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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its ninety-fourth session, 29 August–2 September 2022

Opinion No. 41/2022 concerning Qin Yongpei (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 42/22.

2. In accordance with its methods of work,¹ on 2 March 2022 the Working Group transmitted to the Government of China a communication concerning Qin Yongpei. The Government submitted a late response on 5 May 2022. 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).

¹ [A/HRC/36/38](#).

Submissions

Communication from the source

4. Qin Yongpei is a citizen of China born on 12 September 1969. His usual place of residence is Nanning, Guangxi Zhuang Autonomous Region.

5. According to the source, Mr. Qin is a rights defence lawyer who was disbarred by the authorities in May 2018 because of his criticism of government officials. Mr. Qin is reportedly among several defence lawyers whose licences were revoked by the judicial authorities. Mr. Qin has served as the director of Baiyongming Legal Consulting Services Co. Ltd., an entity that had formerly been a law firm until it was forced to dissolve and was turned into a consultancy.

Arrest and detention

6. In September 2018, after being disbarred, Mr. Qin, along with several other disbarred lawyers, set up the “Disbarred China Lawyers Club”. Mr. Qin continued to criticize government officials by posting comments online alleging corruption and abuse of power.

7. Before being detained, Mr. Qin had reportedly openly urged citizens in Guangxi to seek out and share allegations of corrupt practices by judicial and public security officials. He was briefly taken into custody and interrogated by the police as a part of the reported crackdown on human rights lawyers in July 2015. Mr. Qin had also drawn the attention of the authorities for his work advocating for the rights of the local villagers, including those detained after they had protested against pollution from State-owned mining companies.

8. The source reports that on 31 October 2019, more than 10 police officers from the Nanning City Public Security Bureau seized Mr. Qin from the office of Baiyongming Legal Consulting Services Co. Ltd., located in Nanning. The officers searched both the company’s premises and Mr. Qin’s home, confiscating several of Mr. Qin’s personal possessions. The authorities placed Mr. Qin in criminal detention on the following day, 1 November 2019.

9. The source states that during the arrest, the authorities presented an arrest warrant issued by the Nanning City Public Security Bureau. However, Mr. Qin’s family was not allowed to have a copy of this notice.

10. According to the source, the reason given by the authorities for Mr. Qin’s arrest was incitement to subversion of State power, which is sanctioned in article 105 (2) of the Criminal Law. The source recalls that it is stipulated in this article that “whoever incites others by spreading rumours or slander or any other means to subvert 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”.

11. According to the source, on 3 December 2019 Mr. Qin was formally arrested by the authorities of the Nanning City Public Security Bureau. On 30 April 2020, the Nanning City Procuratorate indicted Mr. Qin.

12. Initially, Mr. Qin was held at Nanning Municipal Detention Centre No. 1. On 20 January 2021, he was transferred to Nanning Municipal Detention Centre No. 2, where he remains to date, according to the source.

13. On 27 December 2021, at a pretrial hearing, nearly 19 months after being indicted and after almost two years in pretrial detention, Mr. Qin’s family and lawyer were given four days’ notice of his trial date, which was set for 31 December 2021.

Trial

14. On 31 December 2021, Mr. Qin was tried for inciting subversion of State power, by the Nanning Municipal Intermediate People’s Court, in a closed trial held at Nanning Municipal Detention Centre No. 2, where Mr. Qin was in pretrial detention. Mr. Qin maintained his innocence.

15. The source submits that the authorities may have deliberately timed the trial with such short notice to coincide with the winter holiday season, in order to minimize the international attention to Mr. Qin's case.

16. Reportedly, the court refused to allow seven witnesses called by Mr. Qin's defence to testify. No members of the public or family members were permitted to attend the trial; only one relative was able to attend because she had previously registered as a legal representative for his defence. The court has reportedly not yet rendered a verdict, and Mr. Qin remains in custody at Nanning Municipal Detention Centre No. 2.

17. The source submits that the authorities have violated the rights of the public to free expression and free association by attempting to avoid public scrutiny of Mr. Qin's case. In the days leading up to the trial, the authorities reportedly harassed and threatened human rights defenders and human rights lawyers, along with Mr. Qin's associates, warning them against attempting to observe the trial, to display support or to otherwise speak out about his case. Commenting on the case has required approval from the authorities. Throughout Mr. Qin's detention, the authorities have visited Mr. Qin's family members in person, warning them against posting information about his case on social media platforms.

18. The source further notes that the violations that occurred prior to Mr. Qin's trial included delaying his access to his lawyer. It is reported that his lawyer was able to meet him for the first time on 25 May 2020, almost seven months after he was initially detained. Moreover, it is submitted that the authorities have repeatedly obstructed access by Mr. Qin's legal defence to his case files, often claiming that these could not be viewed because the person responsible for the case was out of the office. For instance, Mr. Qin's legal defence was not permitted to view the investigative report that formed the basis of his indictment.

19. The source reports that on 15 June 2020, an Open Government Information complaint was filed on behalf of Mr. Qin alleging that he had been repeatedly denied access to his lawyers from the start on his detention on 31 October 2019. It is also alleged that the authorities prevented Mr. Qin from receiving correspondence from his legal counsel. Instead, the correspondence was sent to the national security team of the Nanning City Public Security Bureau. A complaint was filed about this matter to the local authorities, demanding an investigation into this deprivation of Mr. Qin's right to communicate with his lawyers.

20. According to the source, the Nanning city government ruled that the Public Security Bureau had acted within its authority, and stated that the request did not fall within the requirements of the Open Government Information regulations. An administrative appeal was filed against the city government's decision. However, on 17 September 2020, the Nanning city government upheld its decision.

Treatment in detention

21. As regards the treatment of Mr. Qin while in custody, after his transfer to Nanning Municipal Detention Centre No. 2 the authorities reportedly denied requests by his family to allow him to see his mother before her death in July 2021. Furthermore, Mr. Qin was not permitted to attend her funeral. Mr. Qin's spouse was not permitted to meet with him until August 2021 – a year and ten months after his initial detention.

22. Mr. Qin was reported to be held in overcrowded conditions, with over 30 inmates in the same cell, making the heat unbearable during summer. The authorities at the detention facility also reportedly refused to give Mr. Qin warm clothes during the cold weather, which had been provided by his family.

Legal analysis by the source

23. The source submits that Mr. Qin's deprivation of liberty falls within categories I, II and III of the Working Group. In relation to category I, the source submits that Mr. Qin has been detained and charged with the politically motivated criminal offence of inciting subversion of State power stipulated in article 105 (2) of the Criminal Law, which is a crime that comes under the category of endangering national security. The source recalls that the Working Group has previously called 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.

24. The source further recalls that the Working Group has described this provision as neither necessary to protect public or private interests against injury, nor proportionate. In its opinion No. 11/2020, the Working Group described the provisions as vaguely and broadly worded and noted that they could be used to deprive individuals of their liberty without a specific legal basis and violate the due process of law enshrined in the principle of legality found in article 11 (2) of the Universal Declaration of Human Rights. The source concludes that Mr. Qin's detention lacks legal basis and is thus arbitrary, falling under category I of the Working Group.

25. In relation to category II, the source submits that the charge against Mr. Qin of inciting subversion of State power is based solely on his online criticism of government officials and his involvement in a group of disbarred human rights lawyers. The source notes that the prosecutor's indictment clearly states that Mr. Qin is being prosecuted for his online speech and his activities with the "Disbarred China Lawyers Club" group.

26. The source specifies that in the indictment, the authorities accused Mr. Qin of having used social media platforms since 2014 in order to denigrate and spread rumours about State leaders with malicious intent, attack the regime and the socialist system and incite the public who are not familiar with the real situation to doubt the socialist system. The prosecution also accused Mr. Qin of stirring up public opinion with malicious intent, distorting the facts and defaming the judicial authorities, accusing law enforcement officers and discrediting the judicial system.

27. In addition, the prosecution accused Mr. Qin in the indictment of setting up the illegal "Disbarred China Lawyers Club" organization and planning to organize a "moot court" – which, according to the indictment, had openly challenged the public authority of the State judicial authorities.

28. It is noted that Mr. Qin, who was disbarred in May 2018, was among several lawyers who set up, in September 2018, what was named the "Disbarred China Lawyers Club". The lawyers, though prohibited from representing clients at trial or visiting them in detention, agreed to continue providing legal consultations and to advocate for rule-of-law reforms. By November 2018, the authorities had declared the club an illegal organization. In January 2019, the authorities raided one of the club's locations.

29. In the months prior to his detention, Mr. Qin had commented online on political topics, including the pro-democracy protests in Hong Kong, China. He had also actively called for the release of several detained lawyers who had been accused of inciting subversion of State power. The source reports that in February 2020, the police interrogated Mr. Qin's family members about his online activities and any comments that he may have made at home.

30. The source concludes that the above-mentioned circumstances relating to Mr. Qin's detention violate Mr. Qin's right to freedom of expression and association enshrined in article 35 of the Constitution and articles 18, 19 and 20 of the Universal Declaration of Human Rights.

31. In relation to category III, the source notes that there have been numerous legal irregularities in Mr. Qin's case, including lack of consistent access to his lawyers and lack of contact with his family. Mr. Qin's right to a fair trial has thus been violated. Officials have reportedly prevented Mr. Qin's lawyers from meeting with him on multiple occasions, claiming that his case might involve State secrets. It is further noted that article 37 of the Criminal Procedure Law allows the police to deprive a detainee of his or her right of access to a lawyer beyond 48 hours if the detainee is accused of a crime of endangering national security. This, according to the source, violates international human rights standards on access to a lawyer and places detainees at high risk of torture and ill-treatment.

32. The source recalls that Mr. Qin was first able to consult with his lawyers on 25 May 2020, several months after he was detained. The authorities reportedly cited the coronavirus disease (COVID-19) pandemic as the reason for preventing all lawyers from accessing the detention centre. The source notes, however, that Mr. Qin was detained prior to the pandemic and the legal team had consequently requested to meet with Mr. Qin before the outbreak of COVID-19.

33. Mr. Qin was reportedly granted a second meeting with his lawyers on 31 August 2020. The authorities reportedly noted that, at that time, Mr. Qin was able to meet with his lawyers, as his case has entered the trial phase. The source recalls that there are no national laws that allow authorities to restrict lawyers' visits during the investigation phase.

34. The source concludes that the ongoing detention of Mr. Qin constitutes a violation of his right to a fair trial guaranteed by article 9 of the Universal Declaration of Human Rights.

Response from the Government

35. On 2 March 2022, the Working Group transmitted the allegations from the source to the Government of China under its regular communications procedure. The Working Group requested the Government to provide, by 2 May 2022, detailed information about the current situation of Mr. Qin and to clarify the legal provisions justifying his continued detention, as well as the compatibility of his detention with the obligations of China under international human rights law. The Working Group also called upon the Government of China to ensure the physical and mental integrity of Mr. Qin. Given the context of a global pandemic, and in accordance with the World Health Organization recommendations of 15 March 2020 concerning the response to COVID-19 in places of detention, the Working Group urged the Government of China to prioritize the use of non-custodial measures.

36. The Government submitted a response on 5 May 2022, that is, after the deadline given by the Working Group. 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 response, within the deadline, as is provided for in paragraph 16 of the Working Group's methods of work.

Discussion

37. 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.

38. In determining whether Mr. Qin's detention was arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal 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. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations.²

39. The source has submitted that Mr. Qin's detention is arbitrary and falls under categories I, II and III. The Government, in its late response, while not addressing the categories cited in the source's submission, argues that Mr. Qin's detention is lawful under national law and that "the conditions of so-called 'arbitrary detention' do not exist" in China. The Working Group will proceed to address the source's allegations in turn.

(i) Category I

a. The charge of inciting subversion of State authority

40. The source submits that Mr. Qin has been charged with inciting subversion of State authority, on the basis of article 105 (2) of the Criminal Law. The source contends that the charge against Mr. Qin of inciting subversion of State power is based solely on his online criticism of government officials and his involvement in a group of disbarred human rights lawyers; indeed, it is stated in the indictment against Mr. Qin that he is being prosecuted for his online speech and his activities with the "Disbarred China Lawyers Club" group. In its late response, the Government stated that on suspicion of a crime, in October 2019, the Public Security Bureau had taken measures against him according to law, but it did not offer any explanation as to how Mr. Qin's conduct could be considered as inciting subversion to overthrow the socialist system.

² A/HRC/19/57, para. 68.

41. The Working Group recalls that it has been called upon to examine article 105 (2) of the Criminal Law previously on a number of occasions.³ It has previously observed as follows:

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.⁴

42. Following its visits to China in 1997 and 2004, the Working Group emphasized in its reports that charges involving vague and imprecise offences jeopardized the ability of individuals to exercise their fundamental rights and were likely to result in arbitrary deprivation of liberty. The Working Group recommended that these crimes be defined in precise terms and that legislative measures be taken to introduce an exemption from criminal responsibility for those who peacefully exercised their rights guaranteed by the Universal Declaration of Human Rights.⁵ In 2019, the Working Group specifically called upon the Government of China to repeal article 105 (2) of the Criminal Law, or to bring it into line with the country's obligations under international human rights law.⁶

43. The Working Group therefore concludes that the arrest and subsequent detention of Mr. Qin pursuant to article 105 (2) of the Criminal Law was arbitrary, being in breach of article 9 of the Universal Declaration of Human Rights. As it has previously stated, article 105 (2) of the Criminal Law fails to meet the principle of legality. The Working Group once again 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.

44. Finally, as noted above, article 105 (2) risks resulting in individuals being charged with vague and imprecise offences, and thereby jeopardizing the ability of individuals to exercise their fundamental rights. Such an encroachment onto rights and freedoms, arising from the use of article 105 (2), is alleged by the source in the present circumstances, and is addressed below in the section on category II.

b. The right to challenge the arbitrariness and lawfulness of detention

45. The source reports, and the Government does not dispute, that after his detention which began on 31 October 2019, Mr. Qin was "formally arrested" by the authorities of the Nanning City Public Security Bureau on 3 December 2019, and then indicted by the Nanning City Procuratorate on 30 April 2020. He was only permitted to meet his lawyer for the first time on 25 May 2020, and it was not until 27 December 2021, at a pretrial hearing held after he had been in pretrial detention for approximately two years, that Mr. Qin's family and lawyer were given four days' notice of his trial, which was held on 31 December 2021.

46. 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.⁷ The right to be promptly brought before a judicial authority or to bring such proceedings is recognized in articles 9, 10 and 11 (1) of the Universal Declaration of Human Rights, principles 11 and 32 of the Body of Principles

³ See opinions No. 15/2019, No. 82/2020, No. 66/2021 and No. 9/2022. The Working Group notes that article 105 (2) was considered under category I in its most recent review of the provision; see opinion No. 9/2022.

⁴ Opinion No. 15/2019, paras. 33–34.

⁵ [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).

⁶ Opinion No. 15/2019, paras. 33–35.

⁷ 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; and opinion No. 15/2019, para. 28.

for the Protection of All Persons under Any Form of Detention or Imprisonment and principles 1, 4, 8, 11 and 15 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 right to challenge detention also underlies the right to an effective remedy, which is recognized in article 8 of the Universal Declaration of Human Rights, principles 11 and 32 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and principles 10 and 11 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.

47. The Working Group notes that there is no information demonstrating that Mr. Qin was brought before a judicial authority to challenge the legality of his detention prior to meeting his lawyer on 25 May 2020.⁸ Nothing in the materials received indicates that the Nanning City Public Security Bureau or the Nanning City Procuratorate are independent judicial authorities, or that Mr. Qin was able to challenge his detention when he was “formally arrested” and then indicted by these bodies in December 2019 and April 2020 respectively. Even after he had first met his lawyer on 25 May 2020, there is no indication that Mr. Qin was able to challenge his pretrial detention before an independent judicial authority. On 15 June 2020, an Open Government Information complaint was filed on behalf of Mr. Qin, which was rejected by the Nanning city government. The Nanning city government also rejected the subsequent administrative appeal against this decision, on 17 September 2020. However, there is no information in the materials submitted to the Working Group indicating that the Nanning city government constitutes an independent judicial authority. Additionally, both the source and the Government in its late response note that no verdict had been issued by the Nanning Municipal Intermediate People’s Court at the time of their respective submissions, the latter of which was made more than two and a half years after the start of Mr. Qin’s detention.

48. The Working Group finds that Mr. Qin was not afforded his right to be promptly brought before an independent judicial authority, contrary to articles 9, 10 and 11 (1) of the Universal Declaration of Human Rights, principles 11 and 32 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and principles 1, 4, 8, 11 and 15 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. Given that Mr. Qin was not able to challenge his detention throughout this period, his right to an effective remedy under article 8 of the Universal Declaration of Human Rights, principles 11 and 32 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and principles 10 and 11 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, were also violated.

49. In the light of the preceding considerations, the Working Group considers that there was no legal basis for the arrest and detention of Mr. Qin and that his deprivation of liberty is arbitrary under category I.

(ii) *Category II*

50. Looking to category II, Mr. Qin has reportedly been charged with inciting subversion of State power under article 105 (2) of the Criminal Law, which is an impermissibly vague provision, as discussed above in the section on category I.

51. The Working Group recalls that detention purely as a result of the peaceful exercise of rights protected by the Universal Declaration of Human Rights may be arbitrary.⁹ The Working Group also recalls that freedom of opinion and freedom of expression as set forth in article 19 of the Universal Declaration of Human Rights are indispensable conditions for the full development of the person; they are essential for any society and in fact constitute

⁸ 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 6. See also opinion No. 15/2019, para. 27; and [E/CN.4/2005/6/Add.4](#), para. 32 (b) and (c).

⁹ See, for example, opinion No. 66/2021; and opinion No. 9/2022, para. 58.

the foundation stone for every free and democratic society.¹⁰ Freedom of expression includes the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers, and this right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, including political opinions. The right to freedom of thought, conscience and religion, encapsulated in article 18 of the Universal Declaration of Human Rights, belongs to everyone, as does the right to freedom of assembly and association, protected in article 20 of the Universal Declaration of Human Rights. With regard to all these rights, the Working Group recalls that 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 purpose 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.

52. In the absence of any substantive response from the Government addressing these allegations in its belated response, it has not been established that any of these limitations permitted under article 29 (2) of the Universal Declaration of Human Rights apply in the present case. The Government provides no indication that Mr. Qin used or incited violence. The source conveys (and the Government did not refute in any timely submission) that the reference in the indictment to use by Mr. Qin of social media platforms to denigrate and spread rumours about State leaders was not supported by detailed allegations; and, according to the source, Mr. Qin's legal defence was not permitted to view the investigative report that formed the basis of his indictment. Moreover, the source notes that Mr. Qin's online comments concerned political topics, including the pro-democracy protests in Hong Kong, China, and he called for the release of several lawyers detained for allegedly inciting subversion of State power. Mr. Qin advocated against corruption and the abuse of power and in favour of the rights of local villagers, including those detained after they had protested against pollution from State-owned mining companies. Similarly, the references in the indictment to setting up the "Disbarred China Lawyers Club", and to planning to organize a "moot court", do not constitute a sufficient basis to justify encroaching on Mr. Qin's liberty and his rights to freedom of expression and of association.

53. Consequently, the only plausible explanation for Mr. Qin's arrest and detention is that he is being punished for the exercise of his rights to freedom of expression and of association, which are protected by articles 18, 19 and 20 of the Universal Declaration of Human Rights. The Working Group concludes that the detention of Mr. Qin is arbitrary under category II. The Working Group refers the present case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on the situation of human rights defenders.

(iii) *Category III*

54. Given its findings under category II, the Working Group notes that no trial should have taken place. Nonetheless, the trial did take place, on 31 December 2021, and the source submits, with regard to category III, that there were violations of Mr. Qin's rights protected under article 9 of the Universal Declaration of Human Rights.

a. *Pretrial detention*

55. The Working Group recalls that pretrial detention is a measure which should only be used exceptionally, for the shortest period of time, and should be based on an individualized assessment by the judiciary, addressing concerns such as the risk of flight or of interference with the investigation.¹¹

56. This was not the case for Mr. Qin, who was kept in pretrial detention at Nanning Municipal Detention Centre No. 1 and then Nanning Municipal Detention Centre No. 2 for almost two years before his trial. The Government has provided no indication that an individualized determination was made in Mr. Qin's case, nor an explanation for why in Mr.

¹⁰ See, for example, opinion No. 50/2021.

¹¹ Opinion No. 9/2022, para. 48.

Qin's case detention in custody was reasonable and necessary for such purposes as to prevent flight, interference with evidence or the recurrence of crime.¹² Similarly, it has not provided a justification for the lengthiness of the period of pretrial detention.

57. In the light of the facts, the Working Group considers that Mr. Qin's pretrial detention also violated his rights under article 9 of the Universal Declaration of Human Rights.

b. Access to legal assistance

58. As the Working Group has 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 is to be provided without delay. Moreover, the Working Group has emphasized the importance of ensuring that, if public health emergencies require restrictions on physical contact, States must ensure the availability of other means for legal counsel to communicate with their clients, including secured online communication or communication over the telephone, free of charge and in circumstances in which privileged and confidential discussions can take place.¹³

59. The Working Group recalls that Mr. Qin was not able to consult with his lawyers until 25 May 2020, more than six months after his detention began. The authorities reportedly cited the COVID-19 pandemic as the reason for preventing his access to his lawyers. However, Mr. Qin had been detained for several months prior to the pandemic and the legal team requested to meet with Mr. Qin before the outbreak of COVID-19.

60. The Working Group considers that denying access by Mr. Qin to lawyers of his choosing, for more than six months after he was detained, violated his right to legal assistance guaranteed under articles 10 and 11 (1) of the Universal Declaration of Human Rights and, together with the delay of nearly two years before he had a pretrial hearing, violates principles 11, 15, 17, 18 and 32 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principles 1, 8, 9 and 10 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 and rule 61 (1) of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). Moreover, by denying or restricting the ability of Mr. Qin's lawyers 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 and principle 7 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 Working Group notes that the reason the Government of China reportedly gave for denying access to the case materials, namely that his case might involve State secrets, was not asserted by the Government in its belated response to the present complaint. Accordingly, the Government has not shown that a blanket denial of access to the underlying information could be justified, let alone that it was necessary and proportionate in the present case and that less restrictive means to uphold any such security interests were unavailable.¹⁴

61. The source notes that article 37 of the Criminal Procedure Law allows the police to deprive the detainee of his right of access to a lawyer beyond 48 hours if the detainee is accused of a crime of endangering national security. According to the source, this violates international human rights standards on access to a lawyer and places detainees at high risk of torture and ill-treatment. While depriving detainees of access to a lawyer can increase the risk of other violations such as torture and ill-treatment,¹⁵ for current purposes it is sufficient

¹² Human Rights Committee, general comment No. 35 (2014), para. 38.

¹³ See the Working Group's deliberation No. 11 (A/HRC/45/16, annex II) (denial of fair trial on the pretext of public health emergencies), para. 21.

¹⁴ 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, guidelines 5 and 13.

¹⁵ 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, guidelines 8 and 10, and introduction, para. 2.

to note that any justification for barring access to a lawyer could not justify the delay of more than six months before Mr. Qin was able to see his lawyer.

62. Furthermore, the undisputed claims that, after more than two years of detention, Mr. Qin's family and legal defence were given only four days' notice of his trial date of 31 December 2021, and that they were not permitted to view the investigative report underlying his indictment, further underline that he was deprived of guarantees necessary for his defence, in violation of article 11 (1) of the Universal Declaration of Human Rights and principle 9 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.¹⁶ The Working Group notes the source's complaints that the court refused to allow seven witnesses called by Mr. Qin's defence to testify, that no members of the public or of Mr. Qin's family were permitted to attend the trial apart from one relative who had previously registered as a legal representative for his defence, and that other human rights defenders and lawyers had been warned by the authorities against discussing his case. However, the Working Group has insufficient information at its disposal to assess whether these matters constituted violations of Mr. Qin's rights.

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

(iv) *Category V*

64. It is stated in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms that 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.¹⁷ 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 to the equal protection of the law under article 7 of the Universal Declaration of Human Rights.¹⁸

65. The Working Group considers that the source's allegations demonstrate that Mr. Qin was detained for the exercise of his rights under the above-mentioned declaration as a (former) human rights lawyer and defender, and for his political opinions, particularly his setting up of the "Disbarred China Lawyers Club" and his criticism of government officials via comments posted online. His arrest and subsequent detention consequently violated article 7 of the Universal Declaration of Human Rights, and fall under category V.

66. The Working Group refers the present case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the rights to freedom of peaceful assembly and of association, the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on the situation of human rights defenders, for appropriate action.

(v) *Concluding remarks*

67. Finally, the Working Group's view (that the violations of international human rights standards that occurred during Mr. Qin's arrest and detention were sufficiently serious to

¹⁶ 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 9, para. 14 ("persons deprived of their liberty shall be accorded adequate time and facilities to prepare their case").

¹⁷ General Assembly resolution 53/144, arts. 1, 5 (c), 6, 8, 9 (1–3) 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.

¹⁸ See, for example, opinion No. 15/2019, para. 37; and opinions No. 46/2018, No. 45/2018 and No. 36/2018.

constitute arbitrary detention) is reinforced by the fact that contact with his family was repeatedly denied to him without legitimate and proportionate reasons for such a limitation being provided. The Working Group notes the information from the source in this respect, including the fact that the authorities denied requests for Mr. Qin to see his mother before her death in July 2021 and that he was not permitted to attend her funeral. He was also prohibited from seeing his spouse until a year and ten months after his initial detention. Additionally, the Working Group notes with concern that Mr. Qin was reported to be held in overcrowded conditions, with over 30 inmates in the same cell, making the heat unbearable during summer. Though the source does not demonstrate that this overcrowding was directed at Mr. Qin personally, its impact would have aggravated the impact of the other violations of his rights noted in the present opinion.

68. In its 30-year history, the Working Group has found China to be in violation of its international human rights obligations in numerous cases.¹⁹ The Working Group is concerned that this indicates a systemic problem with arbitrary detention in China, which amounts to a serious violation of international law. 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.

69. The Working Group would welcome the opportunity to conduct a country visit to China. Given that a significant period of time has passed since its previous visit to China, in September 2004, the Working Group considers that it is an appropriate time to conduct another visit. The Working Group looks forward to a positive response to its request of 15 April 2015.

Disposition

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

The deprivation of liberty of Qin Yongpei, being in contravention of articles 7, 9, 10, 11, 18, 19 and 20 of the Universal Declaration of Human Rights, is arbitrary and falls within categories I, II, III and V.

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

72. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to quash the proceedings against Mr. Qin, release him immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law. In the current context of the global coronavirus disease (COVID-19) pandemic and the threat that it poses in places of detention, the Working Group calls upon the Government to take urgent action to ensure the immediate release of Mr. Qin.

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

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

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

¹⁹ See, for example, decisions No. 43/1993, No. 46/1995 and No. 19/1996; and opinions No. 30/1998, No. 1/1999, No. 8/2000, No. 7/2001, No. 1/2002, No. 2/2003, No. 14/2004, No. 17/2005, No. 11/2006, No. 32/2007, No. 21/2008, No. 26/2010, No. 15/2011, No. 7/2012, No. 2/2014, No. 3/2015, No. 11/2016, No. 4/2017, No. 22/2018, No. 15/2019, No. 11/2020 and No. 25/2021.

Follow-up procedure

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

77. 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.

78. 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.

79. 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 29 August 2022]

²⁰ Human Rights Council resolution 42/22, paras. 3 and 7.