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## Human Rights Council Working Group on Arbitrary Detention

### Opinions adopted by the Working Group on Arbitrary Detention at its eighty-fourth session, 24 April–3 May 2019

#### Opinion No. 9/2019 concerning Trần Thị Xuân (Viet Nam)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 2 November 2018, the Working Group transmitted to the Government of Viet Nam a communication concerning Trần Thị Xuân. The Government has not replied to the communication. Viet Nam 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 or her sentence or despite an amnesty law applicable to him or her) (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 Covenant (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. Trần Thị Xuân is a 42-year-old Vietnamese citizen who usually resides in Lộc Hà District, Hà Tĩnh Province, Viet Nam.

5. The source reports that, prior to her arrest, detention and conviction, Ms. Xuân had no previous criminal record. She organized activities to aid local residents in her community who were affected by the Hung Nghiep Formosa Steel Plant environmental disaster in 2016. As part of this initiative, Ms. Xuân raised concerns about environmental pollution caused by the toxic discharge of industrial chemicals into the water, and demanded compensation for the fishermen affected. Ms. Xuân is also affiliated with the non-violent, pro-democracy alliance known as the Brotherhood for Democracy.

6. On 17 October 2017, Ms. Xuân was taken into custody by the Public Security Agency from the Hà Tĩnh Province Police Department while she was on the way home from her local church in Cua Sot parish. The source alleges that, in the light of the coordinated arrests of other members and activists of the Brotherhood for Democracy, the order for Ms. Xuân's arrest is likely to have come from the national Government. The source adds that the freedom of expression and activism by civil society remain restricted in Viet Nam. The authorities have recently been increasing pressure on those who use the Internet as a means of disseminating uncensored information, and State control of the media has resulted in the silencing of journalists and bloggers through their arrest and prosecution.

7. According to the source, no arrest warrant was presented at the time of Ms. Xuân's arrest. Two days after the arrest, the police of Hà Tĩnh Province issued a press release on the "urgent" arrest of Ms. Xuân. The source states that the press release did not provide any clear evidence of criminal activities or wrongdoing to justify Ms. Xuân's arrest and detention.

8. In addition, the source alleges that, from the time of her arrest on 17 October 2017 until her closed trial on 12 April 2018, Ms. Xuân was held in incommunicado pretrial detention at the Hà Tĩnh Province Police Detention Centre.

9. According to the source, although Ms. Xuân suffers from a pre-existing kidney disease, she was not given prompt medical treatment. As a result, she has suffered from fluid retention, which was apparent when Ms. Xuân appeared at her trial. She did not receive permission to obtain medication from her family and from the prison until the end of May 2018. From that point, her fluid retention has improved.

10. The source also reports that Ms. Xuân's closed trial was not announced to the public or to her family, and that she was tried without the presence of legal counsel. During the trial, the prosecution claimed that Ms. Xuân "attempted to overthrow the people's Government", but provided no concrete evidence to support that charge. Despite the lack of evidence, Ms. Xuân was convicted under article 79 of the 1999 Vietnamese Penal Code ("Carrying out activities aimed at overthrowing the people's administration"). The People's Court of Hà Tĩnh Province subsequently sentenced her to nine years of imprisonment followed by five years of house arrest. The source points out that the charge is one of the severest that an activist can face, as convictions under this charge carry heavy sentences.

11. The source alleges that, given the lack of evidence, the sole basis for bringing criminal charges against Ms. Xuân was to punish her for her peaceful pro-democracy activism and for her membership of the Brotherhood for Democracy. According to the source, the Brotherhood for Democracy, an online alliance of civil society activists and human rights defenders that strives for a just society in Viet Nam, has recently been the target of a general crackdown by the authorities. Courts in Hanoi, Thái Bình and Hà Tĩnh have convicted and sentenced other human rights defenders from the Brotherhood for Democracy on the same charge, "of attempting to overthrow the people's Government". As at April 2018, eight members of the Brotherhood for Democracy had been found guilty and given lengthy prison

sentences. To date, the charge has only been used against dissidents and pro-democracy activists.

12. The source reports that Ms. Xuân had 15 days to appeal the decision in her case, that is, until 30 April 2018. However, after her conviction, neither Ms. Xuân's family nor her lawyers were able to visit her before the deadline for appeal. Furthermore, she was also not aware of the appeal procedure. The source argues that Ms. Xuân was unable to file an appeal before the deadline because of the restrictions placed by the prison authorities on her visitation rights.

13. In July 2018, the authorities transferred Ms. Xuân from the Hà Tĩnh Province Police Detention Centre to Prison No. 5, Thanh Hoa Province. On 7 October 2018, Ms. Xuân's family was permitted to visit her. The source reports that Ms. Xuân was suffering from a vitamin B1 and thiamine deficiency.

14. Ms. Xuân has now been deprived of her liberty for more than 18 months. The source expresses concern that the ongoing imprisonment of Ms. Xuân will result in further deterioration of her physical health, particularly given that care for her kidney disease, which causes fluid retention, has been neglected.

#### *Submissions*

15. The source submits that Ms. Xuân's detention is arbitrary according to categories II and III.

16. In relation to category II, the source submits that the arrest and detention of Ms. Xuân was the result of her exercise of the right to the freedom of expression under article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant, and the exercise of her right to freedom of association under article 20 of the Universal Declaration of Human Rights and article 22 of the Covenant. The source recalls that Viet Nam acceded to the Covenant on 24 September 1982.

17. The source points to the fact that Ms. Xuân was a vocal critic of the Government and participated in peaceful protests. Her outspoken activism was likely to have resulted in her persecution by the authorities. The source concludes that the authorities have violated the Universal Declaration of Human Rights and the Covenant by depriving Ms. Xuân of liberty on the basis of her political opinions and activism.

18. The source furthermore recalls that Ms. Xuân was prosecuted under article 79 ("Carrying out activities aimed at overthrowing the people's administration") of the 1999 Penal Code, according to which persons found guilty of activities or of establishing or joining organizations with the intent of "overthrowing the people's administration" are subject to the following penalties: (a) In the case of organizers, instigators and active participants or those who cause "serious consequences", a sentence of between 12 and 20 years of imprisonment, life imprisonment or capital punishment; (b) in the case of other accomplices, a sentence of between 5 and 15 years of imprisonment.

19. The source submits that article 79 is overly broad and vague. For example, the provision does not define what is meant by "serious consequences". According to the source, such broad terms and ambiguity allow the authorities to apply the law in an arbitrary manner. In the present case, the police press release announcing Ms. Xuân's arrest did not sufficiently state the basis for her arrest. Moreover, the authorities were unable to produce concrete evidence during Ms. Xuân's proceedings with regard to what constituted the intent to "overthrow the people's administration" or that her actions caused "serious consequences". Given the lack of legal support for this charge, Ms. Xuân's conviction under article 79 of the Penal Code was arbitrary and violated her freedom of expression.

20. The source also alleges that the arrest, continuous detention and conviction of Ms. Xuân are based on her association with the Brotherhood for Democracy, which is evident from the pattern of coordinated arrests of her fellow members. The source submits that these simultaneous arrests suggest that the authorities intend to dismantle the Brotherhood for Democracy, violating the members' right to freedom of association with others.

21. In relation to category III, the source submits that Viet Nam did not observe the minimum international standards of due process guaranteed under the Universal Declaration of Human Rights. During Ms. Xuân's arrest, detention and trial, the Government violated her rights under articles 10 and 11 of the Universal Declaration of Human Rights and principles 10 to 16 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. In particular:

(a) Ms. Xuân was not presented with an arrest warrant or informed of the charges against her when she was taken into custody by the police of Hà Tĩnh Province on the way home from her church;

(b) Ms. Xuân was held incommunicado in the Hà Tĩnh Province Police Detention Centre as her family was unable to communicate with her. She was subsequently subjected to inhumane treatment while in detention, namely medical neglect leading to the deterioration of her physical health, in violation of article 11 of the Universal Declaration of Human Rights and principles 10, 11, 12, 13, 15 and 16 of the Body of Principles;

(c) Ms. Xuân did not violate any national or international law, yet the authorities have deprived her of liberty for having exercised her right to freedom of expression and freedom of association, and charged her under the Penal Code, in violation of article 11 of the Universal Declaration of Human Rights;

(d) Ms. Xuân's closed trial was neither fair nor public, and the court was neither independent nor impartial. Having been held incommunicado, Ms. Xuân was unable to retain a lawyer to represent her, in violation of article 10 of the Universal Declaration of Human Rights and principles 11 and 15 of the Body of Principles. Moreover, during her trial, Ms. Xuân was not given the option of being represented by a lawyer and of presenting evidence in her defence, in violation of article 10 of the Universal Declaration of Human Rights and principles 11, 13 and 15 of the Body of Principles;

(e) Ms. Xuân was not properly informed of her right to appeal, nor was she allowed to retain a lawyer of her choice to represent her in the appeal proceedings. Ms. Xuân's family was denied the opportunity to visit her before the deadline to file the appeal expired, in violation of article 10 of the Universal Declaration of Human Rights and principles 15 and 16 of the Body of Principles.

22. The source adds that Ms. Xuân's arrest and detention was carried out in violation of articles 7, 11 and 18 of the 1999 Criminal Procedure Code, which contain provisions on the protection of life, health, honour, dignity and property of citizens, as well as guarantees of the right to a defence and the right to a public trial.

#### *Response from the Government*

23. On 2 November 2018, the Working Group transmitted the allegations from the source to the Government under its regular communication procedure. The Working Group requested the Government to provide detailed information by 2 January 2019 about the current situation of Ms. Xuân. The Working Group also requested the Government to clarify the legal provisions justifying her continued detention and its compatibility with the State's obligations under international human rights law. Moreover, the Working Group called upon the Government to ensure Ms. Xuân's physical and mental integrity.

24. In a note verbale dated 8 January 2019, the Government requested a one-month extension of the deadline for response. Given that the request was made after the initial deadline of 2 January 2019, the Working Group did not grant the extension.

25. The Working Group regrets that it did not receive any further response from the Government to the regular communication.

#### **Discussion**

26. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

27. In determining whether the deprivation of liberty of Ms. Xuân is arbitrary, the Working Group refers to the principles established in its jurisprudence regarding evidentiary

issues. 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 allegations (A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the *prima facie* credible allegations made by the source.

28. The source alleges that Ms. Xuân was not presented with an arrest warrant or informed of the charges against her at the time of her arrest on 17 October 2017. Although it had an opportunity to do so, the Government did not challenge these allegations.

29. The Working Group recalls that, according to article 9 (1) of the Covenant, no one should be deprived of his or her liberty except on such grounds and in accordance with such procedure as are established by law. Therefore, for deprivation of liberty to be considered lawful and not arbitrary, established legal procedures and guarantees must be respected. In this case, Ms. Xuân was arrested without a warrant, in violation of article 9 (1) of the Covenant. As the Working Group has stated, in order for a deprivation of liberty to have a legal basis, it is not sufficient that there is a law which may authorize the arrest. The authorities must invoke that legal basis and apply it to the circumstances of the case through an arrest warrant (see for example opinions No. 46/2017, No. 75/2017, No. 35/2018, No. 36/2018 and No. 46/2018).<sup>1</sup>

30. In addition, the source alleges that Ms. Xuân was held in incommunicado detention for nearly six months from her arrest on 17 October 2017 until her trial on 12 April 2018. According to the source, Ms. Xuân had no contact with her family or a lawyer during this period, and there is nothing to suggest that she was brought before a judicial authority to challenge the legality of her detention. This amounts to a violation of Ms. Xuân's right to be brought promptly before a judge under article 9 (3) of the Covenant, and to bring proceedings herself to challenge her detention under article 9 (4) of the Covenant. As the Working Group has consistently argued, holding persons incommunicado violates their right to challenge the lawfulness of detention before a court under article 9 of the Covenant (see for example opinions No. 45/2017 and No. 46/2017). The Working Group considers that judicial oversight of detention is a fundamental safeguard of personal liberty<sup>2</sup> and is essential in ensuring that detention has a legal basis.

31. Accordingly, the Working Group finds that the Government failed to establish a legal basis for Ms. Xuân's arrest and pretrial detention. Her deprivation of liberty is therefore arbitrary under category I.

32. Furthermore, the source alleges that Ms. Xuân was deprived of her liberty solely for exercising her rights under the Universal Declaration of Human Rights and the Covenant. Ms. Xuân was convicted under article 79 of the Penal Code, according to which persons found guilty of activities or of establishing or joining organizations with the intent of "overthrowing the people's administration" are subject to the following penalties: (a) In the case of organizers, instigators and active participants or those who cause "serious consequences", a sentence of between 12 and 20 years of imprisonment, life imprisonment or capital punishment; (b) in the case of other accomplices, a sentence of between 5 and 15 years of imprisonment.<sup>3</sup>

33. The Working Group has considered the application of national security offences in Viet Nam, including article 79 of the Penal Code, on numerous occasions.<sup>4</sup> In those cases, the Working Group determined that article 79 was so vague and broad that it could result in penalties being imposed on individuals who had peacefully exercised their rights. The Working Group pointed out in these cases that the Government had not provided evidence

<sup>1</sup> The source did not specify when Ms. Xuân was notified of the charge against her. The Working Group is therefore unable to determine whether there was an additional violation of article 9 (2) of the Covenant through a failure by the authorities promptly to inform the accused of the charges against her.

<sup>2</sup> See 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 (A/HRC/30/37), para. 3.

<sup>3</sup> The Working Group understands that the 1999 Penal Code was amended in November 2015 and, despite some renumbering of provisions, the content of article 79 remained the same.

<sup>4</sup> See for example opinions No. 46/2011, No. 27/2012, No. 26/2013, No. 40/2016, No. 35/2018, No. 36/2018 and No. 46/2018.

of any violent action by the petitioners, and that, in the absence of such information, the charges and convictions could not be regarded as consistent with the Universal Declaration of Human Rights or the Covenant. The Working Group came to a similar conclusion following a visit to Viet Nam in October 1994, noting that vague and imprecise offences did not distinguish between violent acts and the peaceful exercise of fundamental freedoms (E/CN.4/1995/31/Add.4, paras. 58–60). It requested the Government to amend its laws in order to clearly define offences and to state what was prohibited without any ambiguity.

34. In the present case, the Government has not demonstrated that the actions of Ms. Xuân were violent or incited others to commit acts of violence, or would in any way amount to subversive activities under article 79 of the Penal Code. The source alleges, and the Government has not denied, that Ms. Xuân organized activities to aid local residents in her community who were affected by the Formosa Steel Plant environmental disaster in 2016, including raising concerns about environmental pollution and demanding compensation for community members affected. She was also affiliated with the Brotherhood for Democracy. The Government offered no explanation of how any of the said activities demonstrate an intent to overthrow the people's administration. In the absence of such an explanation, the Working Group finds that the arrest, detention and conviction of Ms. Xuân was due to her peaceful advocacy and her membership of the Brotherhood for Democracy.

35. Accordingly, the Working Group considers that Ms. Xuân's activism falls within the boundaries of the freedom of expression protected by article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant. Similarly, the Working Group finds that, through her involvement with the Brotherhood for Democracy, Ms. Xuân was exercising her right to freedom of association under article 20 of the Universal Declaration of Human Rights and article 22 of the Covenant.<sup>5</sup> Lastly, the Working Group is of the view that Ms. Xuân was engaging in advocacy relating directly to government policies in Viet Nam, particularly in relation to compensation for the 2016 Formosa Steel Plant disaster, and was deprived of her liberty as a result of exercising her right to take part in the conduct of public affairs under article 21 (1) of the Universal Declaration of Human Rights and article 25 (a) of the Covenant.<sup>6</sup>

36. The restrictions permitted on the freedom of expression, association and the right to take part in the conduct of public affairs under articles 19 (3), 22 (2) and 25 of the Covenant do not apply in the present case. The Government did not present any argument or evidence to the Working Group to invoke any of these restrictions, nor did it demonstrate why bringing charges against Ms. Xuân was a legitimate, necessary and proportionate response to her activities. In any event, the Human Rights Council, in its resolution 12/16, called upon all States to refrain from imposing restrictions that are not consistent with international human rights law, including restrictions on discussion of government policies and political debate, reporting on human rights, and expression of opinion and dissent.

37. Furthermore, according to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders), everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels, to communicate with non-governmental organizations, and to have effective access in the conduct of public affairs (arts. 1, 5 (b) and 8).<sup>7</sup> The Working Group

<sup>5</sup> The Working Group has found in cases relating to Viet Nam that the arrest and detention of individuals because of their association with pro-democracy groups is arbitrary. See for example opinions No. 6/2010, No. 42/2012 and No. 36/2018.

<sup>6</sup> According to the Human Rights Committee, citizens may take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organise themselves. See general comment No. 25 (1996) on participation in public affairs and the right to vote, para. 8. See also opinions No. 13/2007, No. 46/2011, No. 42/2012, No. 26/2013 and No. 40/2016.

<sup>7</sup> See the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, GA Res. 53/144, adopted on 9 December 1998, articles 1, 5 (b) and 8. See also General Assembly resolution

considers that the source's allegations clearly demonstrate that Ms. Xuân was detained for the exercise of her rights under the Declaration as a human rights defender. The Working Group has determined that detaining individuals on the basis of their activities as human rights defenders violates their right to equality before the law and equal protection of the law under article 7 of the Universal Declaration of Human Rights and article 26 of the Covenant.<sup>8</sup>

38. Accordingly, the Working Group concludes that the deprivation of liberty of Ms. Xuân resulted from the peaceful exercise of her rights to freedom of expression and of association, and to take part in the conduct of public affairs, and was contrary to article 7 of the Universal Declaration of Human Rights and article 26 of the Covenant. Her deprivation of liberty is arbitrary and falls within category II. The Working Group refers the present matter to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the rights to freedom of peaceful assembly and of association.

39. As noted above, the Working Group considers that the provision applied to Ms. Xuân, namely article 79 of the Penal Code, is vague and overly broad. Article 79 does not define what type of behaviour amounts to activities carried out with intent to "overthrow the people's administration", and leaves the determination of whether an offence has been committed entirely to the discretion of the authorities. It also lacks a specific definition of the circumstances in which a person could be accused of causing "serious consequences". This is particularly troubling, given that the potential sentences under the provision range from 5 to 20 years of imprisonment, life imprisonment or capital punishment. As the Working Group has stated, the principle of legality requires that laws be formulated with sufficient precision so that the individual may have access to and understand the law, and regulate his or her conduct accordingly.<sup>9</sup> The Working Group considers that article 79 is so vague as to be inconsistent with international human rights law, and calls upon the Government to bring it into line with its obligations under the Covenant.

40. Given its finding that the deprivation of liberty of Ms. Xuân was arbitrary under category II, the Working Group emphasizes that no trial of Ms. Xuân should have been held; Ms. Xuân was, however, tried on 12 April 2018. The Working Group considers that her right to a fair trial was violated prior to, during and following the trial proceedings. In reaching the conclusions below, the Working Group is mindful that the Government did not respond to any of the source's allegations.

41. The source alleges that, two days after Ms. Xuân's arrest, the Hà Tĩnh Province police issued a press release on the "urgent" arrest of Ms. Xuân. The Working Group considers that this action compromised Ms. Xuân's right to the presumption of innocence given that describing the arrest as "urgent" conveyed the message that Ms. Xuân had committed a serious offence for which she had to be apprehended as soon as possible. This was particularly unfair, as there is nothing to suggest that Ms. Xuân posed any kind of imminent danger or had committed any criminal activity that would require her urgent arrest. Indeed, as noted above, the Working Group considers that Ms. Xuân was arrested and detained solely on the basis of her peaceful advocacy and activism. As the Human Rights Committee stated in its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, it is the duty of all public authorities to refrain from prejudging the outcome of a trial, including by abstaining from making public statements affirming the guilt of the accused. The Working Group finds that Ms. Xuân was deprived of her right to the presumption of innocence, in violation of article 11 (1) of the Universal Declaration of Human Rights and article 14 (2) of the Covenant.

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70/161, in which the Assembly called upon States to take concrete steps to prevent and put an end to the arbitrary arrest and detention of human rights defenders, and in this regard strongly urged the release of persons detained or imprisoned, in violation of the obligations and commitments of States under international human rights law, for exercising their human rights and fundamental freedoms.

<sup>8</sup> See for example opinions No. 26/2017, No. 75/2017, No. 79/2017, No. 35/2018, No. 36/2018, No. 45/2018 and No. 46/2018.

<sup>9</sup> See for example opinion No. 41/2017, paras. 98–101.

42. As noted above, the source alleges that Ms. Xuân was held incommunicado for nearly six months following her arrest and until her trial. Prolonged incommunicado detention creates the conditions that may lead to violations of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and may itself constitute torture or ill-treatment.<sup>10</sup> The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has also argued that the use of incommunicado detention is prohibited under international law (A/HRC/13/39/Add.5, para. 156). The Working Group considers that the incommunicado detention of Ms. Xuân violated articles 9, 10 and 11 (1) of the Universal Declaration of Human Rights and article 9 of the Covenant. The fact that Ms. Xuân was unable to communicate with her family before and after her trial also amounts to a violation of the right to have contact with the outside world under rules 43 (3) and 58 (1) of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) and principles 15 and 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. In addition, the prolonged incommunicado detention of Ms. Xuân effectively placed her outside the protection of the law, in violation of her right to be recognized as a person before the law under article 6 of the Universal Declaration of Human Rights and article 16 of the Covenant.

43. In addition, the source alleges that Ms. Xuân's trial was closed and was not announced to either the public or Ms. Xuân's family. The Working Group is convinced, on the basis of the credible case presented by the source, that the trial was closed.<sup>11</sup> Moreover, there is no evidence that any of the exceptions to the right to a public hearing set out in article 14 (1) of the Covenant were applicable in this case. Accordingly, the Working Group finds that Ms. Xuân did not receive a public hearing, in violation of articles 10 and 11 (1) of the Universal Declaration of Human Rights and article 14 (1) of the Covenant.

44. According to the source, Ms. Xuân had no access to legal counsel during her pretrial detention and during her trial. In the absence of any information to rebut this claim, the Working Group considers that Ms. Xuân did not have access to a lawyer at any point during her proceedings. This is of particular concern, given that she was facing serious penalties under article 79 of the Penal Code, and that in fact received a heavy sentence without having had any legal assistance.

45. As the Working Group stated in principle 9 and guideline 8 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, all persons deprived of their liberty have the right to legal assistance by counsel of their choice at any time during their detention, including immediately after their apprehension, and such access should be provided without delay.<sup>12</sup> In this case, the denial of access to legal counsel violated Ms. Xuân's right to adequate time and facilities for the preparation of her defence and to communicate with and defend herself through counsel of her choosing, in accordance with articles 10 and 11 (1) of the Universal Declaration of Human Rights and article 14 (3) (b) and (d) of the Covenant.

46. Lastly, the source alleges that Ms. Xuân was not properly informed of her right to appeal. According to the source, Ms. Xuân had 15 days to appeal the decision in her case, but neither her family nor her lawyers were able to visit her, and she was not aware of the appeal procedure. The Working Group considers that Ms. Xuân should, at the very least, have been permitted to have access to legal counsel for the purposes of filing an appeal, and should have been informed of the appeals procedure. In these circumstances, Ms. Xuân's right to a review of her conviction and sentence by a higher tribunal under article 14 (5) of the Covenant was violated by the authorities.

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<sup>10</sup> See *Official Records of the General Assembly, Fifty-fourth session, Supplement No. 44 (A/54/44)*, para. 182 (a). See also General Assembly resolution 68/156, para. 27.

<sup>11</sup> See also opinions No. 75/2017, para. 53, No. 79/2017, para. 61 and No. 36/2018, para. 53.

<sup>12</sup> See also Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, para. 35.



47. The Working Group concludes that the above-mentioned violations of the right to a fair trial are of such gravity as to give Ms. Xuân's deprivation of liberty an arbitrary character under category III.

48. Furthermore, the Working Group considers that Ms. Xuân was targeted because of her activities as a human rights defender, and particularly because of her role in providing support to victims of the 2016 Formosa Steel Plant environmental disaster. In reaching this conclusion, the Working Group notes the source's allegation that Ms. Xuân, despite having no prior criminal record, was sentenced to a particularly harsh and disproportionate punishment of nine years of imprisonment, to be followed by five years of house arrest, for her peaceful activism. This appears to be a means of curtailing the peaceful advocacy of Ms. Xuân and other human rights defenders. The Working Group also considers that it is no coincidence that Ms. Xuân's detention follows the arrest, detention and conviction on similar charges of eight of her fellow members of the Brotherhood for Democracy.

49. There appears to be a broader pattern in Viet Nam of targeting and detaining human rights defenders for their work, including activists who have participated in protests or attempted to raise awareness about issues relating to the Formosa Steel Plant. The Working Group has made findings on this matter in recent years,<sup>13</sup> and finds the present case to be a further example. Indeed, several special procedure mandate holders have called upon the Government to release activists detained for taking action to address the discharge of toxic chemicals by the Formosa Steel Plant in Ha Tinh in April 2016, calling the imprisonment of bloggers and activists for their work raising public awareness on environmental and public health concerns "unacceptable". They called upon the authorities to ensure that the State's rapid economic expansion did not come at the expense of human rights, in particular those of local communities and workers. The convictions not only violated the rights to freedom of expression of those concerned but also undermined the rights of everyone in Viet Nam to receive vital information on toxic pollution and to debate the best remedy for it and ultimately to hold those responsible for the disaster accountable.<sup>14</sup>

50. For these reasons, the Working Group finds that Ms. Xuân was deprived of her liberty on discriminatory grounds, that is, owing to her status as a human rights defender, and on the basis of her political or other opinion in challenging the actions of the Government. Her deprivation of liberty is arbitrary according to category V. The Working Group refers the present case to the Special Rapporteur on the situation of human rights defenders.

51. The Working Group expresses its concern about Ms. Xuân's health. According to the source, Ms. Xuân suffers from a pre-existing kidney disease which, without medical attention, results in fluid retention. Ms. Xuân is also believed to be suffering from a thiamine (vitamin B1) deficiency. The source alleges, and the Government has not denied, that she was not given prompt medical treatment and did not receive permission to obtain medication from her family or from the prison until the end of May 2018. In the view of the Working Group, this treatment fell short of the standards set out in, inter alia, rules 1, 24, 27 (1) and 31 of the Nelson Mandela Rules. The Working Group has therefore decided to refer the present case to the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. It urges the Government to ensure that Ms. Xuân is released with immediate effect and that she receives the necessary medical care.

52. Furthermore, given the source's claim that Ms. Xuân was subjected to inhumane treatment, namely medical neglect leading to the deterioration of her health, the Working Group has decided to refer the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

53. The Working Group is aware that Ms. Xuân is not the only member of the Brotherhood for Democracy who has been prosecuted under the national security provisions

<sup>13</sup> See, for example, opinions No. 27/2017, No. 79/2017, No. 35/2018, No. 45/2018 and No. 46/2018.

<sup>14</sup> OHCHR, "Viet Nam: UN rights experts urge release of activists jailed for protesting toxic spill", news release, 23 February 2018.

of the Penal Code.<sup>15</sup> The Working Group clarifies that, while it has addressed the situation of Ms. Xuân in the present opinion, its conclusions apply to other detainees targeted solely for the peaceful exercise of their rights, including other members of the Brotherhood for Democracy.

54. The present case is one of many cases brought before the Working Group in recent years concerning the arbitrary deprivation of liberty of persons in Viet Nam.<sup>16</sup> The Working Group notes that many of the cases involving Viet Nam follow a familiar pattern of lengthy pretrial detention with no access to judicial review and often without legal counsel; charges and prosecution under vaguely worded criminal offences; a very brief closed trial and appeal, at which basic due process has not been observed; and denial of access to the outside world and to medical treatment. The Working Group is concerned that this pattern indicates a systemic problem with arbitrary detention in Viet Nam that, if it continues, may amount to a serious violation of international law.<sup>17</sup>

55. The Working Group would welcome the opportunity to work constructively with the Government to address the arbitrary deprivation of liberty in Viet Nam. On 11 June 2018, the Working Group reiterated earlier requests to the Government to undertake a country visit, and looks forward to receiving a positive response. Given that the human rights record of Viet Nam was recently subject to review during the third cycle of the universal periodic review in January 2019, the Government has an opportunity to demonstrate its commitment to the recommendations made by strengthening its cooperation with the special procedures of the Human Rights Council and by bringing its laws into conformity with international human rights law.

### Disposition

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

The deprivation of liberty of Trần Thị Xuân, being in contravention of articles 6, 7, 9, 10, 11 (1), 19, 20 and 21 (1) of the Universal Declaration of Human Rights and articles 9, 14, 16, 19, 22, 25 (a) and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

57. The Working Group requests the Government of Viet Nam to take the steps necessary to remedy the situation of Ms. Xuân without delay and to bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

58. The Working Group considers that, taking into account all the circumstances of the case, including the risk of further harm to the health of Ms. Xuân, the appropriate remedy would be to release Ms. Xuân immediately, and to accord her an enforceable right to compensation and other reparations, in accordance with international law.

59. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Ms. Xuân and to take appropriate measures against those responsible for the violation of her rights.

60. The Working Group requests the Government to bring its laws, particularly article 79 of the revised Penal Code, into conformity with the recommendations made in the present opinion and with the commitments made by Viet Nam under international human rights law.

61. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the rights to freedom of peaceful assembly and of association, the Special Rapporteur on the situation of human rights

<sup>15</sup> See opinion No. 46/2018. See also OHCHR, “Viet Nam: UN experts call for change after jailing of rights defenders”, news release, 12 April 2018.

<sup>16</sup> See, for example, opinions No. 45/2015, No. 40/2016, No. 26/2017, No. 27/2017, No. 75/2017, No. 79/2017, No. 35/2018, No. 36/2018, No. 45/2018 and No. 46/2018.

<sup>17</sup> See, for example, opinion No. 47/2012, para. 22.

defenders, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, for appropriate action.

62. The Working Group encourages the Government to incorporate the Model Law for the Recognition and Protection of Human Rights Defenders<sup>18</sup> into its domestic legislation, and to ensure its implementation.

63. The Working Group requests the Government to disseminate the present opinion through all available means and as widely as possible.

#### **Follow-up procedure**

64. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

- (a) Whether Ms. Xuân has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Ms. Xuân;
- (c) Whether an investigation has been conducted into the violation of Ms. Xuân's rights and, if so, the outcome of the investigation;
- (d) Whether any legislative amendments or changes in practice have been made to harmonise the laws and practices of Viet Nam with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

65. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example through a visit by the Working Group.

66. The Working Group requests the source and the Government to provide the above-mentioned information within six months of the date of transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

67. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.<sup>19</sup>

*[Adopted on 25 April 2019]*

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<sup>18</sup> Developed in consultation with more than 500 human rights defenders from around the world and 27 human rights experts. See [www.ishr.ch/sites/default/files/documents/model\\_law\\_full\\_digital\\_updated\\_15june2016.pdf](http://www.ishr.ch/sites/default/files/documents/model_law_full_digital_updated_15june2016.pdf).

<sup>19</sup> See Human Rights Council resolution 33/30, paras. 3 and 7.