

**Mandates of the Working Group on Arbitrary Detention; the Working Group on Enforced or Involuntary Disappearances; 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 right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur on the independence of judges and lawyers; the Special Rapporteur on the right to privacy; the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment**

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Excellency,

We have the honour to address you in our capacities as Working Group on Arbitrary Detention; Working Group on Enforced or Involuntary Disappearances; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the rights to freedom of peaceful assembly and of association; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on the situation of human rights defenders; Special Rapporteur on the independence of judges and lawyers; Special Rapporteur on the right to privacy; Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, pursuant to Human Rights Council resolutions 33/30, 36/6, 34/18, 32/32, 33/9, 34/5, 35/11, 37/2, 31/3 and 34/19.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the use of **Residential Surveillance in a Designated Location (RSDL) as amended in the 2012 Criminal Procedure Law Article 73**, in relation to persons suspected of endangering State security, of terrorist activities or of involvement in major bribery and where confinement in their own home may 'impede the investigation'.

According to the information received:

Pursuant to relevant Chinese criminal and criminal procedural provisions, an individual may be placed under Residential Surveillance at a Designated Location (RSDL) in cases involving crimes of endangering State security, terrorism or serious bribery, and when confinement in their home may impede the investigation.

Although it was initially conceived as a protective measure for persons in situations of vulnerability (seriously ill, pregnant women), RSDL has increasingly been applied to a variety of suspected offenders, including human rights defenders, journalists and human rights lawyers (UA CHN 3/2017).

According to Article 73 of the Criminal Procedure Law (CPL): “Residential confinement shall be executed at the residence of a criminal suspect or defendant; or may be executed at a designated residence if the criminal suspect or defendant has no fixed residence. Where execution of residential confinement at the residence of a criminal suspect or defendant in a case regarding compromising national security, terrorist activities, or extraordinarily significant bribery may obstruct criminal investigation, it may be executed at a designated residence with the approval of the people's procuratorate or public security authority at the next higher level. However, residential confinement may not be executed at a place of custody or a place specially used for handling cases. If residential confinement is executed at a designated residence, the family of the person under residential confinement shall be notified within 24 hours after residential confinement is executed, unless such notification is impossible. Where a criminal suspect or defendant under residential confinement retains a defender, the provisions of Article 33 of this Law shall apply. People's procuratorates shall oversee the legality of decisions and execution of residential confinement at a designated residence.<sup>1</sup>”

Furthermore, the Supreme People’s Procuratorate Regulations to Implement Monitoring of RSDL which came into effect in January 2016 (the 2016 SPP Regulations) state that RSDL can be used when the suspect does not have a permanent domicile in the city or county where the investigation is taking place.

RSDL may be imposed in a place other than the domicile of the individual concerned, with no obligation for the authorities to inform the relatives or the legal representatives of the identified location of detention. However, RSDL cannot be implemented in a detention centre or in the premises where investigations are conducted. Individuals may be placed under RSDL for a period of time of up to six months.

According to the law, families of those placed under RSDL, should be notified within 24. However, it appears that the notice does not need to specify the address of the designated place of detention. In addition, when the notification has the potential to “impede the investigation”, the authorities may not disclose information concerning the suspects’ whereabouts and grounds for their detention.

Combined, these conditions of detention are analogous to incommunicado and secret detention and tantamount to enforced disappearance; they expose those subjected to RSDL to the risk of torture and other inhuman and degrading treatment and other human rights violations.

It is also reported that various individuals who were placed under RSDL have undergone forced medication for non-existent medical conditions, resulting in side effects such as muscle pain, blurred vision, brain fog and affected eyesight.

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<sup>1</sup> [https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/60490/103249/F-1220070742/CHN60490%20\(2012\).pdf](https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/60490/103249/F-1220070742/CHN60490%20(2012).pdf)

Furthermore, while persons held in RSDL and suspected of having committed a major bribery, terrorist activities or endangering national security, have, according to the law, the right to appoint a legal counsel (Articles 73 and 33) following the imposition of these ‘compulsory measures’, under Article 37, the investigation body has the discretionary power to grant or not permission for their defense counsel to meet them. This permission is reportedly routinely denied or access to an independent and impartial counselling of the choice of the person detained is not granted.

The supervision of the legality of the placement of a suspect in RSDL, and the monitoring of the suspects’ treatment under that condition, should in principle fall within the scope of the State’s Procuratorate’s office. In practice, there are no records of Procuratorate’s oversight of the decision to detain and placed in RSDL. This appears to be at the sole discretion of the police or investigation body. In addition, the police is allegedly not required to seek the Procuratorate’s approval to detain a suspect for 30 days. Further, the Procuratorate has up to seven days to approve or turn down a police recommendation to arrest someone. This does not apply if such supervision is deemed by the police to interfere with its investigation, thus depriving those suspected of these crimes of the Procuratorate’s oversight concerning the decision to detain, and its monitoring of their detention and treatment.

Also, due to the lack of transparency regarding the use of RSDL, and the lack of public data on the number of persons accused of these crimes, it is reportedly impossible to know the exact number of RSDL detainees and the length of time for which each detainee is held.

Based on this information, we would like to bring to your Excellency’s Government attention the following concerns:

*Enforced or involuntary disappearance*

If not all cases of RSDL rise to the level of what the WGEID would consider to be an enforced disappearance, “exceptions”, as set out in Article 73 of the 2012 CPL, make placement in RSDL tantamount to an enforced disappearance. The practice which consists of placing individuals under incommunicado detention for investigation for prolonged periods without disclosing their whereabouts amount to secret detention and is a form of enforced disappearance (A/HRC/36/39, para. 71 and A/HRC/19/58/rev.1 pages 36-37). The United Nations Declaration on the Protection of All Persons from Enforced Disappearances recognizes the right to be held in an officially recognized place of detention, in conformity with national law and to be brought before a judicial authority promptly after detention in order to challenge the legality of the detention. The same Declaration establishes the obligation of the detaining authorities to make available accurate information on the detention of persons and their place of detention to their family, counsel or other persons with a legitimate interest (article 10). The Declaration also establishes the obligation to maintain in every place of detention an official up-to-date

register of detained persons (article 12) and provides that no circumstances whatsoever, whether a threat of war, a state of war, internal political instability or any other public emergency, may be invoked to justify enforced disappearances (article 7).

The Committee Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in the Concluding Observations of its Fifth Periodic Report of China (CAT/C/CHN/CO/5, para. 14), recommended that the State party repeal, as a matter of urgency, the provisions of the Criminal Procedure Law that allow suspects to be held de facto incommunicado, at a designated location, while under residential surveillance. Pending the repeal of that provision, the Committee recommended to the State party that it ensures that Procuratorates promptly review all the decisions on residential surveillance taken by public security officers and ensure that detainees who are designated for potential prosecution are charged and tried as soon as possible and those who are not to be charged or tried are immediately released. If detention is justified, detainees should be formally accounted for and held in officially recognized places of detention. Officials responsible for abuses of detainees should be held criminally accountable. These recommendations do not seem to have been taken into account by China and we are hereby reiterating them.

Although China is not a signatory to the United Nations Convention on Enforced Disappearances, it has expressed on several occasions its support to the international community's efforts to eliminate and prevent enforced disappearances, including at the UN Human Rights Council<sup>2</sup>.

*Right not to be subjected to arbitrary arrest, to a fair trial and independence of the judiciary and the legal profession*

We are concerned that the practice of imposing RSDL without judicial oversight, without formal charges, in conditions amounting to incommunicado detention or solitary confinement, 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 and without delay.

Furthermore, several provisions of the Supreme People's Procuratorate Regulations to Implement the Monitoring of RSDL, which came into effect in January 2016, also appear to contravene the principle of independence of judges and lawyers and the right to fair trial of persons placed in RSDL. Under these Regulations, indeed, Procuratorates are required to ascertain that the relevant documentation is complete and the decision to use RSDL is lawful; however, they do not have the power to challenge discretionary decisions by the police, as the regulations do not provide for any formal review of the decision to use RSDL and whether the case meets the criteria for arrest.

Furthermore, there appears to be no formal procedure for reviewing the police decision to qualify a case as involving terrorist activities, major bribery or endangering national security. The law only requires that a police decision to place someone under RSDL must be approved by the police at the next higher administrative level. The extensive

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<sup>2</sup> Statement made at the 36th session of the Human Rights Council, September 2017.

powers attributed to the police with regard to RSDL cases pose serious concerns with regard to the principles of separation of powers and the independence of the judiciary.

The practice of RSDL also seems to violate the right of accused persons to defend themselves through a legal counsel of their choosing. In RSDL cases, it appears that contacts between accused persons and their lawyers are often denied, that lawyers have been subject to threats and interferences in the exercise of their profession, that in some case, these have led to their dismissal and to the withdrawal of their licenses to practice law.

In this regard, we refer to articles 9 and 10 of the Universal declaration of Human Rights (UDHR), which guarantee the right not to be “subjected to arbitrary arrest, detention or exile” and the right of everyone who stands accused of a crime “in full equality... to a fair and public hearing before an independent and impartial tribunal”.

The Basic Principles on the Role of Lawyers provide that all persons are entitled to call upon the assistance of a lawyer of their choice (principle 1). The Principles also stipulate that Governments have the duty to ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference, and that lawyers and their families shall not suffer, or be threatened with prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics (principle 16).

Further, we wish to refer to the Principle 17 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. According to this provision, the adoption of specific measures is required under international law to ensure meaningful access to the right to bring proceedings before a court without delay to challenge the arbitrariness and lawfulness of a detention and receive appropriate remedies by certain groups of detainees, including, persons detained in solitary confinement or other forms of incommunicado detention or restricted regimes of confinement.

*Right to be free from torture and other cruel, inhumane or degrading treatment*

China is a State Party to the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment (CAT). We are concerned that the 2012 Criminal Law and Criminal Procedure Law fails to define torture in accordance with the Convention’s definition, leaving many forms of acts that may amount to torture not prohibited and not criminalized: these include threats against family members, excessive periods of solitary confinement, or excessive periods of interrogation. The law also unduly restricts the definition of torture to acts committed during the investigatory phase, for the purpose of extracting confessions or evidence.

In a previous communication (UA CHN 10/2015), we drew the attention of your Excellency’s Government to paragraph 27 of General Assembly Resolution 68/156, which, “[r]eminds all States that prolonged incommunicado detention can facilitate the perpetration of torture and other cruel, inhuman or degrading treatment or punishment and

can in itself constitute a form of such treatment, and urges all States to respect the safeguards concerning the liberty, security and dignity of the person’.

We reiterate our concern that the provisions of the 2012 CPL appear to allow those suspected of one of the three types of crimes potentially warranting RSDL (terrorism, major bribery and endangering national security) to be held incommunicado, for long periods, in undisclosed location, 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. Although, the 2016 Regulations (Article 16 (iv)) require the Procuratorate to ascertain that interrogations have taken place and that detainees have not been subjected to corporal punishment and ill treatment, we particularly regret that there is no requirement for the Procuratorate to speak with detainees in confidence, nor reference to any treatment that may contribute to mental distress. Numerous reports of treatment in RSDL describe conditions that may, over time and where applied repeatedly, amount to physical or psychological torture.

The CAT establishes the absolute and non-derogable prohibition of torture and other cruel, inhuman or degrading treatment or punishment in its articles 2 and 16. General Assembly Resolution 68/156 (February 2014), “[r]eminds all States that prolonged incommunicado detention or detention in secret places can facilitate the perpetration of torture and other cruel, inhuman or degrading treatment or punishment and can in itself constitute a form of such treatment, and urges all States to respect the safeguards concerning the liberty, security and dignity of the person and to ensure that secret places of detention and interrogation are abolished”.

Principle 1 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment adopted by the General Assembly on 9 December 1988 (adopted by General Assembly resolution 43/173 of 9 December 1988) refers to humane treatment and respect for the inherent dignity of the person. Principle 6 states that no person will be subjected to torture or other ill-treatment while imprisoned. In addition, the recently updated Standard Minimum Rules for the Treatment of Prisoners (as amended and adopted by the UN General Assembly on 5 November 2015 and renamed the “Mandela Rules”) and in particular Rule 58 that provides that prisoners shall be allowed, under necessary supervision, to communicate with their family and friends at regular intervals by corresponding or by receiving visits.

#### *Right to the highest attainable standard of health*

In a recent communication, we expressed concerns at allegations of inadequate access to medical treatment for persons held in RSDL (UA CHN 3/2017). We reiterate our concern regarding the alleged lack of “specificity” surrounding the treatment and living conditions of persons held in RSDL in the provisions of the 2012 CPL, and we express our additional concern at the reported forced treatment during RSDL contrary to individual’s informed consent and with impact on their health status. Further concern is expressed at the allegations that individuals subject to prolonged pre-trial detention have been denied access to medical care for pre-existing health conditions.

In relation to the above, we would like to refer Your Excellency's Government to article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified to by China on 27 March 2001.

In its General Comment 14 of the Committee on Economic, Social, and Cultural rights, indicates that, under ICESCR article 12, States have the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees to medical care and by refraining from applying coercive medical treatments (GC 14, Para 34). Informed consent is an integral part of respecting, protecting and fulfilling the right to health (A/64/272, Para.18) and as such any medical intervention during detention should guarantee informed consent. The revised UN Standard Minimum Rules for the Treatment of Prisoners, also known as the Mandela Rules, unanimously adopted by the General Assembly in December 2015, establish States' responsibility to provide healthcare for prisoners (rules 22–26; 52; 62; and 71, para. 2), including health-care that ensures continuity of treatment and care (Rule 24.2) for pre-existing conditions and health-care professionals responsibility to abide by the same ethical and professional standards as those applicable in the community, in particular adherence to prisoners' autonomy with regard to their own health and informed consent (Rule 32 (b)).

*Rights to freedom of peaceful assembly and freedom of association; freedom of opinion and expression, including for the purposes of protecting and promoting internationally recognised human rights*

An additional concern is that Article 73 of the Criminal Procedure appears to be increasingly used as a legal ground for subjecting journalists and human rights defenders to enforced disappearances<sup>3</sup>.

Articles 19 and 20 of the UDHR guarantee the rights to freedom of expression, of peaceful assembly and of association. We recall that these rights can only be limited by the strictly established criteria of legality, necessity and proportionality. In this connection, the grounds for applying RDSL under Article 73, fail to comply with the requirement of legality as they are overbroad and leave significant discretion at the hands of the authorities in charge of interpreting and applying the provision. A restriction does not meet the requirement simply because it is formally enacted as a national law. It must be formulated with sufficient precision to enable both the individual and those charged with its execution to regulate conduct accordingly. Furthermore, the criteria of necessity and proportionality require the State to demonstrate that the tools chosen to achieve a legitimate objective are necessary and proportionate to protect that objective. While national security is a legitimate objective, legislation seeking to protect national security must be narrowly construed to avoid that it is applied in a broad and potentially abusive manner, for instance to suppress the legitimate and peaceful exercise of human rights (CCPR/C/GC/34). The Human Rights Council recognized this in Resolution 7/36 when it stated that there is a need to ensure that invocation of national security, including counter-terrorism, is not used unjustifiably or arbitrarily to restrict the right to freedom of expression. Considering this, Article 73 fails

to comply with the requirements of necessity and proportionality. It is difficult to see how this measure of secret detention can be said to achieve a legitimate objective that cannot otherwise be achieved through measures in line with the State obligations to respect and guarantee due process.

We are furthermore concerned at the use of RSDL against human rights defenders, and against lawyers defending them. In this regard, we would like to refer your Excellency's Government to the fundamental principles set forth in 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, also known as the UN Declaration on Human Rights Defenders. We would like to refer to articles 1 and 2 of the Declaration which state that everyone has the right to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels and that each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms. Moreover, article 12 of the Declaration states that the State shall take all necessary measures to ensure the protection by the competent authorities of everyone against any arbitrary action as a consequence of their legitimate and peaceful actions in defense of human rights.

#### *Rights to privacy*

The information received indicates that family members of human rights defenders, or lawyers held in RSDL, have been subject to harassment and surveillance in conditions that appear to have the purpose of intimidating them into ending their legitimate efforts to seek clarification about the whereabouts of their relatives, and complain and denounce their detention and prosecution, which may further interfere with the human rights to privacy.

Surveillance measures can only be justified when it is prescribed by law, necessary to achieve a legitimate aim, and proportionate to the aim pursued. Surveillance, in addition to interfering with the private life of individuals, also interferes directly with the privacy and security necessary for freedom of opinion and expression, and always requires evaluation under articles 12 and 19 of the UDHR (A/71/373).

#### *Concluding remarks:*

We are seriously concerned that the use of RSDL, purportedly intended to apply to suspected crimes involving acts of terrorism, major bribery or endangering national security, is being used to muzzle the peaceful and legitimate rights to freedom of expression and to peaceful assembly and association of individuals expressing dissenting or critical views or seeking to support or protect the peaceful work of human rights defenders. We are further concerned that RSDL extends the police and the public security organs' discretionary powers to arbitrary arrest and unlawfully detain individuals and in conditions that may amount to secret detention and enforced disappearance. It also establishes a two-tiered system of justice that denies the fundamental right to fair trial, potentially undermines the right to physical and mental integrity, and denies persons held under these conditions of their rights to counsel and family visits.

We therefore urge the Government of China to repeal the 2012 CPL provisions that instituted the use of the RSDL as they contradict all China's international human rights obligations and commitments which we have referred to in this communication.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would therefore appreciate receiving the views of your Government with regard to the following aspects of RSDL:

1. What is the legal basis of RSDL and the reasons to amend the criminal law in 2012.
2. Is there an official, public, list of places where individuals can be placed in RSDL?
3. What is the judicial oversight and control exercised by judges over persons placed in RSDL?
4. At what stage of the process of arrest and detention are defense lawyers informed about the placement of their client in RSDL?
5. What are the procedures in place to ensure that persons placed in RSDL are interrogated and treated in compliance with China's obligations under CAT? What is the mechanism in place to ensure proper oversight and control of interrogation procedures to ensure persons under such conditions of detention are protected against abuse of power?
6. To what extent, information or confessions of guilt extracted during RSDL are used as evidence in court.
7. Is there a judicial process that accompanies the placement of a person in RSDL?
8. How are the judicial right to due process guaranteed to individuals placed in RSDL?
9. Can a person placed in RSDL be tried during that period?
10. How many people have been thus far held in RSDL, and for what offences?

We would like to inform your Excellency's Government that this communication, as a commentary on pending or recently adopted legislation, regulations or policies, will be posted on the respective webpages of the involved Special Rapporteurs to be made available to the public. Your Excellency's Government's reply will be made available on the same webpages, as well as in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.

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