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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-fourth session, 24 April–3 May 2019

Opinion No. 20/2019 concerning Zhen Jianghua and Qin Yongmin (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 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 3 August 2018, the Working Group transmitted to the Government of China a communication concerning Zhen Jianghua and Qin Yongmin. The Government replied to the communication on 21 September 2018. The State is not a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his 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. Zhen Jianghua, born on 12 December 1985, is a national of China. He usually resides in Zhuhai City, Guangdong Province.

5. According to the source, Mr. Zhen is a human rights activist and a journalist, who has in recent years led campaigns on the online platform “human rights campaign in China”, which publishes information about alleged human rights abuses in the country. He has also helped to establish and was active with a group founded in 2012 to provide technical assistance to bypass the Government’s censorship in cyberspace. In addition, according to the source, Mr. Zhen has been a vocal supporter of victims of the “709 crackdown” launched in July 2015 against human rights lawyers in China. In this context, he joined demonstrations to call for the release of detained lawyers and activists.

6. Qin Yongmin, born on 11 August 1953, is a national of China. He usually resides in Wuhan City, Hubei Province.

7. The source states that Mr. Qin is a democracy activist and a dissident whose advocacy dates back to the late 1970s. At the time of being taken into custody, Mr. Qin was the head of a group that he had founded, named “Human Rights Watch in China”, also known as the “Rose Team”, which has promoted democracy and the protection of rights. The group has issued online statements denouncing governmental policies and occasionally gathered for discussions about political and social issues. The group, mostly consisting of citizens who present individual rights complaints to authorities, has repeatedly tried to register with the authorities in order to operate legally as a formal non-governmental organization. However, the source states that these efforts were consistently met with police harassment and persecution of the group’s members.

8. The source also states that, in 1980, Mr. Qin assisted in establishing the China Democracy Party. In January 1993, he participated in the launch of the “Peace Charter” movement in Beijing, which called for democracy in China, demanding redress for victims of the 1989 Tiananmen massacre and advocating for the release of persons deprived of their liberty for political reasons. The source further states that, in retaliation for his long-term rights advocacy, the authorities have previously imprisoned Mr. Qin on two occasions for a total of 20 years. They also sent Mr. Qin to a camp for re-education through labour for two years.

Arrest and detention of Zhen Jianghua

9. The source indicates that, on 1 September 2017, Mr. Zhen was taken from his apartment in Zhuhai City by police officers in plain clothes. Later that night, approximately 20 officers took Mr. Zhen back to his residence and confiscated his mobile telephones and computers.

10. On 2 September 2017, the police returned to Mr. Zhen’s residence to conduct a second search. It is reported that, on that occasion, the officials took promotional materials and documents related to the “human rights campaign in China” platform. Allegedly, the police did not present a detention notice or warrant to search Mr. Zhen’s apartment.

11. The source states that, on 2 September 2017, Mr. Zhen was detained. Reportedly, his detention was ordered by the Zhuhai Municipal Public Security Bureau. Mr. Zhen was initially held at Zhuhai City No. 1 Detention Centre. By mid-December 2017, the police had placed him under “residential surveillance at a designated place of residence”, the location of which has not been disclosed.

12. The source submits that the legal basis for the arrest of Mr. Zhen is article 105 (2) of the Criminal Law (“inciting subversion of State power”), which stipulates a fixed-term imprisonment of not more than five years, criminal detention, public surveillance or deprivation of political rights for those who incite others by spreading rumours or slander or any other means to subvert the State power or overthrow the socialist system.

13. According to the source, the detention of Mr. Zhen featured numerous legal violations. He was taken away on 1 September 2017 and placed in criminal detention the following day. His whereabouts were unknown for several days after the police took him into custody, as his family did not receive a detention notice until 7 September 2017. The source argues that such acts by the authorities violate article 83 of Criminal Procedure Law, which stipulates that the family of a detainee must be informed within 24 hours of the individual being taken into custody.

14. The source also submits that the authorities have held Mr. Zhen incommunicado and have not allowed him to have access to a lawyer. On 14 September 2017, one of Mr. Zhen's lawyers requested to see him, but the police explicitly told him not to return to the detention centre or to "spread speculation" about Mr. Zhen's case on social media. Similarly, the authorities warned Mr. Zhen's family members and supporters not to speak publicly about his case.

15. By mid-December 2017, Mr. Zhen had been placed under "residential surveillance at a designated place of residence", a form of detention codified in article 73 of the Criminal Procedure Law. The source argues that this form of detention amounts to incommunicado detention.

16. The source reiterates that, since the detention of Mr. Zhen in September 2017, his family members and lawyers have requested to see him on many occasions; however, the authorities have refused all of these requests. International and domestic human rights groups have reported on the detention of Mr. Zhen and have demanded his release.

17. According to the source, the period of "residential surveillance" concluded on 29 March 2018. On or around 30 March 2018, Mr. Zhen was likely transferred to the Zhuhai City No. 2 Detention Centre. The source also notes that neither the lawyer nor family of Mr. Zhen have received any formal notification of this transfer.

18. On 13 July 2018, another lawyer went to visit Mr. Zhen at Zhuhai City No. 2 Detention Centre, but was stopped from seeing him by a national security officer. The officer reportedly informed him that the case had already been recommended for indictment and sent to the local prosecutor's office. The lawyer, believing that the police had concluded their investigation of the case, reiterated his request to meet his client. Subsequently, a police officer in the detention centre produced a copy of a letter that had been supposedly handwritten by Mr. Zhen, stating that on a date prior to 2 September 2017, Mr. Zhen had dismissed the legal counsel appointed by his family. The source notes that it was impossible to verify with Mr. Zhen whether this was true. The authorities at the detention centre refused both to give the lawyer a copy of the document or take a photograph of it.

19. The source maintains that the human rights advocacy activities of Mr. Zhen had for years attracted the attention of the authorities and that his current detention is retaliation for those activities. At the time he was taken into custody, Mr. Zhen was leading campaigns on the "human rights campaign in China" online platform. The source argues that his detention, which occurred just weeks before the 19th National Congress of the Communist Party of China, is a sign of an increasing crackdown on civil society by the Government. More specifically, it is noted that the detention of Mr. Zhen follows the detention of several heads of advocacy groups that use the Internet to monitor and report on the human rights situation in the country.

20. The source adds that, in the past few years, and prior to his current detention, Mr. Zhen had been detained and harassed by the police in retaliation for his human rights advocacy. For instance, he was briefly detained in September 2016 when he went to Wukan village in Guangdong to speak with local residents protesting against alleged corruption and the detention of a village leader. Beginning in 2010, the authorities in Zhuhai had allegedly forced Mr. Zhen to change his residence about once a year. Every time Mr. Zhen moved residence, the police would exert pressure on landlords not to rent accommodation to him. On several occasions Mr. Zhen was also prohibited to travel overseas.

21. The source concludes that Mr. Zhen's detention violates the peaceful exercise of his rights and freedoms guaranteed under articles 7, 9, 13, 18, 19 and 20 of the Universal

Declaration of Human Rights. It therefore falls within categories I, II and III of the Working Group.

22. Mr. Zhen was the subject of a joint allegation letter (AL CHN 2/2018) sent on 24 January 2018 by the Working Group; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the situation of human rights defenders; and the Special Rapporteur on the independence of judges and lawyers. The Working Group acknowledges the reply from the Government of China received on 7 March 2018.

Arrest, detention and conviction of Mr. Qin

23. The source submits that Mr. Qin was taken into custody on 15 January 2015, at his residence in Wuhan City, Hubei Province, immediately after completing a 10-day administrative detention for allegedly organizing an illegal assembly.

24. The source notes that officials from the Wuhan City Security Bureau and the Qingshan District Branch of the Wuhan Municipal Public Security Bureau did not show any arrest warrant or other decision by a public authority.

25. According to the source, having been taken into custody on 15 January 2015, Mr. Qin was forcibly disappeared for approximately 70 days. His family did not receive a detention notice. The source argues that this violated the provisions of article 83 of the Criminal Procedure Law, which stipulate that a detainee's family must be informed within 24 hours of an individual being taken into custody. The source states that Mr. Qin was guarded by Wuhan public security officers and deprived of access to a legal counsel.

26. The source reports that, after his detention, Mr. Qin was taken to Baxian Island along with a family member. The family member remained missing until early February 2018. The source notes that Mr. Qin was among more than 10 individuals belonging to the Rose Team who were forcibly disappeared, criminally detained or formally arrested by the police in 2015 and 2016.

27. According to the source, on 30 March 2015, Mr. Qin was criminally detained and transferred to Wuhan City No. 2 Detention Centre. On 6 May 2015, Mr. Qin was formally arrested by Wuhan Municipal Public Security Bureau officials in accordance with an indictment based on suspicion of subverting State power, issued by the Wuhan City People's Procuratorate.

28. The source specifies that the legal basis for the arrest was article 105 (2) of the Criminal Law, that stipulates a fixed-term imprisonment of not more than five years, criminal detention, public surveillance or deprivation of political rights to those who incite others by spreading rumours or slander or any other means to subvert the State power or overthrow the socialist system.

29. The source alleges that the legal basis for detention was article 105 (1) of the Criminal Law, which provides for not less than 10 years' fixed-term imprisonment or life imprisonment for those who organize, plot or carry out a scheme to subvert State power or overthrow the socialist system, and to ringleaders and others who commit major crimes; 3 to 10 years' fixed-term imprisonment for active participants therein; and not more than 3 years' imprisonment for participants.

30. The source submits that Mr. Qin has spent more than three years in police custody without being brought before a judge and argues that this constitutes an unreasonably prolonged pretrial detention according to international human rights standards. Before indicting Mr. Qin on 17 June 2016, the Wuhan City People's Procuratorate extended the period of investigation into his case on three occasions. The source argues that this often indicates weak evidence in a criminal case.

31. The source also notes that, though Mr. Qin was arrested in May 2015 for inciting subversion, he was indicted for a more serious criminal charge that prescribes a longer prison sentence. The authorities did not reveal to Mr. Qin's lawyer the reason for this change.

32. According to the source, the authorities scheduled the trial at first instance to take place on 29 December 2017, but then suddenly cancelled it without setting a new date for the proceedings.

33. The source reports that international and domestic human rights groups have reported on the detention of Mr. Qin and demanded his release. Prior to his trial, Mr. Qin's lawyers applied for him to be freed on bail, consistently maintained his innocence and requested that anyone with evidence against him be allowed to testify in court.

34. On 11 May 2018, the Wuhan City Intermediate People's Court initiated proceedings concerning the case of Mr. Qin. On 12 May 2018, the Court concluded the trial, but did not announce the verdict.

35. According to the source, the authorities restricted the movement of several supporters of Mr. Qin who wished to attend the hearing or to gather outside the courthouse to show their solidarity. It is also reported that, during the trial, the presiding judge often interrupted Mr. Qin and his lawyers, thus preventing them from exercising their right to defence. At one point, after an argument with the presiding judge, Mr. Qin lost consciousness and was removed from the courtroom. The source notes that this was partly due to Mr. Qin's weakened physical state. After returning to the courtroom, Mr. Qin remained silent for the remainder of the proceedings.

36. The source adds that, on 11 May 2018, the judge did not allow Mr. Qin's lawyers to leave the court in order to eat a meal, thus restricting their freedom of movement. On 12 May 2018, after the trial had ended, Mr. Qin's lawyers refused to sign the trial transcript in protest against allegedly unjust court proceedings.

37. On the morning of 28 May 2018, Mr. Qin's lawyers went to Wuhan City No. 2 Detention Centre and requested to meet with their client. A detention centre officer told them that Mr. Qin was continuing to suffer from high blood pressure. The lawyers were told to go through higher level authorities or the court to request permission to visit Mr. Qin. The source reports that the lawyers were ultimately not allowed to visit their client.

38. The indictment alleged that the expression of political beliefs by Mr. Qin through his writing constituted a criminal act. The source specifies that Mr. Qin advocated for political change, with the goal of moving China from a one-party dictatorship to political pluralism and then achieving a fair multi-party system under a constitutional government. In addition, he wrote about the fundamental principle of national reconciliation, the supremacy of human rights, positive interaction and peaceful transition.

39. The source maintains that the main reasons given in the indictment for prosecuting Mr. Qin reflect the suppression by the Government of his rights to free expression, assembly and association. It was alleged that Mr. Qin had circulated writings about democracy and been involved in a series of activities with the aim of subverting State power, including writing online essays, organizing advocacy for the China Democracy Party, forming the Rose Team and contacting overseas groups.

40. The source alleges that, on 11 July 2018, Mr. Qin was sentenced to 13 years in prison after the Wuhan City Intermediate People's Court had found him guilty of "subversion of State power".

41. The source observes that, for decades prior to his current detention, Mr. Qin was targeted by the authorities in retaliation for his exercising his right to freedom of expression, assembly and association. In addition to being sentenced to two prison terms and a period in re-education through labour, Mr. Qin was taken into police custody for questioning or faced some other form of deprivation of liberty on more than 40 occasions in retaliation for his activities in the field of human rights advocacy.

42. The source argues that the deprivation of liberty of Mr. Qin violates his rights guaranteed under articles 7, 9, 10, 13, 18, 19 and 20 of the Universal Declaration of Human Rights, thus falling under categories I, II and III of the Working Group.

43. Mr. Qin was previously the subject of a joint urgent appeal (JUA CHN 5/2011) sent on 3 March 2011 by the Working Group; the Chair-Rapporteur of the Working Group on Enforced or Involuntary Disappearances; the Special Rapporteur on the independence of

judges and lawyers; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the situation of human rights defenders; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

Response from the Government

44. On 3 August 2018, the Working Group transmitted the allegations made by the source to the Government through its regular communication procedure. The Working Group requested the Government to provide, before 2 October 2018, detailed information about the current situation of Mr. Zhen and Mr. Qin and any comments on the source's allegations. Moreover, the Working Group called upon the Government to ensure the physical and mental integrity of Mr. Zhen and Mr. Qin.

45. According to the Government's response received on 21 September 2018, Mr. Zhen, accused of inciting the subversion of State power, was placed under criminal detention in accordance with the law by Guangdong Province public security on 1 September 2017, and under "residential surveillance at a designated place of residence" on 29 September 2017. On 10 August 2018, the Guangdong Province Zhuhai City Intermediate People's Court held a first-instance trial and will announce a verdict at a later date.

46. The Government adds that Mr. Qin, accused of subverting State power, was placed under criminal detention in accordance with the law in March 2015. His arrest was approved by the procuratorial organs in May 2015 with an indictment submitted in June 2016. On 11 July 2018, the Wuhan City Intermediate People's Court held a public verdict hearing at first instance, finding him guilty of subverting State power and accordingly sentencing him to fixed-term imprisonment of 13 years and deprivation of political rights for 3 years.

47. The Wuhan City Intermediate People's Court held that, after his release in 2010 upon completion of his sentence for his previous conviction of subverting State power, Mr. Qin expressed dissatisfaction with State power and the socialist system. He continued to subvert State power by writing articles and publishing books, using the Internet and overseas media, declaring an ideology of subverting State power and pronouncing objectives, strategies and methods for subverting such power, and founded and ran an illegal organization to that end. The Government states that the same court issued its verdict in accordance with the evidence, nature, circumstances and severity of his crime as the ringleader and repeat offender in a plot to subvert the fundamental system contained in the Constitution.

48. The Government adds that Mr. Qin is a criminal sentenced by the judiciary according to the law and that his sentence is unrelated to the issue of human rights. China is a country ruled by law, and anyone who violates the law, regardless of their identity, should be punished according to the law.

49. Regarding the source's claim that Mr. Qin's supporters were not allowed to attend his trial and that his defence lawyers were not able to fully exercise their rights, the Government states that a first-instance case trial should be held in public in accordance with article 183 of the Criminal Procedure Law and article 186 of the Supreme People's Court's judicial interpretation of the Criminal Procedure Law. However, the proceedings before the Wuhan City Intermediate People's Court on 11 and 12 May 2018 were not open to the public since the said provision explicitly provides for exceptions in cases involving State secrets or personal privacy. However, the judgment was announced on 11 July 2018 in the presence of Mr. Qin's family and representatives.

50. According to the Government, the collegial panel of judges convened a pretrial meeting with the prosecutors, Mr. Qin and his lawyers to consult on the presentation of the evidence and other trial-related issues, during which his family fully expressed their views. During the pretrial meeting, Mr. Qin fully expressed his opinions and during the trial proceedings and through repeated inquiries before the collegial panel, neither Mr. Qin nor his lawyers expressed new opinions. Following the trial, Mr. Qin's lawyers again submitted defence statements to the collegial panel through judicial administrative organs.

51. The Government rejects the source's claim that Mr. Zhen and Mr. Qin have faced retaliation for their human rights activities, as China is a country governed by law in which no place or person is outside the law. Because the two individuals have been punished in accordance with the law and the principle of equality before the law, the matter is unrelated to the issue of human rights.

Further comments from the source

52. In a response dated 16 November 2018, the source rebuts the claims made by the Government that the cases of Mr. Zhen and Mr. Qin are unrelated to the issue of human rights; that they involve "State secrets", which require proceedings in camera; and that the two individuals have not been subjected to retaliation for their human rights activities. The source reiterates that the persecution of Mr. Zhen and Mr. Qin is part of an ongoing and deepening crackdown against Chinese human rights defenders and their exercise of the rights to free and peaceful expression, assembly and association. According to the source, the application of vague charges involving "subversion" reflect the Government's systematic practice of charging and prosecuting human rights defenders for political crimes.

53. The source adds that the Government has not responded to the alleged deprivation of the legal and human rights of Mr. Zhen. The source states that, in contravention of international and domestic legal norms, his family has never received notice of his arrest or detention. Mr. Zhen has been held in continuous incommunicado detention with no access to the lawyers chosen by his family to represent him. Neither the lawyers hired by his family nor his family members received any advance notice of the trial from either the court or from the lawyers appointed by the Government. These lawyers were assigned to him after he supposedly dismissed his family-hired lawyers in a decision that cannot be independently verified because of his continued incommunicado detention; the notice of the trial appeared only for a short time on an official procuratorial website and was posted nearly two weeks after the proceedings.

54. With regard to Mr. Qin, the source maintains that the indictment and judgment against him largely relate to his writings on democracy and human rights, his various associations with fellow human rights defenders and independent groups, and his activism in various groups and associations, in particular the Rose Team, which he founded. The Rose Team is mostly made up of "petitioners", individuals who present personal grievances about alleged human rights abuses to officials above the local level of government, and who themselves are often subjected to further rights violations in retaliation for their search for justice.

55. In an statement published online on 5 May 2018, six days before his trial, and addressed to the Working Group and other human rights bodies, Mr. Qin noted that the criminal charges against him concerned his demand that the Government respect its international human rights obligations, including those contained in the Universal Declaration of Human Rights and the Covenant.¹

56. Contrary to the assertion that during the pretrial meeting, Mr. Qin fully expressed his opinions; during the trial proceedings and through repeated inquiries before the collegial panel, neither Mr. Qin nor his lawyers expressed new opinions; and following the trial, Mr. Qin's lawyers again submitted defence statements to the collegial panel through judicial administrative organs, the source submits that such claims do not accurately reflect what happened. It notes that, during the court hearing on 11 May 2018, Mr. Qin lost consciousness. His poor physical state severely compromised his ability to take part in the proceedings, including in responding to the questions of the presiding judge. However, the court ignored the request made by his defence team to have a qualified physician examine his condition and insisted that he continue to participate in the proceedings. His lawyers refused to file defence statements after the trial in protest at the unjust judicial proceedings. They also refused to submit opinions about the presentation of evidence and other trial-related issues in a pretrial meeting convened by the collegial panel in protest against the

¹ Mr. Qin's statement was released by a human rights organization based in China, but has not been submitted to the special procedures of the Human Rights Council.

provisions of the Criminal Procedure Code that require such submissions to the collegial panel given that it does not adjudicate the case in practice.

57. Lastly, the source maintains that the case of Mr. Qin does not involve “State secrets” that require closed hearings. Among other things, the authorities cited his receipt of financial contributions through international money transfers, which are a widely used form of lawful transaction.

Discussion

58. The Working Group thanks the source and the Government for their submissions in relation to the arrests and detention of Mr. Zhen and Mr. Qin.

59. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has presented 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 (A/HRC/19/57, para. 68).²

60. The Working Group wishes to reaffirm that the Government has an obligation to respect, protect and fulfil the right to liberty and that any national law allowing deprivation of liberty should be made and implemented in conformity with the relevant international standards set forth in the Universal Declaration and other applicable international and regional instruments.³ Consequently, even if the detention is in conformity with national legislation, regulations and practices, the Working Group is entitled and obliged to assess the judicial proceedings and the law itself to determine whether such detention is also consistent with the relevant provisions of international human rights law.⁴

Category I

61. The Working Group will first consider whether there have been violations under category I, which concerns deprivation of liberty without any legal basis being invoked.

62. The source alleges, and the Government does not contest, that Mr. Zhen and Mr. Qin were not presented with an arrest warrant or informed of the reasons for their arrest at the time of their arrest, 1 September 2017 and 15 January 2015 respectively, and that they were not promptly informed of any charges against them. While the Government states that they were arrested in accordance with its domestic law, that law must meet the threshold of international human rights standards.

63. The international norms on detention include the right to be presented with an arrest warrant to ensure the exercise of effective control by a competent, independent and impartial judicial authority, which is procedurally inherent in the right to liberty and security of person and the prohibition of arbitrary deprivation of liberty 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

² See, for example, opinions No. 50/2017, para. 54; No. 61/2017, para. 26; No. 62/2017, para. 45; No. 69/2017, para. 24; No. 70/2017, para. 48; No. 75/2017, para. 34; No. 79/2017, para. 47; No. 11/2018, para. 41; No. 19/2018, para. 25; No. 35/2018, para. 24; No. 36/2018, para. 37; No. 37/2018, para. 27; No. 40/2018, para. 42; No. 43/2018, para. 71; No. 44/2018, para. 78; No. 45/2018, para. 39; No. 46/2018, para. 45; No. 52/2018, para. 68; No. 67/2018, para. 69; No. 70/2018, para. 31; No. 75/2018, para. 57; No. 78/2018, para. 67; No. 79/2018, para. 68; and No. 90/2018, para. 29.

³ General Assembly resolution 72/180, fifth preambular paragraph; Human Rights Council resolution 10/9, para. 4 (b); and opinions No. 41/2014, para. 24; No. 28/2015, para. 41; No. 76/2017, para. 62; No. 83/2017, paras. 51 and 70; No. 88/2017, para. 32; No. 94/2017, para. 59; No. 38/2018, para. 60; No. 68/2018, para. 37; No. 82/2018, para. 25; and No. 87/2018, para. 51.

⁴ See, for example, opinions No. 1/1998, para. 13; No. 5/1999, para. 15; No. 1/2003, para. 17; No. 33/2015, para. 80; No. 94/2017, paras. 47–48; No. 38/2018, para. 60; No. 68/2018, para. 37; No. 82/2018, para. 25; and No. 87/2018, para. 51.

Imprisonment.⁵ The Working Group finds no valid grounds, such as arrest *in flagrante delicto*, to justify an exception to this principle in the present case.

64. The Working Group also finds that, in order to ascertain a legal basis for deprivation of liberty, the authorities should have informed Mr. Zhen and Mr. Qin of the reasons for their arrest, at the time of arrest, and of the charges against them promptly; the failure to do so violates article 9 of the Universal Declaration of Human Rights and principle 10 of the Body of Principles, and renders their arrest devoid of legal basis.

65. The source further maintains, and the Government does not dispute, that Mr. Zhen and Mr. Qin were held incommunicado for the first 6 days and 70 days, respectively, of their detention. Such deprivation of liberty, entailing a refusal to disclose the fate or whereabouts of a person or to acknowledge their detention, lacks any valid legal basis under any circumstance and is 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.⁶

66. The Working Group notes that neither Mr. Zhen nor Mr. Qin was brought promptly before a judge, within 48 hours of the arrest barring exceptional circumstances, in accordance with the international standard,⁷ or afforded the right to take proceedings before a court so that it may decide without delay on the lawfulness of the detention in accordance with articles 3, 8 and 9 of the Universal Declaration and principles 11, 32 and 37 of the Body of Principles. In addition, 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 indicates 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 (A/HRC/30/37, paras. 2–3). This right, which is in fact a peremptory norm of international law, applies to all forms and situations of deprivation of liberty.⁸

67. In Mr. Zhen’s case, he was held incommunicado under “residential surveillance at a designated place of residence”. The Working Group, in this regard, considers that such a term lacks clarity since, as in the case of Mr. Zhen, the person subject to it is confined not to his or her usual place of residence but “a designated place of residence”, which may well be a prison. The State prosecutors and the public security organs have, in effect, the power to hold a person incommunicado without judicial oversight. In the Working Group’s view, such an enabling act for the law enforcement officials is devoid of legal basis.

68. The Working Group therefore considers that the arrest, detention and imprisonment of Mr. Zhen and Mr. Qin lack a legal basis and are thus arbitrary, falling under category I.

Category II

69. The Working Group recalls that the rights to freedom of movement and residence, freedom to seek asylum, freedom of thought, conscience and religion, freedom of opinion and expression, freedom of peaceful assembly and association, participation in political and public affairs, legal equality and non-discrimination, and the protection of persons belonging to ethnic, religious or linguistic minorities are among the most fundamental human rights, deriving from the inherent dignity of the human person, reaffirmed and ensured by the international community in articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights.

⁵ See, for example, opinions 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.

⁶ See General Assembly 47/133. See also opinion No. 82/2018, para. 28.

⁷ See opinions No. 57/2016, paras. 110–111; No. 2/2018, para. 49; No. 83/2018, para. 47; No. 11/2019, para. 63; and No. 30/2019, para. 30.

⁸ Opinion No. 39/2018, para. 35.

70. The source asserts that Mr. Zhen and Mr. Qin have been arbitrarily deprived of their liberty for legitimately exercising their fundamental human rights as human rights defenders, while the Government claims that the said exercise constitutes the subversion of State power and an attempt to overthrow the socialist system for the purposes of its Criminal Law, a grave offence punishable by imprisonment.

71. Article 29 (2) of the Universal Declaration of Human Rights provides that the only legitimate limitations on the exercise of one's rights and freedoms must be for the purposes of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and general welfare in a democratic society. In this connection, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has reiterated that the right to freedom of expression includes the expression of views and opinions that offend, shock or disturb (A/HRC/17/27, para. 37).⁹ Even the statements considered unacceptable, disrespectful and in very bad taste by the authorities are entitled to protection. The Special Rapporteur also added that protection of national security or countering terrorism cannot be used to justify restricting the right to expression unless the Government can demonstrate that: (a) the expression is intended to incite imminent violence; (b) it is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.¹⁰

72. The Working Group notes that article 105 of the Criminal Law defines subversion of State power or the overthrow of the socialist system as follows:

Among those who organize, plot or carry out the scheme of subverting State power or overthrowing the Socialist system, the ringleaders and the others who commit major crimes shall be sentenced to life imprisonment or fixed-term imprisonment of not less than 10 years; the ones who take an active part in it shall be sentenced to fixed-term imprisonment of not less than three years but not more than 10 years; and the other participants shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention, public surveillance or deprivation of political rights.

Whoever incites others by spreading rumours or slanders or any other means to subvert the State power or overthrow the Socialist system shall be sentenced to fixed-term imprisonment of not more than five years, criminal detention, public surveillance or deprivation of political rights; and the ringleaders and the others who commit major crimes shall be sentenced to fixed-term imprisonment of not less than five years.

73. The Working Group finds that such vaguely and broadly worded provisions could be used to deprive individuals of their liberty without a specific legal basis and violate the due process of law undergirded by the principle of legality in article 11 (2) of the Universal Declaration of Human Rights. As the Working Group has previously stated, the principle of legality requires that laws be formulated with sufficient precision so that an individual can access and understand the law and regulate his or her conduct accordingly.¹¹

74. In the Working Group's view, the principle of legality further requires the substance of penal law to be present and appropriate in a democratic society that respects human dignity and rights. Hence, the penal punishment must, at a minimum, satisfy the principle of necessity, the prerequisite of wrongdoing and the principle of guilt in the interest of formal and material justice.¹²

⁹ In addition, the Human Rights Council, in its resolution No. 12/16 (para. 5 (p) (i)), has stated that restrictions on discussion of government policies and political debate are not consistent with article 19 (3) of the Covenant.

¹⁰ A/HRC/17/27, para. 36, citing the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, principle 6, as endorsed in E/CN.4/1996/39.

¹¹ Opinion No. 62/2018, para. 57.

¹² Opinion No. 10/2018, para. 53.

75. The Working Group also considers that the provisions of article 105 of the Criminal Law, under which Mr. Zhen was sentenced to 13 years in prison and 3 years' deprivation of political rights for his advocacy for political change, are neither necessary to protect public or private interests against injury nor proportionate to the crime.

76. Therefore, the Working Group finds it difficult to consider the routine human rights advocacy or calls for political change of Mr. Zhen and Mr. Qin, a natural expression of their values and beliefs, as well as the creation and management of civil society organizations to that end, to be criminal acts in a free and democratic society. The Government in no way states or implies that either of them had committed acts of violence or incited imminent violence.

77. In the light of the above, the Working Group is of the opinion that the deprivation of liberty of Mr. Zhen and Mr. Qin is arbitrary, falling within category II, as it violated articles 18, 19 and 20 (1) of the Universal Declaration of Human Rights.

Category III

78. Given its finding that the deprivation of liberty of Mr. Zhen and Mr. Qin is arbitrary under category I, the Working Group wishes to emphasize that their trials should never have taken place. However, as the trials did take place, the Working Group will now consider whether the alleged violations of the right to a fair trial and due process were grave enough to give their deprivation of liberty an arbitrary character so that it falls within category III.

79. Both Mr. Zhen and Mr. Qin were denied the right to notify and communicate with their families and lawyers, contrary to principles 15 to 19 of the Body of Principles, as well as the right to be brought promptly before a judge, who should decide without delay upon the lawfulness and necessity of detention, as stipulated in principles 11, 32 and 37 of the Body of Principles. In the view of the Working Group, such procedural defects severely compromised their due process and fair trial rights from the beginning of the detention.

80. Subsequently, the Government failed to respect the right of Mr. Zhen and Mr. Qin to legal assistance at all times, which is inherent in the right to liberty and security of person, and their right to a fair and public hearing by a competent, independent and impartial tribunal established by law with all the guarantees necessary for defence in a criminal case, in accordance with articles 3, 9, 10 and 11 (1) of the Universal Declaration of Human Rights and principles 11, 15, 17 and 18 of the Body of Principles.

81. The interrogations in the absence of their lawyers during their incommunicado detention deprived them of their right to legal counsel at the critical stage of criminal proceedings and exposed them to the risk of coercion. The lack of adequate access and communication between Mr. Zhen and Mr. Qin and their lawyers violate the essence of the right to legal assistance and preparation for defence. The Working Group does not understand the reason for the dismissal of family-appointed lawyers under questionable circumstances in Mr. Zhen's case and the judge's failure to allow the defence attorneys to leave for a meal during the trial of Mr. Qin.

82. The Working Group further determines that Mr. Zhen's pretrial detention from 1 September 2017 to 10 August 2018, for almost one year, and Mr. Qin's pretrial detention from 15 January 2015 to 11 July 2018, for more than three years, without an individualized judicial determination undermines the presumption of innocence guaranteed under article 11 (1) of the Universal Declaration of Human Rights and principle 36 (1) of the Body of Principles.

83. The prolonged pretrial detention also violated the right of Mr. Zhen and Mr. Qin to be tried within a reasonable time or to be released pending trial in accordance with principle 38 of the Body of Principles. Such an undue delay in a criminal trial cannot be in the interests of justice or human rights.

84. In Mr. Zhen's case, the determination of the legality of the decision and enforcement of "residential surveillance at a designated place of residence" by the people's procuratorates under article 73 of the Criminal Procedure Law does not qualify as a fair and public hearing by a competent, independent and impartial tribunal, as stipulated in article

10 of the Universal Declaration of Human Rights. Prosecutors cannot sit in judgment of their own investigative and prosecutorial conduct.

85. The Working Group also doubts the necessity of the closed proceedings in Mr. Qin's trial, in violation of articles 10 and 11 (1) of the Universal Declaration. The Government has offered no details or plausible reason to suggest that his case involved "State secrets" other than vague assertions to that effect. The international money transfers, as the source suggests, certainly do not justify such a conclusion.

86. Furthermore, the Working Group considers that forcing the trial to proceed with Mr. Qin in attendance, despite his visible fatigue resulting possibly from his high blood pressure, not only threatened his right to health but also compromised his ability to properly defend himself in court.

87. In the light of the above, the Working Group concludes that the violations of the right to a fair trial and due process are of such gravity as to give the deprivation of liberty of Mr. Zhen and Mr. Qin an arbitrary character that falls within category III.

Category V

88. The Working Group will now examine whether the deprivation of liberty of Mr. Zhen and Mr. Qin constitutes illegal discrimination under international law for the purpose of category V.

89. The Working Group notes that Mr. Zhen and Mr. Qin are both prominent human rights activists and that they have been arrested, convicted and imprisoned for their public calls for political change, which the Government has characterized and condemned as a scheme or incitement to subvert State power or overthrow the socialist system. The Working Group considers that they are entitled to protection as human rights defenders.¹³

90. In the above discussion on the application of category II to the present case, the Working Group established that the deprivation of liberty of Mr. Zhen and Mr. Qin resulted from their exercise of the rights or freedoms guaranteed under articles 18, 19 and 20 (1) of the Universal Declaration of Human Rights. Mr. Zhen and Mr. Qin, like their colleagues, have been the target of official persecution for many years because of their well-known political views, activities and organizations.

91. For these reasons, the Working Group considers that the deprivation of liberty of Mr. Zhen and Mr. Qin constitutes a violation of articles 2 and 7 of the Universal Declaration of Human Rights on the grounds of discrimination based on political or other opinion and their status as human rights defenders. Their deprivation of liberty therefore falls under category V.

92. The Working Group is concerned that the presence of multiple cases¹⁴ found in violation of the international norms on detention indicates a systemic problem with arbitrary detention. The Working Group recalls that, under certain circumstances,

¹³ See the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, articles 9 and 12.

¹⁴ See decisions No. 43/1993, No. 44/1993, No. 53/1993, No. 63/1993, 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 and 36/2019.

widespread or systematic imprisonment or other severe deprivation of liberty in violation of the rules of international law may constitute crimes against humanity.¹⁵ The Working Group has referred to this possibility in its past cases concerning arbitrary detention.¹⁶

Disposition

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

The deprivation of liberty of Zhen Jianghua and Qin Yongmin, being in contravention of articles 2, 3, 6, 7, 8, 9, 10, 11 (1) and (2), 18, 19, 20 (1) and 25 of the Universal Declaration of Human Rights, is arbitrary and falls within categories I, II, III and V.

94. The Working Group requests the Government of China to take the steps necessary to remedy the situation of Mr. Zhen and Mr. Qin without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights.

95. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Zhen and Mr. Qin immediately and accord them an enforceable right to compensation and other reparations, in accordance with international law.

96. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Zhen and Mr. Qin and to take appropriate measures against those responsible for the violation of their rights.

97. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to: (a) the Special Rapporteur on the situation of human right defenders; (b) the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and (c) the Special Rapporteur on the independence of judges and lawyers.

98. The Working Group recommends that the Government accede to and ratify the International Covenant on Civil and Political Rights and its Optional Protocols.

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

Follow-up procedure

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

¹⁵ See, for example, 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; and No. 60/2012, para. 21.

¹⁶ Opinions No. 69/2017, para. 44; and No. 62/2018, para. 80.

101. 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.

102. 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.

103. 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.¹⁷

[Adopted on 1 May 2019]

¹⁷ Human Rights Council resolution 33/30, paras. 3 and 7.