

**Human Rights Council****Working Group on Arbitrary Detention****ADVANCE UNEDITED VERSION****Opinions adopted by the Working Group on Arbitrary Detention at its seventy-first session, 17– 21 November 2014****No.49/2014 (People's Republic of China)****Communication addressed to the Government on 18 September 2014****Concerning Messrs. Jingling Tang, Qingying Wang and Xinting Yuan**

The Government has not replied to the communication.

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. The mandate was extended for a further three years in resolution 24/7 of 26 September 2013. In accordance with its methods of work (A/HRC/16/47 and Corr.1, annex), 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. According to the source, Messrs. Jingling Tang, Qingying Wang and Xinting Yuan are all active participants of the ‘Nonviolent Citizens’ Disobedience Movement’, reportedly a network of activists that advocate for reforms aimed at bringing about liberal democracy in China.

4. Mr. Jingling Tang, born in 1971, is a Chinese national residing in Guangzhou City, Guangdong Province, China. Since 2000, Mr. Tang has practiced as a lawyer in Guangdong Province and dealt with a variety of human rights defense cases. The source informs that in recent years, police allegedly detained, threatened, and tortured Mr. Tang as a result of his human rights activism. In 2006, Chinese authorities did not renew Mr. Tang’s attorney license, as a consequence of his work on a local election recall case in Taishi Village, Guangdong Province. Since his disbarment, Mr. Tang has worked as a “citizen agent” by providing legal assistance on human rights cases and collaborating on campaigns related to civil and political rights reforms. Mr. Tang founded the Nonviolent Citizens’ Disobedience Movement.

5. Mr. Qingying Wang, born in 1982, is a Chinese national residing in Guangzhou City, Guangdong Province, China. Mr. Wang was previously a teacher at Guangdong University of Technology. Since 2006, he has been a prodemocracy activist while also supporting the actions of Mr. Tang. The source informs that in 2009, under pressure from local authorities, the University fired Mr. Wang after he signed Charter 08, the manifesto promoting political reform and democratization in China. In 2013, he participated actively in the Nonviolent Citizens’ Disobedience Movement with Mr. Tang and Mr. Xinting Yuan. Mr. Wang often faced harassment and pressure from authorities due to his human rights activism.

6. Mr. Xinting Yuan (aka, Yuan Chaoyang), born in 1971, was previously an editor at the Guangzhou Press. The source informs that in 2009, under the pressure by local authorities, the company fired Mr. Yuan after he signed Charter 08. Since 2013, Mr. Yuan has participated actively in the Nonviolent Citizens’ Disobedience Movement. Over the last few years, Mr. Yuan has been pressured and harassed by national authorities for his human rights defense activities.

7. The source reports that on 16 May 2014, Messrs. Tang, Wang and Yuan were all arrested on criminal charges of suspicion of “creating a disturbance” and have been detained since. Following their arrest, they were all detained at Guangzhou Baiyun District Detention Center and on 19 June 2014, transferred to Guangzhou No. 1 Detention Center, where they remain to date.

8. According to the source, Mr. Tang was arrested in his home by the police officers from Baiyun District Branch of the Guangzhou Public Security Bureau (“Guangzhou PSB”). Earlier on that day, the police presented a search warrant and a criminal detention notice issued by the Baiyun District Branch of the Guangzhou PSB pursuant to article 80 of

the Criminal Procedure Law of the People's Republic of China that regulates the initial detention of criminal suspects. They searched his residence and confiscated computers, cell phones and books.

9. The source reports that Mr. Wang was arrested in his home by national security police officers from Guangzhou PSB. Together with police officers from Baiyun District and Panyu District Branches of the Guangzhou PSB, they searched his home and confiscated laptops and cell phones in the absence of any warrant. Mr. Yuan was reportedly arrested in his home by police officers from the Guangzhou PSB who did not present any warrant.

10. The source informs that on 20 June 2014, Messrs Tang, Wang and Yuan were all formally charged by the Guangzhou Municipal People's Procuratorate, under charges of "inciting subversion of State power", pursuant to article 105 (2) of the Criminal Law of the People's Republic of China. This provision stipulates a fixed-term imprisonment of not more than five years to those who incite others by spreading rumors or slanders or any other means to subvert the state power or overthrow the socialist system. The ringleaders and the others who commit major crimes shall be sentenced to fixed-term imprisonment of not less than five years.

11. On 21 May 2014, Mr. Tang's lawyer met with him at Baiyun District Detention Center. Mr. Tang reported that a discipline management officer had tried to force him to squat but he refused, prompting the enraged officer to violently kick him. In addition, the detention center did not allow his family to send eye-glasses to Mr. Tang even though he is severely nearsighted. His family has not been allowed to meet him since he was arrested.

12. On 23 May 2014, Mr. Wang's lawyer met him at Baiyun District Detention Center, and learned that his client had allegedly been tortured and mistreated. Reportedly, Mr. Wang had been repeatedly slapped in the face by authorities for refusing to falsify evidence against Mr. Tang and Mr. Yuan. He had also been forced to work long hours and held in a 20-square meter room with 30 other inmates, and given very poor-quality and inadequate food. Following his visit on 10 June 2014, the lawyer reported that Mr. Wang had been interrogated at least 20 times, sometimes for as long as 12-13 hours at a time, until he confessed under duress. Since having confessed under duress, Mr. Wang has reportedly received improved treatment, being placed in a larger room and no longer beaten. Mr. Wang's wife was reportedly also harassed and threatened by national security officers.

13. The source submits that the deprivation of liberty of Messrs. Tang, Wang and Yuan is arbitrary and falls within category II of the categories applicable to the consideration of cases submitted to the Working Group. The source claims that they, as active members of the Nonviolent Citizens' Disobedience Movement, have been detained solely on the basis of the peaceful exercise of their rights guaranteed under articles 19 and 20 of the Universal Declaration of Human Rights (UDHR), namely the right to freedom of opinion and expression and the right of freedom of peaceful assembly.

14. The source further submits that the deprivation of liberty of Messrs. Tang, Wang and Yuan also falls within category III of the categories applicable to the consideration of cases submitted to the Working Group. No arrest warrant was produced for the arrests of Mr. Wang and Mr. Yuan. In addition, the petitioners were not informed of the exact charges brought against them until four days after their arrest. They now face prosecution under a criminal charge that carries a more severe punishment than the one for which they were initially detained. Furthermore, Mr. Wang's confessions were allegedly extracted under torture during his detention. The source argues that this constitutes a violation of articles 9, 10 and 11 of the UDHR.

Response from the Government

15. The Working Group addressed a communication to the Government of China on 18 September 2014, requesting detailed information about the current situation of Messrs. Tang, Wang and Yuan and a clarification of the legal provisions justifying their continued detention. The Working Group regrets that the Government has not responded to the allegations transmitted to it.

16. According to paragraph 15 of the Working Group's revised methods of work, a Government is requested to reply to a communication within 60 days from the date of its transmittal. However, in accordance with paragraph 16, the Working Group may grant a Government a further period of a maximum of one month in which to reply.

Discussion

17. Despite the absence of any information from the Government, the Working Group considers that it is in a position to render an opinion on the case on the basis of the submissions that have been made, in conformity with paragraph 16 of its revised methods of work.¹

18. In the present case, the Government has chosen not to rebut the prima facie reliable allegations submitted by the source. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues.² If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the given allegations. Hence, the Working Group should base its opinion on the prima facie case made out by the source.

19. On 16 May 2014, Messrs. Tang, Wang and Yuan were reportedly arrested in their respective homes by national security police officers from Guangzhou PSB. In particular, Mr. Wang and Mr. Yuan were arrested by police officers who did not present any warrant and they were not informed of the exact charges brought against them until four days after their arrest. The arrests of Mr. Wang and Mr. Yuan were, therefore, conducted in violation of article 9 of the UDHR which stipulates that “No one shall be subjected to arbitrary arrest, detention or exile.”

20. Furthermore, reportedly, although Messrs. Tang, Wang and Yuan were arrested initially on criminal charges of suspicion of “creating a disturbance”, they were all formally charged on 20 June 2014 by the Guangzhou Municipal People’s Procuratorate, for “inciting subversion of State power”, pursuant to article 105 (2) of the Criminal Law of the People’s Republic of China, which would call for an immensely higher level of punishment when compared to the allegations at the time of their arrest. Such a change of charges to the disadvantage of the accused also constitutes a clear violation of articles 9, 10 and 11 of the UDHR.

21. Whereas article 10 of the UDHR requires that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him, article 11, paragraph 2 specifies that no one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

¹ See for instance Opinion No. 5/2014 (Iraq) with references in [15]-[16] ‘Evidence’.

² See, for example, Report of the Working Group, A/HRC/19/57, para. 68.

22. Furthermore, the source reports that Mr. Tang and Mr. Wang were subjected to torture and ill-treatment in the detention center. Mr. Tang was violently kicked by a discipline officer and has neither been allowed to meet his family since the inception of his detention, nor to receive eye-glasses from them. The source also alleges that Mr. Wang had been subjected to a repeated practice of torture and ill-treatment by the authorities who forced him to falsify evidence against Mr. Tang and Mr. Yuan. It was only after he made false confessions that he received improved treatment. Such a practice of torture and ill-treatment is in clear violation of the international norms on the prohibition of torture, including article 5 of the UDHR, which stipulates that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

23. The Working Group further notes that Messrs. Tang, Wang and Yuan have been subjected to detention from 16 May 2014 to this day without trial. It is part of the well-established international law on detention that pre-trial detention should be an exception and should be as short as possible. In its 2011 annual report (A/HRC/19/57, paras. 48-58), the Working Group also underlined that pre-trial detention should be an exceptional measure. The Working Group finds that the mismanagement of the criminal administration as evidenced by the practice of torture and ill-treatment, prolonged pre-trial detention, and the change of charge to the effect of increasing the severity of sanction are of such gravity as to give the deprivation of liberty an arbitrary character, falling within category III of the categories applicable to the consideration of cases submitted to the Working Group.

24. The Working Group is also highly concerned by the fact that, as alleged by the source, Messrs. Tang, Wang and Yuan, active members of the Nonviolent Citizens’ Disobedience Movement, have been detained on the basis of the peaceful exercise of their rights guaranteed under articles 19 and 20 of the UDHR providing for the right to freedom of opinion and expression and the right of freedom of peaceful assembly. The deprivation of liberty of Messrs. Tang, Wang and Yuan, in this context, is arbitrary and falls within category II of the categories applicable to the consideration of cases submitted to the Working Group.

Disposition

25. In the light of the foregoing, the Working Group on Arbitrary Detention renders the following Opinion:

(a) The deprivation of liberty of Messrs. Tang, Wang and Yuan from 16 May 2014 to this day has been conducted as a result of their legitimate exercise of the rights or freedoms guaranteed by articles 19 and 20 of the Universal Declaration of Human Rights. It falls within category II of the categories applicable to the consideration of cases submitted to the Working Group.

(b) The aforementioned deprivation of liberty is also in violation of articles 9, 10 and 11 of the Universal Declaration of Human Rights, falling within category III of the categories applicable to the consideration of cases submitted to the Working Group.

26. Consequent upon the Opinion rendered, the Working Group requests the Government of China to take the necessary steps to remedy the situation of Messrs. Tang, Wang and Yuan without delay. The Working Group considers that, taking into account all the circumstances of the case, the adequate remedy would be to immediately release Messrs. Tang, Wang and Yuan and grant them reparation for the harm they have suffered during the period of their arbitrary detention.

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

[Adopted on 20 November 2014]
