



Human Rights Council
Working Group on Arbitrary Detention**Opinions adopted by the Working Group on Arbitrary Detention at its eighty-seventh session, 27 April–1 May 2020****Opinion No. 11/2020 concerning Cheng Yuan, Liu Dazhi and Wu Gejianxiong (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 (A/HRC/36/38), on 29 October 2019 the Working Group transmitted to the Government of China a communication concerning Yuan Cheng, Dazhi Liu and Gejianxiong Wu. The Government replied to the communication on 13 December 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).



Submissions

Communication from the source

4. Cheng Yuan, born on 18 October 1973, is a citizen of China. He usually resides in Shenzhen, Guangdong Province.

5. The source informs the Working Group that Mr. Cheng is a legal activist and professional who works in the non-governmental sphere. In the late 2000s, Mr. Cheng began defending legal rights of vulnerable groups, firstly within the Tianxiagong (Justice for All) organization, and from February 2016 by co-founding a public interest non-governmental organization for advocacy, named Changsha Funeng. Through policy advocacy and legal empowerment, this group promoted and protected legal rights of disadvantaged groups, including the rights of people living with hepatitis B and/or AIDS. The source further informs the Working Group that the latter organization has often applied for public disclosure of information by the Government, as allowed under domestic law. The source notes that at Changsha Funeng, Mr. Cheng was a colleague of the other two individuals listed in this communication.

6. The source informs the Working Group that Mr. Cheng has a long record of supporting people who live with hepatitis B and/or AIDS and are discriminated against on account of these medical conditions. He has also helped to alleviate the bias against these diseases in China. In 2013, Mr. Cheng led an employment discrimination lawsuit in Jiangxi Province.

7. His work has resulted in a landmark court decision to award compensation to an individual who was denied a teaching position due to his HIV-positive status. Mr. Cheng has also provided legal support, including through the filing of lawsuits, in cases relating to the implementation of the country's household registration system and its one-child family planning policy.

8. Liu Dazhi, born on 16 March 1977, is a citizen of China. He usually resides in the city of Changsha, Hunan Province.

9. According to the source, in 2017 Mr. Liu joined the Changsha Funeng organization. He has also helped to establish the Changsha Chunyu Mutual Aid Team, which focuses on protecting workers' rights, assisting victims of occupational diseases and promoting the education of children whose parents have been affected by occupational illnesses. Mr. Liu has also worked on environmental health issues. In 2014, he sought public disclosure by the authorities in Changsha about the quality of the tap water. Three years later, he applied for disclosure of information about how biomedical waste was being disposed of in the city.

10. Wu Gejianxiong, born on 1 January 1995, is a citizen of China. He usually resides in the city of Changsha, Hunan Province. The source informs the Working Group that Mr. Wu had recently joined the Changsha Funeng organization. He had mainly worked with lawyers defending the rights of individuals.

11. The source reports that Mr. Cheng was taken into custody on 22 July 2019, from his residence in Shenzhen, by authorities from the Changsha National Security Bureau. The officers did not show a warrant or any other decision by a public authority. The reason for the arrest imputed by the authorities was subversion of State power. The source specifies that this offence is contained in article 105 (1) of the Criminal Law of China and stipulates fixed-term imprisonment of not more than 3 years for participants, 3 to 10 years for active participants, and not less than 10 years or life imprisonment for those who organize, plot or carry out a scheme to subvert State power or overthrow the socialist system, and for ringleaders and others who commit major crimes.

12. According to the information received, on the same day, 22 July 2019, Mr. Liu and Mr. Wu were taken into custody from locations in the city of Changsha, Hunan Province, by authorities from the Changsha National Security Bureau. They did not show a warrant or any other decision by a public authority. Authorities imputed the same reason for the arrests of Mr. Liu and Mr. Wu as they did for the arrest of Mr. Cheng – subversion of State power.

13. The source further specifies that Mr. Cheng, Mr. Liu and Mr. Wu were initially disappeared on 22 July 2019, the date on which they were placed in criminal detention. The source submits that the authorities did not notify the families of the above-mentioned individuals of their detention within 24 hours. The source specifies that this is allowed under exemptions stipulated in article 85 (previously article 83) of the Criminal Procedure Law for individuals charged with a crime in the category of endangering State security.

14. According to the information received, on 24 July 2019 lawyers and family members of Mr. Cheng, Mr. Liu and Mr. Wu enquired about their whereabouts to the Wangcheng District Public Security Bureau in Changsha. The Wangcheng police reportedly denied that their bureau had ordered the detentions.

15. The source submits that the above-mentioned individuals have been deprived of their legal rights since they were initially detained; this has included an absence of police documentation concerning their detentions, and of notification to their families.

16. The source reports that on 25 July 2019, the families of Mr. Cheng, Mr. Liu and Mr. Wu received information from the authorities which indicated that national security officers had taken them into custody. Mr. Cheng, Mr. Liu and Mr. Wu were formally arrested on 26 August 2019, as the 37-day limit for criminal detention was approaching. The source explains that under domestic law, they would have had to be released if they were not placed under formal arrest.

17. The source also notes that only Mr. Cheng's family received a written arrest notice. Initially, his family was informed by the Changsha authorities during a telephone call on 26 August 2019 that all three individuals had been formally arrested on charges of subversion of State power.

18. According to the source, all three individuals are detained in Changsha City Kaifu District Detention Centre, in Hunan Province (previously known as the Hunan Province National Security Detention Hall). The authorities have imputed "subversion of State power" as the reason for their formal arrest.

19. The defence lawyers of Mr. Cheng, Mr. Liu and Mr. Wu have on several occasions requested information and updates on their clients' cases from the Changsha National Security Bureau. The source reports that the officials have refused to reveal information on criminal cases against Mr. Cheng, Mr. Liu and Mr. Wu.

20. The source submits that the three above-mentioned individuals have been subjected to State retaliation for their efforts to advocate for the rights of individuals who have suffered discrimination, particularly people living with HIV and persons with disabilities. The source also states that Mr. Cheng, Mr. Liu and Mr. Wu have been deprived of their rights to exercise free expression, peaceful assembly and free association. Furthermore, the source alleges that all three were blocked from accessing legal counsel while being held incommunicado which lasted for the whole duration of the detention.

21. Furthermore, the source submits that the deprivation of liberty of Mr. Cheng, Mr. Liu and Mr. Wu appears to reflect the growing suppression by the Government of the work of non-governmental organizations in China. This suppression has allegedly become more evident in recent years, since the adoption of laws on domestic charities and overseas non-governmental organizations. As a result, organizations such as Changsha Funeng, which had in the past enjoyed some freedom in conducting their work, have faced increased pressure by the Government.

22. The source further submits that the Changsha Funeng organization had set up a company in Hong Kong, China, through which it had received funding from overseas. The source suggests that this fact may be related to the detention of Mr. Cheng, Mr. Liu and Mr. Wu. The source also submits that the serious criminal charge against the three individuals, as well as the statement by the authorities that their cases involve national security concerns, suggests that the authorities have reacted in a harsher manner than they did in other cases concerning detention of professionals working for non-governmental organizations.

23. The source also notes that Mr. Cheng, as a co-founder of the Changsha Funeng organization, had been subjected to harassment by the police before being taken into custody in July 2019. Allegedly, the police had threatened Mr. Cheng several times with detention, in the weeks prior to seizing him. According to the source, Mr. Cheng had travelled to Hong Kong, China to handle some personal and business affairs, during a period of time which coincided with public protests calling for political reforms. The source believes Mr. Cheng not to have been involved in the protests.

24. According to the information received, the authorities have held the above-mentioned individuals in incommunicado detention during their entire period in custody. The source asserts that this has increased the risk of torture and other forms of ill-treatment.

25. The source submits that the authorities have charged Mr. Cheng, Mr. Liu and Mr. Wu with an unusually harsh criminal offence of “subversion of State power”, which is a crime in the category of “endangering State security”. Thus, according to the source, the authorities are able to take advantage of the domestic provision that allows deprivation of detainees’ access to a lawyer beyond 48 hours, the legal limit set for such access for virtually all other criminal charges. National security officers have also informed the families of the above-mentioned three individuals that since the case allegedly involves “national security”, it will be difficult for defence lawyers and relatives to meet with the detainees.

26. The source also reports that the authorities have refused several applications by the lawyers of Mr. Cheng, Mr. Liu and Mr. Wu to visit them in detention, and have also refused to allow any communication between the above-mentioned detainees and their lawyers or family members. The source submits that this is a violation of the right to communication of Mr. Cheng, Mr. Liu and Mr. Wu.

27. The source also submits that because of this case, family members of Mr. Cheng have faced police harassment and were deprived of liberty, despite them having no ties to Mr. Cheng’s advocacy work. The source specifies that a family member of Mr. Cheng was brought in for questioning by the police in July 2019, shortly after Mr. Cheng was taken into custody. He was again brought in for questioning in late August 2019, on suspicion of “picking quarrels and provoking trouble”.

28. Another relative of Mr. Cheng was detained by the police on the same day as Mr. Cheng and has faced ongoing harassment. The source informs the Working Group that on 22 July 2019, the police handcuffed and interrogated this person, put a hood over her head and threatened her. She was released following an interrogation and 18 hours in custody. This relative was then placed under “residential surveillance” at her home on charges of “subversion of State power”. The police confiscated some of her personal property, including identity documents, bank cards, her cell phone and her computer. On 23 July 2019, the authorities froze her bank account. On 3 August 2019, this relative of Mr. Cheng sent a letter of complaint about her mistreatment by the police to the Hunan Province People’s Procuratorate, the Changsha City People’s Procuratorate and the Hunan Province State Security Department. In the letter, she stated that the Changsha State Security Department had unlawfully exercised abuse of power by initiating a criminal case against her. She also demanded termination of the compulsory measures against her, particularly of the deprivation of her freedom under residential surveillance.

29. In mid-August 2019, national security personnel from the city of Changsha reportedly showed the family of Mr. Cheng a video recorded inside the detention centre. Reportedly, Mr. Cheng appeared thin and lethargic in the video, which has prompted concerns about his treatment while in custody, as well as concerns for the other two individuals mentioned in the communication. The source emphasizes the fact that all three individuals are being held incommunicado and are thus at a greater risk of torture and other forms of mistreatment.

30. The source submits that Mr. Cheng, Mr. Liu and Mr. Wu remain in custody and that their detention constitutes violations of their rights to exercise peaceful assembly and free association, which are protected under article 35 of the Constitution of China. Furthermore, the source submits that the circumstances of these individuals’ detentions constitute violations of their rights to peacefully exercise free expression, assembly and association. It

concludes that the detention of Mr. Cheng, Mr. Liu and Mr. Wu violates articles 3, 5, 9, 19, 20 and 23 of the Universal Declaration of Human Rights and falls under categories I, II and III of the Working Group.

Response from the Government

31. On 29 October 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 30 December 2019, detailed information about the current situation of Messrs. Cheng, Liu and Wu and any comments on the source's allegations. Moreover, the Working Group called upon the Government to ensure the physical and mental integrity of Messrs. Cheng, Liu and Wu.

32. In its reply of 13 December 2019, the Government notes that on 22 July 2019, the Changsha National Security Bureau, Hunan Province, adopted criminal detention compulsory measures against Messrs. Cheng, Liu and Wu, who are suspected of engaging in criminal activities endangering national security. On 26 August 2019, with the approval of the Changsha City People's Procuratorate, Hunan Province, the Changsha National Security Bureau arrested Messrs. Cheng, Liu and Wu. The local authorities handled the case in accordance with the law and carried out civilized law enforcement, which fully guaranteed the rights of the three individuals. At present, all three persons are in good health.

Further comments from the source

33. In its reply, the source notes that the rights of Messrs. Cheng, Liu and Wu have not been guaranteed, as is claimed by the Government. All three individuals have been denied the right to legal counsel and legal counsel of their choice.

Discussion

34. 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).

i. Category I

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

36. The source submits, and the Government does not contest, that Messrs. Cheng, Liu and Wu were not presented with an arrest warrant at the time of their arrest on 22 July 2019.

37. As the Working Group has stated, in order for a deprivation of liberty to have a legal basis, it is not sufficient for there to be a law authorizing the arrest, but rather the authorities must invoke that legal basis and apply it to the circumstances of the case through an arrest warrant, which was not implemented in the present case.¹

38. The international human rights law on detention includes the right to be presented with an arrest warrant to ensure the exercise of effective control by a competent, independent and impartial judicial authority, which is procedurally inherent in the right to liberty and security and the prohibition of arbitrary deprivation under articles 3 and 9 of the Universal Declaration of Human Rights and principles 2, 4 and 10 of the Body of Principles

¹ See, for example, opinions No. 93/2017, para. 44; No. 10/2018, paras. 45–46; No. 36/2018, para. 40; No. 46/2018, para. 48; No. 9/2019, para. 29; No. 32/2019, para. 29; No. 33/2019, para. 48; No. 44/2019, para. 52; No. 45/2019, para. 51; and No. 46/2019, para. 51.

for the Protection of All Persons under Any Form of Detention or Imprisonment.² The Working Group has not been presented with valid grounds, such as arrest in flagrante delicto, to justify exception to this principle in the present case.

39. The source further maintains, and the Government again does not dispute, that Messrs. Cheng, Liu and Wu have been held incommunicado during the entire period of their detention to this date, now nearly one year since they were arrested on 22 July 2019. Such deprivation of liberty, entailing a refusal to disclose the fate or whereabouts of the persons concerned or to acknowledge their 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.³

40. It also negates the right to challenge the legality of detention, in violation of articles 6 and 8 of the Universal Declaration of Human Rights.⁴ The Working Group considers that judicial oversight of detention is a fundamental safeguard of personal liberty and is essential in ensuring that detention has a legal basis.⁵ Given that Messrs. Cheng, Liu and Wu were not able to challenge the legality of their detention, their right to an effective remedy under article 8 of the Universal Declaration of Human Rights was also violated.

41. Moreover, the Working Group notes that Messrs. Cheng, Liu and Wu were forcibly disappeared from 22 July 2019 until 25 July 2019, at which time their families received information from authorities, indicating that national security officers had taken them into custody. The Working Group recalls its jurisprudence which states that enforced disappearances constitute a particularly aggravated form of arbitrary detention.⁶

42. The Working Group notes 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 It also observes that the reason for the arrest imputed by the authorities was subversion of State power – an offence contained in article 105 (1) of the Criminal Law of China. It is stipulated in that provision that among those who organize, plot or carry out the scheme of subverting State power or overthrowing the socialist system, the ringleaders and 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 three years but not more than 10 years, and the other participants shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention, public surveillance or deprivation of political rights.

43. 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 upheld by the principle of legality in article 11 (2) of the Universal Declaration of Human Rights. As the Working Group has previously stated, the principle of legality requires that laws be formulated with sufficient

² The Working Group has maintained from its early years that the practice of arresting persons without a warrant renders their detention arbitrary. See, for example, decisions No. 1/1993, paras. 6–7; No. 3/1993, paras. 6–7; No. 4/1993, para. 6; No. 5/1993, paras. 6, 8 and 9; No. 27/1993, para. 6; No. 30/1993, paras. 14 and 17 (a); No. 36/1993, para. 8; No. 43/1993, para. 6; and No. 44/1993, paras. 6–7. For more recent jurisprudence, see opinions No. 38/2013, para. 23; No. 48/2016, para. 48; No. 21/2017, para. 46; No. 63/2017, para. 66; No. 76/2017, para. 55; No. 83/2017, para. 65; No. 88/2017, para. 27; No. 93/2017, para. 44; No. 3/2018, para. 43; No. 10/2018, para. 46; No. 26/2018, para. 54; No. 30/2018, para. 39; No. 38/2018, para. 63; No. 47/2018, para. 56; No. 51/2018, para. 80; No. 63/2018, para. 27; No. 68/2018, para. 39; and No. 82/2018, para. 29.

³ See the Declaration on the Protection of All Persons from Enforced Disappearance; and Working Group opinions No. 82/2018, para. 28; No. 18/2019, para. 33; No. 22/2019, para. 67; No. 26/2019, para. 88; No. 28/2019, para. 61; No. 29/2019, para. 54; No. 36/2019, para. 35; No. 41/2019, para. 32; No. 42/2019, para. 48; No. 51/2019, para. 58; and No. 56/2019, para. 79.

⁴ Opinions No. 35/2018, No. 79/2017 and No. 28/2016.

⁵ See 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, para. 3.

⁶ Opinions No. 5/2020 and No. 6/2020.

⁷ Opinions No. 10/2018, para. 50; and No. 36/2019, para. 40.

precision so that the individual can access and understand the law, and regulate his or her conduct accordingly.⁸

44. For these reasons, the Working Group considers that the deprivation of liberty of Messrs. Cheng, Liu and Wu lacks a legal basis and is thus arbitrary, falling under category I.

ii. Category II

45. The Working Group recalls that the right to equality before the law and equal protection of the law, the right to freedom of thought, conscience and religion, the right to freedom of opinion and expression, the right to freedom of peaceful assembly and association and the right to participate in political and public affairs are among the most fundamental human rights, deriving from the inherent dignity of the human person, reaffirmed in articles 7, 18, 19, 20 and 21 of the Universal Declaration of Human Rights.

46. The source alleges, and the Government does not refute, that Messrs. Cheng, Liu and Wu are co-founders and members of Changsha Funeng, a public interest advocacy group with a long record of supporting persons with HIV and other health issues in their fight against discrimination, and that the authorities threatened Mr. Cheng with detention in the weeks prior to his arrest. Their case, *prima facie*, constitutes violations of freedom of thought, freedom of expression and freedom to take part in the conduct of public affairs.

47. Although freedom of opinion and expression is not without limitation, 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.

48. The Working Group has not been presented with any evidence that the exercise by Messrs. Cheng, Liu and Wu of their rights to freedom of expression and of peaceful assembly and association could be reasonably qualified as posing threats against morality, public order and the general welfare in a democratic society. In fact, the Government has provided no grounds for condemning their work as human rights defenders as "subversion of State power", although it had the opportunity to do so.

49. In accordance with 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 to draw public attention to the observance of human rights.⁹ The source has demonstrated that Messrs. Cheng, Liu and Wu were detained for the exercise of their rights under that Declaration as human rights defenders. 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.¹⁰

50. The Working Group therefore concludes that the deprivation of liberty of Messrs. Cheng, Liu and Wu is arbitrary, falling within category II, as it violates articles 7, 19, 20 (1) and 21 of the Universal Declaration of Human Rights.

⁸ Opinion No. 62/2018, para. 57.

⁹ See arts. 1 and 6 (c) of 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. See also General Assembly resolution 70/161, para. 8, in which the Assembly called upon States to take concrete steps to prevent and put an end to the arbitrary arrest and detention of human rights defenders, and strongly urged the release of persons detained or imprisoned for exercising their human rights and fundamental freedoms.

¹⁰ See, for example, opinions No. 9/2019, No. 46/2018, No. 45/2018, No. 36/2018, No. 35/2018, No. 79/2017 and No. 75/2017.

iii. Category III

51. Given its finding that the deprivation of liberty of Messrs. Cheng, Liu and Wu is arbitrary under category II, the Working Group wishes to emphasize that in such circumstances no trial should take place. However, as Messrs. Cheng, Liu and Wu have been detained and charged by the authorities with the likelihood of criminal prosecution, the Working Group will now consider whether the alleged violations of the right to a fair trial and due process were grave enough to give their deprivation of liberty an arbitrary character, so that it falls within category III.

52. Article 39 of the revised Criminal Procedure Law stipulates that during the investigation period for crimes of endangering State security, involving terrorist activities or significant amounts of bribes, defence lawyers shall obtain the approval of investigating organs before they meet with the criminal suspects. The investigating organs shall inform the place of deprivation of liberty of information relating to the aforesaid cases in advance.

53. The Working Group notes that, accordingly, the authorities failed to respect Messrs. Cheng, Liu and Wu's right to legal assistance at all times, which is inherent in the right to liberty and security of person as well as in the right to a fair and public hearing by a competent, independent and impartial tribunal established by law, in accordance with articles 3, 9, 10 and 11 (1) of the Universal Declaration of Human Rights. The Working Group considers that this violation substantially undermined and compromised their capacity to defend themselves in any subsequent judicial proceedings. 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, 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 the moment of apprehension, and such access is to be provided without delay. The Working Group therefore finds that the absence of legal counsel for Messrs. Cheng, Liu and Wu violated their rights to a fair trial and due process under articles 10 and 11 (1) of the Universal Declaration of Human Rights and principles 17 and 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

54. The Working Group further recalls principle 19 of the Body of Principles, which states that a detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his or her family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations. The Working Group notes the denial of this right to Messrs. Cheng, Liu and Wu. Giving prompt and regular access to family members, as well as to independent medical personnel and lawyers, is an essential and necessary safeguard for the prevention of torture as well as for protection against arbitrary detention and infringement of personal security.

55. The Working Group further expresses its concern at the prima facie allegation of ill-treatment of Messrs. Cheng, Liu and Wu, as evidenced by Mr. Cheng's thin and lethargic appearance in the video shown to his family; the Government has produced no credible proof to dispute this. Not only does such ill-treatment constitute a grave violation of human rights per se in violation of articles 5 and 25 of the Universal Declaration of Human Rights and article 16 (1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as well as principle 6 of the Body of Principles and rule 1 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), it also seriously undermines the ability of persons to defend themselves and hinders their exercise of the right to a fair trial, especially in light of the right not to be compelled to testify against oneself or to confess guilt under article 11 (1) of the Universal Declaration of Human Rights.

56. 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 the deprivation of liberty of Messrs. Cheng, Liu and Wu an arbitrary character that falls within category III.

v. Category V

57. The Working Group will now examine whether the deprivation of liberty of Messrs. Cheng, Liu and Wu constitutes discrimination under international law for the purpose of category V.

58. The Working Group notes that Messrs. Cheng, Liu and Wu have been human rights defenders actively fighting the widespread social stigma and unjust discrimination faced by persons with HIV and other health conditions. Their organization, Changsha Funeng, has applied for disclosure of information by the Government, and scored a landmark victory in an anti-discrimination lawsuit on behalf of an HIV-positive teacher.

59. The Working Group cannot help but notice that the political views and convictions of Messrs. Cheng, Liu and Wu are clearly at the centre of the present case and that the authorities have displayed an attitude towards them that can only be characterized as discriminatory. Indeed, they have been a target of persecution and there is no explanation for this other than their exercise of the right to express such views and convictions.

60. For these reasons, the Working Group considers that the deprivation of liberty of Messrs. Cheng, Liu and Wu constitutes a violation of articles 2 and 7 of the Universal Declaration of Human Rights on the grounds of discrimination, based on political or other opinion as well as on their status as human rights defenders, which is aimed at and results in ignoring the equality of human beings. Their deprivation of liberty therefore falls under category V.

61. In its 29-year history, the Working Group has found China in violation of its international human rights obligations in at least 94 cases.¹¹ 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.¹²

62. 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 last 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 country visit request of 15 April 2015.

¹¹ Decisions No. 43/1993, No. 44/1993, No. 53/1993, No. 63/1993, No. 65/1993, No. 66/1993, No. 46/1995 and No. 19/1996, and opinions No. 30/1998, No. 1/1999, No. 2/1999, No. 16/1999, No. 17/1999, No. 19/1999, No. 21/1999, No. 8/2000, No. 14/2000, No. 19/2000, No. 28/2000, No. 30/2000, No. 35/2000, No. 36/2000, No. 7/2001, No. 8/2001, No. 20/2001, No. 1/2002, No. 5/2002, No. 15/2002, No. 2/2003, No. 7/2003, No. 10/2003, No. 12/2003, No. 13/2003, No. 21/2003, No. 23/2003, No. 25/2003, No. 26/2003, No. 14/2004, No. 15/2004, No. 24/2004, No. 17/2005, No. 20/2005, No. 32/2005, No. 33/2005, No. 38/2005, No. 43/2005, No. 11/2006, No. 27/2006, No. 41/2006, No. 47/2006, No. 32/2007, No. 33/2007, No. 36/2007, No. 21/2008, No. 29/2008, No. 26/2010, No. 29/2010, No. 15/2011, No. 16/2011, No. 23/2011, No. 29/2011, No. 7/2012, No. 29/2012, No. 36/2012, No. 51/2012, No. 59/2012, No. 2/2014, No. 3/2014, No. 4/2014, No. 8/2014, No. 21/2014, No. 49/2014, No. 55/2014, No. 3/2015, No. 39/2015, No. 11/2016, No. 12/2016, No. 30/2016, No. 43/2016, No. 46/2016, No. 4/2017, No. 5/2017, No. 59/2017, No. 69/2017, No. 81/2017, No. 22/2018, No. 54/2018, No. 62/2018, No. 15/2019, No. 35/2019, No. 36/2019, No. 72/2019 and No. 76/2019.

¹² A/HRC/13/42, para. 30; and opinions No. 1/2011, para. 21; No. 37/2011, para. 15; No. 38/2011, para. 16; No. 39/2011, para. 17; No. 4/2012, para. 26; No. 38/2012, para. 33; No. 47/2012, paras. 19 and 22; No. 50/2012, para. 27; No. 60/2012, para. 21; No. 9/2013, para. 40; No. 34/2013, paras. 31, 33 and 35; No. 35/2013, paras. 33, 35 and 37; No. 36/2013, paras. 32, 34 and 36; No. 48/2013, para. 14; No. 22/2014, para. 25; No. 27/2014, para. 32; No. 35/2014, para. 19; No. 34/2014, para. 34; No. 36/2014, para. 21; No. 44/2016, para. 37; No. 60/2016, para. 27; No. 32/2017, para. 40; No. 33/2017, para. 102; No. 36/2017, para. 110; No. 51/2017, para. 57; and No. 56/2017, para. 72.

Disposition

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

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

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

65. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Messrs. Cheng, Liu and Wu immediately and accord them 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 Messrs. Cheng, Liu and Wu.

66. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Messrs. Cheng, Liu and Wu 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 the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, for appropriate action.

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

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 Messrs. Cheng, Liu and Wu has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Messrs. Cheng, Liu and Wu;

(c) Whether an investigation has been conducted into the violation of Messrs. Cheng, Liu and Wu'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.¹³

[Adopted on 1 May 2020]

¹³ Human Rights Council resolution 42/22, paras. 3 and 7.