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Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-fifth session, 12–16 August 2019

Opinion No. 36/2019 concerning Wang Yi and Jiang Rong (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 28 February 2019 the Working Group transmitted to the Government of China a communication concerning Wang Yi and Jiang Rong. The Government submitted a late response on 7 May 2019. The State is not a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

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Submissions

Communication from the source

4. Wang Yi, born on 1 June 1973, is a citizen of China. He resides in Chengdu, Sichuan Province.

5. The source submits that Mr. Wang is a prominent evangelical pastor and has been an outspoken defender of religious freedom in China for Protestants, Tibetan Buddhists, and Muslims in Xinjiang. In 2005, Mr. Wang and his wife, Jiang Rong, founded the Early Rain Covenant Church. They have allegedly faced police harassment and intimidation, since this church is not registered with the Government as an official religious institution. For instance, the source states that in May 2018, the police approached them after the church held a memorial service to mark the 10-year anniversary of the 2008 Wenchuan earthquake in Sichuan.

6. The source also notes that Mr. Wang is a trained lawyer, and was formerly a blogger, a film critic, and a professor at the University of Chengdu. In 2004, *Southern People Weekly* listed him as one of the 50 most influential public intellectuals in China.

7. Mr. Wang is also known outside China for his religious activities. In 2006, he met with the President of the United States of America at the White House to discuss religious freedom. Furthermore, in 2008, he attended the Conference for Global Christians in Law, in Washington D.C., to receive the "Prize for the Contribution to Promoting Religious Freedom".

8. Jiang Rong, born on 26 December 1973, is a citizen of China. She resides in Chengdu, Sichuan Province.

9. The source submits that Ms. Jiang co-founded the Early Rain Covenant Church, along with her husband, Mr. Wang, who served as the church pastor. From the time that this independent church was founded, Ms. Jiang and Mr. Wang have allegedly faced police harassment and intimidation.

10. According to the source, on 9 December 2018 national security officers from the Chengdu City Public Security Bureau in Sichuan Province detained Mr. Wang and Ms. Jiang during a coordinated raid on the Early Rain Covenant Church and on homes of its members.

11. The source reports that authorities surrounded the church premises, which were located in a rented space inside an office building in Chengdu. The authorities also sent officers to the homes of several church members, including Mr. Wang. It is alleged that the aim of the raid was to shut down the independent church.

12. The source reports that Mr. Wang and Ms. Jiang were arrested at their home in Chengdu on 9 December 2018 by Chengdu City Public Security Bureau national security officers. The officers showed a warrant, issued by the Chengdu City Public Security Bureau, to Mr. Wang's relative, had her sign it, and then took the document away without leaving a copy for the family. The legal basis for the arrest cited by authorities was article 105 (2) of the Criminal Code, ("inciting subversion of State power"), which stipulates a term of imprisonment of not less than five years, criminal detention, public surveillance or deprivation of political rights for those who incite others by spreading rumours or slander, or any other means, to subvert State power or overthrow the socialist system.

13. On 10 December 2018, officers reportedly confiscated materials from the church premises. It is alleged that the police authorities initially detained or subjected to disappearance more than 100 members of the church. By the afternoon of 10 December 2018, some detained church members had been released or placed under house arrest. It is furthermore alleged that before releasing some of the church members, the police forced many of them to sign a document declaring that they would stop attending the church. On the same day, the authorities reportedly issued a State directive prohibiting the national media from publishing coverage of the raid on the church and the detention of its members.

14. The source states that a total of 13 individuals with ties to the church are believed still to be detained, including Mr. Wang and Ms. Jiang. Approximately 12 individuals were

in administrative detention (for 14 or 15 days) and 11 individuals were released on bail after a period of criminal detention. Besides charges of "inciting subversion of State power", these individuals faced criminal suspicion for "picking quarrels and provoking trouble", "illegal business activity" or "illegal publishing".

15. Since the date of their arrest, Mr. Wang and Ms. Jiang have been held by the authorities of the Chengdu City Public Security Bureau. Mr. Wang is being held at an unknown detention centre, while Ms. Jiang is being held at an unknown police-designated location.

16. The source asserts that Mr. Wang's lawyer went to the Chengdu City Public Security Bureau to enquire about his client's status and location, and whether he could meet him. However, the authorities refused to provide any information in that regard.

17. On 8 January 2019, the Chengdu police took Mr. Wang's lawyer to Wangjiaguai Police Station soon after he had met with Mr. Wang's family. He was released on 9 January 2019.

18. On 15 February 2019, the lawyer again met with officers from the Chengdu City Public Security Bureau to request a meeting with Mr. Wang. That request was also denied by the authorities.

19. Ms. Jiang's lawyer has filed a request to meet with his client and a request for her to be released on bail pending investigation, but has received no response from the authorities.

20. The source argues that the detention of Mr. Wang and Ms. Jiang is the result of government retaliation for their actions, particularly for Mr. Wang's opposition to tightened restrictions on religious freedom and for the Early Rain Covenant Church's long-standing assertion of independence. The source points out that circumstances of the detention constitute a violation of Mr. Wang's and Ms. Jiang's rights to peacefully exercise free speech, including the expression of religious belief, as well as of their rights to freedom of assembly and association. The source recalls that these rights are protected by articles 18, 19 and 20 of the Universal Declaration of Human Rights. The source concludes that the detentions of Mr. Wang and Ms. Jiang fall under category II.

21. The source further asserts that the authorities have used provisions contained in the Criminal Procedure Law of China to deprive Mr. Wang and Ms. Jiang of their rights, particularly by blocking their access to legal counsel and by not disclosing their locations. As such, the source points out that Mr. Wang and Ms. Jiang are the only two individuals apprehended after the raid on the church to be charged with a crime in the category of "endangering State security" ("inciting subversion of State power"). Under article 83 of the Criminal Procedure Law, the authorities may deprive of legal counsel a suspect who is charged with such an offence.

22. It is further argued that in the case of Mr. Wang, no official detention notice has been provided to his family since he was taken into custody, in violation of the Criminal Procedure Law, as article 83 of that legislation stipulates that a public security bureau must produce an official notice when placing an individual under detention. The source notes that officers briefly showed the notice to Mr. Wang's relative and forced her to sign it, before taking it away.

23. In the case of Ms. Jiang, it is alleged that the police placed her under "residential surveillance at a designated location", which is a form of detention whereby a detainee can be held in secret for up to six months, as codified under article 75 of the 2018 Criminal Procedure Law (previously article 73). The source submits that residential surveillance at a designated location is tantamount to enforced disappearance, according to international standards. The source concludes that the above-mentioned circumstances demonstrate violations of Mr. Wang's and Ms. Jiang's rights guaranteed under article 9 of the Universal Declaration of Human Rights, and that their deprivation of liberty thus falls within category III.

24. The source observes that the crackdown on the Early Rain Covenant Church comes amid an ongoing government campaign targeting independent churches. In particular, the suppression of the Early Rain Covenant Church and the detention of Mr. Wang and Ms.

Jiang follows the implementation, since February 2018, of the amended Religious Affairs Regulations, which mandate greater State control of religious practices. The source thus submits that in line with the regulations, the authorities have reportedly required intrusive video surveillance equipment to be installed in churches and information on churchgoers to be handed over, banned Bible sales online, and demolished churches or removed crosses.

25. The source notes that independent churches publicly protested against the regulations through an open letter. On 1 September 2018, over 100 pastors of independent churches released an open statement opposing the amended regulations. The statement then gathered nearly 200 signatures across China. The statement outlines the pastors' aspiration for the churches to remain independent, and specifically, not to register them officially or to join State-controlled official churches as required under the regulations.

26. Concerned about the increasingly suppressive conditions for religious expression, in September 2018 Mr. Wang prepared a statement asserting that if he were ever detained, he would not confess to crimes for legitimately expressing his religious beliefs and exercising his right to free speech. The statement was reportedly drafted on 21 September 2018 and revised on 4 October 2018, and was posted online on 11 December 2018, 48 hours after Mr. Wang was detained.

27. The source also reports that on 10 December 2018, the Chengdu Religious Affairs Bureau issued a notice stating that the activities of the Early Rain Covenant Church were violating the amended Religious Affairs Regulations. According to the regulations, only churches, mosques and temples registered with the Government and under State control are considered legal.

28. The source also submits that unconfirmed reports indicated that as many as 50 church members had been taken to Xinjin County Legal Education Centre in Chengdu. It asserts that these centres are a form of extralegal detention and have been used in the past to hold human rights defenders under the guise of providing education on Chinese law.

Response from the Government

29. On 28 February 2019, the Working Group transmitted the allegations made by the source to the Government through its regular communication procedure. The Working Group requested the Government to provide, by 29 April 2019, detailed information about the current situation of Mr. Wang and Ms. Jiang and any comments on the source's allegations. Moreover, the Working Group called upon the Government to ensure Mr. Wang and Ms. Jiang's physical and mental integrity.

30. The Government submitted its response on 7 May 2019, eight 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 paragraph 16 of the methods of work of the Working Group. 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.

Recent developments

31. It has come to the Working Group's attention that Ms. Jiang was released on bail pending further investigation on 10 June 2019, after six months in custody under residential surveillance at a designated location. She is currently under surveillance and is subjected to restrictions on her speech and movement. Mr. Wang remains in incommunicado detention on charges of "inciting subversion of State power". He still has not been allowed to meet with the lawyer hired by his family.

Discussion

32. The Working Group has in its jurisprudence established the ways in which it deals with 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).[1] In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

33. The Working Group wishes to reaffirm that the Government has the obligation to respect, protect and fulfil the right to liberty and that any national law allowing deprivation of liberty should be made and implemented in conformity with the relevant international standards set forth in the Universal Declaration of Human Rights and other applicable international and regional instruments.[2] Consequently, even if the detention is in conformity with national legislation, regulations and practices, the Working Group is entitled and obliged to assess the judicial proceedings and the law itself to determine whether such detention is also consistent with the relevant provisions of international human rights law.[3]

Category I

34. The Working Group will first consider whether there have been violations under category I, which concerns deprivation of liberty without any legal basis being invoked.

35. The source alleges, and the Government does not contest, that Mr. Wang and Ms. Jiang have both been held incommunicado since their arrest on 9 December 2018, at an unknown detention centre and an unknown police-designated location, respectively, by the Chengdu City Public Security Bureau. Such deprivation of liberty, entailing a refusal to disclose the fate or whereabouts of the person concerned or to acknowledge his or her detention, lacks any valid legal basis under any circumstance and is inherently arbitrary as it places the person outside the protection of the law in violation of article 6 of the Universal Declaration of Human Rights.[4]

36. The Working Group notes that thereupon neither Mr. Wang nor Ms. Jiang was brought promptly before a judge, within 48 hours of the arrest barring absolutely exceptional circumstances, as per the international standard set out in the Working Group's jurisprudence,[5] and nor was either of them afforded the right to take proceedings before a court so that it may decide without delay on the lawfulness of the detention in accordance with articles 3, 8 and 9 of the Universal Declaration of Human Rights and principles 11, 32 and 37 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. In addition, 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 (A/HRC/30/37, annex) indicate that the right to challenge the lawfulness of detention before a court is a self-standing human right, the absence of which constitutes a human rights violation, and that it is essential in order to preserve legality in a democratic society (paras. 2–3). This right, which is in fact a peremptory norm of international law, applies to all forms and situations of deprivation of liberty.[6]

[1] See, for example, opinions No. 50/2017, para. 54; No. 61/2017, para. 26; No. 62/2017, para. 45; No. 69/2017, para. 24; No. 70/2017, para. 48; No. 75/2017, para. 34; No. 79/2017, para. 47; No. 11/2018, para. 41; No. 19/2018, para. 25; No. 35/2018, para. 24; No. 36/2018, para. 37; No. 37/2018, para. 27; No. 40/2018, para. 42; No. 43/2018, para. 71; No. 44/2018, para. 78; No. 45/2018, para. 39; No. 46/2018, para. 45; No. 52/2018, para. 68; No. 67/2018, para. 69; No. 70/2018, para. 31; No. 75/2018, para. 57; No. 78/2018, para. 67; No. 79/2018, para. 68; and No. 90/2018, para. 29.

[2] See General Assembly resolution 72/180, preambular para. 5; Commission on Human Rights resolutions 1991/42, para. 2, and 1997/50, para. 15; Human Rights Council resolutions 6/4, para. 1 (a), and 10/9, para. 4 (b); and opinions No. 41/2014, para. 24; No. 28/2015, para. 41; No. 76/2017, para. 62; No. 83/2017, paras. 51 and 70; No. 88/2017, para. 32; No. 94/2017, para. 59; No. 38/2018, para. 60; No. 68/2018; para. 37; No. 82/2018, para. 25; and No. 87/2018, para. 51.

[3] See, for example, opinions No. 1/1998, para. 13; No. 5/1999, para. 15; No. 1/2003, para. 17; No. 33/2015, para. 80; No. 94/2017, paras. 47–48; No. 38/2018, para. 60; No. 68/2018, para. 37; No. 82/2018, para. 25; and No. 87/2018, para. 51.

[4] General Assembly resolution 47/133. See also opinion No. 82/2018, para. 28.

[5] Opinions No. 57/2016, paras. 110–111; No. 2/2018, para. 49; No. 83/2018, para. 47; No. 11/2019, para. 63; and No. 30/2019, para. 30.

[6] Opinion No. 39/2018, para. 35.

37. Ms. Jiang was held incommunicado under "residential surveillance at a designated location" under article 75 (previously article 73) of the 2018 Criminal Procedure Law, which stipulates that:

> Residential surveillance shall be enforced at the domicile of a criminal suspect or defendant or at a designated place of residence if he/she has no fixed domicile. Where, for a crime suspected of endangering State security and a crime involving terrorist activities …, residential surveillance at the domicile of the criminal suspect or defendant may impede the investigation, it may, upon approval by … the public security organ at the next higher level, be enforced at a designated place of residence, provided that residential surveillance is not enforced in a detention house or a special venue for case investigation.
>
> Where a criminal suspect or defendant is placed under residential surveillance at a designated place of residence, his/her family shall be informed of the information related thereto within 24 hours upon enforcement of residential surveillance, unless notification cannot be processed.
>
> Where criminal suspects and defendants under residential surveillance entrust defenders, article 34 of this law shall apply.
>
> People's procuratorates shall exercise supervision over the legality of the decision and enforcement of residential surveillance at designated places of residence.

38. The Working Group considers that "residential surveillance at a designated place of residence" can be a misnomer in the sense that, as in the example of Ms. Jiang, the criminal suspect or defendant subject to it is confined not to his usual place of residence (i.e. house arrest) but in a "designated place of residence", which may well be a prison in all but name. The public security organ in effect has the power to make a person disappear without judicial oversight. In the Working Group's view, such an enabling act for law enforcement officials is devoid of legal basis.

39. The Working Group will elaborate further on the propriety of detention under article 105 of the Criminal Code in view of the principle of legality and its effect on the right to a fair trial and other freedoms in Mr. Wang and Ms. Jiang's case.

40. One of the fundamental guarantees of due process is the principle of legality, including: (a) the principle of non-retroactivity; (b) the prohibition against analogy; (c) the principle of certainty; and (d) the prohibition against uncodified, that is, unwritten, or judge-made criminal provisions. This means that an act can be punished only if, at the time of its commission, the act was the object of a valid, sufficiently precise, written criminal law to which a sufficiently certain sanction was attached.[7]

41. Article 105 of the Criminal Code defines subversion of State power or overthrow of the socialist system as follows:

> Among those who organize, plot or carry out the scheme of subverting the State power or overthrowing the socialist system, the ringleaders and the others who commit major crimes shall be sentenced to life imprisonment or fixed-term imprisonment of not less than 10 years; those who take an active part in it shall be sentenced to fixed-term imprisonment of not less than 3 years but not more than 10 years; and the other participants shall be sentenced to fixed-term imprisonment of not more than 3 years, criminal detention, public surveillance or deprivation of political rights.
>
> 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.

[7] Opinion No. 10/2018, para. 50.

42. The Working Group finds that such vaguely and broadly worded provisions, which cannot qualify as *lex certa*, could be used to deprive individuals of their liberty without a specific legal basis and violate the due process of law undergirded by the principle of legality in article 11 (2) of the Universal Declaration. As the Working Group has previously 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.[8]

43. The Working Group further notes that the Human Rights Committee has found, in its case law, that detention pursuant to proceedings that were incompatible with article 15 of the International Covenant on Civil and Political Rights were necessarily arbitrary within the meaning of article 9 (1) of the Covenant.[9] By the same logic, proceedings in violation of article 11 (2) of the Universal Declaration of Human Rights are arbitrary for the purpose of article 9 of the Declaration.

44. In the Working Group's view, the principle of legality also requires the substance of penal law to be due and appropriate in a democratic society that respects human dignity and rights. Hence, the penal punishment must, at the minimum, satisfy the principle of necessity, the prerequisite of wrongdoing and the principle of guilt in the interest of formal and material justice.[10]

45. The Working Group considers that the provisions of article 105 of the Criminal Code, which provide for fixed-term imprisonment of not less than five years for peaceful protest to advocate religious freedom, are neither necessary to protect public or private interests against injury nor proportionate to guilt. Punishment should fit the crime, not the criminal. In addition, the requirement of non-retroactivity, the prohibition against analogy, the principle of certainty and the prohibition against uncodified criminal provisions must be construed more strictly in proportion to the severity of the prescribed punishment.

46. The Working Group therefore considers that the deprivation of liberty of Mr. Wang and Ms. Jiang lacks a legal basis and is thus arbitrary, falling under category I.

Category II

47. The Working Group recalls that the rights to freedom of movement and residence, freedom to seek asylum, freedom of thought, conscience and religion, freedom of opinion and expression, freedom of peaceful assembly and association, participation in political and public affairs, legal equality and non-discrimination, and protection of persons belonging to ethnic, religious or linguistic minorities are among the most fundamental human rights, deriving from the inherent dignity of the human person, reaffirmed and ensured by the international community in articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights.

48. The source asserts that Mr. Wang and Ms. Jiang have been arbitrarily deprived of their liberty for legitimately exercising their fundamental human rights as religious leaders, while the Government claims that they violated the law concerning registration of religious groups.

49. Article 29 (2) of the Universal Declaration of Human Rights provides that the only legitimate limitations to the exercise of one's rights and freedoms must be for the purposes of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. Article 1 (3) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief also stipulates that freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

[8] Opinion No. 62/2018, para. 57.

[9] Human Rights Committee, *Fardon v. Australia* (CCPR/C/98/D/1629/2007), para. 7.4 (2).

[10] Opinion No. 10/2018, para. 53.

50. In the present case, the Working Group is not persuaded by the Government's claim that Mr. Wang and Ms. Jiang's arrest and detention are justified by their church's violation of the registration requirement, or its long-standing position that registration concerns "religious associations and places of worship, but not individual believers or meetings within families".[11] The registration requirement cannot be used to restrict freedom of religion and association unless it meets the principle of necessity and proportionality. In the present case, the Government has presented neither a legitimate policy goal nor the lack of a less intrusive alternative means, nor a weighing up of the public interest and interference with individual freedoms.

51. The Working Group also expresses its concern at what appears to be the use of the mandatory registration system for religious organizations in order to restrict religious freedom. The Working Group notes that the Special Rapporteur on freedom of religion or belief has noted that registration has often appeared to be used as a means to limit the right of freedom of religion or belief of members of certain religious communities. The Special Rapporteur also stated that registration should not be compulsory, that is, it should not be a precondition for practising one's religion, but only for the acquisition of a legal personality and related benefits; that registration procedures should be easy and quick and not depend on extensive formal requirements in terms of the number of members or the time a particular religious group has existed; and that registration should not depend on reviews of the substantive content of the belief, the structure, the clergy and so on.[12]

52. The Working Group also notes that the Special Rapporteur has reiterated this point: "It should be clear that the right of an individual or group to their freedom of religion or belief can never be 'created' by any administrative procedures. Rather, it is the other way around: registration should serve this human right, which itself must be respected as preceding any registration. On the basis of this general understanding, registration should be an offer by the State but not a compulsory legal requirement."[13]

53. The source also maintains, and the Government has not contested, that Mr. Wang and Ms. Jiang have been arrested and detained for their vocal objection to the revised Religious Affairs Regulations, which tighten the Government's control of religious practices. For this reason, the Working Group considers that they have been deprived of their liberty for their exercise of the right to freedom of expression, as well. In this vein, the Working Group refers the present case to (a) the Special Rapporteur on freedom of religion or belief, (b) the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, (c) the Special Rapporteur on the rights to freedom of peaceful assembly and of association, and (d) the Special Rapporteur on the situation of human rights defenders, for appropriate action.

54. The Working Group is, therefore, of the opinion that Mr. Wang and Ms. Jiang's deprivation of liberty is arbitrary, falling within category II, as it violated articles 18, 19 and 20 (1) of the Universal Declaration of Human Rights.

Category III

55. Given its finding that Mr. Wang and Ms. Jiang's deprivation of liberty is arbitrary under category II, the Working Group wishes to emphasize that their detentions should never have taken place. However, as the investigative and judicial process is taking place, the Working Group will now consider whether the alleged violations of the right to a fair trial and due process were of such gravity as to give their deprivation of liberty an arbitrary character so that it falls within category III.

56. Both Mr. Wang and Ms. Jiang were denied the right to notify and communicate with their family and lawyers, contrary to principles 15−19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and also contrary to the right to be brought promptly before a judge, who is to decide without delay upon the

[11] E/CN.4/1995/91, p. 116.
[12] E/CN.4/2005/61, paras. 55–58.
[13] A/HRC/28/66/Add.2, para. 32.

lawfulness and necessity of detention, as stipulated in principles 11, 32 and 37 of the Body of Principles. In the view of the Working Group, such procedural defects severely compromised their due process and fair trial rights from the beginning of the detention.

57. Subsequently, the Government failed to respect Mr. Wang and Ms. Jiang's right to legal assistance at all times, which is inherent in the right to liberty and security of person, and their right to a fair and public hearing by a competent, independent and impartial tribunal established by law with all the guarantees necessary for defence in a criminal case, in accordance with articles 3, 9, 10 and 11 (1) of the Universal Declaration of Human Rights and principles 11, 15, 17 and 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

58. The interrogations in the absence of their lawyers during their incommunicado detention deprived them of their right to legal counsel at a critical stage of the criminal proceedings and exposed them to the risk of coercion. The lack of adequate access to and communication between Mr. Wang and Ms. Jiang and their lawyers violate the essence of the right to legal assistance and preparation for defence.

59. The Working Group also notes with concern that, on 8 January 2019, the Chengdu police took Mr. Wang's lawyer to Wangjiaguai Police Station soon after he had met with Mr. Wang's family. He was released on 9 January 2019.

60. The Working Group also determines that Mr. Wang's pretrial detention from 9 December 2018, for over eight months, without an individualized judicial determination of the legality of the detention, undermines the presumption of innocence guaranteed under article 11 (1) of the Universal Declaration of Human Rights and principle 36 (1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

61. In Ms. Jiang's case, the determination of the legality of the decision and enforcement of "residential surveillance at designated places of residence" by the public security organ under article 75 (previously article 73) of the Criminal Procedure Law does not qualify as a fair and public hearing by a competent, independent and impartial tribunal, as stipulated in article 10 of the Universal Declaration of Human Rights. A non-judicial police or security force cannot sit in judgment of its own investigative conduct.

62. Given the above, the Working Group concludes that the violations of the right to a fair trial and due process are of such gravity as to give Mr. Wang and Ms. Jiang's deprivation of liberty an arbitrary character that falls within category III.

Disposition

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

> The deprivation of liberty of Wang Yi and Jiang Rong, being in contravention of articles 2, 3, 6, 7, 8, 9, 11 (1), 18, 19 and 20 (1) of the Universal Declaration of Human Rights, is arbitrary and falls within categories I, II and III.

64. The Working Group requests the Government of China to take the steps necessary to remedy the situation of Mr. Wang and Ms. Jiang 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.

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

66. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Wang and Ms. Jiang and to take appropriate measures against those responsible for the violation of their rights.

67. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to (a) the Special Rapporteur on freedom of religion or belief, (b) the

Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, (c) the Special Rapporteur on the rights to freedom of peaceful assembly and of association, and (d) the Special Rapporteur on the situation of human rights defenders, for appropriate action.

68. The Working Group recommends that the Government ratify and accede to the International Covenant on Civil and Political Rights and its Optional Protocols.

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

Follow-up procedure

70. 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. Wang has been released and Ms. Jiang released unconditionally and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Wang and Ms. Jiang;

(c) Whether an investigation has been conducted into the violation of Mr. Wang and Ms. Jiang'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.

71. 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.

72. 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.

73. 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.[14]

[*Adopted on 12 August 2019*]

[14] Human Rights Council resolution 33/30, paras. 3 and 7.