

# 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

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Friday, January 9, 2016

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44 Yet Kieu Street, Hoan Kiem district  
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Pham Binh Minh  
Minister of Foreign Affairs  
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Dear Ministers:

## Re: Arbitrary Arrest and Incommunicado Detention of Nguyễn Văn Đài and Lê Thu Hà

Lawyers' Rights Watch Canada (LRWC) and other non-government international human rights organizations are concerned that the 16 December 2015 arrest and incommunicado detention of **Nguyễn Văn Đài** and **Lê Thu Hà** violate international human rights laws and put **Nguyễn Văn Đài** and **Lê Thu Hà** at grave risk of torture and other prohibited treatment at the hands of Vietnamese authorities. This treatment coupled with the charges against them irreparably compromised their rights to a fair trial. LRWC requests the immediate release of **Nguyễn Văn Đài** and **Lê Thu Hà** and withdrawal of charges followed by the investigation and remediation of their wrongful detention and treatment.

**Nguyễn Văn Đài** is a lawyer and the founder of the Brotherhood for Democracy. **Lê Thu Hà**, is a human rights activist and the secretary of the Brotherhood for Democracy. Both are well known for their contributions to peaceful human rights education and advocacy—work specifically protected by the United Nations (UN) instruments including the *Universal Declaration of Human Rights* (UDHR) *International Covenant on Civil and Political Rights* (ICCPR) and the *Declaration on Human Rights Defenders*.<sup>1</sup> Neither is known to have engaged in any activities not protected by these instruments or activities that could reasonably be considered criminal.

Viet Nam is a signatory to the *International Covenant on Civil and Political Rights* (ICCPR)<sup>2</sup> and the *International Convention on the Elimination of all Forms of Racial Discrimination*

<sup>1</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>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>.

(CERD)<sup>3</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 *Universal Declaration of Human Rights* (UDHR)<sup>4</sup> 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 obliged 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>

**Nguyễn Văn Đài** and **Lê Thu Hà** were both arrested on 16 December 2016: **Nguyễn Văn Đài** while en route to meet with European Union representatives, and **Lê Thu Hà** at her office. Both are being detained incommunicado (in B14 prison in Ha Noi) and are being denied access to legal counsel and visits by family members. In addition to holding the two incommunicado, Viet Nam authorities have refused to approve the application by a Vietnamese lawyer to act as defense counsel for **Nguyễn Văn Đài**.

Viet Nam authorities rely on the Viet Nam’s *Criminal Procedures Code* Article 81 as the legal basis for the arrests and detentions. The *Criminal Procedures Code* purports to authorize the arbitrary arrest and detention of any person believed to be “preparing to commit very serious or exceptionally serious offences.” There are no known grounds to believe that either **Nguyễn Văn Đài** or **Lê Thu Hà** were ever engaged in committing or preparing to commit any criminal offence. Neither **Nguyễn Văn Đài** nor **Lê Thu Hà** has been brought before a court to test the legality of their detention or to apply for pre-trial release as required by the provisions of the ICCPR and other UN instruments.

Both **Nguyễn Văn Đài** or **Lê Thu Hà** were subsequently charged under Article 88 of the *Penal Code* with ‘conducting propaganda against Viet Nam’, an offence that violates international standards of certainty for criminal offences and must be considered as void for vagueness. The broad and vague language of Article 88 potentially criminalizes internationally protected activities such as all peaceful expression that could be characterized as critical, or potentially critical, of the Government of Viet Nam. Criminal offences must be worded with sufficient precision and certainty: a) to give fair notice that certain conduct is prohibited and b) to prevent arbitrary arrests and convictions and uncontrolled discretion by police and the judiciary. Article 88 prevents both foreknowledge and defense, thereby allowing arbitrary arrests and automatic convictions. As expressed by the Supreme Court of Canada, “[a] law must not be so devoid of precision in its content that a conviction will automatically flow from the decision to prosecute.”<sup>6</sup>

#### **Article 88.- Conducting propaganda against the Socialist Republic of Vietnam**

1. Those who commit one of the following acts against the Socialist Republic of Vietnam shall be sentenced to between three and twelve years of imprisonment:
  - a) Propagating against, distorting and/or defaming the people’s administration;
  - b) Propagating psychological warfare and spreading fabricated news in order to

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<sup>3</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>4</sup> *Universal Declaration of Human Rights* (UDHR), adopted 10 Dec. 1948, online <http://www.un.org/en/documents/udhr/index.shtml>.

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

<sup>6</sup> *R v Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at 636.

- foment confusion among people;
- c) Making, storing and/or circulating documents and/or cultural products with contents against the Socialist Republic of Vietnam.
2. In the case of committing less serious crimes, the offenders shall be sentenced to between ten and twenty years of imprisonment.

Recognizing that these provisions violate internationally protected rights, the UN Human Rights Council 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>

The arrest and detention of **Nguyễn Văn Đài** and **Lê Thu Hà** constitute continuing violations of their rights recognized and guaranteed by the ICCPR; the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (CAT); 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;
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, CAT art. 1, and UDHR, art. 5.

The arrest and detention of **Nguyễn Văn Đài** and **Lê Thu Hà** appear to have been carried out to suppress and punish their lawful exercise of internationally protected rights to expression, association and participation in the conduct of public affairs, 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).

The fact that Viet Nam has invoked Articles 81 of the *Criminal Procedures Code* and 88 of the *Penal Code* does not validate the arrest or the detention of either **Nguyễn Văn Đài** or **Lê Thu Hà**. The UN Human Rights Committee (HR Committee) in General Comment 32 has made it clear that adherence to domestic law does not alone, make an arrest or detention legitimate.

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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.

An arrest or detention may be authorized by domestic law and nonetheless be arbitrary. The notion of “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 well as elements of reasonableness, necessity and proportionality. For example, remand in custody on criminal charges must be reasonable and necessary in all the circumstances. Aside from judicially imposed sentences for a fixed period of time, the decision to keep a person in any form of detention is arbitrary if it is not subject to periodic re-evaluation of the justification for continuing the detention.<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** and **Lê Thu Hà** to fair trials. International human rights jurisprudence has determined that the duty of a State to ensure and protect the right to a fair trial implies a set of obligations. Firstly, State officials must allow lawyers the contact with clients necessary to the preparation and presentation of a full defense. Articles 7, 8, and 14 of the ICCPR have been interpreted by the HR Committee to give detainees the right to consult a lawyer from the moment of arrest.<sup>9</sup> The HR Committee has concluded that all laws that allow for incommunicado detention violate Articles 7, 9, and 10 of the ICCPR.<sup>10</sup> The Special Rapporteur on torture stated similarly that “all detainees should be effectively guaranteed the ability to challenge the lawfulness of their detention before an independent court ... and have an effective right to have access to legal counsel.”<sup>11</sup> The importance of timely access was emphasized by the European Court of Human Rights (ECtHR) in *Magge v. UK*, ECHR, 6 June 2000 at para. 44, wherein the Court determined that denial by state authorities of a detained person’s access to counsel for a period of 48 hours violated and could irretrievably prejudice the accused’s right to a fair trial.

The Constitution of the Socialist Republic of Viet Nam (“the Constitution”) protects the right to participate in public affairs<sup>12</sup> and the right to freedom of expression, thought, religion and association.<sup>13</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 United Nations documents prepared by the Human Rights Council Working Group on the Universal Periodic

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<sup>8</sup> HR Committee General Comment 35, Article 9 (Liberty and Security of the Person) CCOR/C/GC/35, 16 December 2014.

<sup>9</sup> Human Rights Committee, Consideration of Reports Submitted by State Parties under Article 40 of the CCPR/CO/84/TJK (18 July 2005) para 17. See also Human Rights Council, Implementation of the General Assembly Resolution 60/251 of 15 March 2006 Entitled Human Rights Council, forth sess., A/HRC/4/33/Add.3, 5 January 2007, at para 72. See also the General Assembly, Promotion and Protection of All Seventh sess., A/HRC/7/3/Add.4, 22 November 2007 at para 75.

<sup>10</sup> Human Rights Committee, Consideration of reports submitted by state parties under Article 40 of the Covenant concluding observations of the Rights Right Committee Switzerland, 73rd sess., CCPR/CO/73/CH (12 November 2001) at para. 14.

<sup>11</sup> Human Rights Council, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development, A/HRC/7/3/Add.3, 1 October 2007 at para 90.

<sup>12</sup> *Constitution of the Socialist Republic of Viet Nam* (15 April 1992), Article 53, <http://www.unhcr.org/refworld/docid/3ae6b573c.html>

<sup>13</sup> *Ibid.*, Articles 69-70.

Review, for the 2009 First Periodic Review of Viet Nam,<sup>14</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>15</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>16</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>17</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>18</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 Covenant.<sup>19</sup> 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.<sup>20</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>21</sup>

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Repression of Rights Activists

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<sup>14</sup> 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](http://lib.ohchr.org/HRBodies/UPR/Documents/Session5/VN/A_HRC_WG6_5_VNM_2_E.pdf)

<sup>15</sup> *Ibid.*, para. 38, referencing: E/CN.4/2006/55/Add.1, paras. 1110; A/HRC/7/14/Add.1, paras. 734-736.

<sup>16</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>17</sup> *Ibid.*, para. 39, referencing: A/HRC/7/4/Add.1, opinion No. 13/2007, pp. 92-96.

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

<sup>19</sup> *Ibid.*, para. 27, referencing: CCPR/CO/75/VNM, para. 8.

<sup>20</sup> *Ibid.*, referencing: CCPR/CO/75/VNM, para. 12.

<sup>21</sup> Human Rights Watch, *World Report 2012: Vietnam*, p. 382, online <http://www.hrw.org/world-report/2013>.

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>22</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.

...

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>23</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, the 2012 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.<sup>24</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 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

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<sup>22</sup> Amnesty International, *Silenced Voices: Prisoners of Conscience in Viet Nam* (2013), online <http://www.trust.org/item/20131107121444-4aqei/asa410072013en-1.pdf>

<sup>23</sup> *Ibid.*, p. 5.

<sup>24</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>  
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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>25</sup>

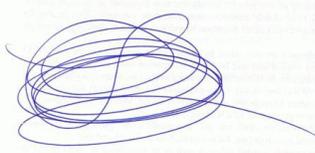
The WGAD, in its November 2013 Opinion ([A/HRC/WGAD/2013](#)), concluded that lawyer and human rights activist and commentator Le Quoc Quan had been held incommunicado for two months when first arrested and thereby deprived of timely access to his lawyer and his right to a fair trial and that his detention 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** and **Lê Thu Hà** the wording of the charges under Article 88 of the *Penal Code* alone deprives them of any opportunity for a fair trial.

The rights of **Nguyễn Văn Đài** and **Lê Thu Hà** to a fair trial to determine the charges against them have been irremediably compromised by the actions of the Government of Viet Nam in detaining the lawyers incommunicado, denying the due process required by law and violating their internationally protected rights. 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.

LRWC urges the Government of Viet Nam to take the remedy required by law and ensure the:

1. Cessation of the prosecution through the charges being withdrawn or stayed; and
2. Immediate release of **Nguyễn Văn Đài** and **Lê Thu Hà**.

Sincerely,



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<sup>25</sup> *Ibid*, para. 41.

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