



Human Rights Council
Working Group on Arbitrary Detention**Opinions adopted by the Working Group on Arbitrary Detention at its sixty-fifth session, 14–23 November 2012****No. 59/2012 (China)****Communication addressed to the Government on 31 July 2012****Concerning Guo Quan****The Government has replied to the communication on 29 August 2012.****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, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 2006/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. In accordance with its methods of work (A/HRC/16/47, annex, and Corr.1), the Working Group transmitted the above-mentioned communication to the Government.
2. 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 the detainee) (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, and which aims towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

3. The source reports that Guo Quan is a prolific writer and commentator on the system of government of China and the future of democracy in China. Between 2007 and 2008, he wrote and published a series of 347 articles on the Internet known as the “Herald of Democracy” series. The series included open letters addressed to the President of China, Hu Jintao, and Wu Bangguo, Chairman of the Standing Committee of the National People’s Congress. The letters addressed a wide range of social problems in China, including workers who had been laid off, demobilized military cadres and peasants who had lost their land. Guo Quan’s “Herald of Democracy” articles also voiced strong support for rights defenders seeking redress for social injustice, while raising important accountability questions concerning the Government’s role in the devastation caused by the 2008 Sichuan earthquake, the safety of nuclear facilities in Sichuan and a decision by local authorities to permit construction of a chemical factory in Nanjing.

4. The source also informs that Guo Quan is a vocal advocate for the peaceful implementation of a multiparty, competitively elected democratic system in China. He founded the China New Democracy Party (CNDP) and often used the “Herald of Democracy” series to distribute key CNDP documents.

5. According to the source, the Suqian Intermediate People’s Court, in its 16 October 2009 criminal verdict, placed heavy emphasis on the “Herald of Democracy” series as a basis for Guo Quan’s conviction on charges of “subversion of state power” and sentence of 10 years’ imprisonment and three years’ deprivation of political rights. Specifically, the court identified five “Herald of Democracy” articles as evidence to support the conviction, including an article outlining the CNDP constitution and party agenda.

6. On 22 December 2009, the Jiangsu Province Higher People’s Court upheld the Suqian Intermediate People’s Court’s conviction and sentencing of Guo Quan in its entirety, finding that “his actions constitute the crime of inciting subversion of state power”, that “his criminal acts were grave” and that “he should be punished according to the law”.

7. The source submits that Guo Quan’s “Herald of Democracy” series, emphasized throughout the Suqian Intermediate People’s Court’s criminal verdict as an act of “subversion”, peacefully expressed support for democratic reforms in opposition to China’s one-party system. His work used the Internet to openly raise important questions of Government accountability and support the efforts of rights defenders against a wide range of social and economic inequalities. Moreover, the “Herald of Democracy” series helped disseminate information concerning CNDP, advocating peaceful political organization and association in opposition to the Chinese system of government.

8. The source also submits that this type of expression falls squarely within the kind of political expression and opinion guaranteed under article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights. Guo Quan’s imprisonment therefore constitutes an unlawful interference with his freedom

to hold and seek, receive and impart information and ideas through any media and regardless of frontiers under international human rights law.

9. The source further submits that the justification of the Government of China for Guo Quan's deprivation of liberty does not constitute a permissible restriction on the right to freedom of opinion and expression. According to the verdict of the Suqian Intermediate People's Court, his "Herald of Democracy" writings constituted an attempt to "subvert state power and overthrow the socialist system".

10. However, the source maintains that this justification for his imprisonment fails to satisfy requirements for permissible punishment of expression as a threat to national security under generally recognized principles of international law, including the three elements required under principle 6 of the 1995 Johannesburg Principles on National Security, Freedom of Expression and Access to Information:

(a) Firstly, Guo Quan's purpose and intent behind the "Herald of Democracy" series was to express and support peaceful opposition to the Chinese one-party system. As he maintained throughout his trial, he demonstrated neither a subjective nor objective intent to violently attack or overthrow the Government of China, and therefore never "intended to incite imminent violence";

(b) Secondly, the articles in his "Herald of Democracy" series were peaceful in nature, and contained no calls for the use of force or violence in opposition to the Government of China. Guo Quan's expression was therefore not likely to incite imminent violence;

(c) Thirdly, there existed no "direct and immediate connection" whatsoever between Guo Quan's expressive acts and the likelihood or occurrence of any imminent violence. The source points out that no acts of violence have occurred in connection with any acts of expression by Guo Quan, nor were any such acts identified in the criminal verdict against him.

11. To this end, the source submits that the Chinese judiciary has failed to satisfy any, let alone all, of the elements required to permissibly punish Guo Quan's expressive acts as a threat to national security under principle 6 of the Johannesburg Principles. Moreover, the application by the Government of China of the crime of "subversion of state power" does not appear to have a "genuine purpose and demonstrable effect ... to protect [the] existence [of the Government of China] or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force". The imprisonment of Guo Quan therefore seems not to be legitimately related to national security.

12. In the light of the foregoing, the source submits that Guo Quan's detention is arbitrary as it is a result of his peaceful exercise of the right to freedom of opinion and expression as provided under article 19 of the Universal Declaration of Human Rights, as well as article 19 of the International Covenant on Civil and Political Rights.

13. The source also informs that, as the founder of CNDP, Guo Quan actively recruited individuals who volunteered themselves as CNDP members, arranged for the collection of party dues to fund CNDP activities and frequently distributed CNDP documents and other pro-democracy materials to CNDP members online. He often used the "Herald of Democracy" series to distribute key CNDP documents electronically.

14. The source further reports that, in its 16 October 2009 criminal verdict, the Suqian Intermediate People's Court emphasized Guo Quan's CNDP-related activities as a basis for his conviction on charges of "subversion of state power" and subsequent sentence of 10 years' imprisonment and three years' deprivation of political rights. As mentioned above, his conviction and sentence were upheld by the Jiangsu Province Higher People's Court.

15. The source submits that, through his actions to organize CNDP, Guo Quan sought to enable the peaceful association and assembly of individuals who shared his support for the implementation of a multiparty, competitively elected democratic system in China. CNDP, dedicated to non-violent opposition to the Chinese one-party system, provided a forum for like-minded individuals to peacefully share political expression and opinions, and plan advocacy in support of Government accountability and democratic reform. To this end, the source submits that Guo Quan's actions to organize CNDP fall within the kind of peaceful association guaranteed under article 20 of the Universal Declaration of Human Rights and article 22 of the International Covenant on Civil and Political Rights.

16. The source therefore submits that Guo Quan's detention is arbitrary, as it is a result of his exercise of the right to freedom of association, guaranteed by article 20 of the Universal Declaration of Human Rights and article 22 of the International Covenant on Civil and Political Rights.

17. Moreover, the source recalls that the courts have failed to establish how Guo Quan's peaceful activities in support of Government accountability and democratic reform, including his organization of CNDP, were intended to incite imminent violence or likely to incite such violence. Thus, his imprisonment for "subversion of state power" does not appear to have a genuine purpose or the demonstrable effect of protecting the Government against the use or threat of force. The imprisonment of Guo Quan seems not to be legitimately related to national security.

Response from the Government

18. In its response to the above allegations, the Government provided the Working Group with the following information and explanations.

19. Guo Quan was arrested on 19 December 2008. Suqian Intermediate People's Court of Jiangsu Province found that Guo Quan: went online to organize the illegal "China New Democracy Party", published a large number of articles inciting subversion of state power, recruited party members and organized, plotted and carried out actions to subvert the State power of China and overthrow the socialist system. His actions constitute the crime of subversion, his crimes are major and he should be punished in accordance with the law. On 16 October 2009, the court of first instance issued a judgment which sentenced him to 10 years' imprisonment (from 13 November 2008 to 12 November 2018) with subsequent deprivation of political rights for three years for the crime of subversion.

20. After the initial judgment was issued, Mr. Guo filed an appeal, and on 25 December 2009 the Jiangsu Province Higher People's Court issued a ruling, rejecting Guo Quan's appeal and upholding the initial judgment. Guo Quan is now serving his sentence at the Pukou Prison of Jiangsu Province.

21. In trying this case, the Chinese courts strictly followed the relevant provisions of the Criminal Law and Criminal Procedure Law. Guo Quan hired two attorneys to defend him. During the trial, Mr. Guo also defended himself, and his two attorneys provided a full defence.

22. Freedom of expression is strictly protected by the Constitution of China and laws as a citizens' basic and fundamental right; however, this does not mean that there is no limit to when citizens may exercise this right of freedom of expression. The Chinese Constitution provides that citizens have a right to freedom of expression, article 51 and 54 also provide that, "in exercising their freedoms and rights, [they] may not infringe upon the interests of the State, of society or of the collective, or upon the lawful freedoms and rights of other citizens. It is the duty of citizens of the People's Republic of China to safeguard the security, honour and interests of the motherland; they must not commit acts detrimental to the security, honour and interests of the motherland." This necessary restriction in the

Chinese Constitution complies with the spirit of the International Covenant on Civil and Political Rights. According to article 19, paragraph 3, of the Covenant, there is a particular duty and responsibility when exercising the right of freedom of expression; therefore, it places some restrictions on expression in order to: respect others' rights or reputations and protect national security or public order or public health or morals.

23. Mr. Guo's actions inciting subversion of the State power and socialism of China are outside the bounds of free speech. On the one hand, Guo Quan denied the State power and socialist system of China through slander and rumour. On the other hand, Guo Quan, via the Internet, publically incited others and founded a social organization attempting to change the current political system and to overthrow the socialist system. Such actions are not an individual expressing his thoughts and opinions, but present imminent danger, violating article 105(2) of the Chinese Criminal Law. Thus, Chinese judicial organs tried Guo Quan according to the law, which illustrates that China follows the rule of law.

Further comments from the source

24. The source notes that the Government reply sets out two explanations in support of Guo Quan's conviction for "subversion of state power". First, the Government states that freedom of expression is an important right enjoyed by Chinese citizens, but one that is not limitless. Citing provisions 51 and 54 of the Chinese Constitution, the Government explains that expression is limited under Chinese law when it "infringe[s] upon the interests of the State, of society or of the collective, or upon the lawful freedoms and rights of other citizens". Second, the Government asserts that Guo Quan's actions fall within this exception, because they constituted slander and incitement to overthrow the Government and the socialist system. As such they represented an "obvious danger" and fell outside the speech protected under the Chinese Constitution.

25. In this regard, the source submits, that, as the international community widely recognizes, freedom of expression has limits, but such limits must be clearly and narrowly defined. As the Government of China recognizes in its response, the International Covenant on Civil and Political Rights permits restrictions on free speech when those limits are provided by law and necessary "for respect for the rights or reputations of others" or "for the protection of national security or public order (ordre public), or of public health or morals".

26. The source recalls, that other international standards have further defined these exceptions. When the right to free expression is limited in the interest of national security and the reputation of the government, one such standard, the 1995 Johannesburg Principles on National Security, Freedom of Expression and Access to Information, asserts that expression may only be punished when it is "intended to incite imminent violence ... is likely to incite such violence ... and there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence". These principles further stipulate that restrictions intended only to "protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology" are improper. Mr. Guo's conviction rested entirely on peaceful activities and writings criticizing the Communist Party and proposing political change.

27. In the source's view, the response of the Government of China to Guo Quan's case clearly demonstrates that the limits currently placed on freedom of expression under Chinese policy and practice are inconsistent with relevant international standards, and with the spirit of the International Covenant on Civil and Political Rights. The source further notes that Guo Quan's case is not an isolated incident, but rather demonstrates a pattern on the part of the Government of China of arbitrarily restricting freedom of expression and denying due process in speech-related cases.

28. In this regard, the source refers to the Working Group's opinions in cases of Liu Xiaobo, Chen Guangcheng, and Liu Xianbin, where the detention was found arbitrary.¹

Discussion

29. In its response, the Government does not contest the allegation that Guo Quan's deprivation of liberty is linked to publication of articles on the Internet, "inciting subversion of state power and overthrowing socialist system". The Government does not refute the allegation that Guo Quan was convicted for his publications and comments on the Chinese system of government and the future of democracy in China, his advocacy for the peaceful implementation of a multiparty, competitively elected democratic system in China, as well as use of Internet to openly raise important questions of Government accountability and support the efforts of rights defenders against a wide range of social and economic inequalities..

30. The Working Group considers that Guo Quan was arrested and convicted due to exercise of his right to freedom of expression through publication of articles and reports critical of the authorities. The fact that these peaceful expressions of opinions are criminalized under domestic law as the "incited subversion of state power and overthrowing socialist system" does not deprive him of his right under article 19 of the Universal Declaration of Human Rights.

31. In this regard, the Working Group recalls that in previous opinions concerning China, it emphasized that, although national laws might punish such conduct, it is, however, protected by the rights to freedom of opinion and expression and association in international law.²

32. The Working Group reiterates that, in conformity with its mandate, it must ensure that national law is consistent with the relevant international provisions set forth in the Universal Declaration of Human Rights. Consequently, even if the deprivation of liberty is in conformity with national legislation, the Working Group must ensure that it is also consistent with the relevant provisions of international law.³

33. The Working Group recalls that the holding and expression of opinions, including those which are not in line with official Government policy, are protected by article 19 of the Universal Declaration of Human Rights.

34. In the Working Group's view, Guo Quan was deprived of his liberty for having peacefully exercised his right to freedom of opinion and expression, as guaranteed under articles 19 and 20 of the Universal Declaration of Human Rights. Thus, the deprivation of liberty of Guo Quan falls within category II of the arbitrary detention categories referred to by the Working Group when considering the cases submitted to it.

Disposition

35. In the light of the preceding, the Working Group on Arbitrary Detention renders the following opinion:

The deprivation of liberty of Guo Quan has been arbitrary, being in contravention of articles 19 and 20 of the Universal Declaration of Human Rights, and falls within category II of the arbitrary detention categories referred to by the Working Group when considering the cases submitted to it.

¹ See opinions No. 15/2011 (China), No. 47/2006 (China) and No. 23/2011 (China).

² See opinions No. 29/2012 (China); No. 32/2007 (China).

³ See, inter alia, Opinion No. 29/2012 (China).

36. Consequent upon the opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation of Guo Quan and bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights.

37. The Working Group believes that, taking into account all the circumstances of the case, the adequate remedy would be to release Guo Quan and accord him an enforceable right to compensation.

38. The Working Group also calls upon the Government to consider the possibility of ratification of the International Covenant on Civil and Political Rights.

[Adopted on 20 November 2012]
