



Human Rights Council
Working Group on Arbitrary Detention**Opinions adopted by the Working Group on Arbitrary Detention at its sixtieth session, 2–6 May 2011****No. 15/2011 (China)****Communication addressed to the Government on 3 February 2011****Concerning: Liu Xiaobo****The State is not a 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. The mandate of the Working Group was clarified and extended in Commission resolution 1997/50. The Human Rights Council assumed the mandate in its decision 2006/102. The mandate was extended for a further three-year period in Council resolution 15/18 of 30 September 2010.
2. The Working Group forwarded a communication to the Government on 3 February 2011 and received a reply on 13 April 2011. The Working Group welcomes the cooperation of the Government.
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; disability or other status, and which aims towards or can result in ignoring the equality of human rights (category V).

4. The case concerns Liu Xiaobo. The Working Group has at the same time considered the case of Liu Xia, who is married to Liu Xiaobo (see opinion No. 16/2011 adopted on 5 May 2011).

5. The Working Group further points out that this is only one of several opinions in which it has been alleged that China is in violation of its international human rights obligations (see opinions No. 26/2010 and No. 29/2010). The Working Group reminds China of its duties to comply with international human rights obligations not to detain arbitrarily, to release persons who are arbitrarily detained, and to provide compensation to them. The duty to comply with international human rights rests not only on the Government but on all officials, including judges, police and security officers, and prison officers with relevant responsibilities. No person can contribute to human rights violations.

6. The United Nations High Commissioner for Human Rights, expressing concern for the fate of human rights defenders in China, has on several occasions mentioned Liu Xiaobo, and called for his release.

7. After Liu Xiaobo was awarded the Nobel Peace Prize, his case was the subject of a press release by the Chairperson of this Working Group, together with the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the independence of judges and lawyers, and the Special Rapporteur on the situation of human rights defenders, on 11 October 2010. The Working Group now turns to the merits of the case, following submissions from the source and the Government's reply.

Submissions

Communication from the source

8. The case summarized hereinafter was reported by the source to the Working Group on Arbitrary Detention as follows: Liu Xiaobo, a citizen of China, born 28 December 1955, is a human rights activist and literary scholar. He is usually resident in Qixian in Beijing.

9. He was arrested on 8 December 2008 at his home by police officers from the Beijing Public Security Bureau. The police officers did not state reasons for his arrest, providing an arrest warrant which did not indicate any specific offence. The police officers searched the home of Liu Xiaobo and seized computers and other materials.

10. Liu Xiaobo was held incommunicado from 8 December 2008 to 31 December 2008, and was denied access to his family and legal counsel. He had two visits by his spouse at the Xiaotangshan Conference Centre after 31 December 2008, but was otherwise held in solitary confinement until 23 June 2009.

11. On 23 June 2009, Liu Xiaobo was formally arrested on charges of inciting subversion of state power. He was detained at the Beijing No. 1 Detention Centre until 24 May 2010, when he was moved to Jinzhou Prison in Liaoning Province, where he remains in detention.

12. On 10 December 2010, the Beijing Municipal People's Procuratorate Branch No. 1 submitted the indictment against Liu Xiaobo. The prosecution asserted that Liu Xiaobo had disregarded state laws and, by means of rumour mongering and slander, incited subversion of state power and the overthrow of the socialist system in violation of article 105(2) of the Criminal Law of the People's Republic of China. The source alleges that these charges were based on Liu Xiaobo's participation in "Charter 08" and six articles he has published. The source further informs the Working Group that "Charter 08" is a document drafted by a number of intellectuals, including Liu Xiaobo, calling for political reform in China.

13. On 23 December 2009, Liu Xiaobo was prosecuted before the Beijing Municipal No. 1 Intermediate People's Court. The source alleged that Chinese authorities significantly limited access to the proceeding; journalists, foreign diplomatic representatives, and all but two members of Liu Xiaobo's family were prevented from entering the courthouse for the trial. The police prevented Liu Xia, the spouse of Liu Xiaobo, from leaving her home and attending the trial. The proceedings lasted for two hours, and the court imposed a time limit of 14 minutes for Liu Xiaobo's defence.

14. On 25 December 2009, Liu Xiaobo was convicted for inciting subversion of state power, and sentenced to 11 years' imprisonment and 2 years' loss of political rights. On 9 February 2010, the Beijing Municipal High People's Court rejected the appeal.

Response from the Government

15. The Government's reply was received on 13 April 2011. It states that citizens of China enjoy the right to freedom of speech, including the right to criticize the government. The Government notes that freedom of speech is limited by articles 51 and 54 of the Constitution of the People's Republic of China, in line with article 19, paragraph 3, of the International Covenant on Civil and Political Rights. The Government argues that the justifications for limitations on the right to freedom of expression contained in article 19, paragraph 3, of the Covenant are present in this case.

16. The Government states that China is a nation respecting the rule of law. Liu Xiaobo was convicted according to the criminal code offences for inciting subversion of state power, and not for the promotion or protection of human rights. The courts strictly followed domestic criminal procedural law, allowing Liu Xiaobo and his lawyers to present a defence with Liu Xiaobo's family members present at the hearing.

Comments from the source

17. The source claims that Liu Xiaobo's detention is a direct result of his writings, including the "Charter 08" initiative, containing peaceful calls for democratic reform and the protection of human rights in China.

18. The indictment and verdict cite Liu Xiaobo's participation in the production of these materials as the basis for his prosecution. The Government's position that it prosecuted Liu Xiaobo under a criminal charge does not change that the core charges against him directly relate to his exercise of the fundamental right to freedom of expression.

Discussion

19. Article 9 of the Universal Declaration of Human Rights prohibits arbitrary arrest and detention, declaring that "no one shall be subjected to arbitrary arrest, detention or exile".

20. The prohibition of arbitrary detention is customary international law, authoritatively recognized as a peremptory norm of international law or *jus cogens*; see, inter alia, the established practice of the United Nations as expressed by the Human Rights Committee in its general comment No. 29 (2001) on states of emergency (CCPR/C/21/Rev.1/Add.11, 31

August 2001, para. 11), which this Working Group follows in its opinions. Of assistance is the judgment of the International Court of Justice in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* of 30 November 2010 and in particular the discussions by Judge Cançado Trindade on arbitrariness in customary international law,* with which the Working Group agrees. The International Covenant on Civil and Political Rights, other treaties and conventions, and the jurisprudence of the United Nations and other treaty bodies are important sources in determining the extent of what constitutes arbitrary detention in customary international law. The constant jurisprudence of the rulings contained in the opinions of this Working Group, and of the other United Nations special procedure mandate holders, dealing with full range of human rights treaties and customary international law, is yet another source.

21. The Working Group will first address the issues relating to the pretrial detention of Liu Xiaobo. The starting point is the requirements that follow from article 9 of the Universal Declaration of Human Rights (see the 2009 annual report of the Working Group, A/HRC/13/30, 15 January 2010, para. 61). Liu Xiaobo was not informed, at the time of arrest, of the reasons for his arrest or promptly informed of any charges against him. He was not brought promptly before a judge. He was held incommunicado for an extended period and not granted access to legal counsel. The pretrial detention of Liu Xiaobo constitutes a clear violation of article 9.

22. The Working Group will now turn to the trial and sentencing of Liu Xiaobo. The Government states that citizens of China enjoy the right to freedom of speech, including the right to criticize the government. The Government notes that freedom of speech is limited by articles 51 and 54 of the Constitution of the People's Republic of China, and article 19, paragraph 3, of the International Covenant on Civil and Political Rights. Article 51 of the Constitution of the People's Republic of China provides that "the exercise by citizens of the People's Republic of China of their freedoms and rights may not infringe upon the interests of the state, of society and of the collective, or upon the lawful freedoms and rights of other citizens". Article 54 of the Constitution of the People's Republic of China provides that "it is the duty of citizens of the citizens of the People's Republic of China to safeguard the security, honour and interest of the motherland; they must not commit acts detrimental to the security, honour and interests of the motherland". Article 19, paragraph 3, of the International Covenant on Civil and Political Rights provides that "the exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) for respect of the rights and reputations of others; (b) for the protection of national security or of public order (*ordre public*), or of public health or morals". The Government's position is that the limitations on the right to freedom of expression contained in article 19, paragraph 3, of the Covenant apply in this case.

23. The starting point for the Working Group is the requirements that follow from articles 9 and 10 of the Universal Declaration of Human Rights. The total or partial non-observance of the relevant international standards contained in the Universal Declaration of Human Rights relating to the right to a fair trial can be of such gravity so as to confer on the deprivation of liberty, of whatever kind, an arbitrary character. The trial was organized in a way which constitutes a breach of fairness. Despite the difficult balancing issues that are involved in free-speech cases, Liu Xiaobo's defence was limited to 14 minutes. His detention thus falls within category III of the categories applicable to the cases submitted to the Working Group.

* See, respectively, International Court of Justice, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment of 30 November 2010, *ICJ Reports 2010*, para. 79; and Separate Opinion of Judge Cançado Trindade, pp. 26-37, paras. 107-142.

24. A detention is also arbitrary if it is the result of a judgment or sentence for the exercise of the rights and freedoms of the Universal Declaration of Human Rights.

25. Article 19 of the Universal Declaration provides that “everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”.

26. Restrictions on the right to political free speech are strongly circumscribed. The Government has not shown in this case a justification for the interference with Liu Xiaobo’s political free speech. The requirement of proportionality that applies to such restrictions is not satisfied by the reasons provided by the Government. His detention also falls within category II of the categories applicable to the cases submitted to the Working Group.

27. Customary international law provides for an enforceable right of compensation. The Working Group has in its jurisprudence continued to develop, based on general principles, the right to a remedy, which primarily is a right to immediate release and to compensation. In this case, Liu Xiaobo is to be released immediately. He also has a claim to compensation. The reasons that may be given for his detention cannot be used against a claim for compensation.

Disposition

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

The deprivation of liberty of Liu Xiaobo, being in contravention to articles 9, 10 and 19 of the Universal Declaration of Human Rights, is arbitrary, and falls within categories II and III of the categories applicable to 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, which include the immediate release of and adequate reparation to Liu Xiaobo.

30. The Working Group would like to take this opportunity to invite the Government of China to ratify the International Covenant on Civil and Political Rights.

[Adopted on 5 May 2011]