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Human Rights Council Working Group on Arbitrary Detention

Opinion adopted by the Working Group on Arbitrary Detention at its seventy-second session (20–29 April 2015)

No. 3/2015 (China)

Communication addressed to the Government on 26 June 2014

concerning Jiaxi Ding

The Government replied to the communication on 20 August 2014.

The State is 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, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 2006/102 and extended it for a three-year period in its resolution 24/7 of 26 September 2013. In accordance with its methods of work (A/HRC/16/47 and Corr.1, annex), the Working Group transmitted the above-mentioned communication to the Government.

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 or her sentence or despite an amnesty law applicable to the detainee) (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 State concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

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

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

Submissions

Communication from the source

3. Jiayi Ding, a Chinese national, is a human rights lawyer. In 2010, he began advocating for the rights of migrant children to take college entrance examinations in their place of residence, rather than in their place of origin as required under the country's household registration system. He has also been involved in the New Citizens' Movement, which is a loose group of activists who advocate for social justice and political and legal reforms.

4. On 17 April 2013, officers of the Beijing Municipal Public Security Bureau arrested Mr. Ding at his home and searched his house, office and car. The officers showed an arrest warrant, issued pursuant to article 80 of the Criminal Procedure Law of the People's Republic of China, which allows the public security authorities to detain an active criminal or a person suspected of a major crime.

5. The source believes that Mr. Ding was seized because of his involvement in an anti-corruption campaign that was associated with the New Citizens' Movement. It is reported that the police had been closely monitoring Mr. Ding's role in the movement prior to apprehending him.

6. The authorities cited, as reasons for the detention, "gathering a crowd to disrupt the order of a public place" by "holding banners calling for the disclosure of Chinese officials' financial assets" and "inciting and organizing hundreds of people to appeal for equal access to education in front of the Ministry of Education building". In respect of the crime of "gathering a crowd to disrupt the order of a public place," article 291 of the Criminal Law of the People's Republic of China stipulates a term of imprisonment not exceeding five years, criminal detention or public surveillance, for assembling to disturb the order at railway stations or bus terminals, wharves, civil airports, marketplaces, parks, theatres, cinemas, exhibition halls, sports grounds or other public places or to block or disrupt traffic or to resist or obstruct public security officers of the State from carrying out their duties according to law, if the circumstances are serious.

7. Trial proceedings in respect of Mr. Ding began on 27 January 2014 in the Haidian District People's Court in Beijing.

8. Prior to the trial, the court allegedly did not allow an adequate period of time for Mr. Ding's lawyer to review the case files, including the prosecutor's evidence against him, and prevented him from making copies of the files. The court also rejected his request to have a public hearing and instead held the hearing in private in a small courtroom. At the trial, Mr. Ding's lawyer refused to address the court to protest against those procedural irregularities. He subsequently ceased being Mr. Ding's legal representative and the trial was thus suspended. Although a new lawyer was appointed to represent Mr. Ding thereafter, he faced difficulties in accessing Mr. Ding in detention.

9. Mr. Ding's trial resumed on 8 April 2014 in the Haidian District People's Court with a heavy police presence outside the court. Activists who had gathered outside the courthouse to support Mr. Ding were dispersed and several foreign diplomats were prevented from attending the hearing. Furthermore, the police assaulted Mr. Ding's lawyer during a court recess after he gave a media interview. On 9 April 2014, Mr. Ding's lawyer walked out of the courtroom in protest, after he was given photocopies of the evidence against Mr. Ding rather than the originals.

10. On 17 April 2014, the judicial authorities disbarred Mr. Ding's lawyer from representing him, rejected his defence statement and prevented him from attending the sentencing hearing.

11. On 18 April 2014, the court sentenced Mr. Ding to three and a half years' imprisonment. He remains in detention at Beijing No. 3 Detention Centre.

12. The source argues that Mr. Ding's detention is arbitrary, as he was arrested, detained and sentenced solely on the basis of the peaceful exercise of his right to freedom of opinion and expression and his right to freedom of peaceful assembly and association, guaranteed under articles 19 and 20 of the Universal Declaration of Human Rights.

13. The source also submits that Mr. Ding's right to a fair trial was violated in the present case, as the authorities deliberately prevented the public from attending the court hearing, contrary to articles 10 and 11 of the Universal Declaration of Human Rights, as well as to articles 11 and 152 of the Criminal Procedure Law of the People's Republic of China 1996 and article 183 of the 2013 amendments to that law, which stipulate that first instance trials are to be heard in public. In addition, Mr. Ding's lawyers were not provided with adequate access to his case file, including the prosecutor's evidence against him, in violation of international norms relating to the right to a fair trial. The source considers that the disregard of Mr. Ding's right to a fair trial is of such gravity as to give his detention an arbitrary character.

Response from the Government

14. In its response of 20 August 2014 (the translation of which the Working Group received on 6 January 2015), the Government provided the following information:

(a) On 18 April 2013, Mr. Ding was placed in criminal detention, in accordance with the law, on suspicion of having committed the offence of unlawful assembly. On 25 May 2013, his arrest was approved by the prosecuting authorities, and on 8 December 2013 his case was transferred to those authorities for investigation and indictment;

(b) On 18 April 2014, the Haidian District People's Court in Beijing sentenced Mr. Ding in first instance to three years and six months of imprisonment for the offence of assembling a crowd to disturb the order in a public place. After the announcement of the ruling issued in first instance, Mr. Ding lodged an appeal. The Beijing First Intermediate People's Court heard the case, in accordance with the law, and on 18 July 2014 it dismissed the appeal and upheld the original decision.

15. Moreover, according to the Government, the People's Court heard the case in strict accordance with the law and fully upheld Mr. Ding's legal rights during the proceedings.

16. The Government maintains that the claims that Mr. Ding's lawyer was denied access to the case file, that the case was heard in secret or that the verification of evidence was hindered, for instance, are untrue. In particular, the Government states that:

(a) The lawyer's right to review the case file was fully upheld. With regard to the hard copies of the files provided by the public prosecution authorities, the court made high-definition scans of all the files and burned them onto a disk that it gave to the defence

lawyer. With regard to the video materials related to the case, the court specifically made arrangements, reserving a convenient time and place, with the necessary equipment, so that the defence lawyer could consult them. However, after receiving the relevant notification, he did not go to the designated place to consult the materials;

(b) The trial was open to the public, in accordance with the law. A summary of the case, the defendant's name, and the time and place of the trial were published three days before the trial opened, and the public was allowed to attend. Members of the general public and the defendant's family were present both at the trial and at the sentencing in first instance. After Mr. Ding appealed, the Beijing First Intermediate People's Court conducted investigations and determined that the facts of the case were clear. In accordance with the provisions of article 223 of the Criminal Procedure Law of the People's Republic of China, it did not hold a trial, and it issued the ruling publicly;

(c) During the trial in first instance, the court investigated and debated the facts and evidence relevant to the conviction and sentencing. Mr. Ding's defence lawyer was able to make his case. Because the lawyer's words and deeds violated rules and regulations for the presentation of the case, and decorum in court, the court, acting in accordance with the law, ordered him to desist and issued him with a warning. At no point did it interfere with the lawyer's defence;

(d) During the trial in first instance, Mr. Ding's defence lawyer disrupted the order in the court by moving around the courtroom as he pleased, interrupted the judge and left the courtroom in the middle of the trial without the court's permission. He abandoned his responsibilities as a defence counsel and was not in any way disqualified by the court from representing his client.

Further comments from the source

17. In its comments on the Government's response, the source reiterated that the case of Mr. Ding, who was tried on a charge of "gathering a crowd to disrupt the order of a public place" for his involvement in an anti-corruption campaign that was linked to the New Citizens' Movement (a loose grouping of activists who have called for top Chinese officials to disclose their financial assets), did not involve any criminal charge or other circumstance that would allow for a closed trial.

18. The source also reiterated the alleged violations of the right to a fair trial. Specifically, according to the source:

(a) The court did not allow an adequate period of time for the lawyer to review the case files, and he was prohibited from making copies of the files;

(b) The court arranged to hold the trial in a small courtroom and turned the public away, citing "limited space"; after the resumption of the trial, activists were taken away from outside the courthouse and several foreign diplomats were prevented from attending the hearing;

(c) The lawyer refused to speak in defence at the trial as a form of protest over the procedural irregularities and stepped down from the case as he was not given access to proper case materials, and he accused court officials of not possessing sufficient authority;

(d) The new lawyer representing Mr. Ding walked out of the courtroom in protest after he was given photocopies of evidence against Ding instead of original documentation. The lawyer was given two warnings by the judge and was then fined;

(e) A day before the sentencing hearing, the judicial authorities repudiated the lawyer's competence to represent Mr. Ding. The authorities rejected the lawyer's defence

statement (regarding his walking out of the court in protest) and prevented him from attending the hearing;

(f) Since the conclusion of Mr. Ding's trial, the judicial authorities in Beijing have ordered a one-year suspension of legal practice in respect of the lawyer Mr. Cheng for allegedly "disturbing court order", while the lawyer Mr. Sui has been told that he may face, at a minimum, a half-year suspension.

Discussion

Alleged violations of articles 19 and 20 of the Universal Declaration of Human Rights

19. The Government has not rebutted the prima facie reliable allegation that Mr. Ding was arrested, detained and sentenced solely on the basis of the peaceful exercise of his right to freedom of opinion and expression and his right to freedom of peaceful assembly and association. Specifically, the Government did not deny the assertion that Mr. Ding was arrested at his home after close monitoring by the police of his role in the New Citizens' Movement.

20. The Working Group recalls that this is not the first time that it has considered a case where the Government has arbitrarily applied the law on the crime of "gathering a crowd to disrupt the order of a public place" as set forth in article 291 of the Criminal Law of the People's Republic of China to human rights activists who have peacefully exercised their right to freedom of expression and freedom of association. In particular, in a similar case, the Working Group found arbitrary the detention of another human rights activist who had also been formally convicted for violation of article 291 of the Criminal Law.¹

21. The Working Group considers that Mr. Ding has been deprived of his liberty for having peacefully exercised his right to freedom of expression and his right to freedom of association as guaranteed by articles 19 and 20 of the Universal Declaration of Human Rights. Thus, the deprivation of liberty of Mr. Ding falls within category II.

Alleged violations of articles 10 and 11 of the Universal Declaration of Human Rights

22. With regard to the alleged violations of the right to a fair trial, the Working Group is not in a position to reach a conclusion because of the vagueness of the information provided by the source.

23. In particular, the source reiterates that prior to the trial, the defence was provided with copies of the prosecution material rather than with originals. The source, however, did not address the Government's assertion that the court made high-definition scans of all the files, burned them onto a disk and gave the disk to the defence lawyer. Neither in its original submission nor in its subsequent comments did the source elaborate on how the disclosure of the material in electronic format affected the ability of the counsel to prepare the defence in the case in question.

24. Instead, in its subsequent clarification, the source referred to the "theory of evidence", the admissibility and reliability of evidence, the "best evidence rule", and the interpretation of the Supreme People's Court in which it is stated that "evidence adopted for verdict should be original. Photocopies may be used only where there is indeed a difficulty in obtaining the original documentation."

25. The source appears to have confused the disclosure of the material by the parties with the presentation of the evidence at the trial; the latter raising issues of its admissibility

¹ Opinion No. 47/2006 (China); see A/HRC/7/4/Add.1.

and reliability. Disclosure in electronic format as such does not constitute violation of the right to a fair trial. In fact, such form of disclosure is provided for in the rules of the international criminal tribunals and is accepted practice at the International Criminal Court.²

26. Neither in its original submission nor in its subsequent comments and clarifications did the source elaborate on how the disclosure of the material in electronic format affected the ability of the counsel to prepare the defence in the case in question. Furthermore, if the source had unambiguously alleged that it was at the trial that only copies of the evidence had been presented, and that the court, despite the request from the defence, had refused to order the prosecution to present the originals, then the Working Group would have made enquiries to the Government about the relevant information.

27. The source reiterated its allegation that the court had not allowed an adequate period of time for the lawyer to review the case files. However, the source provided no further information, such as the amount of time that was allocated to the lawyer for that purpose, or whether or not he had applied for an extension of time if he considered the time inadequate.

Disposition

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

The deprivation of liberty of Jiayi Ding is arbitrary, being in contravention of article 19 of the Universal Declaration of Human Rights. It falls within category II of the categories applicable to the cases submitted to the Working Group for consideration.

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

30. The Working Group believes that, taking into account all the circumstances of the case, the adequate remedy would be to release Mr. Ding and grant him compensation for the harm that he has suffered during the period of his arbitrary detention.

[Adopted on 20 April 2015]

² See, for instance, rule 68 (ii) of the rules of procedure of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991; rule 68 (B) of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994; and *Prosecutor v. Lubanga*, International Criminal Court decision on the E-Court protocol, 24 January 2008. Moreover, regulation 26 (4) of the International Criminal Court provides that “in proceedings before the Court, evidence other than live testimony shall be presented in electronic form whenever possible”.