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## Human Rights Council Working Group on Arbitrary Detention

### Opinions adopted by the Working Group on Arbitrary Detention at its ninety-third session, 30 March-8 April 2022

#### Opinion No. 35/2022 concerning Nguyen Bao Tien (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 42/22.
2. In accordance with its methods of work<sup>1</sup>, on 10 December 2022, the Working Group transmitted to the Government of Viet Nam a communication concerning Nguyen Bao Tien. The Government replied to the communication on 10 March 2022. The State is 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).

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<sup>1</sup> A/HRC/36/38.

## Submissions

### *Communication from the source*

4. Bao Tien Nguyen is a citizen of the Socialist Republic of Viet Nam, usually residing at Tuy Hoa City, Phu Yen province, Viet Nam. He was 35 years old at the time of his detention and was a driver and volunteer collaborator at Liberal Publishing House (LPH) where he delivered books to readers.

5. According to the source, in July 2019, Ho Chi Minh City security police force tightened the postal service locations to prevent LPH from transferring books to readers, leading the publisher to call for the community's help. Mr. Tien, among others, supported this appeal, and contacted LPH through a Facebook name, "Venerable Thich Ngo Nghinh", which stopped working in October 2019. Reportedly, Mr. Tien was an enthusiastic collaborator of LPH. The source notes that LPH lost contact with him since 2 October 2019. At that time, his Facebook and Whatsapp names were locked and LPH could not find Mr. Tien as they did not know his real name, address or any circumstances related to him.

### *Arrest and Detention*

6. According to the source, Mr. Tien was arrested in October 2019, at his home, by security agents of the Phu Yen province's police. The source notes that, in contrast, media coverage in Viet Nam reported that he was arrested on 5 May 2021, while delivering 68 packages of books received from LPH.

7. The source explains that a warrant was issued by the Department of Security and Investigation of the Police of Phu Yen province and was presented to Mr. Tien. Reportedly, Mr. Tien was accused of "Stockpiling, distributing and propagating documents to oppose the State of the Socialist Republic of Vietnam" under Point a, Clause 1 of article 117 of the Criminal Code of the Socialist Republic of Viet Nam (the "Criminal Code").

8. According to the source, from mid-August to October 2019, Mr. Tien repeatedly received 68 parcels containing many titles of books and distributed 24 parcels to recipients. Reportedly, the Department of Security and Investigation discovered that Mr. Tien continued to distribute 21 parcels at the Kerry Express Phu Yen Post Office and made a record of seizure. When this act became known, Mr. Tien reportedly handed over 23 parcels hidden at his home to the investigating agency.

9. The source reports that, around November and December 2019, LPH continuously received notices from readers from many provinces, interrogated or detained by the police force, about security investigating "a book-making line in Phu Yen". LPH concluded that Mr. Tien was arrested and that the Department of Security and Investigation was attempting to hold him responsible for the activities of LPH. The source explains that, given the lack of information on the situation, LPH could not use the media to advocate on Mr. Tien's behalf, fearing that information given by the publisher may be used as evidence against him.

10. On 20 April 2021, based on collected documents and evidence, the Investigation Security Agency of Phu Yen Provincial Police executed the search and arrest warrants for the temporary detention and search of Mr. Tien.

11. The source notes that Vietnamese press reported on the arrest and prosecution of Mr. Tien until 5 May 2021.

### *Legal Analysis*

12. The source argues that Mr. Tien's arrest and detention are arbitrary under categories I, II and III of the methods of work of the Working Group.

### *Category I*

13. The source alleges that Mr. Tien's detention is arbitrary under category I because it is impossible to invoke any legal basis justifying his deprivation of liberty and continued detention.

14. The source recalls that a detention violates category I when it is clearly impossible to invoke any legal basis justifying the deprivation of liberty. The source notes that the Working Group has found detentions arbitrary under category I when: (1) the government held an individual incommunicado for a period of time; (2) the government arrested an individual without a warrant and without judicial authorization; and (3) vague laws were used to prosecute individuals.

(i) Incommunicado detention and access to judicial review

15. The source notes that, under article 9 (3) of the Covenant, individuals arrested or detained on criminal charges must be promptly brought before a judge or other officers authorized by law to exercise judicial power. Article 9 (4) of the Covenant reiterates this obligation of a *habeas corpus* hearing without delay.

16. The source emphasizes the Human Rights Committee's determination that incommunicado detentions inherently violate article 9 (3) of the Covenant. Further, the source notes that the prohibition against incommunicado detention is also articulated under Principle 15 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment ("Body of Principles"), which prohibits the denial of communication between detainees and their family or counsel for more than a few days. The source submits that this guarantee serves as a check on arbitrary detention and an important safeguard for other rights, such as the right to be free from torture.

17. The source alleges that Mr. Tien was not allowed to communicate with his family, lawyer or friends. Further, Mr. Tien was reportedly not brought before a judge following his arrest. The source argues that holding Mr. Tien behind closed doors, with no information, constitutes incommunicado detention.

(i) Broad and vague laws

18. The source notes that under article 15(1) of the Covenant and article 11(2) of the Universal Declaration of Human Rights, individuals have the right to know what the law is and what conduct violates the law. The source recalls that under these articles, national and international law, citizens cannot be prosecuted for an act that did not constitute an offense at the time it was committed. In this regard, the source refers to the Human Rights Committee's General Comment No. 35, which states that "any substantive grounds for arrest or detention must be prescribed by law and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application".

19. The source also refers to the report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, which explained that the standard for legal certainty requires framing laws so that they are "adequately accessible so that the individual has a proper indication of how the law limits his or her conduct", and with sufficient precision for individuals to regulate their conduct accordingly.

20. The source argues that article 117 of the Criminal Code defines the crime of "conducting propaganda" so vaguely as to make it impossible for any individual to reasonably foresee what behaviour is criminal. In particular, no instruction is given as to what constitutes propagating psychological warfare, dismay among the people, or documents or products against the Government. The source emphasizes the absence of any intent component or measure of what the prosecutor must prove in order to obtain a conviction. The source alleges that article 117 of the Criminal Code lacks any plain meaning and does not give individuals a fair notice of what conduct is prohibited.

21. The source submits that, in Mr. Tien's case, article 117 of the Criminal Code resulted in the arbitrary prosecution of acts that are both unforeseeable as criminal and protected under the Covenant, the Universal Declaration of Human Rights, and other international norms and standards.

22. In addition, the source recalls that concerned UN member countries recommended that Viet Nam repeal or amend the Criminal Code so as to prevent the arbitrary application of those provisions to impede freedom of opinion and expression, including on the Internet. In particular, the source alleges that the crime of “conducting propaganda” is so vague that it cannot provide a legal basis for detention resulting from a conviction on such charge.

*Category II*

23. The source alleges that Mr. Tien’s detention is arbitrary under category II because it resulted from the peaceful exercise of his right to freedom of expression and association.

24. The source notes that article 20 (1) of the Universal Declaration of Human Rights and article 22 (1) of the Covenant protect everyone’s right to peaceful assembly and association. The source recalls the Human Rights Council’s call on every state to fully respect and protect the rights of individuals to freely associate, especially for persons espousing minority or dissenting views, and human rights defenders. Specifically, it noted, in general comment No. 25, that the right to freedom of association, including the right to form and join organizations and associations concerned with political and public affairs, is an essential adjunct to the right to participate in public affairs, protected by article 25 of the Covenant. The source also notes that the right to assemble, form associations and hold demonstrations is further protected under article 25 of the Vietnamese Constitution.

25. The source argues that Mr. Tien had the right to associate with a group of journalists and express his political opinions through organizations. Despite that, the Government allegedly persecuted Mr. Tien as a means to punish his involvement and communications with people and organizations critical of the Government, and with LPH and its members. The source concludes that the Government violated article 20 (1) of the Universal Declaration of Human Rights, article 22 (1) of the Covenant, and article 25 of the Vietnamese Constitution.

26. The source recalls that article 22 (2) of the Covenant allows for restrictions to the right to freedom of association but that any such limitation must meet a strict justification test. According to the source, none of the restrictions to freedom of association enumerated under article 22 (2) of the Covenant apply to Mr. Tien’s case. The source notes the three requirements established by the Human Rights Committee for any limitation on the rights to freedom of expression and association: that it be provided by law, for the protection of national security, public order, or public health and morals, and that it be necessary to achieve one of these enumerated purposes.

27. The source alleges that the limitation on Mr. Tien’s freedom of association does not meet the proper purpose requirement. The Government allegedly claimed that Mr. Tien was being detained for “opposing the state” or “conducting propaganda”, as might be considered appropriately banned under article 20 of the Covenant. The source submits that Mr. Tien’s meeting with members of the LPH in no way directly or indirectly called for violence or could reasonably be considered to threaten national security, public order, public health or morals, or the rights or reputations of others. In this regard, the source explains that Mr. Tien was an LPH staff member who merely delivered books to readers. Despite that, his activities were deemed to pose a great danger to national security and public order. The source submits that the Government failed to establish how Mr. Tien’s activity of delivering books could constitute a danger to national security or public order.

*Category III*

28. The source alleges that Mr. Tien’s detention is arbitrary under category III because he was not afforded minimum due process rights.

(i) Right to appeal

29. The source notes that article 14 (5) of the Covenant protects the right of everyone convicted of a crime to have their conviction and sentenced reviewed by a higher tribunal

according to the law. Further, it protects the right to appeal and requires that the State party substantively review the conviction and sentence, based on the sufficiency of both the evidence and the law, such that the procedure allows for due consideration of the nature of the case. According to the source, such a review must consider formal and legal aspects of the conviction, as well as the facts of the case, the allegations against the convicted person, and the evidence submitted at trial, as referred to in the appeal.

30. Moreover, the source notes that article 331 of the 2015 Vietnamese Criminal Procedure Code (CPC) grants the defendant the right to appeal judgments of first instance courts. Further, article 332 of the CPC requires that the warden of the detention facility enable the execution of a defendant's right to appeal by forwarding the written appeal to the proper court.

31. According to the source, Mr. Tien was not allowed to communicate with his lawyer, in violation of his right to appeal.

(ii) Right to access and communicate with legal counsel

32. The source stresses that article 14(3)(b) and (d) of the Covenant guarantees individuals' right to defend themselves, in person or through counsel of their own choosing, to have adequate time and facilities to prepare their defence, and to communicate with counsel of their choosing. Such guarantees require prompt access to counsel and that State parties permit and facilitate detainees' access to counsel in criminal cases, from the outset of their detention.

33. In this regard, the source submits that Mr. Tien tried to hire a lawyer but his request was denied without any justification. The source notes that Mr. Tien was not appointed a lawyer by the Government either. The source underlines that many cases brought to the Working Group reflect that, even where the applicant's family hires a lawyer to visit and represent the individual, lawyers are often not allowed to meet with their clients. The source argues that, in the case at hand, Mr. Tien was unable to communicate with his family and thus was unable to hire a lawyer.

34. The source concludes that, by not respecting Mr. Tien's request for a lawyer, the Government violated his right to access legal representation.

(iii) Right to be visited by family and to communicate with the outside world

35. The source notes that, under Principle 19 of the Body of Principles, detainees and imprisoned individuals have the right to be visited by and correspond with members of their family, subject to reasonable conditions and restrictions as specified by law or lawful regulations. The source stresses that the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) also protects this right. Specifically, rule 43 prohibits disciplinary sanctions or restrictive measures from including the prohibition of family contact. Further, rule 58 of the Nelson Mandela Rules affords prisoners the right to communicate with family and friends at regular intervals, under necessary supervision. In addition, rule 106 of the Nelson Mandela Rules prescribes that special attention must be given to maintaining relations between prisoners and their family, as desirable in both of their best interests.

36. According to the source, Mr. Tien was not allowed to communicate with the outside world or to be visited by his family, contrary to principle 19 of the Body of Principles, as well as rules 43, 58 and 106 of the Nelson Mandela Rules.

*Response from the Government*

37. On 22 December 2022, 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 8 February 2022 about the current situation of Mr. Tien. The Working Group also requested the Government to clarify the legal provisions justifying his detention, as well as its compatibility with the obligations of Viet Nam under international human rights law. Moreover, the Working Group called upon the Government to ensure his physical and mental integrity.

38. On 27 January 2022, the Government requested an extension of the deadline for its response. The extension was granted, with a new deadline of 10 March 2022.

39. The Government submits that the allegations mentioned in the Communication were not accurate and that Mr. Tien was arrested because he violated Viet Nam's laws as shown by the specific investigative evidence. Vietnamese competent authorities reportedly carried out the legal proceedings and procedures against Mr. Tien with full respect for Viet Nam's laws and consistent with international conventions on human rights to which Viet Nam is a party.

40. The Government submits that during the investigation, prosecution, adjudication and execution of the judgment, Mr. Tien's rights were ensured in accordance with Viet Nam's laws.

41. On the arrest and prosecution of Mr. Tien, the Government submits that Mr. Tien was born in 1986 and resides in Tuy Hoa City, Phu Yen Province. Reportedly, on 20 April 2021, the police of Phu Yen Province executed a prosecution decision, that is a temporary detention warrant and a residence search warrant, against Mr. Tien to investigate his alleged offence of "making, possessing, spreading information, materials, items for the purpose of opposing the State of Socialist Republic of Viet Nam" under article 117 of the Criminal Code of 2015. According to the Government, Mr. Tien possessed and spread 108 books containing distorted information about the directions and policies of the Socialist Republic of Viet Nam, which incites overthrowing the people's government.

42. The Government submits that the investigation process showed that Mr. Tien illegally possessed explosive materials that were stolen by him during a local military drill. Therefore, the police of Phu Yen Province issued an additional prosecution decision against Mr. Tien for the offence of "illegal appropriation and possession of explosive materials" under article 305 of the Criminal Code of 2015.

43. The Government further submits that the arrest and temporary detention of Mr. Tien fully complied with Viet Nam's criminal procedural provisions and were consistent with international conventions to which Viet Nam is a party. The execution of the arrest warrant against Mr. Tien was reportedly published at the time of the arrest and witnessed by the local authority and Mr. Tien's relatives. It submits that the execution of the arrest warrant against Mr. Tien was recorded in the written document signed by all relevant parties. The Government also submits that the investigative agency fully explained the rights and obligations of Mr. Tien during the arrest process.

44. The Government further submits that the criminal procedural decisions, such as the warrants for arrest and temporary detention of Mr. Tien, were approved by the People's Procuracy of Phu Yen Province, and that the whole criminal procedural process was monitored by the People's Procuracy of Phu Yen Province. The Government adds that the rights of Mr. Tien were guaranteed throughout that process. According to the Government, in Viet Nam, the People's Procuracy is the judicial agency empowered to examine the legality of criminal procedural activities carried out by investigative agencies. To be legally effective and implemented, every criminal procedural decision must be approved by the People's Procuracy, as provided under articles 20 and 107 of the Constitution of 2013. The Government submits that this is consistent with the provisions of international law, in particular, article 9 of the Covenant. Therefore, the Government concludes that the allegation that the arrest of Mr. Tien violated international conventions on human rights is unfounded.

45. The Government submits that article 117 of the Criminal Code of 2015 has clear provisions in determining offences and only deals with acts propagandizing information and documents that distort the truth and are against the State of the Socialist Republic of Viet Nam. As such, the Government rejects the allegation that article 117 of the Criminal Code is not consistent with international law.

46. The Government submits that on 8 November 2021, the investigative agency issued the investigative conclusion and transferred the case files to the People's Procuracy of Phu Yen Province for its consideration.

47. On 25 November 2021, the People's Procuracy of Phu Yen Province reportedly indicted and prosecuted Mr. Tien for (i) "[m]aking, possessing, spreading information, materials, items for the purpose of opposing the State of Socialist Republic of Viet Nam" under article 117 of the Criminal Code; and (ii) "[i]llegal appropriation and possession of explosive materials" under article 305 of the Criminal Code.

48. The Government denies the allegations that Mr. Tien was detained incommunicado, did not receive visits from his relatives, and did not have access to his lawyers. It submits that the security investigative agency fully explained to Mr. Tien his rights and obligations during the detention process as soon as he was arrested.

49. On 22 April 2021, Mr. Tien reportedly authorized a relative to contact lawyers to defend him. According to the Government, on 29 April 2021, his relative contacted a law firm that the Government named in its submission to request a named lawyer to defend him and protect his rights and benefits. On 11 May 2021, the law firm sent the registration of defense to the investigative security agency. On 12 May 2021, the investigative security agency issued the defense certificate for the named lawyer of the said firm to act as Mr. Tien's lawyer. On 18 May 2021, the lawyer attended the interrogation of Mr. Tien by the investigative security agency.

50. The Government submits that at the time of the temporary detention of Mr. Tien, the Covid-19 pandemic developed very complicatedly in Phu Yen Province and spread rapidly in the community. To prevent the spread of the pandemic and protect the health of temporary detainees, their family and their relatives, the Detention Center of the Police of Phu Yen Province temporarily stopped organizing visits to any of the temporary detainees, including to Mr. Tien. The Government adds that Mr. Tien's relatives were still entitled to send their gifts to him in accordance with the Law on Temporary Detention and Custody.

51. The Government submits that on 21 January 2022, the People's Court of Phu Yen Province held the first instance trial to adjudicate the accusation against Mr. Tien of "making, possessing, spreading information, materials, items for the purpose of opposing the State of Socialist Republic of Viet Nam" under article 117 of the Criminal Code and of "illegal appropriation and possession of explosive materials" under article 305 of the Criminal Code. The Court reportedly sentenced him to 5 years and 6 months in prison for the offence provided under article 117 of the Criminal Code and to 1 year in prison for the offence provided under article 305 of the Criminal Code. The total corresponding punishment is 6 years and 6 months in prison.

52. According to the Government, Mr. Tien's health is normal and his rights have been fully guaranteed according to the relevant legal provisions.

53. The Government submits that Viet Nam does not restrict citizens' freedom to publish and does not censor works before they are published. In this regard, it refers to article 25 of the Constitution of 2013, which stipulates that "[c]itizens have the right to freedom of speech and freedom of the press, and have the right of access to information, the right to assembly, the right to association, and the right to demonstrate. The exercise of those rights shall be prescribed by law". The Government notes that article 13(3) of the Press Law of 2016 provides that "[t]he press is not censored before print, transmission and broadcasting" and article 5(2) of the Publishing Law of 2021 stipulates that "[t]he State shall not censor works before publication".

54. The Government submits that Viet Nam does not censor people's forms of expression, but in fact is trying to perfect its legal system to ensure freedom of speech and expression for people in the press and in cyberspace, and other forms, which protect people against fake news, news that are inconsistent with Viet Nam's fine customs and traditions, and fabricated and untrue news inciting hatred. Moreover, the Government notes that for Viet Nam as well as many countries around the world, acts of reporting fake news and misinformation which distort and incite war and hatred are existential risks threatening national security, order, morality and social safety. As such, the Government notes that individuals and organizations that do not register but borrow the publisher's name to commit illegal acts will be handled in accordance with the laws.

*Further comments from the source.*

55. On 10 March 2022, the Government's reply was transmitted to the source for further comments, which the source submitted on 22 March 2022. In its further comments, the source rebuts the Government's submission that Mr. Tien's arrest and detention are lawful under domestic law and international law, arguing that the Government fails to substantiate this argument. The source also emphasises that the Government has failed to establish a causal link between Mr. Tien possessing 108 books and him seeking to overthrow the Government.

56. The source also rebuts the Government's allegation that Mr. Tien was represented by the law firm named in its submission.

57. The source further argues that the complete ban on family visits in prison cannot be justified based on the Covid-19 pandemic.

58. Regarding article 13 of the Press Law 2016 and article 5(2) Publishing Law, the source rebuts the Government's submission that freedom of expression protects Vietnamese society from fake news, news that is inconsistent with Viet Nam's fine customs and traditions, and fabricated and untrue news, inciting hatred. The source submits that "customs and traditions" is not a permissible ground for restrictions of human rights under the Covenant.

### **Discussion**

59. The Working Group thanks the source and the Government for their submissions.

60. As a preliminary matter, the Working Group notes the Government's response that "[t]he fact that the Working Group on Arbitrary Detention only took into account forms of acts exercising the right of freedom of expression (spreading information) and ignored the nature and purpose of acts (posting and spreading information which distorts the truth with a view to overthrowing the people's government) led to incorrect assessments on the legal system and judicial activities of Viet Nam." The Working Group wishes to clarify that in its communication dated 10 December 2021 to the Government, it was merely transmitting to the Government the source's submission and did not make any assessment of the allegations therein at that stage.

61. In determining whether the deprivation of liberty of Mr. Tien is arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has presented a *prima facie* case for breach of the international law constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations.<sup>2</sup>

### *Category I*

62. The source submits that Mr. Tien was arrested at home in October 2019 by security agents of the Phu Yen Province's police. The source submits that as a driver and volunteer collaborator at LPH, his Facebook account stopped working in October 2019 and that LPH lost contact with him since 2 October 2019. As such, the source alleges that Mr. Tien's whereabouts were unknown between October 2019 and April 2021, when the search and arrest warrants for his temporary detention and search were executed. The Government does not rebut this submission nor does it account for Mr. Tien's whereabouts during this period.

63. For these reasons, the Working Group is minded to find that Mr. Tien was forcibly disappeared between October 2019 and April 2021 noting that enforced disappearance constitutes a particularly aggravated form of arbitrary detention, in violation of article 6 of the Universal Declaration of Human Rights.<sup>3</sup>

64. The source submits and the Government confirms that Mr. Tien was officially arrested on 20 April 2021 pursuant to a warrant, and accused of "Stockpiling, distributing and propagating documents to oppose the State of the Socialist Republic of Vietnam" under Point

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<sup>2</sup> A/HRC/19/57, para. 68.

<sup>3</sup> See Opinions No. 32/2020, para. 33; No. 1/2021, para. 76; No. 81/2021, para. 87.

a, Clause 1 of article 117 of the Criminal Code. According to the Government, Mr. Tien possessed and spread 108 books containing distorted information about the directions and policies of the Socialist Republic of Viet Nam, which incites overthrowing the people's government.

65. The source submits, and the Government does not deny, that following his arrest in October 2019, Mr. Tien was not brought before a judge during his pre-trial detention. The Working Group recalls that legal safeguards against arbitrary deprivation of liberty as encapsulated in articles 9 of the Universal Declaration of Human Rights and the Covenant requires anyone arrested or detained on a criminal charge to be brought promptly before a judge to exercise judicial power.

66. As the Working Group has reiterated in its jurisprudence, and the Human Rights Committee has specified, 48 hours is ordinarily sufficient to satisfy the requirement of bringing a detainee "promptly" before a judge or other officer authorized by law following his or her arrest; any longer delay must remain absolutely exceptional and be justified under the circumstances.<sup>4</sup> The Working Group finds that Mr. Tien was not brought promptly before a judicial authority in violation of his rights under article 9 of the Universal Declaration of Human Rights and article 9(3) the Covenant.

67. The Working Group further observes that Mr. Tien was not afforded the right to bring proceedings before a court so that the court may decide without delay on the lawfulness of his detention, in accordance with articles 3, 8 and 9 of the Universal Declaration of Human Rights, articles 2 and 9(4) of the Covenant, and principles 11, 32, 37 and 38 of the Body of Principles. 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 affirms 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, and is essential to preserve legality in a democratic society.<sup>5</sup> This right, which is in fact a peremptory norm of international law, applies to all forms and situations of deprivation of liberty.<sup>6</sup>

68. Judicial oversight of deprivation of liberty is a fundamental safeguard of personal liberty and is essential in ensuring that detention has a legal basis.<sup>7</sup> Given that Mr. Tien was unable to challenge his detention before a court, his right to an effective remedy under article 8 of the Universal Declaration of Human Rights and article 2(3) of the Covenant has been violated. He was also placed outside the protection of the law, in violation of his 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.

#### *Incommunicado detention*

69. The source alleges that Mr. Tien was held incommunicado. While the Government denies this allegation, it does substantiate its position that Mr. Tien was represented by a law firm.<sup>8</sup> The source however submits that as Mr. Tien was unable to communicate with his family, he was thus unable to hire a lawyer, as discussed below. The Working Group finds the source's allegation to be credible. As the Working Group and other human rights mechanisms have stated, holding persons incommunicado violates their right to challenge the lawfulness of their detention before a court under article 9(3)<sup>9</sup> and 9(4) of the Covenant. This finding of incommunicado detention is strengthened by the Working Group's findings below that Mr. Tien's right to communicate with the outside world was violated.

<sup>4</sup> See, e.g. Opinions Nos. 66/2020; 60/2020; 49/2019; 30/2017 and 6/2017; See also Human Rights Committee, general comment No. 35, at para 33.

<sup>5</sup> A/HRC/30/37, paras. 2–3.

<sup>6</sup> *Ibid.*, para. 11, and annex, para. 47 (a). See also opinion No. 39/2018, para. 35.

<sup>7</sup> See opinions Nos. 35/2018, para. 27; 83/2018, para. 47; 32/2019, para. 30; 33/2019, para. 50; 44/2019, para. 54; 45/2019, para. 53; 59/2019, para. 51; and 65/2019, para. 64; UN 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; CAT/C/VNM/CO/1, para. 24.

<sup>8</sup> Opinions Nos. 45/2019, 44/2019, 9/2019, 35/2018, 46/2017, 45/2017.

<sup>9</sup> Human Rights Committee, General Comment No. 35 (2014), para. 35.

*Right to communicate with the outside world*

70. Regarding Mr. Tien's right to receive visits from his relatives, the Government submits that at the time of Mr. Tien's temporary detention, the Covid-19 pandemic developed very complicatedly in Phu Yen Province and spread rapidly in the community. To prevent the spread of Covid-19 and protect the health of temporary detainees as well as of their family and relatives, the Detention Center of the Police of Phu Yen Province temporarily stopped organizing family visits to detainees, including to Mr. Tien. The source submits that such a complete ban on family visits cannot be justified and that the Government failed to explain why this was necessary when family visits could have been allowed under social distance rules or by wearing masks or allowing family visits for a shorter time than usual.

71. The Working Group refers to its deliberation No. 11 on the prevention of arbitrary deprivation of liberty in the context of public health emergencies.<sup>10</sup> The Working Group notes the Government's submission that Mr. Tien's relatives were entitled to send him gifts but observes that this does not satisfy the right to communicate with the outside world. The Working Group also recalls the source's submission that because Mr. Tien was unable to communicate with his family, he was not able to hire a lawyer.

72. The Working Group finds that the restrictions placed on Mr. Tien's contact with his family violated his right to contact with the outside world under rules 43(3), 58(1) and 106 of the Nelson Mandela Rules, and principles 15 and 19 of the Body of Principles, and adversely impacted his ability to secure legal assistance.

*Vague laws*

73. The source argues that article 117 of the Criminal Code defines the crime of "conducting propaganda" so vaguely as to make it impossible for any individual to reasonably foresee what behaviour is criminal. As such, in Mr. Tien's case, article 117 of the Criminal Code resulted in the arbitrary prosecution of acts that are both unforeseeable as criminal and protected under the Covenant, the Universal Declaration of Human Rights, and other international norms and standards.

74. According to the Government, Mr. Tien possessed and spread 108 books containing distorted information about the directions and policies of the Socialist Republic of Viet Nam, *which incites overthrowing the people's government*. The Government submits that article 117 of the Criminal Code has clear provisions in determining offences and will only deal with acts propagandizing information and documents that distort the truth and are against the State of the Socialist Republic of Viet Nam. The source submits that no instruction is given as to what constitutes "propagating psychological warfare, dismay among the people, or documents or products against the Government". The source emphasizes the absence of any intent component or measure of what the prosecutor must prove in order to obtain a conviction. According to the source, article 117 of the Criminal Code lacks any plain meaning and does not give individuals a fair notice of what conduct is prohibited. Accordingly, the source submits that Mr. Tien could not have foreseen that his actions would amount to criminal conduct.

75. The Working Group has raised the issue of prosecution under vague penal laws with the Government of Viet Nam on several occasions,<sup>11</sup> specifically article 117 of the Criminal Code.<sup>12</sup>

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<sup>10</sup> A/HRC/45/16 paras. 3, 20-22.

<sup>11</sup> Opinion Nos. 45/2019, para. 54; 44/2019, para. 55; 9/2019, para. 39; 8/2019, para. 54; 46/2018, para. 62; 36/2018, para. 51; 35/2018, para. 36; 79/2017, para. 54; 75/2017, para. 40; 27/2017, para. 35; 26/2017, para. 51; 40/2016, para. 36; 45/2015, para. 15; 26/2013, para. 68; 27/2012, paras 38-41; 20/2003, para. 19; 13/1999, para. 12; 27/1998, para. 9; 21/1997, para. 6.

<sup>12</sup> See eg: Opinions No. 40/2021, paras 69, 73-75, 99; No. 36/2021, paras 73-74, 77-78, 103; No. 11/2021, paras 67, 73-74, 96.

76. The principle of legality requires that laws be formulated with sufficient precision so that individuals can access and understand the law, and regulate their conduct accordingly.<sup>13</sup> In the Working Group's view, article 117 of the Criminal Code does not meet this standard. It is thus incompatible with article 11(2) of the Universal Declaration of Human Rights and article 15(1) of the Covenant and cannot be considered "prescribed by law" and "defined with sufficient precision" due to its vague and overly broad language.<sup>14</sup> As such, the Working Group considers that the charge on which Mr. Tien is being detained is so vague that it is impossible to invoke a legal basis for his detention.

77. Based on the above, the Working Group finds that the Government failed to establish a legal basis for Mr. Tien's arrest and detention. His detention is thus arbitrary under category I.

#### *Category II*

78. The source alleges that Mr. Tien's detention is arbitrary under category II because it resulted from the peaceful exercise of his rights to freedom of expression and association. The Government submits that it does not restrict its citizens' freedom to publish or censor freedom of expression but is trying to protect people from fake news that is inconsistent with Viet Nam's fine customs and traditions, and fabricated and untrue news that incite hatred. Rather, the Government argues that Mr. Tien was arrested, detained, prosecuted and convicted because he violated article 117 of the Criminal Code.

79. The Working Group considers that charges and convictions under article 117 of the Criminal Code for the peaceful exercise of rights cannot be regarded as consistent with the Universal Declaration of Human Rights or the Covenant. The Working Group has considered the application of vague and overly broad provisions of Viet Nam's criminal laws in numerous opinions.<sup>15</sup>

80. In May 2017, the United Nations Country Team in Viet Nam recommended the repeal or revision of numerous articles of the Criminal Code, among them article 117, on the basis of their incompatibility with human rights obligations under the Covenant.<sup>16</sup> Along with other provisions, article 117 was highlighted as being vague and broad and not defining which actions or activities are prohibited, nor the constitutive elements of the offences thereunder.<sup>17</sup> The Country Team in Viet Nam also noted that these provisions do not differentiate between the use of violent means, which should be prohibited, and the legitimate peaceful activities of protest, expression of one's opinion, including criticism of the Government's policies and actions, or advocacy for any kind of changes, including to the political system, which directly fall under the rights to freedom of expression, opinion, assembly and religion, as well as participation in public life, and which, as such, should be guaranteed and protected in accordance with international human rights law (*see* articles 18, 19, 21 and 25 of the Covenant).<sup>18</sup>

81. The Human Rights Committee has called on Viet Nam to end violations of the right to freedom of expression offline and online, and ensure that restrictions do not go beyond the

<sup>13</sup> Opinion No. 41/2017, paras. 98–101. See also Opinion No. 62/2018, paras. 57-59; Human Rights Committee, General comment No. 35 (2014), para. 22.

<sup>14</sup> Human Rights Committee, General comment No. 34 (2011), para. 25.

<sup>15</sup> Opinion Nos. 11/2021, 40/2021, 81/2020, 45/2019, 44/2019, 8/2019, 75/2017, 27/2017, 26/2017, 26/2013, 27/2012, 24/2011, 6/2010, 1/2009, 1/2003; A/HRC/41/7, paras. 38.73, 38.171, 38.175, 38.177, 38.183-4, 38.187-91 38.196-8.

<sup>16</sup> <https://vietnam.un.org/en/14681-un-recommendations-2015-penal-code-and-criminal-procedural-code-viet-nam>, p.1.

<sup>17</sup> See Human Rights Council Resolution 19/36 "recalls that the interdependence between a functioning democracy, strong and accountable institutions, transparent and inclusive decision-making and effective rule of law is essential for a legitimate and effective Government that is respectful of human rights". In para. 16 (c) of the same resolution, the Council calls upon States to strengthen the rule of law by "ensuring that a sufficient degree of legal certainty and predictability is provided in the application of the law, in order to avoid any arbitrariness".

<sup>18</sup> <https://vietnam.un.org/en/14681-un-recommendations-2015-penal-code-and-criminal-procedural-code-viet-nam>, p.1

strictly defined limitations set forth in article 19 of the Covenant.<sup>19</sup> It found that the vague and broadly formulated offences in various articles of the Criminal Code, including article 117, their use to curtail freedom of opinion and expression, and the definition of certain crimes related to national security to encompass legitimate activities, such as exercising the right to freedom of expression, do not appear to comply with the principles of legal certainty, necessity and proportionality.<sup>20</sup>

82. The freedom of expression guaranteed under article 9 of the Covenant includes the right to seek, receive and impart information and ideas of all kinds regardless of frontiers and this right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, including political opinions.<sup>21</sup> Moreover, the permitted restrictions to this right may relate either to the respect of the rights or reputations of others or to the protection of national security, public order (*ordre public*) or public health or morals. As the Human Rights Committee has stipulated, “restrictions are not allowed on grounds not specified in paragraph 3, even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated”.<sup>22</sup>

83. The Working Group agrees with the source’s assertion that the restrictions enumerated by the Government such as fake news and “customs and traditions” are not permissible grounds to restrict the freedom of expression guaranteed under article 9 of the Covenant.

84. In this regard, the Working Group recalls that in a Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda, adopted in Vienna on 3 March 2017, several experts (including the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression) stated that general prohibitions on the dissemination of information based on vague and ambiguous ideas, including false news or information, are incompatible with international standards for restrictions on freedom of expression and should be abolished.<sup>23</sup>

85. In relation to freedom of association, according to article 22(2) of the Covenant, any restriction on freedom of association must be prescribed by law, for a legitimate interest, namely national security, public safety, public order, public health or morals, or the rights or freedoms of others, and necessary in a democratic society to secure such legitimate interest.

86. The Working Group finds that Mr. Tien is being punished for the exercise of his rights to freedom of expression under article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant, and freedom of association under articles 20 of the Universal Declaration of Human Rights and article 22 of the Covenant. The limitations on these rights and freedoms permitted under the Universal Declaration of Human Rights and the Covenant, and discussed above, 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 limitations, nor did it demonstrate why bringing charges against Mr. Tien was a legitimate, necessary and proportionate response to his peaceful delivery of books to readers. Importantly, there is nothing to suggest, as alleged by the Government, that the purpose of his delivering books to readers was to overthrow the Government.

87. The source submits that Mr. Tien’s meeting with members of the LPH in no way directly or indirectly called for violence or could reasonably be considered to threaten national security, public order, public health or morals, or the rights or reputations of others. In this regard, the source explains that Mr. Tien was an LPH staff member who merely delivered books to readers. The source submits that the Government failed to establish how

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<sup>19</sup> CCPR/C/VNM/CO/3, para. 46.

<sup>20</sup> Ibid. para. 45(a).

<sup>21</sup> CCPR/C/GC/34 at para 11.

<sup>22</sup> CCPR/C/GC/34 at para 22.

<sup>23</sup> <https://www.ohchr.org/Documents/Issues/Expression/JointDeclaration3March2017.doc>, para. 2.a. See Opinions No. 46/2020, para. 54 and No. 77/2020, para. 73.

Mr. Tien's activity of delivering books could constitute a danger to national security or public order.

88. The Working Group considers that Mr. Tien's conduct falls within the rights to freedom of opinion, expression and association protected under articles 19 and 20 of the Universal Declaration of Human Rights and articles 19 and 22 of the Covenant. His detention is therefore arbitrary and falls under category II. The Working Group thus refers this case 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.

### *Category III*

89. Given its finding that Mr. Tien's detention is arbitrary under category II, the Working Group emphasizes that no trial should have taken place. Nonetheless, according to the Government, on 21 January 2022, the People's Court of Phu Yen Province held the first instance trial to adjudicate the case of Mr. Tien for the offence of "making, possessing, spreading information, materials, items for the purpose of opposing the State of Socialist Republic of Viet Nam" under article 117 of the Criminal Code and the offence of "illegal appropriation and possession of explosive materials" under article 305 of the Criminal Code. Mr. Tien was sentenced to 5 years and 6 months in prison for the offence provided under article 117 and 1 year in prison for the offence provided under article 305. He has therefore been sentenced to a total of 6 years and 6 months in prison.

90. On the source's arguments on Mr. Tien's right to appeal, the Working Group is unable to make any findings due to insufficient information.

91. On Mr. Tien's right to access legal counsel, the Government submits that Mr. Tien was granted the right to access to counsel, asserting that he was represented by a law firm and that on 18 May 2021, a lawyer attended the interrogation of Mr. Tien by the investigative security agency. However, the source denies this, noting that the Government, has failed to submit any evidence showing that Mr. Tien was represented by the law firm in question. The source submits that Mr. Tien tried to hire a lawyer but his request was denied without any justification and that he was not provided with a lawyer appointed by the Government either. The source argues that because Mr. Tien was unable to communicate with his family, he was unable to hire a lawyer. The Working Group finds the source's allegation to be credible and observes that this case is another example of instances when legal representation was denied or limited for individuals facing serious charges, suggesting that there is a systemic failure to provide access to counsel during criminal proceedings in Viet Nam.<sup>24</sup>

92. The Working Group recalls that 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 shall be provided without delay.<sup>25</sup> The Working Group finds that the Government of Viet Nam violated Mr. Tien's rights under article 14(3)(b) and (d) of the Covenant, which guarantees individuals' right to defend themselves, in person or through counsel of their own choosing, to have adequate time and facilities to prepare their defence, and to communicate with counsel of their choosing.

93. The right to legal assistance is one of the key safeguards against arbitrary detention and must be strictly adhered to by all States. By preventing Mr. Tien from accessing legal counsel from the moment of his arrest, the authorities violated the equality of arms principle, and thereby placed Mr. Tien at an unfair disadvantage, in violation of article 14 of the Covenant.<sup>26</sup> The Working Group concludes that the above violations of Mr. Tien's due

<sup>24</sup> Opinions No. 40/2021, No. 11/2021, No. 45/2019, No. 44/2019, No. 9/2019, No. 46/2018, No. 35/2018, No. 79/2017, No. 75/2017, No. 27/2017, No. 26/2017, No. 40/2016. See also CAT/C/VNM/CO/1, paras. 16-17.

<sup>25</sup> UN Basic Principles and Guidelines, principle 9 and guideline 8; Human Rights Committee, General comment No. 35 (2014), para. 35; A/HRC/48/55, para. 56 and para. 8 of the annex (Deliberation No. 12 on women deprived of their liberty); A/HRC/45/16, paras 50-55. See also A/HRC/27/47, para. 13

<sup>26</sup> See eg Opinion No. 65/2021, para. 57.

process and fair trial rights are of such gravity as to give his detention an arbitrary character under category III.

#### **Disposition**

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

The deprivation of liberty of Nguyen Bao Tien, being in contravention of articles 3, 6, 8, 9, 19 and 20 of the Universal Declaration of Human Rights and articles 2, 9, 14, 16, 19 and 22 of the International Covenant on Civil and Political Right is arbitrary and falls within categories I, II, and III.

95. The Working Group requests the Government of Viet Nam to take the steps necessary to remedy the situation of Mr. Tien without delay and 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.

96. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Tien immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law. In the current context of the global coronavirus disease (COVID-19) pandemic and the threat that it poses in places of detention, the Working Group calls upon the Government to take urgent action to ensure the immediate unconditional release of Mr. Tien

97. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Tien and to take appropriate measures against those responsible for the violation of his rights.

98. The Working Group requests the Government to bring its laws, particularly article 117 of Criminal Code of the Socialist Republic of Viet Nam, into conformity with the recommendations made in the present opinion and with the commitments made by Viet Nam under international human rights law.

99. 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 and the Special Rapporteur on the rights to freedom of peaceful assembly and of association for appropriate action.

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

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

101. 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 Mr. Tien has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Tien;
- (c) Whether an investigation has been conducted into the violation of Mr. Tien's rights and, if so, the outcome of the investigation;
- (d) Whether any legislative amendments or changes in practice have been made to harmonize 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.

102. 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.

103. 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.

104. 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>27</sup>

*[Adopted on 7 April 2022]*

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<sup>27</sup> See Human Rights Council resolution 42/22, paras. 3 and 7.