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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. 25/2021 concerning Zhan Zhang, Mei Chen and Wei Cai (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,<sup>1</sup> on 2 December 2020 the Working Group transmitted to the Government of China a communication concerning Zhan Zhang, Mei Chen and Wei Cai. The Government replied to the communication on 28 December 2020. China 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).

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<sup>1</sup> A/HRC/36/38.



## Submissions

### *Communication from the source*

4. Zhan Zhang, born in 1983, is a citizen of China residing in Pudong New District, Shanghai.
5. The source submits that Ms. Zhang is a former lawyer whose licence was suspended because she actively spoke out about politics and the human rights situation in China. Because of her activism, Ms. Zhang was allegedly repeatedly threatened by the authorities. In 2019, she spoke out about the protests held in Hong Kong, China, voicing her support for the protesters by posting comments, writing articles and holding up placards. In September 2019, she was summoned by the Shanghai police and was later criminally detained and arrested on suspicion of “picking quarrels and provoking trouble”. The police released her on 26 November 2019. During her detention, Ms. Zhang was reportedly forced to undergo two psychiatric examinations.
6. Mei Chen, born in 1993, is a citizen of China residing in Guangzhou, Guangdong Province.
7. The source submits that Mr. Chen was employed by a public interest non-governmental organization in Beijing after he graduated from South China Agricultural University in Guangzhou. Before being detained, he volunteered for the Terminus2049 website, which posted news articles, including about the coronavirus disease (COVID-19) pandemic, and which was censored by the Government.
8. Wei Cai, born in 1993, is a citizen of China residing in Huanggang, Hubei Province.
9. According to the source, Mr. Cai is a former employee of an Internet company. In 2018, he graduated with a Master’s degree in sociology from Tsinghua University in Beijing, after having finished his undergraduate degree at Central University of Finance and Economics in 2015. Mr. Cai co-founded the Terminus2049 website, which posted news articles, including about the COVID-19 pandemic, censored by the Government.
10. The source submits that, in early February 2020, Ms. Zhang travelled from her home in Shanghai to report on the COVID-19 pandemic in Wuhan. She disseminated numerous stories through her WeChat, Twitter and YouTube accounts, including on the detention of other independent reporters and on the harassment of families of victims seeking accountability.
11. On 14 May 2020, officers of the Shanghai Public Security Bureau, Pudong New District, detained her at an unknown location in Wuhan. Ms. Zhang was then brought back to Shanghai and, on 15 May 2020, was placed under criminal detention on suspicion of “picking quarrels and provoking trouble”, in breach of article 293 of the Criminal Code. This provision stipulates a fixed-term imprisonment of up to five years for those who: (a) wilfully attack another person and the circumstances are serious; (b) chase, spy on or curse at another person and the circumstances are serious; (c) forcibly take away, demand or wilfully damage or seize public or private property and the circumstances are serious; or (d) create a disturbance in a public place, causing serious disorder.
12. The source notes that, on 14 or 15 May 2020, Ms. Zhang went missing. On 15 May 2020, officers of the Shanghai Public Security Bureau, Pudong New District, gave Ms. Zhang’s criminal detention notice and her luggage to her family.
13. On 19 June 2020, Ms. Zhang was formally arrested on charges of “picking quarrels and provoking trouble”. On that occasion, no detention notice was given to her family. On 15 September 2020, Ms. Zhang was indicted and has been held at Shanghai Pudong New District Detention Centre since then.
14. On 6 November 2020, the prosecutors made a copy of the criminal indictment available to Ms. Zhang’s lawyers. On 13 November 2020, that copy was made public. The source submits that, according to the information contained in the document, Pudong New District Procuratorate indicted Ms. Zhang on 15 September 2020 and that Ms. Zhang is being prosecuted in retaliation for her reporting on the COVID-19 pandemic. Ms. Zhang is accused of travelling to Wuhan on 3 February 2020, of posting a large amount of false information

on WeChat, Twitter and YouTube, of accepting interviews with Radio Free Asia and *The Epoch Times*, two overseas media outlets, and of maliciously stirring up negative sentiment about the Wuhan epidemic situation. The indictment states that such conduct is evidence of the crime of “picking quarrels and provoking trouble”.

15. On 23 November 2020, Ms. Zhang received a visit from her lawyer, to whom she maintained her innocence. She is on hunger strike but is being force-fed mainly through a feeding tube but also by her other cellmates. As a result, Ms. Zhang suffers from stomach pain and weakness while walking. She has been examined by a doctor and been found to have low blood pressure.

16. Mr. Chen and Mr. Cai disappeared on 19 April 2020 from unknown locations in Beijing. The source notes that they worked as volunteers for the Terminus2049 website, which posts news articles about the COVID-19 situation.

17. On 23 April 2020, the family of Mr. Cai was notified by the Beijing Public Security Bureau, Chaoyang District, that Mr. Cai had been placed under residential surveillance in a designated location. The criminal charge cited in the notice was “picking quarrels and provoking trouble”. The date on which Mr. Cai was placed under residential surveillance in a designated location remains unknown. Mr. Chen’s family did not receive any such notification. It is believed that Mr. Chen and Mr. Cai were arrested by officers of the Beijing Public Security Bureau, Chaoyang District.

18. On 12 June 2020, officers of the Beijing Public Security Bureau, Chaoyang District, formally arrested Mr. Chen and Mr. Cai on charges of “picking quarrels and provoking trouble”.

19. On 21 September 2020, Mr. Chen was indicted and his case was sent to Chaoyang District Court in Beijing.

20. The source specifies that, after Mr. Chen was formally arrested on 12 June 2020, he was transferred to Beijing Chaoyang District Detention Centre. On 28 June 2020, two State-appointed lawyers called his family claiming that Mr. Chen had applied for legal aid and that they had accepted to represent him. A family member of Mr. Chen informed the lawyers that a legal representative had already been hired for Mr. Chen in April 2020. The family therefore asked the two lawyers to withdraw their legal representation. However, the State-appointed lawyers refused to do so.

21. Family members of Mr. Chen repeatedly called the two lawyers at their office but were unable to reach them. On 6 August 2020, one of the lawyers called a relative of Mr. Chen to report that Mr. Chen’s case had been transferred to the Procuratorate for review. Mr. Chen’s family inquired whether the State-appointed lawyer had had an opportunity to visit Mr. Chen and whether he knew about Mr. Chen’s conditions of detention. The lawyer said that he had not been able to visit Mr. Chen because of the pandemic. In addition, the source submits that the detention centre’s authorities repeatedly denied requests from the lawyer hired by Mr. Chen’s family to visit Mr. Chen.

22. The source also submits that, on 12 August 2020, Mr. Cai’s family filed a complaint to the Beijing Supervisory Commission, Chaoyang District, asking it to investigate the conduct of the Chaoyang District Public Security Bureau and Procuratorate. It was claimed that the authorities had prevented Mr. Cai’s family from hiring a lawyer for Mr. Cai and had manipulated the legal aid system to appoint State lawyers.

23. The source further submits that 20 November 2020 marked two months since Mr. Chen’s and Mr. Cai’s case was transferred to Chaoyang District Court in Beijing (the men had been indicted on 21 September 2020). The source notes that, in accordance with the Code of Criminal Procedure, the trial hearing should have been arranged by 20 November 2020 or a delay should have been requested; in both cases, the families should have been notified. The authorities have not notified the families about any trial hearing or about any delays.

24. The source submits that the three individuals mentioned above were detained in connection with the peaceful exercise of their right to freedom of expression and, specifically, for reporting on and documenting the COVID-19 pandemic in China. The source adds that their ongoing detention is evidence of the fact that the Government’s general response to

journalists and human rights defenders sharing information about the pandemic has been to detain them. Other measures have included restrictions on reporting by the media.

25. The source submits that, given the above, the detention of Ms. Zhang, Mr. Chen and Mr. Cai constitutes a violation of their right to freedom of expression and of association, in contravention of articles 18, 19 and 20 of the Universal Declaration of Human Rights, and falls under category II.

26. The source argues that the legal rights of Ms. Zhang, Mr. Chen and Mr. Cai, including their right to a fair trial, have not been protected. It submits that all three have been denied access to their lawyers. In addition, Ms. Zhang has been subjected to torture through forced feeding while on hunger strike to protest her detention. Mr. Chen and Mr. Cai have been denied access to counsel of their choice and are instead being represented by State-appointed lawyers.

27. The source claims that the authorities did not grant Ms. Zhang a meeting with her lawyer for over a month after she had been detained, in other words, not until 25 June 2020. That delay violated article 39 of the Code of Criminal Procedure, which stipulates that counsel can visit and communicate with detained criminal suspects. On 9 September 2020, Ms. Zhang began a hunger strike and Shanghai Pudong New District Detention Centre officials force-fed her. Her health was very poor. Ms. Zhang received a visit from one of her lawyers on 28 September 2020, after she had been indicted, who said that she appeared very thin and weak. She has not been allowed to communicate with her family.

28. According to the source, on 31 August 2020 the authorities from Pudong New District Procuratorate refused to recognize the credentials of one of Ms. Zhang's lawyers. The officials, quoting Shanghai Procuratorate regulations, claimed that Ms. Zhang needed to sign the letter of engagement herself, even though her family had signed the document. As a result, the lawyer was not allowed to examine any of the case documents.

29. The source adds that Mr. Chen and Mr. Cai have also been denied access to their lawyers and have had no contact with their families. On 26 April 2020, Mr. Chen's family hired a lawyer. On 8 May 2020, when the lawyer went to locate Mr. Chen, he was blocked at the entrance of the building housing the Beijing Public Security Bureau, Chaoyang District. When the lawyer called the relevant authorities, officials would not provide him with information on the case. The lawyer was repeatedly denied access to Mr. Chen. On 28 June 2020, two State-appointed lawyers called Mr. Chen's family members and claimed to be his legal representatives.

30. The source notes that on 27 April 2020 Mr. Cai's family hired a lawyer for him. On 29 April 2020, the lawyer went to the building housing the Beijing Public Security Bureau, Chaoyang District, to seek information about Mr. Cai's whereabouts and his conditions of detention. However, the officials refused to provide any such information. The lawyer filed a complaint to the Chaoyang District Procuratorate but still was not granted access to his client.

31. After 1 May 2020, the authorities of the Procuratorate contacted the lawyer to confirm that they had accepted his application and to report that the case would be handled within three months. On 12 June 2020, the same authorities called the lawyer and confirmed that the officers in charge were investigating Mr. Cai's case. On the same day, the police officer in charge of Mr. Cai's case informed his family members that Mr. Cai had been formally arrested and detained at Beijing Chaoyang District Detention Centre. The police officer also said that Mr. Cai had applied for legal aid and had hired two State-appointed lawyers to represent him. Mr. Cai's family called the two State-appointed lawyers. The lawyer hired by Mr. Cai's family has not been able to visit or communicate with Mr. Cai.

32. The source cites article 34 of the Code of Criminal Procedure, according to which criminal suspects have the right to hire their legal representatives during the investigation stage and the investigation unit should inform the criminal suspects about their right to legal representation. Moreover, article 39 of the Code of Criminal Procedure stipulates that counsel can visit and communicate with detained criminal suspects.

33. The source submits that Mr. Chen's and Mr. Cai's right to a fair trial has been violated, adding that denying access to a lawyer places detainees at high risk of torture or other ill-treatment.

34. According to the source, both Mr. Chen and Mr. Cai were placed under residential surveillance in a designated location for approximately 54 days. The written notice given to Mr. Cai's family listed the criminal charge of "picking quarrels and provoking trouble". Article 75 of the Code of Criminal Procedure stipulates that suspects may be placed under residential surveillance in a designated location for crimes involving endangering national security, terrorist activities and serious bribery. The source notes that "picking quarrels and provoking trouble" is a public security crime and does not belong among the aforementioned crimes. The source asserts that the use of residential surveillance in a designated location, a de facto form of enforced disappearance, was not legal in this case, not even under national law.

35. The source concludes that the aforementioned circumstances indicate that the ongoing detention of Ms. Zhang, Mr. Chen and Mr. Cai constitutes a violation of their right to a fair trial, guaranteed under the article 9 of the Universal Declaration of Human Rights and that the deprivation of liberty of Ms. Zhang, Mr. Chen and Mr. Cai fall under category III.

#### *Response from the Government*

36. On 2 December 2020, the Working Group transmitted the source's allegations to the Government of China under its regular communications procedure, requesting detailed information about the current situation of Ms. Zhang, Mr. Chen and Mr. Cai by 1 February 2021. The Working Group also requested that the Government clarify the legal provisions justifying their continued detention, as well as the compatibility of their detention with the obligations of China under international human rights law. Moreover, the Working Group called upon the Government to ensure the physical and mental integrity of Ms. Zhang, Mr. Chen and Mr. Cai. 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 prioritize the use of non-custodial measures.

37. In its reply of 28 December 2020, the Government reported that Ms. Zhang, a 37-year-old woman from Sanyuan County, Shanxi Province, suspected of the crime of "provoking trouble", had been detained by the Shanghai Public Security Bureau on 14 May 2020. The arrest had been approved by the Procuratorate on 19 June 2020. The Procuratorate of Pudong New District, Shanghai, had charged Ms. Zhang of committing the crime of "picking quarrels and provoking trouble" and, on 15 September 2020, the Pudong New District court filed an indictment. The case is currently under review by that court. During the trial, the court will hear the case strictly in accordance with the law in order to fully protect the litigation rights of the defendant.

38. On 12 June 2020, Mr. Cai and Mr. Chen were arrested in Beijing on suspicion of "picking quarrels and provoking trouble". Officers of the Beijing Public Security Bureau, Chaoyang District, arrested them in accordance with the law and transferred their case to the Procuratorate on 6 August 2020. The legal rights of these two individuals are being fully protected. The allegations that their freedom of speech and association and other legal rights have been violated are inconsistent with the facts. The Procuratorate of Chaoyang District charged the defendants with the crime of "picking quarrels and provoking trouble" on 18 September 2020 and has initiated their public prosecution at the court of Chaoyang District. The trial is ongoing. The court will hear the case strictly in accordance with the law in order to fully guarantee the litigation rights of the defendants and their legal counsel.

#### **Discussion**

39. The Working Group thanks the source and the Government for their submissions.

40. In determining whether the detention of Ms. Zhang, Mr. Chen and Mr. Cai was arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal 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.<sup>2</sup>

i. Category I

41. 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.

42. The source submits that Ms. Zhang went missing on 14 or 15 May 2020, and that her family was given a criminal detention notice on 15 May 2020. Ms. Zhang was formally arrested on 19 June 2020. Mr. Chen and Mr. Cai went missing on 19 April 2020 and were formally arrested on 12 June 2020. The Government submits that Ms. Zhang was criminally detained by the Shanghai Public Security Bureau on 14 May 2020 and that her arrest was approved by the Procuratorate on 19 June 2020. Mr. Chen and Mr. Cai were arrested in Beijing on suspicion of “picking quarrels and provoking trouble” on 12 June 2020. Officers of the Beijing Public Security Bureau, Chaoyang District, arrested them in accordance with the law and transferred their case to the Procuratorate on 6 August 2020. It has chosen not to challenge the *prima facie* credible allegations made by the source that Ms. Zhang, Mr. Chen and Mr. Cai were missing for a period of time.

43. The Working Group therefore notes that, during the initial stages of their detention, they were held in a situation of *de facto* enforced disappearance, as their families could not locate them and the authorities do not appear to have disclosed their location.

44. The Working Group recalls that enforced disappearance constitutes a particularly aggravated form of arbitrary detention, in violation of articles 6 and 9 of the Universal Declaration of Human Rights.<sup>3</sup> 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.<sup>4</sup>

45. The source submits that both Mr. Chen and Mr. Chai were placed under residential surveillance in a designated location for 54 days. The Working Group considers that the term “residential surveillance at a designated place of residence” is a misnomer, since, as in the examples of Mr. Chen and Mr. Chai, the criminal suspect or defendant who is subjected to it is confined not to his or her usual place of residence – i.e., under house arrest – but in a designated place of residence, which may well be a prison. The authorities, acting through the procuratorate, in effect have 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.<sup>5</sup>

46. The Working Group and other special procedures have expressed concern that the residential surveillance at a designated location regime is being employed in a manner that violates human rights.<sup>6</sup> 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;

<sup>2</sup> A/HRC/19/57, para. 68.

<sup>3</sup> See opinions No. 5/2020, No. 6/2020, No. 11/2020 and No. 13/2020.

<sup>4</sup> A/HRC/16/48/Add.3 and Corr.1, para. 21. See also E/CN.4/1996/38 and Corr.1, para. 55.

<sup>5</sup> Opinions No. 36/2019, para. 38; and No. 78/2020, para. 47.

<sup>6</sup> See communication CHN 15/2018, available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=23997>. See also opinion No. 15/2019, para. 42.

(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.

47. 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.<sup>7</sup> 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.

48. The Working Group considers that the incommunicado detention of Mr. Chen and Mr. Chai and their placement in residential surveillance at a dedicated location violated articles 9, 10 and 11 (1) of the Universal Declaration of Human Rights. In addition, this means of detention effectively placed them outside the protection of the law, in violation of their right to be recognized as a person before the law under article 6 of the Universal Declaration of Human Rights.<sup>8</sup>

49. As the Working Group has stated previously, it is not sufficient for there to be a law authorizing an arrest. The authorities must invoke that legal basis and apply it through an arrest warrant.<sup>9</sup> In the present case, the arresting officers did not present an arrest warrant at the time of arrest,<sup>10</sup> in violation of articles 3 and 9 of the Universal Declaration of Human Rights.<sup>11</sup> As a result, the authorities did not establish a legal basis for their arrest.<sup>12</sup> In order to invoke a legal basis for the deprivation of liberty, the authorities should have informed them of the reasons for their detention at the time of their arrest.<sup>13</sup> The failure to do so amounts to a violation of article 9 of the Universal Declaration of Human Rights and principle 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and renders the arrests and subsequent detentions arbitrary.

50. The source submits that Ms. Zhang, Mr. Chen and Mr. Cai were not brought promptly before a judge during their pretrial 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.<sup>14</sup> The Government does not rebut this allegation. On this basis, the Working Group finds that the Government has violated article 9 of the Universal Declaration of Human Rights and principles 11, 37 and 38 of the Body of Principles.

51. The Working Group observes that Ms. Zhang, Mr. Chen and Mr. Cai were not afforded the right to take proceedings before a court so that it could decide without delay on

<sup>7</sup> A/HRC/40/6, paras. 28.176 and 28.180–181.

<sup>8</sup> Opinion No. 15/2019, para. 44.

<sup>9</sup> Opinions No. 10/2018, para. 45; No. 36/2018, para. 40; No. 46/2018, para. 48; and No. 46/2019, para. 51.

<sup>10</sup> See, for example, opinions No. 71/2019, para. 70; and No. 45/2019, para. 50.

<sup>11</sup> Opinions No. 65/2020, para. 75; No. 37/2020, para. 52; No. 33/2020, para. 54; No. 31/2020, para. 41; No. 82/2018, para. 29; No. 68/2018, para. 39; No. 30/2018, para. 39; No. 26/2018, para. 54; No. 10/2018, para. 46; and No. 3/2018, para. 43 (finding that the presentation of an arrest warrant is procedurally inherent in articles 3 and 9 of the Universal Declaration of Human Rights).

<sup>12</sup> 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.

<sup>13</sup> Opinions No. 65/2020, para. 75; No. 33/2020, para. 55; No. 31/2020, para. 42; No. 83/2019, para. 50; No. 46/2019, para. 51; No. 32/2019, para. 29; and No. 10/2015, para. 34.

<sup>14</sup> 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; No. 82/2019, para. 76; and No. 78/2020, para. 49.

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 of the Body of Principles. 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.<sup>15</sup> This right, which is in fact a peremptory norm of international law, applies to all forms and situations of deprivation of liberty.<sup>16</sup> 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.<sup>17</sup>

52. Moreover, the Working Group considers that the charge made against Ms. Zhang, Mr. Chen and Mr. Cai of “picking quarrels and provoking troubles” is so vague and broad that it could be used to deprive individuals of their liberty without a specific legal basis.<sup>18</sup> 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.<sup>19</sup>

53. 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. The Working Group has recommended in the past that 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 in the Universal Declaration of Human Rights.<sup>20</sup> The Working Group considers that, in the circumstances of the present case, the laws used to charge the detainees were so vague and overly broad that it was impossible to invoke a legal basis justifying the deprivation of liberty.<sup>21</sup>

54. The Working Group therefore considers that the deprivation of liberty of Ms. Zhang, Mr. Chen and Mr. Cai lacks a legal basis and is thus arbitrary, falling under category I.

## ii. Category II

55. The source alleges that Ms. Zhang, Mr. Chen and Mr. Cai have been detained in connection with the peaceful exercise of their right to freedom of expression and, specifically, for reporting on and documenting the COVID-19 pandemic in China, and that their detention is consistent with the Government’s general response to human rights defenders and journalists sharing information about the pandemic. The Government points out that Ms. Zhang, Mr. Chen and Mr. Cai were detained on suspicion of committing the crime of “picking quarrels and provoking trouble”.

56. Although the right to freedom of opinion and expression is not without limitations, article 29 (2) of the Universal Declaration of Human Rights provides that the only legitimate limitations to 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 the general welfare in a democratic society.

57. In the Working Group’s view, the principle of necessity and proportionality that inheres in freedom of opinion and expression does so equally in other fundamental human rights. The Working Group, in its deliberation No. 9, confirmed that the notion of “arbitrary” includes both the requirement that a particular form of deprivation of liberty is taken in

<sup>15</sup> A/HRC/30/37, paras. 2–3.

<sup>16</sup> *Ibid.*, para. 11, and annex, para. 47 (a). See also opinion No. 39/2018, para. 35.

<sup>17</sup> 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.

<sup>18</sup> See, for example, opinion No. 62/2018, paras. 57–58.

<sup>19</sup> *Ibid.*

<sup>20</sup> See E/CN.4/1998/44/Add.2, paras. 42–53, 106–107 and 109 (b)–(c); and E/CN.4/2005/6/Add.4, paras. 73 and 78 (e).

<sup>21</sup> See, for example, opinion No. 22/2018.



accordance with the applicable law and procedure and that it is proportional to the aim sought, reasonable and necessary.<sup>22</sup> In its jurisprudence, with regard to the application of the principle of proportionality, the Working Group has applied the four-pronged test of: (a) whether the objective of the measure is sufficiently important to justify the limitation of a protected right; (b) whether the measure is rationally connected to the objective; (c) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and (d) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.<sup>23</sup>

58. In view of the standard described above, the Working Group finds that the situation in the present case falls short of such requirement. Aside from the vague accusations of "picking quarrels and provoking trouble", the Government has not submitted information that would reasonably implicate Ms. Zhang, Mr. Chen and Mr. Cai in specific violent or criminal acts that pose threats to the rights and freedoms of others, morality, public order and the general welfare, and therefore the Working Group finds no legitimate aim or objective to justify their deprivation of liberty for their exercise of the freedom to think, the freedom to impart information and ideas, the freedom to peacefully assemble and associate and the freedom to take part in the conduct of public affairs.

59. The Working Group considers that the conduct of Ms. Zhang, Mr. Chen and Mr. Cai and their work as journalists 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.

60. The Working Group notes the charges relating to the sending of false information that were made against Ms. Zhang and recalls the Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda adopted in Vienna on 3 March 2017, by which several experts (including the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression) stated that general prohibitions on the dissemination of information based on vague and ambiguous ideas, including false news or information, are incompatible with international standards for restrictions on freedom of expression and should be abolished.<sup>24</sup>

61. The Working Group concludes that the detention of Ms. Zhang, Mr. Chen and Mr. Cai resulted from their peaceful exercise of the right to freedom of opinion and expression, as well as the right to take part in the conduct of public affairs, and was contrary to articles 19 and 21 of the Universal Declaration of Human Rights. In the present case, the application of vague and overly broad provisions as discussed above adds weight to the Working Group's conclusion that their deprivation of liberty falls 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.

### iii. Category III

62. Given its finding that the detention of Ms. Zhang, Mr. Chen and Mr. Cai is arbitrary under category II, the Working Group emphasizes that no trial should take place. The information submitted by the source points to violations of the right to a fair trial of Ms. Zhang, Mr. Chen and Mr. Cai during the course of their detention to date. The Government simply states that the court will hear the cases strictly in accordance with the law in order to fully protect the litigation rights of the defendants.

63. The Working Group notes the source's submission that Ms. Zhang's access to her lawyer has been restricted and that Mr. Chen and Mr. Cai have been denied all access to legal

<sup>22</sup> A/HRC/22/44, sect. III.

<sup>23</sup> Opinions No. 54/2015, para. 89; No. 41/2017, para. 86; No. 56/2017, para. 51; No. 58/2017, para. 48; No. 76/2017, para. 68; No. 82/2018, para. 38; No. 87/2018, para. 64; No. 32/2020, para. 49; and No. 89/2020, para. 63.

<sup>24</sup> See <https://www.ohchr.org/Documents/Issues/Expression/JointDeclaration3March2017.doc>. See also opinion No. 46/2020, para. 54.

counsel of their choice. The Working Group observes with concern the obstructive measures taken by the authorities to restrict or deny access to legal counsel and case documents. The source submits that this is in violation of domestic law – specifically, articles 34 and 39 of the Code of Criminal Procedural, which set out the right of criminal suspects to gain access to counsel.

64. The Working Group observes that Ms. Zhang, Mr. Chen and Mr. Cai are being effectively 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; and principles 1, 5, 7, 8, 21 and 22 of the Basic Principles on the Role of Lawyers. 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.<sup>25</sup> This right entitles persons deprived of their liberty to be accorded adequate time and facilities to prepare their defence, including through the disclosure of information.<sup>26</sup> Furthermore, legal counsel should be able to carry out their functions effectively and independently, free from fear of reprisal, interference, intimidation, hindrance, or harassment. Authorities should respect the privacy and confidentiality of legal counsel detainee communications.<sup>27</sup>

65. 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 his or her detention.<sup>28</sup> 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.<sup>29</sup> In relation to the allegations of torture and other forms of cruel or inhuman treatment or punishment by the authorities against Ms. Zhang, who is on hunger strike to protest her detention and is being force-fed, the Working Group is of the view that these allegations strengthen the conclusion that her fair trial rights under the standards of category III are being violated. The Working Group has consistently concluded in its opinions that it is unlikely that a person who is being subjected to torture or other forms of ill-treatment or punishment can prepare an adequate defence for a trial that respects the equality of both parties in respect of the judicial proceedings, and that this amounts to a denial of the fundamental principles of a fair trial.<sup>30</sup>

66. The Working Group recalls that, according to principle 6 of the Body of Principles, no person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

67. The source submits that, in accordance with the provisions of the Code of Criminal Procedure in force on 20 November 2020, a trial hearing should have been arranged or a delay should have been requested on behalf of Mr. Chen and Mr. Chai. However, the families have received no information in this regard from the authorities.

68. As such, Mr. Chen and Mr. Chai are being deprived of their liberty while being held in unreasonably prolonged pretrial detention, in violation of their right to be tried without undue delay. The Working Group notes that it has been approximately 18 months since Ms. Zhang, Mr. Chen and Mr. Cai were detained in April 2020. In addition, as noted above, there is no information to suggest that their pretrial detention has been periodically reviewed by a

<sup>25</sup> A/HRC/30/37, annex. See also A/HRC/45/16, paras. 52–53.

<sup>26</sup> A/HRC/45/16, para. 14.

<sup>27</sup> Ibid., para. 15.

<sup>28</sup> Opinion No. 40/2020, para. 29.

<sup>29</sup> Opinions No. 11/2020, para. 54; and No. 82/2020, para. 67.

<sup>30</sup> See, for example, opinion No. 32/2019, para. 42. In opinion No. 29/2017, the Working Group stated that, although its mandate did not cover conditions of detention or the treatment of prisoners, it had to consider to what extent detention conditions could negatively affect the ability of detainees to prepare their defence and their chances of a fair trial (para. 63). See also opinions No. 53/2018, para. 77 (c); No. 52/2018, para. 79 (j); and No. 47/2017, para. 28; and E/CN.4/2004/3/Add.3, para. 33.

judicial authority. The Working Group recalls that the right to be tried within a reasonable time frame is one of the fair trial guarantees set out in articles 10 and 11 (1) of the Universal Declaration of Human Rights and principle 38 of the Body of Principles. The reasonableness of any delay in bringing a case to trial must be assessed given the circumstances of each case, taking into account the complexity of the case, the conduct of the accused and the manner in which the matter was handled by the authorities.<sup>31</sup> The delay in bringing Ms. Zhang, Mr. Chen and Mr. Cai to trial is unacceptably long, and the situation has been exacerbated by the fact that there is no information to suggest that their pretrial detention has been periodically reviewed by a judicial authority. It is clear to the Working Group that they are, but should not have been, detained solely for the exercise of their rights under international human rights law.<sup>32</sup> The Working Group takes this opportunity to reiterate that, if Ms. Zhang, Mr. Chen and Mr. Cai cannot be tried within a reasonable time, they are entitled to be released.

69. For these reasons, the Working Group concludes that the violations of the right to a fair trial of Ms. Zhang, Mr. Chen and Mr. Cai are of such gravity as to give their detention an arbitrary character under category III.

iv. Category V

70. Moreover, the Working Groups views that Ms. Zhang, Mr. Chen and Mr. Cai were deprived of their liberty on discriminatory grounds, that is, for reporting on and sharing opinions on the COVID-19 pandemic. They have been the targeted for their opinions, in other words for exercising their right to express their views and convictions. The authorities have displayed an attitude towards them that can only be characterized as discriminatory. Consequently, the Working Groups finds that their detention violates articles 2 and 7 of the Universal Declaration of Human Rights on the grounds of discrimination based on political or other opinion and is arbitrary according to category V.

v. Concluding remarks

71. The source submits that Ms. Zhang, Mr. Chen and Mr. Cai have not been allowed to communicate with their families. The Working Group finds that these restrictions violate their right to have contact with the outside world under rules 43 (3) and 58 (1) of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) and principles 15, 16 (1) and 19 of the Body of Principles.

72. In its 30-year history, the Working Group has found China to be in violation of its international human rights obligations in numerous cases.<sup>33</sup> 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

<sup>31</sup> Human Rights Committee, general comments No. 32 (2007), para. 35; and No. 35 (2014), para. 37.

<sup>32</sup> In paragraph 63 of its opinion No. 46/2019, the Working Group was not in a position to conclude that the time that had lapsed between the arrest in January 2017 and the sentencing in May 2018 was unreasonable.

<sup>33</sup> 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.

circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of the rules of international law may constitute crimes against humanity.<sup>34</sup>

73. Finally, the Working Group would welcome the opportunity to conduct a country visit to China in order to assist the Government in addressing the arbitrary deprivation of liberty. Given that a significant period of time has passed since its visits to China in October 1997 and September 2004, the Working Group considers that it is an appropriate time to conduct another visit. The Working Group recalls that it made a request to visit on 15 April 2015 and looks forward to a positive response.

### **Disposition**

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

The deprivation of liberty of Zhan Zhang, Mei Chen and Wei Cai, being in contravention of articles 2, 3, 6, 7, 8, 9, 10, 11 (1), 19 and 21 of the Universal Declaration of Human Rights is arbitrary and falls within categories I, II, III and V.

75. The Working Group requests the Government of China to take the steps necessary to remedy the situation of Ms. Zhang, Mr. Chen and Mr. Cai 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.

76. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Ms. Zhang, Mr. Chen and Mr. Cai immediately and accord them an enforceable right to compensation and other reparations, in accordance with international law. In the current context of the global 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 release of Ms. Zhang, Mr. Chen and Mr. Cai.

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

78. The Working Group requests the Government to bring its laws, particularly article 293 of its Criminal Code, into conformity with the recommendations made in the present opinion and with the commitments made by China under international human rights law.

79. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers this case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, for appropriate action.

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

### **Follow-up procedure**

81. 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:

<sup>34</sup> A/HRC/13/42, para. 30. See also, 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; 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.

- (a) Whether Ms. Zhang, Mr. Chen and Mr. Cai have been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Ms. Zhang, Mr. Chen and Mr. Cai;
- (c) Whether an investigation has been conducted into the violation of the rights of Ms. Zhang, Mr. Chen and Mr. Cai 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.

82. 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.

83. 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.

84. 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.<sup>35</sup>

*[Adopted on 6 September 2021]*

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<sup>35</sup> Human Rights Council resolution 42/22, paras. 3 and 7.