
Advance Edited Version

Distr.: General
2 March 2021

Original: English

Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-ninth session, 23–27 November 2020

Opinion No. 82/2020 concerning Xu Zhiyong (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 1 July 2020, the Working Group transmitted to the Government of China a communication concerning Xu Zhiyong. The Government has not replied to the communication. 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. Mr. Xu Zhiyong, born in 1973, is a citizen of China residing in Beijing.
5. The source submits that Mr. Xu is a prominent legal activist who founded the Open Constitution Initiative, a pro-democracy movement that was later renamed the New Citizens' Movement. The movement brings together a group of human rights defenders advocating for democratic and rule of law reforms, constitutionalism, human rights and social justice.
6. According to the information received, Mr. Xu and other members of the New Citizens' Movement were detained in the context of a crackdown that began early in 2013. In 2014, Mr. Xu received a four-year prison sentence. He was released from prison in July 2017.
7. The source reports that, since the start of his activism in 2003, Mr. Xu has promoted non-violence, defended individuals sentenced to death, drafted legal reforms and provided legal consultation and other forms of assistance to homeless petitioners. Moreover, Mr. Xu has been beaten, threatened and detained by the authorities for his activities. Mr. Xu has previously been the subject of communications from special procedures.¹
8. According to the source, Mr. Xu went into hiding the night of 26 December 2019 (or early in the morning of 27 December 2019), after several individuals who had attended a private meeting at which Mr. Xu too was present began to be approached by the police across China.
9. The source submits that Mr. Xu was arrested on 15 February 2020 at the home of a fellow activist in Guangzhou, Guangdong Province, where Mr. Xu was staying. Mr. Xu, his friend and the friend's family were taken away. His friend and the friend's family were taken to Shilou police station, in Guangzhou, and Mr. Xu is believed to have been taken to Guangzhou detention centre No. 1. His friend and family were released the following day.
10. On 16 February 2020, national security officers of the Kaifeng City Public Security Bureau in Henan Province orally informed Mr. Xu's family that he had been detained in Guangzhou and was being transported back to Beijing.
11. The authorities that had carried out Mr. Xu's arrest included the Beijing Municipal Public Security Bureau's national security team, the Guangzhou Public Security Bureau's national security team, the Panyu District Public Security Sub-Bureau's national security officers and the Panyu District Shilou police station officers.
12. The authorities have not shown a warrant or other decision by a public authority. The source adds that the reasons and the legal basis for the arrest remain unknown.
13. Mr. Xu has been continuously detained since 15 February 2020. It is believed that Mr. Xu was held at Guangzhou detention centre No. 1 during the night of 15 February 2020 and that at some point thereafter, on an unknown date, he was placed under residential surveillance at a designated location. He is reportedly being held in custody by the Beijing Municipal Public Security Bureau's national security team.
14. The source submits that the placement of Mr. Xu under residential surveillance at a designated location constitutes de facto enforced disappearance. According to Chinese law, detainees can remain under such surveillance, at a secret location, for as long as six months. Requests for meetings with their lawyers can only be approved by the police and are routinely denied in cases involving human rights defenders.

¹ See CHN 12/2013 of 22 October 2013 (<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=15295>); CHN 10/2013 of 18 September 2013 (<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=14710>); CHN 8/2013 of 9 August 2013 (<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=15447>); and CHN 29/2010 of 7 December 2010.

15. The source reports that the detention is believed to have been ordered by the Beijing Municipal Public Security Bureau's national security team and that the reason for the detention imputed by the authorities was inciting subversion of State power. Article 105 (2) of the Criminal Code of China stipulates a fixed-term imprisonment of not less than five years, criminal detention, public surveillance or deprivation of political rights for those found to have incited others through rumour or slander or any other means to subvert State power or overthrow the socialist system.

16. The source adds that, in June 2020, Mr. Xu was formally arrested, although it is not yet clear what crime he was accused of or where exactly he is being kept.

17. Furthermore, on 31 December 2020, police officers in plain clothes from the Haidian district of Beijing searched Mr. Xu's home without showing a warrant to Mr. Xu's friend present in the house. Only one officer showed his badge, which was, however, blank. The officers seized a safe from Mr. Xu's home containing the deed to the property, cash and other items, as well as personal letters and books.

18. Moreover, after having searched Mr. Xu's house, the police took Mr. Xu's friend to her home, which they searched, and seized a computer, a telephone and USB drives. They did not show a warrant or provide a list of the items taken. After the search, the officers took Mr. Xu's friend to the Public Security Bureau centre in Haidian district on suspicion of "picking quarrels and provoking trouble". Mr. Xu's friend was interrogated about Mr. Xu and forced to sign a criminal summons notice and a transcript of the interrogation but was not allowed to keep them. After releasing her on 1 January 2020, national security officers monitored Mr. Xu's friend's movements for several days. On 16 February 2020, Mr. Xu's friend informed acquaintances by text message that the police were at her door. She has not been heard from since.

19. The source submits that the detention of Mr. Xu constitutes State retaliation for his peaceful exercise of the rights to free expression, peaceful assembly and association. On 7 and 8 December 2019, Mr. Xu had attended a private meeting in Xiamen City at which participants discussed politics and ideas for the future of China and shared experiences. Mr. Xu went into hiding after news emerged on 26 December 2019 of the rounding up of participants in that meeting. He went into hiding because he had a well-founded fear that he might be detained for having attended the meeting. The Yantai City Public Security Bureau in Shandong Province led a crackdown on those who had participated in the meeting and the police detained and summoned for questioning activists and lawyers in Fujian, Shandong, Beijing, Hebei, Sichuan and Zhejiang. Other activists were detained in the same crackdown and placed under residential surveillance in a designated location in Yantai City.

20. The source reports that, while in hiding, Mr. Xu wrote an article that was published on 4 February 2020. In the article, he criticized the country's leadership's handling of the coronavirus disease (COVID-19) outbreak and called for the President to resign. The article received widespread media attention and might be used as evidence against Mr. Xu.

21. The source concludes that the above-mentioned circumstances relating to Mr. Xu's detention constitute violations of his rights to peacefully exercise his rights to freedom of expression, assembly and association, including those guaranteed under articles 18, 19 and 20 of the Universal Declaration of Human Rights. Mr. Xu's deprivation of liberty therefore falls under category II.

22. In addition, the source argues that Mr. Xu has been deprived of his right to due process. The family has not received any written notification of his detention, as required under Chinese law. After Mr. Xu went into hiding on 26 December 2020, national security officers of the Kaifeng City Public Security Bureau in Henan Province placed Mr. Xu's family under surveillance.

23. On 16 February 2020, the day after Mr. Xu was detained in Guangzhou, a national security officer called the family and said they would no longer be under surveillance as Mr. Xu had been caught. The family were not informed of Mr. Xu's criminal status, of the crime he was accused of committing or of where he was being held, in violation of article 83 of the Criminal Procedure Law, which requires families to be notified within 24 hours. The source notes that, while the Criminal Procedure Law allows for exceptions to that provision when

detained individuals are accused of endangering State security, the police did not reveal that Mr. Xu had been accused of inciting subversion of State power, a State security crime, until 7 March 2020, in other words 21 days after he had first been detained.

24. On 24 February 2020, Mr. Xu's family called the police station closest to Mr. Xu's residence in Beijing (Dongxiaokou police station in Changping district). The officer who answered the telephone would not give the family any information about the case and said that they must come in person with Mr. Xu's identification card. The day after the call, national security officers of the Kaifeng City Public Security Bureau arrived at Mr. Xu's family's home and informed them that Mr. Xu had been put under residential surveillance at a designated location and that they should stop looking for him. The officers would not say what crime he had been suspected of committing or where he was being held. The officers also warned the family to not hire a lawyer and said that the Government would appoint a lawyer.

25. Mr. Xu has been held at a secret location for several months and has not been granted any access to the lawyers hired by his family. Under article 37 of the Criminal Procedure Law, the police are allowed to deprive detainees of access to a lawyer beyond 48 hours if they have been accused of crimes of endangering State security.

26. A member of Mr. Xu's family travelled to Beijing and on 5, 6 and 7 March 2020 went to Dongxiaokou police station to get information. The family member was not given any information until the third visit, on 7 March 2020. On that occasion, the authorities told Mr. Xu's family member that Mr. Xu was suspected of inciting subversion of State power, that he was involved in a "major case" being handled by the municipal public security bureau and that it was therefore unlikely that Mr. Xu would be granted a meeting with his lawyer during the investigation period.

27. The source notes that the Beijing police have accused Mr. Xu of the criminal offence of inciting subversion of State power, which is a crime in the category of endangering State security. The source recalls that the Working Group has in the past described the crime of inciting subversion as a vague and imprecise offence and called upon the Government of China to repeal article 105 (2) of the Criminal Code or bring it into line with its obligations under international human rights law.²

28. The source further asserts that the authorities have held Mr. Xu in incommunicado detention for a prolonged period, which has put him at a significant risk of torture and cruel, inhuman or degrading treatment or punishment.

29. The source concludes that the above circumstances indicate that Mr. Xu's ongoing detention constitutes a violation of the rights guaranteed under article 9 of the Universal Declaration of Human Rights. His deprivation of liberty therefore falls within category III of the Working Group.

Response from the Government

30. On 1 July 2020, the Working Group transmitted the allegations made by the source to the Government through its regular communications procedure. The Working Group requested the Government to provide, by 31 August 2020, detailed information about the current situation of Mr. Xu and 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. Moreover, the Working Group called upon the Government to ensure Mr. Xu's physical and mental integrity.

31. The Working Group regrets that it did not receive a response from the Government to that communication. The Government did not request an extension of the time limit for its reply, as provided for in paragraph 16 of the Working Group's methods of work.

² Opinion No. 15/2019, paras. 32–35 and 58.

Discussion

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

33. 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 (see A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the *prima facie* credible allegations made by the source.

34. The Working Group wishes to reaffirm that States are under the obligation to respect, protect and fulfil all human rights and fundamental freedoms, including the liberty of person, 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.³ 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.⁴

35. The Working Group also wishes to reiterate that it applies a heightened standard of review in cases where the rights to freedom of movement and residence, freedom of asylum, freedom of thought, conscience and religion, freedom of opinion and expression, freedom of peaceful assembly and association, participation in political and public affairs, equality and non-discrimination, and protection of persons belonging to ethnic, religious or linguistic minorities, are restricted or where human rights defenders are involved.⁵ Mr. Xu's role as a prominent pro-democracy and human rights activist within the Open Constitution Initiative, later renamed the New Citizens' Movement, requires the Working Group to undertake this kind of intense and strict scrutiny.

i. Category I

36. 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.

37. The source submits, and the Government does not contest, that Mr. Xu was not presented with an arrest warrant or informed of the reasons for his arrest at the time of his arrest on 15 February 2020.

38. As the Working Group has stated, in order for deprivation of liberty to have a legal basis, it is not sufficient for there to be a law authorizing the arrest. The authorities must

³ See General Assembly resolution 72/180, fifth preambular paragraph, and Human Rights Council resolutions 41/2, second preambular paragraph; 41/6, para. 5 (b); 41/10, para. 6; 41/17, first preambular paragraph; 43/26, thirteenth preambular paragraph; 44/16, twenty-fifth preambular paragraph; 45/19, ninth preambular paragraph; 45/20, second preambular paragraph; 45/21, third preambular paragraph; and 45/29, third preambular paragraph. See also 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. 3/2018, para. 39; No. 18/2019, para. 24; No. 36/2019, para. 33; No. 42/2019, para. 43; No. 51/2019, para. 53; No. 56/2019, para. 74; No. 76/2019, para. 36; No. 6/2020, para. 36; No. 13/2020, para. 39; No. 14/2020, para. 45; and No. 32/2020, para. 29.

⁴ Opinions No. 1/1998, para. 13; No. 82/2018, para. 25; No. 36/2019, para. 33; No. 42/2019, para. 43; No. 51/2019, para. 53; No. 56/2019, para. 74; No. 76/2019, para. 36; No. 6/2020, para. 36; No. 13/2020, para. 39; No. 14/2020, para. 45; and No. 32/2020, para. 29.

⁵ Opinions No. 21/2011, para. 29; No. 47/2018, para. 54; No. 51/2018, para. 77; No. 55/2018, para. 62; No. 61/2018, para. 45; and No. 82/2018, para. 26.

invoke that legal basis and apply it to the circumstances of the case through an arrest warrant, which was not done in the present case.⁶

39. International law 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 of person and the prohibition of arbitrary detention under articles 3 and 9 of the Universal Declaration of Human Rights, as well as principles 2, 4 and 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.⁷ The Working Group has been presented with no valid grounds to justify any exception to this principle in the present case. The search and seizure of Mr. Xu's house and his personal belongings without a warrant on 31 December 2019 also violated articles 9 and 12 of the Universal Declaration of Human Rights. As a result, the Working Group finds that the seized material was improperly obtained, which adds weight to the conclusion of the Working Group that appropriate legal procedures were not followed in the present case.⁸

40. The Working Group also finds that, in order to invoke a legal basis for deprivation of liberty, the authorities should have informed Mr. Xu of the reasons for his arrest at the time of arrest and of the charges against him promptly.⁹ Their failure to do so violates articles 3 and 9 of the Universal Declaration of Human Rights, as well as principle 10 of the Body of Principles, and renders his arrest devoid of any legal basis.

41. The source maintains, and the Government again does not dispute, that Mr. Xu was subjected to enforced disappearance and incommunicado detention for two months after his arrest on 15 February 2020. 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.¹⁰ The Working Group refers the present case to the Working Group on Enforced or Involuntary Disappearances.

⁶ 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; No. 46/2019, para. 51; No. 65/2019, para. 59; No. 71/2019, para. 70; No. 72/2019, para. 40; No. 82/2019, para. 74; No. 6/2020, para. 39; No. 11/2020, para. 37; No. 13/2020, para. 46; No. 14/2020, para. 49; No. 31/2020, para. 40; No. 32/2020, para. 32; No. 33/2020, paras. 53 and 71; and No. 34/2020, para. 44.

⁷ 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; No. 82/2018, para. 29; No. 6/2020, para. 40; No. 11/2020, para. 38; No. 13/2020, para. 47; No. 14/2020, para. 50; No. 31/2020, para. 41; No. 32/2020, para. 33; No. 33/2020, para. 54; and No. 34/2020, para. 46.

⁸ Opinions No. 33/2019, No. 31/2019, No. 83/2018, No. 78/2018 and No. 36/2018.

⁹ See, for example, opinion No. 10/2015, para. 34. See also opinions No. 32/2019, para. 29; No. 33/2019, para. 48; No. 44/2019, para. 52; No. 45/2019, para. 51; No. 46/2019, para. 51; No. 51/2019, para. 57; No. 56/2019, para. 78; No. 65/2019, para. 60; No. 71/2019, para. 71; No. 82/2019, para. 74; No. 6/2020, para. 41; No. 13/2020, para. 48; No. 14/2020, para. 51; No. 31/2020, para. 42; No. 33/2020, para. 55; and No. 34/2020, para. 47.

¹⁰ See article 1 of the Declaration on the Protection of All Persons from Enforced Disappearance, by which any act of enforced disappearance is condemned as a denial of the purposes of the Charter of the United Nations and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field. See also 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; No. 56/2019,

42. The Working Group reminds the Government that it has also classified secret detention, which entails elements of incommunicado detention and enforced disappearance, as being in themselves arbitrary, falling within category I.¹¹ No jurisdiction should allow for individuals to be deprived of their liberty in secret for potentially indefinite periods, held outside the reach of the law, without the possibility of resorting to legal procedures, including habeas corpus.¹²

43. Mr. Xu was held incommunicado under residential surveillance at a designated location under article 73 of the 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 to endanger State security [and for 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 people's procuratorate or 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 33 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.

44. The Working Group reiterates that "residential surveillance at a designated place of residence" is a misnomer in the sense that, as in the example of Mr. Xu, the criminal suspect or defendant subject to such surveillance is confined not to his or her usual place of residence (i.e., he or she is not placed under house arrest) but in a designated place of residence, which may well be a prison in all but name.¹³ The Beijing Municipal Public Security Bureau's national security team in effect has the power to make a person disappear without judicial oversight. In the Working Group's view, such power in the hands of law enforcement officials is devoid of legal basis.¹⁴

45. The Working Group and other special procedures have expressed concern that the residential surveillance at a designated location regime, as amended in article 73 of the 2012 Criminal Procedure Law, is being employed in a manner that violates human rights, and highlight the following:¹⁵

para. 79; No. 6/2020, para. 43; No. 11/2020, para. 41; No. 13/2020, para. 52; No. 31/2020, para. 43; No. 32/2020, para. 35; No. 33/2020, paras. 58 and 73; and No. 34/2020, para. 49.

¹¹ Opinion No. 14/2009, para. 19. See also A/HRC/13/42, para. 20. Article 10 (1) of the Declaration on the Protection of All Persons from Enforced Disappearance provides that any person deprived of liberty shall be held in an officially recognized place of detention and, in conformity with national law, be brought before a judicial authority promptly after detention. See also opinions No. 5/2001, para. 10 (iii); No. 14/2009, para. 21; No. 11/2018, para. 51; No. 12/2018, para. 62; No. 29/2018, para. 50; and No. 38/2018, para. 66.

¹² A/HRC/16/47, para. 54.

¹³ Opinion No. 36/2019, para. 38.

¹⁴ Ibid. See also CAT/C/CHN/CO/5, paras. 14–15; OL CHN 15/2018 of 24 August 2018 (available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=23997>); OHCHR, "China: UN experts renew calls for probe into death of Cao Shunli", 14 March 2019; and OHCHR, "China: UN experts gravely concerned by enforced disappearance of three human rights defenders", 23 March 2020.

¹⁵ See OL CHN 15/2018. The Government's response is available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=34431>. See also opinions No. 62/2018, No. 59/2017 and No. 12/2016, and CAT/C/CHN/CO/5, paras. 14–15.

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

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

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

(d) The provisions relating to residential surveillance at a designated location appear to be used to restrict the exercise of the right to freedom of expression and the rights to freedom of peaceful assembly and of association by human rights defenders and their lawyers.¹⁶

46. The Working Group observes that Mr. Xu was not brought promptly before a judge, within 48 hours of his arrest barring absolutely exceptional circumstances, in accordance with the international standard set out in the Working Group's jurisprudence,¹⁷ and that his pretrial detention, which should be the exception rather than the rule, lacked a legal basis as it was not based on an individualized determination that it was reasonable and necessary taking into account all the circumstances, for such purposes specified in law as to prevent flight, interference with evidence or the recurrence of crime, accompanied by consideration of alternatives, such as bail, electronic bracelets or other conditions, rendering detention unnecessary in the particular case.¹⁸ Therefore, the Government has violated articles 3 and 9 of the Universal Declaration of Human Rights, as well as principles 11, 37 and 38 of the Body of Principles.

47. The Working Group also observes that Mr. Xu was not afforded the right to take proceedings before a court so that it may decide without delay on the lawfulness of his detention in accordance with articles 3, 8 and 9 of the Universal Declaration of Human Rights, as well as principles 11, 32 and 37 of the Body of Principles. In accordance with 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 the lawfulness of detention before a court is a self-standing human right, the absence of which constitutes a human rights violation, and is essential to preserve legality in a democratic society. This right applies to all forms and situations of deprivation of liberty, irrespective of the place of detention or the legal terminology used in the legislation. Furthermore, effective judicial oversight and control of deprivation of liberty is essential in ensuring that detention has a legal basis.¹⁹

48. 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 the present case.

¹⁶ Opinion No. 15/2019, para. 42.

¹⁷ Opinions No. 57/2016, paras. 110–111; No. 2/2018, para. 49; No. 83/2018, para. 47; No. 11/2019, para. 63; No. 20/2019, para. 66; No. 26/2019, para. 89; No. 30/2019, para. 30; No. 36/2019, para. 36; No. 42/2019, para. 49; No. 51/2019, para. 59; No. 56/2019, para. 80; No. 76/2019, para. 38; No. 82/2019, para. 76; No. 6/2020, para. 45; No. 14/2020, para. 53; No. 31/2020, para. 45; No. 32/2020, para. 38; No. 33/2020, para. 75; and No. 34/2020, para. 51.

¹⁸ A/HRC/19/57, paras. 48–58.

¹⁹ Opinions No. 35/2018, para. 27; No. 39/2018, para. 35; No. 83/2018, para. 47; No. 32/2019, para. 30; No. 33/2019, para. 50; No. 44/2019, para. 54; No. 45/2019, para. 53; No. 59/2019, para. 51; No. 65/2019, para. 64; No. 71/2019, para. 72; No. 76/2019, para. 38; No. 82/2019, para. 76; No. 6/2020, para. 46; No. 14/2020, para. 54; No. 31/2020, para. 46; No. 32/2020, para. 39; No. 33/2020, para. 56; and No. 34/2020, para. 52.

49. Article 105 of the Criminal Code reads as follows:

Whoever organizes, plots, or acts to subvert the political power of the state and overthrow the socialist system, the ringleaders or those whose crimes are grave are to be sentenced to life imprisonment, or not less than 10 years of fixed-term imprisonment; active participants are to be sentenced from not less than three years to not more than 10 years of fixed-term imprisonment; other participants are to be sentenced to not more than three years of fixed-term imprisonment, criminal detention, control, or deprivation of political rights.

Whoever instigates the subversion of the political power of the state and overthrow [of the] socialist system through spreading rumours, slandering, or other ways are to be sentenced to not more than five years of fixed-term imprisonment, criminal detention, control, or deprivation of political rights; the ringleaders and those whose crimes are grave are to be sentenced to not less than five years of fixed-term imprisonment.²⁰

50. 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 of Human Rights. 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.²¹

51. 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.

52. 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 spreading rumours or slander or for resorting to any other means to subvert State power or overthrow the socialist system may be used to stifle the peaceful advocacy of human rights, are neither necessary to protect public or private interests against injury nor proportionate to the guilt. Punishment should fit the crime, not the criminal.

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

ii. *Category II*

54. The source alleges, and the Government does not refute, that Mr. Xu was arrested for taking part in a meeting of human rights and pro-democracy activists held to discuss political ideas and shared civil society experiences in Xiamen City on 7 and 8 December 2019. The present case thus involves alleged violations of the rights to freedom of opinion and expression, freedom of assembly and association and freedom to take part in the conduct of public affairs.

55. The Working Group observes that citizens take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves and that this participation is supported by ensuring freedom of expression, assembly and association.²² Moreover, given that peaceful assemblies often have expressive functions, and that political speech enjoys particular protection as a form of expression, it follows that assemblies with a political message should enjoy a heightened level of accommodation and protection.

56. 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

²⁰ See www.fmprc.gov.cn/ce/cgvienna/eng/dbtyw/jdwt/crimelaw/t209043.htm.

²¹ Opinions No. 62/2018, para. 57; and No. 36/2019, para. 42.

²² Opinion No. 45/2019, para 61.

the just requirements of morality, public order and the general welfare in a democratic society.

57. In the Working Group's view, the principle of necessity and proportionality that inheres in freedom of opinion and expression does so equally in all fundamental human rights. The Working Group, in its deliberation No. 9, confirmed that the notion of "arbitrary" *stricto sensu* includes both the requirement that a particular form of deprivation of liberty is taken in accordance with the applicable law and procedure and that it is proportional to the aim sought, reasonable and necessary.²³ In its jurisprudence, with regard to the application of the principle of proportionality, the Working Group has applied the four-pronged test of: (a) whether the objective of the measure is sufficiently important to justify the limitation of a protected right; (b) whether the measure is rationally connected to the objective; (c) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and (d) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.²⁴

58. In view of the standard described above, the Working Group finds that the situation in the present case falls short of such requirement. There is no evidence of any violence or incitement to violence, nor has the Government claimed that any violence occurred. Therefore, the standard for permitting a restriction of the right has not been met and no legitimate aim or objective in a free and democratic society exists to justify Mr. Xu's deprivation of liberty.

59. Moreover, the Working Group considers that the language used in article 105 of the Criminal Code is vague and overly broad, as discussed above, which can have a deterrent effect on the exercise of the rights to freedom of opinion and expression, freedom of peaceful assembly and association, participation in political and public affairs, equality and non-discrimination, as they have the potential for abuse, including the arbitrary deprivation of liberty.²⁵ The Working Group is concerned that these provisions appear to lack a clear definition and may, as in the present case, be used to punish the peaceful exercise of human rights and prevent Mr. Xu from regulating his behaviour accordingly.

60. According to articles 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, 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 and to draw public attention to those matters.²⁶ The source has demonstrated that Mr. Xu was detained for the exercise of the rights enshrined in the Declaration. The Working Group has determined that detaining individuals on the basis of their activities as human rights defenders violates their rights to equality before the law and equal protection of the law under article 7 of the Universal Declaration of Human Rights.²⁷

61. The Working Group therefore finds that Mr. Xu's deprivation of liberty is arbitrary, falling within category II, as it resulted from the legitimate exercise of the rights and freedoms set out in articles 19, 20 (1) and 21 (1) of the Universal Declaration of Human Rights.

iii. *Category III*

62. Having found that Mr. Xu's deprivation of liberty is arbitrary under category II, the Working Group emphasizes that in such circumstances no trial should take place. However, as Mr. Xu is being held in pretrial detention and is facing criminal prosecution, the Working Group will now consider the alleged violations of the right to a fair trial and due process.

²³ A/HRC/22/44, para. 61.

²⁴ Opinions No. 54/2015, para. 89; No. 41/2017, para. 86; No. 56/2017, para. 51; No. 58/2017, para. 48; No. 76/2017, para. 68; No. 82/2018, para.38; No. 87/2018, para.64; and No. 32/2020, para. 49.

²⁵ Opinion No. 10/2018, para. 55.

²⁶ General Assembly resolution 74/146, annex.

²⁷ See also, for example, opinions No. 75/2017, para. 45; No. 15/2020, para. 68; and No. 16/2020, para. 71.

63. The Working Group notes that Mr. Xu has had no access to legal counsel of his choice since his arrest on 15 February 2020, even as he was deprived of his liberty by being placed under residential surveillance at a designated location.

64. In the Working Group's view, the Government has failed to respect Mr. Xu'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, principles 15, 17 and 18 of the Body of Principles and principles 1, 5, 7, 8, 21 and 22 of the Basic Principles on the Role of Lawyers.

65. The Working Group considers that this violation has substantially undermined and compromised Mr. Xu's capacity to defend himself in any of the judicial proceedings in which he has been involved. 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 must be promptly informed of this right upon apprehension; nor should access to legal counsel be unlawfully or unreasonably restricted.

66. The Working Group expresses its concern at article 37 of the Criminal Procedure Law, which provides, *inter alia*, that "during the investigation period for crimes endangering State security, involving terrorist activities or involving significant amount of bribes, defence lawyers shall obtain the approval of investigating organs before they meet with the criminal suspects". Such a blanket denial of access to legal counsel without due process of law constitutes non-observance of international law on the right to a fair trial.

67. The Working Group further notes the denial of Mr. Xu's due process right to be visited by and to correspond with his family and to be given adequate opportunity with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations, in accordance with principles 15 and 19 of the Body of Principles and rules 43 (3) and 58 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). Giving prompt and regular access to family members, as well as independent medical personnel and lawyers, is an essential and necessary safeguard for the prevention of torture, protection against arbitrary detention and infringement of personal security.²⁸

68. In the Working Group's view, the pretrial detention of Mr. Xu for nine months under residential surveillance at a designated location, without an individualized judicial determination, has undermined 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.

69. The Working Group is concerned that, given his experience in detention, including incommunicado detention, Mr. Xu's prolonged detention for nine months with no immediate prospect of a trial may amount to a violation of the right to be tried without undue delay under articles 10 and 11 (1) of the Universal Declaration of Human Rights. The delay in the present case is exacerbated by the fact that Mr. Xu was not provided with a bail hearing and, as noted above, it is clear to the Working Group that he is, but should not have been, detained solely for the exercise of his rights under international human rights law.²⁹

70. The Working Group further expresses its grave concern at Mr. Xu's prolonged incommunicado detention under residential surveillance at a designated location. The General Assembly has consistently held, first in its resolution 60/148 of 16 December 2005 (para. 11) and most recently in its resolution 74/143 of 18 December 2019 (para. 17), that prolonged incommunicado detention or detention in secret places can facilitate the perpetration of torture and other cruel, inhuman or degrading treatment or punishment and

²⁸ Opinions No. 10/2018, para. 74; No. 30/2018, para. 47; No. 35/2018, para. 39; No. 39/2018, para. 41; No. 47/2018, para. 71; No. 22/2019, para. 71; No. 36/2019, para. 56; No. 44/2019, paras. 74–75; No. 45/2019, para. 76; No. 56/2019, para. 83; No. 6/2020, para. 54; No. 11/2020, para. 54; No. 31/2020, para. 51; No. 32/2020, para. 59; No. 33/2020, para. 87; and No. 34/2020, para. 57.

²⁹ Opinions No. 15/2020, para. 71; No. 16/2020, para. 77; and No. 46/2019, para. 63.

can in itself constitute a form of such treatment. The Working Group therefore refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for further consideration.

71. 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. Xu's deprivation of liberty an arbitrary character, falling within category III.

iv. Category V

72. The Working Group will now examine whether Ms. Xu's deprivation of liberty constitutes discrimination under international law for the purpose of category V.

73. The Working Group notes that Mr. Xu is a well-known human rights defender who has in the past faced arrest, detention and trial for his pro-democracy activities, and that he has been detained with other participants of the private meeting on the political future of China in Xiamen City on 7 and 8 December 2019.

74. The Working Group cannot help but notice that Mr. Xu's political views and convictions are clearly at the centre of the present case and that the authorities have displayed an attitude towards him that can only be characterized as discriminatory. Indeed, his human rights advocacy appears to be the sole reason for his arrest and detention.

75. For these reasons, the Working Group considers that Mr. Xu's deprivation of liberty constitutes a violation of articles 2 and 7 of the Universal Declaration of Human Rights and of principle 5 of the Body of Principles on the grounds of discrimination based on political views and status as a human rights defender. His deprivation of liberty therefore falls under category V.

76. In its 29-year history, the Working Group has found China in violation of its international human rights obligations in about 100 cases.³⁰ The Working Group is concerned that this indicates a widespread or systemic problem with arbitrary detention in China, which amounts to a serious violation of international law. The duty to comply with international human rights law rests with all State organs, officers and agents, as well as with all other natural and legal persons.³¹ 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.³²

³⁰ 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, No. 76/2019 and No. 11/2020.

³¹ The domestic political and judicial organs are under a positive obligation to ensure an effective remedy and reparation for violations of international human rights law by removing the statute of limitations, sovereign immunity, *forum non conveniens* doctrine or other procedural obstacles to redress in such cases through legislative or judicial action. See opinions No. 52/2014, para. 51; No. 61/2018, para. 77; No. 22/2019, para. 81; No. 42/2019, para. 68; No. 51/2019, para. 80; and No. 56/2019, para. 97. See also CAT/C/CAN/CO/6, para. 15, and CAT/C/CAN/CO/7, paras. 40–41.

³² A/HRC/13/42, para. 30. See also 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.

77. Finally, the Working Group would welcome the opportunity to conduct a country visit to China in order to assist the Government in addressing the issue of arbitrary deprivation of liberty. Given that a significant period of time has passed since its visits to China in October 1997 and September 2004, the Working Group considers that it is an appropriate time to visit. The Working Group recalls that it made a request to visit on 15 April 2015 and looks forward to a positive response.

Disposition

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

The deprivation of liberty of Xu Zhiyong, being in contravention of articles 2, 3, 7, 9, 10, 11 (1) and (2), 12, 19, 20 (1) and 21 (1) of the Universal Declaration of Human Rights, is arbitrary and falls within categories I, II, III and V.

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

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

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

82. The Working Group requests the Government to bring its legal provisions, in particular article 105 of the Criminal Code, which sets out the crime of subversion of State power or overthrow of the socialist system, and articles 37 and 73 of the Criminal Procedure Law, which make it possible to deny access to legal counsel for State security crimes and to place detainees under residential surveillance at a designated location, into conformity with the recommendations made in the present opinion and with the commitments made by China under international human rights law.

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

84. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Working Group on Enforced or Involuntary Disappearances, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on the situation of human rights defenders, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the rights to freedom of peaceful assembly and of association for appropriate action.

85. The Working Group requests the Government to translate, publish and disseminate the present opinion through all available means and as widely as possible.

Follow-up procedure

86. 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. Xu has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Xu;

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.

(c) Whether an investigation has been conducted into the violation of Mr. Xu'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.

87. 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.

88. 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.

89. 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.³³

[Adopted on 26 November 2020]

³³ Human Rights Council resolution 42/22, paras. 3 and 7.