

CHINA'S 'LEGAL' USE OF ENFORCED DISAPPEARANCE:

UN EXPERTS ANALYSE RESIDENTIAL SURVEILLANCE IN A DESIGNATED LOCATION



In **2012** China amended its Criminal Procedure Law (CPL), including a new provision in **Article 73** that allowed for a practice called '**residential surveillance at a designated location**' (known in short as 'RSDL').



This provision authorised holding someone in custody – prior to arrest – for up to **6 months** in any location or building chosen by the police, without a need to disclose such location, and with very limited due process and possibilities for judicial review.

For many lawyers, this provision only legalised an existing practice of police interrogation in 'illegal' locations (hotels, restaurants, disaffected buildings, etc): by giving it a semblance of legality, any information obtained in such locations could now be used in court. However, **putting it into Chinese national law doesn't mean it is lawful under international law.**



How many persons are we talking about?

According to one organisation:



57.000

Up to **57.000** persons have been placed in RSDL between 2013 and 2020



136%

There's been a strong increase in the use of RSDL since 2016, peaking in 2020 with a **136%** increase compared to 2019



While not all these individuals are human rights defenders, this is commonly recognised as a **tactic used to intimidate and coerce** individuals detained for their human rights-related work

In **August 2018**, a group of **10 UN human rights experts** wrote a letter to the Chinese government asking about legal provisions allowing RSDL. They had received information that China's legislative body, the National People's Congress, would be revising the CPL, and that civil society groups and Chinese lawyers had great concerns with Article 73.



The experts studied the law as a whole, and in particular the provision allowing RSDL, and explained the ways in which **it did not meet international standards**, including the human rights treaties that China had ratified.

What has changed since August 2018?



Many more lawyers and human rights defenders have been held in RSDL; some of their cases have been raised by the UN experts, while others have not.



The Criminal Procedure Law was **amended** in October 2018, and RSDL is now provided for by **Articles 74 to 79** in the amended version.

HOW DO THE EXPERTS UNDERSTAND 'RESIDENTIAL SURVEILLANCE AT A DESIGNATED LOCATION'?

Although RSDL was initially justified as a protective measure for persons in situations of vulnerability, it has increasingly been arbitrarily applied to a variety of 'suspected offenders', including human rights defenders, journalists and human rights lawyers. When the latter are **arbitrarily accused of national security or terrorism charges**, the CPL allows for many due process restrictions, including when they are placed under RSDL.

The UN experts made a few key observations:



Scope

A decision by the Supreme People's Procuratorate (SPP) in 2016 noted that RSDL can be applied also in cases when the suspect does not have a permanent domicile in the city or country where the investigation is taking place. Given the prevalence of migration in China, and challenges of changing residence documents, this enlarges the population who may potentially be subject to RSDL.

Right to legal counsel

Individuals accused of different crimes have the right to appoint a legal counsel – but for individuals accused of national security crimes (often the case under RSDL), the right to meet with counsel can be and often is limited by decision of the investigating body. In addition, individuals are often not allowed to appoint a legal counsel of their choosing.



Judicial oversight

While the approval of the people's procuratorate appears to provide for oversight, the extensive police powers and limited role for judicial bodies 'pose serious concerns with regard to... the independence of the judiciary'.

Building or location

By law, RSDL cannot be implemented in a detention centre or other premises where investigations are conducted (procuratorate, police stations, etc).

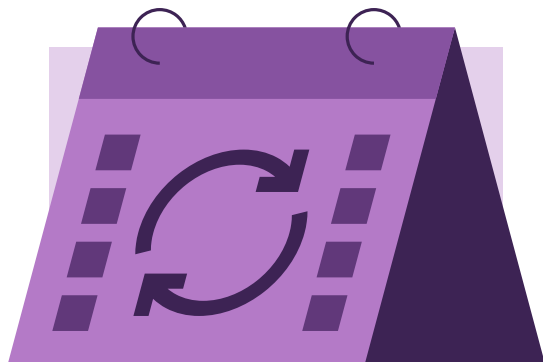


Information to family members

It appears that while, by law, the family must be notified of the application of RSDL – 'unless there is no way to inform them' –, it is not clear that the notification must specify the address of the 'designated location'. In addition, when authorities take someone into custody, they need not to notify the family when it comes to national security crimes (CPL Article 85).

Length of detention

Residential surveillance can be applied for up to six months; after this period, a suspect may be released in principle, but in practice is often moved directly to 'criminal coercive measures' such as pretrial detention. There is also no legal limit on the number of times the authorities can put someone under RSDL.



WHO ARE THE VICTIMS?

In their letter, the UN experts used information they had previously received to support their arguments, including about **individual cases involving RSDL**. This means that they had **attempted to have a dialogue with the Chinese government about their concerns**. Obviously, not all cases of RSDL can be addressed by just a few experts, so the ones included in the analysis are only a very small sample of cases from before August 2018:

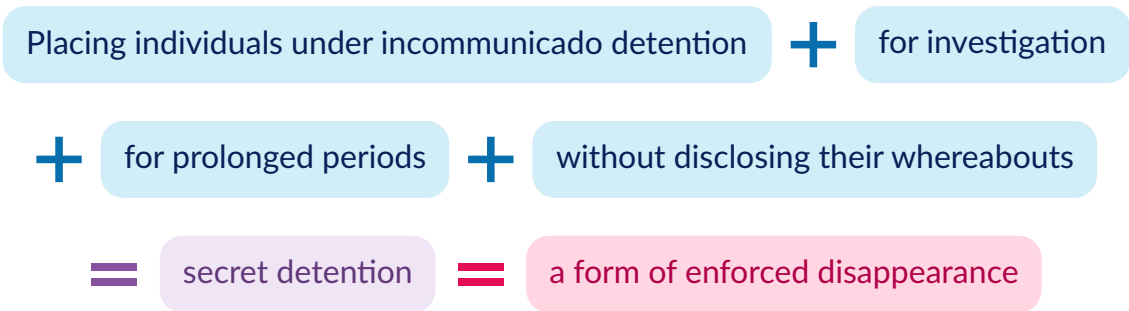


Since this letter was published, these same experts have also spoken out on the use of RSDL in the cases of Ding Jiaxi, Zhang Zhongshun, and Dai Zhenya; and of Qin Yongpei and Chang Weiping.

WHICH INTERNATIONAL HUMAN RIGHTS STANDARDS DO THE UN EXPERTS BELIEVE ARE VIOLATED?

As is the case for any other country, **China has a duty to abide by its international obligations.** This includes binding international human rights law obligations under treaties China itself ratified, and other international human rights standards found in UN declarations, and customary law.

1. Enforced and involuntary disappearances



UN Human Rights Council Resolution 36/39, para 71

The Government should ensure	Who says?
The detainee is held in an officially recognised place of detention and brought immediately before a court	 UN Declaration on Disappearances
The detainee is placed on an up-to-date register and communicated to family or a lawyer	 UN Declaration on Disappearances, Article 10
The Procuratorate reviews decisions taken to impose RSDL	 Committee against Torture: review of China, 2015

Formal accounting of detainees in officially recognised places of detention



UN Declaration on Disappearances, Article 12

Officials guilty of abusing detainees are held criminally accountable



Committee against Torture: review of China, 2015

It lives up to its stated commitment to international community efforts to eliminate and prevent forced and involuntary disappearances



Chinese government statement at Human Rights Council's 36th session

The Government should not

Who says?

Justify by state of war, threat of war, internal political instability, or public emergency



UN Declaration on Disappearances, Article 7



2. Arbitrary detention and due process

If we take the above as a starting point – that **RSDL is incommunicado detention** – then RSDL also violates international standards relating to the **right not to be subjected to arbitrary arrest**, the right to a **fair trial**, as well as standards on the **independence of the judiciary and the legal profession**, if it has :








NO judicial review

- The Supreme People's Procuratorate Regulations to Implement the Monitoring of RSDL (2016) require the Procuratorate to ensure that all documents are available AND that the decision to use RSDL is lawful. But there is no formal review process for the Procurator to challenge the police.
- When police say that a case involves terrorist activities, major bribery or endangering national security, there appears to be no formal procedure for reviewing that assessment. This is worrying because in these 'exceptions', the authorities can decide whether to disclose an individual's whereabouts – or not.



NO formal charges

- RSDL is used at the stage of investigation – while there may be allegations against the person, but while evidence to support them is still being collected, and no formal charges brought. There is no process to determine whether the case meets the criteria for arrest.

The Government should ensure	Who says?	
Fair and public hearing before an independent and impartial tribunal		Universal Declaration of Human Rights, Article 10
Individuals can defend themselves through a legal counsel of choosing		UN Basic Principles on the Role of Lawyers, Principle 1
The right to bring proceedings before a court to challenge the lawfulness of the detention and receive appropriate remedies		UN Basic Principles on the Role of Lawyers, Principle 17
The Government should not	Who says?	
Subject anyone to arbitrary arrest or detention		Universal Declaration of Human Rights, Article 9
Engage in intimidation, harassment or improper interference with lawyers or their families		UN Basic Principles on the Role of Lawyers, Principle 16

3. Torture

If RSDL results in incommunicado detention. AND if we agree with the experts that, in practice, it may violate fair trial rights, then RSDL:



Constitutes torture or cruel, inhumane or degrading treatment on its own:

- Of the individual detained, as a result of lengthy solitary confinement
- Of the relatives of the detained, as a result of intentionally depriving them of any information on the fate of the victim



May further expose those detained to increased risks of further abuse,

including acts of torture, given that they are placed outside the scope of the law and judicial oversight.

The Government should ensure	Who says?
Human treatment and respect for the inherent dignity of the person (no person will be subjected to torture or other ill-treatment while imprisoned)	 UN General Assembly Resolution 43/173, Principle 6
The right to communicate with family and friends at regular intervals by corresponding or by receiving visits, under necessary supervision	 UN Standard Minimum Rules for the Treatment of Prisoners, or 'Mandela Rules', Rule 58
The Government should not	Who says?
Allow any form of torture or cruel treatment, under any circumstance	 Convention against Torture, Articles 2 and 16
Hold someone in incommunicado detention for prolonged periods in an undisclosed location	 UN General Assembly Resolution 68/156

4. Violations of the right to health

In some reports the UN experts have received, they have documented that prisoners have received **insufficient access to medical care** to address problems arising from their detention. In others, those detained were **forced to undergo treatment**, or **failed to receive care** for pre-existing conditions. Both could be violations of the **right to health**.

The Government should ensure	Who says?
Sanitary and healthy conditions of detention	 International Covenant on Economic, Social and Cultural Rights, Article 12
Informed consent of the individual for any treatment	 UN General Assembly Resolution 64/272, para. 18 UN Standard Minimum Rules for the Treatment of Prisoners, or 'Mandela Rules', Rule 32b

Provision of healthcare for prisoners



UN Standard Minimum Rules for the Treatment of Prisoners, or 'Mandela Rules', Rules 22-26, 52, 62, and 71

The Government should not

Who says?

Allow or engage in coercive medical treatments



International Convention on Economic, Social and Cultural Rights, General Comment 14, Para 34

Deny or limit equal access to medical care



Standard Minimum Rules for the Treatment of Prisoners, or 'Mandela Rules', Rule 24.2



5. Restrictions to fundamental freedoms



Based on this analysis, there are plenty of problems with RSDL, no matter who it is applied to or what kind of cases. But the UN experts had another worry: **RSDL seemed to be used specifically and increasingly in cases involving journalists and human rights defenders.**

If the government is targeting these groups with a specific legal provision, they would be in **violation of the rights to freedoms of peaceful assembly and of association, and to freedom of opinion and expression**, including for the purposes of protecting and promoting internationally recognised human rights.



Why?

Because any limits on some fundamental rights such as free speech, association and assembly, have to meet the **triple test** of being:



Legal

Defined by an unambiguous, narrow, and accessible legal provision.



Necessary

There is not another less restrictive tool that exists that can achieve the intended purpose, which can only be to protect public order, health or morals, or national security (but *only* where the interest of the *whole nation* is at stake!).



Proportionate

The severity of the restriction and its scope is appropriate, and the least intrusive, for the intended purpose, the severity of the risk and the number of people impacted.

The Government should ensure	Who says?
The right to express oneself freely, and to seek and impart information	 Universal Declaration of Human Rights, Article 19
The right to form associations and peacefully assemble	 Universal Declaration of Human Rights, Article 20
The right to engage in activities to protect and promote human rights	 UN Declaration on Human Rights Defenders, Articles 1-2

The Government should not	Who says?
Have a broad definition of national security	 International Covenant on Civil and Political Rights, General Comment 34
Invoke national security and counter-terrorism to arbitrarily restrict the right to freedom of expression	 UN Human Rights Council Resolution 7/36
Engage in any arbitrary action in response to legitimate and peaceful action in defence of human rights	 UN Declaration on Human Rights Defenders, Article 12

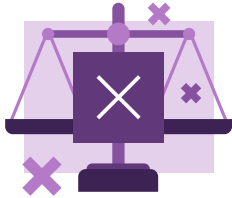
Finally, the tools used to ensure that people stay in RSDL – and that there is little criticism of the practice itself, in China or internationally – **may also violate rights to privacy.**

The Government should ensure	Who says?
Express oneself freely and seek and impart information	 Universal Declaration of Human Rights, Article 19
Form associations and peacefully assemble	 Universal Declaration of Human Rights, Article 20

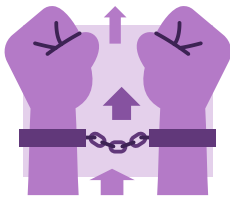
WHAT CONCLUSION DID THE UN EXPERTS REACH?

Based on the information they had received, their knowledge of the situation in China, and their expertise in international human rights standards, the UN experts made a series of clear conclusions about RSDL, both in its legal definition, and actual use.

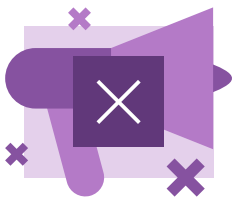
They assert that RSDL:



Denies [those held in RSDL] 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'



Gives the police and public security too much power, that is abused in order to allow arbitrary arrest



Is being used to muzzle peaceful and legitimate rights to freedom of expression, assembly, association and the right to defend rights'

The experts concluded that they **'urge the Government of China to repeal the CPL provisions that instituted the use of RSDL as they contradict all of China's international legal obligations and commitments'** that they identified.

Read the full letter sent by the 10 UN experts to the Chinese Government on 24 August 2018

[READ THE LETTER](#)

The joint letter was sent by the UN independent experts on arbitrary detention, enforced disappearances, counter-terrorism, human rights defenders, torture, judicial independence, right to health, and on the rights to freedom of expression, and freedom of association and peaceful assembly.