 of the *Penal Code* alone deprives him of any opportunity for a fair trial.

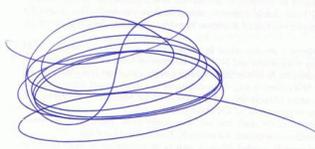
The rights of **Nguyễn Văn Đài** have been irremediably compromised by the actions of the Government of Viet Nam. In addition, the charges are worded so as to lead inevitably to convictions and the arbitrary imposition of a lengthy sentence of up to 20 years irrespective of the evidence.

### Conclusion

LRWC calls on the Office of the UN High Commissioner of Human Rights to persuade the Government of Viet Nam to immediately take steps to ensure:

1. the cessation of the prosecution of **Nguyễn Văn Đài** through the charges being withdrawn or stayed;
2. the immediate and unconditional release of **Nguyễn Văn Đài**; and
3. redress in accordance with the requirements of the ICCPR.

Sincerely,



Gail Davidson, LRWC Executive Director

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<sup>21</sup> United Nations Working Group on Arbitrary Detention, No. 27/2012 (Viet Nam), *Communication addressed to the Government concerning Le Cong Dinh, Tran Huynh Duy Thuc, Nguyen Tien Trung and Le Thang Long* (15 March 2012), online <http://www.unwgadatabase.org/un/Document.aspx?id=2867&terms=%28+viet+nam+%29>.

<sup>22</sup> *Ibid*, para. 41.