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## Joint Submission to the 31<sup>st</sup> Session of the

### Universal Periodic Review

of

China

from

LAWYERS FOR LAWYERS and LAWYERS' RIGHTS WATCH CANADA

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#### A. Introduction

1. Lawyers for Lawyers (L4L) and Lawyers' Rights Watch Canada (LRWC) submit this report on the state of human rights in China, especially in respect to treatment of lawyers, with recommendations to the Office of the High Commissioner for Human Rights for consideration at the 31<sup>st</sup> session of the Universal Periodic Review (UPR) Working Group in the UN Human Rights Council in October/November 2018.
2. L4L is an independent and non-political, Netherlands foundation, which was established in 1986 and is funded by lawyers' donations. L4L promotes the proper functioning of the rule of law through a free and independent exercise of the legal profession around the world and has special consultative status with ECOSOC since 2013.
3. LRWC is a committee of lawyers and other human rights defenders who promote international human rights and the rule of law through advocacy, education, legal research and cooperation with other human rights organizations. LRWC is a volunteer-run NGO in Special Consultative Status with the Economic and Social Council of the United Nations.

#### B. Executive Summary

4. These submissions highlight key concerns of L4L and LRWC regarding China's non-compliance with its international human rights obligations and commitments to ensure the rights to:
  - a. independent counsel as set out in the UN Basic Principles on the Role of Lawyers<sup>1</sup> ('Basic Principles'), the International Covenant on Civil and Political Rights (ICCPR) and other international human rights instruments,

<sup>1</sup> Basic Principles on the Role of Lawyers, adopted by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

focusing on two main themes: the lack of (i) effective guarantees for the functioning of lawyers and (ii) freedom of expression and association of lawyers. Non-compliance with the Basic Principles undermines the proper functioning of the judicial system and the right to fair trial in particular; and,

- b. fair trial including the right to a competent, independent, impartial and tribunal to determine criminal charges and rights and obligations in a lawsuit, as guaranteed by the ICCPR and the Universal Declaration of Human Rights (UDHR); and,
- c. liberty and freedom from arbitrary detention and remedies for violations as guaranteed by the ICCPR and the UDHR; and,
- d. Freedom from torture and remedies for violations.

### **C. Duty to protect advocacy rights of lawyers**

- 5. The adequate protection of internationally protected rights requires that every individual has effective access to independent judicial oversight and the legal representation to properly defend criminal charges and advocate for rights. Legal assistance can only be provided effectively in a judicial system where the state provides protections that enable lawyers, along with judges and prosecutors, to carry out their professional duties independently and free from reprisal and harassment. This follows inter alia from the Charter of the United Nations (ratified by China on 24 October 1945), the UDHR (adopted by China on 10 December 1948) and the ICCPR (signed by China on 5 October 1998).
- 6. On 22 June 2017, the Human Rights Council (HRC) passed a resolution condemning in general “the increasingly frequent attacks on the independence of [lawyers], in particular threats, intimidation and interference in the discharge of their professional functions”. The HRC expressed its deep concern “about the significant number of attacks against lawyers and instances of arbitrary or unlawful interference with or restrictions to the free practice of their profession” and called upon States “to ensure that any attacks or interference of any sort against lawyers are promptly, thoroughly and impartially investigated and that perpetrators are held accountable”.<sup>2</sup>
- 7. Furthermore, the HRC expressed concerns about “situations where the entry into or continued practice within the legal profession is controlled or arbitrarily interfered with by the executive branch, with particular regard to abuse of systems for the licensing of lawyers”<sup>3</sup>.
- 8. In its task of promoting and ensuring the proper role of lawyers, the Government of the People’s Republic of China (Government of China) should respect and take into account the Basic Principles within the framework of its national legislation and practice. The Basic Principles provide a concise description of international standards relating to key aspects of the right to independent counsel. Adherence to the Basic Principles is considered a fundamental pre-condition to fulfilling the

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<sup>2</sup> UN Human Rights Council, Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers A/HRC/RES/35/12, 22 June 2017, [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/35/L.20](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/35/L.20)

<sup>3</sup> UN Human Rights Council, Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers A/HRC/RES/35/12, 22 June 2017, [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/35/L.20](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/35/L.20)

requirement that all persons have effective access to independent legal representation.<sup>4</sup>

9. During the interactive dialogue in the UPR cycle of 2013, several recommendations with respect to the proper functioning of the judicial system and the role of lawyers<sup>5</sup> were accepted<sup>6</sup> by China, including recommendations 186.129<sup>7</sup>, 186.130<sup>8</sup>, 186.131<sup>9</sup> and 186.132<sup>10</sup>.
10. Reports since then indicate that China does not always uphold the necessary guarantees for the proper functioning of the legal profession as set out in the Basic Principles. As a consequence, lawyers encounter difficulties in carrying out their profession independently and are subjected to reprisals, prosecutions and punishments. This undermines the proper functioning of the judicial system, including the right to fair trial.

#### **D.Promotion and protection of human rights**

##### (i) No effective guarantees for lawyers to perform their professional duties or exercise internationally protected rights<sup>11</sup>

11. According to Article 16 of the Basic Principles, China must ensure that lawyers “(a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.” Article 17 stipulates that “[w]here the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.”
12. China has failed to meet these obligations during the review period. Lawyers in China working on sensitive cases have been subjected to harassment, improper interference, illegitimate prosecutions, unfair trials, denial of legal representation, torture, and incommunicado detention, arbitrary deprivation of liberty and denial

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<sup>4</sup> During its 35th session (from 15 June – 3 July 2015), the Human Rights Council adopted a resolution on the independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers. While recalling the Basic Principles on the Role of Lawyers and condemning the increasingly frequent attacks on the independence of lawyers, in particular threats, intimidation and interference in the discharge of their professional functions, the Human Rights Council called on States “to ensure that any attacks or interference of any sort against lawyers are promptly, thoroughly and impartially investigated and that perpetrators are held accountable”. See UN Human Rights Council, Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, A/HRC/RES/35/12, [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/35/L.20](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/35/L.20)

<sup>5</sup> Report of the Working Group on the Universal Periodic Review China, 4 December 2013, A/HRC/25/5, recommendations 186.129 - 186.132.

<sup>6</sup> Report of the Working Group on the Universal Periodic Review China, Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, 27 February 2014, A/HRC/25/5/Add.1

<sup>7</sup> 186.129. Further improve the regulatory framework for lawyers conducive to the unhindered exercise of their profession, and continue to harmonize laws and regulations with international standards (Hungary);

<sup>8</sup> 186.130. Further strengthen the conditions in which lawyers exercise their functions (Cape Verde);

<sup>9</sup> 186.131. Guarantee access to prompt and effective investigation by an independent and impartial body for defence lawyers alleging that their access to their clients has been unlawfully obstructed (Finland); Take steps to ensure lawyers and individuals working to advance human rights can practice their profession freely, including by promptly investigating allegations of violence and intimidation impeding their work (Canada);

<sup>10</sup> 186.132. Inform the suspects of their rights and obligations in a timely manner in accordance with the law, as well as to actively create conditions for lawyers to get involved in a lawsuit from the stage of criminal investigation (Timor-Leste);

<sup>11</sup> Basic Principles on the Role of Lawyers, principles 16, 17, 18, 19, 20, 21, 22.

of access to an independent, impartial and competent judiciary to determine rights and criminal charges.

(ii) Violations of rights to liberty

13. In July 2015, China launched a nation-wide campaign using criminal laws and executive controlled courts to silence lawyers and other human rights defenders (HRDs) through arrests, detentions, convictions, and imprisonment. At least 320 lawyers and HRDs were harassed, arbitrary arrested, forcibly disappeared, tortured, and subjected to politically motivated prosecutions. The campaign, known as the “709 Crackdown” (the **Crackdown**) targeted lawyers representing vulnerable groups or politically sensitive clients and causes and/or calling for improved rights. As of January 31, 2018, of those arrested in the Crackdown, the lawyers who remain in prison include: Wang Quanzhang, Jiang Tianyong, Zhou Shifeng, Xie Yang and Li Heping. HRDs remaining in prison are: Wang Fang, Yin Xu’an, Wu Gan and Hu Shigeng.<sup>12</sup>
14. During the Crackdown, at least 27 of the arrested lawyers and HRDs were subjected to Residential Surveillance at a Designated Location (RSDL)<sup>13</sup> and imprisoned incommunicado in secret locations and denied access to visitors, legal representation of choice and judicial oversight. When sentenced, no credit for RSDP detention was allowed for sentencing.
15. On 3 February 2016, the UN Committee against Torture (CAT), referring to RSDL stated, “these provisions, together with the possibility of refusing access to a lawyer for these types of crimes, may amount to incommunicado detention in secret places, putting detainees at a high risk of torture or ill-treatment”.
16. CAT recommended “as a matter of urgency” that China repeal laws allowing RSDL and “[a]bolish all forms of administrative detention, which confine individuals without due process and make them vulnerable to abuse”.<sup>14</sup>
17. The CAT recommended (para. 43) that no one be “detained in any secret detention facility, as these are per se a breach of the Convention.”
18. Many lawyers and other HRDs detained during the Crackdown were subsequently charged with subversion of state power, inciting subversion of state power, and picking quarrels and stirring up troubles.
19. Such charges of “subverting state power” cannot form a legal basis for conviction or deprivation of liberty as they:
  - a) fail to comply with the international criminal law requirement of certainty;
  - b) violate the requirement for notice (ICCPR Art. 14.3);
  - c) prevent persons from knowing in advance and avoiding what is prohibited; and,

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<sup>12</sup> For details regarding the arrest and detention of these lawyers, see: *The arrest, detention, conviction, and imprisonment of lawyers and human rights defenders in China*. Jing Song, LRWC, February 2018.

<sup>13</sup> RSDL, a form of detention applicable to crimes of “endangering national security, terrorist activities or especially serious bribery cases,” was introduced by a 2012 amendment of the Chinese Criminal Procedure Law. The amendment arrest without a warrant and detention in an undisclosed place outside regulated detention facilities and away from judicial oversight for up to six months. The de-facto RSDL may be extended.

<sup>14</sup> CAT: Concluding Observations on the fifth periodic review of China CAT/C/CHN/CO/5, 3 February 2016, paras. 14, 15, and 43 (b).

- d) preclude a court from objectively determining whether the impugned acts could result in 'subversion of state power';
  - e) can be subjectively interpreted to criminalize the lawful exercise of freedom of expression.
20. Such charges are broad and vague enough to arbitrarily criminalize the publication or distribution of any communication(s) that could expose China to criticism, including with representatives of the UN Human Rights Council and Special Procedures.
21. This use of illegitimate charges to arbitrarily detain lawyers and other HRDs is illustrated by, but not limited to, the following cases:

#### Wang Yu

Lawyer Wang Yu began to focus on human rights and public interest cases in 2011 and has been involved in cases of disability discrimination, religious freedom, land rights and illegal restrictions of personal freedom by government and law enforcement officials, and activists' cases. Wang Yu was the first lawyer detained during the large-scale crackdown against critical lawyers and human rights activists by the Chinese authorities. She was held firstly on suspicion of inciting subversion. The allegation was changed to "subversion of state power" in January 2016. She was released on bail in August 2016.<sup>15</sup>

#### Zhou Shifeng

Zhou Shifeng was the head of the Fengrui Law Firm and a prominent human rights lawyer. He was a key member of the 'rights defense movement,' which has tried to challenge state power through litigation and publicity. He has taken on a number of sensitive human rights cases since 2001. Zhou Shifeng was arrested during the Crackdown and on 4 August 2016 sentenced to seven years imprisonment by a court in Tianjin province on charges of 'subversion of state power'. He appeared on TV confessing to his "crimes."<sup>16</sup>

#### Wang Quanzhang

Wang Quanzhang is a lawyer at the Beijing Fengrui law firm and has defended practitioners of Falun Gong, a spiritual movement persecuted and outlawed in China. He has also taken up cases involving members of the New Citizens' Movement, a loose network of grassroots activists that were persecuted beginning in 2014. On 10 July 2015, he was taken away by security officers during a roundup of Beijing Fengrui staff. He was placed under RSDL and subsequently formally arrested in January 2016 on the charge of "subverting state power".<sup>17</sup>

#### Li Yuhan

Li Yuhan is a Beijing-based human rights lawyer. She has represented clients in numerous sensitive cases on freedom of belief and access to government information. In 2015, Li Yuhan acted as defence counsel for fellow lawyer Wang Yu, one of the central victims of the Crackdown on lawyers and other HRDs. Li Yuhan was arrested on 9 October 2017 and on 31 October 2017, her family

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<sup>15</sup> <http://www.advocatenvooradvocaten.nl/13027/orange-the-world-wang-yu-china/>

<sup>16</sup> <http://www.advocatenvooradvocaten.nl/11413/china-lawyers-continue-to-face-improper-interference/>

<sup>17</sup> <https://www.amnesty.org/en/latest/campaigns/2016/07/one-year-since-chinas-crackdown-on-human-rights-lawyers/>

learned that she had been placed under criminal detention in Shenyang City, Liaoning Province on charges of “picking quarrels and provoking troubles”.<sup>18</sup>

### Jiang Tianyong

Jiang Tianyong is a human rights lawyer who provided legal assistance to both minority groups in Chinese society and fellow human rights lawyers. In 2009, his license to practice as a lawyer was withdrawn in connection to his human rights activities. Being disbarred has not stopped Jiang Tianyong from continuing his valuable human rights work to improve the situation in China.

On 21 November 2016 Jiang Tianyong disappeared after he provided legal assistance to the wife of human rights lawyer Xie Tang, in her attempts to visit her husband in detention. Only at the end of May 2017, the family of Jiang Tianyong was formally informed about his arrest. On 21 November 2017, he was sentenced to 2 years of imprisonment by the Changsha Intermediate People’s Court after a supposed confession in August. He was found guilty of inciting subversion of state power and defaming China’s political system.<sup>19</sup>

22. Lawyers play a fundamental role in defending human rights by providing independent legal services. Targeting lawyers with arbitrary arrest, detention and torture has a chilling effect on the willingness and capacity of lawyers to provide legal representation to clients and causes unpopular with China.

### (iii) Freedom of expression of lawyers

23. The Basic Principles provide that “lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. [...]”<sup>20</sup>.
24. The freedom of expression that lawyers enjoy in connection to their professional functions under the Basic Principles, the UDHR and the ICCPR extends to protect legal advocacy in protection of the rights of their clients. Lawyers must be enabled to effectively protect the rights and interests of clients. This should include the use of social media platforms to inform the public about human rights law.
25. In November 2016, the Chinese Ministry of Justice implemented two administrative directives affecting law firms<sup>21</sup> and lawyers<sup>22</sup>. The Directives require lawyers<sup>23</sup> and law firms<sup>24</sup> to support the leadership of the Communist Party of China and the socialist rule of law as the basic requirement for legal practice. The Directives<sup>25</sup> also prohibit lawyers from inciting or organizing their clients to participate in demonstrations that disturb public order, even if these are

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<sup>18</sup> <http://www.advocatenvooradvocaten.nl/13011/china-lawyer-li-yuhan-arrested/>

<sup>19</sup> <http://www.advocatenvooradvocaten.nl/13141/china-lawyer-jiang-tianyong-sentenced-to-prison-sentence-of-two-years/>

<sup>20</sup> Basic Principles on the Role of Lawyers, principle 23.

<sup>21</sup> ‘DLF’ = Measures for the Administration of Law firms, Order No. 133 of the Ministry of Justice, issued on 6 September 2016 and effective as of 1 November 2016.

<sup>22</sup> ‘DL’ = Administrative Measures for the Practice of Law by Lawyers, Order No. 134 of the Ministry of Justice, issued on 18 September 2016 and effective as of 1 November 2016.

<sup>23</sup> See article 2 DL

<sup>24</sup> See article 3 DLF

<sup>25</sup> See articles 35-41 DL

demonstrations are peaceful. Using the internet to provoke discontent against the Communist Party and the state is forbidden as well.

26. An accusation of non-compliance with these Directives can lead to withdrawal or non-renewal of the license of a firm or lawyer to practice law. The Ministry of Justice and its lower-level offices issue lawyers' licenses annually. For it is an administrative procedure to revoke or not renew a lawyer's license and the applicant has no access to an independent decision maker to oppose or appeal a decision to revoke or refuse renewal of a license to practice law.
27. By formulating broad and vague prohibitory provisions in the Directives, such as the prohibition of 'endangering state power', 'inciting people's irritation against the Party'<sup>26</sup>, the lawyers are subjected to the arbitrariness of the Chinese authorities.
28. Furthermore, the Measures for the Administration of Law firms rules that law firms have the obligation to oversee its lawyers to ensure they abide by the Constitution and the law, including the Directives<sup>27</sup>. In case of an accusation of violation, the accused lawyer and the entire law firm risk the loss of the licenses needed to practice law.
29. Since the implementation of the Directives, authorities have revoked or suspended the licenses to practice law of several human rights lawyers. They have also canceled the registration of one law firm. This is illustrated by, but not limited to, the following case:

#### Zhu Shengwu

According to our information, on 16 September 2017, the Shandong Judicial Department issued a first notification of administrative penalty to lawyer Zhu Shengwu to revoke his license of practice. Zhu was accused of having posted on Sina microblog "speeches that negate the constitutionally established political system, the fundamental principles and that endanger state security". He was also allegedly having "seriously damaged the professional image of lawyers by refusing to correct himself but continued with his acts of law-violation despite the many interviews the judicial administration organ had had with him."

On 10 September, lawyer Zhu requested the Judicial Department to hold a public hearing on the matter, which subsequently took place on 21 September. The decision to revoke the license was upheld in an official notice dated 22 September 2017.<sup>28</sup>

#### **30. Recommendations - L4L and LRWC recommend that China:**

- a. take all measures necessary to prevent the harassment of lawyers and attempts to impede or interfere with their defence of clients, in accordance with articles 16(a) and 18 of the Basic Principles;
- b. take all necessary measures to prevent lawyers from prosecution, disciplinary action or other sanctions on improper grounds, including for peacefully exercising protected rights to expression, association, assembly or the right to participate in public affairs or with carrying out their professional duties in

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<sup>26</sup> See article 40 DL.

<sup>27</sup> See article 50 DLF.

<sup>28</sup> <http://www.advocatenvooradvocaten.nl/12964/china-zhu-shengwus-licence-revoked/>

accordance with Article 16(c) of the Basic Principles and the ICCPR and UDHR;

- c. take measures to guarantee the effective protection of the right of freedom of expression of lawyers as set out in the Basic Principles (Article 23), the ICCPR and UDHR (Articles 19), in particular the right of lawyers and other HRDs to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights, without suffering professional restrictions by reason of their lawful action;
- d. Recognize the principle of judicial independence and the rule of law.
- e. ensure access to a fair and public hearing of, and determination by, a competent, independent and impartial tribunal of all criminal charges and or rights and obligations in a suit of law;
- f. Ensure that lawyers and other human rights defenders will not be punished for their advocacy, or subject to political-motivated prosecution in the name of “national security”.
- g. Abolish RSDL and all other forms of administrative detention, that detain individuals without due process and without independent judicial oversight;
- h. Withdrawn its reservations and declaration to the UN Convention against Torture and other cruel, inhuman and degrading treatment and punishment;
- i. Ensure that lawyers and other HRDs will not subject to torture or mistreatment in police custody and introduce effective measures to prevent and punish the use of torture by state agents;
- j. Immediately release Wang Quanzhang, Jiang Tianyong, Zhou Shifeng, Wang Fang, Yin Xu’an, Wu Gan and Hu Shigeng and compensate them for violations of their internationally protected rights;
- k. Renew the licence to practice law for Zhu Shengwu.