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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its ninety-second session, 15–19 November 2021

Opinion No. 66/2021 concerning Zhang Haitao (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,¹ on 23 August 2021 the Working Group transmitted to the Government of China a communication concerning Zhang Haitao. The Government replied to the communication on 18 October 2021. 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).

¹ [A/HRC/36/38](#).



Submissions

Communication from the source

4. Zhang Haitao, born in 1971, is a citizen of China, residing in Urumqi, Xinjiang Uighur Autonomous Region. The source explains that Mr. Zhang worked as a salesman while writing and posting opinions online that frequently criticized the Government's policies on current affairs, particularly on the restrictions on freedom of religion for Uighur Muslims in the Xinjiang Uighur Autonomous Region. For a brief period, Mr. Zhang also wrote articles for the website of a Chinese human rights group.

5. According to the source, Mr. Zhang became involved in human rights defence work in 2009, when he began submitting complaints to the authorities in the Xinjiang Uighur Autonomous Region to obtain redress over his alleged wrongful detention, after being detained for nearly two months on suspicion of fraud, a charge that was dropped upon his release. Originally from Henan Province, Mr. Zhang moved to the Xinjiang Uighur Autonomous Region in 1995 after losing his job at a State-owned enterprise.

6. The source reports that Mr. Zhang was criminally detained on 26 June 2015 at his residence in the city of Urumqi by officers of the Urumqi City Public Security Bureau after he posted comments online that were critical of the Government's policies. The officers showed a warrant issued by the Urumqi City Public Security Bureau, but did not let the family keep a copy of the notice. Officers searched Mr. Zhang's residence and seized computers, laptops, USB pens, bank cards and his national identity card. Furthermore, the authorities froze his bank account.

7. According to the source, the reason for the arrest imputed by the authorities was inciting ethnic hatred, in violation of article 249 of the Criminal Law of China ("inciting ethnic hatred"). This provision stipulates that: "Whoever incites national hatred or ethnic discrimination, if the circumstances are serious, shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention, public surveillance, or deprivation of political rights; if the circumstances are particularly serious, they shall be sentenced to fixed-term imprisonment of not less than three years and not more than ten years."

8. The source adds that Mr. Zhang was formally arrested on 31 July 2015 on the grounds of "picking quarrels and provoking troubles" in violation of article 293 of the Criminal Law ("picking quarrels and provoking trouble"). This provision stipulates fixed-term imprisonment of up to five years for those who: (a) wilfully attack another person, when the circumstances are serious; (b) chase, intercept or insult another person, when the circumstances are serious; (c) forcibly take away, demand, or wilfully damage or seize public or private property, when the circumstances are serious; or (d) create a disturbance in a public place, causing serious disorder.

9. Furthermore, it is reported that Mr. Zhang was criminally indicted on 25 December 2015 for "inciting subversion of State power" and "providing intelligence overseas". Relevant articles imputed by the authorities were article 105 (2) of the Criminal Law ("inciting subversion of State power") and article 111 of the Criminal Law ("providing intelligence overseas").

10. The source clarifies that article 105 (2) stipulates that: Whoever incites others by spreading rumours or slanders or any other means to subvert 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. Article 111 of the Criminal Law ("providing intelligence overseas") stipulates that: If a foreign institution, organization or person steals, spies into, buys, or illegally provides State secrets or intelligence, the sentence shall be fixed-term imprisonment of not less than 5 years and not more than 10 years; if the circumstances are particularly serious, the sentence shall be fixed-term imprisonment of not less than 10 years or life imprisonment; if the circumstances are less serious, imprisonment for 5 years or less, criminal detention, public surveillance, or deprivation of political rights.

11. The source reports that Mr. Zhang's trial commenced on 11 January 2016, and on 15 January 2016 he was convicted and sentenced by the Urumqi City Intermediate People's Court to 19 years in prison on the same charges of "inciting subversion of State power" (15 years' imprisonment) and "providing intelligence overseas" (five years' imprisonment). Since Mr. Zhang would serve his punishment for the two crimes consecutively, the court ordered him to serve a total of 19 rather than 20 years. As part of his sentence, Mr. Zhang was also fined RMB 120,000 – approximately US\$18,500. He is set to be released on 25 June 2034.

12. The source further reports that in February 2016, Mr. Zhang filed an appeal against his conviction on several grounds, including that he had been tortured to force a confession, that exercising his right to free expression did not constitute a crime, that giving interviews to the media was a standard journalistic behaviour and did not constitute a crime of providing intelligence overseas, and that the prison sentence was excessive.

13. The source submits that the court authorities irregularly delayed the appeal hearing on multiple occasions, noting also that an appeal is typically a mere procedural formality, especially in relation to political crimes. The source further states that following his conviction, the Xinjiang Higher People's Court should have heard an appeal by 19 April 2016; however, the Supreme People's Court approved the delay of three months, and approved another three-month delay on 18 July 2016, thus delaying the appeal date until October 2016. However, in October 2016 the hearing did not take place either, and in November 2016, Mr. Zhang's lawyers received a court notice stating that the appeal would be conducted in writing only. The court eventually heard the appeal, on 28 November 2016, in proceedings that lasted 30 minutes. The appellate court upheld the original decision.

14. The source reports that from 2 December 2016 until the present time, Mr. Zhang has been deprived of his liberty at Shaya County Prison, located in Akesu Prefecture, Xinjiang Uighur Autonomous Region. From 26 June 2015 to 2 December 2016, he was detained at the Xinjiang Uighur Autonomous Region Detention Centre.

15. The source submits that the deprivation of liberty of Mr. Zhang is arbitrary, falling under category II of the Working Group, as it constitutes State retaliation against the peaceful exercise of his right to free expression, in breach of articles 18, 19 and 20 of the Universal Declaration of Human Rights. The source explains that for years prior to being detained in 2015, Mr. Zhang had used the Chinese social media platform Weibo, as well as WeChat and Twitter, to post his opinions online that were critical of State policies and practices. The information that Mr. Zhang posted included allegations including violations of the right to freedom of religion faced by the Uighur Muslim ethnic minority group in the Xinjiang Uighur Autonomous Region.

16. It is further reported that Mr. Zhang also gave interviews to Radio Free Asia and the Voice of America about the above-mentioned allegations of human rights violations. Furthermore, for a brief period, he also contributed articles to a website reporting on human rights conditions in China. The source submits that the harsh 19-year sentence that Mr. Zhang has received for expressing his opinions appears to reflect the Government's tendency to heavily suppress any perceived politically sensitive acts within the Xinjiang Uighur Autonomous Region, on the grounds of countering terrorism.

17. The source notes that the court verdict stipulated that Mr. Zhang had sent 274 online posts from 2010 to 2015 which "resisted, attacked and smeared" the Communist Party and its policies. The court also stated that Mr. Zhang had damaged ethnic minority unity and national unity with his posts and had colluded with hostile foreign forces by accepting interviews from foreign media. The court also reportedly stated that Mr. Zhang had given interviews to overseas media and had collected information from the Xinjiang Uighur Autonomous Region about the "stability maintenance" measures undertaken by Xinjiang Uighur Autonomous Region police, such as photographs of stability maintenance personnel, police vehicles and armoured vehicles, and sent it in articles, emails and interviews to overseas "anti-China and anti-Communist Party of China" websites. The court verdict presented this as evidence of "providing intelligence overseas", even though the source notes that the evidence cited only shows that Mr. Zhang had taken photographs on public streets.

18. The source submits that the 15-year punishment on the charge of “inciting subversion of State power” is especially harsh in light of the fact that Mr. Zhang was neither a prominent activist nor a recidivist – categories for which harsher punishments are stipulated under Chinese criminal law. At trial, Mr. Zhang’s lawyer asserted that his client had not attempted to subvert the Communist Party of China. The lawyer argued that information that Mr. Zhang had provided to overseas entities was either already publicly available or was information that the Government should release under the public information disclosure regulations of China.

19. The source further recalls that the Working Group on Arbitrary Detention has described the crime of “inciting subversion” as a vague and imprecise offence, and called upon the Government in 2019 to repeal article 105 (2) of the Criminal Law or bring it into line with its obligations under international human rights law.²

20. Furthermore, the source notes that the appellate court stated, in its ruling, that Mr. Zhang, through Twitter, Weibo and WeChat, had released a large amount of content with three types of expression: (a) expression that attacked, insulted and vilified the Communist Party of China and the country’s political system; (b) expression that slandered and distorted the Communist Party of China and State policy; and (c) expression that incited subversion of the socialist system. The appellate court also stated that the grounds for appeal of the defendant – the claim that he had not committed the crime of inciting subversion of State power – was not to be accepted. The appeal ruling also claimed that Mr. Zhang’s photographs of aspects of stability maintenance measures by the police, adopted to combat violent terrorist crimes and prevent violent terrorist cases, had harmed national security and benefit.

21. Furthermore, the source argues that the deprivation of liberty of Mr. Zhang falls under category III of the Working Group, since there have been numerous legal irregularities in his case, from the moment of his detention to the sentencing to the appeal. It is thus argued that Mr. Zhang’s right to a fair trial has been breached.

22. It is alleged that Mr. Zhang has been subjected to torture and other forms of mistreatment since 2015. Furthermore, since April 2018 Mr. Zhang’s family and lawyer have been restricted in terms of seeing him – a violation of his right to family visits and to legal counsel, which adds to concerns about his treatment in custody.

23. The source further recalls that after placing Mr. Zhang under criminal detention on charges of “inciting ethnic hatred”, on 26 June 2015, the Urumqi police returned to search his home and confiscated several items. One of Mr. Zhang’s family members was forced to hand over his phone, to sign a copy of the criminal detention notice (but was not allowed to keep it) and was then taken to Zhongyuan Street Police Station. The police took photographs, DNA samples and fingerprints from this family member, as well as enquiring about the relationship with Mr. Zhang. National security officers in Urumqi later told family members that they would be able to request a copy of the criminal detention notice at Zhongyuan Street Police Station. However, when the family went there on 14 July 2015 and asked for a copy, a police officer stated that the family had already seen and signed the notice and that the crime was a State secret. The source notes, however, that at that stage, Mr. Zhang was being held on the charge of “inciting ethnic hatred”, which is not an “endangering State security” or “State secrets” crime. It also notes that under article 83 of the Criminal Procedure Law, families should receive a written notice within 24 hours, except in cases involving “endangering national security” or “terrorism”.

24. Furthermore, the source notes that Mr. Zhang was criminally detained on different charges from those for which he was formally arrested and later convicted and sentenced. The police criminally detained him in June 2015 on suspicion of “inciting ethnic hatred”, but placed him under formal arrest for “picking quarrels and provoking trouble”. Mr. Zhang was subsequently indicted and convicted on charges of “inciting subversion of State power” and “providing intelligence overseas”. The source argues that such changes suggest that the authorities lacked sufficient evidence to criminally detain Mr. Zhang. It states that there even

² Opinion No. 15/2019, paras. 34–35.

exists a possibility that authorities had coerced or tortured Mr. Zhang to extract a confession to charge him with other political crimes.

25. The source also submits that Mr. Zhang was denied access to his lawyer for several weeks following his initial detention; his lawyer's first visit was on either 1 or 2 August 2015. It is alleged that Mr. Zhang was tortured during this period. His lawyer reported torture allegations to the judge in the first instance trial. The judge asked Mr. Zhang about the allegations but dismissed them during the trial.

26. Furthermore, allegations that national security officers in Urumqi tortured Mr. Zhang in order to force a confession were one of the grounds for the appeal. Allegedly, national security officers in Urumqi tortured Mr. Zhang in the 20 days following his detention on 26 June 2015. The torture included sleep deprivation and continuous interrogation, and depriving Mr. Zhang of food and water, as well as beatings, which included hanging Mr. Zhang from the ceiling and punching him all over his body.

27. The source also reports that torture and mistreatment took place following Mr. Zhang's conviction in January 2016. It is alleged that following his conviction in January 2016, Mr. Zhang was forced for six months to wear heavy leg shackles continuously, received less food and water than other inmates and was not allowed outside.

28. In July 2016, the above-mentioned abuses were reported to the judge at the Xinjiang Higher People's Court. The judge did not commit to implementing any changes. However, later on that month, the Xinjiang Higher Procuratorate stated that it had ordered "punishment equipment" to be removed from Mr. Zhang. It is reported that, despite this announcement, Mr. Zhang continued wearing shackles.

29. Reportedly, Mr. Zhang continued to be subjected to cruel and inhumane treatment. It is alleged that the detention centre guards would force him to sit in a certain position and sound a horn if he moved. Mr. Zhang's personal photos, letters and documents for his legal defence were confiscated during a safety inspection and he was not allowed pen and paper for personal use. Mr. Zhang was forced to write a report about his activities for the guards, and another inmate was forced to sleep directly next to him at night.

30. Moreover, it is reported that since September 2016, Mr. Zhang suffered from severe stomach pains that lasted for a few hours, about every ten days. He underwent several medical tests in late September but he was never informed of the results. The detention centre officials told him that the pain was because he ate too much and that he should inform them if it continued as they would make him do exercise. Mr. Zhang was allowed outside a few times but then authorities stopped him from going outside on the grounds of low temperatures. Moreover, Mr. Zhang was forced to undergo strip searches before each lawyer's visit and had to wear a black hood over his head on the way to the meeting room.

31. On 17 November 2016, Mr. Zhang's lawyer spoke with detention centre officials and the local prosecutor concerning the alleged mistreatment. The officials stated that Mr. Zhang had to wear shackles because it was the detention centre's rules with regard to cases of endangering State security. The same prosecutor later allegedly claimed that Mr. Zhang had to wear shackles for violating "supervision rules" but was not able to indicate which rules had been broken. The prosecutor also refused to provide a copy of Mr. Zhang's medical reports.

32. The source reports that since being moved to Shaya County Prison on 2 December 2016, Mr. Zhang has continued to face torture and mistreatment. He was denied visits with his family for several months. Prison authorities told his family that the reason for that was that Mr. Zhang was being educated for three months and had to pass an examination before being allowed to meet his family. His family was able to meet him in prison on 24 April and 27 July 2017.

33. The source notes that the family visit in April 2017 was the first time that Mr. Zhang's family had been able to visit him since the start of his detention in 2015. The authorities also approved a visit either from his family members or his lawyer on 26 April 2018.

34. The source reports that Mr. Zhang also was held in solitary confinement for a prolonged period of time, was not allowed outside and could only get fresh air or sunlight from a small window in his cell.

35. Mr. Zhang has not been permitted to see his family since 26 April 2018. Since his detention in June 2015, Mr. Zhang has seen family members three times in total. Requests to visit Mr. Zhang did not receive a positive reply from the authorities. Up until at least January 2021, money deposited in a prison account for him in 2017 had not been withdrawn, which may be due to the fact that Mr. Zhang has not been permitted to access it.

36. Since his family's last in-person visit, the only information about Mr. Zhang that his family has received has come through four brief letters dated 2 December 2018, 9 June 2019, 6 October 2020 and 5 November 2020. The letters contain similar phrases and content, stating that recently everything has been going well. In the first two letters, Mr. Zhang states that his family does not need to visit him and that he is "studying every day", and that he is studying "traditional Chinese culture".

Response from the Government

37. On 23 August 2021, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government to provide, by 22 October 2021, detailed information about the current situation of Mr. Zhang and to clarify the legal provisions justifying his continued detention, as well as its compatibility with the obligations of China under international human rights law, and in particular with regard to the treaties ratified by the State. Moreover, the Working Group called upon the Government of China to ensure Mr. Zhang's physical and mental integrity.

38. On 18 October 2021, the Government submitted a reply. It explains that on 17 January 2016, Mr. Zhang was sentenced in the first instance to 19 years' imprisonment and deprivation of political rights for five years, and confiscation of personal wealth of RMB 120,000 by the Urumqi Municipal Intermediate People's Court for inciting subversion of State authority, espionage on behalf of a foreign entity, and illegally providing intelligence. Mr. Zhang appealed the Court's judgment, and on 23 November 2016 the Xinjiang Uighur Autonomous Region High People's Court issued a final instance judgment, rejecting the appeal and affirming the original judgment.

39. The Government submits that after hearing the case, the Court found that the defendant, Mr. Zhang, had used the Internet to disseminate to an indeterminate Internet audience a large volume of articles and images slandering the socialist system, and in doing so wilfully misrepresented facts and concocted rumours in order to subvert State authority and overthrow the socialist system. Furthermore, he had links to foreign groups, organizations and people, to which he submitted articles and gave interviews attacking State authority and seriously harming public security. This behaviour constitutes the crime of incitement of subversion of State authority. Mr. Zhang illegally gave intelligence that he had collected to foreign groups, organizations, websites and media, harming national security. This behaviour constitutes the crime of espionage on behalf of a foreign party and illegally providing intelligence. Having committed multiple crimes, according to law Mr. Zhang should be given concurrent punishments. According to the facts, character, circumstances, and degree of social harm of Mr. Zhang's crimes, the aforementioned judgment was issued.

40. The Government notes that after the judgment was issued in the first instance, Mr. Zhang appealed. The Xinjiang Uighur Autonomous Region High People's Court heard the appeal and rejected it, affirming the original judgment. The Court decided this case in strict accordance with the law and thoroughly protected each and all of Mr. Zhang's rights to litigate his case.

41. The Government states that China is a socialist country with rule of law which respects and protects human rights in accordance with the law. In the investigation, prosecution and adjudication, and the serving of Mr. Zhang's sentence, the Chinese judicial organs handled the case in accordance with the law and protected Mr. Zhang's rights in accordance with the law. There was not any torture, and there have been no instances of so-called "arbitrary detention" or "torture". Each and all of the rights of Mr. Zhang himself and the lawyer he

engaged have received complete protection. The People's Procuratorate monitors the prison's actions in executing criminal punishments, guaranteeing that the prisoner's legal interests are not infringed upon. Mr. Zhang is currently serving his sentence in the Xinjiang Aksu Shaya County Prison, and his physical health is normal.

42. The Government explains that prisons in the Xinjiang Uighur Autonomous Region follow the Constitution of China, the Criminal Law of China and the Prisons Law of China in administering prisons according to law, protecting prisoners' human rights according to law.

43. The Government notes that the dignity of prisoners is not undermined, and that their physical safety, lawful property, and rights to legal defence, to appeal, to file lawsuits, to report complaints, and other rights that have not been legally denied or limited, are not infringed upon. Prisoners, while serving their sentences, can meet with their relatives and guardians, and are able to communicate with their family by phone and by letter. The State provides for their clothing, food, shelter and health insurance. According to the life circumstances of the prisoner, the prison guarantees that prisoners are able to eat warm meals that are adequate and hygienic, and guarantees that living conditions have air circulation and light, and are clean and insulated. Prisons actively take hygiene measures against disease, and each prison has an internal hospital that gives free check-ups every six months. Furthermore, every prison has designated to it the best local hospital, to which it can send prisoners for the diagnosis and treatment of difficult cases, ensuring that prisoners with medical conditions are able to obtain timely treatment.

Further comments from the source

44. On 20 October 2021 the Government's reply was sent to the source for further comments, which it submitted on 27 October 2021.

45. The source notes that the Government's response omits three major issues that render Mr. Zhang's detention arbitrary. Firstly, the source reiterates that Mr. Zhang's lawful exercise of freedom of expression was used as the basis for the criminal convictions. Such expression cannot be legitimately curtailed unless needed to ensure due recognition and respect for the rights and freedoms of others and to meet the just requirements of morality, public order and the general welfare in a democratic society, as described in article 29 (2) of the Universal Declaration of Human Rights. The Government has not shown that Mr. Zhang's free exercise of expression posed any danger to morality, public order, or general welfare.

46. Secondly, the source points out that the Government does not contest that the crimes for which Mr. Zhang was arrested and convicted are too vague and broadly worded to provide sufficient legal basis for his conviction. The terms "intelligence" and "espionage" are not defined in article 111 of the Criminal Law, allowing judicial officials to apply the provision so broadly as to deprive individuals of liberty without a specific legal basis.

47. Thirdly, it is submitted that the Government fails to rebut accounts of the grave violations of Mr. Zhang's rights to a fair trial and due process that have occurred during his detention and throughout his sentencing and appeal, including holding Mr. Zhang incommunicado and subjecting him to torture for the purposes of obtaining inculpatory information. General assertions of the Government do not provide specific grounds to disprove allegations of torture and mistreatment both before and after Mr. Zhang's conviction.

48. The source adds that during the trial, Mr. Zhang's lawyer argued that the interrogations carried out under torture should be omitted from evidence. However, the judge dismissed the argument based on affidavits from the officials responsible for Mr. Zhang in custody.

49. Finally, the source notes that, although citing general policy regarding communication between detainees and their families, the Government does not dispute the specific circumstances of Mr. Zhang regarding violation of his rights to visitation and correspondence. Mr. Zhang was last able to see members of his family in person in April 2018.

Discussion

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

51. In determining whether Mr. Zhang's detention was arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has presented a *prima facie* case for breach of international law constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations.³

Category I

52. The Working Group notes that it is not disputed that Mr. Zhang was arrested on 26 June 2015, when he was presented with an arrest warrant, and that he was subsequently charged, tried and sentenced for inciting subversion of State authority, espionage on behalf of a foreign entity, and illegally providing intelligence. In relation to the charge of "inciting subversion", the Working Group notes that this is based on article 105 (2) of the Criminal Law which it has been called upon to examine previously.⁴

53. Following its visits to China in 1997 and 2004, the Working Group emphasized in its reports that charges involving vague and imprecise offences jeopardize the ability of individuals to exercise their fundamental rights and are likely to result in arbitrary deprivation of liberty. The Working Group recommended that those crimes be defined in precise terms and that legislative measures be taken to introduce an exemption from criminal responsibility for those who peacefully exercise their rights guaranteed by the Universal Declaration of Human Rights.⁵

54. As the Working Group has 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.⁶ The Working Group had already called upon the Government to repeal article 105 (2) of the Criminal Law or bring it into line with its obligations under international human rights law⁷ but the circumstances of this case demonstrate that this has not taken place.

55. In the present case, Mr. Zhang was charged under a vague and imprecise offence of inciting subversion of State power under article 105 (2) of the Criminal Law.⁸ This provision does not define what conduct amounts to subversion and overthrowing the socialist system through rumours, slander or other means. The communication of mere thoughts, ideas or opinions could potentially fall within the prohibited conduct. Moreover, the determination of whether an offence has been committed appears to be left entirely to the discretion of the authorities. Indeed, the Government has not explained how Mr. Zhang's conduct could be considered as inciting subversion and overthrowing the socialist system. Importantly, there is nothing to suggest that Mr. Zhang engaged in or incited violence as part of his activities which might have given cause to restrict his behaviour. On the contrary, he chose to work peacefully by advocating for reform in various areas of Chinese law and society and by defending the rights of others.

56. Recalling that it is not contested that Mr. Zhang was formally arrested on 31 July 2015 on the grounds of "picking quarrels and provoking troubles" in breach of article 293 of the Criminal Law, the Working Group must make similar observations also in regard to this crime, as this is yet another provision which it has been called upon to examine previously.⁹

³ A/HRC/19/57, para. 68.

⁴ See opinions No. 82/2020 and No. 15/2019.

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

⁶ See, for example, opinion No. 41/2017, paras. 98–101.

⁷ Opinions No. 15/2019, para. 35; and No. 82/2020, paras. 48–52.

⁸ See also A/HRC/48/55, para. 48.

⁹ Opinion No. 32/2020, para. 50.

The Working Group concluded then, also in respect of this provision, that the principle of legal certainty has not been satisfied, and called upon the Government to address this provision.¹⁰ The Working Group regrets that no action seems to have followed.

57. Noting all the above, the Working Group concludes that the arrest and subsequent detention of Mr. Zhang on the basis of articles 105 (2) and 293 of the Criminal Law was arbitrary and falls under category I as lacking legal basis, in breach of article 9 of the Universal Declaration of Human Rights. The Working Group makes this conclusion due to the failure of articles 105 (2) and 293 of the Criminal Law to meet the standards of the principle of legality. The Working Group once again calls upon the Government to repeal articles 105 (2) and 293 of the Criminal Law or bring them into line with its obligations under international human rights law.

Category II

58. The source has further argued that the arrest and detention of Mr. Zhang was retaliation for the peaceful exercise of his rights under articles 19 and 20 of the Universal Declaration of Human Rights. The Government, in its reply, has merely stated that Mr. Zhang was arrested and sentenced for “inciting subversion of State authority, espionage on behalf of a foreign entity, and illegally providing intelligence”. It has further explained that Mr. Zhang “used the Internet to disseminate to an indeterminate Internet audience a large volume of articles and images slandering the socialist system, and in doing so wilfully misrepresented facts and concocted rumours in order to subvert State authority and overthrow the socialist system. He furthermore had links to foreign groups, organizations and people, to which he submitted articles and gave interviews attacking State authority and seriously harming public security. This behaviour constitutes the crime of incitement of subversion of State authority.”

59. The Working Group is unable to accept the description provided by the Government as a description of a criminal offence, especially one that would entail 19 years of imprisonment. As already noted above, importantly, the Government has made no suggestion that Mr. Zhang engaged in or incited violence as part of his activities which might have given cause to restrict his behaviour. On the contrary, he chose to work peacefully by advocating for reform in various areas of Chinese law and society. The source has argued that Mr. Zhang engaged with various issues, including, in particular, the restrictions on and violations of freedom of religion for Uighur Muslims in the Xinjiang Uighur Autonomous Region, a topic on which he posted online submissions as well.

60. The mere fact that the views he expressed challenged the views of the authorities cannot be a legitimate reason for his arrest and detention. In this regard, the Working Group wishes to specifically recall Human Rights Council resolution 24/5, which “reminds States of their obligation to respect and fully protect the rights of all individuals to assemble peacefully and associate freely, online as well as offline, including in the context of elections, and including persons espousing minority or dissenting views or beliefs, human rights defenders, trade unionists and others”.

61. The Working Group considers that the only plausible explanation for Mr. Zhang’s arrest and detention is that he is being punished for the exercise of his rights to freedom of expression and of association protected by articles 19 and 20 of the Universal Declaration of Human Rights, as he engaged in advocacy for human rights and respect of the freedom of religion of Uighur Muslims in the Xinjiang Uighur Autonomous Region. The limitations on these rights and freedoms permitted under article 29 (2) of the Universal Declaration of Human Rights do not apply in the present case. The Government did not present any argument to the Working Group to invoke any of these limitations, nor did it demonstrate why bringing charges against Mr. Zhang was a legitimate, necessary and proportionate response to his peaceful activities.

62. Furthermore, according to 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, “everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human

¹⁰ Opinion No. 32/2020, paras. 60–61.

rights and fundamental freedoms at the national and international levels”, to communicate with non-governmental organizations, and to have effective access in the conduct of public affairs.¹¹ The Working Group considers that the source’s allegations demonstrate that Mr. Zhang was detained for the exercise of his rights under the above-mentioned declaration as a human rights activist and defender.

63. The Working Group has determined that detaining individuals on the basis of their activities as human rights defenders violates their right to equality before the law and equal protection of the law under article 7 of the Universal Declaration of Human Rights.¹² Accordingly, the Working Group concludes that the deprivation of liberty of Mr. Zhang resulted from the peaceful exercise of his rights to freedom of expression and of association as he engaged in advocacy for human rights and respect of the freedom of religion of Uighur Muslims in the Xinjiang Uighur Autonomous Region, and was contrary to articles 19 and 20 of the Universal Declaration of Human Rights. His deprivation of liberty is arbitrary and falls within category II. The Working Group refers this matter to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the rights to freedom of peaceful assembly and of association, the Special Rapporteur on minority issues, the Special Rapporteur on freedom of religion or belief and the Special Rapporteur on the situation of human rights defenders.

Category III

64. Given its finding that the deprivation of liberty of Mr. Zhang is arbitrary under category II, the Working Group wishes to emphasize that he should not have been tried; however, he was tried and was sentenced to a very lengthy imprisonment of 19 years. The source has argued that serious fair trial violations occurred during his trial, while the Government contends that all of Mr. Zhang’s rights were observed, without addressing any of the specific allegations.

65. The Working Group notes the uncontested submission that the trial of Mr. Zhang started on 11 January 2016 and that he was convicted to 19 years of imprisonment a mere four days later. Although the length of a trial in itself cannot be a sole indicator of whether it has been fair, in the present case the Working Group is bound to observe that it would be impossible for a trial to meet the requisite standard of fairness as encapsulated in articles 10 and 11 of the Universal Declaration of Human Rights when the proceedings lasted a mere four days, concluding with such a seriously heavy penalty as 19 years of imprisonment. Moreover, the appellate proceedings, following numerous postponements for which neither the court at the time nor the Government in its reply provided any legitimate explanation, finally commenced on 28 November 2016 and concluded on the same day, a mere 30 minutes later, conforming the original decision. The Working Group considers that such delays, especially noting its findings under category II above, are entirely incompatible with the obligations of China under the Universal Declaration of Human Rights. It considers the appeal proceedings to fall short of the standards of judicial proceedings based on the rule of law, in clear breach of Mr. Zhang’s rights under articles 10 and 11 of the Universal Declaration of Human Rights.

66. The Working Group further notes the uncontested allegations that Mr. Zhang’s right to legal assistance at all times was not respected, as he was denied access to his lawyer for several weeks after his detention, and subsequently documents and correspondence with his lawyers were confiscated. The right to legal assistance is inherent in the right to liberty and security of person as well as in the right to a fair and public hearing by a competent, independent and impartial tribunal established by law, in accordance with articles 3, 9, 10 and 11 (1) of the Universal Declaration of Human Rights. The Working Group considers that

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

¹² See, for example, opinions No. 15/2019, No. 46/2018, No. 45/2018 and No. 36/2018.

this violation substantially undermined and compromised his capacity to defend himself in any subsequent judicial proceedings.

67. As the Working Group has stated in 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 such access is to be provided without delay. The Working Group therefore finds that the absence of legal counsel for Mr. Zhang violated his rights to a fair trial and due process under articles 10 and 11 (1) of the Universal Declaration of Human Rights and principles 17 and 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

68. The Working Group further recalls principle 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, in which it is stated that a detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his or her family, and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations. The Working Group notes the denial of this right to Mr. Zhang. Giving prompt and regular access to family members, as well as to independent medical personnel and lawyers, is an essential and necessary safeguard for the prevention of torture as well as for protection against arbitrary detention and infringement of personal security.

69. The Working Group further expresses its concern at the *prima facie* allegation of ill-treatment of Mr. Zhang, as submitted by the source and not contested by the Government. Although it appears that the procuracy attempted to somehow mitigate and address the situation (see para. 28 above), the Working Group is particularly disturbed at the uncontested submissions that the lawyer of Mr. Zhang brought the torture and ill-treatment allegations to the attention of the judge, who took no action.

70. Not only does ill-treatment and torture constitute a grave violation of human rights per se in violation of articles 5 and 25 of the Universal Declaration of Human Rights and article 16 (1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as principle 6 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and rule 1 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), it also seriously undermines the ability of persons to defend themselves and hinders their exercise of the right to a fair trial, especially in light of the right not to be compelled to testify against oneself or to confess guilt under article 11 (1) of the Universal Declaration of Human Rights. The Working Group refers the present case to Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Special Rapporteur on the independence of judges and lawyers, for appropriate action.

71. The Working Group considers that the failure of the court to take action when allegations of ill-treatment and torture were brought to its attention is a further violation of the right of Mr. Zhang to an independent and impartial tribunal as required by article 10 of the Universal Declaration of Human Rights.

72. Given 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. Zhang an arbitrary character that falls within category III.

Category V

73. Furthermore, the Working Group is convinced that Mr. Zhang was targeted because of his activities as a human rights activist and defender. The source alleges, and the Government has not contested, that Mr. Zhang was subject to a pattern of harassment, intimidation and retaliation by the authorities over several years, including detention for nearly two months in 2009, and subsequently when he challenged the authorities over the legality of this detention. Mr. Zhang's current deprivation of liberty appears to be part of this pattern.

74. The Working Group has previously concluded that being a human rights defender is a status protected by article 7 of the Universal Declaration of Human Rights.¹³ Accordingly, the Working Group finds that Mr. Zhang was deprived of his liberty on discriminatory grounds, that is, due to his status as a human rights defender, as well as on the basis of his political or other opinion in challenging the actions of the Government. This amounts to a violation of articles 2 and 7 of the Universal Declaration of Human Rights. His deprivation of liberty is arbitrary and falls within category V.

Concluding remarks

75. The Working Group is disturbed at the allegations concerning the state of health of Mr. Zhang and denial of appropriate medical treatment, and at his conditions of detention and his treatment in detention, including the denial of food and the requirement for him to wear heavy leg shackles, and also that “educational measures” have been ordered in relation to him. The source has also alleged that Mr. Zhang has been denied family contact. Although the Government denies these allegations, the Working Group recalls that it is the duty of all Governments to treat their detainees with humanity and respect for their inherent dignity as a human being, as stipulated in rule 1 of the Nelson Mandela Rules.

76. The Working Group also wishes to highlight the fact that in addition to 19 years of imprisonment, Mr. Zhang was sentenced to five years’ deprivation of political rights. The Working Group considers this entirely incompatible with the obligations of China under the Universal Declaration of Human Rights, especially in the light of its findings in the present opinion.

77. In its 30-year history, the Working Group has found China in violation of its international human rights obligations in over 100 cases.¹⁴ The Working Group is concerned that this indicates a systemic problem with arbitrary detention in China, which amounts to a serious violation of international law. The Working Group recalls that, under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of the rules of international law may constitute crimes against humanity.¹⁵

78. The Working Group would welcome the opportunity to conduct a country visit to China. Given that a significant period of time has passed since its last visit to China in September 2004, the Working Group considers that it is an appropriate time to conduct another visit. The Working Group looks forward to a positive response to its country visit request of 15 April 2015.

Disposition

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

¹³ See, for example, opinions No. 15/2019, para. 50; No. 83/2018; No. 19/2018; No. 50/2017 and No. 48/2017; and [A/HRC/36/37](#), para. 49.

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, No. 20/2019, No. 35/2019, No. 36/2019, No. 72/2019, No. 76/2019, No. 11/2020, No. 32/2020, No. 78/2020, No. 82/2020, No. 25/2021 and No. 30/2021.

¹⁵ Opinions No. 35/2019, para. 65; 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.

The deprivation of liberty of Zhang Haitao, being in contravention of articles 2, 7, 9, 10, 11, 19 and 20 of the Universal Declaration of Human Rights, is arbitrary and falls within categories I, II, III and V.

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

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

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

83. The Working Group requests the Government to bring its laws, particularly articles 105 (2) and 293 of the Criminal Law, into conformity with the recommendations made in the present opinion and with the commitments made by China under international human rights law.

84. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the rights to freedom of peaceful assembly and of association, the Special Rapporteur on the situation of human rights defenders, the Special Rapporteur on minority issues, the Special Rapporteur on freedom of religion or belief, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Special Rapporteur on the independence of judges and lawyers, for appropriate action.

85. The Working Group recommends that the Government accede to the International Covenant on Civil and Political Rights.

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

Follow-up procedure

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

88. 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.

89. 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.

90. 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.¹⁶

[Adopted on 17 November 2021]

¹⁶ Human Rights Council resolution 42/22, paras. 3 and 7.