

REPORT FOR THE INDEPENDENT TRIBUNAL INTO FORCED ORGAN HARVESTING OF PRISONERS OF CONSCIENCE IN CHINA

Submitted by Clive Ansley

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A. PROFESSIONAL BACKGROUND

I, CLIVE MALCOLM ANSLEY, Barrister and Solicitor of British Columbia, Canada, affirm that:

1. I was admitted to the Bar of British Columbia in January 1983.
2. I am 77 years of age.
3. Attached hereto is a true copy of my current *curriculum vitae*.
4. I have been actively involved with China and Sino-Canadian relations for about 52 years.
5. I speak and read Chinese.
6. I received my undergraduate degree with Honours in Asian Studies from the University of British Columbia in 1966, my Master of Arts Degree in Asian Studies from the University of British Columbia in 1968, my undergraduate law degree (LL.B) from the University of Windsor in 1980, and my LL.M degree in Chinese Law from the School of Oriental and African Studies, University of London, in 1981.
7. I taught Chinese Law for six years at the University of Windsor (1978-1980) and the University of British Columbia (1983-1985). I also taught in the Law Faculty of Shanghai's Fudan University in 1984 and still hold the title of Advising Professor at that institution. In 1996, I taught International Economic Law at Shanghai's Jiaotong University and in 2003 was appointed as a Visiting Professor of law at the Silicon Lake University in Kunshan, China.
8. I taught Chinese History, Chinese Civilization, Chinese Language, and The Life and Thought of Mao Zedong at the University of Windsor from 1968 to 1980.
9. I have studied the new Chinese legal system since its inception in 1979, and have published and lectured widely on Chinese law.
10. I have provided written and/or *viva voce* evidence as an expert witness on the Chinese legal system to a number of Canadian and foreign courts and tribunals, including the English Commercial Court, the Supreme Court of British Columbia, the Supreme Court of Hong Kong, the High Court of New Zealand, the Supreme Court of New South Wales in Australia, and numerous appearances before the Immigration and Refugee Board of Canada ("IRB").
11. My appearances before the Canadian IRB date back to 1983 and have continued to the present date. I have given evidence before that board on numerous occasions over the past seventeen years and am scheduled to do so in connection with several different matters over the next few months.

12. I have provided expert evidence on Chinese Law in the case of *Jin v. Ministry of State Security et al* to the Federal District Court for the District of Columbia in Washington, D.C., a lawsuit brought on behalf of Falun Gong practitioners in 2005.
13. I have provided expert evidence for the Home Office of Great Britain in the case of Hua Jin, a Falun Gong practitioner then facing deportation from the U.K. in 2005.
14. I have provided expert evidence on the Chinese “judicial” system in a case involving a lawsuit against the Bank of China in the U.S. Federal Court, Southern District of New York.¹

¹ I have enclosed the words “courts” and “judicial” in quotation marks for a very specific purpose, but do not continue the practice throughout this paper because I suspect that such usage might prove a distraction from its main focus.

The point I wish to make at the outset is that Chinese “courts” are not really courts at all, in any sense of the word as it is understood in countries governed by the Rule of Law. The use of quotation marks does not arise from a simple desire to express derision for the Chinese “courts”. Rather, I am attempting to draw attention to the fact that unless we use quotation marks or, alternatively employ another term (perhaps “legal administrative unit”), we are very likely to become prisoners of our own language and form images of the Chinese “judicial” system which are utterly divorced from reality. When we use the words “court”, “judge”, or “judgment”, we make certain basic assumptions and conjure up certain typical mental pictures which mirror our own experiences and cultural backgrounds. In common law countries, I think we would all agree that these words evoke an image of learned men or women of mature years, steeped in the study and practice of law, sitting on the bench and applying legal principles to facts in a completely impartial manner and acting independently, free from all outside influence including interference from government.

When we refer to the “Supreme Court of China”, a western reader likely forms the mental picture of perhaps nine judges who are the most learned in the judicial system, administering justice independently. There are actually more than six hundred judges on the Chinese Supreme Court and this reflects the fact that their real function is administrative, rather than judicial. It is true that many judges on this “court” have legal training, but many do not. Indeed, the last Chief Justice of China (President of the Supreme Court), Wang Shengjun, had neither a law degree, nor any legal background or training whatever. The most recently appointed Chief Justice has both a law degree and further legal training, but he is only the second Chief Justice to have such credentials since the “judiciary” was created in 1979.

“Judges” on the Supreme Court of China seldom “hear” cases; rather groups of “judges” “handle” cases. The quotation marks are not inserted to demean the individuals involved; the intent is simply to note that their function is political and administrative, rather than judicial. The Chinese Communist Party can over-rule any “court” in China, including the Supreme Court. The Party can in practice, though not according to the Constitution, appoint and dismiss all “judges” at will, and on any case which concerns the Party’s interests and/or policies, the Party dictates the required “judgment” to the “court”, all of whose judges must be Party members. In my submission, these facts do not describe a court, if that word is not to be robbed of all meaning. “Judges” in China clearly function simply as civil servants, members of one category of bureaucrats. They are employed by and take instructions from the Chinese Communist Party. Moreover, both their average salaries and the relatively low esteem in which they are held betray their status as fairly low ranking bureaucrats. Chinese “judges” may be as young as 23 years; the average age is between 30 and 35. With the exception of minor lawsuits which do not interest the Chinese Communist Party, virtually all “judgments” handed down by Chinese “courts” are politically driven, rather than judicially driven. In short, a group of civil servants directly responsible to the political party which appointed them does not magically metamorphose into a court simply because the instructing political party chooses to employ this nomenclature. Nor can a group of inexperienced individuals with scant legal training, who are entirely controlled by a ruling political party be transformed into “judges” simply by dressing them in black robes, conferring the title of “judge” upon them, and conferring the title of “court” on the building in which they work on behalf of the Party/State.

15. I have provided expert evidence on the Chinese judicial system in two cases before the Superior Court of Justice in Ontario, Canada.
16. In 1998 I gave a confidential presentation to key members of the Department of Foreign Affairs and International Trade on the workings of the Chinese court system, in the only secure room of the Canadian Embassy in Beijing.
17. In June of 2000, at the invitation of the Canadian Ambassador in Beijing, I gave a presentation on the current state of the Chinese legal system to Madame Justice Beverley MacLachlin, then Chief Justice of Canada, and several other justices of the Supreme Court of Canada.
18. In February of 2001, I gave a presentation at the invitation of the Canadian Consul General in Shanghai to the Team Canada delegation led by the Right Honourable Jean Chretien, then Prime Minister of Canada. This presentation addressed the issue of "Dispute Resolution in China".
19. On January 27, 2004, I presented a paper entitled "Genocide Against the Falun Gong in the Context of the Supposedly 'Reformed' Chinese Legal System", to the *NGO Conference on Genocide* in Stockholm.
20. On May 9, 2004 I gave an address in the Parliament of Denmark on the topic "The Abuse of Human Rights in China".
21. On May 11, 2004 I gave an address in the Parliament of Sweden on the topic "A Chinese 'Court' is not a Court".
22. On May 25, 2004 I gave an address in the Parliament of Norway on the topic "The Chinese Judicial System and its Role in the Illegal Detention, Torture, and Murder of Falun Gong Practitioners".
23. On June 19, 2004 I gave a presentation on the Chinese legal system at Concordia University in Montreal as part of the Forum, *Searching for Justice: Counteracting Hate, Torture, and Crimes Against Humanity*.
24. During April, May, and June of 2008 I gave two presentations on Capitol Hill in Washington, D.C., and two presentations on Parliament Hill in Ottawa. All four presentations were supported by multi-party members of Congress and Parliament, respectively, and all four focused on human rights violations in China and the absence of the Rule of Law in that country.
25. On May 5, 2010, I delivered a presentation to the MacDonald-Laurier Institute in Ottawa exploring the degree to which the Chinese Communist Party has penetrated various levels of government in Canada, as well as various sectors of Canada's civil society.
26. On November 24, 2010 I delivered a presentation in the Canadian Parliament to Members of Parliament from all parties, addressing the fraudulent nature of the Chinese legal system and the fact that it continues to deteriorate, rather than reform.

27. On July 20, 2014, I addressed a meeting at the Provincial Legislative Building in Victoria, British Columbia on the 15th anniversary of the official launch by the Chinese Communist Party of the persecution of Falun Gong. This presentation dealt primarily with the well documented mass murder of prisoners of conscience for purposes of organ harvesting.
28. On August 30, 2015, I lectured at Langara College in Vancouver on the question of whether the recent phenomenon of Chinese courts accepting several hundred thousand lawsuits against Jiang Zemin represents a new consciousness on the part of the Chinese population, or simply a strategic manipulation by Xi Jinping.
29. In 1984, I opened the first foreign law office in Shanghai for the Canadian law firm of Bull, Housser & Tupper (BHT) and managed that office until 1989. In early 1989 I moved to the Hong Kong office of BHT and in late 1989 moved to Taipei as resident partner of the BHT office there. In 1994 I re-opened an office for BHT in Shanghai and managed that office until February of 2001. From May of 2001 until April of 2003, I served as Senior Legal Consultant in the Shanghai office of the English (London) firm, Holman Fenwick & Willan.
30. In the course of the fourteen years I served as a foreign lawyer in China, I estimate that I handled approximately 300 litigation cases involving the Chinese courts, on behalf of foreign clients.
31. During those fourteen years, I was one of only two foreign lawyers whose main practice consisted of handling litigation matters in the Chinese courts. All other foreign lawyers were then, and I believe still are, almost exclusively concerned with corporate and commercial matters, such as drafting and negotiating contracts between foreign and Chinese parties.
32. Over the last several years of my service in China I frequently conferred with trade representatives of Canada, Australia, the U.K., and the USA over the frustration which business people from these jurisdictions were experiencing because of their inability to obtain any semblance of fundamental fairness or due process at the hands of the Chinese "courts", and we specifically discussed ways of bringing the issue before the World Trade Organization ("WTO") in the form of a joint complaint that China was chronically breaching its obligation under the WTO to provide a fair and transparent legal system for the protection of foreign investment.
33. Over the last several years of my service in China, I also frequently gave presentations to Foreign Chambers of Commerce on the nature of the Chinese courts. In early 2003 I addressed a select group of foreign CEO's from major multinational corporations, convened by the Economist magazine, on this same topic.
34. I served two terms as President of the Canadian Business Forum in Shanghai and the Canada China Business Council, Shanghai Chapter (2001 and 1998). The name of the organization was changed from Canadian Business Forum to Canada China Business Council in 2001.
35. I served as Vice President of the Canadian Business Forum in Shanghai in 1999, as Secretary of that organization in 1997, and as a director in 1996.

36. I now practise with my own firm in Courtenay, British Columbia (Ansley & Company). I continue to represent western clients who are investing in or trading with China, but now focus mostly on issues relating to human rights abuses by the Chinese government.
37. I served as China Country Monitor for Lawyers' Rights Watch Canada from 2005 through December of 2016.
38. I am the North American Chairperson of the Coalition to Investigate the Persecution of Falun Gong.
39. I am legal counsel and member of the Board of Directors for *Doctors Against Forced Organ Harvesting*, Washington, D.C.
40. I am a member of the International Advisory Board of the *International Coalition to End Transplant Abuse in China*.
41. I have published articles and commentaries on the Chinese court system in a number of periodicals, including among others *China Law and Practice*, *U.B.C. Law Review*, *Canadian International Lawyer*, and *The Verdict*. My publications are set out in my *Curriculum Vitae*.
42. I am thoroughly familiar with the structure of the Chinese judicial system, including the hierarchy of Chinese courts, the function of the Procuratorate (the prosecution arm of the judicial system), which by the authority of the *Organic Law of the People's Procuratorate* is charged with the supervision and execution of judgements, and with supervising the relationship of the Chinese Communist Party (CCP) to the courts.
43. I am equally familiar with the structure and function of the CCP in the Chinese judicial system. In capsule-comment form, the CCP in practice, though not visibly, stands completely above all the other various actors in the judicial system and in cases involving its interests, the CCP provides Chinese judges with strict and detailed instructions, which are always followed to the letter, on what the judgment should be. All individuals and institutions within the system are unequivocally subservient to the will of the CCP.

B. BACKGROUND

44. The political reality in the PRC is that the legal system, as well as all other organizations in the Chinese Party/State, are entirely subservient to and controlled and directed by the CCP, to serve the ends of the CCP.
45. With extremely rare exceptions, all Chinese judges must be members of the CCP. Moreover they are in reality, though not in theory, appointed by the CCP and they serve only at the pleasure of the CCP. They can be arbitrarily dismissed at any time by the People's Congress which formally appoints them, and the Congresses are simply rubber stamp

organs whose deputies all either are Communist Party members, or have been approved by the Party.

46. Over the past several years the Chinese Party/State has required all law firms in China to establish Chinese Communist Party committees within their firms and all Chinese lawyers are now required to take an oath of allegiance to the CCP.
47. In February of 2001, China's leading legal professional periodical, *China Lawyer*, carried a seminal article by Luo Shuping, a judge in the Higher People's Court of Sichuan Province.² It was Luo who coined the phrase which has since become a ubiquitous conversational term amongst virtually all Chinese lawyers and judges: "*Shenzhe bupan; Panzhe bushen*" ("**Those who have heard the case do not make the judgement; those who make the judgment have not heard the case**").
48. The article by Luo Shuping addressed the fact that what transpires in Chinese "trials" involving large or sensitive issues is simply theater and has no impact on the ultimate judgement in the case.
49. Typically, a tribunal of three "judges" will hear the case, perhaps ask questions of witnesses (in those rare trials in which witnesses actually appear in court), accept documents and then adjourn, ostensibly to consider the "judgement". But that is not what follows. At the end of the hearing, the only power retained by the tribunal which heard the case is to make a recommendation to the Judicial Committee.
50. The Judicial Committee is a completely invisible group of "judges", meeting in a back room and making "judgements" on batches of cases collectively, without ever having heard the evidence in any of them.
51. Originally, the rationale for this system was that so many judges were inexperienced and untrained that it was safer to have more senior judges review the evidence and make the judgment. In recent years, court spokesmen have claimed that because of the increasing sophistication and legal training of all judges, this monitoring and supervising role of the Judicial Committees is no longer so important and therefore fewer and fewer cases are being referred to the Judicial Committees. There are several problems with both the initial rationale and the claim that the trend is toward more decisions by those who hear the cases.
 1. First, the official court statement about the trend is patently false. The trend is in fact in the opposite direction for several reasons. But the very rationale for the existence of the Judicial Committees has been transparently false from the outset. I say this because when the system was first established, **all** the judges in the court were uniformly untrained and there was no reason whatever to think that the judgments of the back room judges would be any more correct than would be any judgment by the tribunal members who actually heard the case.

² Although this article is now about seventeen years old it still accurately describes the decision making of Chinese courts. It can be considered outdated only in the sense that the problem addressed in the article has become worse in the interim between publication and the present time. A steadily greater percentage of cases is now routinely sent to the Judicial Committee for disposition than was the case at the time the article was published.

52. The real reason for the existence of the Judicial Committees has always been to facilitate the control of the courts by the Party, and to do it invisibly. As mentioned earlier, all the members of the Committee are Party members. But even more importantly, the driving force within the Committee is always the judge who serves as Party Secretary within the court. Also, the President of the court is always a member of the Committee and for historical reasons the President is usually the least legally qualified of any judge in the court. In fact, very often the only credential the President holds is his Party membership.
53. As mentioned earlier, the original rationale for the function of the Judicial Committee was the need for a kind of internal review power over inexperienced judges. Also, in the beginning the purported expectation was that only very important or "sensitive" cases would be referred to the Judicial Committee. Why then has the trend been to routinely send most cases to the committee? There are at least two reasons for this trend.
- a. First, one of the greatest flaws in the judicial system, and in Chinese administration generally is a deep-rooted aversion on the part of officials to taking responsibility for decisions. This aversion is well-founded because of the historical prevalence of scapegoating by the Party/State. To ensure that there is never any serious questioning of CCP *policy*, disastrous policy usually results in the *decisions* of individual government functionaries, rather than the policy itself, being denounced and identified as the cause of the disaster. Over the years, many judges have tended to cover themselves by turning their files over to the Judicial Committees even where the case in question is not particularly large, sensitive, or important.
 - b. Over a period of many years, Luo Gan and Zhou Yongkang, former chairpersons of the Central Political/Legal Committee of the CCP³ conducted repeated campaigns to tighten the CCP's control over courts, police, and the procuratorate. China's current General Secretary (President of China), Xi Jinping, has reiterated that the CCP must retain absolute control over all three. This translates into a larger role for the Judicial Committees within each court.
54. Since the CCP took power in 1949, it has enjoyed a monopoly of power and has erected a system which integrates all state organs and all Non-Governmental Organizations (NGOs) into an overall structure tightly controlled by the CCP. China's courts are unquestionably

³ The Political Legal Committee of the CCP at every level (district, provincial, and central) exercises total control over the courts, police, and procuratorate at that level. The Political Legal Committee can overturn any judgement of any court at its respective level, notwithstanding the fact that its members usually have no legal training.

included within this organizational structure and are scrupulously obedient to the orders of the Party/State.⁴

55. Both theoretically and in practice, China's courts are required to "accept the leadership" of the CCP. The Chinese Constitution says that the "courts" are under the leadership of the

⁴ Many Rights lawyers throughout China have, over the past seventeen years or so brought actions, or attempted to do so, against Chinese government agencies and a large proportion of those lawyers has been detained, disbarred, and beaten by police as a result of their efforts. In most cases the courts have refused to accept these lawsuits. However, in a limited number of instances, such actions have proceeded and judgements have issued. This means that the Party/State has directed the courts to accept the cases. I have addressed elsewhere the use of citizen lawsuits by the Party/State to drain off public outrage which might easily otherwise eventually focus on the CCP. Although there are no reliable statistics available, according to my observations the great majority of these lawsuits are decided against the plaintiff citizen litigants. That being said, in relatively rare cases such litigants have actually won their cases. However, those cases do not represent a triumph for the Rule of Law over political domination of the courts; on the contrary, they function both as pressure release valves and also to allow the Party to shift blame and responsibility from the Party itself to bureaucratic agencies and individual bureaucrats. The argument is that it was not Party policy which was wrong (or Party leaders); rather any torts or crimes committed were results only of individual malfeasance or misfeasance.

Two examples of such lawsuits brought or attempted by Rights lawyers are those organized by Zheng Enchong in Shanghai and Chen Guangcheng in Linyi County, Shandong Province.

Zheng Enchong in 2003 advised approximately five hundred Shanghai families of their rights under the law to sue the Shanghai Municipal Government. These people were victims of corruption in a form responsible for widespread unrest in China today. Local government authorities collude with large developers to force homeowners from their homes, which are bulldozed down to allow for massive developments, enriching both the developers and the local officials in the process. Homeowners are forced into homelessness, either with no compensation whatever or with woefully inadequate compensation. Zheng tried to initiate a class action lawsuit against both a developer and the Shanghai municipal government. In 2003, a crowd of plaintiffs whom he had advised appeared at the Shanghai Intermediate Court and attempted to file suit. The suit was never accepted by the court, but Zheng was detained a few days later and ultimately convicted of "providing state secrets to a foreign entity". The "state secrets" consisted of published laws and regulations relating to real estate, as well as information on the plight of the dispossessed homeowners, all faxed to Human Rights Watch in the U.S. (the foreign entity). Zheng was sentenced to three years in prison, but remained under house arrest long after he completed the prison sentence. In the years since 2006 he has been re-arrested several times and on one occasion was savagely beaten by police in public for approximately one hour. Zheng was again arrested and "disappeared" after being scooped up by police in the course of the mass nationwide roundup of Rights lawyers in July of 2015.

Chen Guangcheng is a blind human rights lawyer now living in exile in the U.S. after a dramatic escape from house arrest in his Shandong village and obtaining temporary refuge in the U.S. Embassy, Beijing. He had brought an early class action lawsuit against local government, and individuals including the mayor and other officials. This lawsuit actually went to trial. But the defendants refused to attend. Instead of rendering a default judgement in favour of the plaintiffs, the court ultimately dismissed the lawsuit on the basis that it was "inappropriate" and there was insufficient evidence.

He also brought a class action lawsuit in Linyi County, in 2005, on behalf of a large number of women who had suffered cruel, violent, and illegal late term abortions at the hands of government family planning officials (as late as eight months). The suit against the Family Planning Commission was ultimately accepted by the court, but no trial date was ever set. In 2006, Chen was convicted of the two "crimes" of disturbing public traffic, and destroying public property. He was sentenced to four years in prison, which term he served in full. The lawyers he had selected to represent him were refused entry to the courthouse and the court appointed two lawyers who served his interests in

People's Congresses which appointed them. But these Congresses are rigidly and totally controlled by the CCP and so this is tantamount to CCP control of the judicial system. But even if the CCP were not in control of the Congresses, the very notion that courts should be subject to a legislature and subject to arbitrary dismissal by that legislature makes a mockery of the Rule of Law.

56. Few China legal scholars sufficiently address the one fundamental issue determining whether China can possibly implement the rule of law. The language of various statutes is continually cited, analyzed, and parsed. But the formal provisions contained in Chinese statutes and regulations are almost entirely irrelevant for purposes of evaluating the existence or non-existence of the Rule of Law.

C. UNFAIR TRIAL, LACK OF INDEPENDENT JUDICIARY, AND NO PRESUMPTION OF INNOCENCE

- FAIR TRIAL

57. No one receives a "fair trial" in China.

58. To many, the statement in the previous paragraph may seem broad, sweeping and far too general. I am sometimes asked how I can insist that there are no honest or fair judges in China. But I have never made such an allegation. In fact I had close relationships in the past with Chinese judges who were both honest and fair. But they had no independence and were powerless to affect the many institutional flaws in the judicial system, flaws which insure that every Chinese trial denies even a modicum of fairness to every accused.

59. There is simply no such thing as a fair trial in China. This is not to say that every person convicted of a criminal offence by a court in China is innocent; there are genuine criminals in China as in every country and common sense dictates that some of those appearing before the courts will be guilty. But the process of proving their guilt, and arriving at an adjudication of guilt, is so fundamentally flawed, corrupt, and deficient, that there is no way to determine whether a convicted person is one of the guilty or whether he is an innocent victim of the inherently unfair process.

a. Virtually all accused parties in Chinese courts are ultimately found guilty. Both the genuinely guilty and those innocents also found guilty are sentenced as the final step of a process which is inherently unjust and offers no reasonable assurance that any given individual has been rightly convicted.

b. The system is heavily dependent on confessions, and torture is routinely employed to extract such confessions.

a. The Code of Criminal Procedure is routinely ignored by investigators, police, and "courts", throughout the process.

- c. Criminal defence lawyers are harassed, beaten, intimidated and often incarcerated simply for being too vigorous in acting on behalf of their clients. They are routinely prevented by police from meeting with their clients, are denied access to the prosecution file, and are prevented from asking their clients about essential facts of the case, notwithstanding provisions to the contrary set out in the Code of Criminal Procedure.
 - d. Accused are convicted on the basis of hearsay evidence in the form of out of court statements by witnesses never subjected to cross examination. Often these statements have been made while the authors were in police custody and likely themselves subjected to torture.
 - e. With rare exceptions, all Chinese “judges” are members of the CCP; many have no legal training, though the trend has for some years been to require a law degree of new judges. But clearly CCP membership has been more important than legal training.
60. Article 14 of the International Convention on Civil and Political Rights (“ICCPR”) sets out (depending on how the sub-sections are counted) approximately 17 **MINIMUM** requirements for a fair trial. Of all the listed provisions, China meets only two: the requirement to provide an interpreter for any accused who does not understand the language and the right of the accused to be present at his own trial. China meets *none* of the other **MINIMUM** standards for fair trial required by this treaty, to which China is a signatory but which China has never ratified.
61. From the time a person enters the criminal investigation system, there is not a single step which is remotely fair to the accused. The issue is not the fairness or honesty of individual judges; the issue is that the entire system is so flawed and perverse that fairness is simply impossible.
62. After detention, the accused may be legally held (that is to say it is authorized by the CPL) for up to 37 days before the authorities decide whether to “arrest” him; but
- a. In practice, time limits are frequently exceeded with impunity;
 - b. The accused may be spirited away into the arms of the Central Committee for Discipline Inspection (“CCDI”) and thereafter he disappears altogether, sometimes for months on end, or even years.
 - c. Even within the formal “judicial” system, the restrictions set out in the CPL, the Constitution, and other statutes are routinely ignored, but the accused is at least resident at a known detention centre and his whereabouts is known by family, friends, and lawyers;
 - d. But no law whatever, even in theory, applies to the CCDI. Interrogators are entirely unmonitored and unregulated. The process is brutal for most of those subjected to CCDI interrogations. As mentioned earlier, torture should be assumed throughout the investigatory period.

- e. In the course of criminal investigations since 1979, accused persons have been denied the right to meet with legal counsel until prosecutors and police have completed their investigations and, in almost all cases, obtained a confession.
 - f. At trial, the accused has no right to call defence witnesses and there are never any witnesses for the defence in attendance;
 - g. There are always witnesses for the prosecution, but those witnesses also are also almost never in attendance at the trial:
 - i. Although the CPL makes it an absolute requirement that all witnesses must be in court and must be subjected to cross examination, this never happens.
 - ii. Witness evidence at a Chinese criminal trial consists of written statements signed by deponents who are not present and whose evidence therefore cannot be tested, and these statements are simply read out to the “court” by police officers or prosecutors.
 - iii. When the written “judgement” is handed down by the “court”, the Reasons typically state that witnesses x, y, and z provided evidence to the court and that the court has found that evidence credible. But the judgement never discloses to the reader that all this testimony was hearsay, given by out of court deponents whom lawyers for the accused have had no opportunity to cross examine.
63. One requirement for a trial to meet the “fairness” test under the ICCPR is that the accused must have the right to trial before an independent, competent, and impartial court. Leaving aside the competence and impartiality requirements, the fact is that Chinese “courts” operate essentially as low level administrative organs of the CCP and judges are simply low level functionaries of the Chinese bureaucracy.
64. The subordination of Chinese “courts” to the CCP is in fact enshrined in the Chinese Constitution. Judges are appointed by and serve at the pleasure of the “People’s Congress” at the level of the “court” concerned. But the members of those congresses are all appointed/approved by the CCP, so that in reality the CCP not only appoints, but can dismiss any judge at any time for any reason.
65. The CCP also appoints a Party Secretary within each “court” and this person is a permanent member of the “Judicial Committee” which ultimately decides on all important “judgements” of the “court”. The trial is heard in court before three “judges”, but these “judges” do not make the judgement. That decision is made invisibly in a back room by the “Judicial Committee”, which decides the case after input from the Party Secretary setting out the required “judgement” to the Judicial Committee. The Judicial Committee then instructs the three judges who heard the case, on the “judgement” they must issue. Hence the widespread aphorism among Chinese lawyers that ***“Those who have heard the case do not make the judgement; those who make the judgement have not heard the case.”***

66. From the Lai Changxing panel in Canada (2001) to the more recent pronouncement by a New Zealand Immigration Minister that an accused person she wished to deport to China could get a fair trial there "...at least to a reasonable extent", officials in western democracies have often been intellectually incapable of understanding the reality that the concept of "fair trial" does not and cannot exist in China's present circumstances.

– **DOES THE PRESUMPTION OF INNOCENCE APPLY IN CHINESE CRIMINAL PROCEEDINGS?**

67. There is no presumption of innocence in the Chinese judicial system.

68. That said, there is some confusion over the issue of its existence.

69. In 1996, I attended a presentation in Shanghai by the then Canadian Ambassador to China, Howard Balloch. His theme was China's alleged tremendous progress in implementing the Rule of Law. The background to the Ambassador's address was the unveiling of the 1996 Revised Criminal Procedure Law ("CPL"), the first revision since the proclamation of the original law in 1979.

70. "It is impossible to over-emphasize the importance of the fact that for the first time in more than 5,000 years of history, the presumption of innocence has actually been formally written into the Chinese criminal law", declared Ambassador Balloch. He cited Article 12 of the newly Revised CPL, stating that the presumption of innocence was clearly set out there. But Article 12, which remains unchanged in the CPL after its most recent revision in 2012, says no such thing.

71. Article 12 simply consists of the tautological assertion that "No person shall be found guilty without having been judged as such by a People's Court, in accordance with law." Obviously the wording of the Article has nothing whatever to do with the legal concept embodied in the presumption of innocence. Equally obvious is the fact that "no one is guilty until they are guilty", irrespective of whether the guilty verdict is handed down in a country governed by the Rule of Law, or by a "court" in a Fascist Police State.

72. Interestingly, Chinese legal scholars writing about this principle employ a term which is a direct translation of the English words "presumption of innocence". But those Chinese words are not to be found in the revised Code of Criminal Procedure. The wording of the article does not actually address the issue of presumption of innocence, or the onus of proof to which the presumption gives rise.

73. The history of Article 12 is instructive. It represents an attempt to mollify overseas critics who had assailed the Chinese government for years about the Chinese CPL's lack of specific provisions generally deemed necessary for implementation of the Rule of Law. The lack of any presumption of innocence had been a frequent source of foreign criticism. The CCP introduced Article 12 in order to impress a foreign audience. Clearly Canada's ambassador was suitably impressed.

74. But the wording of Article 12 illustrates the complete lack of understanding by the Chinese draughtsmen of the principles embodied in “presumption of innocence”; or alternatively their drafting may have simply reflected their cynicism. But while I was practicing in China, I never encountered any comprehension of the principle even among the best Chinese lawyers I knew. None seemed to appreciate that “presumption of innocence” establishes burden of proof and affects judicial proceedings at every step.
75. Many good Chinese lawyers and outspoken critics of the CCP judicial system spoke proudly and optimistically of their belief that in the words of Ambassador Balloch, the presumption of innocence was now enshrined in Chinese law. Even western lawyers working in China frequently made the same assertions, causing me to assume that they had not read Article 12.
76. I have never read a judgement from a Chinese Criminal Court which addressed the presumption of innocence or reflected it in any way.
77. The undeniable truth of the matter is that the presumption of guilt is absolute in the Chinese criminal courts, notwithstanding the alleged statutory provisions to the contrary.
78. I have interviewed Chinese prosecutors on this subject. All those with whom I have talked have pointed to the so-called statutory Presumption of Innocence as one of the most significant among the revisions made to the Code. However, all have gone on to laugh openly at the idea and state that it has made no difference whatever to their own procedures, to those of the courts, or to the percentage of defendants found guilty (the percentage is estimated by prosecutors and defence lawyers alike to fall very little short of 100%). These statements of course beg the question of why the prosecutors regarded the alleged presumption of innocence in Article 12 as so significant.
79. The revised code, as support for the Presumption of Innocence principle, also stipulates that all accused must be referred to in the media and in court documents as the "Accused" or the "Defendant" until such time as they are convicted of the crimes with which they are charged.
80. Yet Lai Changxing was vilified and condemned as the “worst criminal in Chinese history” for many years prior to his trial, by the whole of China’s mass media, which is of course controlled by the Party/State. He was identified in all media coverage as “The criminal, Lai Changxing”.
81. The Chinese Premier at the time, Zhu Rongji, made frequent statements to the media that the “criminal, Lai Changxing should be executed ten times over”. This, before Lai had even been formally charged, let alone brought to trial!
82. The discussion of Lai Changxing dates back some seventeen years. But few substantive improvements have been made to the Chinese legal system in the interim. Current media comment on accused human rights lawyers, before trial, is a telling example. Since July 9, 2015 the entire Human Rights and Criminal Defence bars have come under attack by the Party/State and many prominent lawyers have been charged criminally. Some have already been convicted and given draconian sentences; many are awaiting trial. Over

the past three years, several such lawyers, while awaiting trial, have appeared on public television with bowed heads and confessed to vague charges of subverting state security.

83. A number of historical and cultural factors serve to resist the presumption of innocence. From the first Criminal Code under Emperor Qin Shi Huang (221-206 B.C.), through the Qing Dynasty Codes (1644-1911 A.D.), there was an overwhelming presumption of guilt. Since 1949 the CCP has been remarkably successful in creating a cult of Party Infallibility and that has supported the continuation of the presumption of guilt.
84. The presumption of guilt is so deeply ingrained in the criminal system that the very act of pleading "Not Guilty" is quite literally considered an affront to the police, the prosecutors, the court, and the state. Indeed, one of the problems facing an accused who is genuinely not guilty of the offence with which he is charged arises from the twin facts that:
 - a. He is certain to be found guilty in any event, since virtually no one is ever found innocent; and
 - b. If he pleads "Not Guilty", he will receive a more severe sentence (assuming he is not already facing the death sentence) because of his "bad attitude", as evidenced by the very act of asserting his innocence.
85. The claim of innocence is a direct attack on all these institutions, an assertion that the infallible Party/State is wrong. The CCP assiduously cultivates the myth that the Party does not make mistakes.
86. There was a standing directive issued jointly by the Justice Bureau (the local extension of the Ministry of Justice) and the All China Lawyers' Association ("ACLA") in each urban centre to all law firms within their jurisdiction, stipulating the actions to be taken in the event that any lawyer should actually have a client who insists on pleading "Not Guilty!" The directive makes clear that such a plea is considered as a highly unusual and most undesirable phenomenon. It instructs the heads of law firms to promptly inform the Justice Bureau and the ACLA of any case in which a plea of "Not Guilty" is planned and to handle it with great care. I have been informed by a number of Chinese lawyers that their own law firms enforce a strict rule requiring that any lawyer planning to plead a client "Not Guilty" must inform the senior partner in the firm and the individual lawyer must thereafter work directly with the senior partner; on no account may he proceed on his own. The senior partner, in turn, is under orders from the Justice Bureau and the ACLA to keep those organs informed in detail at every stage, of the defence to be argued and the overall defence strategy.
87. Not surprisingly, almost all defendants plead guilty and in any event virtually all are ultimately judged to be guilty. I have interviewed a number of Chinese criminal defence lawyers over the years (beginning long before the case involving Lai Changxing). On occasion I have encountered defence lawyers who actually claimed success in defending their clients in Chinese courts. In particular, one rather well known lawyer claimed a success rate of about 30%. This lawyer enjoys an unusually good relationship with many judges in the criminal courts, which might in other circumstances explain a success rate much higher than expected. Nevertheless, when I pressed this counsel on the definition of success, he

made it clear that he had never succeeded in having a client found innocent. He measured success in terms of having a relatively lenient sentence imposed, or having an earlier sentence reduced. Acquittal was simply not a viable option for the court.

88. The overwhelming and virtually unanimous opinion expressed to me since the "reform" of the Criminal Code and the Code of Criminal Procedure, by both Chinese defence lawyers and prosecutors, is that in cases where there is really no evidence at all to sustain a conviction against the accused, the courts will sometimes levy a very lenient sentence, but on no account will they find any defendant innocent. On appeal, there are examples, though rare, of higher courts reviewing cases and finding that the evidence against the accused is woefully inadequate, but the result is not acquittal. Instead, the court informs the prosecutors that the evidence they have presented is insufficient and invites them to try again. No acquittal is entered and the prosecutors go "back to the drawing board" and try to strengthen their case. In some instances they have brought the same charge back to an appeal court four or five times, and have been repeatedly told that their evidence is insufficient, but each time they are afforded the opportunity to try their luck once more and the accused is never discharged. It should, however, be understood that these are exceptional cases and in the overwhelming majority of cases the accused is simply convicted in the court of first instance regardless of the evidence against him or the lack thereof.

– WHAT IS THE CONVICTION RATE IN CHINESE CRIMINAL COURTS?

89. There is a general consensus among scholars specializing in the Chinese legal system that the conviction rate is virtually 100%. I have seen the figure stated in the range of 99.3% to 99.7%.
90. I have used the word "virtually" in the previous paragraph because acquittals have occurred in a miniscule number of cases, always involving unusual circumstances.
91. The Chinese government provides no statistics on the conviction rate and independent researchers are forced to compile estimates on the basis of collecting media reports and interviewing Chinese lawyers, judges, and prosecutors, although the Chinese Supreme Court has frequently stated that the conviction rate is above 99%. The Supreme Court has suggested that this percentage proves that the courts are performing extremely well.
92. The Chinese government does not challenge the consensus of specialists who assert the figure of 99% plus.
93. All prosecutors and defence lawyers whom I have interviewed have agreed that the conviction rate exceeds 99%.
94. In the Lai case cited above, the Canadian Ministry of Justice lawyer handling the case on behalf of the Chinese police (and the Canadian Minister of Citizenship and Immigration) did not quarrel with this figure but told the Federal Court that the 99+ percentage of

convictions proved the excellence of the Chinese legal system, a system in which police and prosecutors “would never bring a case to trial were they not absolutely certain of the defendant’s guilt”. Moreover, said the Minister’s Counsel, “The Chinese police and prosecutors are so careful and thorough that they just do not make mistakes!”

– **JUDICIAL INDEPENDENCE**

95. Chinese “courts” have no independence whatsoever. They do not function in any way like real courts in countries adhering to Rule of Law. The “judges” are in fact simply low level civil servants instructed by the Party/State.
96. Article 126 of the Chinese Constitution proclaims that the courts are completely independent and no individual, organization or entity may influence them. But like many other provisions in the Constitution, this Article is honoured in the breach.
97. The lawyer from the MOJ, in the Lai Changxing case cited earlier, argued to the Federal Court of Canada that the courts of China “are completely independent, because Article 126 of the Constitution guarantees their independence.”
98. However, former President Jiang Zemin once responded to a press conference question, concerning whether a newly announced policy of his government would require a constitutional revision, that the Chinese Constitution “is not really a law”.
99. Similarly, the Chinese Constitution guarantees freedom of religion and freedom of speech. But woe betides the Chinese citizen who attempts to exercise those constitutionally guaranteed rights in defiance of the CCP Party/State. Serious physical injuries usually result from insisting on one’s constitutional rights when the Party/State is infringing them.
100. It is not surprising that there is no such thing as the practice of Constitutional Law within the Chinese bar. Furthermore, no court in China could ever accept a case involving a constitutional challenge to the Chinese Party/State.
101. In the early years of this new century, the British Columbia Attorney General sponsored a seminar presentation on China’s prosecutorial system by a delegation of Chinese prosecutors. Members of the Victoria Bar were invited. One lead prosecutor told the audience that the office of the prosecutors (the “procuratorate”) selects, trains, promotes and disciplines the judiciary.” A Victoria lawyer asked the speaker whether this relationship did not “risk compromising judicial independence”. The answer was, “We do not accept the concept of judicial independence in China.”
102. Judges are appointed (notwithstanding the comment of the prosecutor speaking to the Victoria Bar members) by the People’s Congresses at every level of the state structure. The judges serve at the pleasure of those congresses, have no tenure, and may be removed at any time by the Congress which appointed them. Since all members of the Congress are

either members of the CCP or have been approved by the CCP, the reality is that all judges are appointed and may be removed by the Party/State.

103.The Chinese “courts” are governed internally by the CCP committee within each court.

104.A former close friend of mine was a judge on the Chinese Supreme Court. He described to me how China’s president at the time, Jiang Zemin, would frequently call China’s Chief Justice to alert him about cases which would soon be coming to the Supreme Court and to issue instructions on the Judgement which the Supreme Court would be required to issue.

105.The Supreme Court judge cited in the preceding paragraph, as well as a number of judges at lower levels, have also described to me in detail the ideological lectures which are mandatory for all Chinese judges. All have noted that they are instructed by Party ideologues that when issuing judgements, they should of course “pay some attention to the law, but it is much more important to consider the social and political consequences of your decisions.”

106.China’s “courts” involve four levels (local, intermediate, high court, and Supreme Court). A “Chief Justice” (actually called the President of the Court) sits at every level. China has a “one appeal” system in which every appeal goes to the next higher level, which then becomes in effect the final court of appeal.

107.It is frequently the practice that the court of first instance vets its judgement with the court above and receives that court’s approval before issuing the judgement. In the event of an appeal, the higher court which has already pre-approved the first judgement then becomes the “appeal court” and rules on the judgement it has already approved.

108.But at every level the ultimate authority resides in the Chair of the “Politics and Law Committee” of the CCP at that level. These people are not judges and usually have no legal training. But they do have the power to overturn any judgement by any court at their level of the hierarchy and substitute their own decision for that of the court.

109.Over the past decade, successive heads of the Political/Legal Committee of the CCP have spoken about the dangers of adopting features of western legal systems and have repeatedly warned that the CCP must tighten its control over all parts of the judicial system, including police, prosecutors, and courts. They have particularly stressed that no part of the system can be independent of the CCP.

110.More recently, at the National People’s Congress in 2017, and at meetings related to that Congress, China’s Chief Justice Zhou Qiang, together with General Secretary of the CCP (and thereby automatically China’s “President”), Xi Jinping, both stated that China will never allow the “erroneous Western legal principle” of judicial independence. They also stated that China’s greatest legal achievement over the past two years has been the crackdown on and prosecution of China’s human rights lawyers.

111.Attached hereto are four reports on the statements of Zhou and Xi concerning judicial independence.

112.Attached herein is an article by Jerome Cohen which was published in the Far Eastern Economic Review in December of 2008. It is among the most succinct summaries of the

deplorable state of the Chinese judicial system that I have seen. More importantly, it is in my opinion completely accurate. Cohen addresses the direct interference by the CCP in the decision making of the courts. He also discusses the Judicial Committees and the absence of judicial independence generally.

113. During the recent repression and persecution of human rights lawyers in China (July 9, 2015 to the present), a new abuse of fundamental rights occurred on several occasions. The Rights Lawyers appointed legal counsel to represent them, but their family were later informed by police that the accused had fired the lawyers they had earlier appointed and that the court had appointed new legal counsel for them.

114. But equally disturbing is the habit the Party has developed of extra-judicially appointing *ad hoc* "Offices" with exclusive power to carry out functions which are legally the sole preserve of the courts. When these bodies are appointed, the CCP instructs the courts to defer to the "Office" newly appointed by the Party and to refuse any cases brought in connection with the new campaign. There is no legal basis or authority in any Chinese statute for the creation of these special "offices" with *carte blanche* to usurp the powers of the courts.

115. For all the reasons addressed above, I conclude that the purpose of "trials" in Chinese "courts" has nothing whatever to do with discovering truth; the purpose of the exercise is always simply to convict any accused brought before the court, regardless of any evidence supporting factual guilt or innocence.

116. There is no such thing as the practice of constitutional law in China. This is because no Chinese court would ever accept a lawsuit against the government or the Party on the basis that some action of theirs was unconstitutional. There have been pressures from high places, such as that of the former Vice President of the Supreme Court, who in the past pushed lower courts to accept such cases and make constitutional rulings. He is now serving a sentence of life imprisonment, having been "convicted" on corruption charges.

117. Shortly after the Chinese Constitution was revised in 2004 to provide for the protection of private property, then President Jiang Zemin was asked at a press conference about specifics of enforcement. Part of his reply was to the effect that the Constitution "is not really a law".

118. No matter how Chinese statutes and regulations are interpreted and analyzed, a process towards which most of those charged with their implementation are largely indifferent, there is one underlying fundamental issue with respect to the Rule of Law, and it is almost never addressed.

119. It is possible to have a total monopoly of all power in society by a single political party, including unchallenged power over the "judiciary"; *or* it is possible to have the Rule of Law. But it is most decidedly not possible to have both.

120. No China legal scholar could possibly defend the proposition that the CCP is subject to the decisions of the "courts", or subject to the law. Theoretically it is, but anyone arguing that position is simply engaging in pedantic sophistry.

121. So long as the Communist Party of China stands above the law rather than under it, as is undeniably the case at present, any claim that China is advancing toward the Rule of Law, as opposed to Rule *by* Law, is patently absurd. It is true that the CCP uses law as a tool for exercising its power, but it is equally true that the CCP is in no way *subject* to the law. Attached hereto is an article from the Wall Street Journal by Nicholas Bequelin, entitled “Beijing’s Rule of Law Retreat”, published on July 1, 2007. In this article the author:

- a. describes the problem in china as “*a woefully inadequate legal system that lacks true independence from the government, cannot address citizen concerns and exacerbates rather than alleviates local corruption*”;
- b. demonstrating how the legal system fails Chinese citizens, writes that “Predatory officials rob farmers of their land, forcibly evict residents from their homes, and cover up extravagant abuses of power...typically embezzlement, but also rape and murder. These officials close their eyes to labour exploitation and condone or profit from criminal rackets, human trafficking and illegal mining. There is even a term in Chinese for local officials’ collusion with criminal gangs, “black umbrellas”, which refers to officials who give protection to illegal activities in exchange for bribes.”
- c. notes that “With no avenues to seek redress, China’s citizens are abused and exploited on a shocking scale. The problems are not confined to small towns or rural areas; recent prominent corruption cases include the police chief of Shenyang in

Liaoning province, the Party Secretary of Shanghai and the head of the National Food and Drug Administration.”⁵

- d. further states that ***“The critical obstacle to reform remains the judicial system’s enslavement by the party at every level. China’s key legal institutions – the police and the courts – are under the authority of the party’s political and legal committees. Through these institutions, local power holders can easily instruct the police to abandon investigations, or foreclose legal challenges, dictate the outcome of particular cases to judges, or frame protesters and activists on vague charges of threatening state security and stability.*** Granted, when the party’s interest and justice align, China’s courts function reasonably well. But the overwhelming powers of party officials over the judiciary are an open invitation to abuse them.”

⁵ The recent prosecutions of Bo Xilai and Zhou Yongkang by the Xi Jinping faction, together with a seemingly similar move against Jiang Zemin, are addressed elsewhere. All these prosecutions and civil lawsuits have been overtly predicated on corruption. But the trial of Bo Xilai was just as interesting for the offences which the Party steered clear of entirely.

Bo Xilai was the leading perpetrator of the most heinous Crime Against Humanity since the Third Reich. During his tenure first as Mayor of Dalian, and then as Governor of Liaoning Province, that province led the nation in the savage persecution of Falun Gong practitioners. Bo was clearly responsible for the murders of tens of thousands of FLG practitioners for the purpose of harvesting their organs for transplantation. Beyond that atrocity, he is almost certainly responsible for the supply of hundreds of FLG cadavers to two travelling exhibitions which have circled the globe in recent years displaying plastinated human bodies, most or all of which can be sourced to the Public Security Bureau of Dalian City during Bo Xilai’s tenure as Governor of Liaoning.

Interestingly, just as the struggle against Bo was beginning, then Chinese premier Wen Jiabao made a veiled remark, with no apparent context, in the course of a Beijing speech, referring to the killing of healthy people for organ harvesting and asking rhetorically how such acts could be perpetrated “by humans”. Some have speculated that at that time, the Chinese leaders were becoming fearful of future prosecutions against them for Crimes Against Humanity, and were attempting to distance themselves from the atrocity. Several top leaders were already unable to travel to some countries because of warrants or lawsuits against them for such crimes. In any event, this issue was ignored completely by the Party and the charges against Bo were limited to graft and corruption.

Wang Lijun, a former municipal Chief of Police in Liaoning under Bo Xilai, was the latter’s “right hand man” in Liaoning Province and moved with him when Bo was transferred to become Party General Secretary for Sichuan Province. In Sichuan, Wang became Chief of Police and Vice Mayor of the City of Chongqing. When he had a serious falling out with Bo, Wang Lijun fled to Chengdu and took refuge in the American Consulate there, where he sought political asylum. Asylum was refused but he was delivered to the central CCP, rather than to the Chongqing police who had surrounded the Chengdu Consulate with instructions to deliver Wang to Bo Xilai.

Wang eventually received a fifteen year sentence, again on charges of corruption and abuse of power. But, as with Bo Xilai, the great irony is that he was never charged with his much greater Crimes Against Humanity. During his days in Liaoning, Wang played an actual “hands on” role in the slaughter of Falun practitioners for the purpose of stoking the lucrative organ transplantation trade. He even claimed credit for the invention of a new method for removing the organs of living donors and spoke emotionally of the tremendous feeling of satisfaction he felt from witnessing the organs of healthy donors being transplanted into a new body. See Ethan Gutmann, *The Slaughter: Mass Killings, Organ Harvesting, and China’s Secret Solution to its Dissidents Problems*: Amherst, New York, 2014. This important work fully documents and provides photographic evidence of Wang Lijun’s physical involvement in China’s organ harvesting.

- i) observes that ***“Unfortunately, there are no signs that Beijing intends to empower the legal system to operate in an effective and independent manner. In fact under President Hu, the party has abandoned its rule – of – law rhetoric to talk more about a “Socialist” Rule of Law – implying that the party, not the law itself, remains supreme.”***⁶
- e. further observes that “Top law officials like Luo Gan, head of the Political and Legal Committee of the Central Committee, have recently issued an order to purge the legal system of “negative Western legal concepts”, including fundamentals such as judicial independence. But nowhere is the authorities’ attitude towards an autonomous legal system clearer than in the wave of repression it has unleashed since last year on China’s nascent civil – rights movement, sentencing for subversion the country’s top human – rights lawyer Gao Zhisheng, jailing countless rights activists, using house arrest to silence many critics, and tightening control over the legal profession.”
- f. Concludes with this observation: ***“But it is a mistake to think that the Chinese legal system can heal itself while the party refuses to relinquish any power.”***

122. Jerome Cohen is the most senior among all foreign China legal scholars. He also practised law in China for many years and is a massive publisher on the subject of Chinese law and the Chinese “judiciary”. In a 2001 administrative tribunal hearing, I was called to give evidence for one party and Jerome Cohen was called by the other side. I was asked at that hearing to comment on Cohen’s credentials. I replied that Jerome Cohen is looked up to and totally respected by all China legal scholars and that most consider him the “guru” of all western China law scholars. Ironically, given the fact that we had been called by adverse parties, there was no disagreement between Cohen’s evidence and mine, on any substantive issues.

123. In the course of the tribunal hearing referred to in paragraph 70 *ante*, Jerome Cohen stated that ***“the Chinese courts have an absolutely impeccable record of following the instructions of the Chinese Government”***.

124. It is well documented by the United Nations Rapporteur on torture, by victims of torture, by Amnesty International, by Lawyers' Rights Watch Canada and by many other NGO's, as well as by almost all western scholars and jurists who specialize on Chinese law, that the use of torture is endemic in Chinese criminal investigations. So routine is the practice that the assumption of torture must be the starting point in assessing any statements allegedly made to police interrogators.

⁶ President Hu’s views on the proper place of courts in the legal system were enshrined in a new orthodox “Theory” which was made compulsory reading for all CCP members. It was termed the “Theory of the Three Supremes”. The “Three Supremes” theory dictates that the “courts” should look for guidance first to the Party, then to the masses of the people (only the CCP is authorized to interpret the views of the “masses”), and thirdly to the law. The most visible practical result of the implementation of the “Three Supremes” theory was Hu’s replacement of the former Chief Justice of China (Xiao Yang), who had a degree in law, by Hu’s new Chief Justice, Wang Shengjun, who not only had no law degree but in fact had no legal training or background of any kind. To be fair, the current Chief Justice appointed by Xi Jinping, Zhou Qiang, does have solid legal qualifications.

125. The entire government of China itself is controlled and directed by the CCP; the government and the CCP are effectively one and the same, with CCP officials holding real power and the parallel government officials deferring to them.
126. The government structure is composed of “People’s Congresses” at each level. The local People’s Congress is “elected” at the local level; it, in turn, elects the members of the Provincial People’s Congress and the Provincial Congresses elect delegates to the National People’s Congress (NPC), which passes for the national parliament. In reality, the NPC has no power and sits only when the Communist Party summons it to rubber stamp CCP decisions.
127. This structure precisely parallels the structure of the CCP, and at every level it is the CCP official who holds real power, while the state functionary defers to him. For example, the “mayor” of Shanghai, who is not elected but is appointed by the CCP, is not really the power holder in Shanghai politics. He must always defer to the Secretary-General of the Shanghai Communist Party. In most cases, neither the “mayor” nor the Secretary-General of the party is even resident in the area to which he is appointed by the CCP, until he moves to that area and assumes his post.
128. In more recent times, there has been a trend toward uniting the CCP function and the state function in the same person. Bo Xilai was an example of that when he served both as the ranking Party official for Liaoning Province (and therefore as the supreme authority) and also as the Governor of the Province (which would have made him only the titular provincial authority in the absence of his Party position).
129. On February 2, 2007 Joseph Kahn reported in the *New York Times*, (and based on my experience I believe this article to be correct) about a speech by Luo Gan in which Luo asserted that “enemy forces” were seeking to use China’s legal system to Westernize and divide the country. **“The Communist Party must fend them off by maintaining its dominance over lawyers, judges and prosecutors, China’s top law and order official said ...”**. The Kahn piece goes on to report that Luo Gan, who was then a member of the nine member Politburo Standing Committee at the apex of the Chinese leadership (and Chair of the Central CCP Political/Legal Committee), had stated that “China is now part of the global community” and that it must consider “international factors”... “when making judicial decisions.... But he drew a sharp line between such interests and allowing greater leeway for lawyers, judges and prosecutors to make decisions independently as they do in the West. **“There is no question about where legal departments⁷ should stand”, Mr. Luo said. “The correct political stand is where the party stands”**. “In practice, prosecutors and judges answer to Political-Legal Committees run by the Communist Party. Verdicts in cases that involve delicate issues are decided by ranking party officials, often including Mr. Luo himself, Chinese legal experts say.... But he listed a number of political challenges that he said would require closer integration between legal officials and other party and government units”. “There can’t be any ‘free people’ who are outside the management net”, he said.

⁷ Chinese “courts” are clearly included in the general term “legal departments”.

130. Attached hereto is a true copy of a report entitled "A Great Danger for Lawyers"; *Human Rights Watch*, Volume 18, No. 15(c), December, 2006. I have read this report and I consider it to be a thorough and impeccably accurate report on the situation of lawyers in China in 2018; it illustrates the extreme obstacles faced by the criminal defence bar in China even before the vicious pogrom in progress since July 9, 2015.

131. In 2005, I published an article in the *Canadian International Lawyer*, a journal produced jointly by the Canadian Bar Association Section on International Law, and the Ontario Bar Association Section on International Law. Attached hereto is a true copy of that article, entitled "So You Think a Chinese 'Court' is a Court?" In that article, I made the following points:

132. "China now is governed by the Communist Party's absolute and untrammelled monopoly of power at all levels. This includes the "judicial system". It is totally impossible for any Chinese "court" to override any act or policy of the Party. Party and Government leaders regularly and routinely instruct judges at the Supreme Court level on the judgment they shall give in any case affecting the Party or the Government. 'Courts' are simply very low level administrative organs of the Chinese Communist Party." (p.164);

133. "The Rule of Law", if ever implemented in China, would quite simply end the total dictatorship of the Party and destroy its monopoly of power ... The Chinese Government/ Party has made it abundantly clear in a myriad ways [sic] that it will brook no threat to or limitation on its power and it ruthlessly crushes any person or organization which publicly questions the legitimacy of the government or even the legitimacy of a particular law or policy. Neither in law, nor in practice, is there a shred of independence in the Chinese "judiciary" ..." (p. 164).

134. Attached hereto is a true copy of an article written by me and published in *The Verdict*, the official organ of the Trial Lawyers Association of British Columbia, entitled "The Chinese 'Judicial System': A Fairy Tale of Beijing" (Issue 112, March 2007).

135. In this March 2007 article in *The Verdict*, I make the following points:

"[The Chinese 'judicial' system] is not a judicial system at all. A Chinese 'court' is simply a very low level administrative organ of the Chinese Communist Party." (p. 59);

"... at every level it is the [Chinese Communist] Party official who holds real power, while the state functionary defers to him. For example, the 'mayor' of Shanghai, who is not elected but is appointed by the Chinese Communist Party at the central level, is not really the power holder in Shanghai politics. He must always defer to the Secretary General of the Shanghai Communist Party." (p. 59);

"... the Chinese Communist Party exercises total control over all the People's Congresses at every level and in reality it is therefore the Party which appoints all 'judges' to all Chinese 'courts'. Moreover, with extremely rare exceptions, all 'judges' are required to be Communist Party members. They may be removed immediately by the Party at whichever level they were appointed. And those who resist Party directives are indeed removed quickly." (p. 60);

“... the ‘Judicial Committee’ [is] the most important body within each ‘court’. The ‘Judicial Committee’ is a standing committee composed of between five and seven ‘judges’, depending on the size of the ‘court’. It meets regularly, usually once a week. It is here, behind closed doors, completely away from public view and scrutiny, that most cases are decided. Nothing which has transpired in the ‘courtroom’ has any impact on the ‘judgment’. In one afternoon, a Judicial Committee may decree the ‘judgments’ in up to 25 pending cases. In virtually all instances, the Judicial Committee rules on these ‘judgments’ without having heard any of the witnesses or, indeed, having attended the hearing ... The key to disposition by the Judicial Committee is the input of the Communist Party spokesman on the committee.” (p. 61);

“... the architects of the ‘judicial system’ have ensured that the most powerful person at any level of the hierarchy is not the Chief Justice of the ‘court’ at that level. Indeed, the most powerful person is not a ‘judge’ at all, and typically has no legal training. He is the Chairman of the Political Legal Committee in the People’s Congress at every level.” (p. 61);⁸

“... Chinese lawyers are forbidden by ‘Justice’ Bureau edicts to accept ‘sensitive’ cases, without Bureau approval.” (p. 62)

“Some years ago, the Chinese government decreed that Falun Gong practitioners did not enjoy the right to retain defence counsel; it prohibited all Chinese lawyers from defending practitioners and it prohibited all Chinese ‘courts’ from accepting lawsuits brought by the practitioners. Over the last two decades, scores of Chinese lawyers have been disbarred, imprisoned, and/or tortured for bravely insisting on defending Falun Gong practitioners and political dissidents.” (p. 63). All Chinese lawyers must attend an annual study session lasting approximately one working week. This meeting includes professional development programs, as well as political instruction. Shanghai lawyers have been admonished in these sessions that in the event of a particularly ‘big’ or ‘sensitive’ case, they should not accept it if approached by the client. In those cases, the lawyers have been told that the ‘court’ will appoint a defence lawyer for the accused.

The procedure was somewhat modified in 1998 by the ‘Justice’ Bureau of Shanghai, which instructed Shanghai lawyers in that year that if defendants in ‘important’ or ‘big’ cases sought to retain them, the lawyers should first report to the ‘Justice’ Bureau for comment and approval before formally accepting the case.

Shanghai lawyers have informed me that in criminal cases pressure on the individual lawyer or his firm from the Bureau of ‘Justice’, the All China Lawyers Association, and the prosecutors, is routine. If a case involves political factors, a prospective defence lawyer is commonly informed, sometimes openly and

⁸ This was erroneous wording. In fact the Political Legal Committee at every level is a committee of the CCP, not of the People’s Congress.

sometimes privately, that it would not be appropriate for him or his firm to take on the defence of the accused.” (p. 52);

“The *Organic Law of the People’s Courts*, Article 3, states that: The task of the People’s Courts is ... to protect the Proletarian Dictatorship System ...” (p. 59, fn. 23);

“... the very simple and fundamental fact [is] that the rule of law is undeniably and absolutely incompatible with the principle of Party supremacy, and particularly with the overt position of the Chinese government that the ‘courts’ must accept the leadership of the Communist Party.” (p. 56);

‘Courts’ [in China] are not independent bodies charged with the dispassionate application of laws to facts and the dispensing of judgments which may conflict with the express policy goals of government. The ‘courts’ in China are nothing more and nothing less than administrative organs of the Chinese government/ Communist Party. Neither the government nor the Chinese Communist Party (which is the real power) has ever contemplated the concept of judicial review or in fact judicial independence of any kind.(p. 57);

136. Even on a theoretical level, there is no legal basis whatever for such a decree as the Party issued removing all constitutional rights of a group estimated by the Party at seventy to one hundred million people. There have been several instances in recent years of the Communist Party bypassing state and legal institutions to superimpose a special “office” charged with overall supervision and leadership of a particular campaign. These offices, which completely supersede the powers of the “courts”, are named for the date on which they are established. Thus the Party Office in charge of the campaign against Falun Gong is called the “610 Office”, denoting that it was established on June 10 (1999). “Courts”, prosecutors, and police are all told that they must defer to and take instructions from the 610 Office on all matters involving Falun Gong practitioners. The 610 office is a completely extra-legal agency appointed directly by the Central Committee for Discipline Inspection (“CCDI”) of the CCP and empowered by the Party to exercise absolute control over the courts, police, and prosecution personnel.

137. Attached hereto is an article by Jerome Cohen which was published in the *Far Eastern Economic Review* in December of 2008. Entitled “*China’s Reform Era Legal Odyssey*”, this is one of the most succinct summaries of the deplorable state of the Chinese judicial system that I have seen. More importantly, it is completely accurate. Cohen addresses the direct interference by the CCP in the decision making of the courts. He also discusses the Judicial Committees and the absence of judicial independence generally.

138. Jerome Cohen also later reported on the savage public beating of Li Heping, a prominent Chinese human rights lawyer and Cohen’s personal friend, by a gang of thugs acting under the instructions of Chinese police, a standard and routine occurrence in contemporary China.

139. Cohen additionally published an account of how he himself was prevented by police officers from keeping a dinner appointment with the prominent Shanghai lawyer, Zheng Enchong, at Zheng’s apartment. Zheng served three years in prison, on a specious charge of passing

state secrets, after he insisted on bringing a class action lawsuit representing five hundred Shanghai homeowners against the Shanghai municipal government, despite being warned not to take the case. Then, the lawyer who represented him, after also being warned by the Shanghai Justice Bureau to drop Zheng's case, was disbarred and placed under house arrest before leaving China and obtaining refugee status in Canada

140. Attached hereto is a further article by Jerome Cohen, entitled "Beijing Must Reveal Fate of Human Rights Lawyer" published in the South China Morning Post (a Hong Kong newspaper). It addresses the appalling torture of Gao Zhisheng, widely recognized as China's foremost human rights lawyer. But his case simply exemplifies the reign of terror then being unleashed against all human rights lawyers in China, which continues unabated today. Lawyers' Rights Watch Canada has a long list of other colleagues of Gao's who are now incarcerated, disbarred, and/or undergoing almost incomprehensible forms of torture.

141. Many published statements by politicians and businessmen in western countries have created the impression that the Beijing government is committed to implementing human rights and the rule of law. The evidence provides no support for that premise.

D. THE OPERATION OF THE POLICE AND OTHER LAW ENFORCEMENT AGENCIES IN CHINA

142. If western tribunals are to assess the reliability of evidence from China, as opposed to the "truthfulness" or good character of individual police officers, it is crucial that the Court understand the powers of police in China, and the interrogation methods regularly employed in the preparation of criminal cases.

143. Where investigations ostensibly fall under the requirements of the Code of Criminal Procedure, those requirements are routinely ignored. But at least the accused is detained at a regular detention centre where his whereabouts may be known to his lawyer and family members. However, when the investigative practice of "*shuanggui*" is invoked, even the largely fictitious protections an accused or witness theoretically enjoys according to the Code of Criminal Procedure are vitiated. The accused will be whisked away by a group of interrogators accountable only to the CCP. The process occurs under the instructions of the Central Committee for Discipline Inspection ("CCDI") of the CCP and the interrogators are subject to no rules, restrictions, or restraints whatsoever. The interrogation does not occur in a detention centre, jail, or police station. Normally the accused is held in a remote guest house or hotel and subjected to physical and mental torture and degradation until he or she confesses. Only when he or she has signed a written confession is he/she turned over to police and prosecutors and only then do the provisions of the Code of Criminal Procedure theoretically kick in.

144. *Shuanggui* is translated literally as "double regulation". This is said to refer to the fact that the object of the investigation is summoned to appear at a designated place and time for interrogation. But it would be more meaningful to view the name as a reference to the fact that these regulations are unaffected by the procedures spelled out in the CPL and

constitute a parallel investigation system, altogether distinct from the formal procedure set out in the CPL. Lawyers attempting to meet with their “in custody” clients, an absolute right conferred by Article 96 of the CPL, are told that they are being denied under the internal regulations of the prison, rather than under the CPL; similarly, victims of *shuanggui* are told that the CPL has no application to them because the authorities have chosen the “*shuanggui*” method of interrogation in preference to the formal statute known as the Criminal Procedure Law. In short, the CPL applies in theory only until the CCP elects to opt out of it.

145. Originally, ***Shuanggui*** was created as a part of the internal rules of discipline governing the conduct of CCP members, administered by the CCDI, and inapplicable to any non-members of the CCP. It was then expanded to include government bureaucrats and given a slightly modified name.
146. Over the past few years, the practice of *Shuanggui* has been invoked with increased frequency against police and CCP targets, irrespective of whether or not the targets are Party members or government bureaucrats. Once the targets are placed into this *shuanggui* system, even the theoretical but largely meaningless rights of an accused person under the CPL are vitiated.
147. More recently, and particularly during the course of the 2015 repression of human rights lawyers in China, the practice of *shuanggui* has been widely applied to non-members of the CCP, but under a different title: “residential surveillance at a designated place”. This is a misnomer because what happens to the victims goes far beyond surveillance, and also because the detention, in *shuanggui* style certainly does not occur at home; moreover, far from being conducted at a “designated place”, these coercive and brutal interrogations occur in top secret locations for the specific purpose of ensuring that neither friends nor family have any idea where the victim is being held.
148. Although ***shuanggui*** originally is supposed to have referred to a summons ordering a person to appear at a designated time and place, this is certainly not the practice at present, with respect to either *shuanggui* or “residential surveillance at a designated place”. The psychology of the exercise requires that the target be cut off from all friends, relatives, and colleagues. It is imperative that no one knows where the victim is and that there is no one he can contact, or who can contact him.
149. Attached hereto is a report by Harry Wu, the late Director of the Laogai Research Foundation in Washington, D.C., entitled *A Look at Judicial Reform in China: The Death Penalty and Shuanggui (Double Regulations)*. This document includes an accurate summary of *Shuanggui*.⁹
150. The use of torture by Chinese criminal investigators has been reported with near unanimity by NGO's and governments throughout the world as "routine", "endemic", "systemic", etc. Attached hereto is the text of a presentation by Professor Murray Scot Tanner to the Congressional-Executive Committee on China of the U.S. Congress, examining torture in China. This address was delivered on July 26, 2002, but the use of torture has continued

⁹ In Chinese, see *Zhongguo Gongchandang Dangnei Fagui Xinbian*. Falu Chubanshe, 2006.

unabated up to the present. Professor Tanner has published widely on the subject of torture in China, sometimes co-authoring with Jerome Cohen.

151. Statements used in Chinese criminal 'trials' are routinely obtained through torture, and also through threats made against the families of the witnesses in case the witnesses are reluctant to make the statements demanded of them.

152. The systemic and routine coercion of witnesses in the Chinese 'judicial' system goes to the very heart of assessing the reliability of testimony, as opposed to the personal integrity of the witness proffering that testimony.

153. It is extremely dangerous to rely on any edicts or pronouncements from either Chinese "courts" or police agencies for the purpose of drawing conclusions concerning the likely guilt or innocence of accused persons. The reasons for this apply equally to both the Chinese "courts" and the Chinese police. Both are completely and absolutely under the control and direction of the Chinese Communist Party/State and lack any independence whatsoever.

- a. The Chinese "judicial" system lacks any semblance of due process. This lack of due process characterizes the criminal "justice" system from the moment a suspect is detained until he is sentenced to death or imprisonment by a court.
- b. Detention is not the same as arrest and suspects are often "detained" for months before a decision is taken on whether to "arrest" them. Supposedly relatives are to be notified within 24 hours, however that legal provision has so many exceptions that even the law itself allows for extended detentions without charge. But beyond the deficiencies of the statute, the law is routinely ignored in any event.
- c. Detained accused are by law not allowed access to a lawyer until the police and prosecutors have completed their investigation. By that time the accused has usually confessed, and has most frequently done so as a result of torture.
- d. Once the investigation (normally including torture) has concluded, the law to the contrary notwithstanding, police and prison guards routinely still block access of counsel to clients and *vice versa*. Usually, defence counsel will only get to meet with their client a very short time before trial. It is not unusual that defence counsel may *never* be allowed to meet with the accused prior to trial.
- e. If a meeting does take place, a police officer must be present during the meeting unless, as is now becoming frequent, the meeting between counsel and accused is monitored by video camera. If the lawyer asks the client anything about the facts of the case (how he was apprehended, why he was accused, whether he was at the scene of the crime, etc.), the meeting will be immediately terminated. The lawyer is permitted only to inform the accused of the offence with which he is charged and explain the elements of that offence to him.
- f. Although the Code of Criminal Procedure (CPL) stipulates that defence counsel has the right to access the prosecution and court files, this simply does not happen in practice. Police, prosecutors, and judges hold meetings on the file and the "judges" see all the prosecution evidence beforehand, but defence counsel are excluded from these meetings and

never are allowed to see anything in the file which might help the accused.

- g. Article 306 of the Criminal Code makes it an offence for defence counsel to falsify or suppress evidence, or to suborn perjury on the part of a client. On the face of it, this seems reasonable, although interestingly it is an offence which applies only to defence counsel and not to prosecutors! The problem is in its interpretation. A disturbingly large number of Chinese defence counsel are now incarcerated after conviction under Article 306. Almost all such convictions result from one of the two following situations:
 1. In the very rare instance where an accused enters a plea of “Not Guilty”¹⁰ (almost all accused confess and enter a guilty plea), the “court” reasons that:
 - a. Although the accused pled “not guilty” and perhaps provided an alibi, the “court” has found him guilty in any event;¹¹
 - b. Therefore, by definition, the accused was lying to the court;
 - c. It follows that his lawyer must have counselled him to lie;
 - d. Therefore accused and his lawyer both go off to prison together.
 2. There is a second way in which members of the Defence Bar run afoul of Article 306. Since the lawyer has no access to the prosecution file, he does not know what his client has told police and prosecutors in the course of his confession. If accused gives his lawyer prior to trial an account which differs materially from what is in the file, and counsel leads that evidence, the court normally interprets this as evidence that the lawyer has induced the accused to change his evidence and the lawyer is therefore convicted under Article 306 for suborning perjury.
 3. Article 59 (Article 47 before the last revision) of the Chinese Code of Criminal Procedure clearly stipulates that no accused may be convicted on the basis of witness evidence unless the witness has attended in open court and been cross examined by both sides. Article 59 notwithstanding, witnesses very seldom ever appear in court and it is *clearly the norm* for accused to be convicted on the basis of such written hearsay evidence from out of court authors. Moreover, the “judgements” of the “courts” normally give no clue to the reader that the witnesses were not in court and were never cross examined. The “judgement” will simply state that the

¹⁰ A “not guilty” plea is quite literally interpreted as an insult to the state, the police, the prosecutors, and the “courts”. So disturbing is such a development to the “legal establishment”, that the Justice Ministry, or its local Justice Bureaux have issued standing orders that they must be notified any time a lawyer intends to plead a client innocent. When that happens, the case is taken away from the original lawyer and put into the hands of a senior partner, who must then confer closely with local officials and completely disclose the planned defence to those officials.

¹¹ Virtually 100% of accused persons in Chinese “courts” are convicted.

accused has been convicted “on the basis of testimony from the following witnesses that”

4. In any event, the “judgement” is in the end not usually rendered by the “judges” who heard the case; it is determined by an invisible committee in a back room, chaired by the CCP secretary within the “court”.
- h. Aside from the flawed nature of procedures within the “court”, the fundamental and insurmountable obstacle to implementing the Rule of Law in China is the undeniable fact that the CCP, which monopolizes all political and administrative power in China stands entirely above the law:
- i. The Chinese Constitution (Article 128) states that the “courts” are responsible to the People’s Congresses which have created them at each level, and these Congresses are completely controlled by the Party;
 - ii. Article 5(4) of the *Organic Law of the People’s Procuratorates* authorizes the prosecutors to exercise supervision over execution of the courts’ judgments and over the relationship between the courts and the CCP;
 - iii. Theory aside, as a demonstrable matter of practice, the Party and Government regularly and routinely dictate to the “courts” on the “judgements” they should issue and even on whether they should accept certain kinds of cases.
- i. Chinese having the courage to speak out against the system or to publicly espouse viewpoints seriously divergent from those of the CCP usually pay a terrible price. Virtually all human rights lawyers and human rights lay advocates in China today are routinely subjected to vicious beatings by thugs recruited and protected by the police, heavy intimidation, torture, incarceration, and in some cases death. The examples are legion and include those who have:
- i. defended or spoken out on behalf of Falun Gong practitioners;
 - ii. attempted peacefully to organize political parties;
 - iii. assisted and advocated on behalf of victims of forced and violent late term abortions;
 - iv. represented dispossessed homeowners whose homes have been destroyed by corrupt local officials in order to “clear” sites for developers;
 - v. organized victims of serious and illegal pollution;
 - vi. insisted on defending accused persons (including other lawyers) whom the authorities have instructed should not have the right to counsel;
 - vii. represented victims of earthquakes, mass poisonings, and mining disasters who in law would appear to have claims in negligence and criminality against officials;
 - viii. represented victims of safety violations and other violations of labour laws.

- j. Lawyers' Rights Watch Canada has files on a tragically long list of Chinese rights lawyers and advocates who have been victimized in the course of the unceasing illegal campaigns launched by the Chinese Party/State over the years.¹²

¹² The earlier list, comprising 161 lawyers and Human Rights Advocates, includes: Ai Weiwei, Cai Shaojie, *Cao Shunli (detained and disappeared at Beijing Capital International Airport while waiting for flight to Geneva to provide information on human rights in China; held incommunicado for months while medical treatment denied; died within a week of release months after)*, Bao Longjun, Bao Mengmeng, Chen Guangcheng, Chen Jianfang, Chen Taihe, Chen Wei, Chen Zhonghe, Cheng Hai, Chi Yunling, Choedar Dargye, Dai Xuewu, Ding Zilin, Du Daobing, Feng Zhenghu, Gao Lading, *Gao Zhisheng (recognized as China's premiere human rights lawyer; served long prison sentences as reprisal for representing FLG practitioners and homeowners facing government expropriation; beaten and obscenely tortured before being released with serious psychological impairment)*, Gedun Thogphel, Gou Hongguo, Guo Feixiong (aka Yang Maodong), *Guo Guoting (defended FLG practitioners and colleague Zheng Enchong); disbarred, placed under house arrest, and finally forced into exile in Canada)*, Gu Chuan, Guo Yan, He Depu, Hu Qingyun, Hu Jia, Hua Chunhui, Huang Jinchun, Huang Jinping, Huang Liqun, Huang Ronghe, Huang Shengrui, Huang Qi, Huang Yanming, Jampa Choephel, Jamyang Oezer, Jiang Hansheng, , Jiang Meili, , Jiang Qisheng, Jiang Shuhua, Jiang Tianyong, Jiang Yanyong, Jiang Zhongli, Jin Guanghong, Li Chunfu, Li Dunyong, Li Boguang, Li Guoguang, Li Guotao, Li Hai, Li Heping, Li Fanping, Li Jian, Li Jianhong, Li Jianqiang, Li Lanying, Li Mei, Li Pingfang, Li Qun, Li Shuangde, Li Shuyun, Li Sihua, Li Subing, Li Tiantian, Li Tingting, Li Weiji, Li Weiping, Li Wendong, Li Xiongbing, Lin Mu, Lin Wangmao, Lin Xinshu, Liu Fenggang, Liu Jie, Liu Jinlin, Liu Ping, Liu Shihui, Liu Xianbin, Liu Xiaobo, Liu Xiaoyuan, Liu Yan, Liu Zhengqing, Lo Yongzhong, Lu Banglie, Ma Wenbao, Mao Hengfeng, Mo Hongluo, Mo Shaoping, *Ni Yulan (one of China's most prominent and active defenders of homeowners losing their homes to government expropriation with little or no confirmation; had her legs broken by police while in custody in 1992 and has been in a wheelchair ever since; regularly detained and beaten by police; now detained in the current campaign of mass arrests)*, Peng Jian, *Pu Zhiqiang (one of China's very best human rights lawyers, Pu has been illegally detained since last fall and has just had an extension to his detention approved by China's highest "court")*, Qi Zhiyong, Qin Yongmin, Ren Qiuguang, Shao Yan, Shi Tao, Shi Yulin, Sui Muqing, Sun Jianguo, Tang Jitian, Tang Jingling, Tan Kai, *Teng Biao (among the very best and most courageous of the China human rights bar; illegally detained on numerous occasions; became a Visiting Scholar at Hong Kong University; now a Visiting Scholar at New York University)*, *Wang Bingzhang (a courageous human rights advocate, though not a lawyer; founding member of China Democratic Party who immigrated to Canada and became a Canadian citizen; now serving life sentence in China after having been kidnapped by Chinese police while on a visit to Vietnam)*, Wang Jie, Wang Jinbo, Wang Man, Wang Quanzhang, Wang Shengrui, Wang Wanxing, *Wang Yonghang (sentenced to 8 years on a vague charge; became a quadriplegic as a result of custodial beatings)*, Wang Yu, Wei Luqiu,, Wei Ruji, Wei Tingting, Wei Zhongping, Wen Haibao, Wen Jianmin, Wu Hongwei, Wu Lihong, Wu Rongrong, Wu Xuewei, Xie Yanyi, Xiao Shichang, Xiao Yunliang, Xie Yang, Xu Yonghai, Xu Zhenqing, *Xu Zhiyong (among China's most celebrated lawyers; now serving a lengthy prison sentence)*, *Yu Wensheng (recently illegally detained for 88 days without charge)*, Zu Zhengqing, Zhang Yanyong, Zhang Zuhua, Yan Zhengxue, Yang Chunlin, Yang Qinheng, Yang Tianshui, Yang Zaixing, Yao Feizhu, Yao Fuxin, Yao Lifa, Ye Guozhu, Yu Jie, Yu Wang, Yu Wensheng, Yue Tianxiang, Zhang Bo, Zhao Changqing, Zhang Hai, Zhang Jianguo, Zhang Jiankang, Zhang Jianzhong, Zhang Junjie, Zhang Kai, Zhang Lin, Zhang Shizhi, Zhang Xianling, Zhang Yanyong, Zhang Zuhua, Zhao Xin, Zhao Yan, Zheng Churan, Zheng Enchong, Zheng Mingfang, Zhou Qing, Zhu Jiuhu.

k. Attached hereto is a letter from *Lawyers' Rights Watch Canada ("LRWC")* to Xi Jinping and other officials of the Chinese Party/State dated July 15, 2015. This letter sets out in objective detail the substantial body of international laws and treaty obligations which China breaches on a regular basis and calls upon China specifically to release all lawyers and other human rights advocates who were detained in the recent nationwide persecution of human rights advocates; it also more generally calls upon China to acknowledge and honour both customary international law and all the corollary international obligations arising from its membership in the United Nations and from the international treaties to which China has acceded.

l. I would particularly cite here the case of Gao Zhisheng, China's unchallenged leader among human rights lawyers, and a man who has received a number of very prestigious awards from foreign jurist organizations. He has defended Falun Gong practitioners, Christian Protestants and Catholics, injured and dispossessed workers, labor organizers, peasant organizations, and democracy dissidents against corrupt prosecution by Chinese police and prosecutors.

a) Gao was first warned not to take these cases, of which the CCP disapproved;

i. When he defied the authorities and insisted on performing his ethical responsibilities as a lawyer, he was first disbarred and had his law firm closed by the "Justice" Ministry in 2005, allegedly because he had failed to register a change of address for the firm;

ii. Then, there were several attempts on his life by unknown thugs;

iii. Next he, his wife, and even his daughter were subjected to beatings and harassment on a number of occasions;

iv. In December of 2006, he was convicted "subversion" and other spurious, vague, and transparent charges of undermining social order. He was sentenced to four and a half years in prison, but in the face of significant international protest, the sentence was suspended, though he was placed under house arrest.

v. After writing a particularly strong letter to the US Congress and decrying the support of democratic nations for the 2008 Olympic Games, Gao was abducted by plain clothes thugs in September of 2007 and subjected to 51 days of diabolical torture including, *inter alia*:

1. Severe beatings;

2. Electrical burns to almost the entire skin surface of his body;

3. Application of electrical batons to his genitals;

4. Insertion of toothpicks up his penis;

5. Being urinated upon by his captors

vi. When finally turned loose by his captors (clearly Chinese plain clothes police), he was warned that if he disclosed what had happened to him, they would kill him the next time. As soon as he was sufficiently recovered, he wrote another open letter which has

been published around the world, detailing the horrors to which he had been subjected. He was once more kidnapped and disappeared in February of 2009 and for a long time there was no trace of him, leading to widespread fears that the worst had happened.

- vii. But in March of 2010, Gao was released for a short period, probably simply to prove he was still alive, as accusations had begun to circulate that police had murdered him. Shortly thereafter he was again taken into custody and was only released in August of 2014 after serving four years in a Xinjiang prison. At that time, his lawyer described him as being almost incapable of speech, emotionless, basically unintelligible and missing teeth.
- viii. In September of 2016, Gao exhibited once more the almost incomprehensible courage he has exhibited throughout his career, granting an interview to the BBC, in which he detailed the more recent torture to which he had been subjected during his latest incarceration, and attacking the Chinese Party/State for its repression.
- ix. Subsequently he was placed under house arrest and held in a cave residence in Xinjiang Province, in the far West of China. His current whereabouts and condition are unknown.

154. For the last eighteen years, the Chinese Communist Party has conducted a steadily escalating campaign of terror against the criminal defence and human rights bars in China. But we have never seen anything on the scale of the pogrom pressed relentlessly from July 9, 2015 to the present.

155. The list of detained, tortured, disbarred, and disappeared grows daily. In the course of this country wide movement against almost the entire community of "rights" lawyers, the CCP has not confined its illegal repression to the lawyers themselves. Even paralegals and support staff have been arrested in law firms across the country. Moreover, in many cases even the family members of lawyers have been taken into custody, including children.

156. Attached hereto are two representative pieces selected from the flood of reports on this unprecedented and brutal attack on the legal profession in China.

E. UNTRUTHFUL EVIDENCE

157. By the very nature of the court procedure in China, it is by definition impossible to identify instances of untruthfulness on the part of witnesses in Chinese court proceedings. This is because witnesses in the Chinese criminal system virtually never appear in court and are therefore never subjected to cross-examination.

158. There is consequently no method of independently and objectively assessing witness evidence when reading the Reasons for Judgment of a Chinese Criminal Court.

159. It is important to understand that the fact that witnesses are not subject to cross examination in the Chinese system does not result from cultural differences, or simply consensus in Chinese legal theory that cross examination is not necessary. On the contrary, the Criminal Procedure Law of 2012 unambiguously specifies that every witness in a Chinese criminal trial must give *viva voce* evidence before the court and be cross examined. It further makes clear that no one may be convicted on the basis of witness evidence where the witness has not appeared in court and been cross examined.

160. Article 59 of the Code of Criminal Procedure (“CPL”), formerly Article 47 before the latest revision of the Code, reads as follows: *“The testimony of a witness may be used as a basis in deciding a case only after the witness has been questioned and cross examined in the courtroom by both sides (sic), that is, the public prosecutor and victim as well as the defendant and defenders, and after the testimonies of the witnesses on all sides have been heard and verified.”*

161. Notwithstanding the very clear requirements of Article 59 as cited in the preceding paragraph, the fact is that virtually all Chinese criminal cases are decided on the basis of out of court hearsay evidence in the form of signed statements whose authors are never subjected to cross examination. It is therefore not possible to determine whether the witnesses have been truthful or untruthful, accurate or inaccurate, properly informed or mistaken. This is as true in the case of police officers as it is with any other witnesses.

162. What is clear is that virtually all witness statements in criminal cases are taken by the police and/or prosecutors. The witnesses are usually in custody at the time of interrogation. They are not allowed legal representation at the time of interrogation. The fact that torture and intimidation are used routinely in the course of Chinese criminal investigations has been widely documented by many human rights organizations whose credentials are unimpeachable, and by many legal scholars specialising in Chinese law as well. In fact it is difficult to imagine any knowledgeable China Law specialist questioning the evidence that torture is endemic throughout the Chinese criminal justice system.

- a. The deponents cannot be called as witnesses for the defence, without the court's consent, are almost never called by the prosecution or by the court, and are therefore never subjected to cross examination by the defence. It is important to note not only the obvious difficulty in assessing the worth of such evidence, but also that it is undeniably a flagrant violation of Article 59 of the Chinese Criminal Procedure Law.
- b. I would also cite the evidence of a Chinese prosecutor before a foreign tribunal, wherein the prosecutor acknowledges the provisions of Article 47 (now Article 59) of the CPL and also acknowledges that in the case before the tribunal, the Chinese court had convicted entirely on the basis of out of court statements by witnesses who never appeared for cross examination. His simple explanation was that it was “not necessary in this case”. The greatest fundamental problem with the Chinese legal system is precisely the fact that it is *never* “necessary” for the courts or the police to adhere to the clear requirements of the law.

- c. The Reasons for Judgement in this case analyzed and cited the “testimony” of approximately a half dozen “witnesses”. But the prosecutor confirmed that none of these witnesses had attended the trial. The court noted and accepted the testimony, but failed to note the absence of the witnesses who had provided that testimony.
- d. The prosecutor in the case referenced in sub-paragraphs "t" and "u" *ante*, also admitted that the two accused had been convicted partially on the basis of “confessions” which were repudiated at trial by both accused on the basis that the confessions had been obtained by torture. The Reasons for Judgement contained no reference whatever to the torture claims. The prosecutor admitted under cross examination that the two accused had indeed claimed at trial that they had been tortured, but there is no mention of this in the Reasons for Judgement, and but for the prosecutor’s admissions no one would ever have known.
- e. A reader of the Reasons for Judgement in that case would have no way of knowing:
 - i. That the accused had repudiated their confessions at trial;
 - ii. That the accused had put forward a claim of torture; or
 - iii. That none of the witnesses whose evidence the court had accepted in its entirety had been present in court or otherwise subject to cross examination.

F. HOW IS EVIDENCE GATHERED TO PREPARE WARRANTS FOR ARREST? ARE STATEMENTS BY INFORMANTS VOLUNTARY OR THE RESULT OF POLICE COERCION? HOW RELIABLE ARE CHINESE WARRANTS AS EVIDENCE OF THE FACTS THAT THEY ALLEGE?

163. The system is heavily dependent on confessions, and torture is routinely employed to extract such confessions, both from accused persons and from other persons involved with them, who are detained by police for in custody interrogations.

164. Shanghai prosecutors have openly stated to me that it would be impossible to completely eliminate torture from criminal investigations because in most instances confessions constituted the only evidence investigators could produce against accused persons.

165. In 2002 I also interviewed a Shanghai criminal defence lawyer who had been brutally beaten by police at a Shanghai detention centre after he had become too strident in insisting on his right under the CPL to visit his client. He had been unable to walk for some time after the beating and had sustained broken ribs and a broken cheek bone.

166. Among the many Chinese cases in which Lawyers Rights Watch Canada has been involved, we have seen all too many instances of human rights lawyers and lay advocates detained while in perfect health for interrogation, which often lasts for months, then

permanently confined to wheelchairs upon release. Some die while in police custody; others frequently die within a week or two of their release.

167.The fact is that many detainees never emerge from Chinese detention centres. Some simply disappear. Others are released in permanently crippled condition. Some die as a result of their interrogations. But in all cases, entering a Chinese detention centre is a terrifying experience for anyone. The Chinese *Gong An* (Public Security Bureau) is arguably among the most feared of all the police forces in the world's most notorious "thugocracies".

168.Statements used both in Chinese criminal "trials" and in foreign extradition proceedings are routinely obtained through torture, and also through threats made against the families of the witnesses in case the witnesses are reluctant to make the statements demanded of them.

169.No accused persons in China ever receive a fair trial and virtually all are found guilty. To be accused in China is to be convicted.

G. DETENTION/IMPRISONMENT

170.Detention and arrest are not synonymous. An accused may be detained for months before the decision is taken to arrest him. During that detention period he will be subject to torture and prolonged coercive interrogation, all while deprived of all contact with family, friends, or counsel.

171.Arrest is routinely followed by more torture, prolonged detention without the possibility of contacting family or friends, and the inevitable confession with no access to counsel beforehand, a trial in which all "witness" evidence takes the form of out of court statements obtained by police and read out in court by either police or procurators. Often defence counsel is barred from the courtroom and not infrequently is beaten by police or court officials. Sometimes lawyers are physically attacked by judges in the courtroom.

172.Torture is considered by the most authoritative individual experts and organizations to be almost universal in Chinese criminal investigations and prosecutions and it continues in prisons.

173.China is a signatory to the Convention Against Torture ("CAT") and under CAT is prohibited from ever using torture. Yet it is beyond dispute that the use of torture by the Chinese Party/State is routine in the criminal "justice" system.

174.In the recent past the Committee Against Torture has found "...gross, flagrant and mass violations of human rights in China, involving human rights lawyers, ethnic minorities, and Falun Gong practitioners...."

175.I believe that the persecution of its human rights and criminal defence bars since July 9, 2015, is in terms of scale without precedent in recent world history. The Party/State has in effect claimed that all Rights lawyers and Criminal Defence lawyers in China are now engaged in, and/or have been engaged in criminal activities against the state. So far as I can discover, there is no Rights lawyer or criminal defence lawyer in China who has not, since July 9, 2015, been either disappeared, sentenced to long periods of incarceration, beaten, disbarred, intimidated, had family members detained, or seen their office staff and

paralegals arrested and their offices ransacked by police. In the face of these events, there is an air of total unreality in attempting serious discussion of the possibility for fair trial of any person accused of a criminal offence.

176. The research of David Matas, David Kilgour, and Torsten Trey has long since conclusively established the ongoing medical murders of huge numbers of Falun Gong practitioners who are kept alive in “donor herds” after having blood and tissue types fed into computer databases and who are then killed on demand for their organs when computer matches are made with paying organ purchasers. More recently, Ethan Gutmann has provided evidence that Tibetans, Uighurs (Muslims), and house Christians are also utilized as such organ sources.
177. China’s ongoing forced organ harvesting from involuntary organ “donors” constitutes one of the greatest Crimes Against Humanity that the world has witnessed since the defeat of the Third Reich.
178. The de facto denial of legal counsel to an accused until police and prosecution interrogators have finished with him (and by that time extracted a “confession”) in and of itself makes a fair trial impossible.
179. There are many clearly documented instances of Chinese human rights lawyers and other prisoners of conscience who have died in custody, or been crippled for life, specifically because they were refused medical aid when they desperately needed it. In some cases this involved refusal to treat a chronic pre-existing condition; in other cases the medical care was needed because of beatings inflicted while the prisoner was in custody.
180. The previously mentioned mass murder of Falun Gong practitioners, Tibetans, Uighurs, and underground Christians is in fact carried out by Chinese doctors. It appears that the majority of executions in China today occur at hospitals, rather than the traditional execution grounds. And in the case of prisoners of conscience, they have never gone through any formal judicial process.
181. Many members of the Western medical profession believe that one of the greatest tragedies in China today has been the co-opting of the medical profession in carrying out Crimes Against Humanity.
182. It is perhaps appropriate to note that China is believed to execute more people each year than all other countries of the world combined. The exact number is difficult to pinpoint, because execution statistics are official state secrets. The last estimate I have from a ranking Chinese official was “even fewer than 10,000.” Amnesty International has always reported substantially lower figures, but AI stresses that the real number is almost certainly substantially higher. This is because AI counts only those executions which have been reported in the Chinese media. China only reports executions nowadays when there is a political reason for doing so or when there is a perceived deterrent effect. It is commonly suggested that the number of executions has been significantly reduced in recent years since the Chinese Supreme “Court” began reviewing all death sentences before they could be carried out. But there is absolutely no credible source for this position and as stated above, there are certainly no statistics.
183. All in all, given the excessive, almost casual use of the death penalty, the systemic incidence of torture in the criminal “justice” system, and the hospital killing on demand of

huge numbers for the harvesting of their organs (estimated by Matas, Kilgour, and Gutmann to range from 60,000 to 100,000 per year), it is hardly possible to imagine a more egregious example of "...a consistent pattern of gross, flagrant or mass violations of human rights" than the situation which obtains in China.

184. Referring to capital punishment in China, former New Zealand Prime Minister Clark observed that "...it has been known to have been inflicted on the innocent." In China, the casual and widespread imposition of death sentences, together with the hopelessly flawed nature of the entire "judicial" process ensures that **significant numbers** of innocents must be executed.

H. SPECIFIC TOPICS I HAVE BEEN ASKED TO ADDRESS

185. ***Some witnesses refer to having been sentenced to three years in a labour camp. I am asked whether this would be a "sentence", as that term is generally understood, and if so, who would actually issue the sentence?***

It is a sentence in that it does have the force of law. But the official issuing the sentence is simply an ordinary police officer, issuing a fiat under regulations, rather than statute. Any police office may order any citizen to be incarcerated in a labour camp for a period not to exceed three years. The person affected never appears before any court and is not involved in any judicial proceedings of any kind. He/she is given no opportunity to defend or even to speak to the accusations made against him/her.

The maximum term the police may impose is three years, but for context I would cite the example of Harry Wu, who was originally sentence to a laogai camp for the maximum three year period, but who emerged from that camp only 19 years later.

186. ***What types of detention facilities exist in China and what are the processes leading to detention in each case, with reference to prisons, labour camps, "black jails"?***

- a. The first and most visible form of detention facility is the local jail, which is actually known as a Detention Centre. It also houses the local police station. This is convenient because there is no guards forming a separate class of custodians. Regular police officers serve as guards, supervisors, monitors, and attendants for the prisoners in the Detention Centres. For prisoners investigated, interrogated and charged theoretically under the provisions of the CPL, it is here that all interrogations by police and prosecutors will take place prior to laying of charges and proceeding to "trial". As discussed earlier, this process will always involve coercive measures, normally involving a range of torture methods including extremely prolonged questioning and sleep deprivation at the lower end of the scale. While all the theoretical limitations on treatment of prisoners set out in the CPL are routinely ignored by police and prosecutors, the location of the accused is at least known to family and friends. If a lawyer is retained, he/she can attempt to secure a meeting with the accused. Such requests are typically refused, but at least the police know there are people nearby who care.

- b. Standard prisons exist in which accused persons who have completed the standard process culminating in a trial will serve their sentences. Conditions in Chinese prisons are almost uniformly appalling and imprisonment in China in and of itself usually amounts to “cruel, inhuman and degrading treatment”; Chinese prisons are notoriously grossly overcrowded, shockingly unsanitary, lacking in medical care, and lacking in proper heating during winter. Moreover guards frequently recruit real criminal prisoners to inflict serious beatings on prisoners of conscience, in return for privileges and rewards.
- c. The third type of detention facility is what was called until recently the “Reform through Labour” camps (*Laogai*). Recently the CCP has claimed that these camps have been eliminated, but it appears they have simply been renamed, usually as “Re-education camps. The overwhelming majority of Falun Gong detainees have been interned in such camps which are widely dispersed throughout China.

Finally, references to “black jails” appear to apply to the unknown locations which operate entirely outside the formal “judicial” system. These locations are closely guarded secrets where targets are “disappeared” and interrogations are conducted by CCDI in the case of Party members, but also frequently of non-party members as well. However, non-party members may be interrogated in such locations by Public Security Bureau (“PSB”) officers. Most commonly, the abductors use small remote countryside hotels or guesthouses for these detentions, frequently chaining detainees to beds or other fixtures and taking away their clothing.