
Statement Regarding the Matter of Mr. Le Quoc Quan and the Government of the Socialist Republic of Viet Nam:

Violation of Rights to Pre-trial Release

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Promoting human rights by protecting those who defend them

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Introduction

Mr. Le Quoc Quan, a qualified lawyer, active blogger and human rights defender, is currently arbitrarily detained by the Government of Viet Nam due to having exercised his right to freedom of expression, right to freedom of peaceful assembly and association, as well as his activities as a human rights defender.

This Statement, submitted by Lawyers' Rights Watch Canada (LRWC), addresses the failure of the Government of Viet Nam to ensure Mr. Quan's right to freedom from arbitrary arrest and detention and his right to a remedy and reparation for suffering caused by his unlawful detention.

This Statement does not address other violations of international law by the Government of Viet Nam in relation to the present arbitrary detention of Mr. Quan, including, *inter alia*, Viet Nam's failure to protect and ensure: (1) the right to a fair trial before a competent, independent and impartial tribunal; (2) the right to disclosure and to make full answer and defence; and (3) freedom from malicious prosecutions and prosecutions based on illegitimate charges.

Viet Nam is a signatory to the *International Covenant on Civil and Political Rights* (ICCPR)¹ and the *International Convention on the Elimination of all Forms of Racial Discrimination* (CERD)² 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 *Universal Declaration of Human Rights* (UDHR)³ and the various principles, guidelines, standards and recommendations adopted by the UN General Assembly and other prominent international organizations relating to pre-trial detention, as well as relevant rules of customary international law relating to arbitrary arrest and detention.

Background

Mr. Le Quoc Quan is by profession a lawyer who graduated with a Master's degree in law from Hanoi University in 2003. From 1998-2006, he served as a consultant for numerous community-based organizations and civil society groups, including International Development Projects funded by the World Bank, the Asian Development Bank, and the Swedish International Development Agency. Prior to being disbarred in 2007, upon his return from a trip to the United States, Mr. Quan defended human rights cases in court.

In addition to practicing as a lawyer, Mr. Quan has also been an active blogger since 2005, writing for the BBC and many online newspapers, in which he has spoken about political freedom in Viet Nam and has also criticized the current political regime and exposed human rights abuses. In 2008, he was recipient for the 2008 Hellman/Hammett award for extensive

¹ *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>.

² *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>.

³ *Universal Declaration of Human Rights* (UDHR), adopted 10 Dec. 1948, online <http://www.un.org/en/documents/udhr/index.shtml>.

writing on civil rights, political pluralism and religious freedom on his blog: lequocquan.blogspot.com.

History of harassment of Mr. Quan by the authorities

Since 2007, Mr. Quan and his family have been subjected to surveillance and harassment by the Vietnamese authorities, including receiving notices to appear for daily interrogations, and threats to submit to “administrative re-education”.

In 2007, Mr. Quan was detained, following his return to Viet Nam from a five-month study in the United States where he had been a Reagan-Fascell Fellow in residence at the National Endowment for Democracy in Washington, D.C., which culminated in his drafting of a report entitled “Promoting Democracy in Vietnam: the Role of Civil Society”. Mr. Quan was released after one hundred days in prison, but was no longer permitted to leave Viet Nam and was subsequently disbarred on suspicion of engaging in “activities to overthrow the regime”.

On 4 April 2011, Mr. Quan was arrested again after appearing outside a Hanoi courthouse to show support for dissident Cu Huy Ha Vu, a fellow lawyer being tried for spreading propaganda against the State. Mr. Quan was released without charges.

On 19 August 2012, Mr. Quan was severely injured during a violent attack near his house in Hanoi, which he believes was conducted by authorities. In an interview with Associated Press news agency in September 2012, Mr. Quan reported that he and his family and staff had received frequent warnings from the Vietnamese authorities. In October 2012, some 50 Security Police and plain-clothed militia forced entry into the head office of his family firm, the Vietnam Credit in Hanoi and its branch office in Saigon, seizing documents and harassing the staff. Around the same time, Mr. Quan’s brother, Le Dinh Quan, was arrested for tax evasion. Mr. Quan’s cousin, Nguyen Thi Oanh, who was in the early stages of pregnancy, was also arrested in December 2012 and released without charges on 4 February 2013.

Detention from 27 December 2012 to present

Mr. Quan was most recently detained on 27 December 2012 and charged with “tax evasion”, pursuant to Article 161 of the Vietnamese Penal Code. It is understood that Mr. Quan had not been notified of any concerns with his financial affairs by the State at any stage prior to his arrest and detention and he does not believe that this is the real reason for his arrest.

Mr. Quan was held incommunicado and denied access to his family or to his lawyer. At the start of his detention, Mr. Quan was on hunger strike, which lasted 15 days. His lawyer was only allowed to attend two interrogation sessions, in the last week of February and once in the first week of March 2013, and was not allowed access to any of the investigative reports that were drafted after these interrogations, nor were they allowed access to any of the case documents until the investigations were concluded. Despite repeated requests made by Mr. Quan’s family to visit him in his place of detention, all requests were denied and no family visits have been allowed to this day.

An application for pre-trial release was made and never responded to by the court.

On 2 October 2013, Mr. Quan was convicted of “tax evasion” in a trial lasting half a day before the Supreme People’s Court in Hanoi and sentenced to 30 months in prison. A fine of 1.2 billion dong (approx. US \$60,000) was levied against the Company of which Mr. Quan is a director. An appeal filed by Mr. Quan’s lawyers is expected to be heard in November 2013. Mr. Quan remains in Hoa Lo No. 1 Prison.

Suppression of freedom of expression in Viet Nam

The Constitution of the Socialist Republic of Viet Nam (“the Constitution”) protects the right to participate in public affairs⁴ and the right to freedom of expression, thought, religion and association.⁵ 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 United Nations documents prepared by the Human Rights Council Working Group on the Universal Periodic Review, for the 2009 First Periodic Review of Viet Nam,⁶ 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.⁷
- 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.⁸
- 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.⁹
- The Human Rights Committee (HR Committee) was concerned at 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 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*.¹⁰ 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

⁴ *Constitution of the Socialist Republic of Viet Nam* (15 April 1992), Article 53, <http://www.unhcr.org/refworld/docid/3ae6b573c.html>

⁵ *Ibid.*, Articles 69-70.

⁶ A/HRC/WG.6/5/VNM/2, 16 March 2009.

http://lib.ohchr.org/HRBodies/UPR/Documents/Session5/VN/A_HRC_WG6_5_VNM_2_E.pdf

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

⁸ *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.

⁹ *Ibid.*, para. 39, referencing: A/HRC/7/4/Add.1, opinion No. 13/2007, pp. 92-96.

¹⁰ *Ibid.*, para. 40, referencing: CCPR/CO/75/VNM, para 18.

be deprived of their liberty on the basis of a judgement based on law, as required by article 9, paragraphs 3 and 4, of the Covenant.¹¹ Moreover, the HR Committee recommended providing information in respect of all the institutions in which persons are 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.¹²

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.¹³

...

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*¹⁴, 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.

...

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

¹¹ *Ibid.*, para. 27, referencing: CCPR/CO/75/VNM, para. 8.

¹² *Ibid.*, referencing: CCPR/CO/75/VNM, para. 12.

¹³ Human Rights Watch, *World Report 2012: Vietnam*, p. 382, online <http://www.hrw.org/world-report/2013>.

¹⁴ Amnesty International, *Silenced Voices: Prisoners of Conscience in Viet Nam* (2013), online <http://www.trust.org/item/20131107121444-4aqei/asa410072013en-1.pdf>

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.¹⁵

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, the most recently reported opinion concerning Le Cong Dinh, Tran Huynh Duy Thuc, Nguyen Tien Trung, and Le Thang Long, four Vietnamese nationals arrested and charged with circulating propaganda against Vietnam.¹⁶ 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 the denial of ability to provide defense and 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 *International Covenant on Civil and Political Rights*, 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.¹⁷

Mr. Quan's detention is "arbitrary" under international law

Although Mr. Quan was convicted of tax evasion, it is submitted that, given the history of Viet Nam detaining political prisoners and those who speak out against the political regime, as touched on briefly above, and also due to Mr. Quan's history as a human rights defender and blogger and the history of his previous arrests and harassment, including disbarment, the real purpose of the present detention and prosecution is to punish Mr. Quan for exercising his rights guaranteed under *ICCPR*, Articles 19 (freedom of expression), 21 (peaceful assembly), 22 (freedom of association) and 25 (the right to take part in the conduct of public affairs) and to deter others from doing so.

As elaborated in the following section, detention without legal justification constitutes "arbitrary detention" and is a violation of international law. As the Working Group on Arbitrary Detention holds, a deprivation of liberty is "arbitrary" when the deprivation of liberty results from the exercise of certain rights or freedoms guaranteed by the *UDHR* and the *ICCPR*, including rights

¹⁵ *Ibid.*, p. 5.

¹⁶ 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>

¹⁷ *Ibid.*, para. 41.

to freedom of expression and peaceful assembly.

Detaining Mr. Quan for a period of nine months before trial, which exceeded the maximum four months stipulated in Viet Nam's Criminal Procedures Code, denial of a right of access to his lawyer and denial of the time and facilities for the preparation of his defence, and violation of the right to communicate with the outside world, particularly with his family, also constitute violations of Mr. Quan's rights under international law, further rendering his continued detention arbitrary.

International Standards Governing Pre-trial Release

Binding international law provisions relating to pre-trial detention in Viet Nam are contained in the *UDHR*, *ICCPR* and *CERD*. Also relevant are the following instruments: Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules);¹⁸ United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles);¹⁹ United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules);²⁰ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules);²¹ United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (The Bangkok Rules);²² United Nations Rules for the Protection of Juveniles Deprived of their Liberty ("Havana Rules");²³ and Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ("Basic Principles and Guidelines on the Right to a Remedy and Reparation")²⁴. Finally, Viet Nam is bound by relevant rules of customary international law relating to arbitrary arrest and detention.

¹⁸ *Standard Minimum Rules for the Treatment of Prisoners* (Standard Minimum Rules), United Nations Secretariat, Report of First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, Switzerland (Aug. 22-Sept. 3, 1955), annex I.A. Approved by Economic and Social Council, E.S.C. Res. 663C XXIV (July 31, 1957), amended by the Economic and Social Council, E.S.C. Res. 2076 LXII (May 13, 1997), online

<http://www.unhcr.org/refworld/docid/3ae6b36e8.html>

¹⁹ *United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Body of Principles), G.A. Res. 43/173, U.N. Doc. A/RES/43/173 (Dec. 9, 1988), online

<http://www.un.org/documents/ga/res/43/a43r173.htm>

²⁰ *United Nations Standard Minimum Rules for Non-custodial Measures* (Tokyo Rules), G.A. Res. 45/110, U.N. Doc. A/RES/45/110 (Dec. 14, 1990), online <http://www.un.org/documents/ga/res/45/a45r110.htm>

²¹ *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (The Beijing Rules)²¹, G.A. Res. 40/33, U.N. Doc. A/RES/40/33 (Nov. 29, 1985), online <http://www.un.org/documents/ga/res/40/a40r033.htm>.

²² *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders* (The Bangkok Rules), adopted by General Assembly Resolution 65/229 of 21 December 2010, online

http://www.un.org/en/ecosoc/docs/2010/res_2010-16.pdf.

²³ *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* ("Havana Rules")²³, G.A. Res. 45/113, U.N. Doc. A/RES/45/113 (Dec. 14, 1990), online < <http://www.un.org/documents/ga/res/45/a45r113.htm>>;

²⁴ *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* ("Basic Principles and Guidelines on the Right to a Remedy and Reparation")²⁴, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, online

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>

As pre-trial detention involves the detention of individuals who have not been convicted of a crime, it can negatively impact on the presumption of innocence and the right to liberty and security of the person. All of the international standards governing pre-trial detention, therefore, reflect the principle that pre-trial detention should be minimized whenever possible, and should be used only as a last resort in certain, limited circumstances.

A presumption in favour of pre-trial release is based on the following principles:

- the presumption of innocence;
- the right to non-discrimination;
- the right to liberty and security of the person, including freedom from arbitrary arrest and detention;
- the presumption in favour of pre-trial release;
- the right to be informed of reasons for arrest and of any charges;
- the right to be promptly brought before a judge and to trial within a reasonable time, or release pending trial;
- the right to prompt review of lawfulness of detention; and
- the right to compensation for unlawful deprivation of liberty.

While these standards are concerned primarily with pre-trial detention and release, also relevant are related due process rights, among them, the right to counsel, the right to remain silent, the right to a fair trial and the right to participation, right to adequate time and facilities to prepare a defence, and the rights of persons in detention, including the right to humane conditions of detention and freedom from torture and the right to have contact with the outside world, and in particular, one's family.

A. Presumption of Innocence

Every individual charged with a crime has the right to be presumed innocent until proven guilty according to law. This principle requires that pre-trial detainees be treated in accordance with their status as unconvicted persons. Defendants must not be presented in court in a manner indicating that they may be dangerous criminals. Public authorities must refrain from making public statements about an accused which may prejudice the outcome of a fair trial. If detention is necessary, officials may only impose those restrictions required to maintain order and security in the place of detention. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons. The length of pre-trial detention (also referred to as "preventive detention") or a denial of bail does not affect the presumption of innocence. Pre-trial detainees may not be subject to "punishment".

As a member of the United Nations and as a signatory to the *ICCPR*, Viet Nam is obligated to respect the presumption of innocence, as set out in *UDHR*, Article 11(1); *ICCPR*, Articles 10(2), 14(2); and *Standard Minimum Rules*, Rule 84(2).

International Standards

***UDHR*, Article 11(1):**

11. (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

ICCPR, Articles 10(2)(a) and 14(2):

10. (2)(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons.

14. (2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

Standard Minimum Rules, Rule 84(2):

84. (2) Unconvicted prisoners are presumed to be innocent and shall be treated as such.

Interpretation

The HR Committee, in *CCPR General Comment No. 32*, states, at paragraph 30:

According to article 14, paragraph 2 everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle. All public authorities have the duty to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused. Defendants should normally not be shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals. The media should avoid news coverage undermining the presumption of innocence. Furthermore, the length of pre-trial detention should never be taken as an indication of guilt and its degree. The denial of bail or findings of liability in civil proceedings do not affect the presumption of innocence.²⁵

In *CCPR General Comment No. 21*, the HR Committee states, at paragraph 9:

Article 10, paragraph 2 (a), provides for the segregation, save in exceptional circumstances, of accused persons from convicted ones. Such segregation is required in order to emphasize their status as unconvicted persons who at the same time enjoy the

²⁵ *CCPR General Comment No. 32* Article 14 (Right to equality before courts and tribunals and to a fair trial), 23 August 2007, CCPR/C/GC/32, at para. 30, online <http://www2.ohchr.org/english/bodies/hrc/comments.htm>

right to be presumed innocent as stated in article 14, paragraph 2...²⁶

In *Gridin v. Russia*, the HR Committee found public statements made by high-ranking law enforcement officials portraying the author as guilty, which were given wide media coverage, to be a violation of the presumption of innocence.²⁷

B. Non-discrimination

States are obligated to ensure that the international human rights of persons within its territory are enjoyed without distinction of any kind. Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights. The right to equality before the courts and tribunals includes equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination. An arrest and detention based solely on a prohibited ground of discrimination is an arbitrary and therefore, unlawful, deprivation of liberty at international law.

As a member of the United Nations and as a signatory to *ICCPR* and *CERD*, Viet Nam is obligated to ensure that the international human rights of persons within its territory are enjoyed without distinction of any kind as set out in *UDHR*, Article 2; *ICCPR*, Articles 2(1) and 26; *CERD*, Article 5; *Body of Principles*, Principle 5(1); and *Standard Minimum Rules*, Rule 6(1).

International Standards

UDHR, Article 2:

2. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

ICCPR, Articles 2(1) and 26:

2. (1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

²⁶ *CCPR General Comment 21: Article 10 (Humane treatment of persons deprived of liberty)*, 10 April 1992, para. 9, online

<http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/3327552b9511fb98c12563ed004cbe59?Opendocument>

²⁷ HR Committee: Communication No. 770/1997, *Dimitry L. Gridin v. Russian Federation*, at para 8.3.

26. All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

CERD, Article 5(a):

5. In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;

Body of Principles, Principle 5(1):

5. (1) These principles shall be applied to all persons within the territory of any given State, without distinction of any kind, such as race, colour, sex, language, religion or religious belief, political or other opinion, national, ethnic or social origin, property, birth or other status.

Standard Minimum Rules, Rule 6(1):

6. (1) The following rules shall be applied impartially. There shall be no discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Interpretation

The HR Committee, in *CCPR General Comment No. 32*, states, at paragraph 8, that the right to equality before courts and tribunals

in general terms, guarantees, in addition to the principles mentioned in the second sentence of Article 14, paragraph 1, those of equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination.²⁸

In *CCPR General Comment 18*, the HR Committee states, at paragraph 1, that

Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights. Thus, article 2, paragraph 1, of the International Covenant on Civil and Political Rights obligates each State party to respect and ensure to all persons

²⁸ *CCPR General Comment No. 32*, *supra* note 25, at para. 8.

within its territory and subject to its jurisdiction the rights recognized in the Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 26 not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.²⁹

C. Right to Liberty and Security of the Person – freedom from arbitrary arrest and detention

All persons in Viet Nam have an internationally protected right to liberty and security of the person, which includes the right to be free from arbitrary arrest and detention. To be lawful under international human rights law, arrests and detentions must be carried out in accordance with both formal and substantive rules of domestic and international law, including the principle of non-discrimination, and must not be arbitrary.

“Arbitrariness” has been defined to include an element of inappropriateness, injustice, lack of predictability and lack of due process of law. A remand in custody, therefore, must not only be lawful but reasonable and necessary in all of the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.

The Working Group on Arbitrary Detention regards deprivations of liberty as “arbitrary” when the deprivation results from the exercise of the rights or freedoms guaranteed by *UDHR*, articles 7, 13, 14, 18, 19, 20 and 21 and, insofar as States parties are concerned, by *ICCPR*, articles 12, 18, 19, 21, 22, 25, 26 and 27.

As a member of the United Nations and 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*, 9, 12, 13, 36(2); and *The Tokyo Rules*, Rule 3.

International Standards

UDHR, Articles 3 and 9:

3. Everyone has the right to life, liberty and security of person.
9. No one shall be subjected to arbitrary arrest, detention or exile.

ICCPR, Article 9 (1):

²⁹ HR Committee, *CCPR General Comment No. 18: Non-discrimination*, 11 October 1989, Thirty-seventh session, 1989, para. 1, online <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/3888b0541f8501e9c12563ed004b8d0e?Opendocument>.

9. (1) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Body of Principles, Principles 9, 12, 13, 36(2):

9. The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.

12. (1) There shall be duly recorded:

(a) The reasons for the arrest;

(b) The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority;

(c) The identity of the law enforcement officials concerned;

(d) Precise information concerning the place of custody.

(2) Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.

13. Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively with information on and an explanation of his rights and how to avail himself of such rights.

36. (2) The arrest or detention of such a person pending investigation and trial shall be carried out only for the purposes of the administration of justice on grounds and under conditions and procedures specified by law. The imposition of restrictions upon such a person which are not strictly required for the purpose of the detention or to prevent hindrance to the process of investigation or the administration of justice, or for the maintenance of security and good order in the place of detention shall be forbidden...

The Tokyo Rules, Rule 3:

3.1 The introduction, definition and application of non-custodial measures shall be prescribed by law.

3.2 The selection of a non-custodial measure shall be based on an assessment of established criteria in respect of both the nature and gravity of the offence and the personality, background of the offender, the purposes of sentencing and the rights of victims.

3.3 Discretion by the judicial or other competent independent authority shall be exercised at all stages of the proceedings by ensuring full accountability and only in accordance with the rule of law.

Interpretation

The HR Committee, in *CCPR General Comment No. 8*, states, at paragraph 1, that Article 9(1) “is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc.”³⁰

The HR Committee has held that the obligation to ensure security of the person includes an obligation to protect non-detained individuals from threats made by persons in authority.³¹

Pre-trial detention in accordance with the law

The HR Committee has held that Article 9(1) of *ICCPR* requires that the grounds for arrest and detention must be clearly established by domestic legislation and made in accordance with that law.³² Such laws must accord with applicable international human right law.

Pre-trial detention must be reasonable and necessary in all of the circumstances

In addition to being carried out in accordance with the law, arrest and detention must not be arbitrary. This requires that an arrest be reasonable in all of the circumstances and that pre-trial detention be necessary in all of the circumstances. The “reasonableness” of pre-trial detention will be assessed in the light of all of the circumstances of the particular case, such as the gravity of the offences, the risk of absconding and the risk of influencing witnesses, as well as the conduct of the domestic authorities.

Pre-trial detention has been found to be arbitrary, *inter alia*, where no charges have been laid, the duration of detention is indefinite or becomes excessive, detention is applied automatically or there is no possibility of bail.

With respect to “arbitrary arrest”, the HR Committee has explained that

The drafting history of article 9, paragraph 1, confirms that “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law. As the Committee has observed on a previous occasion, this means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Remand in custody must further be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.³³

³⁰ HR Committee, *CCPR General Comment No. 8: Right to liberty and security of persons (Art. 9)*, 30 June 1982, Sixteenth session, 1982, para. 1, online at:

<http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/f4253f9572cd4700c12563ed00483bec?Opendocument>.

³¹ HR Committee: Communication No. 449/1991, *Barbarin Mojica v. Dominican Republic*, at para. 5.4; HR Committee: Communication No. 314/1988, *Bwalya v. Zambia*, at para. 6.4.

³² HR Committee: Communication No. 702/1996, *Clifford McLawrence v. Jamaica*, at para. 5.5; HR Committee: Communication No. 770/1997, *Dimitry L. Gridin v. Russian Federation*, at para 8.1.

³³ HR Committee: Communication No. 458/1991, *Albert Womah Mukong v. Cameroon*, at para. 9.8, reaffirmed, *inter alia*, in HR Committee: Communication No. 1085/2002, *Abdelhamid Taright, Ahmed Touadi, Mohamed Remli and Amar Yousfi v. Algeria*, at para. 8.3, and HR Committee: Communication No. 1128/2002, *Rafael Marques de*

Pre-trial detention may become a violation of the right to liberty and the presumption of innocence where, for example, the duration is excessive or is set according to the length of potential sentence or applied automatically.³⁴ In *Salim Abbassi v. Algeria*, the Committee recalled its jurisprudence that, “in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification”.³⁵ Cases in which individuals have been arrested without warrant or summons and kept in detention without a court order have been found to violate the right to freedom from arbitrary arrest and detention in *ICCPR* Article 9(1).³⁶ Detention should not be of a punitive character.³⁷

D. Presumption in Favour of Pre-trial Release

Consistent with the presumption of innocence and the presumption in favour of liberty, the international standards provide that pre-trial detention should be the exception and not the rule, and should be used as a means of last resort only, and for the minimum necessary period. Release may be conditioned by guarantees to appear for trial.

The burden is on the State to show why an accused cannot be released. Under the *ICCPR*, pre-trial detention should be ordered only if there are reasonable grounds to believe that the accused has been involved in the commission of the alleged offence, and there is a danger of flight, commission of further serious offences, or that the course of justice will be seriously interfered with if they are freed.

The necessity for detention and the imposition of non-custodial measures must be kept under judicial review. This requires that a detainee be brought before a court at regular intervals throughout a detention or the imposition of non-custodial measures so that the court can review the continuing need for detention or such measures.

States should take various measures to minimize pre-trial detention. Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded. Where appropriate and compatible with the legal system, and in accordance with established criteria, the police, the prosecution service or other agencies dealing with criminal cases should be empowered to discharge the offender if they consider that it is not necessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and the rights of victims.³⁸

A wide range of alternatives to pre-trial detention, prescribed by law, should be employed as

Morais v. Angola, at para. 6.1.

³⁴ HR Committee (2006) Concluding Observations: Italy (CCPR/C/ITA/CO/5), at para. 14.

³⁵ HR Committee: Communication No. 1172/2003, *Salim Abbassi v. Algeria*, at para. 8.4.

³⁶ HR Committee: Communication No. 90/1981, *Luyeye Magana ex-Philibert v. Zaire*, at para. 8.

³⁷ *Rafael Marques de Morais v. Angola*, *supra*, note 33, at para. 6.1.

³⁸ See *Tokyo Rules*, Rule 5.1 *infra*; also, *UN Guidelines on the Role of Prosecutors*, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, at paras 14 and 18, online

<http://www.unrol.org/files/Guidelines%20on%20the%20Role%20of%20Prosecutors%20.pdf>

early as possible.

As a member of the United Nations and as a signatory to the *ICCPR*, Viet Nam must ensure that pre-trial detention is used only as a last resort and is the exception, rather than the rule, and is justified in each case according to the limited justifications under *ICCPR*, Article 9(3); *Body of Principles*, 39; and *The Tokyo Rules*, Rules 2.3, 3.1, 3.4, 3.5, 5.1, 6.

International Standards

ICCPR, Article 9(3):

9. (3) ... It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial...

Body of Principles, Principle 39:

39. Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review.

The Tokyo Rules, Rules 2.3, 3.1, 3.4, 3.5, 5.1, 6:

2. (3) In order to provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society and to avoid unnecessary use of imprisonment, the criminal justice system should provide a wide range of noncustodial measures, from pre-trial to post-sentencing dispositions. The number and types of noncustodial measures available should be determined in such a way so that consistent sentencing remains possible.

3. (1) The introduction, definition and application of non-custodial measures shall be prescribed by law.

...

(4) Non-custodial measures imposing an obligation on the offender, applied before or instead of formal proceedings or trial, shall require the offender's consent.

(5) Decisions on the imposition of non-custodial measures shall be subject to review by a judicial or other competent independent authority, upon application by the offender.

5. (1) Where appropriate and compatible with the legal system, the police, the prosecution service or other agencies dealing with criminal cases should be empowered to discharge the offender if they consider that it is not necessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and the rights of victims. For the purpose of deciding upon the appropriateness of discharge or determination of proceedings, a set of established criteria shall be developed within each legal system. For minor cases the prosecutor may impose suitable non-custodial measures, as appropriate.

6. (1) Pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim.

(2) Alternatives to pre-trial detention shall be employed at as early a stage as possible. Pre-trial detention shall last no longer than necessary to achieve the objectives stated under rule 5.1 and shall be administered humanely and with respect for the inherent dignity of human beings.

(3) The offender shall have the right to appeal to a judicial or other competent independent authority in cases where pre-trial detention is employed.

Interpretation

Pre-trial detention only as a last resort

The HR Committee, interpreting the *ICCPR*, states in *CCPR General Comment No. 8*, that “[p]re-trial detention should be an exception and as short as possible.”³⁹

The Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders expressed serious concern about, among other things, delays in the criminal justice process and the high proportion of pre-trial detainees among the prison population and recommended that member states use pre-trial detention only if circumstances make it strictly necessary and as a last resort in criminal proceedings.⁴⁰

The burden is on the State to justify pre-trial detention

States must demonstrate that the detention of individuals pending trial is absolutely necessary. The HR Committee has stated, in relation to the *ICCPR*, that “bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the state party.”⁴¹ The mere assumption by the State party that the author would interfere with the investigations or abscond if released on bail does not justify an exception to the rule in article 9, paragraph 3 of the *ICCPR*.⁴²

Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Leila Zerougi, has stated that a system of mandatory denial of pre-trial release for certain crimes may, by definition be arbitrary, “since it does not allow the decision maker to take the individual circumstances into account”.⁴³

³⁹ *CCPR General Comment No. 8*, *supra* note 30, at para. 3.

⁴⁰ Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August – 7 September, 1990, A/Conf.144/28/Rev.1, p.158.

⁴¹ HR Committee: Communication No. 526/1993, *Hill v. Spain*, at para. 12.3.

⁴² HR Committee: Communication No. 1178/2003, *Aleksander Smantser v. Belarus*, at para. 10.3.

⁴³ Laurel Townhead, *Pre-Trial Detention of Women and its Impact on their Children*, February 2007, Quaker United Nations Office, Women in Prison and Children of Imprisoned Mothers Series, at p. 13, citing comments on mandatory sentencing made by Leila Zerougi, Chairperson-Rapporteur of the Working Group on Arbitrary Detention, during the second regular session of the Human Rights Council, 20 December 2006, online: <http://www.quno.org/humanrights/women-in-prison/womenPrisonLinks.htm>.

Under the *ICCPR*, detention before trial must be lawful, reasonable and necessary in all the circumstances, “for example, to prevent flight, interference with evidence or the recurrence of crime”.⁴⁴ In *Aleksander Smantser v. Belarus*, the HR Committee, reaffirmed its jurisprudence that pre-trial detention should remain the exception and that bail should be granted,

except in situations where the likelihood exists that the accused would abscond or tamper with evidence, influence witnesses or flee from the jurisdiction of the State party... The mere assumption by a State party that the author would interfere with the investigations or abscond if released on bail does not justify an exception to the rule in article 9, paragraph 3, of the Covenant.⁴⁵

E. Right To Be Promptly Brought Before a Judge or Other Judicial Officer and to Trial within a Reasonable Time, or Release

Individuals arrested must be brought promptly before a judicial authority so that the court may determine whether an initial detention was justified and whether or not the accused shall be remanded in custody pending trial. This safeguard is contained within each of the major international and regional human rights instruments. The right is automatic and does not depend upon the request of the detainee.

The HR Committee has indicated that the delay between the arrest of an accused and the time he or she is brought before a judicial authority should not exceed a few days and ideally should be within 48 hours. The judicial authority shall decide without delay upon the lawfulness and necessity of detention.

No person may be kept in detention pending investigation or trial, except upon the written order of a judicial authority. A detained person shall, when brought before such an authority, have the right to make a statement on the treatment received by him or her while in custody.

The judicial authority reviewing the arrest and detention must be independent of the executive, must personally hear the person concerned, and must be empowered to direct pre-trial detention or release the person arrested. The courts must give reasons for decisions imposing pretrial detention or refusing a request for release. Detainees should have the right, contained in law, to appeal to a higher judicial or other competent authority a decision to detain or to revoke conditional release.

Where an individual is detained, that person is entitled to be tried within a reasonable time or to release pending trial. What constitutes “reasonable time” is a matter of assessment for each particular case, but detention must not continue beyond the period for which the State party can provide appropriate justification, as discussed in the previous section. The relevant period of detention to be assessed is the date of arrest or commencement of detention until the date of final judgment.

As a member of the United Nations and as a signatory to the *ICCPR*, Viet Nam must guarantee

⁴⁴ HR Committee: Communication No. 458/1991, *Albert Womah Mukong v. Cameroon*, *supra* note 33, at para. 9.8.

⁴⁵ HR Committee: Communication No. 1178/2003, *Aleksander Smantser v. Belarus*, at para. 10.3.

that persons arrested within its territory are promptly brought before a judge or other judicial officer and are tried within a reasonable time, or released, as provided by *ICCPR*, Article 9(3); *Body of Principles*, 11, 37, 38; and *Tokyo Rules*, Rule 6.3.

International Standards

ICCPR, Article 9(3):

9. (3) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release...

Body of Principles, Principles 11, 37, 38:

11. (1) A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.

...(3) A judicial or other authority shall be empowered to review as appropriate the continuance of detention.

37. A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention. No person may be kept under detention pending investigation or trial except upon the written order of such an authority. A detained person shall, when brought before such an authority, have the right to make a statement on the treatment received by him while in custody

38. A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial.

Tokyo Rules, Rule 6.3:

6.3 The offender shall have the right to appeal to a judicial or other competent independent authority in cases where pre-trial detention is employed.

Interpretation

The HR Committee has stated that the purpose of the first sentence of Article 9(3) is to bring the detention of a person charged with a criminal offence under judicial control. "A failure to do so at the beginning of someone's detention, would thus lead to a continuing violation of article 9(3), until cured."⁴⁶

Under the *ICCPR*, the duty to bring a detainee promptly before a judicial authority applies regardless of whether a detainee requests it.⁴⁷

⁴⁶ HR Committee: Communication No. 521/1992, *Vladimir Kulomin v. Hungary*, at para. 11.3.

⁴⁷ H R Committee, Concluding Observations: Republic of Korea, CCPR/C/79/Add.114, 1

A hearing must be held promptly following arrest

In *CCPR General Comment No. 8*, the HR Committee states that “delays must not exceed a few days.”⁴⁸ The Committee ruled that the term “promptly” in *ICCPR* Article 9 must be determined on a case-by-case basis, the delay between the arrest of an accused and the time before he or she is brought before a judicial officer “should not exceed a few days”⁴⁹ and ideally should be made available within 48 hours.⁵⁰

The duty is automatic and does not depend upon the request of the detainee

Under the *ICCPR*, the duty to bring a detainee promptly before a judicial authority applies regardless of whether a detainee requests it.⁵¹

The “officer” must be independent, objective and impartial, with the authority to order the detainee’s release

In *Kulomin v. Hungary*, the HR Committee considered the meaning of “officer” under *ICCPR* Article 9(3), finding that “it is inherent to the proper exercise of judicial power, that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with.”⁵² In that case, the Committee ruled that a public prosecutor who extended an individual’s pre-trial detention several times could not be regarded as having the “institutional objectivity and impartiality necessary to be considered an ‘officer authorized to exercise judicial power’ within the meaning of [*ICCPR*] article 9(3).”⁵³

Right to trial within a reasonable time, or to release

Detainees must be granted provisional release once continuing detention ceases to be reasonable. What constitutes “reasonable time” in which to be brought to trial must be assessed in each particular case. However, detention should not continue beyond the period for which the State party can provide appropriate justification. (See previous section for legal justifications for pre-trial detention).

Interpreting the *ICCPR*, the HR Committee stated:

The lack of adequate budgetary appropriations for the administration of criminal justice alluded to by the State party does not justify unreasonable delays in the adjudication of criminal cases. Nor does the fact that investigations into a criminal case are, in their essence, carried out by way of written proceedings, justify such delays.⁵⁴

November 1999, at para. 13.

⁴⁸ *CCPR General Comment No. 8*, *supra* note 30, at para. 2.

⁴⁹ HR Committee: Communication No. 373/1989, *Stephens v. Jamaica*, at para. 9.6.

⁵⁰ HR Committee, Concluding Observations: Zimbabwe, *CCPR/C/79/Add.89* (1998), at para. 17.

⁵¹ HR Committee, Concluding Observations: Republic of Korea, *CCPR/C/79/Add.114*, 1 November 1999, at para. 13.

⁵² *Kulomin v. Hungary*, *supra* note 47, at para. 11.3.

⁵³ *Ibid.*

⁵⁴ HR Committee: Communication No. 336/1988, *Fillastre and Bizouarn v. Bolivia*, at para. 6.5.

F. Right to be informed of reasons for arrest and of any charges

States must promptly inform persons arrested and detained of the reasons for an arrest and of any charges, in a language which they understand and in sufficient detail so as to be able to take proceedings to have the lawfulness of their detention decided speedily.

The *UN Body Of Principles for the Protection of all Persons under any Form of Detention or Imprisonment*, Principle 12(1), requires that the following information be duly recorded:

- The reasons for the arrest;
- The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority;
- The identity of the law enforcement officials concerned; and
- Precise information concerning the place of custody.

Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.

As a member of the United Nations and as a signatory to the *ICCPR*, Viet Nam must, inform persons, at the time of their arrest, of the reasons for the arrest and promptly inform them of any charges against them, as set out in *ICCPR*, Articles 9(2), 14(3); *Body of Principles*, 10 and 12; and *Tokyo Rules*, Rule 7.1.

International Standards

ICCPR, Articles 9(2), 14(3):

9. (2) Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

14. (3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

Body of Principles, Principles 10 and 12:

10. Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.

12. (1) There shall be duly recorded:

(a) The reasons for the arrest;

...

(2) Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.

Tokyo Rules, Rule 7.1:

7.1 Basic procedural safeguards such as...the right to be notified of the charges...shall be guaranteed at all stages of proceedings.

Interpretation

Interpreting the *ICCPR*, in *CCPR General Comment No. 32*, the HR Committee states:

The right of all persons charged with a criminal offence to be informed promptly and in detail in a language which they understand of the nature and cause of criminal charges brought against them, enshrined in paragraph 3 (a), is the first of the minimum guarantees in criminal proceedings of article 14. This guarantee applies to all cases of criminal charges, including those of persons not in detention, but not to criminal investigations preceding the laying of charges. Notice of the reasons for an arrest is separately guaranteed in article 9, paragraph 2 of the Covenant. The right to be informed of the charge “promptly” requires that information be given as soon as the person concerned is formally charged with a criminal offence under domestic law, or the individual is publicly named as such...[original citations omitted]⁵⁵

Detainees must receive “prompt” information regarding the criminal charge made against them to enable them, in turn, “to request a prompt decision on the lawfulness of his or her detention by a competent judicial authority.”⁵⁶ In *Morrison v. Jamaica*, the HR Committee stated that a general refutation by the State was not adequate to disprove a detainee’s claim that he had not been informed of charges against him for three or four weeks after his arrest.⁵⁷ Nor does the HR Committee consider it sufficient under Article 9(2) simply to inform the person arrested and detained that the deprivation of liberty has been carried out on the orders of the President of the country concerned.⁵⁸

Arresting and detaining a person for a “presumed connection with subversive activities” without providing an explanation as to “the scope and meaning of ‘subversive activities’, which constitute a criminal offence under the relevant legislation”, is not sufficient justification for the purposes of the *ICCPR*, including Article 9(2).⁵⁹

G. The Right to a Prompt Review of the Lawfulness of Detention

Persons arrested or detained are entitled to take proceedings to challenge the lawfulness of their detention. The legality of the detention must be determined promptly and release ordered, if detention is found to be unlawful. “Lawfulness” includes compliance with the *ICCPR*. This judicial remedy must be “effectively available” to the detainee. A person detained on remand must be able to take proceedings at reasonable intervals to challenge the lawfulness of his detention.

⁵⁵ *CCPR General Comment No. 32*, *supra* note 25, at para. 31.

⁵⁶ HR Committee: Communication No. 248/1987, *Campbell v. Jamaica*, at para. 6.3.

⁵⁷ HR Committee: Communication No. 635/1995, *Morrison v. Jamaica*, at para. 21.2.

⁵⁸ HR Committee: Communication No. 414/1990, *Essono Mika Miha v. Equatorial Guinea*, at para. 6.5.

⁵⁹ HR Committee: Communication No. 33/1978, *Carballal v. Uruguay*, at paras. 12-13.

The legality of the detention must be determined by a court, which is independent and impartial, with the authority to review both the procedural and substantive grounds for the deprivation of liberty and to make a binding order for release, in the event of a determination that the detention is unlawful. The absence of an effective remedy to violations of the rights recognized under international human rights law is itself a violation of those laws.

As a member of the United Nations and as a signatory to the *ICCPR*, Viet Nam must guarantee the right of all persons arrested or detained to take proceedings to challenge the lawfulness of their detention, as set out in *UDHR*, Article 8; *ICCPR*, Articles 2(3) and 9(4); *Body of Principles*, 7 and 32; and *Basic Principles and Guidelines on the Right to a Remedy and Reparation*, paragraphs 11 and 12.

International Standards

UDHR, Article 8:

8. Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

ICCPR, Articles 2(3) and 9(4):

2. (3) Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

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.

Body of Principles, Principles 7 and 32:

7. (1) States should prohibit by law any act contrary to the rights and duties contained in these principles, make any such act subject to appropriate sanctions and conduct impartial investigations upon complaints.

(2) Officials who have reason to believe that a violation of this Body of Principles has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial powers.

(3) Any other person who has ground to believe that a violation of this Body of Principles has occurred or is about to occur shall have the right to report the matter to the superiors

of the officials involved as well as to other appropriate authorities or organs vested with reviewing or remedial powers.

32. (1) A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.

(2) The proceedings referred to in paragraph 1 of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.

Basic Principles and Guidelines on the Right to a Remedy and Reparation, paragraphs 11 and 12:

11. Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law:

- (a) Equal and effective access to justice;
- (b) Adequate, effective and prompt reparation for harm suffered;
- (c) Access to relevant information concerning violations and reparation mechanisms.

12. A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws...

14. An adequate, effective and prompt remedy for gross violations of international human rights law or serious violations of international humanitarian law should include all available and appropriate international processes in which a person may have legal standing and should be without prejudice to any other domestic remedies.

Interpretation

The right to challenge the lawfulness of one's deprivation of liberty must be effectively available. The HR Committee has found a violation of *ICCPR* Article 9(4) when a person was held incommunicado and effectively barred from challenging his arrest and detention.⁶⁰

Similarly, where a lack of access to legal representation throughout his detention prevented an individual from, in principle, applying for a writ of habeas corpus, the HR Committee held that his detention was a violation of Article 9(4) of *ICCPR*.⁶¹ In Communication No. 9/1977, *Valcada v. Uruguay*, Valcada was arrested on "grounds of a grave and imminent danger to security and

⁶⁰ HR Committee: Communication No. 84/1981, *Guillermo Ignacio Dermitt Barbato et al. v. Uruguay*, at para. 10.

⁶¹ HR Committee: Communication No. 330/1988, *Berry v. Jamaica*, at para. 11.1.

public order.” Because the remedy of habeas corpus was inapplicable in principle, the HR Committee determined that he was denied an effective remedy to challenge his arrest and detention.⁶² However, in a case where there was no evidence that either the author of a communication to the HR Committee or his legal representative applied for a writ of habeas corpus, the Committee was unable to conclude that the author “was denied the opportunity to have the lawfulness of his detention reviewed in court without delay”.⁶³

The review must be conducted by an independent, impartial and objective court with authority to order the detainee’s release, if unlawful

The HR Committee found that a right to appeal against a detention order to the Minister of the Interior, “while providing for some measure of protection and review of the legality of detention, does not satisfy the requirements of [ICCPR] article 9, paragraph 4, which envisages that the legality of detention will be determined by a court so as to ensure a higher degree of objectivity and independence in such control.”⁶⁴

Equality of arms

The concept of “equality of arms” denotes that a fair trial necessarily includes respect for the essential balance that must exist between the arms of the prosecution and the defence and respect for the principle of adversary proceedings.⁶⁵ The HR Committee held that the requirement for equality of arms was not met when “the accused is denied the opportunity to personally attend the proceedings, or where he is unable to properly instruct his legal representative. In particular, the principle of equality of arms is not respected where the accused is not served a properly motivated indictment.”⁶⁶

The lawfulness of detention is determined under domestic law and international law

Article 9(4) of the ICCPR governs the granting of compensation for arrest or detention that is “unlawful” either under domestic law or within the meaning of the Covenant.⁶⁷

The court must rule speedily on the legality of detention

The HR Committee emphasized, in *Torres v. Finland*, that, to ensure compliance with the ICCPR

as a matter of principle, the adjudication of a case by any court of law should take place as expeditiously as possible. This does not mean, however, that precise deadlines for the handing down of judgements may be set which, if not observed, would necessarily justify the conclusion that a decision was not reached “without delay”. Rather, the question of whether a decision was reached without delay must be assessed on a case by case basis.⁶⁸

⁶² HR Committee: Communication No. 9/1977, *Valcada v. Uruguay*, at para. 12.

⁶³ HR Committee: Communication No. 373/1989, *Stephens v. Jamaica*, at para. 9.7.

⁶⁴ HR Committee: Communication No. 291/1988, *Torres v. Finland*, at para. 7.2.

⁶⁵ *Campbell v. Jamaica*, *supra* note 57, at para. 6.5

⁶⁶ HR Committee: Communication No. 289/1988, *Dieter Wolf v. Panama*, at para. 6.6.

⁶⁷ HR Committee: Communication No. 1128/2002, *Marques v. Angola*, at para. 6.6.

⁶⁸ *Torres v. Finland*, *supra* note 65, at para. 7.3.

H. Right to Compensation for Unlawful Deprivation of Liberty

Individuals deprived of their liberty through unlawful arrest or detention have an enforceable right to compensation.

As a member of the United Nations and as a signatory to the *ICCPR*, Viet Nam is obligated to guarantee the right of all persons deprived of their liberty through unlawful arrest or detention to compensation, in accordance with *ICCPR*, Article 9(5); *Body of Principles*, 35; and *Basic Principles and Guidelines on the Right to a Remedy and Reparation*, paragraph 18.

International Standards

ICCPR, Article 9(5):

9. (5) Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Body of Principles, Principle 35:

35. (1) Damage incurred because of acts or omissions by a public official contrary to the rights contained in these principles shall be compensated according to the applicable rules or liability provided by domestic law.

(2.) Information required to be recorded under these principles shall be available in accordance with procedures provided by domestic law for use in claiming compensation under the present principle.

Basic Principles and Guidelines on the Right to a Remedy and Reparation, paragraph 18:

18. In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

Interpretation

The HR Committee, in *CCPR General Comment No. 31*, states that *ICCPR*

Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee

notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.⁶⁹

Conclusions

The Government of Viet Nam has failed in its legal obligations to protect and ensure the internationally protected rights of Le Quoc Quan to:

- freedom from arbitrary detention;
- liberty;
- the presumption of innocence;
- prompt and regular judicial review and determination of the legality of detention;
- pre-trial release; and
- reparation for suffering caused by unlawful detention.

The Government of Viet Nam has failed to ensure that Mr. Quan was brought regularly, or at all, before a judicial official for the review and determination of the legality of his pre-trial detention. Such failure constitutes a continuing violation of the ICCPR.⁷⁰

Recommendations

LRWC calls on the Government of Viet Nam to:

- release Le Quoc Quan immediately and unconditionally;
- ensure that Le Quoc Quan is able to effectively access his right to a remedy in accordance with international law and that he is provided with just compensation for the arbitrary detention which he suffered; and
- take such other steps as are necessary to prevent further violations of Le Quoc Quan's freedom to participate in public life and his rights to freedom of expression, association and assembly as recognized and guaranteed by the *ICCPR* and the *UDHR*.

Note to Reader: For additional reading see, *Pre-trial release and the right to be presumed innocent: A handbook on international law rights to pre-trial release*, Lois Leslie, Lawyers Rights Watch Canada, March 2013.

Available online at <http://www.lrwc.org/handbook-pre-trial-release-and-the-right-to-be-presumed-innocent/>

⁶⁹ HR Committee, *CCPR General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add. 13, para. 16, online at: <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

⁷⁰ HR Committee: Communication No. 521/1992, *Vladimir Kulomin v. Hungary*, at para. 11.3.