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## Socialist Republic of Vietnam v. Pham Thi Doan Trang

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Columbia  
Law School

HUMAN RIGHTS  
INSTITUTE



**Socialist Republic  
of Vietnam**  
**v.**  
**Pham Thi Doan  
Trang**

**April 2022**

*David McCraw*

**TRIALWATCH FAIRNESS REPORT**  
**A CLOONEY FOUNDATION FOR JUSTICE INITIATIVE**

## ABOUT THE AUTHORS

**David McCraw** teaches Media Law at Harvard Law School and the New York University School of Law. He has served as in-house counsel at The New York Times and the New York Daily News and is the author of the book, “Truth in Our Times: The Fight for Press Freedom in the Age of Alternative Facts.”

The **Columbia Law School Human Rights Institute and the Human Rights Clinic** work to advance human rights around the world and to train the next generation of strategic advocates for social justice. The Institute serves as the focal point of international human rights education, scholarship, and practice at Columbia Law School. The Clinic works in partnership with civil society organizations and communities to carry out human rights investigations, legal and policy analysis, litigation, report-writing, and advocacy. The Institute and Clinic are partners in the Clooney Foundation for Justice’s TrialWatch Initiative.

## ABOUT THE CLOONEY FOUNDATION FOR JUSTICE’S TRIALWATCH INITIATIVE

**TrialWatch is an initiative of the Clooney Foundation for Justice.** Its mission is to expose injustice, help to free those unjustly detained and promote the rule of law around the world. TrialWatch monitors criminal trials globally against those who are most vulnerable — including journalists, protesters, women, LGBTQ+ persons and minorities — and advocates for the rights of the unfairly convicted. Over time, TrialWatch will use the data it gathers to publish a Global Justice Ranking exposing countries’ performance and use it to support advocacy for systemic change.

*The statements and analysis expressed are solely those of the authors, and the views expressed in this report are not necessarily those of the Clooney Foundation for Justice.*

## EXECUTIVE SUMMARY



### **David McCraw, a member of the TrialWatch Expert panel, assigned this trial a grade of F:**

The trial of Pham Thi Doan Trang, a well-known journalist, author, and human rights activist, was marred by significant flaws from her arrest through sentencing, including violations of her right to be free from arbitrary detention, her right to legal assistance, her right to cross-examine witnesses and contest the evidence against her, and her right to an independent and impartial tribunal.

The charges themselves—conducting “anti-state propaganda” by writing, storing, and disseminating material “against the Socialist Republic of Vietnam”—and her nine-year sentence violate her substantive right to freedom of expression and the principle of legality.

With respect to procedure, Ms. Trang was detained without access to a lawyer for over a year in the leadup to her trial, ostensibly to allow the investigation to proceed, but the evidence consisted largely of publicly-available materials (some dating back several years) and much of it had apparently been compiled even before her arrest in 2020. Indeed, a careful review of the indictment, which was filed about ten months after her arrest, suggests that the long delay in bringing Ms. Trang’s case to trial was not justified by the complexity of the charges against her.

Then, at trial, although Ms. Trang’s legal team requested that witnesses be summoned for questioning, the Court rejected this request and decided its verdict and Ms. Trang’s sentence in a matter of hours at the end of one day. The Court relied without explanation on the “opinion assessment conclusion of the competent authority” that the materials at issue constituted “distorted information, defaming the People’s Government, spreading psychological warfare, spreading fake news to cause dismay among the people, and sabotage the Socialist Republic of Vietnam,” effectively outsourcing the key question to be decided to a different government body.

Taken together, the entire process, from her prolonged pretrial detention to the charges on their face to her rapid conviction and excessive sentence in a judgment devoid of a clear explanation of why she was guilty, suggests that this was an abuse of process and Ms. Trang was being punished for exercising her rights to political opinion and expression.

On the night of October 6, 2020, at the conclusion of a virtual human rights meeting between the governments of the United States of America and Vietnam, Vietnamese police arrested the journalist and human rights activist Pham Thi Doan Trang at her home in Hanoi. Ms. Trang was arrested and detained for allegedly “conducting propaganda against the Socialist Republic of Vietnam” and “making, storing, spreading information, materials, items for the purpose of opposing the State of Socialist Republic of Vietnam”—two of the most notorious of Vietnam’s fifteen national security offenses.

It would be a full year—during which time Pham Doan Trang was held incommunicado in detention—before she would meet her lawyers and receive her indictment in October 2021, despite the fact that the indictment itself is dated August 30, 2021. After a one-day trial on December 14, 2021, Ms. Trang was convicted and sentenced to nine years in prison—more than the seven to eight years recommended by the prosecuting authorities. Ms. Trang has since appealed. As of the date of this report, the court of appeals has yet to consider her appeal.

Columbia Law School’s Human Rights Institute monitored this trial by reviewing copies of the indictment and judgment in the case, and by gathering information from other sources.

Pham Thi Doan Trang is a well-known human rights activist, author, blogger, and journalist whose work as an advocate and a journalist spans a wide spectrum of human rights topics in Vietnam—LGBTQ+ rights, environmental issues, police brutality, and the treatment of human rights defenders and political prisoners, to name a few. She co-founded the blog *Luat Khoa Tap Chi* (Journal of Law) and the Liberal Publishing House, which in 2020 won the International Publishers Association’s Prix Voltaire. She is also the founder of Green Trees, a pro-democracy environmentalist organization. In January 2022, she was awarded the Martin Ennals Human Rights Award for her advocacy and awareness-raising on a broad range of human rights issues in Vietnam and previously received Reporters without Borders (“RSF”)’s Press Freedom Award in 2019 for her investigative journalism.

Over the last decade, she has been repeatedly arrested, detained, and beaten by authorities in connection with her writing and activism—often at moment coinciding with attention to the human rights situation in Vietnam. For instance, she was arrested in 2016 ahead of US President Obama’s visit to Vietnam and then again in 2017, after leaving a meeting with a delegation from the European Union in advance of its EU-Vietnam human rights dialogue. And indeed, in this case, one of the materials the authorities alleged was “against the state” was a 2017 interview titled “What did civil society representative say to EU diplomatic mission” as well as other documents that were, according to the defendant, materials she had received from EU conferences.<sup>1</sup>

After her arrest on October 6, 2020, Ms. Trang was detained without access to a lawyer or her family for a year. This is common practice, as Vietnamese procedure essentially creates a presumption in favor of detention during investigation in the case of “serious” crimes. The indictment is dated August 2021 but was presented to Ms. Trang only on October 8, 2021, when she was finally informed of the charges against her. She met with legal counsel for the first time on October 18, 2021, just ahead of her trial, which was originally scheduled for November 3, 2021, giving her team about two weeks to prepare and review over 11,000 pages of evidence against her. Ms. Trang’s trial was delayed at the last minute because of COVID exposure amongst the prosecuting authorities (the Office of the Procuracy) and rescheduled for six weeks later.

On December 14, 2021, at the conclusion of the rescheduled trial, which lasted a single day, a court in Hanoi convicted Pham Thi Doan Trang of “spreading information against the Socialist Republic of Vietnam” under Article 88 of the 1999 Penal Code and sentenced her to nine years in prison. The indictment listed numerous articles, reports, and interviews that Ms. Trang had either allegedly authored or that had allegedly been found on devices seized from

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<sup>1</sup> Socialist Republic of Vietnam v. Pham Thi Doan Trang, Judgment, Dec. 14, 2021, at 12.

her apartment but ultimately, her conviction rested on five articles and interviews:

1. An English-language document: “Brief report on the marine life disaster in Vietnam”;
2. An English-language document: “General assessment on human rights situation in Vietnam”;
3. An English-language report, "Report Assessment of the 2016 Law on Belief and Religion in relation to the exercise of the right to Freedom of Religion and Belief in Vietnam" (and a Vietnamese translation of the report);
4. The interview: “*Pham Thi Doan Trang: Vietnamese middle class does not need democracy and freedom*” with Radio Free Asia (which included audio and a written article and was from 2018); and
5. Statements in an online conversation with BBC News (likewise from 2018).

Ms. Trang’s trial violated her human rights, including her rights to a fair trial and to freedom of expression, resulting in an unjust conviction and sentence. Her detention for over a year without access to counsel and her family and with no information about the charges and evidence against her violated her rights at the pretrial stage—notably, the right to be free from arbitrary detention, the right to be informed of the reasons for her arrest, and the right to adequate time and facilities to prepare a defense.

These and other violations further infected the trial stage, during which the court denied Ms. Trang’s defense team’s requests to call their own witnesses and cross-examine the prosecuting authorities’—in particular, individuals at the agency who determined that the materials in question were “anti-State.” In fact, the Court went so far as to characterize this agency’s role as “concluding that the following documents have violated the law”—the key question to be decided in the case—and yet was content to deny the defendant’s request for their testimony because “due to their business commitments, they could not be present at the hearing.” In this way, the Court outsourced the determination of Ms. Trang’s guilt or innocence to a different body, the decisions of which were not allowed to be effectively challenged in court.

This also was not the only irregularity in the way evidence was obtained and presented. The prosecuting authorities relied on information seized by police from Ms. Trang’s computer—including documents that were never published or shared publicly—to support its case that she was storing and spreading propaganda and then relied on her alleged signature on these documents from pretrial interrogation sessions years prior, where she was unrepresented, to prove she had admitted authorship of articles and reports critical of Vietnam’s human rights situation, despite the fact that she denied having signed the documents.

The Court did, appropriately, reject some of the evidence presented by the Procuracy—for example, an article from a Facebook account that Ms. Trang denied was hers and one on another website where the authorities could not establish who owned the domain. But most of the evidence against Ms. Trang was accepted without giving Ms. Trang an opportunity to meaningfully contest it.

The charges against Ms. Trang, on their face, also present violations of her rights. UN bodies and experts have repeatedly raised concerns that the law under which she was convicted is vague and overbroad, and thus inconsistent with the principle of legality. Further, the charges against her—for anti-state propaganda—all centered around her alleged authorship, sharing, and possession of articles about the human rights situation in Vietnam, conduct protected

under human rights law. More broadly, this prosecution meets all the criteria for finding an abuse of process. Ms. Trang's conviction is part of a pattern of arrests followed by prolonged detention, rapid trials, and excessive punishment in Vietnam, targeting journalists and advocates for their criticism of the government and/or human rights activism.

# BACKGROUND INFORMATION

## A. POLITICAL AND LEGAL CONTEXT

Since the reunification of North and South Vietnam in 1976, the Socialist Republic of Vietnam (hereinafter “Vietnam”) has been ruled as a one-party state by the Communist Party of Vietnam (“CPV”). The Constitution of Vietnam establishes the CPV as “the leading force of the State and society”<sup>2</sup> and the Party continues to exercise centralized control over all branches of government, including the judiciary. This “supreme” authority over political, civil, cultural, and economic life has been used to justify the criminalization, harassment, and punishment of government critics, activists, journalists, and many others.

Vietnam has ratified the International Covenant on Civil and Political Rights, and its Constitution affirmatively requires respect for human rights.<sup>3</sup> However, the Constitution also allows for these rights to be restricted “for the reasons of national defence, national security, social order and security, social morality, and the health of the community”<sup>4</sup> and establishes that human rights cannot “infringe national interests.”<sup>5</sup> Journalists and human rights activists in particular have been prosecuted and imprisoned for speech that allegedly threatens national interests and challenges the CPV.<sup>6</sup>

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<sup>2</sup> Article 4 of the Constitution of the Socialist Republic of Viet Nam 1992 (rev. 2013), *available at* [https://www.constituteproject.org/constitution/Socialist Republic of Vietnam 2013?lang=en](https://www.constituteproject.org/constitution/Socialist%20Republic%20of%20Vietnam%202013?lang=en).

<sup>3</sup> Articles 14-15 of the Constitution.

<sup>4</sup> Article 14(2) of the Constitution.

<sup>5</sup> Article 15(4) of the Constitution

<sup>6</sup> See Letter to the Government of the Socialist Republic of Vietnam from the Mandates of the Special Rapporteur on the situation of human rights defenders; the Working Group on Arbitrary Detention; 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 right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on freedom of religion or belief; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and the Working Group on discrimination against women and girls, Nov. 22, 2021,

<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=26765>.

INTERNATIONAL FEDERATION FOR HUMAN RIGHTS & VIETNAM COMMITTEE ON HUMAN RIGHTS, VIETNAM: ASSAULT ON CIVIL SOCIETY CONTINUES UNABATED, Feb. 17, 2020, *available at*

[https://www.fidh.org/IMG/pdf/20200217\\_vietnam\\_dialogue\\_bp\\_en.pdf](https://www.fidh.org/IMG/pdf/20200217_vietnam_dialogue_bp_en.pdf); Amnesty International, *Viet Nam 2020* (2020), *available at* [https://www.amnesty.org/en/location/asia-and-the-pacific/south-east-asia-and-the-pacific/viet-nam/report-viet-nam/#\\_edn2](https://www.amnesty.org/en/location/asia-and-the-pacific/south-east-asia-and-the-pacific/viet-nam/report-viet-nam/#_edn2); HUMAN RIGHTS FOUNDATION, “Vietnam’s COVID Success Belies Escalating Crackdown on Rights,” Aug. 10, 2020, *available at* <https://hrf.org/vietnams-covid-success-belies-escalating-crackdown-on-rights/>;

HUMAN RIGHTS WATCH, “Vietnam: Crackdown on Rights Little Tolerance for Freedom of Expression, Independent Trade Unions” Jan. 14, 2020, <https://www.hrw.org/news/2020/01/14/vietnam-crackdown-rights>; ARTICLE 19, “Vietnam: Convictions for social media use part of intensifying assault on internet freedom,” May 5, 2021, <https://www.article19.org/resources/vietnam-convictions-for-social-media-use/>;

CIVICUS, “Activists Face Repression Around and Following the Vietnam Communist Party Congress,” March 29, 2021, <https://monitor.civicus.org/updates/2021/03/29/activists-face-repression-around-and-following-vietnam-communist-party-congress/>.



## Restrictions on Freedom of Expression in Vietnam Through National Security Laws

In recent years, Vietnam has intensified its crackdown on dissent, arresting journalists, bloggers, human rights activists, labor activists, and many others and charging them with criminal offenses that carry huge penalties. Of particular concern is the application of broadly-defined “national security” offenses to human rights advocates, often for non-violent speech-related offenses.

According to The 88 Project for Free Speech in Viet Nam, as of March 4, 2022, there are 204 individuals detained in Vietnam for their writing or activism, 36 of whom are women, with many more facing harassment by the authorities for their criticism of the government.<sup>7</sup> The 88 Project has further documented that 35 people were arrested in 2020 for their advocacy work in Vietnam—including 27 people charged with “national security” offenses, two of whom received life in prison for “activities against the people’s government.”<sup>8</sup> Defend the Defenders similarly found that the majority of the political prisoners serving sentences in 2021 were convicted of political crimes including “subversion,” “propaganda against the state,” “abusing democratic freedom,” “disruption of security,” and “undermining the national unity.”<sup>9</sup>

In 2015, Vietnam adopted a new criminal code, which went into effect in 2018; this code expanded the number of national security offenses and, in some cases, added harsher penalties.<sup>10</sup> These offenses, listed under Articles 78 through 92 in the 1999 code, include a wide range of broadly-defined offenses such as “rebellion” (Article 82), “terrorism” (Article 84), “undermining the implementation of socio-economic policies” (Article 86), “conducting propaganda against the Socialist Republic of Vietnam” (Article 88), and “fleeing abroad or defecting to stay overseas with a view to opposing the people’s administration” (Article 91).<sup>11</sup> The 2015 code lists national security offenses under Articles 108-122, renaming some offenses, adding others, and expanding the penalties. For example, and central to the present case, “conducting propaganda...[by] making, storing and/or circulating documents and/or cultural products with contents against the Socialist Republic of Vietnam” (Article 88 in the 1999 code) was “updated” with a parallel law, Article 117, which criminalized “making, storing, spreading information, materials, items for the purpose of opposing the State of Socialist Republic of Vietnam.”<sup>12</sup> The sentencing range for this offense under Article 88 is three to 12 years in prison; under Article 117, the minimum sentence is five years in prison.

Both codes share vague and expansive terms without clarification through definitions, and

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<sup>7</sup> The 88 Project for Free Speech in Viet Nam, *Database of Persecuted Activists in Vietnam*, <https://the88project.org/database/> (accessed March 4, 2022).

<sup>8</sup> THE 88 PROJECT FOR FREE SPEECH IN VIETNAM, 2020 HUMAN RIGHTS REPORT VIETNAM: OUR REPORT ON POLITICAL PRISONERS AND ACTIVISTS AT RISK (2021), *available at* [https://the88project.org/wp-content/uploads/2021/04/HR-Report-20\\_final.pdf](https://the88project.org/wp-content/uploads/2021/04/HR-Report-20_final.pdf).

<sup>9</sup> VIETNAM DEFEND THE DEFENDERS, DEFEND THE DEFENDERS’ LATEST STATISTICS: VIETNAM HOLDS 264 PRISONERS OF CONSCIENCE (Oct. 10, 2021).

<sup>10</sup> See Human Rights Watch, “Vietnam: Widespread ‘National Security’ Arrests,” Nov. 15, 2015, <https://www.hrw.org/news/2015/11/19/vietnam-widespread-national-security-arrests>.

<sup>11</sup> Socialist Republic of Vietnam, Penal Code (No. 15/1999/QH10), <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/56207/111125/F97325861/VNM56207%20Eng.pdf>

<sup>12</sup> Socialist Republic of Vietnam, No. 100/2015/QH13, Criminal Code 2015, Article 117, [https://www.policinglaw.info/assets/downloads/2015\\_Criminal\\_Code\\_of\\_Vietnam\\_\(English\\_translation\).pdf](https://www.policinglaw.info/assets/downloads/2015_Criminal_Code_of_Vietnam_(English_translation).pdf). Article 117 in the 2015 Criminal Code just covers making and storing “propaganda,” while Article 88 of the 1999 Code is broader and making and storing propaganda is only one subsection.

both involve significant penalties for those convicted. Six of the designated national security offenses in the 2015 criminal code (“high treason,” “activities against the people’s government,” “espionage,” “rebellion,” “terrorism to oppose the people’s government,” and “sabotaging facilities of Socialist Republic of Vietnam”) carry a potential death sentence.<sup>13</sup>

Over the years, the United Nations and numerous human rights organizations have raised concerns with these national security crimes on their face, given the vagueness of their wording, and with their misuse to target journalists, human rights defenders, and others for exercising their right to freedom of expression.<sup>14</sup> In 2017, for example, several UN human rights experts raised concerns about the plight of six human rights defenders and pro-democracy activists, noting that their arrest and incommunicado detention were “based on legal charges that are incompatible with Vietnam’s obligations under international human rights law, as they criminalize the legitimate exercise of the rights to freedom of expression, freedom of religion or belief and freedom of association and peaceful assembly.”<sup>15</sup> That same year, the United Nations urged the government to “amend the overly broad ill-defined laws that are used—under the pretext of national security—to crack down on dissent.”<sup>16</sup> More recently in January 2021, the UN Office of the High Commissioner for Human Rights criticized the government of Vietnam’s use of “vaguely defined laws” to arbitrarily detain—often for months, incommunicado—journalists, bloggers, and others commenting on Vietnam’s human rights situation.<sup>17</sup>

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<sup>13</sup> Human rights organizations FIDH and the Vietnam Committee on Human Rights observed that the number of people executed in Viet Nam is itself considered a “state secret” by the government. See VIETNAM: ASSAULT ON CIVIL SOCIETY CONTINUES UNABATED, at 5.

<sup>14</sup> INTERNATIONAL FEDERATION FOR HUMAN RIGHTS & VIETNAM COMMITTEE ON HUMAN RIGHTS, VIETNAM: ASSAULT ON CIVIL SOCIETY CONTINUES UNABATED, Feb. 17, 2020, *available at* [https://www.fidh.org/IMG/pdf/20200217\\_vietnam\\_dialogue\\_bp\\_en.pdf](https://www.fidh.org/IMG/pdf/20200217_vietnam_dialogue_bp_en.pdf); Amnesty International, *Viet Nam 2020* (2020), *available at* [https://www.amnesty.org/en/location/asia-and-the-pacific/south-east-asia-and-the-pacific/viet-nam/report-viet-nam/#\\_edn2](https://www.amnesty.org/en/location/asia-and-the-pacific/south-east-asia-and-the-pacific/viet-nam/report-viet-nam/#_edn2); HUMAN RIGHTS FOUNDATION, “Vietnam’s COVID Success Belies Escalating Crackdown on Rights,” Aug. 10, 2020, *available at* <https://hrf.org/vietnams-covid-success-belies-escalating-crackdown-on-rights/>; HUMAN RIGHTS WATCH, “Vietnam: Crackdown on Rights Little Tolerance for Freedom of Expression, Independent Trade Unions” Jan. 14, 2020, <https://www.hrw.org/news/2020/01/14/vietnam-crackdown-rights>; ARTICLE19, “Vietnam: Convictions for social media use part of intensifying assault on internet freedom,” May 5, 2021, <https://www.article19.org/resources/vietnam-convictions-for-social-media-use/>; CIVICUS, “Activists Face Repression Around and Following the Vietnam Communist Party Congress,” March 29, 2021, <https://monitor.civicus.org/updates/2021/03/29/activists-face-repression-around-and-following-vietnam-communist-party-congress/>.

<sup>15</sup> Mandates of 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 right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur on freedom of religion or belief; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, AL VNM 6/2017 at 4, Sept. 2017, *available at* <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=23338>.

<sup>16</sup> United Nations High Commissioner for Human Rights, “Press briefing notes on Vietnam and Venezuela,” July 28, 2017, *available at* <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21921&LangID=E..>

<sup>17</sup> *UN News*, “Viet Nam: UN rights office denounces ‘increasing clampdown’ on freedom of expression” Jan. 8, 2021, *available at* <https://news.un.org/en/story/2021/01/1081632>.

Article 88 of the 1999 Criminal Code (the charge that Ms. Trang was convicted of in the present case<sup>18</sup>) states in full:

Those who commit one of the following acts against the Socialist Republic of Vietnam shall be sentenced to between three and twelve years of imprisonment:

- a) Propagating against, distorting and/or defaming the people's administration;
- b) Propagating psychological warfare and spreading fabricated news in order to foment confusion among people;
- c) Making, storing and/or circulating documents and/or cultural products with contents against the Socialist Republic of Vietnam.<sup>19</sup>

This offense, and its parallel offense under Article 117 of the 2015 Code, has been repeatedly criticized for its criminalization of lawful conduct and its use by the authorities as a weapon to silence government critics.<sup>20</sup> In 2016, then-UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein said:

Article 88 effectively makes it a crime for any Vietnamese citizen to enjoy the fundamental freedom to express an opinion, to discuss or to question the Government and its policies. The overly broad, ill-defined scope of this law makes it all too easy to quash any kind of dissenting views and to arbitrarily detain individuals who dare to criticize Government policies.<sup>21</sup>

Despite concerns raised by domestic and international human rights organizations, the government of Vietnam has continued to use these national security offenses to target its critics. In 2019, the Supreme People's Procuracy (the office of the Prosecutor General) reported to the National Assembly that prosecutions for crimes against national security had increased 58 percent since the previous year;<sup>22</sup> and in January 2020, Prime Minister Nguyễn Xuân Phúc referred to crimes against national security as "the worst of all crimes."<sup>23</sup>

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<sup>18</sup> Ms. Trang was charged under both Criminal Codes—the 1999 and the 2015 (effective 2018) versions—because some of the materials she was accused of writing and storing predated the enactment of the 2015 Code.

<sup>19</sup> Criminal Code of Vietnam, Art. 88 (1999).

<sup>20</sup> UN Human Rights Committee, *Concluding observations on the third periodic report of Viet Nam* (Aug. 29, 2019), [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/VNM/CO/3&Lang=En](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/VNM/CO/3&Lang=En); see generally HUMAN RIGHTS WATCH, *Vietnam: Big Brother Is Watching Everyone*, (Dec. 20, 2018), <https://www.hrw.org/news/2018/12/20/vietnam-big-brother-watching-everyone>; UN Human Rights Committee, *Concluding observations on the third periodic report of Viet Nam*, Aug. 29, 2019, available at [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/VNM/CO/3&Lang=En](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/VNM/CO/3&Lang=En); HUMAN RIGHTS WATCH, *Vietnam: New Law Threatens Right to a Defense*, June 18, 2017, <https://www.hrw.org/news/2017/06/21/vietnam-new-law-threatens-right-defense>

<sup>21</sup> UN Office of the High Commissioner for Human Rights, "UN Human Rights Chief urges Viet Nam to halt crackdown on bloggers and rights defenders," Oct. 4, 2016, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20679&LangID=E>

<sup>22</sup> *VNEconomy*, "Crime infringing on national security increased in 2019," Sept. 3, 2019, available at <https://vneconomy.vn/toi-pham-xam-pham-an-ninh-quoc-gia-tang-trong-nam-2019.htm>

<sup>23</sup> *Vietnam Times*, "PM Nguyễn Xuân Phúc addresses Public Security Conference," Jan. 11, 2020, available at [in Vietnamese]: <https://thoidai.com.vn/thu-tuong-phai-giu-vung-an-ninh-quoc-gia-va-trat-tu-an-toan-xa-hoi-96759.html>

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The national security offenses listed in the criminal code are not the only criminal charges that have been used to silence human rights activists, journalists, and members of the public for their speech. In recent years, the government has expanded its arsenal of laws targeting critics including, for example, a new “fake news” law, ostensibly introduced to combat misinformation about the coronavirus pandemic.<sup>24</sup> In 2019, the government also adopted an aggressive cybersecurity law that, among other things, allows the government to audit and remove online materials considered to threaten “national security, social order and safety, or the lawful rights and interests of agencies, organizations and individuals” and further criminalized “propaganda against the Socialist Republic of Vietnam” spread online.<sup>25</sup> The UN Human Rights Committee observed that this cyber law was an example of “severe restrictions on freedom of opinion and expression ... that appear not to comply with the principles of legal certainty, necessity and proportionality.”<sup>26</sup> This law has enabled government authorities to track and identify a larger group of people expressing dissenting views. According to Amnesty International, between January and March of 2020, authorities detained 654 people in Vietnam who had posted on Facebook and required them to attend “working sessions” related to their COVID-related posts.<sup>27</sup>

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<sup>24</sup> Reuters, “Vietnam introduces ‘fake news’ fines for coronavirus misinformation,” Apr. 15, 2020, <https://www.reuters.com/article/us-health-coronavirus-vietnam-security/vietnam-introduces-fake-news-fines-for-coronavirus-misinformation-idUSKCN21X0EB>; INTERNATIONAL PRESS INSTITUTE, *Vietnam tightens media control by introducing fines for coronavirus “fake news”* (Apr. 3, 2020), <https://ipi.media/alerts/vietnam-tightens-media-control-by-introducing-fines-for-coronavirus-fake-news/>.

<sup>25</sup> Law on Cybersecurity, No.: 24/2018/QH14, Socialist Republic of Vietnam (2018), available at <https://data.allens.com.au/pubs/pdf/priv/cupriv22jun18.pdf>; see also ARTICLE 19, *Vietnam: Convictions for social media use part of intensifying assault on internet freedom* (May 5, 2021), <https://www.article19.org/resources/vietnam-convictions-for-social-media-use/>; Human Rights Watch, “Vietnam: Withdraw Problematic Cyber Security Law,” Jun. 7, 2018, <https://www.hrw.org/news/2018/06/07/vietnam-withdraw-problematic-cyber-security-law>; CNN, “‘Stalinist’ Vietnamese cybersecurity law takes effect, worrying rights groups and online campaigners,” Jan. 2, 2019, <https://www.cnn.com/2019/01/02/asia/vietnam-cybersecurity-bill-intl/index.html>

<sup>26</sup> UN Human Rights Committee, *Concluding observations on the third periodic report of Viet Nam* (Aug. 29, 2019), [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/VNM/CO/3&Lang=En](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/VNM/CO/3&Lang=En); see generally HUMAN RIGHTS WATCH, *Vietnam: Big Brother Is Watching Everyone*, (Dec. 20, 2018), <https://www.hrw.org/news/2018/12/20/vietnam-big-brother-watching-everyone>; UN Human Rights Committee, *Concluding observations on the third periodic report of Viet Nam*, Aug. 29, 2019, available at [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/VNM/CO/3&Lang=En](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/VNM/CO/3&Lang=En).

<sup>27</sup> Amnesty International, “Viet Nam: Facebook must cease complicity with government censorship,” April 22, 2020, available at <https://www.amnesty.org/en/latest/news/2020/04/viet-nam-facebook-cease-complicity-government-censorship/>.

## Court Proceedings and the Right to a Fair Trial in Vietnam

### (1) Overview of the judicial system in Vietnam

Vietnam's courts operate under the civil law system where courts "apply" existing legislation; the Standing Committee of the National Assembly is uniquely empowered to interpret the Constitution.<sup>28</sup> The National Assembly and its agencies also supervise the courts,<sup>29</sup> known as the People's Courts. Judges at the lower People's Courts are selected by the Chief Justice of the Supreme People's Court,<sup>30</sup> who is elected by the National Assembly.<sup>31</sup> Judges (including those on the Supreme People's Court) are initially appointed for five-year terms, which may be renewed upon application for up to 10 years. As some commentators have noted, this short period of tenure and the requirement of an application for renewal, in addition to the factors mentioned below, may impede judicial independence.<sup>32</sup>

During trials, judges sit with "assessors" (sometimes referred to as "people's jurors") who are ordinary citizens "loyal to the Fatherland and the Constitution of the Socialist Republic of Vietnam" with relevant social and legal knowledge and who have a "firm political stance."<sup>33</sup> This system originated as a means to promote civil engagement in trials although it has been criticized as allowing those without legal expertise and who are subject to political control to make judicial decisions.<sup>34</sup> These "assessors" are elected by Local People's Councils based on recommendations from the Vietnam Fatherland Front<sup>35</sup>; they are required to be independent and impartial but also to be loyal to the Fatherland.<sup>36</sup> Judges and assessors may be removed for committing criminal acts or if they are found to lack "ethical qualities."<sup>37</sup>

The close structural relationship between Vietnam's courts and its political system has raised several concerns for judicial independence over the years. As one commentator observed, a court in Vietnam is a legal and political institution: "Legal in that ideally it is bound by law, and political in that ultimately it works for the Party-state and must resolve matters in accordance with a complex hierarchy of influences, only of one which is law."<sup>38</sup> In its 2002 review of Vietnam, the UN Human Rights Committee raised concerns with "undue pressure" that limited judicial independence:

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<sup>28</sup> Article 74 of the Constitution. Vietnam does not have a constitutional court; although the issue has been raised, for example, around the

<sup>29</sup> The Socialist Republic of Vietnam, Law No. 62/2014/QH13, Luat To Chuc Toa An Nhan dan [Law on the Organization of the People's Court], Law No.(Nov. 11, 2014) (Viet.) [hereinafter Law on the Organization of the People's Court] Article 19, <https://www.economica.vn/Portals/0/Documents/622014QH13267272.pdf>

<sup>30</sup> Article 27 of the Law on the Organization of the People's Court.

<sup>31</sup> Article 26 of the Law on the Organization of the People's Court.

<sup>32</sup> OCED, MULTI-DIMENSIONAL REVIEW OF VIET NAM: TOWARDS AN INTEGRATED, TRANSPARENT AND SUSTAINABLE ECONOMY (2020).

<sup>33</sup> Article 85 of the Law on the Organization of the People's Court.

<sup>34</sup> Trang Mae Nguyen, *In Search of Judicial Legitimacy: Criminal Sentencing in Vietnamese Courts*, 32 HARV.H.R.J. 147, 167 (2019); Pip Nicholson, *Renovating courts: the role of courts in contemporary Vietnam in ASIAN COURTS IN CONTEXT* (eds. Jiunn-rong Yeh & Wen-Chen Chang 2015) at 545 (*citing* UNDP, REPORT ON THE SURVEY OF NEEDS OF DISTRICT PEOPLE'S COURTS NATIONWIDE (2007)).

<sup>35</sup> Article 86 of the Law on the Organization of the People's Court.

<sup>36</sup> Article 89 of the Law on the Organization of the People's Court.

<sup>37</sup> Articles 82 & 90 of the Law on the Organization of the People's Court.

<sup>38</sup> Pip Nicholson, *Renovating courts: the role of courts in contemporary Vietnam in Asian courts in context* (eds. Jiunn-rong Yeh & Wen-Chen Chang 2015) at 562.

The Committee is concerned that the judicial system remains weak owing to the scarcity of qualified, professionally trained lawyers, lack of resources for the judiciary and its susceptibility to political pressure. The Committee is also concerned that the Supreme People's Court is not independent of government influence. It is further concerned that the judiciary seeks the opinion of the National Assembly's Standing Committee in regard to the interpretation of laws and that the Standing Committee is responsible for setting criteria and instructions which are binding for the judiciary.<sup>39</sup>

In recent years, there have been important efforts at reform to improve judicial independence through, for example, the 2013 constitutional amendments and the 2014 law on court organization, which sought to professionalize the judiciary and remove it from local control.<sup>40</sup> Despite these reforms, many commentators and human rights experts have noted that the appointment and dismissal of judges in Vietnam remains heavily controlled by the CPV, with Party officials sometimes directly involved in oversight of political and high-profile cases.<sup>41</sup>

Beyond the Party's control over judges, the Party also limits the independence of counsel. Legal aid services, where available, are delivered through the Ministry of Justice and the attorneys associated with these services "owe a twin duty to the client and to the Party-state," which can hamper their real and perceived independence.<sup>42</sup> In 2004 when a group of lawyers in Vietnam attempted to create its own indigent defense practice—the For Justice group—the Hanoi Bar Association, reviewing its registration, said these activities and the organization

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<sup>39</sup> UN Human Rights Committee CCPR/CO/75/VNM, Concluding Observations of the Human Rights Committee: Viet Nam, Aug. 5, 2002, para. 9, <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsmq1D%2B4Wvg6LhA1iuk%2BHo%2BVfUUUsLFDiHiqmWgdywzhgPOb1Lh5xM2K5Lwg%2BfWdx9LjQf2f1b1retJKiSuNZMUaCzF9%2F2761CcnTyf4nFxLT>

<sup>40</sup> Law on the Organization of the People's Court; see generally Trang Mae Nguyen, *In Search of Judicial Legitimacy: Criminal Sentencing in Vietnamese Courts*, 32 HARV.H.R.J. 147 (2019); Pip Nicholson, *Renovating courts: the role of courts in contemporary Vietnam* in ASIAN COURTS IN CONTEXT (eds. Jiunn-rong Yeh & Wen-Chen Chang 2015).

<sup>41</sup> See UN Office of the High Commissioner for Human Rights, *Human Rights Committee examines the situation of civil and political rights in Viet Nam* (Marc. 12, 2019), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24324&LangID=E>; FIDH - International Federation for Human Rights & Vietnam Committee on Human Rights, *Joint Submission for the Universal Periodic Review of Vietnam by the United Nations Human Rights Council* (2018), [https://www.fidh.org/IMG/pdf/vchr\\_fidh\\_joint-submission\\_upr\\_july\\_2018.pdf](https://www.fidh.org/IMG/pdf/vchr_fidh_joint-submission_upr_july_2018.pdf); THE 88 PROJECT & UNIVERSITY OF CHICAGO LAW SCHOOL, GLOBAL HUMAN RIGHTS CLINIC, JOINT SUBMISSION OF THE 88 PROJECT AND THE GLOBAL HUMAN RIGHTS CLINIC OF THE UNIVERSITY OF CHICAGO LAW SCHOOL TO THE UNIVERSAL PERIODIC REVIEW OF THE SOCIALIST REPUBLIC OF VIETNAM (Nov. 1, 2021), at 15 [https://the88project.org/wp-content/uploads/2021/10/Final-ENG-version\\_UPR-Submission-GHRC-88-Project-10-28-21.pdf](https://the88project.org/wp-content/uploads/2021/10/Final-ENG-version_UPR-Submission-GHRC-88-Project-10-28-21.pdf); Pip Nicholson, *Renovating courts: the role of courts in contemporary Vietnam* in ASIAN COURTS IN CONTEXT (eds. Jiunn-rong Yeh & Wen-Chen Chang 2015) at 557; Pip Nicholson & Nguyen Hung Quang, *The Vietnamese Judiciary: The Politics of Appointment and Reappointment*, 14 PACIFIC RIM L.&P.J. 1 (2005); Trang Mae Nguyen, *In Search of Judicial Legitimacy: Criminal Sentencing in Vietnamese Courts*, 32 HARV.H.R.J. 147 (2019); Mark Sidel, *LAW AND SOCIETY IN VIETNAM: THE TRANSITION FROM SOCIALISM IN COMPARATIVE PERSPECTIVE* (2008); HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH SUBMISSION TO THE EUROPEAN UNION FOR THE EU-VIETNAM HUMAN RIGHTS DIALOGUE (2020), <https://www.hrw.org/news/2020/02/18/human-rights-watch-submission-european-union-eu-vietnam-human-rights-dialogue>.

<sup>42</sup> Pip Nicholson, *Renovating courts: the role of courts in contemporary Vietnam* in ASIAN COURTS IN CONTEXT (eds. Jiunn-rong Yeh & Wen-Chen Chang 2015) at 551.

were illegal.<sup>43</sup>

## (2) *The Right to a Fair Trial in Vietnam*

The Constitution of Vietnam and the Criminal Procedure Code recognize several core fair trial rights, including the presumption of innocence,<sup>44</sup> the right to a “timely”<sup>45</sup> and public hearing,<sup>46</sup> the right to present evidence and witnesses,<sup>47</sup> the right to an impartial and independent court,<sup>48</sup> and the right to legal assistance.<sup>49</sup>

In practice, however, these rights are often not respected—and indeed, even as a matter of law, these rights are not absolute. For example, while the Constitution of the Socialist Republic of Vietnam states that trials shall be held in public, it permits the courts to hold hearings behind closed doors where “necessary to the protection of state secrecy, fine customs and beautiful habits of the nation, the protection of youths and the protection of privacy according to the legitimate requirement of the persons concerned. . .”<sup>50</sup> Even where this exclusion is not explicitly invoked, members of the public—including defendants’ relatives and the press—have been regularly excluded from proceedings.<sup>51</sup>

As previously noted, defense lawyers may also face a conflict in representing clients in sensitive cases. Article 19(3) of the Criminal Code requires that if a “defender of an offender has knowledge” of an offense involving “national security or other extremely serious crimes,” they must report this information or face criminal liability.<sup>52</sup> This provision is a significant threat to the right to counsel as it requires lawyers to inform on their clients or else face criminal consequences. The Ho Chi Minh City Bar Association urged the National Assembly to drop this clause, noting its conflict with lawyers’ duty to client confidentiality, but this law went into effect in 2017.<sup>53</sup>

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<sup>43</sup> Mark Sidel, *LAW AND SOCIETY IN VIETNAM: THE TRANSITION FROM SOCIALISM IN COMPARATIVE PERSPECTIVE* (2008) at 183-88.

<sup>44</sup> Article 31 of the Constitution of the Socialist Republic of Viet Nam 1992 (rev. 2013), *available at* [https://www.constituteproject.org/constitution/Socialist\\_Republic\\_of\\_Vietnam\\_2013?lang=en](https://www.constituteproject.org/constitution/Socialist_Republic_of_Vietnam_2013?lang=en); Article 9 of the Criminal Procedure Code.

<sup>45</sup> Article 31 of the Constitution; Article 31 of the Criminal Procedure Code.

<sup>46</sup> Article 31 of the Constitution; Article 18 of the Criminal Procedure Code.

<sup>47</sup> Article 19 of the Criminal Procedure Code.

<sup>48</sup> Articles 14 & 16 of the Criminal Procedure Code.

<sup>49</sup> Article 31, Constitution.

<sup>50</sup> Article 11 of the Criminal Procedure Code; Article 103, Constitution of the Socialist Republic of Viet Nam.

<sup>51</sup> See HUMAN RIGHTS SPACE, THE COOPERATION GROUP FOR GOVERNANCE AND PUBLIC ADMINISTRATION REFORM ET AL., JOINT-SUBMISSION TO THE HUMAN RIGHTS COUNCIL’S THIRD UNIVERSAL PERIODIC REVIEW OF VIET NAM, (2019), [https://www.upr-info.org/sites/default/files/document/viet\\_nam/session\\_32\\_-\\_january\\_2019/js15\\_upr32\\_vnm\\_e\\_main.pdf](https://www.upr-info.org/sites/default/files/document/viet_nam/session_32_-_january_2019/js15_upr32_vnm_e_main.pdf); THE 88 PROJECT, 2019 REPORT ON POLITICAL PRISONERS AND ACTIVISTS AT RISK IN VIETNAM (2019), <https://the88project.org/wp-content/uploads/2020/06/PDF-2019-annual-report.pdf>; LAWYERS FOR LAWYERS, *Joint letter on the trial of citizens of Dong Tam* (Oct. 8, 2020), <https://lawyersforlawyers.org/en/joint-letter-on-the-trial-of-citizens-of-dong-tam/>.

<sup>52</sup> Article 19(3), Criminal Code, No. 100/2015/QH13, Socialist Republic of Vietnam, *available at* <https://www.wipo.int/edocs/lexdocs/laws/en/vn/vn086en.pdf>.

<sup>53</sup> Human Rights Watch, “Vietnam: New Law Threatens Right to a Defense,” June 21, 2017, *available at* <https://www.hrw.org/news/2017/06/21/vietnam-new-law-threatens-right-defense>.

In practice, the right to counsel is further impeded by significant delays in assigning counsel to detained individuals and delays and obstructions in allowing counsel to meet their detained clients.<sup>54</sup> Human rights groups have frequently observed that lawyers get very limited time with detained clients, often only meeting them very briefly close to the start of trial.<sup>55</sup> Moreover, human rights groups report that those charged with national security offenses—including a large number of defendants facing charges for speech or human rights activism—are frequently held incommunicado and denied access to legal representatives (or indeed, their families) during their lengthy pre-trial detention and while the investigation into their alleged offense continues.<sup>56</sup>

## The Right to be Free from Arbitrary Detention

Human rights organizations have observed that those detained for national security offenses—including those arrested for human rights activism and speech offenses—are routinely subjected to prolonged pretrial detention (often incommunicado), are separated from other detainees, and may be treated more harshly than others, with less respect for their rights while in detention.

Under Vietnam's Code of Criminal Procedure (2015), a person suspected of "horrific and extremely severe felonies" can be detained for up to four months during the investigation of their alleged offense, but authorities may apply for an extension of the investigation phase and the individual's detention.<sup>57</sup> In investigations into a "breach of national security," authorities may extend detention for up to 16 months (four renewable four-month periods.)<sup>58</sup> For "extremely severe" national security offenses, authorities may detain a person indefinitely throughout the investigation. The law provides that "[i]f no grounds for termination of detention exist in a special case of extremely severe felony of national security breach, the head of the

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<sup>54</sup> UN Human Rights Council, Working Group on Arbitrary Detention, Opinion No. 36/2020 concerning Đào Quang Thực, Para. 76, Sept. 18, 2020, *available at* <https://undocs.org/en/A/HRC/WGAD/2020/36>; THE 88 PROJECT & UNIVERSITY OF CHICAGO LAW SCHOOL, GLOBAL HUMAN RIGHTS CLINIC, JOINT SUBMISSION OF THE 88 PROJECT AND THE GLOBAL HUMAN RIGHTS CLINIC OF THE UNIVERSITY OF CHICAGO LAW SCHOOL TO THE UNIVERSAL PERIODIC REVIEW OF THE SOCIALIST REPUBLIC OF VIETNAM (Nov. 1, 2021), [https://the88project.org/wp-content/uploads/2021/10/Final-ENG-version\\_UPR-Submission-GHRC-88-Project-10-28-21.pdf](https://the88project.org/wp-content/uploads/2021/10/Final-ENG-version_UPR-Submission-GHRC-88-Project-10-28-21.pdf); Human Rights Watch, *Vietnam: US Should Urge Release of Dissidents* (Nov. 8, 2021), <https://www.hrw.org/news/2021/11/08/vietnam-us-should-urge-release-dissidents>; AMNESTY INTERNATIONAL, PRISONS WITHIN PRISONS: TORTURE AND ILL-TREATMENT OF PRISONERS OF CONSCIENCE IN VIETNAM (Jul. 2016), <https://www.amnesty.org/en/documents/asa41/4187/2016/en>.

<sup>55</sup> *Id.* See also, LAWYERS FOR LAWYERS, *Joint letter on the trial of citizens of Dong Tam*, (Oct. 8, 2020), <https://lawyersforlawyers.org/en/joint-letter-on-the-trial-of-citizens-of-dong-tam/>; INTERNATIONAL FEDERATION FOR HUMAN RIGHTS VIETNAM COMMITTEE ON HUMAN RIGHTS, *Vietnam: Assault on Civil Society Continues Unabated* (Feb. 17, 2020), [https://www.fidh.org/IMG/pdf/20200217\\_vietnam\\_dialogue\\_bp\\_en.pdf](https://www.fidh.org/IMG/pdf/20200217_vietnam_dialogue_bp_en.pdf).

<sup>56</sup> ACAT-FRANCE, BOAT PEOPLE SOS, CAMPAIGN TO ABOLISH TORTURE IN VIETNAM, CHRISTIAN SOLIDARITY WORLDWIDE, LEGAL INITIATIVES FOR VIETNAM, & VIETNAM-COALITION AGAINST TORTURE, REPORT TO THE UNITED NATIONS COMMITTEE AGAINST TORTURE FOR THE EXAMINATION OF THE FIRST STATE REPORT OF THE SOCIALIST REPUBLIC OF VIETNAM, 23-24 (2018), *available at* [https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/VNM/INT\\_CAT\\_CSS\\_VNM\\_32824\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/VNM/INT_CAT_CSS_VNM_32824_E.pdf); AMNESTY INTERNATIONAL, PRISONS WITHIN PRISONS: TORTURE AND ILL-TREATMENT OF PRISONERS OF CONSCIENCE IN VIETNAM (July 2016).

<sup>57</sup> Code of Criminal Procedure (101/2015/QH13 Nov. 27, 2015), Article 173, <https://vanbanphapluat.co/law-no-101-2015-qh13-criminal-procedure-code#:~:text=Criminal%20procedure%20code%20prescribes%20the,the%20enforcement%20of%20criminal%20judgments.>

<sup>58</sup> *Id.* at Article 173(5).



Supreme People's Procuracy shall decide to maintain detention until the investigation closes."<sup>59</sup> As this statute suggests, the presumption is *against* release in these cases—the inverse of the standard under human rights law.

In politically sensitive cases, the government of Vietnam has used pretrial detention arbitrarily to silence and punish its critics. In September 2020, for example, the UN Working Group on Arbitrary Detention considered the case of human rights activist Đào Quang Thực who died in custody in Vietnam while serving a 13-year sentence for “carrying out activities aimed at overthrowing the people’s administration” in violation of article 79 of the 1999 Penal Code.<sup>60</sup> Mr. Thực had allegedly been beaten and tortured by police and denied adequate food, medical care, and other necessities while in detention and had gone on hunger strike for several weeks in the summer of 2019 to protest these conditions. In finding that Mr. Thực was “deprived of his liberty on discriminatory grounds, that is, owing to his status as a human rights defender, and on the basis of his political or other opinion in seeking to hold the authorities to account,”<sup>61</sup> the Working Group observed that the Vietnamese government’s treatment of Mr. Thực was not an aberration but rather part of a larger problematic pattern:

The present case is one of many cases brought before the Working Group in recent years concerning arbitrary detention in Vietnam. These cases follow a familiar pattern of extended detention pending trial with no access to judicial review; incommunicado detention; prosecution under vaguely worded criminal offences for the peaceful exercise of human rights; denial of access to legal counsel; a brief closed trial at which due process is not observed; disproportionate sentencing; and denial of access to the outside world. This pattern indicates a systemic problem with arbitrary detention in Vietnam which, if it continues, may amount to a serious violation of international law.<sup>62</sup>

Human rights groups have also observed that those in detention for “crimes of conscience” are subjected to harsher rules while in detention.<sup>63</sup> In 2011, the Ministry of Public Security issued a regulation that, in classifying prisoners by offense type, authorizes prison officials to place additional restrictions on national security prisoners (including those categorized as “pleading not guilty or being die-hard opposers”) such as extended periods of isolation for “re-education.”<sup>64</sup> According to a 2014 study from the Campaign to Abolish Torture in Vietnam, 59 of the 60 former prisoners of conscience interviewed said were held completely incommunicado during the pre-trial investigation period.<sup>65</sup>

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<sup>59</sup> *Id.*

<sup>60</sup> UN Human Rights Council, Working Group on Arbitrary Detention, Opinion No. 36/2020 concerning Đào Quang Thực, Sept. 18, 2020, *available at* <https://undocs.org/en/A/HRC/WGAD/2020/36>.

<sup>61</sup> UN Human Rights Council, Working Group on Arbitrary Detention, Opinion No. 36/2020 concerning Đào Quang Thực, Para. 76, Sept. 18, 2020, *available at* <https://undocs.org/en/A/HRC/WGAD/2020/36>.

<sup>62</sup> *Id.* at para 80.

<sup>63</sup> CAMPAIGN TO ABOLISH TORTURE IN VIETNAM, CIRCULAR 37: HARSH TREATMENT OF PRISONERS OF CONSCIENCE IN 'PRISONS WITHIN PRISONS', (2018), *available at* <http://www.stoptorture-vn.org/circular-37-harsh-treatment-of-prisoners-of-conscience.html>

<sup>64</sup> Circular 37 of the Ministry of Public Security, Detailing Classification and Incarceration of Inmates according to Categories, No. 37/2011/TT-BCA, dated June 3, 2011, *available at* [http://www.stoptorture-vn.org/uploads/2/5/9/2/25923947/vietnam\\_mps\\_circular\\_no\\_37\\_en.pdf](http://www.stoptorture-vn.org/uploads/2/5/9/2/25923947/vietnam_mps_circular_no_37_en.pdf).

<sup>65</sup> CAMPAIGN TO ABOLISH TORTURE IN VIETNAM, VIETNAM: TORTURE AND ABUSE OF POLITICAL AND RELIGIOUS PRISONERS (2014), *available at* <http://www.stoptorture-vn.org/torture-report.html>

## B. THE CASE: PHAM DOAN TRANG

Pham Thi Doan Trang is a 43-year-old prominent journalist, author, and activist in Vietnam, known for her investigative journalism often critical of Vietnamese governmental authorities.<sup>66</sup> Ms. Trang was previously detained by Vietnamese authorities on numerous occasions for both her journalism and her activism: in 2009, for “national security” charges, possibly in response to her writing on a mining plan;<sup>67</sup> in 2016, ahead of US President Obama’s visit to Vietnam;<sup>68</sup> then in 2017, after leaving a meeting with a delegation from the European Union in advance of its EU-Vietnam human rights dialogue;<sup>69</sup> and again, in 2018, on several occasions<sup>70</sup> including when she was detained and questioned on March 8 (International Women’s Day) about her book, *Chính trị bình dân* (Politics for the Masses).<sup>71</sup>

Close to midnight, on October 6, 2020, hours after a human rights meeting between the governments of the United States of America and Vietnam had concluded,<sup>72</sup> police arrested Pham Doan Trang at her home in Hanoi, initially under Article 117 of the Criminal Code, which criminalizes “making, storing, spreading information, materials, items for the purpose of opposing the State of Socialist Republic of Vietnam.”<sup>73</sup> According to the indictment, dated August 30, 2021, the Investigation Security Agency of Hanoi City’s Police Department investigated Ms. Trang for alleged violations of Article 117 under the revised 2015 Penal Code and Article 88 under the 1999 Penal Code (conducting propaganda against the Socialist Republic of Vietnam) between September 10, 2016 and August 26, 2021. It further states that the officials decided, at the conclusion of the investigation, to pursue charges under Article 88.<sup>74</sup>

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<sup>66</sup> Richard C. Paddock, *The New York Times*, “The Jailed Activist Left a Letter Behind. The Message: Keep Fighting,” Feb. 2021, available at <https://www.nytimes.com/2020/10/14/world/asia/vietnam-pham-doan-trang-arrest.html>; Front Line Defenders, “Woman human rights defender Pham Doan Trang formally charged,” Oct. 20, 2021, available at <https://www.frontlinedefenders.org/en/case/woman-human-rights-defender-pham-doan-trang-formally-charged>; Amnesty International, “Viet Nam: Human rights champion arrested, at grave risk of torture,” Oct. 8, 2020, available at <https://www.amnesty.org/en/latest/press-release/2020/10/viet-nam-human-rights-champion-arrested-at-grave-risk-of-torture/>; Committee to Protect Journalists, “Journalist Pham Doan Trang arrested on anti-state charges in Vietnam,” Oct. 7, 2020, available at <https://cpj.org/2020/10/journalist-pham-doan-trang-arrested-on-anti-state-charges-in-vietnam/>.

<sup>67</sup> Martha Ann Overland, *Time Magazine*, “Vietnam to Its Journalists: Don’t Tread on China,” Sept. 5, 2009, <http://content.time.com/time/world/article/0,8599,1920520,00.html>

<sup>68</sup> Simon Lewis, *Time Magazine*, “Empty Chairs’ at Embassy Meeting as Vietnam Keeps Activists Away From Obama” May 24, 2016, available at <https://time.com/4346032/vietnam-obama-human-rights-detained/>

<sup>69</sup> HUMAN RIGHTS WATCH, *Vietnam: EU Should Press for Release of Political Prisoners*, Nov. 28, 2017, <https://www.hrw.org/news/2017/11/28/vietnam-eu-should-press-release-political-prisoners>

<sup>70</sup> HUMAN RIGHTS WATCH, *Vietnam: Free Prominent Blogger*, Dec. 13, 2021, <https://www.hrw.org/news/2021/12/13/vietnam-free-prominent-blogger#>

<sup>71</sup> The 88 Project for Free Speech in Vietnam, Profile: Phạm Đoan Trang, available at <https://the88project.org/profile/286/pham-doan-trang/>.

<sup>72</sup> *Reuters*, “Vietnam detains activist hours after human rights meeting with U.S.,” Oct. 7, 2020, available at <https://www.reuters.com/article/us-vietnam-security-idUSKBN26S0RT>.

<sup>73</sup> Article 117, Criminal Code, No. 100/2015/QH13, Socialist Republic of Vietnam, available at <https://www.wipo.int/edocs/lexdocs/laws/en/vn/vn086en.pdf>

<sup>74</sup> Indictment at 10. As discussed above, the sentencing range under the 1999 code is three to 12 years for most offenses compared to five to 12 years under the 2015 code. Article 7(2) of the 2015 Criminal Code, which went into effect in 2018, says that “A provision of law that provides for a new crime, a more severe sentence, a new aggravating factor or reduce the scope of suspended sentences, exemption from criminal liability, removal of criminal responsibility, exemption from sentence, commutation, or conviction expungement which is less favorable shall not be applied to criminal offences committed before such provision of law comes

Between September 2016 and August 2021, as detailed in the indictment, Hanoi police investigated Ms. Trang, on several occasions calling her into the police station for questioning on specific articles and reports she had allegedly published on the human rights situation in Hanoi. On October 7, 2020, when Ms. Trang was arrested, police also seized her laptop, recording devices, and other materials at her apartment and reviewed their contents as part of the investigation into her alleged crimes.<sup>75</sup>

Investigators cited numerous articles, documents, and recordings in the indictment but the ones on the basis of which Ms. Trang was ultimately convicted were:

- 1) An English-language document: “Brief report on the marine life disaster in Vietnam”;
- 2) An English-language document: “General assessment on human rights situation in Vietnam”;
- 3) An English-language report, "Report Assessment of the 2016 Law on Belief and Religion in relation to the exercise of the right to Freedom of Religion and Belief in Vietnam" (and a Vietnamese translation of the report);
- 4) The interview: “*Pham Thi Doan Trang: Vietnamese middle class does not need democracy and freedom*” with Radio Free Asia (which included audio and a written article and dated from 2018); and
- 5) Statements in an online conversation with BBC News (also from 2018).

All of the above, the indictment claims, “include content which spreads psychological warfare, fake news to foment confusion among the people, and spreads fabricated information on the guidelines and policies of the Socialist Republic of Vietnam, defaming the People’s Government.”<sup>76</sup> In particular, the indictment alleges that Ms. Trang “made, stored and circulated documents, articles with content opposing the Socialist Republic of Vietnam; answering interviews of foreign press with fabricated information on the guidelines and policies of the Socialist Republic of Vietnam, defaming the People’s Government, spreading psychological warfare, spreading fake news to foment confusion among the people.”<sup>77</sup>

Some of these documents remain accessible online. For instance, the Court explains in its judgment that “[t]he purpose of [the freedom of religion] document was expressed through 6 items in its recommendation part.”<sup>78</sup> In fact, the recommendations include such suggestions as “[a]n independent mechanism for handling complaints should be developed to reverse wrongful decisions by the authorities on human rights and their violations themselves” and that “[t]he Vietnamese Penal Code should be amended, with special regard to those ambiguous and vague articles.”<sup>79</sup>

In a subsequent letter to the Government of Vietnam, several UN experts noted that that the evidence against Ms. Trang included reports she shared with the United Nations, which, if the basis for charges, they warned “could have far-reaching consequences and consolidate an

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into force.” Because some of the articles Ms. Trang was accused of writing preceded the enactment of the newer Code, prosecutors prosecuted under the older (1999) code with its lower threshold sentence.

<sup>75</sup> Indictment at 5.

<sup>76</sup> Indictment at 11.

<sup>77</sup> Indictment at 11.

<sup>78</sup> Judgment at 4.

<sup>79</sup> The Working Group on Religion, *Assessment of the 2016 Law on Belief and Religion and the exercise of the right to Freedom of Religion and Belief* (Oct. 2017), at pp. 36-37, [https://3axzii1c65q0b073i2mogga1-wpengine.netdna-ssl.com/wp-content/uploads/2017/11/Report\\_on\\_FoR\\_Vietnam\\_10\\_2017.pdf](https://3axzii1c65q0b073i2mogga1-wpengine.netdna-ssl.com/wp-content/uploads/2017/11/Report_on_FoR_Vietnam_10_2017.pdf)

environment of fear in Viet Nam, as already noted by several UN experts, leading to self-censorship and inhibiting others from cooperating with the UN.”<sup>80</sup>

Finally, the People’s Procuracy (the office of the prosecution) noted in the indictment that Ms. Trang’s prior offense should be considered an aggravating factor<sup>81</sup> (although it does not appear that Ms. Trang was previously convicted of a crime, as the judgment says that she has no criminal record) and that it was providing over 11,000 pages of evidence to support the indictment.<sup>82</sup> The defense team was allowed to see and photocopy the evidence but only 10 days before the original trial date.

A month after Ms. Trang’s conviction, an individual was sentenced to six years in prison for, amongst other things, shipping 46 books mainly by Pham Thi Doan Trang and sharing news from international websites.<sup>83</sup>

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<sup>80</sup> Letter to the Government of the Socialist Republic of Vietnam from the Mandates of the Special Rapporteur on the situation of human rights defenders; the Working Group on Arbitrary Detention; 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 right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on freedom of religion or belief; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and the Working Group on discrimination against women and girls, Nov. 22, 2021, at pp. 28-29,

<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=26765>.

<sup>81</sup> Based on the indictment, this appears to stem from Ms. Trang’s 2009 arrest under Article 258 of the Criminal Code, which criminalizes “abusing democratic freedoms to infringe upon the interests of the State, the legitimate rights and interests of organizations and/or citizens.” It is unclear, however, that Ms. Trang was ever convicted of this offense.

<sup>82</sup> Indictment at 13.

<sup>83</sup> *Radio Free Asia*, “Người chuyển sách của tác giả Phạm Đoan Trang bị án tù,” Jan. 21, 2022, <https://www.rfa.org/vietnamese/news/vietnamnews/shipper-of-books-by-independent-journalist-pham-doan-trang-gets-jail-sentence-01212022071322.html>

## C. PRE-TRIAL PROCEEDINGS

Ms. Trang was arrested and detained late on October 6/early on October 7, 2020. According to numerous reports and as discussed at trial, she was held incommunicado,<sup>84</sup> unable to meet with lawyers or family, for over a year. On October 7, 2021, Ms. Trang reportedly learned that an indictment had been finalized and a trial date set for November 3, 2021;<sup>85</sup> her attorneys were allowed to see the indictment and the evidence on October 18, 10 days before trial. On October 19, 2021, one of Ms. Trang's attorneys, Luan Le, reported that he was allowed to meet her for the first time, more than a year into her detention and less than three weeks before her case was set to go to trial.<sup>86</sup>

According to her attorney, Ms. Trang had repeatedly requested and been denied medical treatment while in detention even as she lost significant weight, was bleeding, and had other medical concerns.<sup>87</sup> On October 26, 2021, court officials informed Ms. Trang's defense team that the case would be postponed due to COVID-exposure.

A day before this postponement was announced, the United Nations Working Group on Arbitrary Detention (UNWGAD) issued an opinion on her on-going detention, finding it unlawful under international human rights law.<sup>88</sup> The UNWGAD held that her detention was arbitrary on multiple grounds, specifically because (a) government authorities detained her on a vague charge without sufficient legal basis and she was not given the opportunity to challenge her detention before an independent judicial body;<sup>89</sup> (b) government authorities detained her for the lawful exercise of her rights to freedom of opinion and expression and her

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<sup>84</sup> See e.g. UN Human Rights Council, Working Group on Arbitrary Detention, A/HRC/WGAD/2021/40, Opinion No. 40/2021 concerning Pham Doan Trang (Viet Nam) (Oct. 25, 2021), para. 65 ("Although the Government rejects the allegation of incommunicado detention, it appears to confirm that Ms. Trang is being held incommunicado. The Government relies on article 74 of the Code of Criminal Procedure of 2015, which permits defence counsel's engagement in legal proceedings when the investigation ends. As the investigation is ongoing and no indictment has been issued, it follows that Ms. Trang has not, by the Government's own admission, been allowed to meet with her lawyers.").

<sup>85</sup> Letter to the Government of the Socialist Republic of Vietnam from the Mandates of the Special Rapporteur on the situation of human rights defenders; the Working Group on Arbitrary Detention; 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 right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on freedom of religion or belief; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and the Working Group on discrimination against women and girls, Nov. 22, 2021, at pp. 28-29, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=26765>.

<sup>86</sup> VanViet, "Lawyer's Recommendation about Pham Thi Doan Trang's Health Condition and Change of Detention Measures," Oct. 22, 2021, available at <http://vanviet.info/van-de-hom-nay/kien-nghi-cua-luat-su-ve-tinh-trang-suc-khoe-cua-pham-thi-doan-trang-v-thay-doi-bien-php-tam-giam/>

<sup>87</sup> See Joint Letter, Access Now and 27 other organizations, *Vietnam: Immediately release independent journalist and human rights defender Pham Doan Trang*, Oct. 26, 2021, <https://www.hrw.org/news/2021/10/26/vietnam-immediately-release-independent-journalist-and-human-rights-defender-pham-0>.

<sup>88</sup> UN Human Rights Council, Working Group on Arbitrary Detention, A/HRC/WGAD/2021/40, Opinion No. 40/2021 concerning Pham Doan Trang (Viet Nam) (Oct. 25, 2021).

<sup>89</sup> *Id.* at para. 65-70. See on the inability to request bail, para. 66: "The Working Group therefore finds that Ms. Trang has not been brought promptly before a judicial authority to challenge her detention, in violation of article 9 (3) of the Covenant. The Government submits that the arrest warrants were approved by the People's Procuracy, pursuant to domestic legislation. However, as the Working Group has stated, the Procuracy is not an independent judicial authority."

right to take part in the conduct of public affairs;<sup>90</sup> (c) her right to a fair trial, even in the pretrial stage, was violated by the authorities' refusal to give her access to her lawyer and the long delay in bringing her case to trial;<sup>91</sup> and (d) authorities detained Trang on discriminatory grounds, based on her status as a human rights defender and because of her political or other opinion.<sup>92</sup> The Working Group also raised concerns that the delay in bringing Ms. Trang to trial while she remained in pretrial detention violated international standards requiring that non-custodial measures be prioritized for women.<sup>93</sup>

The Working Group observed that Ms. Trang's detention for her journalism and activism as a human rights defender was part of a "pattern of harassment by national authorities"<sup>94</sup> and raised its repeated concerns with the government's use of a "vague and broad" law to arrest and charge her, one that fails to "differentiate between the use of violent means, which should be prohibited, and legitimate peaceful activities to protest."<sup>95</sup>

## D. TRIAL PROCEEDINGS: December 14, 2021

The details of the trial proceedings described here are based on review of the judgment, which summarizes arguments made by the defense and prosecution, and information made public by the defense team and civil society organizations in Vietnam and by the media,<sup>96</sup> as well as other sources, which were deemed credible as generally consistent with each other.

There were three core issues at trial, discussed in greater detail below. First, the defense requested to examine the prosecuting authorities' witnesses, none of whom testified at trial. In particular, the indictment asserts that the "Department of Information and Communications of Hanoi City issued the Assessment results, concluding that the [three] documents [on which the Court ultimately relied to convict Ms. Trang] have violated the law."<sup>97</sup> The judgment explains that the defense argued that the Court "should subpoena the assessors, witnesses, representatives of the Department of Domestic Security, and investigators to the hearing to clarify the details of the case."<sup>98</sup>

Second, the defense challenged the attribution of certain documents to Ms. Trang.<sup>99</sup> While some of the articles Ms. Trang was accused of writing were in the public domain and publicly

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<sup>90</sup> *Id.* at paras. 73, 78, 80.

<sup>91</sup> *Id.* at paras. 84-87.

<sup>92</sup> *Id.* at para. 91.

<sup>93</sup> *Id.* at para. 85, *citing* United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), sect. III. See also the Working Group's deliberation No. 12 (A/HRC/48/55, annex), paras. 7-9.

<sup>94</sup> *Id.* at para. 85.

<sup>95</sup> *Id.* at para. 74.

<sup>96</sup> *See, e.g.*, [https://saigonhnews-com.translate.google.com/thoi-su/viet-nam/pham-doan-trang-da-chien-thang-tuyet-doi-tai-toa-nhu-the-nao/?\\_x\\_tr\\_sl=auto&\\_x\\_tr\\_tl=en&\\_x\\_tr\\_hl=en](https://saigonhnews-com.translate.google.com/thoi-su/viet-nam/pham-doan-trang-da-chien-thang-tuyet-doi-tai-toa-nhu-the-nao/?_x_tr_sl=auto&_x_tr_tl=en&_x_tr_hl=en).

<sup>97</sup> Indictment at 9.

<sup>98</sup> Judgment at 12.

<sup>99</sup> The defense also challenged the accuracy of the Vietnamese translation of some of the articles allegedly written and/or stored by Ms. Trang, which the authorities had translated from English into Vietnamese. See Judgment at 13 ("The Investigation

Agency requested English into Vietnamese translation services of the English documents from a translation agency instead of a professional agency. This does not guarantee the accuracy of the information. The fact that the Investigation Agency did not request an assessment of the English documents is not an appropriate action.").

credited to her, others were seized from her computer. For these, while Ms. Trang admitted on the stand that she was the author of one report, she disputed the authenticity of the prosecution's asserted evidence that she had previously admitted authorship of other documents. In particular, the prosecution relied on her supposed signature on some of these documents during an interrogation in 2017, which it then matched to a known signature of hers. As the judgment notes, the defense argued that "the assessment conclusion of Ha Noi Police was not sufficient to determine that the signatures on the seized documents belong to Pham Thi Doan Trang." The prosecution also alleged more broadly that she had admitted authorship during that interrogation, reflected in her signature on the documents.

Finally, the defense contended that this prosecution violated Ms. Trang's right to freedom of expression. In particular, the defense argued that "[t]he Investigation Agency's decision to request an assessment from an agency that does not possess assessment authority to conduct an assessment of a person's thoughts, opinions, and his or her political and legal perception was wrong."

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In early December 2021, Ms. Trang's attorneys were informed that her trial was rescheduled for December 14, 2021. According to Ms. Trang's legal team, the courthouse had several security checkpoints and entry to the courtroom was extremely limited. Ms. Trang's mother and brother, who had not seen her since her arrest in 2020, arrived at the courthouse; although her brother was initially refused entry to accompany their mother, the court staff eventually permitted him to enter. A handful of diplomats were permitted to attend the hearing. Medical staff were also present, apparently due to Ms. Trang's ongoing health concerns.

The Court was comprised of a panel of three judges and two assessors. The presiding judge told the guards to remove the handcuffs from Ms. Trang but Ms. Trang said it was not necessary. The judge summarized the case against Ms. Trang and then asked if the accused understood her rights and was willing to proceed with her lawyers.

Ms. Trang's lawyers then requested the Court to summon several witnesses, including in particular the expert(s) from the Department of Information and Communications, as well as the translator(s) responsible for translating English documents for which Ms. Trang was being held responsible and those present for her interrogations in 2017 when she allegedly admitted authorship of key documents. The prosecution opined that such testimony was not necessary. The defense counsel further requested that the Court provide electronic equipment for use in the proceedings and also give Ms. Trang pen and paper to take notes during the hearing.

The Court said that although Ms. Trang did not get a copy of the summons announcing her trial date, her lawyers had received it so her rights were respected. The Court further said that it couldn't procure electronic equipment but would provide Ms. Trang with pen and paper, instructing the Court to monitor and then recover the paper at the end of trial. Finally, the Court announced that there was no need to summon the investigators or other witnesses or to cross-examine in person those who had not appeared. As reflected in the judgment, the Court found that "The Assessors were summoned to the hearing pursuant to the law; however, due to their business commitments, they could not be present at the hearing. Considering that the Assessors had provided their assessment conclusion based on their expertise and had taken responsibility for their conclusion before the law, the absence of the Assessors hence did not

affect the hearing.”

The Procuracy then read the indictment in court; defense counsel made a request, which was granted, that Ms. Trang be allowed to sit given her poor health. The Court then asked if Ms. Trang agreed with the charges against her and started to ask specific questions such as whether Ms. Trang had given certain interviews, whether it was correct that she had been interviewed by the police, whether she had produced any documents to the police. Ms. Trang said she had not voluntarily given any materials to the police, but the police had seized materials from her home.<sup>100</sup> She said she had given many interviews in her work as a journalist. Asked if she had any opinion on the assessment of her political thoughts and opinions, provided by the Department of Information and Communications, Ms. Trang said that only Vietnam and China had this type of assessment, and she wasn't sure who the examiners were and what qualified them to make this assessment. The judge responded that the defendant had the right to agree or disagree but not to comment. Ms. Trang's lawyers also maintained that it was inappropriate of the Investigation Agency to outsource an assessment of Ms. Trang's political opinions to an administrative agency that essentially made legal conclusions on Ms. Trang's opinions.<sup>101</sup>

The indictment asserts that with respect to the two of key written documents (the report on freedom of religion and the general assessment of the human rights situation) “Pham Thi Doan Trang signed the . . . documents on November 16, 2017.” The prosecution matched her signature on those documents with samples of her signature taken from the minutes of interrogations by the police. The Criminal Technology Department concluded that they “are the signatures of the same person.”

Asked by the Procuracy about such documents that she had allegedly acknowledged, Ms. Trang said she did not recognize some of them or know how her signature had been placed there.<sup>102</sup> She also said that the fact the Procuracy's case rested solely on her testimony allegedly admitting authorship during her 2017 interrogation was against the law.<sup>103</sup>

The Procuracy then questioned Ms. Trang about whether she agreed with the assessment of the examiner. Ms. Trang responded that terms like “psychological warfare” are not legal terms and said many of the allegations were false and silly. The judge again reminded her that she didn't have a right to comment, just to answer questions.

Ms. Trang's defense attorneys then asked whether she had seen the full case file including the investigation conclusions, and she said it had been read to her in detention but she had not been allowed to see it. As reflected in the judgment, her lawyers argued that “the fact that the defendant did not have the chance to access the case record is considered a violation of Article 60 of the Criminal Procedure Code.”<sup>104</sup>

She said she did not know who authored every document in English used as evidence and said that she had not shared the documents that were taken from her computer and translated by the police. As she put it, “If the Investigation Agency did not translate the documents, nobody would know about them. The fact that the Investigation Agency translated the

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<sup>100</sup> Judgment at 12.

<sup>101</sup> Judgment at 13.

<sup>102</sup> Judgment at 12.

<sup>103</sup> *Id.*

<sup>104</sup> Judgment at 11.



documents and assessed them would make the Investigation Agency the disseminator of the documents, not the defendant.”<sup>105</sup>

Asked if she had requested a lawyer, Ms. Trang said she had repeatedly requested one but that the investigators told her she had no right to a lawyer because this was a national security case. As reflected in the judgment, her lawyers argued that “[t]he fact that the Investigation Agency did not allow lawyers to participate right from the beginning of the prosecution had affected the defendant’s rights.”

The lawyers again requested that witnesses be brought in to testify in the trial. The Procuracy instead suggested that written witness statements were sufficient.<sup>106</sup>

The Procuracy then argued to the Court that Ms. Trang should be convicted and sentenced to seven to eight years in prison for the offense of propaganda. The Court took a recess for lunch.

When the court session resumed, Ms. Trang’s brother was again initially not allowed to reenter the court, nor were some of the diplomatic observers. The Defense team began its presentation to the Court noting that despite the representations from the Court and the Procuracy that it didn’t matter that the requested defense witnesses were not present, in fact, their absence had a significant impact on the defense.

The defense team next argued that Article 88 conflicted with the right to freedom of expression protected under both the Constitution of Vietnam (Article 25) and the ICCPR (Article 19), which Vietnam had ratified. They also observed the vagueness of some of the statutory terms such as “the people’s government.”<sup>107</sup> They further argued that the conclusions of the examiner that Ms. Trang had spread lies were not supported by objective facts.

Defense lawyers also raised concerns with the accuracy and authenticity of the evidence presented—in particular, Ms. Trang’s signature that was attached to some documents to ostensibly establish her authorship, the English-language articles translated by the investigating agency (on the grounds they had not been independently and professionally translated), and several other documents that were not authenticated or sourced but were relied upon in the indictment.<sup>108</sup> They also raised concerns that information relied upon in the indictment was procured and evaluated by different agencies, some of which did not have law enforcement authority. They further noted some inconsistencies in the witness statements, taken from those who interrogated Ms. Trang while she was detained, on, for example, whether witnesses were present in the interrogation.

Ms. Trang then testified that she had been arrested by the police around 25 times, forced to attend “working sessions,” and each time was forced to bow and pressured to sign documents including minutes of these meetings.<sup>109</sup> She said that the case had no objective evidence against her, only the evidence of witnesses who were not present in court and her own words, with anything exonerating she had said while interrogated absent from the case. She testified

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<sup>105</sup> Judgment at 11.

<sup>106</sup> It is unclear to TrialWatch whether this referred to statements in the case file, presented to the defense ahead of trial.

<sup>107</sup> Judgment at 13.

<sup>108</sup> Judgment at 12.

<sup>109</sup> *Agence-France Presse*, “Prominent dissident journalist jailed in Vietnam,” Dec. 14, 2021, <https://www.bangkokpost.com/world/2231847/prominent-dissident-journalist-jailed-in-vietnam>

that she had been repeatedly beaten during her arrests and interrogations by the police and on one occasion, her legs were broken.<sup>110</sup>

In their response, the representative for the Procuracy said that the Court had already explained and excused the witnesses' absence; that the defendant was indeed not entitled to a lawyer because this was a national security case; and that the defendant had not requested all the documents in her file.

On the sufficiency of the evidence: the Procuracy claimed that the Investigation Agency performing the translation was competent and qualified to perform it and that this was normal practice. They further argued that the evidence from other agencies was all lawful and lawfully procured so it should be admitted. They also defended the sufficiency of the indictment and maintained that Ms. Trang's signatures on the various documents were verified. The Court, in its judgment, agreed with these findings and as described above excused the absence of witnesses.<sup>111</sup>

The defense lawyers reiterated some of their arguments. They also raised the fact that these allegations allegedly began in 2016 and yet no action had been taken.

At the conclusion of her one-day trial, Ms. Trang gave a statement to the courtroom (shared with friends and family ahead of her trial), stating, "The longer the prison sentence, the more demonstrable the authoritarian, undemocratic, and anti-democratic nature of the Socialist Republic of Vietnam. Brothers and sisters, you may imprison me and bask in celebration for eliminating a longstanding thorn in your eye, but you will never be rid of your ugly, authoritarian, undemocratic, anti-democratic reputation."<sup>112</sup> The judge reportedly interrupted Ms. Trang repeatedly and ordered her to stop speaking.<sup>113</sup>

The panel of judges then exited the courtroom with the assessors and returned approximately one hour later. They announced that Ms. Trang was guilty and would be sentenced to nine years in prison.

## E. JUDGMENT

In its decision, dated December 14, 2021, the Court convicted Ms. Trang of "dissemination of information" opposing the government of Vietnam and sentenced her to nine years in prison (to run from the time of her detention, October 7, 2020). The Court's decision summarized the

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<sup>110</sup> See Joint Statement, Access Now & 27 other organizations, Vietnam: Immediately release independent journalist and human rights defender Pham Doan Trang, Oct. 26, 2021, <https://www.hrw.org/news/2021/10/26/vietnam-immediately-release-independent-journalist-and-human-rights-defender-pham-0#>.

<sup>111</sup> Judgment at 8-9.

<sup>112</sup> *The Vietnamese Magazine*, "Pham Doan Trang's Final Statement At Her Trial," Dec. 14, 2021, available at <https://www.thevietnamese.org/2021/12/pham-doan-trangs-final-statement-at-her-trial/> (translating and reproducing a copy of the statement Ms. Trang provided to her family before trial).

<sup>113</sup> Chris Humphrey, *The Washington Post*, "Vietnam jails its 'most famous activist' for nine years" Dec. 14, 2021, [https://www.washingtonpost.com/world/asia\\_pacific/vietnam-press-freedom-pham-doan-trang/2021/12/14/8ed0f008-57e4-11ec-8396-5552bef55c3c\\_story.html](https://www.washingtonpost.com/world/asia_pacific/vietnam-press-freedom-pham-doan-trang/2021/12/14/8ed0f008-57e4-11ec-8396-5552bef55c3c_story.html); COMMITTEE TO PROTECT JOURNALISTS, *Nine-year sentence for prominent journalist Pham Doan Trang reaffirms Vietnam's 'abysmal' press freedom record*, Dec. 15, 2021, <https://cpj.org/2021/12/nine-year-sentence-journalist-pham-doan-trang-vietnam-abysmal-press-freedom/>.

contents of and investigation into 28 interviews and articles produced as evidence against Ms. Pham. The Court rejected some of the evidence as unverifiable—for example, the Court noted that two written articles were not accompanied by audio files or videos and Ms. Trang did not confess to being their author, thus there was “no legal ground to force Trang to take legal responsibility.”<sup>114</sup>

However, in its findings of fact, the Court determined that Ms. Trang had stored three English documents: (1) “Brief report on the marine life disaster in Vietnam”; (2) “General assessment on human rights situation in Vietnam”; and (3) “Report Assessment of the 2016 Law on Belief and Religion in relation to the exercise of the right to Freedom of Religion and Belief in Vietnam,” a version of which she had also posted online in Vietnamese. For two of the three documents, the Court observed, the handwriting sample used for authentication was from the minutes of her interrogation on October 7, 2020.<sup>115</sup> The other document (on marine life) was discussed at the same interrogation when she allegedly acknowledged authorship of the general assessment on human rights and was sent for assessment in conjunction with an audio file.<sup>116</sup>

It further concluded that on August 9, 2018, Pham Doan Trang was interviewed by the BBC Vietnamese news agency as reflected in a live post “Online Roundtable – BBC News Vietnamese” and that on December 5, 2018, she was interviewed by Radio Free Asia (“RFA”) as reflected in the article: “Pham Thi Doan Trang: Vietnamese middle class does not need democracy and freedom,” which was accompanied by the audio recording of the interview with her.

The judgment observed that these documents and the radio interview had been assessed by the Department of Information and Communications, which found that:

- The marine life report “consists of distorted information which defamed and opposed the People’s Government and spread psychological warfare, untrue, fabricated information to cause dismay among the people”;<sup>117</sup>
- The “General Assessment on human rights” document “has content that fuels psychological war, spreading untrue, fabricated information to cause dismay among the people”;<sup>118</sup>
- The Religious Freedom report, in English, “consists of distorted information about the guidelines and policies of the Socialist Republic of Vietnam. This document defamed and opposed the People’s Government and has content that fuels a psychological war, spreading untrue, fabricated information to cause dismay among the people”; and in Vietnamese, “has content that fuels psychological war, spreading untrue, fabricated information to cause dismay among the people”;<sup>119</sup>
- The BBC online interview and discussion “has content that fuels psychological war,

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<sup>114</sup> Judgment at 11.

<sup>115</sup> Judgment at 9.

<sup>116</sup> Judgment at 9-10.

<sup>117</sup> Judgment at 10.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

- spreading untrue, fabricated information to cause dismay among the people”;<sup>120</sup> and
- The RFA interview “has content which fuels psychological war, spreading untrue, fabricated information to cause dismay among the people.”<sup>121</sup>

The Court did not address the defense arguments that Ms. Trang’s rights were violated when she was interrogated without a lawyer. It did, however, refer to her signature on two documents produced as evidence and her admission that she was the author of one of the reports in finding the evidence was lawfully procured during the investigation and sufficient to establish her authorship.<sup>122</sup>

Based on these materials, the Court said it had sufficient evidence to convict Ms. Trang of “defaming the People’s Government, spreading psychological warfare, spreading fake news to cause dismay among the people, and sabotage the Socialist Republic of Vietnam.”<sup>123</sup> The Court further opined that Ms. Trang’s conduct “caused danger to the society, intending to violate the Socialist regime and the State in the areas of ideology, culture, social issues, foreign affairs, etc.” and “violated the power of the people’s government.”<sup>124</sup> The Court took into account, in her punishment, that Ms. Trang had “actively violated the law over a long period of time,” that she “did not make a sincere statement,” and that her long term of imprisonment would “help educate other people and prevent other violations.”<sup>125</sup>

The Court sentenced Ms. Trang to nine years in prison.

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<sup>120</sup> *Id.* 10-11.

<sup>121</sup> *Id.* at 11

<sup>122</sup> Judgment at 15.

<sup>123</sup> Judgment at 15-16.

<sup>124</sup> Judgment at 16.

<sup>125</sup> Judgment at 16.

# METHODOLOGY



## **THE MONITORING & ASSESSMENT PHASE**

Columbia Law School's Human Rights Institute monitored this trial by reviewing and analyzing the indictment and judgment as well as information made public by Ms. Trang's defense team on the conduct of the trial and from other sources. TrialWatch Expert David McCraw reviewed these materials, as well as drafts of this report, to provide an assessment of the trial's proceedings and compliance with international human rights law.

# ANALYSIS



## A. APPLICABLE LAW

This report draws upon the International Covenant on Civil and Political Rights (“ICCPR”), which has been ratified by the Socialist Republic of Vietnam; jurisprudence and commentary from the United Nations Human Rights Committee, tasked with interpreting and monitoring implementation of the ICCPR; and commentary from UN Special Procedures.

## B. INVESTIGATION AND PRETRIAL STAGE VIOLATIONS

From the moment of her arrest until the trial, more than a year later, the investigation and pretrial proceedings in this case involved significant violations of human rights law, notably the right to be informed of the reasons for her arrest, the right to a speedy trial, and the right to counsel, as well as the right to be free from arbitrary detention. Ms. Trang was held incommunicado for over a year without access to her family, legal counsel, and information about the legal or factual charges against her. Civil society groups have also raised concerns that she was denied adequate medical treatment, although TrialWatch did not have access to information to substantiate these claims. Nevertheless, the defects during the investigation and pretrial phase were not only violations in their own right, but also had severe consequences on the fairness of the trial against Ms. Trang, further detailed in the subsequent sections.

### The Right to Be Informed of Reasons for Arrest

Article 9(2) of the ICCPR requires that “[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest.”<sup>126</sup> As the UN Human Rights Committee has explained, this requirement means that an individual must be provided with this information “immediately upon arrest” barring exceptional circumstances (such as the need for an interpreter),<sup>127</sup> and this information “must include not only the general legal basis of the arrest, but also enough factual specifics to indicate the substance of the complaint, such as the wrongful act and the identity of an alleged victim.”<sup>128</sup> Providing this information is necessary in order to allow the defendant to contest the lawfulness of their detention.<sup>129</sup>

In this case, the UN Working Group on Arbitrary Detention has already determined that the government authorities did not provide Ms. Trang with the reasons for her arrest, nor did they provide a justification for their failure to do so.<sup>130</sup> As discussed subsequently, this defect was not remedied as information about the charges (in the form of the indictment) was not provided to Ms. Trang’s attorneys until a year after her arrest.

<sup>126</sup> ICCPR Article 9(2); see also UN General Assembly, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, U.N. Doc. A/RES/43/173 (Annex), Dec. 9, 1988, Principle 10, [https://www.euromedjustice.eu/en/system/files/20090707131444\\_ONUBodyofPrinciplesfortheProtectionofAllPersonsunderAnyFormofDetentionorImprisonment.pdf](https://www.euromedjustice.eu/en/system/files/20090707131444_ONUBodyofPrinciplesfortheProtectionofAllPersonsunderAnyFormofDetentionorImprisonment.pdf).

<sup>127</sup> Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, Dec. 16, 2014, para. 27.

<sup>128</sup> *Id.* at paras. 25-26.

<sup>129</sup> *Id.* at para. 30.

<sup>130</sup> UNWGAD Opinion No. 40/2021 concerning Pham Doan Trang (2021), *supra*, para. 63.

## The Right to Counsel & to Adequate Time and Facilities to Prepare a Defense

Article 14 of the ICCPR requires that anyone charged with a criminal offense has “adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.”<sup>131</sup> This core right enables a person facing criminal charges to get legal assistance in reviewing and challenging the case against them. This right to counsel attaches at the pretrial stage and ensures a right to legal representation during interrogations.<sup>132</sup> In *Kelly v. Jamaica*, for example, the U.N. Human Rights Committee found a violation of Article 14(3)(b) where police officers ignored the complainant’s request to speak to a lawyer for the first five days he was in custody.<sup>133</sup>

The UN Human Rights Committee has further explained that “adequate facilities” entails access to documents and other evidence, including “all materials that the prosecution plans to offer in court against the accused or that are exculpatory.”<sup>134</sup> The Committee has defined “exculpatory materials” not only as evidence demonstrating an accused’s innocence but also as evidence that “could assist the defence.”<sup>135</sup> In the case of *Khoroshenko v. Russia*, for example, the Human Rights Committee found a violation of Article 14(3)(b) where “despite numerous requests, [the defendant] was not given some documents he considered relevant for his defence.”<sup>136</sup>

In the present case, Ms. Trang was denied both access to a lawyer and adequate opportunity to review and contest the allegations against her, collected over several years by the government but only produced 10 days before her original trial date. Ms. Trang was arrested in October 2020 and interrogated during her pretrial detention but was not allowed to meet her lawyer until a year later, in October 2021, in the leadup to her scheduled trial date of November 3, 2021. The authorities produced over 11,000 pages of evidence against her, provided to the defense ten days before the original trial date.

The authorities defended the denial of counsel during the pretrial investigation stage on the ground that Ms. Trang was being investigated for a national security offense. Under Article 74 of Vietnam’s Code of Criminal Procedure, to protect “confidentiality” in national security cases, the prosecution can “sanction defense counsels’ engagement in legal proceedings after investigations end,”<sup>137</sup> thus denying accused persons access to a lawyer and legal assistance during pre-trial investigations, including interrogations.

The denial of counsel during Ms. Trang’s prolonged pretrial detention and in her interrogations violated her right to legal assistance and adequate time to prepare a defense. Violations of

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<sup>131</sup> ICCPR Article 14(3)(b).

<sup>132</sup> Human Rights Committee, General Comment no. 36, CCPR/C/GC/36, Oct. 30, 2018, para. 41, [https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1\\_Global/CCPR\\_C\\_GC\\_36\\_8785\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf)

<sup>133</sup> Paul Anthony Kelly v. Jamaica, Communication No. 537/1993, U.N. Doc CCPR/C/57/D/537/1993 (1996), para 9.2.

<sup>134</sup> Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/35, August 23, 2007, para. 33 (internal citations omitted).

<sup>135</sup> *Id.*

<sup>136</sup> Human Rights Committee, *Khoroshenko v. Russian Federation*, U.N. Doc. CCPR/C/101/D/1304/2004, April 29, 2011, para. 9.7.

<sup>137</sup> Vietnam Code of Criminal Procedure (2015), Article 74.

these core rights—and in particular, denial of access to legal assistance—result in unfair trials.<sup>138</sup> In its 2021 opinion finding Ms. Trang’s detention to be arbitrary, the UN Working Group on Arbitrary Detention observed: “Any legislation that purports to remove the right to counsel is inherently contrary to international human rights standards.”<sup>139</sup> Further, it found that the failure to provide Ms. Trang with access to a lawyer during her pretrial detention was a violation of her right to adequate time and facilities to prepare her defense under Article 14 of the ICCPR, noting, “This case is another example of legal representation being 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>140</sup>

The Working Group’s decision was based on Ms. Trang’s detention during the investigation and before the indictment was issued. However, it appears that even when the indictment was finalized in August 2021, it was not provided to her attorneys until October 2021 approximately 10 days before trial, and she and her attorneys thus had limited time to review it and the state’s evidence prior to her trial on December 14, 2021. This too violated her right to adequate time and facilities to prepare a defense.

### **The Right to Be Free from Arbitrary Detention and to Be Tried Without Undue Delay**

Under human rights law, pretrial detention should be the exception, not the rule,<sup>141</sup> and must be subject to individualized review.<sup>142</sup> As the UN Working Group on Arbitrary Detention already found,<sup>143</sup> Ms. Trang’s pretrial detention was arbitrary and violated her rights on multiple grounds, specifically because (a) she was detained on a vague charge and without the ability to challenge her pretrial detention;<sup>144</sup> (b) government authorities detained her for the lawful exercise of her rights to freedom of opinion and expression and her right to take part in the conduct of public affairs;<sup>145</sup> (c) her right to a fair trial, even in the pretrial stage, was violated by the authorities’ refusal to give her access to her lawyer and the long delay in bringing her case to trial;<sup>146</sup> and (d) she was detained on discriminatory grounds, based on her status as a human rights defender and because of her political or other opinion.<sup>147</sup>

The Working Group observed that Trang’s detention for her journalism and activism as a

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<sup>138</sup> European Court of Human Rights (Grand Chamber), *Salduz v. Turkey*, App. No. 36391/02, Nov. 27, 2008, ¶¶ 56-62; European Court of Human Rights, *Brusco v. France*, App. no. 1466/07, Oct. 14, 2010, §§ 44-46; European Court of Human Rights, *Plonka v. Poland*, App. No. 20310/02, Mar. 21, 2009, §§ 41 (holding that “the applicant was undoubtedly directly affected by the lack of access to a lawyer during her questioning by the police. Neither the assistance provided subsequently by a lawyer or the adversarial nature of the ensuing proceedings could cure the defects which had occurred during the police custody.”)

<sup>139</sup> UNWGAD, Opinion No. 40/2021 concerning Pham Doan Trang (2021), *supra*, para. 84.

<sup>140</sup> UNWGAD, Opinion No. 40/2021 concerning Pham Doan Trang (2021), *supra*, para. 84. *See also* European Court of Human Rights, *Öcalan v. Turkey*, App. No. 46221/99, May 12, 2005, paras. 147-148; European Court of Human Rights, *Moiseyev v. Russia*, App. No. 62936/00, September 10, 2008, para. 214 (on importance of defendant – lawyer discussions of the evidence).

<sup>141</sup> ICCPR Article 9(3).

<sup>142</sup> ICCPR Article 9(3); Human Rights Committee, General Comment No. 35 (2014), paras. 37–38.

<sup>143</sup> *Id.* at para. 91.

<sup>144</sup> *Id.* at para. 67-70.

<sup>145</sup> *Id.* at paras. 73, 78, 80.

<sup>146</sup> *Id.* at paras. 84-87.

<sup>147</sup> *Id.* at para. 91.



human rights defender was part of a “pattern of harassment by national authorities”<sup>148</sup> and raised its repeated concerns with the government’s use of Article 117 as “vague and broad” and failing to “differentiate between the use of violent means, which should be prohibited, and legitimate peaceful activities to protest.”<sup>149</sup> Although the authorities ultimately proceeded under Article 88—the older version of Article 117—the problematic language is the same in both statutes.

The prolonged investigation and pretrial detention period also violated Ms. Trang’s right to be tried without undue delay, guaranteed under Article 14 of the ICCPR.<sup>150</sup> In assessing whether there has been a violation of this right, the UN Human Rights Committee looks to the totality of the circumstances, including factors such as “the complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the administrative and judicial authorities.”<sup>151</sup> When the accused is held in detention pending trial, courts have a heightened duty to conclude proceedings as expeditiously as possible.<sup>152</sup> Further, Ms. Trang’s prolonged pretrial detention may also have implications for her right to the presumption of innocence, as the Human Rights Committee has said that excessive periods of pretrial detention may violate this right.<sup>153</sup>

Ms. Trang’s case is a paradox; on the one hand, despite the long pretrial detention, the severity of the charges, and the numerous documents allegedly compiled by the prosecution, the trial itself was only one day. On the other, Ms. Trang was detained for over a year in the leadup to her trial, the evidence for which was largely publicly-available materials (some dated back several years) and much of which had allegedly been compiled even before her arrest in 2020.<sup>154</sup> As discussed below, although Ms. Trang’s legal team requested that witnesses be produced for questioning, the Court rejected this request and decided its verdict and Ms. Trang’s sentence in a matter of hours at the end of one-day of trial. The conduct of the authorities and the indictment presented suggests that the long delay in bringing Ms. Trang’s case to trial was not justified by the complexity of the charges against her.

## C. VIOLATIONS AT TRIAL

The violations during the pretrial phase—in particular, the denial of Ms. Trang’s right to adequate time to review evidence and prepare her defense in consultation with her lawyers—continued into and infected the trial phase. The two fair trial violations discussed here—the right to cross-examine witnesses and confront evidence and the right to be tried by an

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<sup>148</sup> *Id.* at para. 85.

<sup>149</sup> *Id.* at para. 74.

<sup>150</sup> Article 14(c) of the ICCPR.

<sup>151</sup> Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 35.

<sup>152</sup> *Id.*

<sup>153</sup> Human Rights Committee, Concluding Observations, Italy, Apr. 24, 2006, CCPR/C/ITA/CO/5

<sup>154</sup> See Indictment.

independent tribunal—coupled with those continuing violations resulted in an unfair trial and outcome where Ms. Trang was denied a real opportunity to defend against the allegations and present her case.

## **Right to Cross-Examine Witnesses and Confront Evidence & to Equality of Arms**

### *Overview*

In refusing to allow the defense attorneys to call and examine the prosecution’s witnesses and to examine and contest the authenticity of evidence seized and used against Ms. Trang, the Court violated the accused’s fair trial rights under the ICCPR.

Under Article 14(3)(e) of the ICCPR, all persons accused of a crime are entitled “to obtain the attendance and examination of witnesses on [their] behalf under the same conditions as witnesses against [them].” In the words of the UN Human Rights Committee, this provision “is important for ensuring an effective defence by the accused and their counsel and thus guarantees the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.”<sup>155</sup> Article 14(3)(e) does not establish an absolute right to call and examine witnesses but does ensure the right to call witnesses who are relevant<sup>156</sup> and who the defense proposes in a timely manner in compliance with procedural requirements.<sup>157</sup> This right also encompasses experts.<sup>158</sup>

In *Allaberdiev v. Uzbekistan*, for example, the Human Rights Committee found a violation of Article 14(3)(e) where a court refused to allow defense counsel to call witnesses they said would show the drug charges against their client were fabricated (including witnesses involved in the investigation).<sup>159</sup>

### *Ms. Trang’s Defense Case*

In the present case, the Court refused to allow the defense team to call and examine the witnesses relied upon by the prosecution as well as their own proposed witnesses,<sup>160</sup> in

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<sup>155</sup> Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 39.

<sup>156</sup> Human Rights Committee, *Saidov v. Tajikistan*, U.N. Doc. CCPR/C/122/D/2680/2015, September 20, 2018, para. 9.6

<sup>157</sup> Human Rights Committee, *Johnson v. Spain*, U.N. Doc. CCPR/C/86/D/1102/2002, March 27, 2006, para. 6.5; Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 39

<sup>158</sup> See Human Rights Committee, *Pustovalov v. Russian Federation*, U.N. Doc. CCPR/C/98/D/1232/2003, May 10, 2010, para. 8.4.

<sup>159</sup> Human Rights Committee, *Sirozhiddin Allaberdiev v. Uzbekistan*, U.N. Doc. CCPR/C/119/D/2555/2015, May 18, 2017, paras. 2.1–2.21, 3.5, 8.7-8.9.

<sup>160</sup> For example, the defense requested the Court summon a representative of the Department of Homeland Security and a representative of the Ministry of Public Security, two agencies involved in the multi-year investigation of Ms. Trang; two translators whose translations of Ms. Trang’s interviews and articles attributed to her were relied upon; and other witnesses cited by the Prosecution whose written testimony was produced by the Prosecution, one of whom appears to have been present during Ms. Trang’s interrogation or “working sessions” and testified to her signing documents.

violation of the right to call and examine witnesses. This prejudiced the case because Ms. Trang was not given an opportunity to challenge her alleged admissions or the legal conclusions that her speech was propaganda.

Some of the articles at issue in the case were publicly posted on *Radio Free Asia* and on *Luatkhoa.org*, an online news and information site that Ms. Trang had co-founded.<sup>161</sup> Others, however, were seized from her home. The Procuracy's case was that Ms. Trang had admitted to authoring some of these articles under interrogation in 2017, which was also allegedly reflected in her signing her name on them during the interrogation session. Specifically, this was the case with at least one of the three English-language documents cited by the Court (on a general human rights assessment).

Ms. Trang, at trial, denied that she had signed any documents during her interrogation and said that she suspected the police had signed for her; she did acknowledge that in her previous arrests and detentions (before the present case), she had been forced to sign documents. Ms. Trang also denied being the author of all the English-language reports seized from her computer by the investigators; she also acknowledged that some she had shared but others she had not.

Finally, the defense argued that the translated versions of the articles (as the authorities had only found a Vietnamese version of one of the articles—the one on freedom of religion and belief) should not have been relied upon by the experts because the translation had not been done objectively and professionally or independently (rather it was the government's own translation of the articles).

On this basis, the defense requested that the Court summon:

- the police investigators for Ms. Trang's case, who could presumably have testified to what she allegedly said during the interrogation,
- the individuals who translated the English-language documents into Vietnamese, and
- representatives from other government agencies that had been involved in her investigation.

The indictment relies heavily on the assessment by experts of Ms. Trang's interviews and the articles taken from her computer. In particular, the indictment states that "the Department of Information and Communications of Hanoi City issued the Assessment results, concluding that the following documents have violated the law."<sup>162</sup> The indictment goes on to describe the experts' views on the various documents, which characterize their contents. For instance, the document on a general assessment of the human rights situation was found by the experts to include "content which fuels psychological warfare, spreading untrue, fabricated information to foment confusion among the people."<sup>163</sup> But the indictment does not explain *which content* met that standard, according to the experts. The defense therefore sought to summon the officials who conducted these assessments.

The Court said that several of the witnesses (namely those who had conducted the

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<sup>161</sup> The Court notably and appropriately did reject some of the evidence presented against Ms. Trang, noting that her authorship and ownership of some materials could not be proven where, for example, the IP address could not be verified and authorities could not confirm the ownership of the domain "luatkhoa.org." Judgment at 11.

<sup>162</sup> Indictment at 9.

<sup>163</sup> Indictment at 9, 10.

assessment of Ms. Trang's articles) had been summoned but they had other commitments and their participation was excused because their absence would not impact the case.<sup>164</sup> It also said that other witnesses requested by the defense were not necessary as their written statements, submitted by the Procuracy, sufficed.<sup>165</sup> The Procuracy said, and the Court agreed, that the translations were made appropriately by the government agencies. The defense did not request that the trial, which had already taken one year to be initiated, be set off; it did, however, request that the Court consider again the summons it had rejected and maintained that the defense was severely disadvantaged by the inability to cross-examine witnesses in this case.

### *The Right to Confront Witnesses and Evidence; Equality of Arms; Presumption of Innocence*

Ms. Trang's right to confront witnesses and evidence was violated by this conduct. The primary evidence against her was (a) documents that the government assessed to be propaganda and (b) her alleged admission that she wrote some of them. Here, Ms. Trang was denied the opportunity to question the assessors who determined that her alleged words and writing constituted propaganda. She was also denied the opportunity to contest the authenticity of her signature on some of the evidence, used to establish her admission of authorship. Both these decisions impacted the fairness and the outcome of her trial.

The UN Human Rights Committee has previously found violations of where the prosecution introduced written statements and the defense was not given an opportunity to question the authors of the statements.<sup>166</sup> In another case, the Committee concluded that a trial court violated the defendant's rights when the court ignored defense counsel's requests to call and examine several important witnesses who had testified during the preliminary investigation without providing any justification for its refusal.<sup>167</sup> That is exactly what transpired here.

The European Court of Human Rights (the jurisprudence of which may also be instructive) has also specifically found that "the defence must have the right to study and challenge not only an expert report as such, but also the credibility of those who prepared it, by direct questioning."<sup>168</sup> Again, this was denied to Ms. Trang.

These violations at trial also violated the principle of "equality of arms,"<sup>169</sup> inherent in the right to a fair trial, and requiring that both sides "be afforded a reasonable opportunity to present the case under conditions that do not place her/him at a substantial disadvantage vis-à-vis the opponent."<sup>170</sup> Ms. Trang and her defense team were denied the opportunity to challenge

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<sup>164</sup> Judgment at 15.

<sup>165</sup> *Id.*

<sup>166</sup> Human Rights Committee, Communication No. 815/1998, Dugin v. Russian Federation, 5 July 2004, para. 9.3, [http://www.worldcourts.com/hrc/eng/decisions/2004.07.05\\_Dugin\\_v\\_Russian\\_Federation.htm](http://www.worldcourts.com/hrc/eng/decisions/2004.07.05_Dugin_v_Russian_Federation.htm).

<sup>167</sup> Human Rights Committee, Nataliya Litvin v. Ukraine, Communication No. 1535/2006, U.N. Doc. CCPR/C/102/D/1535/2006 (2011), para. 10.4 (finding a violation of art.14(3)(e) where the state failed to call and examine witnesses and to conduct requested forensic examinations and failed "to provide any information as to the reasons for refusing to examine the respective witnesses.")

<sup>168</sup> European Court of Human Rights, *Khodorkovsky & Lebedev v. Russia* (No. 2), App. Nos. 51111/07 and 42757/07 (Jan. 14, 2020) para. 482.

<sup>169</sup> ICCPR, Art. 14(3) (requiring "full equality" in trial procedures); see also article 10 of the Universal Declaration of Human Rights (hereafter UDHR), adopted by the UN General Assembly under its resolution 217 (III) of 10 December 1948, guarantees that: "Everyone is entitled in full equality to a fair and public hearing... in the determination of his rights and obligations and of any criminal charge against him".

<sup>170</sup> Legal Digest of International Fair Trial Rights, Organization for Security and Cooperation in Europe 110 (2012), [osce.org/files/f/documents/1/f/94214.pdf](https://osce.org/files/f/documents/1/f/94214.pdf).

incriminating evidence produced against her and the conclusions of the assessing agency that her writing and words (including those to which she admitted authorship and those she simply possessed) violated the law. In particular, as further discussed in a subsequent section, the law itself is vague on its face and so the denial of an opportunity to hear from the assessors what words specifically caused violated what aspects of the law denied Ms. Trang a meaningful opportunity to present her defense.

Further, because the Court accepted the Procuracy's version of the case without allowing Ms. Trang to contest the evidence submitted through witness examination, it may also have violated Ms. Trang's right to be presumed innocent.<sup>171</sup> Article 14 of the ICCPR requires that anyone charged with a criminal offense have "the right to be presumed innocent until proved guilty, according to law."<sup>172</sup> As the UN Human Rights Committee has made clear, this presumption of innocence in a criminal trial "imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, [and] ensures that the accused has the benefit of doubt."<sup>173</sup> In refusing to let the defense present witnesses and challenge the prosecuting authorities' witnesses and evidence, the Court appears to have violated the presumption of innocence by shifting the burden off the prosecution and onto the defense to prove its case.

### **Right to be Informed of the Charges and to a Reasoned Judgment**

Adding to the Court's failure to allow the defense to cross-examine witness and challenge evidence, in this case, the Court relied in a conclusory manner, and without further analysis, on the findings of an administrative agency that Ms. Trang's statements and writing violated Vietnamese law. Not only did this essentially shift the burden off the prosecution to show and prove how every element of the alleged crime was present but, in accepting these conclusions of law without interrogating them, the Court deprived Ms. Trang of her right to both understand the charges against her and to a reasoned judgment.

Article 14(3) of the ICCPR requires that anyone charged with a crime is given information "in detail" on the "nature and cause of the charge" they face.<sup>174</sup> The Human Rights Committee has confirmed that the accused must be informed of "both the law and the alleged general facts on which the charge is based."<sup>175</sup>

Further, under the ICCPR, every person convicted of a crime must have a right to appeal the conviction to a higher court,<sup>176</sup> which requires that the individual be given sufficient information about the underlying decision to convict. In *Van Hulst v. The Netherlands*, for instance, the Committee indicated that courts must give "reasons" for dismissing a line of defense, finding a violation of the Article 14(5) right to appeal.<sup>177</sup> Similarly in *Timmer v. The Netherlands*, the

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<sup>171</sup> Whether or not Ms. Trang was the author of some of the articles and interviews presented against her, the Court's failure to ensure that she could challenge the assessments that these materials constituted propaganda violated her fair trial rights.

<sup>172</sup> ICCPR, Art. 14.

<sup>173</sup> Human Rights Committee, General Comment No. 32, para. 30.

<sup>174</sup> ICCPR, art. 14(3).

<sup>175</sup> General Comment 32, para. 31.

<sup>176</sup> ICCPR, art. 14(5).

<sup>177</sup> *Antonius Cornelis Van Hulst v. Netherlands*, Communication No. 903/1999, U.N. Doc. CCPR/C/82/D/903/1999 (2004), para. 6.5.

Human Rights Committee made clear that this right to appeal required “access to a duly reasoned, written judgement of the trial court.”<sup>178</sup>

Taken together, these requirements mean that, on the front end, an accused person must have detailed information about the charges against them in order to adequately prepare a defense; and on the back end, if convicted, the individual must be given the legal and factual reasons for their conviction.

In the present case, while Ms. Trang was informed of the articles and interviews that allegedly violated Vietnamese law, neither the indictment nor the judgment explains the reasoning behind the determination that the reports and interviews constituted “propaganda.” The judgment reiterates the findings of the Department of Information and Communications that the articles spread “untrue, fabricated information” and included “content that fuels a psychological war,”<sup>179</sup> but at no point does the judgment explain what information was false or how the articles (or any wording or claim therein) would “fuel psychological war.” Moreover, the judgment does not explain the elements of the Article 88 offense or the legal standard to be applied. The statute itself, as is discussed in a subsequent section, is broad and vague on its face; but the decision in this case adds further confusion because it provides no analysis of the application of the law in this case whatsoever. Rather, it simply recites the conclusions of the investigative agencies without providing any independent reasoning or explanation. Without this reasoning, Ms. Trang’s ability to challenge the Court’s conclusions on appeal are limited, in violation of her right to appeal her conviction.

## **Right to be tried by a competent, independent, and impartial court**

Under the ICCPR, “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”<sup>180</sup> As explained by the UN Human Rights Committee, this requirement of competence, independence and impartiality “is an absolute right that is not subject to any exception.”<sup>181</sup>

### **(a) Competence**

The Human Rights Committee has explained that the body conducting a judicial assessment must be competent and also “independent of the executive and legislative branches of government” with “judicial independence in deciding legal matters in proceedings that are judicial in nature.”<sup>182</sup>

In this case, as made clear in the judgment, the Court’s decision on Ms. Trang’s guilt rested on determinations made by an administrative agency (not a judicial one) that Ms. Trang’s comments constituted propaganda. Although the Court said that this was a “professional

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<sup>178</sup> Gert Jan Timmer v. The Netherlands, Communication No. 2097/2011, U.N. Doc. CCPR/C/111/D/2097/2011 (2014), para. 7.2.

<sup>179</sup> Judgment at 10.

<sup>180</sup> ICCPR, art. 14(1).

<sup>181</sup> Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 19

<sup>182</sup> Human Rights Committee, General Comment No. 32.

agency,”<sup>183</sup> this department is not an independent judicial body, staffed by judges, but rather a regulatory and policy-making body within the executive branch.<sup>184</sup> The Court’s judgment quotes the assessments made by this agency on Ms. Trang’s writing without its own analysis or engagement with the materials even as this agency was not just providing factual analysis but legal determinations on the meaning of Ms. Trang’s articles. The Department of Information and Communications did not only make factual assertions as to what Ms. Trang’s commentary may have meant; it went further to make a legal determination that these articles and interviews met the legal standard of Article 88 of the criminal code.

In the judgment, the Court reports the following:

On August 27, 2020, the Department of Information and Communications of Hanoi City issued the Assessment results, concluding that the following documents have violated the law:

(1) The English document: “General Assessment on human rights situation in Vietnam” and its Vietnamese translation has content that fuels psychological war, spreading untrue, fabricated information to cause dismay among the people.

(2) English document: “Report Assessment of the 2016 Law on Belief and Religion in relation to the exercise of the right to Freedom of Religion and Belief in Vietnam” and its Vietnamese translation consists of distorted information about the guidelines and policies of the Socialist Republic of Vietnam. This document defamed and opposed the People’s Government and has content that fuels a psychological war, spreading untrue, fabricated information to cause dismay among the people.

(3) Vietnamese document: “Report – Research: Assessment of the 2016 Law on Belief and Religion and the exercise of the right to Freedom of Religion and Belief” has content that fuels psychological war, spreading untrue, fabricated information to cause dismay among the people.

(4) The interview: “Pham Thi Doan Trang: “Vietnamese middle class does not need democracy and freedom”, posted on December 05, 2018, accompanied by an audio interview (mp3) with Pham Thi Doan Trang on:

[https://www.rfa.org/vietnamese/in\\_depth/doan-trang-middle-class-no-need-democracy-12052018111504.html](https://www.rfa.org/vietnamese/in_depth/doan-trang-middle-class-no-need-democracy-12052018111504.html). has content which fuels psychological war, spreading untrue, fabricated information to cause dismay among the people.

(5) Direct Streaming: “Online discussion table – BBC News Vietnamese” (Thursday, August 9, 2018) on: <http://www.facebook.com/bbcvietnamese/videos/2184604044885659>. has content that fuels psychological war, spreading untrue, fabricated information to cause dismay among the people.

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<sup>183</sup> Judgment at 15.

<sup>184</sup> See Ministry of Information and Communications of the Socialist Republic of Vietnam (MIC), Main Functions, <https://english.mic.gov.vn/Pages/ThongTin/114253/Main-Functions.html>

The Court conducted no further examination of these legal determinations but rather accepted them as conclusive, essentially outsourcing its critical function as a tribunal to an administrative, nonjudicial agency. The central legal determination at the heart of this case, then, was not conducted by a competent judicial body in violation of Ms. Trang's rights.

### **(b) Independence**

The Human Rights Committee has held that the requirement of judicial independence encompasses:

the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature.<sup>185</sup>

The Human Rights Committee has further noted that a "situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal."<sup>186</sup> As the Special Rapporteur on the Independence of Judges and Lawyers has observed, "undermining [judges'] independence jeopardizes most judicial guarantees."<sup>187</sup>

The Basic Principles on the Independence of the Judiciary further provide that "[a]ny method of judicial selection shall safeguard against judicial appointments for improper motives."<sup>188</sup> Likewise, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa provide that "[a]ny method of judicial selection shall safeguard the independence and impartiality of the judiciary"<sup>189</sup> and encourages transparency and accountability in judicial selection. In addition to these protections on the front end, human rights law requires that judges be protected by conditions of tenure that insulate them from removal or interference based on their rulings.

The Human Rights Committee has said that judges should be removed or suspended only on "serious grounds of misconduct or incompetence."<sup>190</sup> Similarly, the UN Basic Principles on Judicial Independence note that any decisions in removal proceedings "should be subject to an independent review."<sup>191</sup> Further, Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe states, "[j]udges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office."<sup>192</sup> The UN Human Rights Committee has, for instance, criticised a five-year term for judges to the Central Court in the Democratic People's Republic of Korea, which it considered

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<sup>185</sup> *Id.*

<sup>186</sup> *Id.*; Human Rights Committee, *Oló Bahamonde v. Equatorial Guinea*, U.N. Doc. CCPR/C/49/D/468/1991, November 10, 1993, para. 9.4.

<sup>187</sup> Report of the Special Rapporteur on the Independence of Judges and Lawyers, Aug. 12, 2008, UN Doc. A/63/271, para 36.

<sup>188</sup> UN Basic Principles on the Independence of the Judiciary, Principle 10, <https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx>.

<sup>189</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Section A(4)(h).

<sup>190</sup> HRC General Comment 32, para 20.

<sup>191</sup> UN Basic Principles on the Independence of the Judiciary, Principle 20.

<sup>192</sup> Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe, Principle 1(3).



endangered the independence of the judiciary.<sup>193</sup>

Here, the system of judicial tenure, appointment, and supervision suggests that the courts in Vietnam are not independent or insulated from political pressure. In Vietnam, it is the single-party National Assembly and its agencies that supervise the courts<sup>194</sup> and it is only the National Assembly that is authorized to interpret the Constitution.<sup>195</sup> As a structural matter, this suggests that the judiciary is not independent of but rather reporting to and inferior to the single-party National Assembly. In its 2002 review of Vietnam, the UN Human Rights Committee raised concerns with “undue pressure” that limited judicial independence, noting the judiciary’s “susceptibility to political pressure” and its concerns that “the Supreme People’s Court is not independent of government influence”; the judiciary relies on the National Assembly’s Standing Committee for the interpretation of the laws; and the role of the Standing Committee in “setting criteria and instructions which are binding for the judiciary.”<sup>196</sup> Further judges (including those on the Supreme People’s Court) are appointed for five-year terms and must reapply for appointment (which can then be renewed for up to 10 years). This term limit and reappointment process implicates judicial independence because judges who want to retain their role will know their appointment is subject to a political review of their decisions.

The lack of structural independence raises particular concerns in cases like the present one, where the charges are political in nature, as discussed in the next section. Judges and assessors are also subject to political qualifications. Assessors are defined as lay persons “loyal to the Fatherland and the Constitution of the Socialist Republic of Vietnam” who have a “firm political stance.”<sup>197</sup> They are elected by Local People’s Councils based on recommendations from the Vietnam Fatherland Front<sup>198</sup> and must be loyal to the Fatherland.<sup>199</sup> Judge and assessors may both be removed for committing criminal acts or if they are found to lack “ethical qualities.”<sup>200</sup>

### (c) Impartiality

Article 14 of the ICCPR also requires that courts be impartial. This has two components: “First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial.”<sup>201</sup> The first component

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<sup>193</sup> UN Human Rights Committee, Concluding Observations: Democratic People’s Republic of Korea, U.N. Doc CCPR/CO/72/PRK (2001), para 8.

<sup>194</sup> The Socialist Republic of Vietnam, Law No. 62/2014/QH13, Luật To Chuc Toa An Nhan dan [Law on the Organization of the People’s Court], Law No.(Nov. 11, 2014) (Viet.) [hereinafter Law on the Organization of the People’s Court] Article 19, <https://www.economica.vn/Portals/0/Documents/622014QH13267272.pdf>

<sup>195</sup> Article 74 of the Constitution. Vietnam does not have a constitutional court; although the issue has been raised, for example, around the

<sup>196</sup> UN Human Rights Committee CCPR/CO/75/VNM, Concluding Observations of the Human Rights Committee: Viet Nam, Aug. 5, 2002, para. 9, <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsmq1D%2B4Wvg6LhA1iuk%2BHo%2BVFfUUuSLFDiHiqmWgdywzhgPOb1Lh5xM2K5Lwg%2BfWdx9LjQf2f1b1retJKiSuNZMUaCzF9%2F2761CcnTyf4nFxLT>

<sup>197</sup> Article 85 of the Law on the Organization of the People’s Court.

<sup>198</sup> Article 86 of the Law on the Organization of the People’s Court.

<sup>199</sup> Article 89 of the Law on the Organization of the People’s Court.

<sup>200</sup> Articles 82 & 90 of the Law on the Organization of the People’s Court.

<sup>201</sup> Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 21. See also Human Rights Committee, Karttunen v. Finland, U.N. Doc. CCPR/C/46/D/387/1989, November 5, 1992, para. 7.2.

of this test is subjective—referring to the individual judge and whether their conduct or bias might impact their decision-making in a specific case. The second component is objective and is tied to the principle that “[n]ot only must Justice be done; it must also be seen to be done.”<sup>202</sup> If there is evidence that gives rise to justifiable doubts in the mind of this reasonable observer as to the court’s impartiality, that court cannot be deemed impartial.<sup>203</sup>

In the present case, news reports suggest that the Court repeatedly interrupted Ms. Trang when she attempted to testify and give her closing statement;<sup>204</sup> this—along with the rapidity with which the sentence was issued and the Court’s refusal to allow the defense to present and cross-examine witnesses—may suggest that the Court had some animus toward Ms. Trang or had prejudged her case. But even without any specific allegation that any of the judges or assessors presiding were motivated by personal bias or prejudice, the lack of structural judicial independence surrounding their appointment, qualifications, and terms of tenure, along with the court’s reported behavior, could give a reasonable observer the impression that this panel could not be expected to act impartially. This may be particularly true because the “national security” charges against Ms. Trang are so political in nature, as discussed below. Judges appointed by and reporting to a single-party legislature were deciding here on whether articles critical of the government constituted “propaganda.” The judgment does not analyse whether the articles and interviews at issue were “propaganda,” what the legal definition of this term is, or the mental state necessary for Ms. Trang to be convicted. Rather, it accepts that criticism of the government is a national security offense deserving a significant prison sentence.

## D. OTHER FAIRNESS CONCERNS

Beyond the significant violations of Ms. Trang’s procedural rights detailed above, the prosecution and conviction of this journalist and human rights activist under a vague law, and explicitly for exercising her right to freedom of expression, raises serious concerns under human rights law. Specifically, the charges and her disproportionate sentence violate the principle of legality and Ms. Trang’s right to freedom of expression, and the conduct of this trial overall suggests an abuse of process.

### The Principle of Legality

The principle of legality, at the core of criminal law and the rule of law overall, requires that offenses be clearly defined and prohibits retroactive application of a law. This ensures that a person is not punished for an act or omission they would not have known to be a crime at the time and protects against arbitrary application of the law. The principle is embodied in Article 15 of the ICCPR, which states: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.”<sup>205</sup>

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<sup>202</sup> R v Sussex Justices, ex parte McCarthy ([1924] 1 KB 256, [1923] All ER Rep 233

<sup>203</sup> ECtHR *Incal v Turkey* (1998), para 71.

<sup>204</sup> Chris Humphrey, *The Washington Post*, “Vietnam jails its ‘most famous activist’ for nine years” Dec. 14, 2021, [https://www.washingtonpost.com/world/asia\\_pacific/vietnam-press-freedom-pham-doan-trang/2021/12/14/8ed0f008-57e4-11ec-8396-5552bef55c3c\\_story.html](https://www.washingtonpost.com/world/asia_pacific/vietnam-press-freedom-pham-doan-trang/2021/12/14/8ed0f008-57e4-11ec-8396-5552bef55c3c_story.html)

<sup>205</sup> United Nations International Covenant on Civil and Political Rights (ICCPR), Mar. 23, 1976, 14668 U.N.T.S. 172, art. 15.

Regional human rights courts have also interpreted the principle of legality to require that states clearly define their criminal laws. As the European Court of Human Rights has explained, the principle of legality “embodies, more generally, the principle that only the law can define a crime and prescribe a penalty,” which it must do clearly and precisely.<sup>206</sup> The Inter-American Court of Human Rights has stated that the legality principle requires “a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviors that either are not punishable offences or are punishable but not with imprisonment.”<sup>207</sup> Indeed, as the Permanent Court of International Justice explained in 1935: “It must be possible for the individual to know, beforehand, whether his acts are lawful or liable to punishment.”<sup>208</sup> Although courts have an inevitable role in clarifying the law through judicial interpretation, they must ensure that any such development and construal is both consistent with the essence of the offence and also could reasonably be foreseen.<sup>209</sup>

The UN Human Rights Committee and other UN experts have repeatedly raised concerns with Article 88 and its successor in the 2015 code, Article 117, of Vietnam’s criminal code, on the grounds that this law is overbroad and vague and, in its application, has been used to punish protected speech and assembly activities.<sup>210</sup> In particular, as raised in 2021 by several UN human rights experts, the “vague and imprecise” language of Vietnam’s national security offenses “do not distinguish between violent acts posing as a threat to national security and the peaceful exercise of fundamental freedoms.”<sup>211</sup> Similarly, the UN Working Group on Arbitrary Detention has previously warned that some provisions of Vietnam’s national security laws draw “no distinction on the grounds of the use or non-use of violence or of incitement or non-incitement to violence.”<sup>212</sup> The fact that the offenses are ostensibly meant to safeguard national security does not excuse this vagueness and imprecision. In fact, the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights explicitly provide, “national security cannot be used as a pretext for imposing vague or arbitrary limitations.”<sup>213</sup>

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<sup>206</sup> ECtHR, *Kokkinakis v. Greece*, App. No. 14307/88, May 25, 1993, para. 52.

<sup>207</sup> Inter-American Court of Human Rights, *Castillo Petruzzi et al. v. Peru*, Series C, No. 52, May 30, 1999, para. 121.

<sup>208</sup> *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, Advisory Opinion, 1935 PCIJ (ser. A/B) No.65 (Dec.4) at 56-57.

<sup>209</sup> ECtHR, *Vasiliauskas v. Lithuania*, Application no. 35343/05, Oct. 20, 2015, para. 155; *S.W. v. the United Kingdom*, 22 November 1995, para. 36, Series A no. 335-B; *C.R. v. the United Kingdom*, 22 November 1995, para. 34, Series A no. 335-C; *Case of Del Rio Prada v Spain*, Application No. 42750/09, Oct. 21, 2013, para. 93.

<sup>210</sup> UN Human Rights Committee, *Concluding observations on the third periodic report of Viet Nam*, CCPR/C/VNM/CO/3 (2019), paras. 5, 45(a); UN Human Rights Committee CCPR/CO/75/VNM, *Concluding Observations of the Human Rights Committee: Viet Nam*, Aug. 5, 2002, para. 18; Letter to the Government of the Socialist Republic of Vietnam from the Mandates of the Special Rapporteur on the situation of human rights defenders; the Working Group on Arbitrary Detention; 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 right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on freedom of religion or belief; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and the Working Group on discrimination against women and girls, Nov. 22, 2021 [hereinafter 2021 Special Mandate Letter to Vietnam], at pp. 32, 37, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=26765>.

<sup>211</sup> 2021 Special Mandate Letter to Vietnam at pp. 32-33.

<sup>212</sup> United Nations Working Group on Arbitrary Detention, E/CN.4/1995/31/Add.4 (Dec. 21, 1994) at para. 58.

<sup>213</sup> American Association for the International Commission of Jurists, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, April 1985, para. 31, <https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf>.

Ms. Trang faced national security charges of “conducting propaganda” for allegedly speaking and writing, privately and publicly, about Vietnam’s human rights record. The statute under which she was convicted, Article 88 of the 1999 Criminal Code, states in full:

Those who commit one of the following acts against the Socialist Republic of Vietnam shall be sentenced to between three and twelve years of imprisonment:

- a) Propagating against, distorting and/or defaming the people's administration;
- b) Propagating psychological warfare and spreading fabricated news in order to foment confusion among people;
- c) Making, storing and/or circulating documents and/or cultural products with contents against the Socialist Republic of Vietnam.<sup>214</sup>

The statute does not include any guidance or definitions of the terms or their elements,<sup>215</sup> which are broad and quite diverse—from “distorting” to “psychological warfare” to “forment[ing] confusion.” Even “against the Socialist Republic of Vietnam” is vague and nonspecific. Beyond the lack of instruction on the meaning of the terms, the statute also has no intent component—meaning that there is no requirement that the authorities have to prove the accused’s conduct was deliberate or in order to cause a particular impact. There is also no explanation or standard for what the state must prove for a conviction.<sup>216</sup>

As such, this law is vague on its face, making it impossible for a person to know what speech or conduct is prohibited and so avoid criminalization.

## The Right to Free Expression

Article 19 of the ICCPR states that everyone has the right to freedom of expression, including the “freedom to seek, receive and impart information and ideas of all kinds,”<sup>217</sup> including those considered to be “offensive.”<sup>218</sup> Where the speech at issue is political, concerning public officials and public institutions, the UN Human Rights Committee has said, “[t]he value placed by the Covenant upon uninhibited expression is particularly high.”<sup>219</sup> The European Court of Human Rights has held that freedom of expression protects ideas and speech that may “offend, shock or disturb the state or any section of the population”<sup>220</sup> or are “provocative or insulting”<sup>221</sup> to government authorities.

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<sup>214</sup> Criminal Code of Vietnam, Art. 88 (1999).

<sup>215</sup> Vietnam uses a civil legal system where courts do not rely on judicial interpretations but rather “apply” existing legislation; the lack of definitions and statutory clarity is thus particularly problematic.

<sup>216</sup> See UN Working Group on Arbitrary Detention, Opinion para. 68 (2021) (“There is no intent component and no measure of what a prosecutor must prove to convict.”). Section 2 of Article 88, like other provisions under the Code, also refers to “less serious” offences without defining them or what distinguishes a “serious” from a “less serious” offense.

<sup>217</sup> ICCPR, Art. 19.

<sup>218</sup> UN Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34 (hereinafter “General Comment No. 34”), September 12, 2011.

<sup>219</sup> General Comment No. 34, para. 38.

<sup>220</sup> ECtHR, *Handyside v. UK*, Application no. 5493/72, 7 December 1976, para. 49.

<sup>221</sup> ECtHR, *Özgür Gündem v. Turkey*, Application no. 23144/93, 16 March 2000, para. 60 (“The Court reiterates that the dominant position enjoyed by the State authorities makes it necessary for them to display

Given the centrality of this right to free expression, the ICCPR mandates that any laws restricting expression are (a) “provided by law”; (b) serve a legitimate purpose; and (c) meet the test of “necessity and proportionality” for the protection of other core rights and interests.<sup>222</sup> The UN Human Rights Committee has explained that a law implicating the right to freedom of expression must not “confer unfettered discretion ... on those charged with its execution,”<sup>223</sup> as this could allow government authorities to punish speech they disagree with.<sup>224</sup> To further ensure that restrictions on speech are not abused, the Human Rights Committee has explained that any legislation restricting freedom of expression must be “formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.”<sup>225</sup>

### ***Provided by Law***

As previously noted, Article 88 is overbroad and fails the “provided by law” prong of the test for laws that restrict expression on its face. Where speech is criminalized in the name of national security, as in the present case, it is more, not less, important to specify why speech should be restricted.<sup>226</sup> As the Human Rights Committee has explained, where government authorities seek to punish speech on the grounds that it presents a risk of violence or a threat to national security, they must “demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.”<sup>227</sup>

Under the Johannesburg Principles on National Security, expression may only be punished as a threat to national security “if the government can demonstrate that: (a) the expression is intended to incite imminent violence; (b) it is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.”<sup>228</sup> On the contrary, under the Johannesburg Principles, speech that “advocates non-violent change of government policy or the government itself” is protected expression.<sup>229</sup> Similarly, the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR make clear that “national security” may only be invoked as a rationale for limiting rights in order to protect a nation’s existence or “territorial integrity or political independence against *force or threat of force*,” (emphasis added).<sup>230</sup>

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restraint in resorting to criminal proceedings. The authorities of a democratic State must tolerate criticism, even if it may be regarded as provocative or insulting.”)

<sup>222</sup> HUMAN RIGHTS COMMITTEE, General Comment No. 34 para. 9 (Sept. 12, 2011), U.N. Doc. CCPR/C/GC/34, para. 22.

<sup>223</sup> UN Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34 (hereinafter “General Comment No. 34”), September 12, 2011, para. 25. Although the Committee in this Comment is discussing the principle of legality in the context of restrictions on the right to freedom of expression, these requirements are fundamental to the legality principle in any context.

<sup>224</sup> UN Human Rights Committee, *Kim v. Republic of Korea*, U.N. Doc. CCPR/C/64/D/574/1994, Jan. 4, 1999, para. 12.2.

<sup>225</sup> General Comment No. 34, para. 25. See also U.N. General Assembly, Report of the Special Rapporteur on the promotion and protection of freedom of expression, U.N. Doc. A/74/486, Oct. 9, 2019, para 6.

<sup>226</sup> See ECtHR, *Başkaya and Okçuoğlu v. Turkey*, Applications nos. 23536/94 and 24408/94, 8 July 1999, para. 62.

<sup>227</sup> General Comment No. 34, para. 35.

<sup>228</sup> The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information, U.N. Doc. E/CN.4/1996/39 (1996), Principle 6.

<sup>229</sup> The Johannesburg Principles, Principle 7.

<sup>230</sup> The Siracusa Principles at para. 29.

Here, the Procuracy charged Ms. Trang with committing a national security offense by writing articles critical of the government. While “national security” is a legitimate interest of the state, there is no evidence presented that Ms. Trang’s writing or words are a threat to be punished, nor is the law sufficiently specific to require this nexus between expression and the likelihood of forceful or violent action. The indictment against Ms. Trang does not reference or suggest any involvement in or support of violent activities against either the state or any individual. Rather, the allegations and cited evidence against Ms. Trang consist of a series of published and unpublished articles and interviews describing the human rights situation in Vietnam, including environmental issues, LGBTQ+ rights, freedom of expression, and political freedoms. The indictment at no point suggests that these activities encourage or promote violence or any specific action. The accusation throughout the indictment is rather that Ms. Trang spread “untrue, fabricated information to foment confusion among the people.”<sup>231</sup> The most forceful language used is an accusation that Ms. Trang used “psychological warfare”;<sup>232</sup> but this term is vague and no conduct or actions suggesting force or violence to achieve a specific end are mentioned.

### ***Necessity and Proportionality***

Further, this prosecution violates the principles of necessity and proportionality because the prosecution and Court made no effort to show that the alleged conduct needed to be prosecuted—much less subject to a severe nine-year prison sentence—in order to avoid damage to national security.

States must demonstrate “the necessity and proportionality of the specific [restriction applied], in particular by establishing a direct and immediate connection between the expression and the [specific] threat” that the state says is the reason for the restriction. According to the UN Special Rapporteur on the right to freedom of expression, to comply with the necessity requirement, “States must demonstrate that the restriction imposes the least burden on the exercise of the right and actually protects, or is likely to protect, the legitimate State interest at issue. States may not merely assert necessity but must demonstrate it, in the adoption of restrictive legislation and the restriction of specific expression.”

Here, the alleged offense of “spreading” propaganda essentially seeks to punish Ms. Trang for some of the core activities of a journalist—collecting, analysing, and sharing information on matters of public and political discourse. The right to free expression guarantees not only the right to hold opinions but also to impart and receive information and ideas.<sup>233</sup> The Venice Commission has similarly explained that “where a person is prevented from communicating, or faces a fine or civil award of damages for doing so, the [] right [to freedom of expression] of both the speaker and the audience is interfered with.”<sup>234</sup>

Ms. Trang’s articles and interviews are protected speech and opinion on matters of public interest; they are the type of expression that are explicitly protected under human rights law. Prosecuting and severely punishing Ms. Trang for her thoughts, commentary, and criticism fails the necessity and proportionality requirements under the ICCPR.

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<sup>231</sup> Indictment at 8-9.

<sup>232</sup> Indictment at 8-9.

<sup>233</sup> ICCPR, art. 19(2).

<sup>234</sup> CDL-AD(2013)024, Opinion on the legislation pertaining to the protection against defamation of the Republic of Azerbaijan, § 21.

## Abuse of Process

Finally, the trial of a human rights activist and journalist explicitly for her work critical of the government clearly meets the standards for finding abuse of judicial process whereby the charges, investigation, detention, and punishment were not directed by a need to punish criminal conduct. Rather, each stage of this prosecution and trial appears to have been designed to punish Ms. Trang for exercising her rights to freedom of opinion and expression and to chill others from publicly or privately criticizing the government. Not only is this prosecution part of a documented trend of abusive prosecutions in Vietnam targeting government critics but it also is only the most recent targeting of Ms. Trang, who has been arrested, detained, and interrogated numerous times for her human rights activities.

While the UN Human Rights Committee has yet to establish clear criteria for assessing such situations—although it has made clear, for instance, that it considers detention for the exercise of protected rights to be arbitrary<sup>235</sup>—European Court of Human Rights jurisprudence is instructive. The European Court evaluates whether a legal proceeding was driven by improper motives, with regard to a range of factors: the political context in which the prosecution was brought;<sup>236</sup> whether the authorities undertook actions against the accused amidst their “increasing awareness that the practices in question were incompatible with [European] Convention standards;”<sup>237</sup> and whether the ultimate decision was well-reasoned and based on law.<sup>238</sup> The Court will also consider the broader context, including any pattern of politicised arrests and prosecutions.<sup>239</sup>

The European Court has held that proof of an illegitimate purpose may be shown by way of circumstantial evidence,<sup>240</sup> including, for example, the relationship between the prosecution and the exercise of rights protected under human rights law; the behaviour of prosecuting

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<sup>235</sup> UN Human Rights Committee, *Khadzhiyev v. Turkmenistan*, UN Doc CCPR/C/122/D/2252/2013, Apr. 17, 2018, para 7.7; see also UN Human Rights Committee, *Nasheed v. Maldives*, UN Doc.

CCPR/C/122/D/2851/2016, May 4, 2018, para. 8.7 (“The State party has not refuted the author’s allegations that the judicial proceedings against him, and the measures taken within the proceedings in 2012-2013, cumulatively, were used as a means of preventing him from campaigning for the 2013 presidential elections, such as twice arresting him to interrupt campaign trips and denying his request to be authorized to travel to other islands and abroad in connection with the political campaign.”)

<sup>236</sup> European Court of Human Rights, “Guide on Article 18 of the European Convention of Human Rights, Limitations on Use of Restrictions and Rights,” August 31, 2018, para. 57 (citing European Court of Human Rights, *Merabishvili v. Georgia*, App. No. 72508/13, November 28, 2017, para. 322; European Court of Human Rights, *Khodorkovskiy v. Russia*, App. No. 5829/04, May 31, 2011, para. 257; European Court of Human Rights, *Khodorkovskiy and Lebedev v. Russia*, App. Nos. 11082/06 and 13772/05, July 25, 2013, para. 901; European Court of Human Rights, *Nastase v. Romania*, App. No. 80563/12, December 11, 2014, para. 107; European Court of Human Rights, *Rasul Jafarov v. Azerbaijan*, App. No. 69981/14, March 17, 2016, paras. 159-161; European Court of Human Rights, *Mammadli v. Azerbaijan*, App. No. 47145/14, April 19, 2018, para. 103; European Court of Human Rights, *Rashad Hasanov and Others v. Azerbaijan*, App. No. 148653/13, June 7, 2018, para. 124).

<sup>237</sup> European Court of Human Rights (Grand Chamber), *Navalnyy v. Russia*, App. No. 29580/12, November 15, 2018, para. 171.

<sup>238</sup> European Court of Human Rights, *Nastase v. Romania*, App. No. 80563/12, December 11, 2014, para. 107.

<sup>239</sup> European Court of Human Rights, *Mammadov v. Azerbaijan* (Grand Chamber), App. No. 15172/13, May 29, 2019, para. 187-89.

<sup>240</sup> European Court of Human Rights, *Merabishvili v. Georgia* (Grand Chamber), App. No. 72508/13, Nov. 28, 2017, paras. 316-317; European Court of Human Rights, *Ibrahimov & Mammadov v. Azerbaijan*, App. No. 63571/16, Feb. 13, 2020, para. 147.

authorities, including delays between the arrest and the laying of charges; and appearances of political interference in the case when there appears to be a correlation between hostile statements by public officials and the timing or wording of criminal charges against the applicant.<sup>241</sup>

The present case evidences an improper motive in light of: (a) the behavior of the authorities, (b) Ms. Trang's punishment for exercise of her rights, including through the proceedings, and (c) the overall context and systemic pattern of arrests and detention of human rights activists and journalists in Vietnam, continuing in defiance of UN decisions.

From the Court's decision, and given the timing and pattern of Ms. Trang's arrests, it seems clear that Ms. Trang was prosecuted and convicted not just for her political opinions but also explicitly for "spreading materials" and for "interviews with foreign press."<sup>242</sup> The trial and prosecution of Ms. Trang thus appear designed to silence her and warn others against criticizing the government of Vietnam. Indeed, sentencing Ms. Trang to nine years in prison for her commentary about Vietnam or having material about Vietnam's human rights situation, the Court noted that the severe sentence served a deterrent purpose, to "educate" the public.<sup>243</sup>

First, the authorities' treatment of Ms. Trang suggested that this was a targeted and malicious prosecution. Ms. Trang is an internationally well-known author, journalist, and author, who has been repeatedly arrested by police in Vietnam, often around significant diplomatic events such as the US-Vietnam human rights dialogue in 2020; after leaving a meeting with a delegation from the European Union in advance of its EU-Vietnam human rights dialogue<sup>244</sup>; and in 2016, ahead of US President Obama's visit to Vietnam.<sup>245</sup> The timing of her repeated arrests and the violence with which she was treated in the past suggests that Ms. Trang has been targeted to be made an example of because of human rights activism and reporting, and because she sought to share information about the situation in Vietnam with an international audience. These conversations may annoy, offend, or inconvenience the government but they are protected under the ICCPR, which explicitly protects political discourse and opinion, commentary, journalism, and the sharing of information.

Second, and relatedly, this prosecution and trial punished Ms. Trang for the exercise of her right to expression and, given how well-known Ms. Trang is in Vietnam and internationally, appears to have been brought to deter others from criticizing the government. As previously discussed, laws that impermissibly limit free expression and political speech, in particular, violate human rights law. Not only do such laws violate the right to hold opinions and receive and impart information but they have a dangerous chilling effect that itself can implicate the fairness of the punishment. In *Baka v. Hungary* (2016), the Grand Chamber of the European Court of Human Rights held the chilling effect from sanctions on legitimate speech and expression not only impacts the proportionality of the punishment but also such an effect

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<sup>241</sup> See European Court of Human Rights, *Kavala v. Turkey*, App. No. 28749/18, Dec. 10, 2019, paras 223-229; European Court of Human Rights, *Demirtas v. Turkey* (No 2), App. No. 14305/17, Nov. 20, 2018, para 170 (2018); European Court of Human Rights, *Ismayilova v. Azerbaijan* (No 2), App. No. 30778/15, Feb. 27, 2020, para. 14.

<sup>242</sup> Judgment at 3.

<sup>243</sup> Judgment at 16.

<sup>244</sup> HUMAN RIGHTS WATCH, *Vietnam: EU Should Press for Release of Political Prisoners*, Nov. 28, 2017, <https://www.hrw.org/news/2017/11/28/vietnam-eu-should-press-release-political-prisoners>

<sup>245</sup> Simon Lewis, *Time Magazine*, "Empty Chairs' at Embassy Meeting as Vietnam Keeps Activists Away From Obama" May 24, 2016, available at <https://time.com/4346032/vietnam-obama-human-rights-detained/>



“works to the detriment of society as a whole.”<sup>246</sup> The Inter-American system shares this concern that a chilling effect that comes from criminal penalties on speech will violate the right to freedom of expression, with a broader impact on society beyond the harm to the individual defendant.<sup>247</sup>

Customary international law practice across jurisdictions also denounce the chilling effect that the threat of court process has on freedom of speech and expression. The Supreme Court of India, for example, has held that “the law should not be used in a manner that has chilling effects on the freedom of speech and expression.”<sup>248</sup> Earlier, the UK House of Lords in *Derbyshire County Council vs Times Newspapers Ltd.* similarly held that the threat of court process has a chilling effect on the freedom of speech and expression.<sup>249</sup>

Third, human rights experts from the UN have raised concerns that Vietnam’s national security laws are misused to punish and chill lawful conduct. The UN Working Group on Arbitrary Detention has previously warned that provisions of Vietnam’s national security laws fail to distinguish “between persons who use violence to achieve their objectives and those who are involved only in political activities which are primarily peaceful and which are, in the final analysis, an expression of freedom of opinion, expression, association and assembly.”<sup>250</sup> And several UN special rapporteurs similarly raised concerns with this misuse of national security laws in Vietnam, highlighting that “the penalisation of a journalist solely for being critical of the government or the political social system espoused by the government can never be considered to be a necessary restriction of freedom of expression.”<sup>251</sup>

In this case, the context suggests that Ms. Trang was arrested, detained, prosecuted, and punished, not for a legitimate national security interest but rather to chill dissent and criticism of the government authorities. Indeed, as the court noted in its verdict, the high sentence

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<sup>246</sup> European Court of Human Rights (Grand Chamber), *Baka v. Hungary*, Application no. 20261/12, June 23, 2016, para. 167. See also European Court of Human Rights, *Kövesi v. Romania*, App. 594/19, May 8, 2020, para. 209; European Court of Human Rights (Grand Chamber), *Navalny v. Russia*, App. No. 29580/12, November 15, 2018; European Court of Human Rights, *Wille v. Liechtenstein*, Application no. 28396/95, Oct. 28, 1999, para. 50.

<sup>247</sup> Inter-American Court of Human Rights, *Case of Herrera-Ulloa v. Costa Rica*, July 2, 2004, para. 133 (finding a violation of the right to freedom of expression in a criminal prosecution that had a “deterrent, chilling and inhibiting effect” on others and “in turn, obstructs public debate on issues of interest to Society.” See generally, Inter-American Commission on Human Rights, *Tulio Álvarez v. Venezuela*, Report No. 4/17, Jan. 26, 2017, para. 84, available at <http://www.oas.org/en/iachr/decisions/court/2017/12663fondo.pdf>. CASE 12.663,

<sup>248</sup> *S. Khushboo vs Kanniammal*, 2010 (V) SCR 322 (citing another decision, *S. Rangarajan Vs. P. Jagjivan Ram & Ors.*, (1989) 2 SCC 574, as laying down the appropriate approach in determining the scope of ‘reasonable restrictions’ that can be placed on the Freedom of Speech and Expression)

<sup>249</sup> *Derbyshire County Council vs Times Newspapers Ltd.*, [1993] 1 All ER 1011, [1993] 2 WLR 449, [1993] UKHL 18, [1993] AC 534, citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964).

<sup>250</sup> United Nations Working Group on Arbitrary Detention, E/CN.4/1995/31/Add.4 (Dec. 21, 1994) at para. 35.

<sup>251</sup> Letter to the Government of the Socialist Republic of Vietnam from the Mandates of the Special Rapporteur on the situation of human rights defenders; the Working Group on Arbitrary Detention; 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 right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on freedom of religion or belief; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and the Working Group on discrimination against women and girls, Nov. 22, 2021, at 38,

<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=26765>.

served to “educate” the public and acts as a deterrent.<sup>252</sup>

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<sup>252</sup> Judgment at 16.

## CONCLUSION AND GRADE



### TrialWatch Expert David McCraw's Findings:

The trial of Pham Doan Trang was marred from beginning to end by severe violations of her right to a fair trial, her right to be free from arbitrary detention, and her right to freedom of expression. Ms. Trang was held incommunicado based on her human rights activities and without access to legal assistance, detailed information about the charges against her, or the opportunity to contest her detention for over a year. In November 2021, the UN Working Group on Arbitrary Detention found that her detention was consequently unlawful; but rather than curing these defects, the authorities continued to prosecute Ms. Trang on vague charges for writing about Vietnam's human rights situation and sharing her opinions publicly—conduct protected under human rights law. Not only were the charges against Ms. Trang provided very late before trial but the law under which she was charged and convicted—Article 88 of the 1999 Penal Code—has been repeatedly criticized by the UN and other experts as too vague and overbroad; as such, the law on its face violates the principle of legality.

At trial, which lasted only one day, Ms. Trang was denied her right under human rights law to call and cross-examine witnesses, including the individuals who had made the legal determination that she had committed anti-state propaganda. Further, the Court adopted these legal conclusions from an administrative agency, essentially delegating its judicial functions to a political and administrative body in violation of the right to an independent and impartial tribunal. The judgment, handed down mere hours after the trial concluded, also violated Ms. Trang's right to a reasoned judgment in its lack of analysis or legal interpretation, thus also denying her right to an effective appeal of the conviction. Beyond these violations within the trial, it also appears that Ms. Trang was targeted for her writing and activism critical of the governmental authorities given not only the charges in this case but also the number of times she has been arrested and detained over the years, often when Vietnam's human rights record was being discussed. Hers is one of many concerning arrests, prosecutions, and sentences in Vietnam for exercising the right to freedom of expression, which further suggests an abuse of process in this case.

This trial merits a grade of F in light of the numerous violations of Ms. Trang's fair trial rights and her rights to freedom of expression and to be free from arbitrary detention and the extremely harsh penalty imposed.

**GRADE:**

**F**

# ANNEX



## GRADING METHODOLOGY

Experts should assign a grade of A, B, C, D, or F to the trial reflecting their view of whether and the extent to which the trial complied with relevant international human rights law, taking into account, *inter alia*:

- The severity of the violation(s) that occurred;
- Whether the violation(s) affected the outcome of the trial;
- Whether the charges were brought in whole or in part for improper motives, including political motives, economic motives, discrimination, such as on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,”<sup>(ICCPR Article 26)</sup> and retaliation for human rights advocacy (even if the defendant was ultimately acquitted);
- The extent of the harm related to the charges (including but not limited to whether the defendant was unjustly convicted and, if so, the sentence imposed; whether the defendant was kept in unjustified pretrial detention, even if the defendant was ultimately acquitted at trial; whether the defendant was mistreated in connection with the charges or trial; and/or the extent to which the defendant’s reputation was harmed by virtue of the bringing of charges); and
- The compatibility of the law and procedure pursuant to which the defendant was prosecuted with international human rights law.

### Grading Levels

- A: A trial that, based on the monitoring, appeared to comply with international standards.
- B: A trial that appeared to generally comply with relevant human rights standards excepting minor violations, and where the violation(s) had no effect on the outcome and did not result in significant harm.
- C: A trial that did not meet international standards, but where the violation(s) had no effect on the outcome and did not result in significant harm.
- D: A trial characterized by one or more violations of international standards that affected the outcome and/or resulted in significant harm.
- F: A trial that entailed a gross violation of international standards that affected the outcome and/or resulted in significant harm.