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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-fourth session, 30 November-4 December 2015

Opinion No. 46/2015 concerning Hung Linh Nguyen (Viet Nam)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 1/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. The mandate was extended for a further three years in resolution 24/7 of 26 September 2013.

2. In accordance with its methods of work (A/HRC/30/69), on 22 September 2015 the Working Group transmitted a communication to the Government of Viet Nam concerning Hung Linh Nguyen. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);



(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Hung Linh Nguyen, born on 14 February 1963, is a citizen of Viet Nam and usually resides in Rach Gia City, Kien Giang Province, Viet Nam. From February 2006 to March 2015 he was Chief Executive Officer of the Kien Giang Trade and Tourism Company, which is a State-owned enterprise under the control of the Kien Giang's People's Committee. From February 2014 to March 2015 Mr. Nguyen was also Chairman of the Viet Nam Food Association.

5. According to the information received, Mr. Nguyen was arbitrarily detained on 7 June 2015. The source reports that, at 12.45 p.m. on that day, a police officer from the Kien Giang police department invited Mr. Nguyen to a coffee shop for a private meeting in Rach Gia City. After the meeting, at approximately 1.15 p.m., Mr. Nguyen was arrested.

6. The source reports that the authorities did not produce an arrest warrant nor did they accuse Mr. Nguyen of any crime. He was taken to the PC 46 police station, at 120 Nguyen Hung Son Street in Rach Gia City, Kien Giang Province. The police did not inform the victim's family of his arrest or the place of his detention.

7. The source reports that Mr. Nguyen's family tried to contact him at the police station on 8 June 2015 and asked to see documents regarding his detention and prosecution. The police refused to provide any information. Later on the same day, however, the family received a copy of the arrest decision from the police department, dated Monday 8 June 2015.

8. The source also reports that on 9 and 10 June 2015 a formal letter was presented to the police station requesting bail and information about the situation of Mr. Nguyen. The police refused to give out any information about the detainee or disclose which authorities had ordered the detention.

9. The source further reports that on 11 June 2015 at 9.30 a.m. a letter was presented by Mr. Nguyen's family to the People's Prosecution Office requesting bail. The Office recommended that the family contact the PC 46 police station, from which no information had been obtained.

10. The source alleges that the family lawyer repeatedly contacted the police station by telephone and insisted on demanding bail for Mr. Nguyen. The police refused to grant any contact between the lawyer and Mr. Nguyen. Moreover, the authorities have allegedly stated that no lawyer would be allowed during the investigation of the case. Mr. Nguyen therefore has currently no access to legal counsel.

11. The source also claims that, on 16 June 2015, an attempt was made to send a letter requesting the liberation of Mr. Nguyen to the Government of Viet Nam in Hanoi. The post office refused to send any mail relating to the victim to the Government. The source alleges that the post office employees were instructed by the Kien Giang police department not to receive the letter.

12. Since the day of his arrest, Mr. Nguyen has not been allowed contact with his family or his lawyer. He has allegedly been detained incommunicado in a small cell at the PC 46

police station in Kien Giang and denied access to medicine, food and personal goods that were sent by his family and friends.

13. From 1 to 8 August 2015, the police department allegedly deprived Mr. Nguyen of food. Moreover, Mr. Nguyen was threatened with death, which might then be presented as suicide. The source adds that, on 23 August 2015, a police officer told Mr. Nguyen's family that requests for bail would not be considered at any point, but in case the victim died, the body would be sent to the family for a proper burial.

14. The source reports that the reason for the arrest of Mr. Nguyen, as provided by the police, is allegedly his lack of responsibility during his tenure as Chief Executive Officer of the Kien Giang Trade and Tourism Company, which caused a financial loss for the Company. The source points out that Mr. Nguyen was not occupying the above-mentioned position when the financial loss occurred.

15. The source alleges that Mr. Nguyen's detention may be motivated by his refusal to participate in a corruption scheme that had supposedly been affecting the Company since the end of 2014.

16. In relation to Mr. Nguyen's refusal to participate in the alleged corruption scheme, the source reports that Mr. Nguyen was harassed and threatened by the Kien Giang authorities prior to his arrest on 7 June 2015. The source reports that, on 5 December 2014, the police department restricted Mr. Nguyen's freedom of movement, following orders from the Kien Giang People's Committee. On 12 January 2015, the Committee allegedly coerced Mr. Nguyen to resign from his position as Chairman of the Viet Nam Food Association. The source adds that on 25 February 2015, the authorities also suspended Mr. Nguyen from his position as Chairman of the Kien Giang Trade and Tourism Company. Furthermore, on 7 March 2015, when Mr. Nguyen was leaving Viet Nam to receive medical treatment in Singapore, the police authorities retained his passport. The authorities have not yet returned the passport to Mr. Nguyen.

17. Mr. Nguyen is reported to be suffering from a number of serious health conditions. He has an abdominal trauma, acute ulcerative colitis, cancerous polyps and colon cancer, for which he has to receive appropriate treatment. The source alleges that no medical treatment for these conditions was provided to Mr. Nguyen while in detention. Prior to his detention, Mr. Nguyen was scheduled for treatment at the Mount Elizabeth Hospital and Medical Centre in Singapore. The source argues that the interruption of the treatment could cause him severe pain and lead to death.

18. On the basis of the foregoing, the source submits that the arrest and continuous detention of Mr. Nguyen are arbitrary. Mr. Nguyen's arrest and detention were committed without any official arrest warrant or arrest decision from the competent authority (the People's Prosecutor's Office). Mr. Nguyen was arrested in violation of the arrest procedures in the Code of Criminal Procedure of Viet Nam, more specifically articles 6, 9 and 80.2 of the aforementioned Code. Furthermore, Mr. Nguyen's detention has violated article 20.2 of the Constitution of Viet Nam.

19. The source submits that the deprivation of liberty of Mr. Nguyen falls under categories I, II and III. With regard to category I, the source argues that Mr. Nguyen's arrest and continuous deprivation of liberty has no legal basis. Furthermore, it is alleged that the confiscation of Mr. Nguyen's passport and his subsequent arrest violate articles 7 and 13 of the Universal Declaration of Human Rights and article 12 of the International Covenant on Civil and Political Rights, thus causing the detention of Mr. Nguyen to fall under category II.

20. Furthermore, the source argues that there has been non-observance of the international norms relating to the right to a fair trial and due process, established in the

Universal Declaration of Human Rights (category III). Mr. Nguyen was arrested without a valid arrest warrant and has been kept in detention without official charges or trial. The source reports that Mr. Nguyen's access to legal counsel has been constantly denied at the police station in which he is reportedly kept. The source concludes that the above-mentioned facts have been conducted in violation of articles 9 of the Declaration and the International Covenant on Civil and Political Rights.

Response from the Government

21. The Working Group regrets that the Government has not responded to the allegations transmitted to it on 22 September 2015.

Discussion

22. The Working Group addressed a communication to the Government of Viet Nam on 22 September 2015 and requested detailed information about the above-mentioned allegations and about the current situation of Mr. Nguyen as well as clarification of the legal provisions justifying his continued detention.

23. According to paragraph 15 of the Working Group's methods of work, a Government is requested to reply to a communication within 60 days from the date of its transmittal. The Working Group received neither a reply nor a request for an extension in time from the Government of Viet Nam.

24. Despite the absence of any information from the Government, the Working Group considers that it is in a position to render an opinion on the case on the basis of the submissions that have been made in conformity with paragraph 16 of its methods of work.¹

25. In the present case, the Government has chosen not to rebut the reliable prima facie allegations submitted by the source. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues.² If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the given allegations. Hence, the Working Group should base its opinion on the prima facie case made out by the source.

26. To begin with, the Working Group considers that the deprivation of liberty of Mr. Nguyen is arbitrary and falls within category I of the categories applicable to the consideration of cases submitted to the Working Group.

27. The arrest and detention have been conducted without any legal basis, based on the elements illustrated in the submission, including the following: (a) on 7 June 2015, Mr. Nguyen was arrested without a warrant and was not notified of the charges against him, which should have been rendered promptly at the time of arrest; (b) the authorities did not inform the victim's family of his arrest or the place of his detention and refused to provide any information, except for a copy of the arrest decision dated 8 June 2015; (c) Mr. Nguyen, according to the explanation given by the police, was arrested for lack of responsibility in his capacity as Chief Executive Officer of the Kien Giang Trade and Tourism Company, concerning its financial loss, which was not incurred during the time of his tenure; (d) the arrest and incommunicado detention were carried out solely by the police without the knowledge of the prosecution.

¹ The Government of Viet Nam replied on 27 November 2015. Even if no reply has been received upon expiry of the set time limit, the Working Group may render an opinion on the basis of all the information it has obtained, in accordance with paragraph 16 of its methods of work (A/HRC/30/69).

² See, for example, A/HRC/19/57, para. 68.

28. An additional set of facts and circumstances that are to be taken into account includes the following: (a) despite the fact that the family lawyer repeatedly contacted the police station by telephone and insisted on demanding bail for Mr. Nguyen, the police refused any contact between the lawyer and Mr. Nguyen; (b) the authorities stated that no lawyer would be allowed during the investigation, thereby depriving Mr. Nguyen of access to legal counsel; (c) on 23 August 2015, a police officer told Mr. Nguyen's family that requests for bail would not be considered at any point, but in case the victim died, the body would be sent to the family for a proper burial.

29. The present case constitutes a clear violation of article 9 of the Universal Declaration of Human Rights that bans the practice of arbitrary arrest and detention, which is a deeply entrenched human rights norm, reflected in both State practice and *opinio juris*. The detention was also conducted in flagrant violation of article 9 (1) of the International Covenant on Civil and Political Rights, which stipulates that no one should be subjected to arbitrary arrest or detention. No one should be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

30. Breaches of law have also been made in regard to article 9 (2) of the Covenant, which clarifies that anyone who is arrested should be informed, at the time of arrest, of the reasons for his arrest and should be promptly informed of any charges against him.

31. Article 9 (3) of the Covenant sets forth two cumulative obligations, namely to be brought promptly before a judge within the first days of the deprivation of liberty and to have a judicial decision rendered without undue delays, in the absence of which the person is to be released.³

32. This provision is completed by the second part of article 9 (3) which provides that it should not be the general rule that persons awaiting trial should be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement. It follows that liberty is recognized as a principle and detention as an exception in the interests of justice.⁴

33. The statement by a police officer, made on 23 August 2015, that requests for bail would not be considered at any point and that if the victim died, the body would be sent to the family for a proper burial, serves, in particular, as an indicator that the deprivation of liberty of Mr. Nguyen was made without any legal basis. It also presents a well-founded presumption that both mistreatment and even acts of torture have been applied to Mr. Nguyen during his detention.

34. The pretrial incommunicado detention that has lasted about half a year, as in the case of Mr. Nguyen, also constitutes a clear violation of the part of the well-established international law on detention that stipulates that pretrial detention should be an exception and should be as short as possible.⁵ In its 2011 annual report (see A/HRC/19/57, paras. 48-58), the Working Group also underlined that pretrial detention should be an exceptional measure.

³ See A/HRC/19/57, para. 53.

⁴ Ibid., para. 54. The Working Group also wishes to refer to paragraph 38 of general comment No. 35 (2014) on liberty and security of person, in which the Human Rights Committee states that it should not be the general practice to subject defendants to pretrial detention. Detention pending trial must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime.

⁵ See, for example, Human Rights Committee, communication No. 1787/2008, *Kovsh (Abramova) v. Belarus*, Views adopted on 27 March 2013, paras. 7.3-4.

Disposition

35. In the light of the foregoing, the Working Group renders the following opinion:

The arrest and detention of the afore-mentioned detainee were conducted in particular violation of articles 9-11 of the Universal Declaration of Human Rights and article 9 (1)-(4) of the International Covenant on Civil and Political Rights, and falls within category I of the categories applicable to the consideration of the cases submitted to the Working Group.

36. Consequent upon the opinion rendered, the Working Group requests the Government to take, without delay, the steps necessary to remedy the situation and bring it into conformity with the standards and principles enshrined in the International Covenant on Civil and Political Rights and the relevant international norms.

37. The Working Group considers that, taking into account all the circumstances of the case, the adequate remedy would be the immediate release of Mr. Nguyen and the provision of reparation for the harm caused by the grievances. The responsibility to provide reparation is also owed to those who have already served their terms or have been released.

38. In the light of the allegations of torture and other ill-treatment inflicted upon the detainee, the Working Group considers it appropriate, in accordance with article 33 (a) of its methods of work, to refer those allegations to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, for appropriate action.

[Adopted on 3 December 2015]
