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Human Rights Council
Working Group on Arbitrary Detention**Opinions adopted by the Working Group on Arbitrary
Detention at its seventy-fourth session,
30 November – 4 December 2015****Opinion No. 46/2015 concerning Hung Linh Nguyen
(Vietnam)**

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 1/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. The mandate was extended for a further three years in resolution 24/7 of 26 September 2013.
2. In accordance with its methods of work (A/HRC/30/69), on 22 September 2015 the Working Group transmitted a communication to the Government of Vietnam concerning Hung Linh Nguyen. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
 - (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him) (category I);
 - (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);
 - (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

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

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

Submissions

Communication from the source

4. Mr. Hung Linh Nguyen, born on 15 February 1963, is a citizen of the Socialist Republic of Vietnam and usually resides in the Rach Gia City, the Province of Kien Giang, Vietnam. From February 2006 to March 2015 he was the Chief Executive Officer of the Kien Giang Trade and Tourism Company (KTC), which is a State owned enterprise under control of Kien Giang's People Committee. From February 2014 to March 2015 Mr. Hung Ling Nguyen was also the Chairman of the Vietnam Food Association (VFA).

5. According to the information received, Mr. Hung Linh Nguyen was arbitrarily detained on 7 June 2015. The source reported that, at 12:45 a.m. on the same day, a police officer from the Kien Giang Police Department (KGPD) invited Mr. Nguyen to a coffee shop for a private meeting located in Rach Gia City in Kien Giang Province. After the meeting, at approximately 1:15 p.m., Mr. Nguyen was arrested.

6. The source informed that authorities did not show an arrest warrant nor accused Mr. Nguyen of any crime. Mr. Nguyen was taken to the Police Station Unit PC 46, located at 120 Nguyen Hung Son Street in Rach Gia City, Kien Giang Province. The KGPD did not inform the victim's family of his arrest or the place of his detention.

7. The source informs that Mr. Hung Linh Nguyen's family tried to contact him at the Police Station PC 46 on 8 June 2015 and asked to see any document regarding his detention or prosecution. The Police refused to provide any information. However, later on the same day, the family received a copy of the arrest decision by the Police Department dated Monday 8 of June 2015.

8. The source informs that on 9 and 10 June 2015 a formal letter was presented to the Police Station PC 46 requesting for a bail out and asking information about the situation of Mr. Nguyen. The Police refused to give any information about the detainee or disclose which authorities ordered the detention.

9. The source further informs that on 11 June at 9:30 a.m. a request letter was presented by Mr. Nguyen's family to the People's Prosecution Office in order to request a bail out. The People's Prosecution Office recommended the family to contact the Police Station PC 46, where no information has been obtained.

10. The source alleged that the family lawyer repeatedly contacted by phone the Police Station PC 46 and insisted on demanding a bail out for Mr. Nguyen. The police refused to provide any contact between the lawyer and Mr. Nguyen. Moreover, the authorities have allegedly stated that no lawyer will be allowed during the investigation of this case. Mr. Nguyen therefore currently has no access to a legal counsel.

11. The source also claims that, on 16 June 2015, an attempt was made to send a request letter for the liberation of Mr. Nguyen to the Government of Vietnam in Hanoi. The post office refused to send any mail related to the victim to the Vietnamese Government. The

source alleged that the post office's employees were instructed not to receive this letter by the KGPD authorities.

12. Since the day of his arrest, Mr. Nguyen has not been allowed contact with his family or lawyer. He has allegedly been detained incommunicado in a small cell at the Kien Giang Police Station PC 46 and denied access to medicines, food and personal goods that were sent by his family and friends.

13. From 1 August to 8 August 2015, the KGPD authorities allegedly deprived Mr. Nguyen of food. Moreover, Mr. Nguyen was threatened to be killed, which would then be presented as his suicide. The source added that, on 23 August 2015, a police officer told Mr. Nguyen's family that requests for a bail out would not be considered at any point, but in case the victim dies, the body will be sent to the family for a proper burial.

14. The source informs that the reasons for the arrest of Mr. Nguyen, as has been provided by the police, are allegedly his lack of responsibility during his tenure as the Chief Executive Officer of the KTC, which caused a financial loss for the company. The source notes that Mr. Nguyen was not occupying the above-mentioned position when the financial loss occurred.

15. The source alleges that Mr. Nguyen's detention might be motivated by his refusal to participate in a corruption scheme that was supposedly affecting the KTC, since the end of 2014

16. In relation to Mr. Nguyen's refusal to participate in the alleged corruption, the source reports that Mr. Nguyen was harassed and threatened by the Kien Gian authorities prior to his arrest on 7 June 2015. The source informed that, on 5 December 2014, the KGPD restrained Mr. Nguyen from freely moving, following orders of the Kien Giang People's Committee (KGPPC). On 12 January 2015, the authorities from the KGPPC allegedly coerced Mr. Nguyen to resign from the position of the Chairman of the VFA. The source added that on 25 February 2015, the authorities also suspended Mr. Nguyen Chairman's position in the KTC. Furthermore, on 7 March 2015, when Mr. Nguyen was leaving Vietnam to receive medical treatment in Singapore, the police authorities retained his passport. Until present, the authorities did not return the passport to Mr. Nguyen.

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

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

19. The source submits that the deprivation of liberty of Mr. Nguyen falls under Categories I, II and III as classified by the Working Group. With regard to the Category I, the source argues that Mr. Nguyen's arrest and continuous deprivation of liberty has no legal basis. Furthermore, it is alleged that the confiscation of Mr. Nguyen's passport and his posterior arrest violate articles 7 and 13 of the Universal Declaration of Human Rights and

article 12 of the International Covenant on Civil and Political Rights, thus rendering detention of Mr. Nguyen to fall under the Category II.

20. Furthermore, the source argues that there has been non-observance of the international norms relating to the right to a fair trial and due process, established in the Universal Declaration of Human Rights (Category III). Mr. Nguyen was arrested without a valid arrest warrant and has been kept in detention with no official charges or trial. The source reported that Mr. Nguyen's access to legal counsel has been constantly denied in the Police Station where he is reportedly kept. The source concludes that the abovementioned facts have been conducted in violation of the article 9 of the ICCPR and the UDHR.

Response from the Government

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

Discussion

22. The Working Group addressed a communication to the Government of the Socialist Republic of Vietnam on 22 September 2015 and requested detailed information about the mentioned allegations as well as about the current situation of **Mr. Nguyen Hung Linh** and a clarification of the legal provisions justifying his continued detention.

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

24. Despite the absence of any information from the Government, the Working Group considers that it is in a position to render an opinion on the case on the basis of the submissions that have been made in conformity with paragraph 16 of its methods of work¹.

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

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

27. The arrest and detention has been conducted with no legal basis considering the elements, as illustrated in the submission, including the followings: 1) on 7 June 2015, Mr. Hung Linh Nguyen was arrested without a warrant and a notification of charges against him that should have been rendered promptly at the time of arrest; 2) the authorities did not inform the victim's family of his arrest or the place of his detention and refused to provide any information, except for a copy of the arrest decision dated 8 of June 2015; 3) Mr.

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

² See, for example, Report of the Working Group, A/HRC/19/57, para. 68.

Nguyen, as has been explained by the police, was arrested for the lack of responsibility as the Chief Executive Officer of the KTC concerning the financial loss, which incurred yet not during the time of his tenure; 4) the arrest and detention incommunicado has been made by the sole hands of the police yet with no knowledge of the prosecution.

28. An additional set of totalities of the facts and the circumstances that points to the establishment of the above observation includes the followings: 1) despite the family lawyer repeatedly contacted by phone the Police Station PC 46 and insisted on demanding a bail out for Mr. Nguyen, the police refused to provide any contact between the lawyer and Mr. Nguyen; 2) the authorities stated that no lawyer would be allowed during the investigation, thereby depriving Mr. Nguyen of the access to a legal counsel; 3) on 23 August 2015, a police officer told Mr. Nguyen's family that requests for a bail out would not be considered at any point, but in case the victim dies, the body would be sent to the family for a proper burial.

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

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

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

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

33. The statement of a police officer, made on 23 August 2015, that requests for a bail out would not be considered at any point and if the victim dies, the body would be sent to the family for a proper burial serves, in particular, as the very indicator that the deprivation of liberty of Mr. Nguyen was made with no legal basis. It also presents a well-founded presumption that both mistreatment and even acts of torture have been applied to Mr. Nguyen while in detention.

34. The pre-trial incommunicado detention that has lasted about half a year, as shown in the case of Mr. Nguyen, also constitutes a clear violation of the part of the well-established

³ Report of the Working Group, A/HRC/19/57, para. 53.

⁴ Ibid, para. 54. The Working Group further wishes to refer to general comment No. 35 (2014) of the United Nations Human Rights Committee whereby "it should not be the general practice to subject defendants to pretrial detention. Detention pending trial must be based on an individualized determination that it is reasonable and necessary in all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime." General Comment No. 35 of the Human Rights Committee, para. 38.

international law on detention that pretrial detention should be an exception and should be as short as possible.⁵ In its 2011 annual report (A/HRC/19/57, paras. 48-58), the Working Group also wishes to recall that it underlined that pretrial detention should be an exceptional measure.

Disposition

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

The arrest and detention of the afore-mentioned detainee was conducted in particular violation of articles 9, 10, 11 of the UDHR and articles 9 (1), 9 (2), 9 (3), 9 (4) of the ICCPR is arbitrary under category I of the methods of work of the Working Group.

36. Consequent upon the Opinion rendered, the Working Group requests the Government, without delay, to take the necessary steps to remedy the situation and bring it into conformity with the standards and principles enshrined in the ICCPR and the relevant international norms.

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

38. In light of the allegations of torture and other ill-treatment inflicted upon the detainees, the Working Group considers it appropriate, in accordance with article 33(a) of its Methods of Work, to refer these allegations to the Special Rapporteur on torture for appropriate action.

[Adopted on 3 December 2015]

⁵ See, for example, Human Rights Committee, Communication No. 1787/2008, CCPR/C/107/D/1787/2008, paras. 7.3-4.