

OPINION No. 32/2007 (China)

Communication addressed to the Government on 7 November 2006.

Concerning Messrs. Jin Haike and Zhang Honghai.

The State has signed but not ratified the International Covenant on Civil and Political Rights.

1. (Same text as paragraph 1 of Opinion No. 14/2007.)
2. (Same text as paragraph 3 of Opinion No. 15/2007.)
3. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. The Working Group transmitted the reply provided by the Government to the source and received its comments.
4. The Working Group believes that it is in a position to render an opinion on the facts and circumstances of the cases, in the context of the allegations made and the response of the Government thereto, as well as the observations by the source.
5. According to the source: Mr. Jin Haike, born on 26 May 1976, a geophysicist, usually resident at No. 2 Courtyard, Lishuiqiaoja, Chaoyangqu, Beijing, and Mr. Zhang Honghai, born on 1 November 1973, a freelance writer, usually resident at 2 East Sihou Road, Wuyun Town, Jinyun County, Zhejiang Province, founded an organization named “New Youth Study Association”, which aims at exploring ways to enact social reform in the People’s Republic of China. Co-founders of this association were Yang Zili, a computer engineer, and Xu Wei, a reporter and editor for Beijing’s Consumer Daily newspaper. The group posted a number of articles online that are critical of the Chinese Government, including those entitled “Be a New Citizen, Reform China” and “What’s to Be Done”. Later, the group was infiltrated by a government official.
6. Jin and Zhang were criminally detained on 13 March 2001 by officers of the Beijing State Security Bureau on suspicion of “inciting subversion of state power” pursuant to article 105 (1) of the People’s Republic Criminal Code, which renders it a criminal offence to “organize, plot or carry out the scheme of subverting the state power or overthrowing the socialist system.” The formal arrest under the authority of the Beijing Municipal People’s No. 1 Procuratorate was carried out on 20 April 2001 by officers of the Beijing State Security Bureau Detention Centre. There they

were both being held in custody until November 2004, the date of their transferral to Zhejiang Qiaosi No. 9 Prison. Jin's and Zhang's families were issued notification of their arrests on 24 April 2001. Upon a search conducted by unknown government officials, several items were confiscated from Jin, Zhang, Yang and Xu, including four floppy discs, two notebooks, a 47-page manuscript, four pieces of loose-leaf paper, one computer circuit, four computer hard discs, one modem, several articles, and one computer. It is not known whether warrants had been issued to authorize the search and seizure.

7. Jin's and Zhang's indictment was delivered to the No. 1 Beijing Intermediate People's Court on 29 August 2001, stating that "the indictees, Xu Wei, Yang Zili, Jin Haike, and Zhang Honghai disregarded the laws of the nation and illegally formed an organization to plot and carry out subversion of State power and overthrow of the socialist system. The four indictees' actions violated the regulation of paragraph 1 of article 105 of the criminal law of the People's Republic of China, and committed the crime of incitement to subvert state power."

8. Jin, Zhang and their two co-defendants' trial commenced on 28 September 2001. Their trial hearing on this day was reported as open to the public, but the court only allowed three family members each and two external observers to attend. The No. 1 Beijing Intermediate People's Court adjourned after four hours, and the trial was not reconvened until 21 April 2003. A verdict was reached after the third trial hearing on 28 May 2003. Zhang Honghai did not enjoy the benefit of the presence of legal counsel on his behalf. Jin Haike was represented by Liu Dongbin. Both defendants repeatedly testified in court that they, like their two co-defendants, had been ill-treated and pressured in detention before and after their arrests in order to make confessions. More particularly, officials holding Zhang in custody reportedly burnt his neck with cigarette butts and made him sit for long hours without moving. Zhang was also forced to eat only a pickled vegetable for twenty days.

9. Jin was sentenced to ten years of imprisonment and two additional years of deprivation of political rights taking into account the period of time already served in detention, for "incitement to subvert state power" in accordance with articles 105 (1), 56 (1), 25 (1), 26 (1) and (4), and 64 of the Chinese Criminal Code. Jin is due for release on 12 March 2011. Zhang was sentenced on identical grounds on the same day to eight years of imprisonment and two additional years of deprivation of political rights. Taking into account the time he had already spent in prison, Zhang is due for release on 12 March 2009.

10. Jin and Zhang both appealed to their sentence on 28 May 2003. Their appeal was heard on 3 November 2003 by the Beijing Higher People's Court and dismissed on 6 November 2003.

11. According to the source, Jin and Zhang's detention is a result of their peaceful exercise of the right to freedom of expression, and the right to access and impart information, and also the result of their legitimate exercise of the right to freedom of association.

12. Jin Haike's and Zhang Honghai's guilty verdict rests in large part on the basis of their exercise of the right to free expression on the Internet by attempting to freely access and post on the Web. This is evidenced by the judgment's reference to specific articles posted on the Internet on behalf of the organization called "New

Youth Study Association” as amounting to incitement of subversion and as efforts to overthrow the Government.

13. According to the source, Jin’s and Zhang’s postings on the Internet did not incite violence to overthrow the current political system, but rather criticized the Government and political climate in China. Resorting to a serious charge such as incitement to subvert State power in response to peaceful criticism is not an appropriate application of the standard of least restrictive means possible, and Jin’s and Zhang’s expressions were unrelated to a specific threat to national security. Moreover, since the legal formulation of Chinese state security crimes is vague and not explicitly defined, Chinese law and its application violate the letter and spirit of international law standards.

14. The source alleges that the verdict against Jin and Zhang relies to a great extent on incriminating peaceful activities in exercising their right to freedom of association by participation in the forming of the group and in the writing of papers for posting on the Internet. These activities did not put the People’s Republic in peril and the views advocated by the group were not violent in nature. The source suggests that Jin’s and Zhang’s detention and conviction is carried out in an effort to silence their political dissent, rather than due to any legitimate concerns related to State security.

15. As to the allegations that the arrest, detention and imprisonment of Jin and Zhang violate their right to a fair trial, the source notes that, firstly, both had already been detained for 38 days prior to their formal arrests in contravention to Chinese criminal procedure law. The Chinese Criminal Procedure Code requires that a request for a formal arrest must be made within three days of detention upon which the Procuratorate must take a decision within further seven days. Only in special circumstances or where there is a major suspect on the run, who repeatedly commits crimes or partners with others to commit crimes, the investigating branch is allowed by law to delay requesting an arrest for four days or for up to 30 days, respectively. In the present case, this law could not be applied or was not properly applied within the time limits proscribed.

16. The source further asserts that the Chinese Criminal Procedure Code stipulates that a court must announce judgment within one and a half months after acceptance of the case, with an additional month of extension for major or complex cases. It is also possible to adjourn a trial for a total of two supplemental investigations, or for obtaining new evidence or witnesses if necessary, provided that each of the actions for which postponement is required is completed within one month. Since the indictment of Jin and Zhang was issued on 29 August 2001 and the trial commenced on 28 September 2001 but was not concluded until 28 May 2003, these regulations have clearly not been adhered to in this case.

17. The source also adverts to Zhang’s lack of access to adequate legal counsel being in contravention of the fundamental right to fair and impartial trial. The denial of legal counsel also infringes upon Zhang’s right under article 96 of the Chinese Criminal Procedure Code, which provides that defendants have the right to obtain legal defence after their first interrogation by investigators or from the day coercive measures are taken against them.

18. In its reply, the Government states that Xu Wei, Jin Haike and Zhang Honghai, in early May 2000, illegally founded the “New Youth Study Group”, described as a

secret organization that had as its objective the subversion of State authority, and drafted a charter for the organization. Yang Zili joined the organization on 19 August 2000. The four individuals then met secretly on numerous occasions at such places as Beijing University and Renmin University of China, where they discussed how to subvert the authority of the State. In order to achieve this objective, the group divided its work up into various tasks: designing and setting up a website, creating a publication and shaping public opinion; plotting to expand the organization globally, creating branches around the world; and posting numerous essays on the Internet and using rumour and libel to subvert the authority of the State and to overthrow the socialist system.

19. According to the Government, the First Branch of the People's Procuratorate of Beijing Municipality charged the above four individuals with the crime of subverting the authority of the State and initiated proceedings against them in the Beijing First Intermediate People's Court. The First Intermediate People's Court heard the case in an open trial and found that the four above-mentioned individuals had established an organization in contravention of the law and had plotted and taken action to subvert the authority of the State and to overthrow the socialist system, actions which constituted the crime of subversion of the authority of the State. On 28 May 2003, the Court announced the first-instance verdict. Xu Wei and Jin Haike were each sentenced to 10 years of imprisonment and 2 years of deprivation of political rights for the crime of subverting the authority of the State, while Yang Zili and Zhang Honghai were each sentenced to 8 years of imprisonment and 2 years of deprivation of political rights.

20. The Government further reports that after this judgement had been rendered, the four individuals objected and filed an appeal. The Supreme People's Court of Beijing Municipality, as court of second instance, considered the appeal in an open hearing. The Court found that the facts of the case as established by the court of first instance were clear, that all testimony and evidence relating to the case had been produced and those testifying cross-examined, and that the evidence had been credible and sufficient. Xu Wei and the others had plotted and taken action to set up an organization in contravention of the law, and had met in secret and plotted together to undermine the authority of the State and overthrow the socialist system, actions which constituted the crime of undermining the authority of the State. On 6 November 2003 the Supreme People's Court of Beijing Municipality issued a second verdict rejecting the appeal and upholding the original verdict.

21. The Government states that throughout the time the case was considered, both the courts of first and second instance held open proceedings, and the rights and interests of the defendants were fully protected. Jin Haike and the three other defendants all appointed lawyers to represent them, and not only did their counsel defend them in court, but the defendants themselves were also able to exercise their right to defence. The attorneys formally designated to represent the four defendants were: for Xu Wei: Zhu Jiuhu, of the Mo Shaoping Law Firm; for Yang Zili: Xu Wanlin, of the Chang'an Law Firm, and Li Heping, of the Beijing Gaobo Longhua Law Firm; for Jin Haike: Liu Dongbing, of the Mo Shaoping Law Firm; for Zhang Honghai: Zhang Enzhi and Yan Ruyu, of the Wu Luan Zhao Yan Law Office.

22. Finally, the Government explains that during the hearing in the court of second instance, Xu Yu was represented by Mo Shaoping and Gao Xia of the Mo Shaoping Law Firm, while Yang Zili, Jin Haike and Zhang Honghai retained their defence

counsel from the first hearing. Jin Haike, Xu Wei and Yang Zili are currently serving their sentences in the Beijing No. 2 prison, while Zhang Honghai is serving his sentence in the Qiaosi detention facility in Zhejiang Province. All four enjoy family visits and their health is “completely normal”.

23. In its comments to the response of the Government, the source points out the fact that the Government simply restates, as in the verdict, that the men formed an illegal group with the intention to subvert State power. The source considers that the lack of response on the substantive concerns related to Mr. Jin’s and Mr. Zhang’s detention tends to confirm that the charges invoked against them have been used in retaliation for exercising their rights to freedom of expression and association.

24. The source notes that the rights of all four defendants were fully protected during the trial and appeal, but it considers that the response does not adequately or specifically address the subsequent arrest of Mr. Jin and Mr. Zhang. According to the response of the Government, the trial was held in open court, but does not explain why some family members were barred from entering the hearing.

25. Further, the source indicates that the Government makes no mention of the prolonged pre-arrest detention of both Mr. Jin and Mr. Zhang nor of the period of one year and a half they spent in detention awaiting their verdict after the trial. These prolonged periods of detention, without charge and then without verdict, violate Chinese criminal procedure law and also international human rights standards and principles.

26. Having analysed all information before it, the Working Group finds that Mr. Jin and Mr. Zhang have been detained solely for creating an organization, organizing meetings and posting articles on the Internet on behalf of the organization called “New Youth Study Association”. The Government, which recognizes that Mr. Jin and Mr. Zhang have been sentenced to imprisonment because of these facts, does not assert that Mr. Jin and Mr. Zhang ever resorted to violence or incited others to violent behaviour when engaging in the activities for which they were convicted.

27. The Working Group is led to conclude that Mr. Jin and Mr. Zhang have been punished merely for establishing an organization and having expressed their critical personal views on political issues in a non-violent manner. Although national laws might punish such conduct, it is, however, protected by the rights to freedom of opinion and expression and association in international law. As the Working Group has stated in its Deliberation No. 8 on Deprivation of Liberty resulting from the use of the Internet¹⁶ a vague and general reference to the interests of national security or public order, without being properly explained and documented, is insufficient to convince the Working Group that the restrictions on the freedom of expression by way of deprivation of liberty are necessary when using the Internet.

28. In the light of the foregoing the Working Group renders the following Opinion:

The detention of Jin Haike and Zhang Honghai is arbitrary, as it contravenes the principles and norms set forth in the articles 9, 19 and 20 of the Universal Declaration of Human Rights and falls within category II of the

¹⁶ E/CN.4/2006/7.

categories applicable to the consideration of cases submitted to the Working Group.

29. Consequent upon the Opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation in order to bring it into conformity with the standards and principles enshrined in the Universal Declaration of Human Rights. The Working Group recommends that the Government considers signing and ratifying the International Covenant on Civil and Political Rights.

Adopted on 28 November 2007