



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. 78/2020 concerning Kai Li (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 10 March 2020, the Working Group transmitted to the Government of China a communication concerning Kai Li. The Government replied to the communication on 29 April 2020. 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. Kai Li, born in 1962, is a citizen of the United States of America. He usually resides in New York. Mr. Li is an owner of a company distributing solar simulators, solar cell processing equipment and materials for space and terrestrial applications.

5. The source submits that on 9 September 2016, Mr. Li arrived in Shanghai to see his family on the one-year anniversary of his mother's death. After landing in Pudong International Airport, he was immediately apprehended by the officials of the Shanghai State Security Bureau.

6. The source reports that the only document provided by the officials at the time of Mr. Li's apprehension was a notice of residential surveillance, which cites article 73 of the Criminal Procedure Law.¹ This article grants the authorities the right to detain those suspected of endangering State security, and requires the authorities to notify family members within 24 hours of the suspect being placed under residential surveillance.

7. The source sustains that a notice of residential surveillance is not a warrant in a strict sense of the term, as it does not provide any reason to clarify why Mr. Li was suspected of endangering State security. According to the source, the officials of the United States have repeatedly inquired about such details but none have been provided.

8. The source further informs that on 25 November 2016, after two and a half months of residential surveillance at a designated location, a formal arrest notice was provided by the Shanghai State Security Bureau. No specific reasons were given by the authorities for Mr. Li's arrest. According to the source, the arrest notice contains a broad accusation of spying. It further makes reference to article 78 of the Criminal Procedure Law.

9. The source notes that the above-mentioned provision states that arrests are subject to approval by a procuratorate or court. The source reports that the case was first presented to the procuratorate on 24 February 2017, which was five and a half months after the initial arrest. The case was first reviewed by a court in April 2017. Therefore, the source concludes that the legal basis of Mr. Li's arrest is unclear.

10. The source states that following his formal arrest, on 25 November 2016, Mr. Li was transferred to the Shanghai No. 1 Detention Centre, where he was held through early March 2019. Since early March 2019, Mr. Li has been held at Qingpu prison in Shanghai.

11. The source reports that the authorities did not provide any additional reasons for Mr. Li's pretrial detention beyond vague suspicions of espionage, as stated in the arrest notice.

12. The source further reports that a trial, which was initially scheduled in May 2017, was postponed twice without explanation from the authorities, until 10 August 2017, nearly a year after Mr. Li's initial arrest. The announcement of the verdict for that trial took place almost a year later – on 25 July 2018 – when the Shanghai No. 1 Intermediate People's Court handed down a sentencing judgment against Mr. Li. In the judgment, Mr. Li was accused of collecting four State secrets on behalf of the Federal Bureau of Investigation of the United States and was sentenced to 10 years in prison, a fine of 50,000 Chinese yuan (approximately \$7,300) and deportation.

13. The source notes that the trial was held behind closed doors, which the source claims to be in violation of article 10 of the Universal Declaration of Human Rights. The source adds that the courts of China do not enjoy judicial independence and feature a conviction rate of over 99.9 per cent.

14. The appeal hearing for Mr. Li's case took place on 29 December 2018, and was also held behind closed doors. Before the sentencing hearing, the presiding judge declared that she did not have any real control over the outcome of the case and was "waiting on her boss to give her guidance" on Mr. Li's sentence. The source submits that this is a clear indication that Mr. Li was not subject to a fair trial by an impartial tribunal. Rather, it asserts that Mr.

¹ In the 2018 revision of the Criminal Procedure Law, the corresponding article is now article 75.

Li's detention was ordered by the political authorities who had the ability to override the judge's opinion. The source questions the existence of any evidence against Mr. Li. It submits that Mr. Li was pressured to confess guilt.

15. The source further asserts that Mr. Li's case featured a lack of procedural transparency. For instance, it notes that article 73 of the Criminal Procedure Law, which was cited in the initial notice of residential surveillance, indicates that a People's Procuratorate should supervise enforcement of the residential surveillance at a designated location. However, there was no indication that there was any involvement of the Procuratorate in the case during the entire period that Mr. Li was held under such residential surveillance.

16. The source also notes that after Mr. Li's transfer to the detention centre, officials from the United States Consulate in Shanghai repeatedly inquired as to whether the case had been transferred to the procuratorate, but the officials of China refused to provide an answer or any written documentation.

17. Following Mr. Li's trial on 10 August 2017, there was a period of three months during which no explanation was given for the continued delay of the sentencing hearing. It was not until 9 November 2017, when Mr. Li and his legal counsel were retroactively notified that on 30 September 2017, the case had been sent back from the court to the procuratorate for supplementary investigation, and then allegedly returned back to the court 30 days later. The supplementary investigation did not uncover any new evidence. The source therefore submits that the authorities in charge of Mr. Li's case have chosen to apply their own timeline and procedure to the case, and to justify their actions retroactively in order to be nominally in line with the Criminal Procedure Law.

18. The source further submits that Mr. Li was not permitted to have legal counsel until the beginning of 2017 and did not have access to a lawyer during his period under residential surveillance at a designated location. The source states that residential surveillance at a designated location is a coercive practice of detaining individuals at an unspecified, unmonitored location where they undergo extremely harsh daily interrogation without access to legal representation, in contradiction of article 33 of the Criminal Procedure Law, which provides that defendants have the right to hire an attorney at any time. The source adds that evidence and forced confessions obtained during periods under residential surveillance at a designated location are considered legally valid. The source questions the validity of evidence obtained without access to legal representation and submits that it cannot be considered a part of a fair hearing.

19. The source further submits that even after Mr. Li was transferred to the detention centre, the officials did not allow him to meet with legal counsel for several months. During the consular visit in December 2016, one official of the Shanghai State Security Bureau informed a United States consular official that they needed to determine whether allowing Mr. Li to meet with his attorney could pose a threat to the security of China. They subsequently rejected the request of Mr. Li's attorney to meet with him, instead only allowing written correspondence that would be monitored and screened by officials of the Shanghai State Security Bureau. The source specifies that inbound communications from the legal counsel to Mr. Li were allegedly confidential, but anything Mr. Li wrote to his attorney was not. The source notes that this is in contradiction of article 33 of the Criminal Procedure Law, which specifies that criminal suspects have the right to access an attorney immediately following their first interrogation by an investigating organ.

20. According to the source, it was not until January 2017 that Mr. Li was able to receive written communications from his attorney. At that time, he was still prevented from writing to his attorney or meeting with him in person. The first in-person visit between Mr. Li and his attorney was in March 2017, after the case had been brought before the procuratorate on 24 February 2017. After that, Mr. Li and his attorney met in person on several occasions. The source adds that the United States consular officials were able to meet Mr. Li within several days of his initial detention and conducted monthly visits until his transfer to prison in March 2019.

21. According to the source, Mr. Li did not have access to his case file until he was able to meet with his attorney. Chinese officials stated in verbal communications with United States officials that Mr. Li's luggage allegedly contained a manufactured component part

associated with Hue Technologies, and that part was the physical evidence that justified his detention. However, no such physical evidence is mentioned in the arrest notice or the sentencing judgment handed down by the Shanghai No. 1 Intermediate People's Court in July 2018.

22. The source notes that Chinese criminal law provides for multiple exceptions in cases where the suspect is deemed to endanger national security. However, determination of whether a case qualifies is, according to the source, inherently arbitrary, since State security organs have the authority to declare anything a State secret, even retroactively. In particular, the source submits that the State secrets that Mr. Li is alleged to have disclosed can be found through an Internet search, even in China.

23. The source concludes that the above-mentioned inconsistencies suggest that Mr. Li's detention is political rather than criminal, especially given the long history of China using charges of endangering State security for political reasons. The source also cites detentions of other foreign nationals, in which the authorities did not disclose the charges against defendants accused of endangering State security on the grounds that doing so would itself endanger the national security of China.

24. The source further reports that initially, Chinese officials did not allow any communication between Mr. Li and his family, other than one brief telephone conversation in June 2018, almost two years after the initial arrest. The only means of direct communication between Mr. Li and his family was through letters that were screened by the Chinese authorities. According to the source, the screening process has delayed transmission from periods of several weeks to several months, and in some instances, the letters were declared to have been lost, or were rejected without any reason given. The source submits that this constitutes a direct violation of article 12 of the Universal Declaration of Human Rights.

25. The source adds that Mr. Li was granted two telephone calls per month after he was moved to Qingpu prison in March 2019, though the first phone call did not occur until several months afterwards, due to apparent issues with the phone system. He now has a right to make two calls of 7.5 minutes' duration to his family per month. These phone calls, as well as visits by United States consular officials, are recorded and closely monitored by the Chinese authorities.

26. The source reports that all calls, letters and consular visits are tightly monitored by the authorities, who do not permit Mr. Li to communicate with or make any requests to elected government officials. Furthermore, it is claimed that the officials persist in their contention that the serious nature of Mr. Li's crime warrants special treatment, thereby denying him of his rights.

27. Finally, the source submits that charges of endangering State security have been routinely used by the Government of China to detain foreign citizens for political reasons. It submits that Mr. Li's detention is political and not criminal. The source concludes that Mr. Li's detention is at least in part attributable to his status as a foreign national of Chinese heritage.

Response from the Government

28. On 10 March 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 to it by 11 May 2020 detailed information about the situation of Mr. Li and any comments on the source's allegations. Moreover, the Working Group called upon the Government to ensure Mr. Li's physical and mental integrity.

29. In its reply of 29 April 2020, the Government notes that on 9 September 2016, Mr. Li was the subject of coercive measures taken by the Shanghai State Security Bureau on suspicion of espionage in accordance with the law. On 24 February 2017, the Bureau transferred the case to the procuratorate for prosecution in accordance with the law.

30. According to the Government, during the period in which Mr. Li was being subjected to coercive measures in accordance with the law, the Ministry of State Security met with Mr. Li's family in Shanghai and agreed that he should communicate with his family, in

accordance with the Vienna Convention on Consular Relations, the Consular Convention between the United States and China, and the Criminal Procedure Law. At the same time, the Consulate General of the United States in Shanghai was promptly informed of Mr. Li's case and consular visits by officials from the Consulate General's United States Citizen Services and Consular Section were properly arranged on seven occasions, and they attended the court's sentencing proceedings on two occasions. Mr. Li's rights have been fully guaranteed.

31. The Government adds that, on 25 July 2018, the Shanghai No. 1 Intermediate People's Court issued a verdict in accordance with the law in the first instance, finding Mr. Li guilty of espionage and sentencing him to 10 years in prison, confiscation of property in the value of 50,000 Chinese yuan and deportation. After the verdict, Mr. Li appealed. On 18 January 2019, the Shanghai Higher People's Court dismissed Mr. Li's appeal and upheld the original sentence in accordance with the law.

32. According to the account of the Government of China, the courts held that Mr. Li had accepted an assignment from agents of an espionage organization to search for, collect and provide them with its State secrets, thus endangering the national security of China through acts that constituted a crime of espionage. The courts tried Mr. Li's case in strict accordance with the law, fully guaranteeing his procedural rights, and promptly informed representatives of the United States of the trial, including the time and place of sentencing, and arranged for them to attend the proceedings and observe the sentencing. During the trial, the authorities of China made special arrangements on humanitarian grounds, within the scope permitted by the domestic law, and allowed Mr. Li to speak with his family, for which he thanked them.

33. The Government also claims that it adheres to the principle of equality before the law and that it treats criminals of foreign nationality in a lawful, strict, rational and civilized manner in accordance with the Criminal Law, the Criminal Procedure Law and the Prison Law, while the rights of such criminals to health, correspondence and visits are guaranteed in accordance with the law. Since Mr. Li's transfer to Qingpu prison, there have been no instances where his ties with his family have been severely restricted or screened.

Further comments from the source

34. In its response, the source states that the Government's response did not address the core reasons that Mr. Li's detention is arbitrary under the Working Group's criteria. For instance, the response of the Government makes no mention of Mr. Li's incommunicado detention for over two months from September to November 2016, which was carried out without an arrest warrant. It also fails to mention his lack of access to any form of legal counsel during the entirety of that period and for an additional two months, during which he was subjected to harsh interrogation every day. Mr. Li's case was not heard by a court until April 2017, seven months after the initial arrest, and prior to that, the case was overseen by the procuratorate. The source notes that an authority that is responsible for prosecutions cannot be considered to be independent or impartial authority, as previously stated by the Working Group.²

35. According to the source, while it is true that the United States officials were given access to two public sentencing hearings on 25 July 2018 and 18 January 2019, it must be clarified that these were mere formalities. The actual trials occurred behind closed doors on 10 August 2017 and 29 December 2018, which consular officials, family members and all other members of the public were barred from attending, in violation of article 10 of the Universal Declaration of Human Rights and article 14 (2) of the International Covenant on Civil and Political Rights.

36. The source also explains that the claim of "special arrangements on humanitarian grounds" presumably refers to a single, pretrial phone call between Mr. Li and his ailing father. Contrary to the Government's response, Mr. Li's right to correspondence was tenuous, as there have been numerous instances, verifiable by the United States consular officials, in which Mr. Li's letters to his family and elected officials were delayed for screening or were confiscated by the authorities altogether, owing to their contents. In November 2019, Mr. Li reported having been threatened by prison officials with punishment for a phone call in which

² Opinion No. 12/2016, para. 20.

he briefly urged a member of his family to advocate his case on his behalf with officials of the Government of the United States. In addition, the Chinese officials have explicitly stated that all outgoing written correspondence from Mr. Li to his attorney is monitored and not privileged.

37. The source lastly points out that the Government's reply has not addressed Mr. Li's argument that the State secrets he is alleged to have stolen are freely available online or the fact that the court judgment failed to mention the physical evidence. All this supports the conclusion that Mr. Li's detention is political rather than legal. The source concludes by stating that arbitrary detention of foreign nationals on grounds of espionage and national security is a practice that has been repeatedly carried out by regimes around the world with weak rule of law for political purposes, and Mr. Li's case is yet another unfortunate example of that practice.

Discussion

38. The Working Group thanks the source and the Government for their submissions. In determining whether Mr. Li's detention was arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has established a prima facie case for breach of international law constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. Furthermore, mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations (A/HRC/19/57, para. 68).

Category I

39. 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.

40. The source submits, and the Government does not contest, that Mr. Li was not presented with an arrest warrant or informed of the reasons for his arrest at the time of arrest on 9 September 2016.

41. 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. 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.³

42. International law concerning the right to personal liberty allows restrictions to this right and includes the right to be presented with an arrest warrant, in cases that do not involve arrests made in flagrante delicto, to ensure the objectivity of the arrest process. It is also required that the decision on whether the arrest is warranted be taken by an outside authority, i.e., a competent, independent and impartial judiciary. This is procedurally inherent in the right to personal 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 for the Protection of All Persons under Any Form of Detention or Imprisonment.⁴

43. The Working Group also finds that, in order to invoke a legal basis for deprivation of liberty, the authorities should have informed Mr. Li of the reasons for his arrest at the time

³ See, for example, opinions No. 93/2017, para. 44; No. 10/2018, paras. 45–46; No. 36/2018, paras. 39–40; 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.

⁴ 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 and 8–9; No. 27/1993, para. 6; No. 30/1993, paras. 14 and 17 (a); No. 36/1993, para. 8; No. 43/1993, para. 6; 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.

of the arrest and promptly informed him of the charges.⁵ Their failure to do so violates article 9 of the Universal Declaration of Human Rights and principle 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. It also renders his arrest devoid of any legal basis.

44. The source further maintains, and the Government again does not dispute, that Mr. Li has been subjected to enforced disappearance and incommunicado detention for over two months, from the time of his arrest on 9 September 2016 to his formal arrest and transfer to Shanghai No. 1 Detention Centre on 25 November 2016. The Working Group recalls that enforced disappearances violate international law and constitute a particularly aggravated form of arbitrary detention.⁶ 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. It is also 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.⁷ The Working Group recalls that the act of enforced disappearance is defined in a way that clearly distinguishes it from related offences, such as enforced deprivation of liberty, abduction, kidnapping and incommunicado detention, among others. The following three cumulative minimum elements should be contained in any definition: the deprivation of liberty against the will of the person concerned; the involvement of government officials, at least indirectly by acquiescence; and the refusal to disclose the fate and whereabouts of the person concerned.⁸ The Working Group refers the present case to the Working Group on Enforced or Involuntary Disappearances.

45. As the Working Group has consistently found, holding persons incommunicado violates their right to be brought before a court and to challenge the lawfulness of their detention before a court under article 9 of the Universal Declaration of Human Rights.⁹ The Working Group recalls that judicial oversight of detention is a fundamental safeguard of personal liberty and is essential in ensuring that detention has a legal basis. Given that he was unable to contact anyone, in particular his lawyer, which is an essential safeguard to ensure the ability of any detainee to personally challenge their detention, his right to an effective remedy under article 8 of the Universal Declaration of Human Rights was also violated.

46. Mr. Li was held incommunicado under residential surveillance at a designated location under article 73 of the Criminal Procedure Law, which provides that residential surveillance is to be enforced at the domicile of a criminal suspect or defendant or at a designated place of residence if he or she has no fixed domicile. For a crime suspected of endangering State security and a crime involving terrorist activities, if it is believed that residential surveillance at the domicile of the criminal suspect or defendant might impede the investigation, the surveillance 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. It further stipulates that where a criminal suspect or defendant is placed under residential surveillance at a designated place of residence, his or her family is to 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 the Law is to apply.¹⁰ It is the duty of the People's Procuratorate to exercise supervision over the legality of the decision and enforcement of residential surveillance at designated places of residence.

47. The Working Group considers that the term "residential surveillance at a designated place of residence" is a misnomer, since in the example of Mr. Li, the criminal suspect or

⁵ 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; and No. 46/2019, para. 51.

⁶ See opinions No. 5/2020, para. 74; and No. 6/2020, para. 43.

⁷ See the Declaration on the Protection of All Persons from Enforced Disappearance. 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; and No. 56/2019, para. 79.

⁸ A/HRC/16/48/Add.3, para. 21. See also E/CN.4/1996/38, para. 55.

⁹ See opinions No. 45/2017, No. 46/2017, No. 79/2017, No. 11/2018 and No. 35/2018.

¹⁰ In the 2018 revision of the Criminal Procedure Law, the corresponding article is now article 34.

defendant who is subjected to it is confined not to his usual place of residence – i.e., under house arrest – but in a designated place of residence, which may well be a prison. The Shanghai State Security Bureau, acting through the procuratorate, in effect has the power to make a person disappear without judicial oversight. In the Working Group’s view, such an enabling act for law enforcement officials is devoid of a legal basis.¹¹

48. The Working Group and other special procedure mandate holders 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 which violates human rights.¹² Those concerns include the following:

(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 residential surveillance at a designated location provisions appear to allow those suspected of certain crimes to be held incommunicado for long periods and in undisclosed locations, which may per se 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 residential surveillance at a designated location provisions 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.

49. The Working Group observes that Mr. Li was not brought promptly before a judge – that is, within 48 hours of his arrest barring absolutely exceptional circumstances, as per the international standard set out in the Working Group’s jurisprudence.¹³ Therefore, the Government has violated article 9 of the Universal Declaration of Human Rights and principles 11, 37 and 38 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

50. The Working Group further observes that Mr. Li was not afforded the right to take proceedings before a court so that it could decide without delay on the lawfulness of his detention in accordance with articles 3, 8 and 9 of the Universal Declaration of Human Rights and principles 11, 32 and 37 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. 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 affirms that the right to challenge the lawfulness of detention before a court is a self-standing human right, the absence of which constitutes a human rights violation, and is essential to preserve legality in a democratic society.¹⁴ This right, which is in fact a peremptory norm of international law, applies to all forms and situations of deprivation of liberty.¹⁵ Judicial oversight of the deprivation of liberty is a

¹¹ Opinion No. 36/2019, para. 38.

¹² Communication CHN 15/2018, dated 24 August 2018. Available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=23997>. See also opinion No. 15/2019, para. 42.

¹³ 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; and No. 82/2019, para. 76.

¹⁴ A/HRC/30/37, paras. 2–3.

¹⁵ *Ibid.*, para. 11, and annex, para. 47 (a). See also opinion No. 39/2018, para. 35.

fundamental safeguard of personal liberty and is essential in ensuring that detention has a legal basis.¹⁶

51. The Working Group also cannot help but note that Mr. Li was effectively deprived of his right to legal counsel and representation, which is procedurally inherent in the right to liberty and security and the prohibition of arbitrary detention, in violation of articles 3 and 9 of the Universal Declaration of Human Rights; principles 15, 17 and 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; and principles 1, 5, 7, 8, 21 and 22 of the Basic Principles on the Role of Lawyers. According to 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.¹⁷ The Working Group notes that access to counsel from the outset of detention is an essential safeguard in ensuring that the detainee can challenge the legal basis for his or her detention.¹⁸

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

Category III

53. The Working Group notes that Mr. Li had no access to legal counsel of his choice from the time of his arrest on 9 September 2016 until January 2017, at which point he received the first written communications from his lawyer in that four-month period, the first two months of which had involved extremely harsh daily interrogations under the residential surveillance at a designated location. Even afterwards, he was prevented from writing to his lawyer or meeting him in person, and the first in-person visit occurred in March 2017, after the case had been brought before the procuratorate on 24 February 2017.

54. In the Working Group's view, the Government failed to respect Mr. Li's right to legal assistance at all times, which is inherent 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 for the Protection of All Persons under Any Form of Detention or Imprisonment; and principles 1, 5, 7, 8, 21 and 22 of the Basic Principles on the Role of Lawyers.¹⁹

55. The Working Group considers that this violation substantially undermined and compromised Mr. Li's capacity to defend himself in any subsequent judicial proceedings. As highlighted by the Working Group 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. In addition, the right to access to legal counsel should not be unlawfully or unreasonably restricted.²⁰

56. The Working Group also notes the Government's failure to observe Mr. Li's rights, including the right to be informed of his right to consular assistance without delay, in line with article 36 (1) (b) of the Vienna Convention on Consular Relations. This and other violations of the rights guaranteed under article 36 (1) (a), (b) and (c) of the Vienna Convention on Consular Relations constitute grave violations of rights to due process and to

¹⁶ Opinions No. 35/2018, para. 27; 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; and No. 65/2019, para. 64.

¹⁷ A/HRC/30/37, annex.

¹⁸ Opinion No. 40/2020, para. 29.

¹⁹ See also communication TUR 15/2018, dated 22 October 2018. Available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24130>.

²⁰ A/HRC/30/37, annex. See also A/HRC/45/16, para. 55.

a fair trial under articles 10 and 11 (1) of the Universal Declaration of Human Rights and principle 16 (2) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

57. The Working Group notes that the General Assembly, in its resolution 72/179, emphatically reaffirmed the duty of States parties to ensure full respect for and observance of the Vienna Convention on Consular Relations, in particular with regard to the right of all foreign nationals, regardless of their migration status, to communicate with a consular official of the sending State in case of arrest, imprisonment, custody or detention, and the obligation of the receiving State to inform the foreign national without delay of his or her rights under the Convention.²¹

58. Furthermore, principle 16 (2) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment highlights the importance of consular assistance for a detained or imprisoned foreign national by specifically mentioning his or her right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he or she is a national.²² In its rule 62 (1), the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) also provides that prisoners who are foreign nationals are to be allowed reasonable facilities to communicate with the diplomatic and consular representatives of the State to which they belong.²³

59. The Working Group also expresses its concern at the prima facie allegation of torture – including the harsh daily interrogation by the agents of the Shanghai State Security Bureau during a state of enforced disappearance and incommunicado detention that lasted for two months – to induce an admission of guilt. Accordingly, the Working Group considers that the source has established a credible prima facie case regarding the violation of articles 5 and 25 of the Universal Declaration of Human Rights; articles 2 and 16 (1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; principle 6 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; and rule 1 of the Nelson Mandela Rules. The Government's failure to take remedial measures under articles 12 and 13 of the Convention against Torture and principle 33 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment compels the Working Group to refer the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, for further consideration.²⁴

60. In the Working Group's view, not only is such torture a grave violation of human rights per se, but it seriously undermines the ability of persons to defend themselves and hinders their exercise of the right to a fair trial, especially in the light of the right not to be

²¹ See also General Assembly resolution 72/149. In its resolution 73/175, in the context of the death penalty, the General Assembly called upon States to comply with their obligations under article 36 of the Vienna Convention on Consular Relations, particularly the right to receive information on consular assistance. In its resolution 42/24, the Human Rights Council also called upon States to comply with those obligations. See also General Assembly resolutions 74/166, 74/167 and 74/168, and Human Rights Council resolution 40/20.

²² See also article 10 of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live (General Assembly resolution 40/144, annex).

²³ See also guideline 21 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, on the permission to monitor all places of immigration detention and public reporting by consular officials (conditional upon request by persons in immigration detention) to ensure that the exercise of the right to bring proceedings before court to challenge the lawfulness and arbitrariness of detention and to receive appropriate remedies is accessible and effective (A/HRC/30/37, annex, para. 110).

²⁴ Opinions No. 39/2018, para. 42; No. 22/2019, para. 77; and No. 28/2019, para. 69. As observed by the Committee against Torture in its concluding observations on Canada (CAT/C/CAN/CO/6 and CAT/C/CAN/CO/7), in relation to civil actions brought against the Islamic Republic of Iran in the domestic courts of Canada by victims of torture and/or sexual violence suffered at the hands of the authorities of the Islamic Republic of Iran, a State must ensure that all victims of torture are able to access remedy and obtain redress, wherever acts of torture occurred and regardless of the nationality of the perpetrator or the victim, including by restricting the application of sovereign immunity.

compelled to testify against oneself or to confess guilt under article 11 (1) of the Universal Declaration of Human Rights. The use of a confession extracted through ill-treatment also constitutes a violation of principle 21 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.²⁵ Moreover, as the Working Group has previously found, confessions made in the absence of a lawyer are not admissible.²⁶

61. The Working Group further notes the denial of Mr. Li's due process right to be visited by and correspond with his family, and to be given adequate opportunity to have contact with the outside world, subject to appropriate conditions and restrictions as specified by law or lawful regulations, in accordance with principles 15 and 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and rules 43 (3) and 58 of the Nelson Mandela Rules.²⁷

62. The source alleges, and the Government does not contest, that Mr. Li was subjected to in camera hearings both in the trial and appeal courts, in violation of his right to a public hearing under articles 10 and 11 (1) of the Universal Declaration of Human Rights. The Government has offered no justification that could warrant such an exceptional procedure. The Working Group therefore concludes that these in camera hearings constituted a breach of articles 10 and 11 (1) of the Universal Declaration of Human Rights.²⁸

63. The Working Group further recalls that before the sentencing hearing, the presiding judge declared that she did not have any real control over the outcome of the case and was "waiting on her boss to give her guidance" on Mr. Li's sentence. The source submits that this is a clear indication that Mr. Li was not subject to a fair trial by an impartial tribunal. Rather, it asserts that Mr. Li's detention was ordered by the political authorities who had the ability to override the judge's opinion. The Working Group therefore concludes that the lack of judicial independence constitutes a breach of articles 10 and 11 of the Universal Declaration of Human Rights and refers the present case to the Special Rapporteur on the independence of judges and lawyers.

64. Given the above observations, 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. Li's deprivation of liberty an arbitrary character that falls within category III.

65. In its 29-year history, the Working Group has found China in violation of its international human rights obligations in over 95 cases.²⁹ 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.³⁰

²⁵ See also opinions No. 48/2016, No. 3/2017, No. 6/2017, No. 29/2017 and No. 39/2018.

²⁶ Opinions No. 40/2012, para. 48; No. 1/2014, para. 22; and No. 14/2019, para. 71.

²⁷ Opinions No. 35/2018, para. 39; No. 44/2019, paras. 74–75; and No. 45/2019, para. 76.

²⁸ Opinions No. 20/2019, para. 85; No. 22/2019, para. 75; and No. 71/2019, para. 89.

²⁹ See decisions No. 43/1993, No. 44/1993, No. 53/1993, No. 63/1993, No. 64/1993, 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.

³⁰ 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

66. Finally, the Working Group would welcome the opportunity to conduct a country visit to China in order to assist the Government in addressing the 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

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

The deprivation of liberty of Kai Li, being in contravention of articles 3, 6, 8, 9, 10, 11 (1) and 25 of the Universal Declaration of Human Rights, is arbitrary and falls within categories I and III.

68. The Working Group requests the Government of China to take the steps necessary to remedy the situation of Mr. Li without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights. The Working Group urges the Government to accede to the International Covenant on Civil and Political Rights.

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

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

71. The Working Group requests the Government to bring its laws, in particular with regard to the use of residential surveillance at a designated location under article 73 of the Criminal Procedure Law, into conformity with the recommendations made in the present opinion and with the commitments made by China under international human rights law.

72. 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 the independence of judges and lawyers; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, for appropriate action.

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

Follow-up procedure

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

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. 34/2014, para. 34; No. 35/2014, para. 19; 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.

(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.

75. 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.

76. 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.

77. 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.³¹

[Adopted on 25 November 2020]

³¹ Human Rights Council resolution 42/22, paras. 3 and 7.