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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, 22-26 August 2016

Opinion No. 43/2016 concerning Xia Lin (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 Xia Lin. The Government has not replied to the communication. The 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 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);

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(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, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Mr. Xia is a well-known human rights lawyer who has been practicing since 1992. He has worked with the Huayi Law Firm in Beijing. Towards the end of his career he founded a pro-bono legal service firm to take on public interest cases and represented individuals from marginalized groups; in some high-profile cases, his involvement led to mitigated sentences for the defendants. In addition to his legal defence work, Mr. Xia has occasionally given talks at universities and other venues, promoting the rule of law and the independence of lawyers and judges.

5. According to the information received from the source, Mr. Xia was detained on 8 November 2014 at his home by officials of the Beijing Municipal Public Security Bureau, Chaoyang District. No warrant was presented and no reason was given at the time of arrest. Mr. Xia was detained on criminal charges on suspicion of "gambling and fraud". He was initially held at Beijing Detention Centre No. 3 and then transferred to Beijing Detention Centre No. 1. He was not given access to a lawyer. It is also reported that he has not been able to contact his family since he was first detained.

6. According to the indictment filed by the Beijing Municipal People's Procurator No. 2, Mr. Xia has allegedly committed fraud involving over 10 million RMB (equivalent to approximately $1.5 million). This offence falls under article 266 (3) of the Criminal Law of China, which stipulates that persons who have committed fraud involving extraordinarily large amounts of money and property or who have been involved in especially serious cases are to be sentenced to 10 years or more in prison or to life imprisonment, in addition to being subjected to fines or the confiscation of property.

7. Mr. Xia has disputed the procurator's claim as untrue. It is alleged that the police exploited his personal financial situation in order to formulate accusations against him. The police reportedly investigated the lawyer's finances a few days before he was detained in an attempt to gather evidence to build a criminal case against him. It is alleged that, given the lack of sufficient evidence for an indictment, the procurator returned his case to the Public Security Bureau twice for further investigation, in July and September 2015, and that the investigation period was extended three times in 2015. The source reports that Mr. Xia was officially arrested on 15 December 2014.

8. It is furthermore submitted that in May 2015, after six months of detention and after the Beijing Public Security Bureau transferred his case to the procurator, Mr. Xia was given access to legal counsel for the first time. The source submits that this is contrary to article 37 of the Criminal Procedure Law of China, which states that a defendant should be given access to a lawyer within 48 hours of a request. The source also submits that every time Mr. Xia's lawyer has wanted to discuss case materials with Mr. Xia, officers monitoring the meetings have interrupted and prevented them from continuing.

9. In December 2015, Mr. Xia's lawyers were notified that a trial would take place in January 2016. However, it did not take place and was instead delayed indefinitely. The source submits that this is contrary to article 202 of the Criminal Procedure Law, which stipulates that a court has to hand down a decision no later than three months after accepting a case from a procurator.

10. Mr. Xia was held in pretrial detention for nearly 20 months before being brought before a judge. On 17 June 2016, his first trial finally took place, reportedly behind closed doors, with just one family member being permitted to observe the trial. The other five people present at the trial were not friends or supporters. The trial ended with no verdict or a date for announcing a verdict.

11. Concern has been raised regarding the fact that, if convicted, Mr. Xia could be detained for 10 years or face lifetime imprisonment. The source submits that Mr. Xia's detention is representative of the common fate of human rights lawyers in China, who have become a group that is highly susceptible to arbitrary deprivation of liberty based on fabricated criminal charges. Suppressions against them culminated in a crackdown that began in July 2015, during which more than 300 lawyers and activists were reportedly detained or questioned.

12. The source submits that it is believed that the arrest and detention of Mr. Xia is the latest act of reprisal against him for taking on politically sensitive cases and, in particular, for representing a well-known activist who was detained late in 2014 during the crackdown against supporters of the Hong Kong pro-democracy protests. A month after the activist was detained, Mr. Xia was taken in for questioning and later detained. Nearly 120 activists were detained in connection with the protests. The source further submits that Mr. Xia is one of more than 100 Chinese human rights defenders who spent part or all of 2015 under prolonged pretrial detention and that the police stretched the law to hold those individuals for longer than was legally permitted.

13. The source submits that the continued detention of Mr. Xia constitutes arbitrary deprivation of liberty under categories II and III of the Working Group.

14. In regard to category II, it is alleged that Mr. Xia has been detained solely on the basis of the peaceful exercise of his rights guaranteed under the Universal Declaration of Human Rights. The source submits that the circumstances of his detention also fall under category III, in so far as he has been deprived of unimpeded access to a lawyer and was kept in pretrial detention for nearly 20 months without trial. In particular, the source submits that Mr. Xia's detention violates article 9 (1) and (3) of the International Covenant on Civil and Political Rights, which the Government of China signed on 5 October 1998.

Response from the Government

15. The Working Group regrets that the Government has not responded to the allegations transmitted by the Group on 22 June 2016.

16. Despite the absence of any information from the Government, the Working Group considers that it is in a position to render its opinion on the detention of Mr. Xia in conformity with paragraph 15 of its methods of work.

Discussion

17. The Government chose not to refute the fact that Mr. Xia was held in pretrial detention for nearly 20 months without being brought before a judge or other impartial and independent authority. The Working Group considers that such a long delay constitutes a grave violation of the relevant international human rights norms, including the Universal Declaration of Human Rights.

18. In that regard, the Working Group recalls that the General Assembly, in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (see resolution 43/173, annex), established that any form of detention should be ordered by, or be subject to the effective control of, a judicial or other authority (principle 4); a person detained on a criminal charge should be brought before a judicial or other authority

promptly after his or her arrest (principle 37) and not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority (principle 11); and such authority should decide without delay upon the lawfulness and necessity of detention (principle 37).

19. In establishing that any form of detention should be ordered by, or be subject to the effective control of, a judicial or other authority, the General Assembly emphasized that the words "judicial or other authority" mean a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence.

20. Contrary to the requirements set out in the Body of Principles, the arrest and detention of the applicant were authorized by a procurator, who is a person also responsible for prosecutions and who therefore cannot be considered to be an independent and impartial authority.

21. The Government has chosen not to rebut the fact that Mr. Xia was deprived of the right to legal assistance for six months after his detention, in violation of international human rights norms, including the Universal Declaration of Human Rights. In particular, the Working Group notes that, pursuant to the Body of Principles, a detained person should be entitled to have the assistance of a legal counsel (principle 17), as well as to communicate and consult with his or her legal counsel and be allowed adequate time for such consultations (principle 18).

22. Mr. Xia was held in pretrial detention for nearly 20 months before his trial started in in June 2016. The Working Group recalls that a person detained on a criminal charge should be entitled to trial within a reasonable time or to release pending trial (principle 38). In the case under consideration, the Government failed to provide any reasons that would justify the lengthy pretrial detention of Mr. Xia.

23. In this regard, the Working Group concurs with the source's submission that the reason for the lengthy pretrial detention of Mr. Xia was the lack of evidence against him. The Working Group notes that the Government opted not to rebut the submission that the arrest and detention of Mr. Xia was an act of reprisal against him for taking on politically sensitive cases and for representing a well-known activist.

24. The Government has not rebutted the allegation that, in violation of article 11 of the Universal Declaration of Human Rights, Mr. Xia was not granted a public hearing during his trial. The Working Group stresses that the public character of a hearing protects an accused person by placing the administration of justice under public scrutiny.

25. 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 and in principles 4, 11, 37 and 38 of the Body of Principles, is in this case of such gravity as to give the deprivation of liberty of Mr. Xia an arbitrary character.

26. Furthermore, the Working Group is of the view that Mr. Xia has been deprived of his liberty for having peacefully exercised the right to freedom of opinion and expression guaranteed in article 19 of the Universal Declaration of Human Rights.

27. Thus, the deprivation of liberty of Mr. Xia falls within categories II and III of the categories applicable to the consideration of cases submitted to the Working Group.

Disposition

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

> The deprivation of liberty of Xia Lin is arbitrary, being in contravention of articles 9, 10 and 19 of the Universal Declaration of Human Rights, and falls within categories II and III of the categories applicable to the consideration of cases submitted to the Working Group.

29. Consequent upon the opinion rendered, the Working Group requests the Government to take the steps necessary to remedy the situation of Mr. Xia and 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. Xia and accord him an enforceable right to compensation.

Follow-up procedure

31. 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 this Opinion, including on:

(a) Whether Mr. Xia has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Xia;

(c) Whether an investigation has been conducted into the violation of Mr. Xia'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 Government's laws and practices with its international obligations and with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

32. 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 of any further technical assistance required, for example, through a Working Group visit.

33. 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. In addition, the Working Group may follow up on its opinion if new concerns in relation to the case are brought to its attention. This follow-up procedure will enable the Working Group to keep the Human Rights Council informed of progress made in implementing its recommendations, as well as of any failure to take action.

34. The Working Group recalls that the Human Rights Council has called upon 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 (see Council resolution 24/7, para. 3).

[Adopted on 26 August 2016]