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Human Rights Council
Working Group on Arbitrary Detention**Opinions adopted by the Working Group on Arbitrary Detention at its eighty-fourth session, 24 April–3 May 2019****Opinion No. 15/2019 concerning Yu Wensheng (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 33/30.
2. In accordance with its methods of work (A/HRC/36/38), on 17 December 2018 the Working Group transmitted to the Government of China a communication concerning Yu Wensheng. The Government submitted a late response on 20 February 2019. China is not a party to the International Covenant on Civil and Political Rights.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
 - (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);
 - (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);
 - (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);
 - (d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);
 - (e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Yu Wensheng is a 51-year-old national of China who usually resides in Shijingshan District, Beijing Municipality.

(a) Background

5. According to the source, Mr. Yu is a human rights lawyer who has represented activists and fellow human rights lawyers whose civil liberties have been violated by the authorities. He has been an advocate for reform in multiple sectors of Chinese society. In 2016, Mr. Yu was among a group of lawyers who brought legal action against the Government in relation to air pollution. The source reports that, prior to his current detention, Mr. Yu was the subject of harassment and intimidation by the authorities for several years, including when he was detained for over three months in 2014 after publicly expressing support for the “Occupy Central” movement in Hong Kong, China.

(b) Arrest and detention

6. On 19 January 2018, the police detained Mr. Yu outside his Beijing home while he was taking his son to school. The source alleges that Mr. Yu was forced into a police vehicle after an altercation between him and at least one police officer. According to the source, soon after Mr. Yu was detained, State media outlets produced a heavily edited video claiming that he had attacked the police officers who were attempting to take him into custody for questioning.

7. According to the source, the authorities initially detained Mr. Yu for obstructing official duties, under article 277 of the Criminal Law. However, an additional charge of inciting subversion of State power, under article 105 (2) of the Criminal Law, was subsequently given as an additional reason for his detention. Mr. Yu was initially detained at Shijingshan Detention Centre in Beijing Municipality. Since January 2018, he has been held in the Xuzhou City Detention Centre in Jiangsu Province.

8. In addition, the source reports that the lawyers hired by Mr. Yu’s family, as well as his family members themselves, have repeatedly appealed to the authorities to release Mr. Yu on bail, but the authorities have denied their requests. In May 2018, the authorities rejected an appeal from Mr. Yu’s family to release him, and the police continued to refuse to allow independent lawyers to visit him.

9. The source also reports that Mr. Yu’s family has sent many letters to public security agencies to seek information on his case. On 25 September 2018, Mr. Yu’s family wrote to the Jiangsu Provincial Public Security Department and the Ministry of Public Security to urge those bodies to make enquiries in relation to Mr. Yu’s case, including by determining his detention status and whether he has been subjected to torture. Moreover, in October 2018, Mr. Yu’s family wrote to China’s National Lawyers Association requesting that the lawyers appointed by the Government to represent Mr. Yu be withdrawn from his case, and that the lawyers originally chosen by his family be permitted to represent him.

10. The source submits that Mr. Yu’s detention is a reprisal for his exercise of the right to freedom of expression, his legal work as a human rights lawyer, and his association with the community of human rights lawyers in China. The source alleges that Mr. Yu was detained during a period of heightened suppression of the human rights community by the authorities in China, and during a severe crackdown on expression relating to politically sensitive issues.

11. The source also alleges that Mr. Yu was the victim of several retaliatory acts by the authorities in the days prior to his detention, including being denied permission to establish a law firm and being banned from travelling overseas on national security grounds.

12. On 16 January 2018, the Beijing Municipal Justice Bureau deregistered, or temporarily cancelled, Mr. Yu’s law licence, in effect disbaring him. As justification for this action, officials cited his lack of employment at a law firm over the previous six months. According to the source, in July 2017, the Beijing Daoheng Law Firm had

dismissed Mr. Yu under pressure from the authorities, who had refused to let Mr. Yu and the firm's director pass the annual licence review for lawyers. The source states that this appears to be a reprisal for Mr. Yu's attempts to visit one of his clients, a detained lawyer who is the longest-held individual still in pretrial detention following the 2015 crackdown on human rights lawyers.

13. On 18 January 2018, the day before he was taken into custody, Mr. Yu released an open letter recommending changes to the Constitution of China, including fair elections and the creation of an oversight system for the Communist Party of China, among other reforms.

14. On 27 January 2018, the police summoned one of Mr. Yu's family members for questioning. The family member learned that the police had added a second, and more severe, criminal charge against Mr. Yu in relation to inciting subversion of State power. On the same day, Mr. Yu was transferred to Xuzhou City Detention Centre in Jiangsu Province, where police placed him under "residential surveillance at a designated location".

15. The source submits that several violations of domestic and international human rights standards have occurred in Mr. Yu's case. Mr. Yu has been denied any visits with a lawyer of his or his family's choosing during his entire detention, in violation of article 37 of the Criminal Law. Article 37 states that a detainee should be given access to a lawyer within 48 hours of making a request. Moreover, the source notes that, according to the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, detainees are entitled to communicate and consult with legal counsel and to be given adequate time to do so. Mr. Yu has been denied these rights.

16. Furthermore, the source reports that there is ongoing concern that Mr. Yu has been mistreated in custody, including by being coerced and possibly even tortured. On 18 April 2018, the lawyers appointed by Mr. Yu's family went to Tongshan District Public Security Bureau in Xuzhou and requested to meet with him. According to the source, the authorities denied the request and presented the lawyers with a note dated 16 April 2018, apparently written and signed by Mr. Yu, expressing his intent to dismiss the two lawyers and requesting his family to not replace them. The source claims that this statement was likely coerced, as it is part of a pattern of detained human rights defenders in China being forced to dismiss their lawyers and to accept government-assigned legal counsel. The source recalls that Mr. Yu recognized that he may one day meet the same fate and, before being taken into custody, he had prepared written and video testimony stating that he would not voluntarily dismiss his legal counsel if he was ever detained. On 19 April 2018, the day of Mr. Yu's formal arrest, a family member was permitted to contact him through a video call. Mr. Yu appeared to have lost weight and his hair had grown long and was unkempt. When asked whether he had written the note dismissing his lawyers, Mr. Yu was unable to give a clear response.

17. According to the source, by mid-July 2018, Mr. Yu had met with government-appointed lawyers. The source alleges that these lawyers will not protect Mr. Yu's legal rights and will not present an appropriate defence on his behalf if the matter proceeds to trial. The lawyers hired by Mr. Yu's family have not been allowed access to him, nor to any of the materials in his case. On 7 November 2018, police at the Xuzhou City Detention Centre refused to allow the lawyers hired by Mr. Yu's family, as well as Mr. Yu's family members, to meet with him.

18. In early September 2018, Xuzhou prosecutors sent Mr. Yu's case back to the police for further investigation, thus delaying his possible criminal prosecution. The Xuzhou City Public Security Bureau has twice recommended that Mr. Yu be indicted, but the Xuzhou City People's Procuratorate has returned the case each time for further police investigation. The source claims that this is often a sign that a case lacks sufficient evidence to be prosecuted. It is believed that the authorities have extended the period of investigation in order to continue depriving Mr. Yu of his liberty in unreasonably prolonged pretrial detention and to deny his right to a timely trial.

19. The source submits that Mr. Yu has been detained solely for the peaceful exercise of his rights guaranteed under the Universal Declaration of Human Rights, particularly articles 1, 2, 6, 9, 10 and 19. As a result, his deprivation of liberty is arbitrary under category II.

Mr. Yu has now been in pretrial detention for over 15 months since he was taken into custody on 19 January 2018.

Communication from special procedure mandate holders

20. On 6 March 2018, the Working Group and other special procedure mandate holders sent a joint urgent appeal to the Government in relation to the arrest and detention of Mr. Yu.¹ The Working Group acknowledges the response received from the Government on 16 March 2018.²

21. In their communication, the special procedure mandate holders expressed serious concern over the alleged arbitrary arrest, incommunicado detention and charges against Mr. Yu for reasons that appeared to be connected with his work as a human rights lawyer and with his exercise of the right to freedom of expression. They recalled the importance of the activities of those in the legal profession as they pertained to the protection of human rights defenders and human rights overall. Moreover, the mandate holders noted that the use of the measure of “residential surveillance at a designated location” by the authorities raised serious concerns about the treatment of Mr. Yu, as well as about the conditions in which he was being held. Finally, the mandate holders expressed concern at the lack of guarantees of due process, including Mr. Yu’s alleged lack of access to legal counsel and to family members, and the potential impact on his ability to mount an effective defence to the charges against him.

22. In its response, the Government stated that Mr. Yu was a male Chinese citizen from Beijing, born in 1967. On 20 January 2018, he had been placed in criminal detention by the public security authorities, in accordance with the law, on suspicion of obstructing State personnel from discharging their duties. On 27 January 2018, the public security authorities, in accordance with the law, had converted the coercive measures into house arrest and had provided his family with written notification. The case was currently pending.

Response from the Government to the regular communication

23. On 17 December 2018, the Working Group transmitted the allegations from the source to the Government under its regular communication procedure. The Working Group requested the Government to provide detailed information by 15 February 2019 about the current situation of Mr. Yu. The Working Group also requested the Government to clarify the legal provisions justifying his detention, as well as its compatibility with the obligations of China under international human rights law. Moreover, the Working Group called upon the Government of China to ensure his physical and mental integrity.

24. The Government submitted a response to the regular communication on 20 February 2019, five days after the deadline for responding. The response is therefore considered late, and the Working Group cannot accept the response as if it had been presented within the time limit. The Government did not request an extension of the time limit for its reply, as provided for in the methods of work of the Working Group. According to paragraph 23 of the methods of work, the Government is required to respond separately to the urgent action procedure and the regular procedure. Moreover, under paragraph 16 of its methods of work, the Working Group may render an opinion on the basis of all the information it has obtained.

Discussion

25. In the absence of a timely response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

¹ Available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=23655>.

² Available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=33962>.

26. In determining whether the deprivation of liberty of Mr. Yu is arbitrary, the Working Group has regard to the principles established in its jurisprudence regarding evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (A/HRC/19/57, para. 68).

27. According to the information provided by the source in its communication to the Working Group under its regular procedure, which was not disputed by the Government, Mr. Yu was taken into custody on 19 January 2018. Since that time, Mr. Yu has had no contact with the lawyers hired by his family, and he was only permitted a video call with his family on 19 April 2018. Mr. Yu is also reported to have met with lawyers appointed by the Government by mid-July 2018. It therefore appears from this timeline provided by the source that Mr. Yu was held in incommunicado detention for the first three months of his detention.³ There is also nothing to suggest that Mr. Yu has been brought before a judicial authority, or has been able to bring such proceedings himself, to challenge the legality of his detention. Review of Mr. Yu's case by the Xuzhou City People's Procuratorate does not satisfy this requirement.⁴

28. The ability to bring proceedings before a court to challenge the arbitrariness and lawfulness of detention and to obtain without delay appropriate and accessible remedies is a non-derogable right under international law.⁵ As the Working Group stated in 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, the adoption of specific measures is required under international law to ensure meaningful access to this right by certain vulnerable groups of detainees, including persons detained in solitary confinement or other forms of incommunicado detention or restricted regimes of confinement.⁶ The source reports that Mr. Yu was placed under "residential surveillance at a designated location" on 27 January 2018. In its response to the joint urgent appeal, the Government referred to Mr. Yu having been placed under "house arrest" on that date. Regardless of the characterization of the detention, the Working Group considers that Mr. Yu, as a human rights lawyer who was initially detained incommunicado, is particularly vulnerable to arbitrary deprivation of liberty that results from a lack of independent judicial oversight. The Government should have put safeguards in place to ensure that he had access to an initial review, as well as regular periodic reviews of his detention by the courts. At a minimum, this should have included access to his family and lawyers who could have provided assistance in accessing this right.⁷

29. The Working Group finds that Mr. Yu has not been afforded his right to be promptly brought before a judicial authority or to bring such proceedings himself, contrary to articles 9, 10 and 11 (1) of the Universal Declaration of Human Rights and principles 4, 11, 32 and 37 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. In the absence of a ruling on the lawfulness of Mr. Yu's detention by a judicial authority, the Working Group concludes that no legal basis has been established for his detention (see, for example, opinions Nos. 62/2018 and 69/2017). Given that Mr. Yu was not able to challenge his detention, his right to an effective remedy under article 8 of the Universal Declaration of Human Rights was also violated.

30. The Working Group therefore considers that there was no legal basis for the arrest and detention of Mr. Yu, and his deprivation of liberty is arbitrary under category I.

³ See also opinion No. 62/2018, para. 45.

⁴ E/CN.4/2005/6/Add.4, para. 32 (b) and (c).

⁵ 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, principle 4, paras. 4–5. The right to challenge the lawfulness of detention before a judicial authority is considered part of customary international law, which applies regardless of whether a State is party to the Covenant: see E/CN.4/2005/6/Add.4, paras. 28 and 52.

⁶ Principle 17, para. 33; and opinion No. 69/2017, para. 29.

⁷ Principle 10, paras. 16–17.

31. In addition, the source alleges that Mr. Yu was deprived of his liberty solely for peacefully exercising his rights under the Universal Declaration of Human Rights. More specifically, the source submits that Mr. Yu's detention is a reprisal for his exercise of the right to freedom of expression, his legal work as a human rights lawyer, and his association with the community of human rights lawyers in China.

32. According to the source, Mr. Yu was initially detained for obstructing official duties under article 277 of the Criminal Law, and a second charge was subsequently brought against him of inciting subversion of State power under article 105 (2) of the Criminal Law. An English translation of these provisions is as follows:⁸

Obstructing official duties (article 277 of the Criminal Law): Whoever by means of violence or threat obstructs a functionary of a State organ from carrying out his functions according to law shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention, or public surveillance or be fined.

Inciting subversion of State power (article 105 (2) of the Criminal Law): Whoever incites others by spreading rumours or slanders or any other means to subvert the 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.

33. 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.⁹

34. Mr. Yu has been charged with a vague and imprecise offence of inciting subversion of State power under article 105 (2) of the Criminal Law. 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. Yu's conduct could be considered as inciting subversion and overthrowing the socialist system. Importantly, there is nothing to suggest that Mr. Yu engaged in or incited violence as part of his activities that might have given cause to restrict his behaviour. On the contrary, he chose to work peacefully within the legal system of China by providing legal representation to human rights lawyers and advocating for reform in various areas of Chinese law and society.

35. 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.¹⁰ The Working Group calls upon the Government to repeal article 105 (2) of the Criminal Law or bring it into line with its obligations under international human rights law.

36. In the absence of a substantive response from the Government addressing the specific allegations made by the source, the only plausible explanation for Mr. Yu's arrest and detention is that he is being punished for the exercise of his rights to freedom of

⁸ See the website of the Supreme People's Court of the People's Republic of China, at http://english.court.gov.cn/2015-12/01/content_22595464_26.htm and http://english.court.gov.cn/2015-12/01/content_22595464_8.htm.

⁹ 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).

¹⁰ See, for example, opinion No. 41/2017, paras. 98–101.

expression and of association and his right to take part in government protected by articles 19, 20 and 21 (1) of the Universal Declaration of Human Rights. 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 or evidence to the Working Group to invoke any of these limitations, nor did it demonstrate why bringing charges against Mr. Yu was a legitimate, necessary and proportionate response to his activities as a human rights defender representing activists and fellow human rights lawyers whose civil liberties had been violated by the authorities.

37. Further, 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 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. Yu was detained for the exercise of his rights under the above-mentioned declaration as a human rights lawyer and defender. 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 (see, for example, opinions Nos. 46/2018, 45/2018 and 36/2018).

38. Accordingly, the Working Group concludes that the deprivation of liberty of Mr. Yu resulted from the peaceful exercise of his rights to freedom of expression and of association and his right to take part in government, and was contrary to article 7 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 and the Special Rapporteur on the rights to freedom of peaceful assembly and of association.

39. Given its finding that the deprivation of liberty of Mr. Yu is arbitrary under category II, the Working Group wishes to emphasize that he should not face trial in the future. The Working Group considers that the information submitted by the source discloses multiple violations of Mr. Yu’s right to a fair trial during his initial custody and pretrial detention.

40. The source alleges that when Mr. Yu was taken into custody on 19 January 2018, there was an altercation between him and a police officer. According to the source, soon after Mr. Yu was detained, State media outlets produced a heavily edited video claiming that he had attacked the police officers who were attempting to take him into custody for questioning. The Government did not challenge any of these allegations. The Working Group considers that this edited footage produced by the State media undermined Mr. Yu’s right to the presumption of innocence, as it unfairly presented him engaging in violence and seemingly reluctant to submit to questioning, without showing the entire context of his arrest. As a result, the Working Group finds that Mr. Yu was denied his right to the presumption of innocence, in violation of article 11 (1) of the Universal Declaration of Human Rights and principle 36 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

41. In addition, the information provided by the source in its submission to the Working Group under the regular procedure, which was not refuted by the Government, indicates that Mr. Yu was detained incommunicado for three months from the time he was taken into custody on 19 January 2018 until 19 April 2018, when he was able to communicate with his family via a video call. Prolonged incommunicado detention creates conditions that may lead to violations of the Convention against Torture and Other Cruel, Inhuman or

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”.

Degrading Treatment or Punishment,¹² to which China is a State party. Indeed, in this case, Mr. Yu is believed to have been coerced to sign a note indicating his intention to dismiss the lawyers that his family had hired. Incommunicado detention may in itself constitute torture or ill-treatment.¹³ The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has also argued that the use of incommunicado detention is prohibited under international law (A/HRC/13/39/Add.5, para. 156).

42. The source also alleges that on 27 January 2018, Mr. Yu was transferred to Xuzhou City Detention Centre in Jiangsu Province, where police placed him under “residential surveillance at a designated location”. The Working Group and other special procedure mandate holders have expressed concern that the residential surveillance at a designated location regime, as amended in article 73 of the 2012 Criminal Procedure Law, is being employed in a manner which violates human rights,¹⁴ including:

(a) The practice, which consists of placing individuals under incommunicado detention for investigation for prolonged periods without disclosing their whereabouts, amounts to secret detention and is a form of enforced disappearance;

(b) The practice of imposing residential surveillance at a designated location without judicial oversight and without formal charges contravenes the right of every person not to be arbitrarily deprived of his or her liberty, and to challenge the lawfulness of detention before a court without delay, as well as the right of accused persons to defend themselves through legal counsel of their choosing;

(c) The residential surveillance at a designated location provisions appear to allow those suspected of certain crimes to be held incommunicado for long periods and in undisclosed locations, which may per se amount to cruel, inhuman or degrading treatment or punishment, or even torture, and additionally may expose them to an increased risk of further abuse, including acts of torture;

(d) The residential surveillance at a designated location provisions appear to be used to restrict the exercise of the right to freedom of expression and the rights to freedom of peaceful assembly and of association by human rights defenders and their lawyers.

43. During the most recent review of the human rights record of China in the third cycle of the universal periodic review, held in November 2018, delegations expressed concern about residential surveillance at a designated location, particularly its use in arbitrarily detaining individuals who defend and promote human rights.¹⁵ The Working Group calls upon the Government to repeal the provisions governing residential surveillance at a designated location or bring them into line with its obligations under international human rights law.

44. The Working Group considers that the incommunicado detention of Mr. Yu and his placement in “residential surveillance at a dedicated location” violated articles 9, 10 and 11 (1) of the Universal Declaration of Human Rights. In addition, this means of detention effectively placed Mr. Yu outside the protection of the law, in violation of his right to be recognized as a person before the law under article 6 of the Universal Declaration of Human Rights.

45. Moreover, the denial of contact between Mr. Yu and his family for several months amounts to a violation of the right to have contact with the outside world, as enshrined in rules 43 (3) and 58 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) and principles 15, 16 (1) and 19 of the Body of

¹² A/54/44, para. 182 (a). See also General Assembly resolution 68/156, para. 27.

¹³ General Assembly resolution 68/156, para. 27.

¹⁴ See OL CHN 15/2018, available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=23997>.

The Government’s response is available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=34431>.

See also opinions Nos. 62/2018, 59/2017 and 12/2016; and CAT/C/CHN/CO/5, paras. 14–15.

¹⁵ See A/HRC/40/6, paras. 28.176 and 28.180–181.

Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. Since Mr. Yu's contact with his family by video call on 19 April 2018, it appears that there has subsequently been limited contact with him, given that his family has continued to contact public security agencies to make enquiries as to his status. It therefore appears that there is an ongoing violation of Mr. Yu's right to have contact with the outside world. Rule 59 of the Nelson Mandela Rules may also have been violated, as it requires that prisoners be allocated, to the extent possible, to prisons close to their homes. In this case, Mr. Yu has been held since 27 January 2018 in the Xuzhou City Detention Centre in Jiangsu Province, well away from his home in Beijing Municipality.

46. The source also alleges that Mr. Yu has not been able to meet with the lawyers appointed by his family throughout his detention, which has now been ongoing for over 15 months since he was taken into custody in January 2018. According to the source, several attempts have been made by Mr. Yu's lawyers and his family to ensure that he can access independent legal advice, but these have been denied. Mr. Yu's lawyers have also reportedly experienced obstruction in attempting to access his case materials. In addition, the Government has allegedly coerced Mr. Yu into writing a note seeking the withdrawal of his own lawyers, and has appointed lawyers to act for him. According to the source, these government-appointed lawyers are unlikely to provide an effective defence for Mr. Yu. The Government has not provided a specific response to any of these allegations by the source.

47. As the Working Group 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, all 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 their apprehension, and such access shall be provided without delay.¹⁶ The Working Group considers that the ongoing denial of Mr. Yu's access to lawyers of his choosing violates his right to legal assistance guaranteed under articles 10 and 11 (1) of the Universal Declaration of Human Rights, principles 15, 17 and 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and rule 61 (1) of the Nelson Mandela Rules. Moreover, by denying Mr. Yu's lawyers the ability to meet with their client and to access his case materials, the Government has violated, inter alia, principles 1, 7, 8, 16 and 21 of the Basic Principles on the Role of Lawyers.

48. Finally, the source alleges that the police and prosecutors in this case are delaying Mr. Yu's trial, thus depriving him of his liberty in unreasonably prolonged pretrial detention and depriving him of his right to trial without undue delay. The Working Group notes that it has been over 15 months since Mr. Yu was detained in January 2018. Mr. Yu has been held in pretrial detention for that entire period despite requests by his family and lawyers that he be released on bail, with no end in sight to such detention, and without any apparent justification as to the lengthy review of his case before trial. In addition, as noted above, there is no information to suggest that his pretrial detention has been periodically reviewed by a judicial authority. The right to be tried within a reasonable time is one of the fair trial guarantees embodied in articles 10 and 11 (1) of the Universal Declaration of Human Rights and principle 38 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The Working Group takes this opportunity to reiterate that, if Mr. Yu cannot be tried within a reasonable time, he is entitled to be released.

49. For these reasons, the Working Group concludes that the violations of the right to a fair trial are of such gravity as to give Mr. Yu's deprivation of liberty an arbitrary character under category III.

50. Furthermore, the Working Group is convinced that Mr. Yu was targeted because of his activities as a human rights lawyer and defender, particularly his work in defending the rights of other activists and human rights lawyers, and his advocacy in calling for reform in China. The source alleges, and the Government has not denied, that Mr. Yu was subject to a pattern of harassment, intimidation and retaliation by the authorities over several years,

¹⁶ See paras. 12 and 67.

including detention for three months in 2014, having his law licence cancelled in 2018, and being banned from travelling overseas. Mr. Yu's current deprivation of liberty appears to be part of this pattern. The Working Group considers that it is no coincidence that Mr. Yu was taken into custody the day after releasing an open letter calling for reforms to the Constitution of China. 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.¹⁷ Accordingly, the Working Group finds that Mr. Yu 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. The Working Group refers the present case to the Special Rapporteur on the situation of human rights defenders.

51. In addition, given the allegations that Mr. Yu has been subject to reprisals for his legal work as a human rights lawyer, the Working Group has decided to refer the present case to the Special Rapporteur on the independence of judges and lawyers.

52. In its 27-year history, the Working Group has adopted 89 opinions in relation to China. In 82 of those cases, the Working Group found the deprivation of liberty to be arbitrary. 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.¹⁸

53. Finally, the Working Group would welcome the opportunity to conduct a country visit to China in order to assist the Government to address the arbitrary deprivation of liberty. Given that a significant period of time has passed since its visits to China in October 1997 and September 2004, the Working Group considers that it is an appropriate time to visit. As a member of the Human Rights Council, and having recently been subjected to review of its human rights record during the third cycle of the universal periodic review in November 2018, it would be timely for the Government to extend an invitation to visit. The Working Group recalls that it made a request to visit on 15 April 2015 and looks forward to a positive response.

Disposition

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

The deprivation of liberty of Yu Wensheng, being in contravention of articles 2, 3, 6, 7, 8, 9, 10, 11 (1), 19, 20 and 21 (1) of the Universal Declaration of Human Rights, is arbitrary and falls within categories I, II, III and V.

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

56. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Yu immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

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

58. The Working Group requests the Government to bring its laws, particularly article 105 (2) of the Criminal Law and article 73 of the 2012 Criminal Procedure Law, into conformity with the recommendations made in the present opinion and with the commitments made by China under international human rights law.

¹⁷ See, for example, opinions Nos. 83/2018, 19/2018, 50/2017 and 48/2017; and A/HRC/36/37, para. 49.

¹⁸ See, for example, opinion No. 47/2012, para. 22.

59. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to (a) the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, (b) the Special Rapporteur on the rights to freedom of peaceful assembly and of association, (c) the Special Rapporteur on the situation of human rights defenders, and (d) the Special Rapporteur on the independence of judges and lawyers, for appropriate action.

60. The Working Group encourages the Government to incorporate the Model Law for the Recognition and Protection of Human Rights Defenders into its domestic legislation and to ensure its implementation.¹⁹

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

Follow-up procedure

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

63. 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.

64. 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.

65. 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.²⁰

[Adopted on 26 April 2019]

¹⁹ The Model Law was developed in consultation with more than 500 human rights defenders from around the world and 27 human rights experts. It is available at www.ishr.ch/sites/default/files/documents/model_law_full_digital_updated_15june2016.pdf.

²⁰ See Human Rights Council resolution 33/30, paras. 3 and 7.