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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 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 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 rights (category V).

Submissions

Communication from the source

4. Mr. Xia Lin (hereinafter 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. During the later stage of his career, he founded a pro-bono legal service firm to take on public interest cases, and represented individuals from marginalized groups leading to mitigated punishments in some high-profile cases. In addition to his legal defence work, Mr. Xia has occasionally given talks at Universities and other venues, promoting the rule of law and 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 the officials of the Beijing Municipal Chaoyang District Public Security Bureau. No warrant was presented and no reason was given at the time of detention. Mr. Xia was criminally detained on suspicion of “gambling and fraud”, initially held at Beijing No. 3 Detention Center, before being transferred to Beijing No. 1 Detention Center. He was not given access to a lawyer. It is also reported that he has not been able to contact his family since the time of detention.

6. According to the indictment filed by the Beijing Municipal No. 2 People’s Procurator, Mr. Xia has allegedly defrauded over 10 million RMB (equivalent to approximately 1.5 million USD). This offense falls under article 266 (3) of China’s Criminal Law, which stipulates that those defrauding extraordinarily large amounts of money and property or involved in especially serious cases are to be sentenced to 10 years or more in prison or life imprisonment, in addition to fines or confiscation of property.

7. Mr. Xia has disputed the procurator’s claim as untrue. It is alleged that the police has exploited his personal financial situation in order to formulate accusations against him. The police had 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 evidence for indictment, the procurator returned his case to the Public Security Bureau twice for further investigation, in July and in September 2015, and that the investigation period was extended three times in 2015. The source informs that Mr. Xia was officially arrested on 15 December 2014.

8. It is furthermore submitted that, in May 2015, after six months of detention, Mr. Xia was given access to legal counsel for the first time after the Beijing Public Security Bureau transferred his case to the procurator. The source submits that this is contrary to article 37 of China’s Criminal Procedure Law which states a defendant should be given access to a lawyer within 48 hours of a request. It is reported that every time his lawyer wants to discuss case materials with Mr. Xia, officers monitoring the meetings interrupt and prevent 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 China’s 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 has been held in pre-trial detention for nearly 20 months without being brought before a judge. On 17 June 2016, his first trial finally took place. It is reported that the trial took place 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 set to announce a verdict.

11. Concern has been raised regarding the fact that, if convicted, Mr. Xia could face 10 years to lifetime in prison. The source submits that Mr. Xia's detention is representative of the common fate of human rights lawyers in China, who have become a vulnerable group 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 rights lawyer Mr. Xia is the latest act of reprisal against him for taking on politically sensitive cases, particularly for representing a well-known activist, who was detained in late 2014 during the crackdown against the supporters of the Hong Kong pro-democracy protests. A month later, Mr. Xia himself was taken in for questioning and later detained. Nearly 120 activists were detained in this context. 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 pre-trial detention, where the police stretched the law to hold these individuals beyond legally permitted periods of time.

13. The source submits that the continued detention of Mr. Xia constitutes an arbitrary deprivation of his liberty under Category II and Category III, as set forth by the United Nations Working Group on Arbitrary Detention.

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 (UDHR). The source submits that the circumstances of his detention also correspond to Category III, in so far as he has been deprived of unimpeded access to a lawyer and has been kept in pre-trial detention for nearly twenty months without a trial. In particular, the source submits that Mr. Xia's detention violates articles 9(1) and 9(3) of the International Covenant on Civil and Political Rights (ICCPR), which the People's Republic of China has 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 it is in the 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 pre-trial 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 UDHR.

18. In this regard, the Working Group recalls that the “Body of Principles for the protection of all persons under any form of detention or imprisonment”¹ (Body of Principles) requires that any form of detention shall be ordered by, or be subject to the effective control of, a judicial or other authority.² Furthermore, a person detained on a criminal charge shall be brought before a judicial or other authority promptly after his arrest and shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority.³ Such authority shall decide without delay upon the lawfulness and necessity of detention.⁴

19. 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.⁵ It is emphasised 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*.⁶

20. Contrary to these requirements, the arrest and detention of the applicant were authorized by a People’s Procurator. Indeed, a Procurator, who is also responsible for prosecutions, cannot be considered as an independent and impartial authority.

21. The Government has chosen not to rebut the facts that, in violation of international human rights norms, including UDHR, Mr. Xia was deprived of the right to legal assistance for 6 months after his detention. In particular, pursuant to the Body of Principles, a detained person shall be entitled to have the assistance of a legal counsel.⁷ Moreover, a detained person shall be entitled to communicate and consult with his legal counsel and shall be allowed adequate time for consultations with the legal counsel.⁸

22. Mr. Xia has been held in pre-trial detention for nearly 20 months before the commencement of the trial in June 2016. Indeed, a person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial.⁹ In the case under consideration, the Government failed to provide any reasons which would justify such a 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 a human rights lawyer Mr. Xia is the 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 UDHR, Mr. Xia was not granted a public hearing in his trial, the fact which has not been refuted by the Government. Indeed, it is the public character of hearing that protects an accused against the administration of justice without 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

¹ Body of Principles for the protection of all persons under any form of detention or imprisonment, A/RES/43/173, 9 December 1988.

² Ibid., Principle 4.

³ Ibid., Principle 11.

⁴ Ibid., Principle 37.

⁵ Ibid., Principle 4.

⁶ Ibid., “Use of terms”, para. *f*.

⁷ Ibid., principle 17.

⁸ Ibid., principle 18.

⁹ Ibid., Principle 38.

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

26. Furthermore, the Working Group is of view that Mr. Xia has been deprived of liberty for having peacefully exercised the right to freedom of opinion and expression as guaranteed by article 19 of the UDHR.

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 Mr. Xia has been arbitrary, being in contravention articles 9, 10, and 19 of the UDHR; it falls within categories II and III of the categories applicable to the consideration of the cases submitted to the Working Group.

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

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

- (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 harmonise the Government's laws and practices with its international obligations in line with this Opinion, and
- (e) whether any other action has been taken to implement this Opinion.

32. The Government is further invited to inform the Working Group of any difficulties which it may have encountered in implementing the recommendations made in this Opinion, and whether further technical assistance is 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 this Opinion. However, the Working Group reserves the possibility of undertaking its own follow-up of this 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.

34. 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.¹⁰

[Adopted on 26 August 2016]

¹⁰ Human Rights Council Resolution 24/7, A/HRC/RES/24/7, 8 October 2013, para. 3.