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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its ninety first session, 6-10 September 2021

Opinion No. 30/2021 concerning Jiaxi Ding, Zhongshun Zhang and Zhenya Dai (China)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 42/22.
2. In accordance with its methods of work, on 14 December 2020, the Working Group transmitted to the Government of China a communication concerning Mr. Ding Jiaxi, Mr. Zhang Zhongshun and Mr. Dai Zhenya. The Government has not replied to the communication. China is not 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 Covenant (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 on the grounds 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. Jiayi Ding born in 1967, is a citizen of China residing in Beijing.
5. According to the source, Mr. Ding, is a Beijing-based lawyer, who began his human rights activism in 2010 by advocating for the rights of the children of migrant workers to take college entrance exams at the location of their current residence rather than needing to return to a place of origin. He also offered legal assistance and provided food for individuals presenting personal grievances to central officials in Beijing. Mr. Ding was previously detained in April 2013 in an alleged retaliation for his participation in the New Citizens' Movement - a network of activists that promoted social justice and political and legal reforms. Mr. Ding was sentenced to 3.5 years in prison. In April 2015, the Working Group adopted Opinion 3/2015 and found that Mr. Ding's detention was arbitrary and asked for his immediate release. He was released in 2016 after serving full sentence.
6. Zhongshun Zhang born in 1967, is a citizen of China residing in the city of Yantai, Shandong province. According to the source, Mr. Zhang is an activist and a University professor. He was previously imprisoned for three years after showing students a documentary about the demonstrations held in Tiananmen Square in Beijing during 1989. Following his release in 2010, Mr. Zhang promoted ideas about grassroots' activism and offered trainings on conducting non-violent rights campaigns. He furthermore sought donations and funding for prisoners of conscience and other human rights defenders facing difficult circumstances.
7. Zhenya Dai born in 1973, is a citizen of China residing in the city of Xiamen, Fujian province. The source informs that Mr. Dai is a finance manager at a private company and has a long-standing record of human rights work. He has donated to and raised funds for political prisoners and human rights defenders, sought the Government to publicly disclose information, assisted individuals who have suffered rights violations to file administrative and public interest lawsuits and promoted the development of civil society. Prior to his current detention, Mr. Dai had on several occasions been detained and interrogated by public security forces.
8. The source informs that Mr. Ding had been temporarily living in Beijing at a friend's house. On 26 December 2019, at around 21:00 hours, a relative of this friend returned home to find the lock broken and approximately 10 plain-clothed police officers talking to Mr. Ding inside. The relative was handcuffed and taken to Beijing Municipal Changping District Nanshao Police Station until around midnight. When he returned home, he witnessed Mr. Ding being taken to a car outside. The house was in disarray and Mr. Ding's personal items, including his phone and computer, were missing. The source specifies that the authorities did not show a warrant or other decision by a public authority and reasons for the arrest were unknown.
9. Furthermore, according to the source, on 26 December 2019, at around 16:05 hours, Mr. Zhang sent a family member a text message that the police wanted to speak to him and he would return home late. When Mr. Zhang's family member returned home after work, at around 16:26 hours, there were approximately 10 Yantai City national security officers waiting at the door of the residence. The officers searched the home for approximately 6 hours and left at around 23:00 hours with Mr. Zhang's computer, phone, books and other items.
10. The officials did not present any warrant; neither did they inform orally what crime Mr. Zhang had been suspected of committing. Officers only produced a list of the items which they had taken, which stated that Yantai Public Security National Security team conducted the search and cited suspected involvement in the "December 13 case". The family did not receive written criminal detention notice.
11. On 2 January 2020, a Yantai PSB national security officer called Mr. Zhang's family and informed that he had been put under the residential surveillance at a designated location (RSDL) on suspicion of committing a criminal act without stating specifically which crime

or the exact date he had been put under RSDL. The family never received a written RSDL notification.

12. The source also submits that on 26 December 2019, at around 21:00 hours, the power went out at Mr. Dai's home in Xiamen City. When the family members went to investigate the power cut, they were circled by approximately 10 plain-clothed police officers who handcuffed Mr. Dai and then proceeded to conduct a raid inside the house until 22:30 hours. Officers took Mr. Dai's computer, phone, computer tablet and other items.

13. According to information received, officers did not provide a list to the family of the items they took; neither did they produce an arrest warrant. The officers told Mr. Dai's family member that they were from Shandong Province and Xiamen City PSB were assisting them. The officers also orally informed Mr. Dai's family that he was suspected of "inciting subversion of state power."

14. That night, Mr. Dai's family went to the Huli District Police Station in Xiamen to ask for further details. After making several phone calls, the police officers at the station told the family that Mr. Dai was at their police station, but they did not have any further details.

15. On 2 January 2020, Xiamen city police requested Mr. Dai's family member to go to Huli District Police Station. There, this family member was orally informed that Mr. Dai had been put under RSDL on suspicion of committing a criminal act, although the officers did not specify which act and on which date Mr. Dai had been moved into RSDL. The family member was made to sign a paper stating that she had been orally informed, but not allowed to keep or copy the transcript, nor was she provided or asked to sign an official notification document. The family never received any notice after that.

16. The source informs that Mr. Ding, Mr. Zhang and Mr. Dai have been detained since 26 December 2019 and under RSDL since an unknown date. The source highlights that RSDL is a *de facto* form of enforced disappearance.

17. The relevant legislation for the detention of the three above-mentioned individuals is article 105 (2) of China's Criminal Law ("inciting subversion of state power"), which stipulates a fixed term imprisonment of not less than five years, criminal detention, public surveillance or deprivation of political rights to those who incite others by spreading rumours or slanders or any other means to subvert the State power or overthrow the Socialist system.

18. The source informs that there are credible allegations that Mr. Ding had been tortured while held under RSDL in Yantai city, which included sleep deprivation with blaring noise and fluorescent lights being switched on for 24-hours.

19. On 19 June 2020, Linyi City Public Security Bureau in Shandong Province formally arrested Mr. Ding on charges of "inciting subversion of State power." The source notes that this formal arrest came as the period of RSDL was approaching the maximum permitted duration. It also notes that Mr. Ding's case was originally handled by Yantai Public Security Bureau in Shandong Province. The authorities did not explain this change to the family. Mr. Ding is currently being held at Linshu County Detention Center in Shandong.

20. On 8 July 2020, Mr. Ding's lawyer travelled to the detention center but was not allowed to meet his client. On 4 August 2020, the lawyer made another request to visit Mr. Ding, which was again denied. Mr. Ding has not been permitted any communication with his lawyer or family throughout his detention.

21. On 19 August 2020, one of Mr. Ding's lawyers filed a request for release on bail. To date, the request has not been granted with Mr. Ding remaining in *incommunicado* detention.

22. The source also informs that the prosecutors have reportedly applied article 159 of the Criminal Procedure Law to extend the investigation period of Mr. Ding's case to 19 January 2021. The source explains that article 159 is applied if a person may be sentenced to over 10-years in prison.

23. Moreover, according to the information received, on 18 June 2020, Mr. Zhang and Mr. Dai were released on bail pending further investigation. They still face charges of "inciting subversion of state power" but are no longer being held in a detention center.

24. The source details that Mr. Dai can currently move around but cannot leave the city of Xiamen. Any other travel needs to be approved by the Xiamen Public Security Bureau. Mr. Dai is required to report his movements and any changes to his residence and workplace immediately. Moreover, he must report to the local police station and take photos at least once a month. In addition, he has been repeatedly informed that he cannot continue his human rights activism, otherwise he might be taken into custody at any time.

25. The source adds that while held in RSDL, authorities forced Mr. Dai to sit in one position for a long time and restricted his food intake. As a result, he has a number of health complications, such as muscle atrophy, herniated lumbar intervertebral disk and knee joint issues.

26. The source submits that the deprivation of liberty of and charges against Mr. Ding, Mr. Zhang and Mr. Dai constitute retaliation against these individuals for their exercising rights to free expression, peaceful assembly and free association. The source alleges that they were detained in retaliation for attending a private meeting held on 7 and 8 December 2019 in Xiamen City where the participants discussed politics and ideas about China's future as well as shared civil society experiences.

27. The source also informs that Yantai City Public Security Bureau in Shandong Province has set up a task force called "December 13" (as the meeting was initially have been reported to have taken place on 13 December 2019 and not on 7 and 8 December 2020). Along with Mr. Ding, Mr. Zhang and Mr. Dai, the police allegedly also detained and summoned for questioning several activists and lawyers in Fujian, Shandong, Beijing, Hebei, Sichuan and Zhejiang. At least five individuals had been detained under RSDL in connection with this meeting, including Mr. Ding, Mr. Zhang and Mr. Dai.

28. The source concludes that the deprivation of liberty of Mr. Ding, Mr. Zhang and Mr. Dai constitute violation of their rights to peacefully exercise freedom of expression, assembly and association, including those guaranteed under articles 18, 19 and 20 of the Universal Declaration of Human Rights. Their detention therefore falls under the category II of the Working Group.

29. Moreover, the source submits that above-mentioned individuals have been deprived of their due process rights since they were initially detained. In this regard, the source notes that the authorities failed to provide police documentation concerning their detentions and to notify their families. The source recalls that the three individuals were initially taken in custody on 26 December 2019 and placed under RSDL on unknown date. The authorities did not notify families of their detentions within 24 hours, which is allowed under exemptions in article 83 of China's Criminal Procedure Law for individuals charged with a crime in the category of "endangering state security."

30. The source also submits that RSDL is a form of detention that constitutes *de facto* enforced disappearance according to international standards, exposing detainee to greater risk of torture. According to the national law, detainees can remain under RSDL, at a secret location, for as long as six months. Requests for meetings with their lawyers must be approved by the police and are routinely denied in cases involving human rights defenders. The source also recalls that the Working Group in its Opinion No. 15/2019 stated that placement in RSDL is a violation of articles 6, 9, 10, and 11(1) of the Universal Declaration of Human Rights.

31. Moreover, in the case of Mr. Zhang, the Yantai police authorities have repeatedly changed charges used to justify raids on his home and real estate properties. According to the source, this appears to indicate that the authorities did not have strong evidence to justify his detention in the first place.

32. As such, on 2 January 2020, Yantai PSB national security officers returned to one of Mr. Zhang's properties in Yantai City which was let out to a tenant. The officers had a search warrant based on the crime "causing an accident through dangerous materials" stipulated under article 136 of the Criminal Law. It is reported that the authorities claimed to have found 245 bullets and printed material on how to make a bomb in the property. Officers showed the

warrant to Mr. Zhang's family member but did not allow this member to make a copy or to take a photo.

33. On 4 January 2020, Yantai PSB national security officers searched two properties in the city of Weihai owned by Mr. Zhang which had been empty for almost a year. The officers had another search warrant, citing the crime of "sabotaging broadcasting, television or public telecommunications facility, stipulated under the article 124 of the Criminal Law. Officers again showed the warrant to Mr. Zhang's family member but would not allow to make a copy or to take a photo.

34. On 13 January 2020, Yantai PSB national security officers searched Mr. Zhang's office in Yantai. They had a warrant which did not mention any crime. The authorities did not allow Mr. Zhang's family member, who was present during the search, to copy or keep a copy of the warrant.

35. The source emphasizes that for over a week, families and lawyers of Mr. Ding and Mr. Zhang did not formally know that these individuals were suspected of having committed the crime of inciting subversion of State power. Moreover, although family members of Mr. Dai were orally informed of the charge, they did not receive a written notification shortly after his apprehension. It took several weeks for them to receive it.

36. Reportedly, the first written notification that Mr. Ding, Mr. Zhang and Mr. Dai had been held on suspicion of inciting subversion of State power are written notices given to lawyers by the Yantai PSB. These written notices, dated 9 and 16 January 2020, deny lawyers a possibility to visit their clients on the grounds that such visits may endanger State security. Notices concerning Mr. Ding and Mr. Zhang were received on 15 January 2020. Notice concerning Mr. Dai was received on 21 January 2020.

37. The source explains that the article 37 of the national Criminal Procedure Law allows the police to deny detainees' access to a lawyer beyond 48 hours if they have been accused of "endangering State security".

38. The source further recalls that Mr. Ding, Mr. Zhang and Mr. Dai were held *incommunicado* whilst in custody. It is alleged that this has put them at a significant risk of torture and cruel, inhuman and degrading treatment.

39. The source also remarks that the Working Group described the crime of "inciting subversion" a vague and imprecise offence and called "upon the [Chinese] Government to repeal article 105 (2) of the Criminal Law or bring it into line with its obligations under international human rights law".

40. The source concludes that deprivation of liberty of Mr. Ding, Mr. Zhang and Mr. Dai contravene article 9 of the Universal Declaration of Human Rights and falls within category III of the Working Group.

Response from the Government

41. On 14 December 2020, the Working Group transmitted the allegations made by the source to the Government through its regular communications procedure. The Working Group requested the Government to provide, by 12 February 2021, detailed information about the current situation of Mr. Mr. Ding, Mr. Zhang and Mr. Dai and clarify the legal provisions justifying their continued detention, as well as the compatibility of his detention with the obligations of China under international human rights law. Moreover, the Working Group called upon the Government to ensure Mr. Ding, Mr. Zhang and Mr. Dai's physical and mental integrity. In the current context of a global pandemic, and in accordance with the World Health Organization recommendations of 15 March 2020 concerning the response to Covid-19 in places of detention, the Working Group urged the Government to prioritise the use of non-custodial measures at all stages of criminal proceedings, including during the pre-trial phase, during the trial and sentencing, as well as after sentencing.

42. The Working Group regrets that it did not receive a response from the Government to that communication. The Government did not request an extension of the time limit for its reply, as provided for in paragraph 16 of the Working Group's methods of work.

Discussion

43. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

44. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. 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 allegations (see A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the *prima facie* credible allegations made by the source.

45. As a preliminary issue, the Working Group notes that Mr. Zhang and Mr. Dai Zhenya has been released on bail. The Working Group nevertheless notes that, in accordance with its methods of work (para. 17 (a)), it “reserves the right to render an opinion, on a case-by-case basis, whether or not the deprivation of liberty was arbitrary, notwithstanding the release of the person concerned”. In the present case, the Working Group considers that the allegations made by the source are extremely serious. Therefore, it proceeds to deliver its opinion.

i. Category I

46. According to the source, the arresting officers did not provide an arrest warrant to Mr. Ding, Mr. Zhang at the time of their arrest, nor did they inform them promptly of the reasons for the arrest at the time of arrest. In the case of Mr. Dai, no arrest warrant was produced, and the authorities orally informed his family that he was suspected of “inciting subversion of state power”. The Working Group recalls that in order for a deprivation of liberty to have a legal basis, the authorities must invoke that legal basis and apply it to the circumstances of the case through an arrest warrant, which was not implemented in relation to Mr. Ding, Mr. Zhang and Mr. Dai.¹

47. International law concerning the right to personal liberty allows restrictions to this right and includes the right to be presented with an arrest warrant, in cases that do not involve arrests made in *flagrante delicto*, to ensure the objectivity of the arrest process. It is also required that the decision on whether the arrest is warranted be taken by an outside authority, i.e., a competent, independent and impartial judiciary. This is procedurally inherent in the right to personal liberty and security and the prohibition of arbitrary deprivation under articles 3 and 9 of the Universal Declaration of Human Rights, and principles 2, 4 and 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.²

48. The Working Group finds that, in order to invoke a legal basis for deprivation of liberty, the authorities should have informed Mr. Ding, Mr. Zhang and Mr. Dai of the reasons for their arrest at the time of the arrest and promptly informed them of the charges.³ Their failure to do so violates article 9 of the Universal Declaration of Human Rights and principle

¹ See, for example, opinions No. 93/2017, para. 44; No. 10/2018, paras. 45–46; No. 36/2018, paras. 39–40; No. 46/2018, para. 48; No. 9/2019, para. 29; No. 32/2019, para. 29; No. 33/2019, para. 48; No. 44/2019, para. 52; No. 45/2019, para. 51; and No. 46/2019, para. 51.

² The Working Group has maintained from its early years that the practice of arresting persons without a warrant renders their detention arbitrary. See, for example, decisions No. 1/1993, paras. 6–7; No. 3/1993, paras. 6–7; No. 4/1993, para. 6; No. 5/1993, paras. 6 and 8–9; No. 27/1993, para. 6; No. 30/1993, paras. 14 and 17 (a); No. 36/1993, para. 8; No. 43/1993, para. 6; No. 44/1993, paras. 6–7. For more recent jurisprudence, see opinions No. 38/2013, para. 23; No. 48/2016, para. 48; No. 21/2017, para. 46; No. 63/2017, para. 66; No. 76/2017, para. 55; No. 83/2017, para. 65; No. 88/2017, para. 27; No. 93/2017, para. 44; No. 3/2018, para. 43; No. 10/2018, para. 46; No. 26/2018, para. 54; No. 30/2018, para. 39; No. 38/2018, para. 63; No. 47/2018, para. 56; No. 51/2018, para. 80; No. 63/2018, para. 27; No. 68/2018, para. 39; and No. 82/2018, para. 29.

³ See, for example, opinion No. 10/2015, para. 34. See also opinions No. 32/2019, para. 29; No. 33/2019, para. 48; No. 44/2019, para. 52; No. 45/2019, para. 51; and No. 46/2019, para. 51. 6 See opinions No. 5/2020, para. 74; and No. 6/2020, para. 43

10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. It also renders their arrest devoid of any legal basis.⁴

49. The source submits that in the case of Mr. Zhang, the Yantai police authorities repeatedly changed charges used to justify raids on his home and other properties. While two of these search warrants specified a crime (dated 2 January 2020 and 4 January 2020), the third (dated 13 January 2020) did not. Family members were not allowed to take copies of these warrants. The Working Group observes that not allowing family members to retain copies of warrants and other legal documents relating to the detention constitutes a recurring pattern in cases of these individuals. The Working Group finds that an absence of a paper trail relating to search warrants, warrant of arrests and other official notifications of the procedures undertaken impacts the ability to mount a proper defence, and contributes to the arbitrary nature of the detentions.

50. Following their detention on 26 December 2020, Mr. Ding, Mr. Zhang and Mr. Dai were subjected to “residential surveillance at a designated location” (“RSDL”) on an unknown date. The Working Group observes that the Government’s failure to provide notification of the arrest and location of detention to their families violated principle 16(1) of the Body of Principles.⁵

51. The Working Group considers that the term “residential surveillance at a designated place of residence” is a misnomer, the criminal suspect or defendant who is subjected to it is confined not to his usual place of residence – i.e., under house arrest – but in a designated place of residence, which may well be a prison. The authorities, in effect has the power to make a person disappear without judicial oversight. In the Working Group’s view, such an enabling act for law enforcement officials is devoid of a legal basis.⁶ The Working Group finds that that placement in RSDL is a violation of articles 6, 9, 10, and 11(1) of the Universal Declaration of Human Rights.⁷

52. The Working Group and other special procedure mandate holders have expressed concern that the residential surveillance at a designated location regime is being employed in a manner which violates human rights.⁸ Those concerns include the following:

(a) The practice, which consists of placing individuals under incommunicado detention for investigation for prolonged periods without disclosing their whereabouts, amounts to secret detention and is a form of enforced disappearance;

(b) The practice of imposing residential surveillance at a designated location without judicial oversight and without formal charges contravenes the right of every person not to be arbitrarily deprived of his or her liberty, and to challenge the lawfulness of detention before a court without delay, as well as the right of accused persons to defend themselves through legal counsel of their choosing;

(c) The residential surveillance at a designated location provisions appear to allow those suspected of certain crimes to be held incommunicado for long periods and in undisclosed locations, which may per se amount to cruel, inhuman or degrading treatment or punishment, or even torture, and additionally may expose them to an increased risk of further abuse, including acts of torture;

(d) The residential surveillance at a designated location provisions appear to be used to restrict the exercise of the right to freedom of expression and the rights to freedom of peaceful assembly and of association by human rights defenders and their lawyers,

⁴ See, for example, Opinion 82/2020.

⁵ See Opinion 6/2021, para 75.

⁶ Opinion No. 36/2019, para. 38; Opinion No. 78/2020, para. 47.

⁷ Opinion No. 15/2019.

⁸ Communication CHN 15/2018, dated 24 August 2018. Available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=23997>. See also opinion No. 15/2019, para. 42

53. Enforced disappearance constitutes a particularly aggravated form of arbitrary detention, in violation of article 6 of the Universal Declaration of Human Rights.⁹ Such deprivation of liberty, entailing a refusal to disclose the fate or whereabouts of the persons concerned or to acknowledge their detention, lacks any valid legal basis under any circumstance. It is also inherently arbitrary, as it places the person outside the protection of the law, in violation of article 6 of the Universal Declaration of Human Rights.

54. During the most recent review of the human rights record of China in the third cycle of the universal periodic review, held in November 2018, delegations expressed concern about residential surveillance at a designated location, particularly its use in arbitrarily detaining individuals who defend and promote human rights.¹⁰ The Working Group calls upon the Government to repeal the provisions governing residential surveillance at a designated location or bring them into line with its obligations under international human rights law.

55. The source submits that Mr. Ding has not been allowed to communicate with his family and remains in *incommunicado* detention. The Working Group finds that the restrictions placed on his contact with his family violates his right to contact with the outside world under rules 43(3) and 58(1) of the the UN Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules), and principles 15 and 19 of the Body of Principles.

56. The Working Group notes the source's submission that Mr. Ding, Mr. Zhang and Mr. Dai were not brought promptly before a judge during their detention – that is, within 48 hours of their arrest barring absolutely exceptional circumstances, as per the international standard set out in the Working Group's jurisprudence.¹¹

57. The United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court affirms that the right to challenge the lawfulness of detention before a court is a self-standing human right, the absence of which constitutes a human rights violation, and is essential to preserve legality in a democratic society.¹² This right, which is in fact a peremptory norm of international law, applies to all forms and situations of deprivation of liberty.¹³ Judicial oversight of the deprivation of liberty is a fundamental safeguard of personal liberty and is essential in ensuring that detention has a legal basis.¹⁴

58. The Working Group observes Mr. Ding, Mr. Zhang and Mr. Dai were not afforded the right to take proceedings before a court so that it could decide without delay on the lawfulness of their detention in accordance with articles 3, 8 and 9 of the Universal Declaration of Human Rights and principles 11, 32 and 37, 38 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The Working Group therefore finds a violation of this right.

59. The source submits that Mr. Ding, Mr. Zhang and Mr. Dai have been charged with a vague and imprecise offence of inciting subversion of State power under article 105(2) of China's Criminal Law. This provision does not define what conduct amounts to subversion and overthrowing the Socialist system through rumours, slander or other means. The communication of mere thoughts, ideas or opinions could potentially fall within the

⁹ A/HRC/16/48/Add.3, para. 21. See also E/CN.4/1996/38, para. 55

¹⁰ See A/HRC/40/6, paras. 28.176 and 28.180–181.

¹¹ Opinions No. 57/2016, paras. 110–111; No. 2/2018, para. 49; No. 83/2018, para. 47; No. 11/2019, para. 63; No. 20/2019, para. 66; No. 26/2019, para. 89; No. 30/2019, para. 30; No. 36/2019, para. 36; No. 42/2019, para. 49; No. 51/2019, para. 59; No. 56/2019, para. 80; No. 76/2019, para. 38; and No. 82/2019, para. 76; Opinion No. 78/2020, para. 49.

¹² A/HRC/30/37, paras. 2–3.

¹³ *Ibid.*, para. 11, and annex, para. 47 (a). See also opinion No. 39/2018, para. 35.

¹⁴ Opinions No. 35/2018, para. 27; No. 83/2018, para. 47; No. 32/2019, para. 30; No. 33/2019, para. 50; No. 44/2019, para. 54; No. 45/2019, para. 53; No. 59/2019, para. 51; and No. 65/2019, para. 64.

prohibited conduct. Moreover, the determination of whether an offence has been committed appears to be left entirely to the discretion of the authorities.

60. As the Working Group has previously stated, the principle of legality requires that laws be formulated with sufficient precision so that the individual can access and understand the law, and regulate his or her conduct accordingly.¹⁵ The Working Group has emphasized in its reports that vague and imprecisely worded laws jeopardize the fundamental rights of those who wish to exercise their right to hold an opinion or exercise their freedoms of expression, of the press, of assembly and of religion, as well as to defend human rights, and that such laws are likely to result in arbitrary deprivation of liberty.

61. Following its visits to China in 1997 and 2004, the Working Group emphasized in its reports that charges involving vague and imprecise offences jeopardize the ability of individuals to exercise their fundamental rights and are likely to result in arbitrary deprivation of liberty. The Working Group recommended that those crimes be defined in precise terms and that legislative measures be taken to introduce an exemption from criminal responsibility for those who peacefully exercise their rights guaranteed by the Universal Declaration of Human Rights.¹⁶ Importantly, there is nothing to suggest that Mr. Ding, Mr. Zhang and Mr. Dai engaged in or incited violence as part of their activities that might have given cause to restrict their behaviour. On the contrary, they chose to work peacefully within the legal system of China by attending a peaceful meeting to discuss China's politics, future and their experiences as activists.

62. The Working Group considers that the charge on which Mr. Ding, Mr. Zhang and Mr. Dai were taken into custody is so vague that it is impossible to invoke a legal basis for their detention and continuing investigation in their cases.¹⁷ The Working Group calls upon the Government to repeal article 105(2) of the Criminal Law or bring it into line with its obligations under international human rights law.

63. The Working Group therefore considers that the deprivation of liberty of Mr. Ding, lacks legal basis as is thus arbitrary, falling under category I. Moreover, until they were released on bail on 18 June 2020, the detention of Mr. Zhang and Mr. Dai lacked a legal basis and was thus arbitrary under category I.

ii. Category II

64. The source alleges that Mr. Ding, Mr. Zhang and Mr. Dai have been detained as a result of peacefully exercising their rights to freedom of opinion, expression, and assembly and association. Specifically, it is submitted that their detention is in retaliation for attending a peaceful, private meeting on 7 and 8 December 2019 in Xiamen City where participants discussed politics, ideas about China's future as well as well as shared civil society experiences. According to the source, the authorities have detained and summoned for questioning several activists and lawyers from around different part of China and five have been detained under RSDL in connection with this meeting.

65. The Working Group considers that the conduct of Mr. Ding, Mr. Zhang and Mr. Dai and their work as human rights defenders is protected by the Universal Declaration of Human Rights, which recognizes 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 the right to freedom of peaceful assembly and association (arts. 19, 20 21(1)). The work of human rights defenders is also protected by the Declaration on the Right and Responsibility of Individuals, Groups and

¹⁵ See, for example, opinion No. 41/2017, paras. 98–101. Also Opinions No. 62/2018, para. 57; and No. 36/2019, para. 4

¹⁶ E/CN.4/1998/44/Add.2, paras. 42–53, 106–107 and 109 (c); and E/CN.4/2005/6/Add.4, paras. 73 and 78 (e). See also CAT/C/CHN/CO/5, paras. 36–37 (noting consistent reports that human rights defenders and lawyers continue to be charged, or threatened to be charged, with broadly defined offences as a form of intimidation).

¹⁷ See, for example, opinions, No. 22/2018, No. 62/2018, and A/HRC/48/55 para.48

Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, which states that everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels (arts. 1 and 5 (a), 9(3))¹⁸ and to communicate with nongovernmental organizations, and to have effective access in the conduct of public affairs.¹⁹

66. According to the UN Declaration on Human Rights Defenders, everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights.²⁰ The source has demonstrated that Mr. Ding, Mr. Zhang and Mr. Dai were detained for the exercise of their rights under the Declaration for their work as human rights defenders. The Working Group has determined that detaining individuals on the basis of their activities as human rights defenders violates their right to equality before the law and equal protection of the law under article 7 of the Universal Declaration of Human.²¹ The Working Group also reiterates that it applies a heightened standard of review in cases in which the freedom of expression, opinion, assembly and association is restricted or where human rights defenders are involved.²²

67. The Working Group therefore concludes that the detention of Mr. Ding, Mr. Zhang and Mr. Dai resulted from their peaceful exercise of their right to freedom of opinion expression, assembly and association as well as the right to take part in the conduct of public affairs, and was contrary to articles 19, 20 and 21 (1) of the Universal Declaration of Human Rights. Their detention is therefore arbitrary under category II. The Working Group refers this case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, and the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association for further consideration of the circumstances of the case and, if necessary, appropriate action.

iii. Category III

68. Given its finding that the detention of Mr. Ding, Mr. Zhang and Mr. Dai are arbitrary under category II, the Working Group emphasizes that no trial should take place in future.

69. The source submits that written notices received by Mr. Ding, Mr. Zhang and Mr. Dai were given to their lawyers who were denied the possibility to visit their clients on the grounds that such visits might endanger State security. The Working Group notes that Mr. Zhang and Mr. Dai are released on bail pending further investigation since 18 June 2020. Mr. Zhang have not been reachable from October 2020. It is believed that Mr. Zhang could be subject to close surveillance. Thus, the Working Group refers this case to the Working Group on Enforced or Involuntary Disappearances. In light of possibility of the domestic surveillance of Mr. Zhang upon his release on bail, the Working Group refers this case to the Special Rapporteur on the Right to Privacy.

¹⁸ See also General Assembly resolution 70/161, para. 8.

¹⁹ See General Assembly resolution 53/144, arts. 1, 5 (c), 6, 8–9 (3) (c) and 11. See also General Assembly resolution 70/161, para. 8, in which the Assembly calls upon States “to take concrete steps to prevent and put an end to the arbitrary arrest and detention of human rights defenders, and in this regard strongly urges the release of persons detained or imprisoned, in violation of the obligations and commitments of States under international human rights law, for exercising their human rights and fundamental freedoms”.

²⁰ GA RES 53/144 annex, articles 1 and 6(c). See also GA RES 74/146, para. 12..

²¹ Opinion Nos. 45/2019, 44/2019, 9/2019, 46/2018, 45/2018, 36/2018, 35/2018, 79/2017, 75/2017.

²² See opinions No. 57/2017, para. 46; No. 41/2017, para. 95; No. 62/2012, para. 39; No. 54/2012, para. 29; and No. 64/2011, para. 20. Domestic authorities and international supervisory bodies should apply the heightened standard of review of government action, especially when there are claims of a pattern of harassment (see opinion No. 39/2012, para. 45).

70. According to the source's submission, Mr. Ding has not been released and was being held in pre-trial detention. The Working Group also notes with concern the source's submission that Mr. Ding has been denied access to a lawyer throughout his detention.

71. The Working Group notes that access to counsel from the outset of detention is an essential safeguard in ensuring that the detainee can challenge the legal basis for detention.²³ The Working Group observes with concern the various obstructive measures undertaken by the authorities to restrict or deny access to legal counsel. The Working Group observes that the abovementioned individuals are being deprived of their right to legal counsel and representation, which is procedurally inherent in the right to liberty and security and the prohibition of arbitrary detention, in violation of articles 3 and 9 of the Universal Declaration of Human Rights; principles 15, 17 and 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; and principles 1, 5, 7, 8, 21 and 22 of the Basic Principles on the Role of Lawyers.

72. According to principle 9 and guideline 8 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, persons deprived of their liberty have the right to legal assistance by counsel of their choice, at any time during their detention, including immediately after the moment of apprehension, and must be promptly informed of this right upon apprehension; nor should access to legal counsel be unlawfully or unreasonably restricted.²⁴

73. The Working Group agrees with the submission made by the source that the denial of access to legal counsel increases the risk of ill-treatment.²⁵ In the case of Mr. Ding, the source submits that there are credible allegations that he was tortured while in detention under RSDL and this included sleep deprivation with blaring noise, and exposure to fluorescent lights for 24 hours.

74. Similarly, the source submits that Mr. Dai who has been released on bail on 18 June 2020 is reportedly recovering from torture suffered in RSDL where authorities forced him to sit in one position for a long time and restricted his food intake. As a result, he has muscular atrophy around the waist and a herniated lumbar, intervertebral disk and knee joint issues. When he returned home, Mr. Dai needed assistance going up and down the stairs. While he is now better, he reportedly continues to face problems with his waist and knees. The Working Group thus finds that Principle 6 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment has been violated.

75. In relation to the allegations of torture, the Working Group is of the view that these allegations strengthen the conclusion that Mr. Ding Jiaxi, and Mr. Dai Zhenya's right to a fair trial is likely to have been jeopardised, adding weight to its conclusion that their detention falls within category III. The Working Group has consistently concluded in its opinions that when it is not possible for a person who is subjected to torture or other forms of ill-treatment or punishment to prepare an adequate defence for a trial that respects the equality of both parties before the judicial proceedings.²⁶ Ill-treatment of detainees under prosecution is a denial of the fundamental principles of a fair trial.

76. For these reasons, the Working Group finds that the fair trial rights of Mr. Ding, Mr. Zhang and Mr. Dai have been violated and as such their detention is arbitrary under category III.

iv. Category V

77. The source submits that Mr. Ding, Mr. Zhang and Mr. Dai were deprived of their liberty on discriminatory grounds, that is, owing to their status as human rights defenders.

²³ Opinion No. 40/2020, para. 29.

²⁴ A/HRC/30/37, annex. See also A/HRC/45/16, para. 55.

²⁵ Opinion 11/2020 para. 54 and Opinion 82/2020 para. 67.

²⁶ Opinion No. 32/2019, para. 42.

78. According to the information received, they had been detained, along with other activists for attending a peaceful meeting of activists. The reason for their detention is based on their activities as human rights defenders. The Working Group therefore agrees that they were targeted because of their activities as human rights defenders.

79. The Working Group finds that the circumstances of their arrest are consistent with a pattern of harassment by the authorities against them. The source submits that all three men have been previously detained. In addition, the arrest of Mr. Dai involved tactics of intimidation, such a power cut and the circling of his family members by 10 plain-clothed policemen who handcuffed Mr. Dai before conducting a raid on his house. It is unclear why so many policemen were needed to arrest Mr. Dai. Moreover, Mr. Dai who has been released on bail, has been repeatedly warned that if he contacts and meets with dissidents, human rights lawyers and defenders he might be taken into custody any time. As such, it would appear that he is serving his bail under the threat of arrest should he resume his activities as a human rights defender. The source also submits that he is required to report to the police station and to take photos at least once a month. The source also alleges repeated changes in the charges against Mr. Zhang to justify raids on his properties. These tactics suggest a pattern of harassment and intimidation that appears to subvert the law enforcement and legal processes.

80. In the case of Mr. Ding, in April 2015, the Working Group in its Opinion 3/2015 found that his detention was arbitrary and asked for his immediate release. He was released in 2016 after serving full sentence of 3,5 years. The Working Group notes the source's submission that Mr. Ding's request for bail was not granted and he remains in *incommunicado* detention. In the absence of information from the Government, the Working Group is concerned at the differential treatment of Mr. Ding in comparison with the other accused has an element of reprisal against him that is indicative of discriminatory treatment, leading to his continued *incommunicado* detention.²⁷ The Working Group is also gravely concerned by the source's submission that there are credible allegations that Mr. Ding was tortured while in detention under RSDL.

81. There appears to be a pattern in China of detaining human rights defenders for their work, and these cases are further examples. These cases follow a familiar pattern of arrest that does not comply with international norms; lengthy detention pending trial with no access to judicial review; denial of access to legal counsel; *incommunicado* detention; prosecution under vaguely worded criminal offences for the peaceful exercise of human rights; and denial of access to the outside world.²⁸ In Working Group's view, this pattern indicates a systemic problem.²⁹

82. Moreover, in the discussion above concerning category II, the Working Group established that the detention of Mr. Ding, Mr. Zhang and Mr. Dai resulted from the peaceful exercise of their rights under international law. When detention has resulted from the active exercise of civil and political rights, there is a strong presumption that the detention also constitutes a violation of international law on the grounds of discrimination based on political or other views.³⁰

83. For these reasons, the Working Group finds that Mr. Ding, Mr. Zhang and Mr. Dai were deprived of their liberty on discriminatory grounds, that is, owing to their status as human rights defenders, and on the basis of their political or other opinion. Their detention violates articles 2 and 7 of the Universal Declaration of Human Rights and is arbitrary according to category V. The Working Group refers the present case to the Special Rapporteur on the situation of human rights defenders.

²⁷ See, for example, Opinion No. 36/2016, paras. 29 and 35.

²⁸ See for example Opinions 78/2020, 82/2020, 11/2020, 32/2020 and 36/2019.

²⁹ See also A/HRC/48/55, paras 46-50.

³⁰ Opinion Nos. 59/2019, para. 79; 13/2018, para. 34; 88/2017, para. 43.

v. Concluding Remarks

84. In its 30-year history, the Working Group has found China in violation of its international human rights obligations in numerous cases.³¹ The Working Group is concerned that this indicates a systemic problem with arbitrary detention in China, which amounts to a serious violation of international law. The Working Group recalls that under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of the rules of international law may constitute crimes against humanity.³²

Disposition

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

The deprivation of liberty of Ding Jiayi, Zhang Zhongshun and Dai Zhenya, being in contravention of articles, 2, 3, 6, 7, 8, 9, 10, 11, 19, 20 and 21 of the Universal Declaration of Human Rights is arbitrary and falls within categories I, II, III and V.

86. The Working Group requests the Government of China to take the steps necessary to remedy the situation of Mr. Ding, Mr. Zhang and Mr. Dai without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights. The Working Group urges the Government to accede to the International Covenant on Civil and Political Rights.

87. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Ding immediately, to unconditionally release Mr. Zhang and Mr. Dai and to accord Mr. Ding, Mr. Zhang and Mr. Dai an enforceable right to compensation and other reparations, in accordance with international law. In the current context of the global coronavirus disease (COVID-19) pandemic and the threat that it poses in places of detention, the Working Group calls upon the Government to take urgent action to ensure the immediate and unconditional release of Mr. Ding, Mr. Zhang and Mr. Dai.

88. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary detention of Mr. Ding, Mr. Zhang and Mr. Dai, and to take appropriate measures against those responsible for the violation of their rights.

89. The Working Group requests the Government to bring its laws, particularly Article 105(2) of China's Criminal Code, into conformity with the recommendations made in the

³¹ See decisions No. 43/1993, No. 44/1993, No. 53/1993, No. 63/1993, No. 64/1993, No. 65/1993, No. 66/1993, No. 46/1995 and No. 19/1996, and opinions No. 30/1998, No. 1/1999, No. 2/1999, No. 16/1999, No. 17/1999, No. 19/1999, No. 21/1999, No. 8/2000, No. 14/2000, No. 19/2000, No. 28/2000, No. 30/2000, No. 35/2000, No. 36/2000, No. 7/2001, No. 8/2001, No. 20/2001, No. 1/2002, No. 5/2002, No. 15/2002, No. 2/2003, No. 7/2003, No. 10/2003, No. 12/2003, No. 13/2003, No. 21/2003, No. 23/2003, No. 25/2003, No. 26/2003, No. 14/2004, No. 15/2004, No. 24/2004, No. 17/2005, No. 20/2005, No. 32/2005, No. 33/2005, No. 38/2005, No. 43/2005, No. 11/2006, No. 27/2006, No. 41/2006, No. 47/2006, No. 32/2007, No. 33/2007, No. 36/2007, No. 21/2008, No. 29/2008, No. 26/2010, No. 29/2010, No. 15/2011, No. 16/2011, No. 23/2011, No. 29/2011, No. 7/2012, No. 29/2012, No. 36/2012, No. 51/2012, No. 59/2012, No. 2/2014, No. 3/2014, No. 4/2014, No. 8/2014, No. 21/2014, No. 49/2014, No. 55/2014, No. 3/2015, No. 39/2015, No. 11/2016, No. 12/2016, No. 30/2016, No. 43/2016, No. 46/2016, No. 4/2017, No. 5/2017, No. 59/2017, No. 69/2017, No. 81/2017, No. 22/2018, No. 54/2018, No. 62/2018, No. 15/2019, No. 35/2019, No. 36/2019, No. 72/2019, No. 76/2019 and No. 11/2020.

³² A/HRC/13/42, para. 30; and opinions No. 1/2011, para. 21; No. 37/2011, para. 15; No. 38/2011, para. 16; No. 39/2011, para. 17; No. 4/2012, para. 26; No. 38/2012, para. 33; No. 47/2012, paras. 19 and 22; No. 50/2012, para. 27; No. 60/2012, para. 21; No. 9/2013, para. 40; No. 34/2013, paras. 31, 33 and 35; No. 35/2013, paras. 33, 35 and 37; No. 36/2013, paras. 32, 34 and 36; No. 48/2013, para. 14; No. 22/2014, para. 25; No. 27/2014, para. 32; No. 34/2014, para. 34; No. 35/2014, para. 19; No. 36/2014, para. 21; No. 44/2016, para. 37; No. 60/2016, para. 27; No. 32/2017, para. 40; No. 33/2017, para. 102; No. 36/2017, para. 110; No. 51/2017, para. 57; and No. 56/2017, para. 72.

present opinion and with the commitments made by China under international human rights law.

90. In accordance with paragraph 33(a) of its methods of work, the Working Group refers this case to: (i) the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, (ii) Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, (iii) Special Rapporteur on the Right to Privacy (iv) the Special Rapporteur on the situation of human rights defenders, and (v) the Working Group on Enforced or Involuntary Disappearances for appropriate action.

91. The Working Group requests the Government to disseminate the present opinion through all available means and as widely as possible.

Follow-up procedure

92. 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 action taken in follow-up to the recommendations made in the present opinion, including:

- (a) Whether Mr. Ding has been released and, if so, on what date;
- (b) Whether Mr. Zhang and Mr. Dai have been released unconditionally and, if so, on what date;
- (c) Whether compensation or other reparations have been made to Mr. Ding, Mr. Zhang and Mr. Dai;
- (d) Whether an investigation has been conducted into the violation of the rights of Mr. Ding, Mr. Zhang and Mr. Dai and, if so, the outcome of the investigation;
- (e) Whether any legislative amendments or changes in practice have been made to harmonise the laws and practices of China with its international obligations in line with the present opinion;
- (f) Whether any other action has been taken to implement the present opinion.

93. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example through a visit by the Working Group.

94. The Working Group requests the source and the Government to provide the above-mentioned information within six months of the date of transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

95. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them 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.³³

[Adopted on 8 September 2021]

³³ Human Rights Council resolution 42/22, paras. 3 and 7.