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

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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.¹

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

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

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.⁷ 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.”⁸ 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.”⁹

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.¹⁰ 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).¹¹ 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.”¹² 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

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

⁸ 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.

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

¹⁰ 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>.

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

¹² 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.¹³

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.¹⁴ 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.”¹⁵ 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.”¹⁶ 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.¹⁷

¹³ 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.

¹⁴ 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; 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; 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/>.

¹⁵ 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>.

¹⁶ 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..>

¹⁷ *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 case¹⁸) 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.¹⁹

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.²⁰ 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.²¹

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;²² and in January 2020, Prime Minister Nguyễn Xuân Phúc referred to crimes against national security as "the worst of all crimes."²³

¹⁸ 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.

¹⁹ Criminal Code of Vietnam, Art. 88 (1999).

²⁰ 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; 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; 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>

²¹ 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>

²² *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>

²³ *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>

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.³⁹

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.⁴⁰ 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.⁴¹

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.⁴² 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

³⁹ 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>

⁴⁰ 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).

⁴¹ 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; 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; 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>.

⁴² 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.

Supreme People's Procuracy shall decide to maintain detention until the investigation closes."⁵⁹ 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.⁶⁰ 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,”⁶¹ 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.⁶²

Human rights groups have also observed that those in detention for “crimes of conscience” are subjected to harsher rules while in detention.⁶³ 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.”⁶⁴ 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.⁶⁵

⁵⁹ *Id.*

⁶⁰ 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>.

⁶¹ 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>.

⁶² *Id.* at para 80.

⁶³ 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>

⁶⁴ 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.

⁶⁵ 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>

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.”⁸⁰

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 factor⁸¹ (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.⁸² 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.⁸³

⁸⁰ 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>.

⁸¹ 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.

⁸² Indictment at 13.

⁸³ *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>

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."

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.¹⁰⁰ 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.¹⁰¹

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.¹⁰² 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.¹⁰³

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.”¹⁰⁴

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

¹⁰⁰ Judgment at 12.

¹⁰¹ Judgment at 13.

¹⁰² Judgment at 12.

¹⁰³ *Id.*

¹⁰⁴ Judgment at 11.

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.”¹³¹ 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.¹³² 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.¹³³

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.”¹³⁴ The Committee has defined “exculpatory materials” not only as evidence demonstrating an accused’s innocence but also as evidence that “could assist the defence.”¹³⁵ 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.”¹³⁶

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,”¹³⁷ 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

¹³¹ ICCPR Article 14(3)(b).

¹³² 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

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

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

¹³⁵ *Id.*

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

¹³⁷ Vietnam Code of Criminal Procedure (2015), Article 74.

human rights defender was part of a “pattern of harassment by national authorities”¹⁴⁸ 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.”¹⁴⁹ 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.¹⁵⁰ 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.”¹⁵¹ When the accused is held in detention pending trial, courts have a heightened duty to conclude proceedings as expeditiously as possible.¹⁵² 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.¹⁵³

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 2020.¹⁵⁴ 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

¹⁴⁸ *Id.* at para. 85.

¹⁴⁹ *Id.* at para. 74.

¹⁵⁰ Article 14(c) of the ICCPR.

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

¹⁵² *Id.*

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

¹⁵⁴ See Indictment.

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.¹⁶¹ 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."¹⁶² 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."¹⁶³ 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

¹⁶¹ 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.

¹⁶² Indictment at 9.

¹⁶³ Indictment at 9, 10.

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.¹⁷¹ 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."¹⁷² 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."¹⁷³ 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.¹⁷⁴ 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."¹⁷⁵

Further, under the ICCPR, every person convicted of a crime must have a right to appeal the conviction to a higher court,¹⁷⁶ 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.¹⁷⁷ Similarly in *Timmer v. The Netherlands*, the

¹⁷¹ 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.

¹⁷² ICCPR, Art. 14.

¹⁷³ Human Rights Committee, General Comment No. 32, para. 30.

¹⁷⁴ ICCPR, art. 14(3).

¹⁷⁵ General Comment 32, para. 31.

¹⁷⁶ ICCPR, art. 14(5).

¹⁷⁷ *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.”¹⁷⁸

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,”¹⁷⁹ 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.”¹⁸⁰ 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.”¹⁸¹

(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.”¹⁸²

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

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

¹⁷⁹ Judgment at 10.

¹⁸⁰ ICCPR, art. 14(1).

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

¹⁸² Human Rights Committee, General Comment No. 32.

agency,”¹⁸³ this department is not an independent judicial body, staffed by judges, but rather a regulatory and policy-making body within the executive branch.¹⁸⁴ 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. 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.

¹⁸³ Judgment at 15.

¹⁸⁴ 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.¹⁸⁵

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."¹⁸⁶ As the Special Rapporteur on the Independence of Judges and Lawyers has observed, "undermining [judges'] independence jeopardizes most judicial guarantees."¹⁸⁷

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."¹⁸⁸ 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"¹⁸⁹ 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."¹⁹⁰ Similarly, the UN Basic Principles on Judicial Independence note that any decisions in removal proceedings "should be subject to an independent review."¹⁹¹ 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."¹⁹² 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

¹⁸⁵ *Id.*

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

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

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

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

¹⁹⁰ HRC General Comment 32, para 20.

¹⁹¹ UN Basic Principles on the Independence of the Judiciary, Principle 20.

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

endangered the independence of the judiciary.¹⁹³

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 courts¹⁹⁴ and it is only the National Assembly that is authorized to interpret the Constitution.¹⁹⁵ 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.”¹⁹⁶ 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.”¹⁹⁷ They are elected by Local People’s Councils based on recommendations from the Vietnam Fatherland Front¹⁹⁸ and must be loyal to the Fatherland.¹⁹⁹ Judge and assessors may both be removed for committing criminal acts or if they are found to lack “ethical qualities.”²⁰⁰

(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.”²⁰¹ The first component

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

¹⁹⁴ The Socialist Republic of Vietnam, Law No. 62/2014/QH13, *Luật Tố 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>

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

¹⁹⁶ 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>

¹⁹⁷ Article 85 of the Law on the Organization of the People’s Court.

¹⁹⁸ Article 86 of the Law on the Organization of the People’s Court.

¹⁹⁹ Article 89 of the Law on the Organization of the People’s Court.

²⁰⁰ Articles 82 & 90 of the Law on the Organization of the People’s Court.

²⁰¹ 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.”²⁰² 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.²⁰³

In the present case, news reports suggest that the Court repeatedly interrupted Ms. Trang when she attempted to testify and give her closing statement;²⁰⁴ 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.”²⁰⁵

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

²⁰³ ECtHR *Incal v Turkey* (1998), para 71.

²⁰⁴ 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

²⁰⁵ 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.²⁰⁶ 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.”²⁰⁷ 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.”²⁰⁸ 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.²⁰⁹

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.²¹⁰ 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.”²¹¹ 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.”²¹² 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.”²¹³

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

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

²⁰⁸ *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.

²⁰⁹ 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.

²¹⁰ 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>.

²¹¹ 2021 Special Mandate Letter to Vietnam at pp. 32-33.

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

²¹³ 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.²¹⁴

The statute does not include any guidance or definitions of the terms or their elements,²¹⁵ 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.²¹⁶

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,”²¹⁷ including those considered to be “offensive.”²¹⁸ 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.”²¹⁹ 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”²²⁰ or are “provocative or insulting”²²¹ to government authorities.

²¹⁴ Criminal Code of Vietnam, Art. 88 (1999).

²¹⁵ 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.

²¹⁶ 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.

²¹⁷ ICCPR, Art. 19.

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

²¹⁹ General Comment No. 34, para. 38.

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

²²¹ 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.²²² 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,”²²³ as this could allow government authorities to punish speech they disagree with.²²⁴ 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.”²²⁵

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.²²⁶ 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.”²²⁷

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.”²²⁸ On the contrary, under the Johannesburg Principles, speech that “advocates non-violent change of government policy or the government itself” is protected expression.²²⁹ 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).²³⁰

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.”)

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

²²³ 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.

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

²²⁵ 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.

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

²²⁷ General Comment No. 34, para. 35.

²²⁸ 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.

²²⁹ The Johannesburg Principles, Principle 7.

²³⁰ 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.”²³¹ The most forceful language used is an accusation that Ms. Trang used “psychological warfare”;²³² 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.²³³ 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.”²³⁴

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.

²³¹ Indictment at 8-9.

²³² Indictment at 8-9.

²³³ ICCPR, art. 19(2).

²³⁴ 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 arbitrary²³⁵—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;²³⁶ whether the authorities undertook actions against the accused amidst their “increasing awareness that the practices in question were incompatible with [European] Convention standards;”²³⁷ and whether the ultimate decision was well-reasoned and based on law.²³⁸ The Court will also consider the broader context, including any pattern of politicised arrests and prosecutions.²³⁹

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

²³⁵ 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.”)

²³⁶ 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).

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

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

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

²⁴⁰ 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.²⁴¹

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."²⁴² 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.²⁴³

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 dialogue²⁴⁴; and in 2016, ahead of US President Obama's visit to Vietnam.²⁴⁵ 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

²⁴¹ 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.

²⁴² Judgment at 3.

²⁴³ Judgment at 16.

²⁴⁴ 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>

²⁴⁵ 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.”²⁴⁶ 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.²⁴⁷

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.”²⁴⁸ 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.²⁴⁹

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.”²⁵⁰ 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.”²⁵¹

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

²⁴⁶ 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.

²⁴⁷ 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,

²⁴⁸ *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)

²⁴⁹ *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).

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

²⁵¹ 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.²⁵²

²⁵² 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,”^(ICCPR Article 26) 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.