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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-sixth session, 22-27 August 2016

Opinion No. 30/2016 concerning Xing Qingxian and Tang Zhishun (China)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 1/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. The mandate was extended for a further three years in resolution 24/7 of 26 September 2013.

2. In accordance with its methods of work (A/HRC/30/69), on 22 June 2016 the Working Group transmitted a communication to the Government of China concerning Xing Qingxian and Tang Zhishun. On the same day, the Working Group also transmitted a communication concerning those individuals to the Government of Myanmar, for information. The Government of China has not replied to the communication. The State is not a party to the International Covenant on Civil and Political Rights. The Government of Myanmar replied to the communication on 19 August 2016. That State is not a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (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

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the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

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

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

Submissions

Communication from the source

4. Xing Qingxian, born on 4 June 1966, became involved in human rights defence after filing a lawsuit in 2004 against a construction company where he had worked as a technician. The lawsuit concerned a wage dispute and an allegedly unlawful termination of contract. Mr. Xing studied law on his own and consequently began providing legal advice to workers defending their labour rights. In 2009, Mr. Xing received a two-year prison sentence for “assembling a crowd to disrupt social order”, after participating in a peaceful demonstration held outside the Chengdu Intermediate People’s Court. After his release in 2011, Mr. Xing continued to document violations of rights, assist petitioners and train others to engage in human rights defence work. Mr. Xing also represented individuals during administrative lawsuits.

5. Tang Zhishun, born on 25 May 1975, began to engage in human rights activism after his home was demolished in 2006. He wrote a training manual to assist others in defending their land rights and helped individuals in Beijing whose homes were threatened with demolition. Furthermore, he has helped to found a public welfare non-governmental organization. Mr. Tang has also engaged in philanthropy, donating money and goods to victims of the earthquakes in Sichuan in 2008 and Qinghai in 2010.

6. Bao Zhuoxuan is the 16-year-old son of the prominent human rights lawyer Wang Yu and the activist Bao Longjun.

7. The source indicates that, on 9 July 2015, the Chinese authorities confiscated Mr. Bao’s passport at Beijing Capital International Airport, from where he was to fly to Australia to study. Mr. Bao was then placed under house arrest and police monitoring, first in Tianjin and then in Hohhot, Inner Mongolia. The source submits that he was threatened when he tried to ask for the return of his cell phone and passport, and that the police warned him not to try to hire lawyers for his parents.

8. According to the information received, in the afternoon of 6 October 2015, Mr. Xing, Mr. Tang and Mr. Bao were arrested by the Chinese authorities and the police of Myanmar in Mong La, Myanmar. No warrant or other decision by a public authority was shown at the time of arrest, and no reason is known to have been given. The three individuals were reportedly taken to Yunnan Province in China that same evening.

9. The source submits that Mr. Bao was again placed under house arrest and strict monitoring by the police in Hohhot. Mr. Tang and Mr. Xing were held incommunicado without seeing a lawyer or family members, or being brought before a judge, until 4 May 2016 and 6 May 2016, respectively, when they were officially arrested on suspicion of “organizing people to secretly cross national borders” under article 318 of the Criminal Law of China. Article 318 stipulates that anyone who organizes people to secretly cross the

national border in various circumstances will be sentenced to no less than two years and no more than seven years of fixed-term imprisonment and a fine; or no less than seven years of fixed-term imprisonment or life imprisonment, and may in addition be sentenced to a fine or confiscation of property. Mr. Tang and Mr. Xing are currently detained at Tianjin City No. 2 Detention Centre by the Tianjin Municipal Public Security Bureau. It is not known when the two men's trial will take place. Their lawyers have not been notified of the status of their cases.

10. At the time of their arrest, no confirmation was given to their families about the location of their detention. On 7 October 2015, Mr. Xing and Mr. Tang's friends and lawyers went to the local police station in Mong La seeking information about their detention. The officers denied that they had seized the three individuals the previous day. It is reported that an eyewitness later disclosed that one officer destroyed the visual evidence of the incident. The friends and lawyers also went to the local politics and law department seeking information. On 8 October 2015, the friends and lawyers filed police reports concerning the disappearances of Mr. Xing, Mr. Tang and Mr. Bao at Special Region No. 4 Police Station in Mong La. Family members of Mr. Xing and Mr. Tang have reportedly been under pressure from the authorities in China since the three men's disappearance. Mr. Tang's family was brought into a police station for questioning on 12 October 2015 and the officers took down information on all of Mr. Tang's personal contacts.

11. It is reported that the activists' homes in China were raided and searched several days after their detention. On 8 October 2015, Mr. Xing's residence was searched by police officers from Chengdu City Beixiangzi Police Station of Jinniu Public Security Bureau Branch. No search warrant was produced. Two days later, half a dozen officers searched Mr. Tang's home and seized his computers. The police who searched the residence did not provide a search warrant, a detention notice or any information on the location of or reasons for Mr. Tang's detention.

12. Although the men's respective lawyers were told in October 2015 that the case had been transferred to Tianjin, the police from Tianjin Municipal Public Security Bureau have repeatedly refused to let the lawyers meet with their clients. Reportedly, the authorities denied lawyers' visits in October and November 2015, and again in January, February and May 2016; the police stated that the cases are of "grave significance, hence a meeting is not allowed".

13. The source expresses concern about the activists' vulnerability to mistreatment, including being deprived of necessary medication for serious health conditions. Mr. Xing requires medicine to treat severe asthma, and he also suffers from rhinitis, a chronic inflammation of the nasal cavity. Mr. Tang has hyperthyroidism that requires daily medication and, if left untreated, can lead to heart problems.

14. The source submits that the Chinese authorities have increasingly used the State media to denounce individuals or groups that the State perceives as "political threats". The only information revealed by the authorities about the men's case has appeared in articles published online in the Chinese State newspaper *Global Times* and by the State news agency Xinhua, 9 and 10 days, respectively, after Mr. Xing and Mr. Tang's detention. According to the reports, which were allegedly intended to vilify both activists, both men were detained on suspicion of "illegally crossing the national border".

15. The source is of the view that the arrest and detention of Mr. Xing and Mr. Tang are the result of their human rights activism, and in particular an act of reprisal against them for helping Mr. Bao escape from house arrest in China.

16. In the case of Mr. Bao, the source is of the view that his continuing house arrest in Hohhot and the police surveillance constitute a form of collective punishment as his parents remain in custody for being adamant human rights defenders.

17. The source submits that both Mr. Xing and Mr. Tang have been detained solely on the basis of their peaceful exercise of their rights guaranteed under the Universal Declaration of Human Rights. The source also submits that their detention is arbitrary and falls within categories II and III of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

18. In addition, it is asserted that the treatment of the above-mentioned individuals and their families is contrary to national laws. The right of a detainee's family to be notified of a criminal detention within 24 hours is guaranteed under article 83 of the Criminal Procedure Law of China. The right of a defendant to be given access to a lawyer within 48 hours of a request is guaranteed under article 37 of the Criminal Procedure Law. The source submits that restricting the access of activists to their lawyers has become common in cases of detained human rights defenders in China. In particular, the authorities allegedly often cite "national security" concerns to deny access to lawyers, taking advantage of an overly broad provision in article 37 of the Criminal Procedure Law, which stipulates that an investigating organ can refuse a visit during the investigation of crimes that could endanger national security. However, it is submitted that the charge of "organizing people to secretly cross the national border" falls under the category of crimes that obstruct the administration of public order and therefore do not endanger national security.

Response from the Government

19. The Government of Myanmar, in its reply of 19 August 2016 concerning its alleged involvement with the Chinese authorities in the applicants' arrest, informed the Working Group that, owing to the local security constraints in the area where the applicants were arrested, the Government was not able to conduct an investigation into the situation.

20. As the custodial State in the present case is China, the Working Group regrets that the Government of China has not responded to the allegations transmitted by the Group on 22 June 2016.

21. Despite the absence of any information from the Government of China, the Working Group considers that it is in the position to render its opinion on the detention of Mr. Tang and Mr. Xing in conformity with paragraph 15 of its methods of work.

Discussion

22. The Government of China has chosen not to rebut the allegations that Mr. Tang and Mr. Xing were held incommunicado without seeing a lawyer in violation of international human rights norms, including articles 9 and 10 of the Universal Declaration of Human Rights. In particular, pursuant to the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, a detained person shall be entitled to have the assistance of a legal counsel and shall be provided with reasonable facilities for exercising it.¹ Furthermore, a detained person shall be entitled to communicate and consult with his legal counsel.²

23. The right of a detained person to be visited by and to consult with his counsel may be restricted in exceptional circumstances only when it is considered indispensable by a judicial or other authority in order to maintain security and good order.³ In the case under consideration, the Government has not provided any information that would demonstrate

¹ See General Assembly resolution 43/173, on the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 17.

² Ibid., principle 18.

³ Ibid., principle 18.

that communication between the applicants and their lawyers would endanger security and good order.

24. Furthermore, Mr. Tang and Mr. Xing were arrested in October 2015, but were not brought before a judge until May 2016. In this regard, the Working Group recalls that the Body of Principles requires any form of detention to be ordered by, or subject to the effective control of, a judicial or other independent authority.⁴ A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority.⁵ Moreover, a person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention.⁶ It is emphasized in the Body of Principles that the words “a judicial or other authority” mean a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of impartiality and independence.⁷ Indeed, a people’s procurator, who is also responsible for prosecutions, cannot be considered as an independent and impartial authority.

25. The Government did not rebut the allegation that no reason for the arrest was given at the time of arrest of the applicants. Indeed, anyone who is arrested shall be informed at the time of his arrest of the reason for the arrest.⁸

26. The Working Group considers that the non-observance of the international norms relating to the right to a fair trial and to liberty and security, established in articles 9 and 10 of the Universal Declaration of Human Rights, in the present case is of such gravity as to give the applicants’ deprivation of liberty an arbitrary character.

27. As to the source’s view that the detention of Mr. Xing and Mr. Tang also falls within category II of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it, the Working Group considers that helping Mr. Bao to leave the country could have been within the scope of their activities as human rights defenders. However, the Working Group has not received sufficient information relating to the events in question.

28. With regard to the alleged house arrest of Mr. Bao, the Working Group has not been provided with the necessary information, such as the reasons for the restrictive measure and the criminal charges against him, if any, to decide whether or not Mr. Bao has been arbitrarily detained.

Disposition

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

The deprivation of liberty of Xing Qingxian and Tang Zhishun has been arbitrary, being in contravention of articles 9 and 10 of the Universal Declaration of Human Rights; it falls within category III of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

30. Consequent upon the opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation of Mr. Xing and Mr. Tang

⁴ Ibid., principle 4.

⁵ Ibid., principle 11.

⁶ Ibid., principle 37.

⁷ Ibid., “Use of terms”, para. *f*.

⁸ Ibid., principle 10.

and bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights.

31. The Working Group believes that, taking into account all the circumstances of the case, the adequate remedy would be to release Mr. Xing and Mr. Tang and accord them an enforceable right to compensation.

32. The Working Group is of the opinion that the case in regard to Mr. Bao is to be filed without prejudice.

33. In accordance with article 33 (a) of its methods of work, the Working Group considers it appropriate to refer the allegations of inhuman treatment of Mr. Xing and Mr. Tang to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for appropriate action.

Follow-up procedure

34. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on follow-up action taken on the recommendations made in the present opinion, including:

- (a) Whether Mr. Xing and Mr. Tang have been released, and if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Xing and Mr. Tang;
- (c) Whether an investigation has been conducted into the violation of Mr. Xing's and Mr. Tang's rights, and if so, the outcome of the investigation;
- (d) Whether any legislative amendments or changes in practice have been made to harmonize the State party's laws and government practices with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

35. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion, and whether further technical assistance is required, for example, through a Working Group visit.

36. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the possibility of undertaking its own follow-up of the present opinion if new concerns in relation to this case are brought to its attention. This follow-up procedure will enable the Working Group to keep the Human Rights Council informed of the progress made in implementing its recommendations, as well as any failure to take action.

37. The Working Group recalls that the Human Rights Council has called for all States to cooperate with the Working Group, to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.⁹

[Adopted on 24 August 2016]

⁹ See Human Rights Council resolution 24/7, para. 3.