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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-fifth session, 18-27 April 2016

Opinion No. 11/2016 concerning Yu Shiwen (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 31 March 2015 the Working Group transmitted a communication to the Government of China concerning Yu Shiwen. The Government replied to the communication on 28 May 2015. 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, 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. Yu Shiwen and his wife have a history of human rights activism. They were student leaders in the 1989 pro-democracy movement in Guangdong Province, roles for which they were previously detained in prison for 18 months. In 2003, Mr. Yu submitted articles to overseas websites, which reportedly resulted in threats from national security officers. In Guancheng, he often met with intellectuals and activists, including other student leaders from 1989. In April 2013, Mr. Yu and his wife attempted to organize a public event commemorating the victims of the Tiananmen Square massacre. The event was allegedly disrupted by the police and many of the participants, including Mr. Yu, were either summoned or detained. On 2 February 2014, Mr. Yu and his wife organized the June Fourth memorial event in Henan Province. This resulted in their house arrest from that date onwards.

5. It is reported that on 23 May 2014, Mr. Yu and his wife were taken from their home by agents of the Zhengzhou Public Security Bureau, in the absence of any warrant. Mr. Yu and his wife were detained incommunicado until 27 May 2014. The following day, 28 May 2014, Mr. Yu's family was informed of their arrest, which was made on suspicion of "gathering a crowd to disrupt the order of a public place", pursuant to article 291 of the Criminal Law of China.

6. On 2 July 2014, the arrest of Mr. Yu and his wife was approved by the Guancheng Huizu District People's Procuratorate. The reason given for their continued detention was "creating a disturbance" through the organization of the June Fourth memorial event. The source indicates that this charge, made pursuant to article 293 of the Criminal Law of China, stipulates fixed-term imprisonment of not more than five years, criminal detention or public surveillance to those who disrupt the social order by: (a) assaulting any other person at will, with execrable circumstances; (b) chasing, intercepting, reviling or intimidating any other person, with execrable circumstances; (c) taking or demanding forcibly or vandalizing or occupying at will public or private property, with serious circumstances; or (d) making trouble in a public place, which causes a serious disorder of the public place.

7. On 2 September 2014, Mr. Yu's wife was released on bail. However, Mr. Yu continues to be detained at the Zhengzhou City No. 3 Detention Centre, under the authority of the Zhengzhou Public Security Bureau's Erligang Branch. It is reported that he has not as yet been brought before a judge since the date of his arrest.

8. According to the source, in June 2014, the Zhengzhou Public Security Bureau stated that Mr. Yu and others linked to him who had also been detained were not being permitted visits from lawyers on the grounds that their cases involved "endangering State security". Mr. Yu was first permitted to see a lawyer on 10 September 2014. It is reported that on 27 February 2015, the lawyer representing Mr. Yu was again denied permission to visit him in detention.

9. The source indicates that Mr. Yu suffers from hypertension and hereditary cardiovascular disease. In July 2014, he suffered a stroke in detention after not being provided with any medication to manage his illness. Mr. Yu was reportedly transferred to

the detention centre's hospital for treatment. There, his hands and feet were almost always bound to his bed. As this situation was reportedly unbearable for Mr. Yu, he decided to return to his prison cell. It is alleged that the detention centre has provided a very limited quantity of medicine for Mr. Yu owing to the cost of the medication he requires. According to the source, repeated requests made by Mr. Yu's lawyer and wife to release him on medical grounds have been denied.

10. It is reported that on 12 February 2015, the Guancheng Huizu District People's Procuratorate in Zhengzhou issued an indictment against Mr. Yu, thereby transmitting his case to be heard by a court. On 18 March 2015, Mr. Yu's lawyers reported that they had not yet been granted access to the materials in his case file.

11. The source indicates that Mr. Yu's legal counsel requested his release in a letter addressed to the Deputy Secretary of the Committee of Political and Legal Affairs under the Chinese Communist Party's Central Committee, who allegedly ordered Mr. Yu's detention and arrest. Another of Mr. Yu's lawyers issued a public statement condemning Mr. Yu's indictment and attesting to his innocence.

12. The source submits that Mr. Yu's deprivation of liberty may be considered arbitrary according to categories II and III of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it. The source argues that, contrary to articles 3 and 9 of the Universal Declaration of Human Rights, Mr. Yu has been detained solely on the basis of the peaceful exercise of his rights to freedom of opinion and expression, as well as to peaceful assembly and association, as guaranteed by articles 19 and 20 (1) of the Universal Declaration of Human Rights. It is believed that Mr. Yu's arrest is directly connected to his participation in the 1989 pro-democracy movement in Guangdong Province and his organization of a public event in April 2013 commemorating the victims of the Tiananmen Square massacre.

13. The source submits that Mr. Yu was detained incommunicado for four days before being formally detained, between 23 and 27 May 2014. Furthermore, it is alleged that he has consistently been denied access to legal counsel and family visits during his detention and he has not been brought before a judicial authority since the date of his arrest. The source argues this is in violation of articles 8, 10, and 11 (1) of the Universal Declaration of Human Rights, article 17 (1) and (2) of the International Convention for the Protection of All Persons from Enforced Disappearance and principles 4 and 17 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

14. In addition, the source submits that the refusal to provide Mr. Yu with appropriate medical treatment in detention and the act of shackling him to his bed during treatment violate article 5 of the Universal Declaration of Human Rights, articles 12 and 13 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, principle 24 of the Body of Principles, rule 22 (2) of the Standard Minimum Rules for the Treatment of Prisoners and principle 9 of the Basic Principles for the Treatment of Prisoners.

Response from the Government

15. In its response of 28 May 2015, the Government provided the Working Group with the information set out below.

16. On 27 May 2014, Mr. Yu was taken into criminal detention by the public security authorities in accordance with the law on suspicion of gathering a crowd to disrupt order in a public place.

17. On 2 July of the same year, the procuratorial authorities lawfully approved his arrest on suspicion of creating a disturbance and on 11 February 2015, the prosecution against him commenced in accordance with the law.

18. During his detention, full attention was given to his health problems. It is not true that he was refused the necessary medical treatment and medicine in his place of detention.

19. Given that Mr. Yu did not fulfil the conditions for bail set out in the Criminal Procedure Law, the procuratorial authorities refused the request for release on bail pending trial and promptly provided the petitioner with their reasons for doing so.

20. Procedural rights were fully guaranteed for Mr. Yu's defence lawyer, who was able to meet with Mr. Yu on five different occasions and consult the relevant files.

Further comments from the source

21. The source reiterated that violations of Mr. Yu's right to defence counsel have occurred throughout his pretrial detention. After being taken into custody in May 2014, Mr. Yu was denied access to a lawyer for nearly four months, and met with his lawyers for the first time on 10 September 2014.

22. In addition, according to the source, Mr. Yu was in detention for nearly 15 months without being brought before a judge, even though the Guancheng Huizu District People's Court accepted Mr. Yu's case in February 2015. According to the Criminal Procedure Law (art. 202), a court must conduct a trial and provide a verdict no later than three months after accepting a case from a procuratorate — a time limit that expired in May 2015.

23. The source maintains that Mr. Yu's lawyers were prevented from seeing the court documents until 22 April 2015, approximately two months after the court accepted Mr. Yu's case. Furthermore, the source alleges that harassment and threats against Mr. Yu's lawyers by local authorities undermined the attorneys' independence and their work.

24. The source maintains allegations of ill-treatment of Mr. Yu in detention. In particular, since Mr. Yu was detained in May 2014, personnel at Zhengzhou City No. 3 Detention Centre did not provide him with effective treatment for both pre-existing medical conditions and the damaging effects from a stroke he suffered in July 2014. After he was taken into custody, the authorities refused to provide any of the medication he needed. It was not until May 2015, during a visit by his lawyer, that Mr. Yu was able to indicate that his illnesses were finally being managed with medicine provided by his family.

25. According to the source, the ill-treatment of Mr. Yu escalated after he was transferred to another hospital, where he was bound to the bed almost all the time.

Discussion

Violation of the right to freedom of expression

26. The Government has not rebutted the prima facie reliable allegation that Mr. Yu has been arrested, detained and sentenced solely on the basis of the peaceful exercise of his rights to freedom of opinion and expression, as well as to freedom of peaceful assembly and association. Specifically, the Government has not challenged the assertion that Mr. Yu was arrested because of his human rights activities, in particular, his involvement in organizing the June Fourth peaceful memorial event in Henan Province in February 2014.

27. The Working Group recalls that this is not the first time that it has considered a case in which 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 China to human rights activists who have peacefully exercised their right to freedom of

expression and freedom of association. In particular, in similar cases, the Working Group found arbitrary the detention of other human rights activists who had also been formally convicted for violation of article 291 of the Criminal Law.¹

28. The Working Group considers that Mr. Yu 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. Yu falls within category II of the categories applicable to the consideration of cases submitted to the Working Group.

Violation of the right to a fair trial and the right to liberty and security

29. The Government has not addressed the information that Mr. Yu was detained incommunicado for four days, between 23 and 27 May 2014, before being formally arrested. Furthermore, the Government has not rebutted the information that after his arrest on 23 May 2014, Mr. Yu was permitted to see a lawyer for the first time on 10 September 2014. Nor has the Government refuted the information that on 27 February 2015, a lawyer representing Mr. Yu was again denied permission to visit him in detention. Instead, the Government merely informed the Working Group that Mr. Yu's defence lawyer met him five times.

30. In this regard, the Working Group recalls that, 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. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it" (principle 17). Moreover, a detained person "shall be entitled to communicate and consult with his legal counsel" and "shall be allowed adequate time and facilities for consultations with his legal counsel" (principle 18).

31. The Body of Principles also requires that any form of detention "shall be ordered by, or be subject to the effective control of, a judicial or other authority" (principle 4). Furthermore, "a person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority" (principle 11). 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 competence, impartiality and independence.

32. Contrary to these requirements, the detention of Mr. Yu was not brought under the control of a judicial or other impartial and independent authority. Instead, his arrest and detention were authorized by the District People's Procuratorate. Indeed, the Procuratorate, which is responsible for prosecutions, cannot be considered an independent and impartial authority. Furthermore, for more than 15 months after his arrest by the Procuratorate in May 2014, Mr. Yu was never brought before a judicial or other impartial and independent authority.

33. 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 principles 4, 11, 17, and 18 of the Body of Principles in this case is of such gravity as to give the deprivation of liberty of Mr. Yu an arbitrary character. Thus, the deprivation of liberty of Mr. Yu falls within category III of the categories applicable to the consideration of cases submitted to the Working Group.

¹ See opinions No. 47/2006 and No. 3/2015.

Disposition

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

The deprivation of liberty of Yu Shiwen has been arbitrary, being in contravention of articles 9, 10, 19 and 20 of the Universal Declaration of Human Rights and principles 4, 11, 17, and 18 of the Body of Principles; it falls within categories II and III of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

35. Consequent upon the opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation of Mr. Yu and to bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

36. The Working Group believes that, taking into account all the circumstances of the case, the adequate remedy would be to release Mr. Yu.

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

[Adopted on 20 April 2015]
