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FREEDOM FROM EXILE - INTERNATIONAL LAW

Viet Nam and the exile of Nguyễn Văn Đài and Lê Thu Hà

Draft Working Paper¹

INTRODUCTION

This paper examines the right to return to and live in one's own country as part of the right to liberty guaranteed by the *Universal Declaration on Human Rights* and other instruments. Freedom from exile is specifically guaranteed by the *Universal Declaration on Human Rights* (UDHR) in Article 9 which provides that "No one shall be subjected to arbitrary arrest, detention or exile." Rights violated by exile or expulsion from one's own country include rights to liberty, freedom from arbitrary detention, freedom of movement, family life, participate in the conduct of public affairs in one's own country, be treated with humanity, work, equality and non-discrimination, freedom from cruel, inhuman and degrading punishment, or treatment and remedies for violations, all of which are protected by a variety of international treaties and other instruments including the *International Covenant on Civil and Political Rights*.

The exile of Nguyễn Văn Đài was arbitrary and prohibited by the *Universal Declaration on Human Rights* as it was not imposed according to a restriction on liberty established by law, was not necessary or proportionate and was not imposed in compliance with Viet Nam's international human rights law obligations.

This paper identifies some of the international human rights treaties and other instruments that ensure the right of individuals to freedom from exile and expulsion and to enter or return to his/her own country. Provisions of treaties are binding on States that have ratified or acceded to each treaty. Standards identified in other instruments are binding on states to the extent that they enunciate principles contained in international treaties or reflect customary international law. Principles, guidelines, standards, and recommendations that are not binding *per se*, serve as guidance for States of the practice required by international law and should be respected by States.

The relevant UN instruments in relation to the international law obligations of Viet Nam to ensure the right to freedom from exile and expulsion and the right to return to one's own country include: the *Universal Declaration of Human Rights* (UDHR)², *International Covenant on Civil*

¹ Prepared for LRWC by Gail Davidson, Joshua Lam and Aliya Virani.

² *Universal Declaration of Human Rights*, adopted 10 Dec. 1948, online at:

<http://www.un.org/en/documents/udhr/index.shtml>.

and Political Rights (ICCPR),³ Convention on the Rights of the Child (CRC),⁴ International Convention on the Elimination of All Forms of Racial Discrimination (CERD),⁵ Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (UNCAT),⁶ Vienna Declaration and Programme of Action, Vienna Convention on the Law of Treaties,⁷ United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (“Body of Principles”)⁸, United Nations Standard Minimum Rules for Non-custodial Measures (“The Tokyo Rules”)⁹, 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”).¹⁰

Expulsion from one’s own country is specifically prohibited by the both *American Convention on Human Rights*, Article 22, *the European Convention on Human Rights*, Article 3 and the *African Charter on Human and Peoples Rights*, Article 12.

The June 2018 exile by Viet Nam of Nguyễn Văn Đài and Lê Thu Hà was arbitrary and contrary to the UDHR, the ICCPR and other relevant instruments. There was no legal justification for Viet Nam to exile Nguyễn Văn Đài and Lê Thu Hà from Viet Nam to Germany. Viet Nam apparently offered exile to Germany as an alternative to Nguyễn Văn Đài and Lê Thu Hà serving prison sentences in Viet Nam of 15 and nine years respectively.

BACKGROUND

Exile Of Nguyễn Văn Đài From Viet Nam

Nguyễn Văn Đài is a prominent Vietnamese human rights lawyer, an active blogger, a human rights educator, and a leading advocate for multiparty democracy. He has established a number of organizations that provide training to community members on their legal rights and has met

3 International Covenant on Civil and Political Rights, 16 Dec. 1966, U.N. Doc. A/6316, 999 U.N.T.S. 171, entered into force 23 March 1976, acceded to by Viet Nam 24 September 1982. Online at:

<http://www2.ohchr.org/english/law/ccpr.htm>.

4 *Convention on the Rights of the Child*, adopted 20 Nov. 1989, entered into force 2 Sept. 1990, UN Doc. A/44/49, at 166 (1989), ratified by Viet Nam 28 February 1990. Online at: <http://www2.ohchr.org/english/law/crc.htm>.

5 *International Convention on the Elimination of All Forms of Racial Discrimination*, adopted 21 December 1965, entered into force 4 January 1969, 660 U.N.T.S. 195, acceded to by Viet Nam 9 June 1982. online at:

<http://www2.ohchr.org/english/law/cerd.htm>.

⁶ Un General Assembly *Convention against Torture and other cruel, inhuman and degrading treatment or punishment*, 10 December 1984, UN Treaty Series vol. 1465, p. 85. Ratified by Viet Nam 5 February 2015.

⁷ *Vienna Convention on the Law of Treaties (VCLT)*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, acceded to by Viet Nam 10 October 2001/ <http://hrlibrary.umn.edu/instree/viennaconvention.html>, states that a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” A State’s obligation to perform its treaty obligations in good faith extends to interpretation of the scope of the treaty.

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

<http://www2.ohchr.org/english/law/bodyprinciples.htm>.

9 *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 at:

<http://daccess-ods.un.org/TMP/7960160.97068787.html>.

10 *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* adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, online at:

<http://www2.ohchr.org/english/law/remedy.htm>.

with international delegations to discuss the state of human rights protection in Viet Nam. He is a citizen of Viet Nam, usually residing in Hanoi. Mr. Nguyễn has faced harassment, surveillance, imprisonment, and acts of violence for more than 10 years as a consequence of his human rights work in Viet Nam. Prior to 2007, he worked as a human rights lawyer representing clients in court to defend their right to religious freedom. He also co-founded the Committee for Human Rights in Viet Nam, a civil society organization dedicated to building the capacity of human rights defenders. In March 2007, he was charged and convicted of “conducting propaganda against the Socialist Republic of Viet Nam” pursuant to article 88 of the Penal Code of Viet Nam,¹¹ and his license to practice law was revoked. He was detained for eight years from March 2007 until March 2015, both in prison and under house arrest. Mr. Nguyễn continued his human rights work while under house arrest. In April 2013, he co-founded “Brotherhood for Democracy,” an organization to support the development of a just society in Viet Nam and to provide training to community members on human rights topics in Viet Nam.¹² He was arrested on 16 December 2015 while en route to meet with a European Union delegation. The government of Viet Nam stated that suspicion of ‘conducting propaganda against Viet Nam’ was the reason for detention. He was detained incommunicado without contact with family or access to a lawyer of choice.

LRWC, the Media Legal Defence Initiative (MLDI), Lawyers for Lawyers (L4L), PEN International, and Viet Tan filed a complaint to the United Nations (UN) Working Group on Arbitrary Detention (WGAD) on 25 November 2016 alleging that the arrest and detention of Nguyễn Văn Đài were arbitrary and violated internationally protected rights to expression, association, participation in public affairs, the practice of law, freedom from arbitrary detention, pre-trial release, the presumption of innocence, timely and confidential access to counsel, and the right to a hearing before an impartial, independent, and competent tribunal.¹³

LRWC, L4L, MLDI, PEN International, and Viet Tan filed a joint response on 18 April 2017¹⁴ to submissions made by Viet Nam in response to the Joint Petition filed by the parties on 25 November 2016. The joint response stated that the Vietnamese law relied on by Viet Nam did not provide a legal justification for the detention and that Nguyễn Văn Đài’s detention was arbitrary both under Vietnamese and international law.

The WGAD Opinion (A/HRC/WGAD/2017/26), released on 8 June 2017,¹⁵ concluded that the detention of Nguyễn Văn Đài was arbitrary under categories I, II, III and IV and was the result of

¹¹ Penal Code- Sect 88. 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 foment confusion among people;
- c) Making, storing, and/or circulating documents and/or cultural products with contents against the Socialist Republic of Vietnam.

¹² Opinions adopted by the Working Group on Arbitrary Detention at its seventy-eighth session, 19-28 April 2017 Opinion No. 26/2017 concerning Nguyen Van Dai (Viet Nam).

¹³ See the full submission here: <https://www.lrwc.org/ws/wp-content/uploads/2016/11/UNWGAD.Nguyen-Van-Dai-.25.Nov..16.pdf>

¹⁴ See the full submission here: <https://www.lrwc.org/ws/wp-content/uploads/2017/04/20170418-FINAL-Observations-on-the-Governments-Reply-re-Nguyen-Van-Dai.pdf>

¹⁵ See full WGAD opinion here: https://www.lrwc.org/ws/wp-content/uploads/2017/06/A_HRC_WGAD_2017_26.pdf

Mr. Nguyễn's lawful exercise of rights to expression, assembly, and association. Taking into account the circumstances of the case and the risk of irreparable harm to Mr. Nguyễn's health and physical integrity, the WGAD concluded that "the appropriate remedy would be to release [Nguyễn Văn Đài] immediately, and accord him an enforceable right to compensation and other reparations, in accordance with international law."¹⁶ The WGAD also cautioned that "under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of the rules of international law may constitute crimes against humanity."¹⁷

The WGAD requested the Government of Viet Nam "to take the steps necessary to remedy the situation of Nguyễn Văn Đài without delay and bring it into conformity with the relevant international norms." Viet Nam did not comply with the WGAD requests, and Nguyen Van Dai remained in detention.

On 29 November 2017, LRWC, L4L, MLDI, Pen International and Viet Tan filed a further report with the WGAD, because Nguyễn Văn Đài remained in detention, and Viet Nam had added to the original charge of "propaganda against the state," an additional illegitimate charge of "attempting overthrow of government."¹⁸

On 5 April 2018, a Hanoi court in a one-day proceeding involving six defendants, summarily convicted Nguyễn Văn Đài, Trương Minh Đức, Nguyễn Trung Tôn, Nguyễn Bắc Truyển, Lê Thu Hà, and Phạm Văn Trội, and imposed sentences ranging from seven years in prison and one year probation to 15 years in prison and five years' probation. Nguyễn Văn Đài and his colleague, human rights activist Lê Thu Hà, were convicted of "carrying out activities aimed at overthrowing the people's administration." Nguyễn Văn Đài was sentenced to 15-years in prison and five years' probation. Lê Thu Hà, Secretary and translator for the Brotherhood for Democracy, was sentence to nine years in prison and two years' probation.

In response to the summary convictions, UN experts (Michel Forst, Special Rapporteur on the situation of human rights defenders; José Antonio Guevara Bermúdez, Chair of the Working Group on Arbitrary Detention; and David Kaye, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression) publically stated they were,

"deeply concerned at the way these peaceful campaigners have been treated and in particular over the use of Article 79 of the 1999 penal code of Viet Nam to charge and convict dissenting voices, mainly human rights defenders, especially as Article 79 carries the possibility of the death sentence or life imprisonment..."¹⁹

The UN experts were particularly concerned that Nguyễn Văn Đài, among others who are pro-democracy campaigners and members of the Brotherhood for Democracy movement, were held in pre-trial detention with very limited access to legal counsel, in a clear breach of international human rights standards, and that they were prosecuted in relation to their activities as human rights defenders and pro-democracy activists. Their statement urged Viet Nam "not to crack

¹⁶ *Supra*, at paras 70-71.

¹⁷ UNWGAD, *Nguyen Van Dai v. Government of the Socialist Republic of Viet Nam*, Opinion No. 26/2017, http://www.phchr.org/Documents/Issues/Detention/Opinions/Session78/A_f.

¹⁸ See the full submission here: <https://www.lrwc.org/ws/wp-content/uploads/2017/12/20171129-Letter-to-the-UNWGAD-under-Follow-Up-Procedure.pdf>

¹⁹ Viet Nam: UN experts call for change after jailing of rights defenders, 12 April 2018

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22937&LangID=E>

down on civil society to muzzle dissenting voices and stifle the people's rights to freedom of expression and peaceful assembly and association in violation of the country's obligations under international human rights law." They also called upon Viet Nam "to release all political prisoners and provide a safe and enabling environment for human rights defenders, in line with their international obligations and commitments."

On 7 June 2018, Nguyễn Văn Đài and Lê Thu Hà were released from prison for involuntary exile to Germany along with Nguyễn Văn Đài's wife, Vu Minh Khanh.

This is not the first time that Viet Nam has used exile as a tool for punishing dissent and removing human rights advocates from the country.²⁰ Viet Nam relies on overbroad Penal Code provisions to arbitrarily arrest, detain and convict human rights defenders and criminalize their work. For example, Article 109 (formerly Article 79) of the Penal Code was used to arbitrarily imprison and convict Nguyễn Văn Đài and Lê Thu Hà. Article 109 states: "Those who carry out activities, establish or join organizations with intent to overthrow the people's administration shall be subject to the following penalties." Article 109 of the Penal Code cannot provide a legal basis for conviction or punishment as it fails to comply with the international criminal law principle of legality.²¹ The principle of legality (*nullum crimen sine lege*) ensures that no crime or punishment can exist without a legal ground²² and that a person cannot be legitimately convicted for acts against which there are no enforceable laws²³ that provide notice of what is unlawful either before the impugned act takes place or before trial. Where any ambiguity exists in the definition of an offense, it must be interpreted in the interest of the defendant.²⁴ This requirement of certainty and notice has its basis in customary international law²⁵ and has been codified in many international instruments, including the UDHR Article 11(2) and the ICCPR Article 14 (3), 15. The charges against Nguyễn Văn Đài and Lê Thu Hà lacked certainty and precision, and prevented foreknowledge, notice, and objective determination of the proscribed behaviour.

The conviction and sentencing of Nguyễn Văn Đài and Lê Thu Hà also contravene the Constitution of Viet Nam which guarantees the right to freedom of speech, assembly, association, and to demonstrate under Article 25, as well as Article 17 which states that Vietnamese citizens may not be expelled. However, individuals' rights under the Constitution of Viet Nam are limited by Article 14, which states that human rights and citizens' rights are only limited "in case of necessity for reasons of national defense, national security, social order and safety, social morality, and community well-being."²⁶

²⁰ See also: <https://apnews.com/d2f5735385404752bbba33e6074f5371>

²¹ Crisan, Iulia, "The Principle of Legality "*Nullum crimen, nulla poena sine lege*" and Their Role" in Effectus Newsletter, Issue 5 (2010); Olasolo, Hector, "A Note on the Evolution of the Principle of Legality in International Criminal Law" in Criminal Law Forum 18:301-319 (2007)

²² Lincoln, Jennifer, "*Nullum Crimen Sine Lege* in International Criminal Tribunal Jurisprudence: the problem of the residual category of crime," 7 Eyes on the ICC 137 2010-2011

²³ Ja'far Habibzadeh, Dr. Mohammad, "*Nullum Crimen, Nulla Poena Sine Lege*: with an approach to the Iranian legal system," International Journal of Punishment and Sentencing 2(1)(2006) 33-45, at 37-38.

²⁴ Sekuloski, Dr. Branko, "International Criminal Court," in European Scientific Journal vol.9, no. 28 (2013)

²⁵ Wharton, Sara, "The Evolution of International Criminal Law: Prosecuting "New" Crimes Before the Special Court for Sierra Leone" in International Criminal Law Review 11 (2011) 217-239

²⁶ English translation of the Constitution of Viet Nam (2013) at <https://vietnamnews.vn/politics-laws/250222/the-constitution-of-the-socialist-republic-of-viet-nam.html>

By subjecting Nguyễn Văn Đài and Lê Thu Hà to detention and then to exile as the alternative to continued detention, Viet Nam is violating its constitutional law in addition to the international covenants and standards including those set out in the UDHR, ICCPR, UNCAT and ICESCR.

INTERNATIONAL HUMAN RIGHTS LAW

Arbitrary – International law definition

When determining the mandate of the UN Working Group on Arbitrary Detention, the UN Commission on Human Rights defined arbitrariness in relation to deprivation of liberty as any deprivation of liberty that is contrary to relevant international provisions laid down in the UDHR or in the relevant international instruments ratified by States.²⁷ Arbitrariness has been further defined as deprivation of liberty that is not authorized by law or that is inappropriate, lacks predictability, or is imposed without due process of law. The scope of the ICCPR Article 9(10) prohibitions on arbitrary detention and exile has been interpreted by the UN Human Rights Committee (HR Committee), as

- “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.”²⁸ and,
- requiring that the grounds for detention must be clearly established by domestic legislation and made in accordance with that law;²⁹

The UN Human Rights Committee (HR Committee), has also determined 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...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.³⁰

The United Nations Human Rights System

International Covenant on Civil and Political Rights (UDHR)

As a member of the UN (20 September 1977), Viet Nam has agreed to respect the provisions of the UDHR including the prohibition of exile, guarantee of the right to enter one's country and freedom from cruel, inhuman or degrading treatment or punishment.

Article 5

No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

²⁷ Resolution 1991/42, as clarified by resolution 1997/50).

²⁸ UN Human Rights Committee (HRC), *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.unhcr.ch/tbs/doc.nsf/%28Symbol%29/f4253f9572cd4700c12563ed00483bec?Opendocument>.

²⁹ Communication No. 702/1996, *Clifford McLawrence v. Jamaica*, at para. 5.5; Communication No. 770/1997, *Dimitry L. Gridin v. Russian Federation*, at para 8.1.

³⁰ HR Committee in *Albert Womah Mukong v. Cameroon*, *Communication No. 458/1991*, at para. 9.8

Exile - International Law Prohibitions

Article 13.2

Everyone has the right to leave any country, including his own, and to return to his country. *As a member of ASEAN (28 July 1995, Viet Nam has accepted to be bound by the ASEAN Human Rights Declaration.*³¹ *The Preamble confirms that Viet Nam and other member states affirm “commitment to the Universal Declaration of Human Rights, the Charter of the United Nations and other international human rights instruments to which ASEAN members are parties;” By Article 10 ASEAN member further affirm “all the civil and political rights” in the UDHR.*

International Covenant on Civil and Political Rights (ICCPR)

Although the ICCPR does not specifically mention exile (see General Comment NO. 35),

Article 7

No one shall be subjected to torture or to cruel inhuman or degrading treatment or punishment.

Article 12 on liberty of movement and the right to enter one's own country guarantees:

Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. [Art. 12(1)]

No one shall be arbitrarily deprived of the right to enter his own country. [Art. 12(4)]

Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, (UNCAT)

Viet Nam ratified UNCAT subject only to the following Declarations

“The Socialist Republic of Viet Nam declares, in accordance with article 28 paragraph 1³², that it does not recognize the competence of the Committee provided for in article 20, and in accordance with article 30, paragraph 2³³, that it does not consider itself bound by article 30, paragraph 1.; and

The Socialist Republic of Viet Nam does not consider the Convention as the direct legal basis for extradition in respect of the offences referred to in Article 4 of the Convention. Extradition shall be decided on the basis of extradition treaties to which Viet Nam is a party or the principle of reciprocity, and shall be in accordance with Vietnamese laws and regulations.”

The UNCAT contemplates expulsion as a form of other acts of cruel, inhuman, or degrading treatment or punishment, which does not amount to torture as defined in its Article 1³⁴.

³¹ ASEAN Human Rights Declaration, 18 November 2012,

³² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted and opened for signature and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987, in accordance with article 27 (1): Article 28. Paragraph 1. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not recognize the competence of the Committee provided for in article 20.

³³ *Supra*, Article 30. Paragraph 2. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by paragraph I of this article. The other States Parties shall not be bound by paragraph I of this article with respect to any State Party having made such a reservation.

³⁴ *Supra*, Article 1. Paragraph 1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the

- Article 16 on expulsion:

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment. [Art. 16(1)]

The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law, which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion. [Art. 16(2)]

The International Covenant on Economic, Social and Cultural Rights (ICESCR)

The ICESCR does not specifically mention exile but recognizes that, in accordance with the UDHR, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy economic, social and cultural as well as civil and political rights.

Article 1 on the right to self-determination and political status:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. [Art. 1(1)]

Article 6

Everyone has the right to work, including the right to gain one's living at work that is freely chosen and accepted.

The Vienna Declaration and Programme of Action

- Article 23 on the right to return to one's own country:

The World Conference on Human Rights reaffirms that everyone, without distinction of any kind, is entitled to the right to seek and to enjoy in other countries asylum from persecution, as well as the right to return to one's own country. [Art. 23]

The Vienna Convention on the Law of Treaties

Viet Nam is prohibited from relying on Penal Code provisions to arbitrarily restrict or deny rights guaranteed by treaties to which Viet Nam is a party. The Vienna Convention on the Law of Treaties³⁵ to which Viet Nam is a State Party (acceded 10 October 2001) imposes in Article 26 a mandatory duty to comply with treaty obligations. Article 27 specifically prohibits a State Party from invoking "the provisions of its internal law as justification for its failure to perform a treaty."

consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

³⁵ *Vienna Convention on the Law of Treaties* (VCLT), 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, acceded to by Viet Nam 10 October 2001/ <http://hrlibrary.umn.edu/instate/viennaconvention.html>, states that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." A State's obligation to perform its treaty obligations in good faith extends to interpretation of the scope of the treaty.

UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings before a Court (Basic Principles)

The WGAD adopted the final version of the *United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of their Liberty to Bring Proceedings Before a Court* (The UN Basic Principles and Guidelines) in its 72nd session which was concluded on 29 April 2015 in Geneva. The UN Basic Principles and Guidelines are based on international law, standards and recognized good practice, and are intended to provide States with guidance on fulfilling, in compliance with international law, their obligation to avoid the arbitrary deprivation of liberty.

The UN Basic Principles and Guidelines state that the right to challenge the lawfulness of detention before a court is a self-standing human right, the absence of which constitutes a human rights violation. It is a judicial remedy designed to protect personal freedom and physical integrity against arbitrary arrest, detention, including secret detention, exile, forced disappearance or risk of torture and other cruel, inhuman or degrading treatment or punishment.

Victims of arbitrary or unlawful detention as outlined by the UN Basic Principles and Guidelines shall have an enforceable right before the competent domestic authority to prompt and adequate restitution, rehabilitation, satisfaction and guarantees of non-repetition, in accordance with the 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. [Guideline 16 (92)]³⁶

HR Committee Jurisprudence

The HR Committee has determined that State Parties to the ICCPR “must not, by stripping a person of nationality or expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country”³⁷ (emphasis added).

In its third review of Viet Nam’s compliance with the ICCPR, the HR Committee specifically rejected Viet Nam’s use of exile and recommended that,

[Viet Nam] should refrain from forcing citizens into exile and respect their right to be protected against any action impeding their access to or stay in its territory in accordance with article 12 (4) and general comment No. 27 (1999) on freedom of movement. The State party should guarantee full respect for the freedom to leave one’s country, including by repealing article 91 of the Penal Code; refrain from arbitrarily imposing travel bans; ensure that any travel ban is justified under article 12 (3) of the Covenant; and lift bans incompatible with that article.³⁸

³⁶ Report of the Working Group on Arbitrary Detention: United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings before a Court, Thirtieth session Agenda item 3 Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. See: <https://www.ohchr.org/EN/Issues/Detention/Pages/DraftBasicPrinciples.aspx>

³⁷ HR Committee General Comment No. 27 Freedom of Movement (article 12), CCPR/C/21/Rev.1/Add.9, 1 November 1999 at para. 21.

³⁸ HR Committee, Concluding observations on the third periodic review of Viet Nam, CCPR/V/VN/CO/3, 28 March 2019, para. 42.

The HR Committee noted that Viet Nam's third periodic report was 13 years late. During part of this period Viet Nam was a member of the UN Human Rights Council. As a member of the UN Human Rights Council Viet Nam had accepted to be bound by certain obligations summarized below.

The mandate of the UN Human Rights Council is to (a) promote human rights education, (b) serve as a forum for dialogue on thematic issues in human rights, (c) make recommendations to the General Assembly on the development of international law in human rights, (d) promote full implementation of human rights by states, (e) undertake a universal periodic review, (f) contribute towards the prevention of human rights, (g) assume the role of the Commission on Human Rights in relation to the Office of the United Nations High Commissioner on Human Rights (h) work in cooperation with governments and regional organizations on human rights, (i) make recommendations with regard to the promotion and protection of human rights, and (j) submit an annual report to the General Assembly.³⁹ As a member Viet Nam accepted the mandatory obligation to “uphold the highest standards for the protection and promotion of human rights, must cooperate fully with the Council.”

The HR Committee⁴⁰ expressed concern with a number of other issues impacting human rights defenders. Human rights abuses of concern included: restriction of rights to expression, association, assembly and participation in public affairs and the lack of fair trials. The HR Committee expressed particular concern with Viet Nam's failure to ensure rights to remedy, freedom from arbitrary detention, fair trial and the freedom of association and stated, “[t]he Committee is particularly concerned of the case of lawyer Nguyen Van Dai (arts. 2, 9, 14 and 22).”⁴¹

The HR Committee identified arbitrary arrests and detention and incommunicado detention of human rights defenders, activists and religious leaders as a concern and recommended sweeping law and policy reform necessary to comply with the international law obligations of the ICCPR

Recalling its previous recommendation (CCPR/CO/75/VNM, para. 8), the Committee recommends that the State party bring its legislation and practice on detention into line with article 9 of the Covenant, in particular by ensuring that:

- (a) Persons arrested or detained on criminal charges have access to counsel from the outset of the deprivation of liberty, and are brought promptly before a judge or other officer authorized by law to exercise judicial power, ordinarily within 48 hours, in order to bring their detention under judicial control;
- (b) The judicial review of the detention of anyone deprived of his or her liberty satisfies the requirements of article 9 (4) of the Covenant and entails a review of the factual basis for the detention. The Committee draws attention to its general comment No. 35 (2014) on liberty and security of person, particularly to paragraphs 32, 33 and 39, indicating, inter alia, that a public prosecutor cannot be considered as an officer exercising judicial power under article 9 (3) of the Covenant.⁴²

Regarding the independence of the judiciary and fair trial, the HR Committee noted the factors undermining judicial independence and fair trial rights and made recommendations. Factor undermining

³⁹ Human Rights Council, A/Res/60/251, UNGAOR, 60th Sess, para 5. Online: Human Rights Council <http://www2.ohchr.org/english/bodies/hrcouncil/docs/A.RES.60.251_En.pdf>

⁴⁰ HR Committee, Concluding observations on the third periodic review of Viet Nam, CCPR/V/VN/CO/3, 28 March 2019, paras. 33, 36, 42 and 46.

⁴¹ *Ibid* at para. 35.

⁴² *Ibid* at para. 26.

fair trial rights included denial of timely and confidential access to a lawyer of choice, and lack of time and facilities to necessary to prepare a defense. The HR Committee also expressed concern

...at reports that lawyers representing human rights defenders, political activists and individuals accused of crimes related to national security face retaliation, disbarment, harassment, threats, arbitrary arrest and detention, and physical attacks, which undermines the right to a fair trial.⁴³

To remedy violations of fair trial rights the HR Committee recommended in paragraph 36 that Viet Nam ensure:

- (a) The right to a fair trial without undue delay, in accordance with article 14 of the Covenant and the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial;
- (b) That detainees have unhindered, prompt and adequate access to the lawyer of their choice or free legal aid from the outset of the detention, and that all communication between counsel and the accused remains confidential, and that the presumption of innocence is strictly observed;
- (c) That lawyers are able to advise and represent persons charged with criminal offences in accordance with generally recognised professional ethics, without restrictions, influence, pressure or undue interference from any quarter in line with the UN Basic Principles on the Role of Lawyers; and ensure investigation and prosecution of threats and attacks on lawyers and provide them with effective remedies.

Universal Periodic Review of Viet Nam

The Universal Periodic Review (UPR) is a process that involves a review of the human rights records of all UN Member States. The UPR is a State-driven process, under the auspices of the Human Rights Council, which provides the opportunity for each State to declare what actions they have taken to improve the human rights situations in their countries and to fulfil their human rights obligations. During the Universal Periodic Review of Vietnam in 2014, Canada's UPR recommendations were accepted by Vietnam. One of the five recommendations that Canada made in Geneva says that Vietnam must:

Amend the provisions concerning offences against national security which could restrict freedom of expression, including on the Internet, particularly articles 79, 88 and 258 of the Penal Code, to ensure its compliance with Viet Nam's international obligations, including the ICCPR.

The European Human Rights System

European Convention on Human Rights

- Article 3 on the prohibition of expulsion of nationals:

No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national. [Art. 3(1)]

No one shall be deprived of the right to enter the territory of the State of which he is a national. [Art. 3(2)]

European Parliament Resolutions

⁴³ *Ibid*, at paras. 33-36.

On 9 June 2016, the European Parliament, having regard to the statement of 18 December 2015 by the Spokesperson of the European External Action Service on the arrest of lawyer Nguyễn Văn Đà passed an urgent resolution,⁴⁴ listing 17 clear examples of Vietnam's gross violations of human rights, and made 19 recommendations. In Resolution 2, the Parliament:

“Calls on the Government of Vietnam to put an immediate stop to all harassment, intimidation, and persecution of human rights, social and environmental activists; insists that the government respect these activists’ right to peaceful protest and release anyone still wrongfully held; asks for the immediate release of all activists who have been unduly arrested and imprisoned such as Lê Thu Hà, Nguyễn Văn Đà, Trần Minh Nhật, Trần Huỳnh Duy Thức and Thích Quảng Độ.”

Additionally, Recommendation 16 of the EU Parliament resolution asks.

...the EU Delegation to use all appropriate tools and instruments to accompany the Government of Vietnam in these steps and to support and protect human rights defenders; underlines the importance of human rights dialogue between the EU and the Vietnamese authorities, especially if this dialogue is followed by real implementation; stresses that this dialogue should be effective and results-oriented.

The Inter-American Human Rights System

American Convention on Human Rights

- Article 22 on the right to freedom of movement and residence:

No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it [Art. 22(5)]

American Declaration on the Rights and Duties of Man

Article VIII. Every person has the right to fix his residence within the territory of the state of which he is a national, to move about freely within such territory, and not to leave it except by his own will.

The African Human Rights System

African Charter on Human and Peoples’ Rights

- Article 12 on the right to return to one’s own country:

Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality. [Art. 12]

The Association of Southeast Asian Nations (ASEAN)

The ASEAN Human Rights Declaration

⁴⁴ European Parliament resolution of 9 June 2016 on Vietnam (2016/2755(RSP))

Viet Nam is a member of ASEAN (July 1995) adopted the ASEAN Human Rights Declaration (AHRD) and formally affirmed its, “.commitment to the Charter of the United Nations, the Universal Declaration of rights, the Vienna Declaration and Programme of Action, and other international human rights instruments to which ASEAN members are parties...”⁴⁵

The AHRD guarantees the right of return to one’s country and freedom of movement and residence.
Article 10

ASEAN Member States affirm all the civil and political rights in the Universal Declaration of Human Rights.

Article 15 on the right to freedom of movement and the right to return to one’s own country:

Every person has the right to freedom of movement and residence within the borders of each State. Every person has the right to leave any country including his or her own, and to return to his or her country.

CONCLUSION

The exile in June 2018 by Viet Nam of Nguyễn Văn Đài and Lê Thu Hà was arbitrary, contrary to the Opinion and recommendations of the WGAD and in violations of Viet Nam’s international legal obligations arising from the UDHR, ICCPR, ICESCR, UNCAT, the Vienna Convention on the Law of Treaties and the Vienna Declaration and Programme of Action. Under those instruments Viet Nam has a duty to ensure freedom of Nguyễn Văn Đài and Lê Thu Hà from arbitrary exile, the right to leave and return to his and her country and the freedom to continue to participate in the conduct of public affairs in Viet Nam. The exile also violates other rights protected by the UDHR, ICCPR and other instruments including rights to work, privacy and family life, association, expression and the right to engage in peaceful human rights advocacy and education. Viet Nam must take all measure necessary to ensure that Nguyễn Văn Đài, his wife Vu Minh Khanh and Lê Thu Hà can return to Viet Nam without threat of imprisonment or other punishment.

APPENDIX

⁴⁵ ASEAN Human Rights Declaration and the Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration (AHRD), 18 November 2012 at page 15. Online at https://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf

Note that the new Viet Nam Criminal Codes are:

2015 Criminal Procedure Code

2015 Penal Code

The new codes went into effect 1 July 2016 after revisions were passed through the National Assembly in November 2015.

Most of the text stayed the same as the previous Code, it was primarily the punishments that were revised. The main articles that are problematic, from an international standards perspective, remain the same.

For example:

Article 108 (formerly Article 78)

1. Any Vietnamese citizen acting in collusion with a foreign country with a view to causing harm to the independence, sovereignty, unity and territorial integrity of the Fatherland, the national defense forces, the socialist regime or the State of the Socialist Republic of Vietnam shall be sentenced to between 12 and 20 years of imprisonment, life imprisonment or capital punishment.
2. In the event of many extenuating circumstances, the offenders shall be subject to between 7 and 15 years of imprisonment.
3. The person takes action in preparation of committing this crime shall be subject to between 1 and 5 years of imprisonment. [NEW]

Article 109 (formerly Article 79)

Those who carry out activities, establish or join organizations with intent to overthrow the people's administration shall be subject to the following penalties:

1. Organizers, instigators and active participants or those who cause serious consequences shall be sentenced to between 12 and 20 years of imprisonment, life imprisonment or capital punishment;
2. Other accomplices shall be subject to between 5 and 12 [REDUCED FROM 15] years of imprisonment.
3. The person takes action in preparation of committing this crime shall be subject to between 1 and 5 years of imprisonment. [NEW]

Article 117 (formerly Article 88)

1. Those who commit one of the following acts against the State of the Socialist Republic of Vietnam shall be sentenced to between 5 and 12 years of imprisonment:
 - a) Making, storing, disseminating or propagandizing materials and products with contents that distort and/or defame the people's administration;

b) Making, storing, disseminating or propagandizing information, materials or products with fabricated contents, causing confusion among the people;

c) Making, storing, disseminating or propagandizing information, materials or product that cause psychological warfare. [REVISED]

2. In the case of committing particularly serious crimes, the offenders shall be sentenced to between 10 and 20 years of imprisonment.

3. The person takes action in preparation of committing this crime shall be subject to between 1 and 5 years of imprisonment. [NEW]

All revisions and additions can be found at this

link: <https://www.hrw.org/news/2015/11/19/vietnams-proposed-revisions-national-security-laws>

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