

No. 23/2011 (China)

Communication addressed to the Government on 4 April 2011

Concerning Liu Xianbin

The State is a not party to the international Covenant on Civil and Political Rights.

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights. The mandate of the Working Group was clarified and extended in Commission resolution 1997/50. The Human Rights Council assumed the mandate in its decision 2006/102. The mandate was extended for a further three-year period in Council resolution 15/18 of 30 September 2010.
2. The Working Group regards deprivation of liberty as arbitrary in the following cases:
 - (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him) (category I);
 - (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);
 - (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);
 - (d) When asylum-seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);
 - (e) When the deprivation of liberty constitutes a violation of the international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; disability or other status, and which aims towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

3. According to the source, Liu Xianbin, born in XXXX, is a leading member of the China Democratic Party, an unrecognized political party in Sichuan province.
4. The source recalls that the Working Group, in its opinion No. 12/2003 (China), concerning Liu Xianbin who was sentenced on 6 August 1999 by the Suining Intermediate People's Court to 13 years' imprisonment for "incitement to subvert State power", held that:
"The detention of ... Liu Xianbin is arbitrary, being in contravention of article 19 of the Universal Declaration of Human Rights, and falls within category II of the categories applicable to the consideration of cases submitted to the Working Group".

5. Following his release in November 2008, Liu Xianbin, according to the source, continued his activism in promotion of democracy and defence of human rights. He has published articles on human rights and democracy and worked to increase public awareness of other persecuted activists.

6. The source further informs that, on 5 July 2010, Liu Xianbin was arrested on suspicion of "inciting subversion of state power" and transferred to the Suining Detention Centre in Suining City, Sichuan Province. According to the source, the police questioned him in relation to his support to democracy activists and human rights defenders including Liu Xiaobo, a writer sentenced to 11 years of prison for "inciting subversion of State power" for his involvement in drafting and organizing the signing of Charter 08. Liu Xianbin was further questioned by the police about the online publication of his articles calling for democratic reforms.

7. According to the source, on 25 March 2011, the Suining Intermediate People's Court tried Liu Xianbin on charges of "inciting subversion of State power". It was alleged that the judge presiding the trial did not allow Liu Xianbin to read out to the court his defence statement and interrupted his lawyers speaking in Liu Xianbin's defence. Liu Xianbin was found guilty and sentenced to 10 years of imprisonment and two years and four months' deprivation of political rights. Liu Xianbin's wife was allowed to attend the trial. This was the first time she had seen her husband since June 2010.

8. It is further reported that his lawyer was able to meet once with Liu Xianbin in July 2010. In September and December 2010, he was no longer allowed meetings to confer with his client on the grounds that Liu Xianbin's case involved "State secrets".

9. The source recalls that, in one of its annual reports, the Working Group considered that "the usage of the term "State secret" runs counter to the relevant United Nations norms in the matter, which authorize and encourage the collection and dissemination of such information ["relating to allegations concerning victims of human rights violations"] ... by defenders of human rights, in the context of special and conventional procedures" (report of the Working Group on Arbitrary Detention to the Commission on Human Rights, E/CN.4/2001/14, p. 31). After recalling the terms of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, the Working Group recommended "that Government take all necessary measures, of a legislative or other nature, to ensure that any legislation concerning national or State security is in no case extended to cover information relating to the defence and protection of either the environment or human rights" (ibid., p. 32).

10. The source argues that Liu Xianbin's deprivation of liberty is a direct consequence of his exercise of the right to freedom of expression as guaranteed inter alia under article 19 of the Universal Declaration of Human Rights. In the light of the Working Group's Opinion No. 12/2003, holding as arbitrary Liu Xianbin's previous detention on the basis of same charges heard by the same court, Suining Intermediate People's Court, the circumstances of the current detention since June 2010 do not seem to be substantially different.

11. According to the source, the activities attributed to Liu Xianbin are protected under article 35 of the Chinese Constitution, which specifically provides that "citizens of the People's Republic of China enjoy freedom of speech [and] of the press". Moreover, article 41 of the Chinese Constitution stipulates that citizens "have the right to criticize and make suggestions regarding any state organ or functionary".

12. In addition, the source contends that Liu Xianbin's deprivation of liberty is in total or partial non-observance of the international norms relating to the right to a fair trial. In particular, article 10 of the Universal Declaration of Human Rights provides that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".

13. The source further cites article 11 of the Universal Declaration, which stipulates that "everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence". Principle 18, paragraph 1, of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, "a detained or imprisoned person shall be entitled to communicate and consult with his legal counsel".

14. According to the source, Liu Xianbin's access to legal counsel was impaired. Only once was he allowed to confer with his lawyer, to be subsequently denied such access due to the allegation that his charges involved "State secrets".

15. Moreover, during his trial, the presiding judge did not allow Liu Xianbin to read out to the court his defence statement and interrupted his lawyers from speaking in Liu Xianbin's defence.

16. The source recalls that principle 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment guarantees that "a detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world". Principle 15 further clarifies that "communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days". Reportedly, while Liu Xianbin had been arrested on 28 June 2010, it was not until his trial on 25 March 2011 that he was, for the first time, able to see his wife.

17. In conclusion, the source submits that Liu Xianbin's detention is arbitrary on the grounds that it is a direct consequence of his exercise of the right to freedom of expression as guaranteed inter alia under article 19 of the Universal Declaration of Human Rights. The source also submits that Liu Xianbin's detention is arbitrary since it is in total or partial non-observance of the international norms relating to the right to a fair trial.

Response from the Government

18. In its reply, the Government reports that, in August 1999, Liu Xianbin was sentenced to 13 years of imprisonment and 3 years of deprivation of political rights for subverting State power. In November 2008, Liu Xianbin was released from prison after serving his principal penalty.

19. The Government further reports that, according to the Intermediate People's Court of Sichuan Suining, from April 2009 to February 2010, Liu Xianbin published a number of articles on the Internet inciting subversion of State power and overthrowing socialist system. His act, according to the Government, constitutes a crime of inciting subversion of State power.

20. The Government maintains that, during the period of serving the imposed deprivation of political rights, Liu Xianbin again committed the crime of inciting subversion of State power. Given the severity of the crime and recidivism, Liu Xianbin should have been punished severely according to the law. On 25 March 2011, the court held a hearing and rendered its judgement. Liu Xianbin was sentenced to 10 years of imprisonment and 2 years of deprivation of political rights for inciting subversion of State power. Considering the four months and eight days of deprivation of political rights which had not been served from the previous sentence, the execution of the judgment is a fixed term of 10 years of imprisonment and 2 years and 4 months of deprivation of political rights.

21. The Government contends that the Intermediate People's Court of Sichuan Suining heard this case in strict accordance with the penal code and the law of criminal procedure. Liu Xianbin appointed his attorney. During the court's hearing of the case, Liu Xianbin benefited from his right to defence. His attorney was able to fully express his arguments. Liu Xianbin's procedural rights were fully respected.

Discussion

22. In its response, the Government does not contest the allegation that Liu Xianbin's deprivation of liberty is linked to publication of articles on the Internet, "inciting subversion of State power and overthrowing socialist system."

23. Without elaborating on the details of the charges against Liu Xianbin, the Government contends that in these articles he "incited subversion of State power and overthrowing socialist system". The Government does not refute the allegation that Liu Xianbin was convicted for the online publication of his articles calling for democratic reforms.

24. In the Working Group's view, Liu Xianbin was deprived of his liberty for having peacefully exercised his right to freedom of opinion and expression, as guaranteed under article 19 of the Universal Declaration of Human Rights. The Government has failed to show "in specific and individualized fashion", the precise nature of the threat posed by Liu Xianbin, and the necessity and proportionality of his imprisonment (see Human Rights Committee, general comment No. 34 (2011) on freedoms of opinion and expression, para. 35).

25. As the Working Group has stated in its deliberation No. 8 on deprivation of liberty linked to/resulting from the use of the Internet (E/CN.4/2006/7), a vague and general reference to the interests of national security or public order, without being properly explained and documented, is insufficient to convince the Working Group that the restrictions on the freedom of expression by way of deprivation of liberty are necessary when using the Internet.

26. Earlier, in its opinion No. 12/2003, concerning a conviction of Liu Xianbin on similar charges, the Working Group concluded that Liu Xianbin had been deprived of his liberty for having peacefully exercised his right to freedom of opinion and expression, as guaranteed under article 19 of the Universal Declaration of Human Rights (Opinion No. 12/2003).

27. As it was noted by the Working Group in another opinion concerning China, although national laws might punish such conduct, it is, however, protected by the rights to freedom of opinion and expression in international law (Opinion No. 32/2007).

28. The Working Group recalls that, in conformity with its mandate, it must ensure that national law is consistent with the relevant international provisions set forth in the Universal Declaration of Human Rights. Consequently, even if the deprivation of liberty is in conformity with national legislation, the Working Group must ensure that it is also consistent with the relevant provisions of international law.

29. Thus, the deprivation of liberty of Liu Xianbin falls into category II of the categories applicable to the consideration of cases submitted to the Working Group.

Disposition

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

The deprivation of liberty of Liu Xianbin has been arbitrary, being in contravention of Article 19 of the Universal Declaration of Human Rights, and falls into category II of the categories applicable to the consideration of the cases submitted to the Working Group.

31. Consequent upon the Opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation of Liu Xianbin and bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights.

32. The Working Group believes that, taking into account all the circumstances of the case, the adequate remedy would be to release of Liu Xianbin and accord him an enforceable right to compensation.

33. The Working Group encourages the Government to consider the possibility to accede to the International Covenant on Civil and Political Rights.

[Adopted on 29 August 2011]