

1. All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings. 2. Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their jurisdiction and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status. 3. Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources. 4. Governments and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms. Special attention should be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers. 5. Governments shall ensure that all persons are immediately informed of the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence. 6. Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of their own choice and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services. 7. Governments shall further ensure that all persons arrested or detained, with or without a criminal charge, shall have prompt access to a lawyer, and shall not later than forty-eight hours from the time of arrest or detention. 8. All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials. 9. Governments, professional associations of lawyers and educational institutions shall ensure appropriate education and training and be made aware of the ideals and ethics of the duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law. 10. Governments, professional associations of lawyers and educational institutions shall ensure that there is no discrimination against a person with respect to entry into or continued practice within the legal profession on the grounds of race, colour, sex, ethnic origin, religion, political or other opinion, national or social origin, property, birth, economic or other status, except that a requirement, that a lawyer must be a national of the country concerned, shall not be considered discriminatory. 11. In countries where there exist groups, communities or regions whose needs for legal services are not met, Governments, professional associations of lawyers and educational institutions should take special measures to provide opportunities for candidates from these groups to enter the legal profession and should ensure that they receive training appropriate to the needs of their groups. 12. Lawyers shall at all times maintain the independence and dignity of their profession as essential agents of the administration of justice. 13. The duties of lawyers towards their clients shall include: (a) Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients; (b) Assisting clients in every appropriate way, and taking legal action to protect their interests; (c) Assisting clients before courts, tribunals or administrative authorities, where appropriate. 14. Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession. 15. Lawyers shall always loyally respect the interests of their clients. 16. Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics. 17. Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities. 18. Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions. 19. No court or administrative authority before whom the right to counsel is recognized shall refuse to recognize the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles. 20. Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority. 21. It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time. 22. Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential. 23. Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to participate in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession. 24. Lawyers shall be entitled to form or join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of these professional associations shall be elected by its members and shall exercise its functions without external interference. 25. Professional associations of lawyers shall cooperate with Governments to ensure that everyone has effective and equal access to legal services and that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognized professional standards and ethics. 26. Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national law and custom and recognized international standards and norms. 27. Charges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures. Lawyers shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice. 28. Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review. 29. All disciplinary proceedings shall be determined in accordance with the code of professional conduct and other recognized standards and ethics of the legal profession and in the light of these principles.

LEGAL ADVOCACY AND THE 2011 CRACKDOWN IN CHINA: ADVERSITY, REPRESSION, AND RESILIENCE

NOVEMBER 2011

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Cover Graphic: Excerpts from United Nations Basic Principles on the Role of Lawyers (1990)

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EXECUTIVE SUMMARY

In 2011, an unprecedented number of lawyers, legal advocates and activists in China have been subject to disappearances, arbitrary detentions, physical and mental abuse, intimidation and harassment. This crackdown intensified the pressures on civil society and legal advocacy that have increased steadily in the past several years.

Between February 2011 and time of press, Chinese authorities took documented punitive actions against hundreds of people. The most drastic of these measures was the enforced disappearances of at least 24 individuals, as well as the criminal detention of at least 52 more. Other measures taken range from generalized harassment to threats, forced relocations, pressures on family and friends, beatings, “house imprisonment” and torture. Of those targeted in the 2011 crackdown, some of the harshest measures were applied against a core group of 15 rights lawyers and legal activists, all of whom had previously been targeted by Chinese authorities for taking on cases deemed controversial or sensitive. (See **Graphic 1: Anatomy of a Crackdown**)

This report examines the shrinking space for legal activism and advocacy in China with a specific focus on the escalation in enforced disappearances, secret detentions, and arrests of this community of rights lawyers since February 2011. It analyses how authorities have used both existing law and extra-legal measures as tools to interfere with the practice of law and eliminate a vanguard of lawyers that take on the most politically sensitive cases, including cases of religious freedom, freedom of expression, access to housing, environmental justice, and access to information. This report references the international human rights framework to demonstrate how this crackdown has violated lawyers’ individual human rights, as well as their rights as legal professionals. (See **Appendix I: United Nations Basic Principles on the Role of Lawyers**)

The 2011 crackdown was sweeping in the volume and range of those targeted. Legal scholar and religious freedom advocate Fan Yafeng later called it one of the worst crackdowns on Chinese civil society in 20 years. Yet, the disappearances and detentions of rights lawyers and activists are not new. Uprisings in the Middle East and North Africa were a convenient pretext to crackdown on human rights advocates throughout the country, even though the overwhelming majority of those targeted had no connection to online calls for “Jasmine Rallies.” The official narrative—that harsh measures were taken by Chinese authorities to combat an external threat—obscures the reality that many of those targeted had already faced harassment, intimidation and detention at the hands of Chinese authorities. The events in the spring provided an opportunity to isolate and incapacitate this community; it also served as an effective warning against other groups who might choose to organize.

Moreover, some lawyers and legal advocates have been subject to the comprehensive array of legal and extra-legal methods used to interfere with their professional duties. These individuals included blind, self-taught

lawyer Chen Guangcheng, rights lawyer Gao Zhisheng, and legal scholar and religious advocate Fan Yafeng. Gao's disappearances in 2009 and 2010 (his whereabouts remain unknown), and Fan's disappearance for nine days in December 2010 foreshadowed a dramatic increase in the use of enforced disappearances in China, a serious violation of international human rights law as well as domestic Chinese law. Chen and Fan are held under extra-legal "house imprisonment," another method used with alarming frequency in 2011. Especially troubling is the increased use of "collective responsibility" where family members and friends are also subjected to arbitrary or extra-legal punitive measures. In some cases, family members were forced to stay in their homes, themselves detained for questioning, or physically harmed.

In August 2011, the National People's Congress of the People's Republic of China introduced draft amendments to the Criminal Procedure Law. The proposals fail to bring the criminal justice system into greater conformity with international law requirements. In some cases, the new provisions would allow for more serious violations of individual's rights. (See **Appendix II: Chart of Domestic and International Standards on Access to Counsel and Due Process**) One proposed amendment dramatically increases detention powers to public security organs in certain cases, allowing authorities to hold individuals at undisclosed locations for up to six months without family notification. The draft amendment appears to formalize the way in which individuals were treated this year, enabling incommunicado detentions and even enforced disappearances.

One of the most disturbing consequences of the 2011 crackdown has been its disabling effect on a vanguard of lawyers committed to the public interest, human rights, and rights defense work, many of whom are part of a cohesive public community. This report discusses how the crackdown impacted this community through disruption and isolation, both physical (through forced relocations) (See **Graphic 3: Fragmenting Community through Relocations**) and virtual (by silencing online discussions, including over Twitter) (See **Graphic 2: Lawyers Tweeting the 2011 Crackdown**). By September 2011, many of these lawyers began to re-emerge publicly, but the comprehensiveness of the recent crackdown, coupled with the introduction of the draft CPL amendments (mentioned above) signals a possible systemization of these secretive measures to silence rights lawyers and other activists that could be readily applied in future.

These troubling developments all demand the attention of the international community. Governments, non-governmental organizations, and international organizations should urge China to ensure that all lawyers are able to practice law freely and without fear of reprisals, regardless of the cases they take on. Professional associations, lawyers, and law firms should also speak out on behalf of their colleagues in China whenever actions that impede their ability to practice are carried out. To this end, they should consider adopting principles that express support for the rights of lawyers, such as those adopted by the New York City Bar Association. (See **Appendix III: Association of the Bar of the City of New York, Lawyers' Statement of Principles Regarding China.**)

This report focuses on rights lawyers that play a fundamental role with respect to human rights promotion and protection in China, protecting the rights of other civic actors, vulnerable citizens, and activists. Although the community is a comparatively small part of China's legal profession, in many cases they represent the "only source of legal resistance"ⁱ to the capriciousness of a developing legal system. They themselves frequently become the target of retaliation and abuse, in the form of surveillance, detentions, harassment and administrative punishments that threaten their livelihoods. Targeting these rights lawyers leaves many vulnerable groups with far fewer advocates able to defend their rights, and threatens the Chinese legal profession as a whole.

i Paul Mooney, *Silence of the Dissidents*, July 4, 2011, <http://www.usasialaw.org/?p=5654> (an edited version of this article was published in the SOUTH CHINA MORNING POST on July 4, 2011) (*quoting* Jerome Cohen).

SUMMARY OF RECOMMENDATIONS

A. To the Chinese government:

Based on the findings in this report, the Committee to Support Chinese Lawyers recommends action on the part of the government in three areas: (1) changes to current practice; (2) legal and legislative reforms; (3) review of individual cases.

Specifically, the Chinese government should:

1. Make changes to its current practices through providing access to independent international experts, investigators, and trainers;
2. Undertake legislative and other legal reforms to promote and protect the human rights of its citizens by:
 - (a) Ratifying the International Covenant on Civil and Political Rights, as well as the International Convention for the Protection of All Persons from Enforced Disappearance
 - (b) Bringing domestic laws related to criminal defense and fair trial guarantees into conformity with international standards, through amendments to its laws, including:
 - o Criminal Law
 - Repeal Article 306 and revise articles to increase specificity in legal provisions.
 - o Criminal Procedure Law
 - Amend articles to guarantee individuals' access to counsel.
 - Amend articles to guarantee attorneys' access to relevant evidence.
 - Amend legal provisions to ensure that the due process rights of individuals are guaranteed.
 - o Law on Lawyers
 - Revise the Law on Lawyers to ensure that all criminal suspects have access to counsel in all stages of criminal proceedings.
 - Increase the protections guaranteed to lawyers for the performance of their professional functions.
 - Amend Law on Lawyers to allow lawyers to join independent lawyers associations that representing their professional interests and integrity.
3. Review and investigate individual cases mentioned in this report, and cease the use of extra-legal and illegal measures to target lawyers for carrying out their professional functions.

B. To the international community

The international community, including governments, non-governmental and international organizations, professional organizations, academic institutions, lawyers associations, and individuals, have an important role to play in calling for a strengthening of the rule of law in China.

The international community should:

1. Continue to press Chinese officials in both official and unofficial settings to strengthen protections for an independent legal profession and judiciary;
2. Increase opportunities for legal exchanges and trainings between China and other legal jurisdictions, at bar associations, law firms, and law schools, to provide for further training and understanding of human rights concerns, independent legal standards, and non-criminal professional sanctions;
3. Build relationships and cooperation between independent bar associations outside of China and the All-China Lawyers Association and city lawyers associations, and working to create a stronger independent bar inside China;
4. Speak out on behalf of individual colleagues in China who have been subjected to criminal prosecution, have had their licenses stripped, or have otherwise been punished for carrying out their professional responsibilities through statements, letters, and the media; and
5. Promote the rights of lawyers as a professional group at home and abroad in meetings with other lawyers, businesses, law firms, bar associations, and governments, such as those adopted by the New York City Bar Association (See **Appendix III**).

I. INTRODUCTION

“Don’t talk so much about the law with me. Do you know where we are? We are on Communist Party territory!”

— State security officer to Teng Biao, December 2010¹

On December 9, 2010, Beijing legal scholar and house church leader Fan Yafeng (范亚峰) was detained in Beijing and taken to an unknown location. He was held incommunicado and in secret for nine days during which time he was reportedly tortured.² Meanwhile, Fan’s wife, Wu Lingling (吴玲玲), was brought in for questioning and then returned home and not permitted to leave.³ Fan was returned home on December 18 and was placed under extra-legal “soft detention” or “house imprisonment.” He remains there, under constant surveillance.⁴

Fan’s secret detention, amounting to an enforced disappearance under international law, foreshadowed a dramatic increase in the use of this method and other extra-legal tactics against rights lawyers

and legal advocates in 2011. Fan’s detention may also have predicted some changes to the Criminal Procedure Law (CPL) proposed by the National People’s Congress (NPC) of the People’s Republic of China (PRC) on August 30, 2011.⁵ One of these proposed amendments dramatically increases detention powers for public security organs in cases where endangering state security, terrorism, or major bribery is suspected. In these circumstances, authorities may hold individuals at undisclosed locations for up to six months without family notification,⁶ a proposal that grants wide discretion and may enable incommunicado detentions and enforced disappearances.⁷

The proposed revision raises serious human rights questions and is especially alarming against the

1 Teng Biao, ‘A Hole to Bury You,’ WALL STREET JOURNAL ASIA: Opinion Asia, Dec. 28, 2010, <http://on.wsj.com/s6eBru>.

2 Chinese Human Rights Defenders Network, China Human Rights Briefing Weekly, January 11–18, 2011, <http://bit.ly/rGzj8p>.

3 Chinese Human Rights Defenders Network, *Chinese Government Must End Persecution of Family Members of Activists, Beating of Chen Guangcheng, Yuan Weijing Latest in Series of Abuses*, Feb. 11, 2011, <http://bit.ly/e2n0JA>.

4 Congressional-Executive Commission on China, *Government Interferes with Activities of House Church Networks in Late 2010 and 2011*, July 1, 2011.

5 中华人民共和国刑事诉讼法修正案（草案）[Draft Criminal Procedure Law of the People’s Republic of China] (*hereinafter* Draft CPL), art. 73, issued by the National People’s Congress Aug. 30, 2011, <http://bit.ly/nAGzmd>.

6 *Id.* Provision 30 of the proposed revisions, amending art. 73.

7 Enforced disappearance is defined under international law as the arrest, detention, abduction or any other form of deprivation of liberty of a person either by state agents or with official support, followed by a refusal to acknowledge the detention or by concealment of the fate or whereabouts of the disappeared person. See *infra* note 47 and accompanying text. Many human rights groups and legal experts have expressed their concern about the proposed amendment. See Sophie Beach, *China’s Plan for Secret Detentions Alarms Rights Activists*, CHINA DIGITAL TIMES, Aug. 27, 2011, <http://bit.ly/ogFIct>; Michael Wines, *More Chinese Dissidents Appear to Disappear*, NY TIMES, Sept. 2, 2011, <http://nyti.ms/qNIBaJ> (quoting Joshua Rosenzweig, “It literally gives the police a ticket to free themselves from any form of supervision,” he said. “The criminal law should protect citizens’ rights and restrict the power of the authorities. The new revision does exactly the opposite.”).

backdrop of escalating harassment, detentions, and surveillance targeting lawyers and activists in China in 2011.⁸ Between February 2011 and time of press, Chinese authorities have taken documented punitive actions against hundreds of people,⁹ the most drastic of which was the enforced disappearances of at least 24 people, as well as the criminal detention of at least 52 more; 11 of these have been formally arrested.¹⁰ Of those targeted in the 2011 crackdown, some of the harshest treatment was taken against a core group of 15 rights lawyers and legal activists, all of whom had previously been targeted by Chinese authorities for taking on cases deemed controversial or sensitive.¹¹

The 2011 crackdown exemplifies the range of extra-legal measures that have increasingly been used to disable rights lawyers and activists deemed to be threats (or at least nuisances) to Chinese authorities.¹² The period also marks a dramatic escalation in the use of extra-legal measures: enforced disappearances occurred in multiple cities; lawyers were subject to forced relocations after their return; severe

physical violence, harsh interrogation techniques and “re-education” measures were also reported.¹³

These extra-legal measures are what the Chinese legal scholar Fu Hualing calls “extra-extra law” [法律外外秩序, *falü waiwai zhixu*]¹⁴—informal, politically-centered policies characterized by a total lack of legality.¹⁵ The extra-legal measures are in direct opposition to China’s own written laws and regulations, yet continue to be widely used. The proposed revision to the CPL expanding detention powers would, if adopted, allow law enforcement enormous discretion in the application of the law, particularly in controversial or sensitive cases.¹⁶ This is especially problematic in light of the fact that the criminal justice system “affords no effective ways for lawyers to challenge self-serving, plainly illegitimate police interpretations and misapplications of the law.”¹⁷

Despite some progress in formal legal reform,¹⁷ in recent years, official political discourse has emphasized social stability and harmony [和谐, *hexie*] at the expense of individual rights.¹⁸ Legal scholars note a

8 See *infra* Section II(b).

9 Xiaorong Li, *Congressional-Executive Commission on China Roundtable on ‘Current Conditions for Human Rights Defenders and Lawyers in China, and Implications for U.S. Policy’*, June 23, 2011, <http://bit.ly/j4g7gq>.

10 At press time, these figures were the latest publicly available figures that are gathered by non-governmental and other sources. See China Human Rights Defenders, *Individuals Affected by the Crackdown Following Call for “Jasmine Revolution”*, <http://bit.ly/v0g0ph>, updated October 28, 2011.

11 See *infra* Section II.

12 “Authorities” refers to the range of police and other security actors and organs that have been implicated in using the extra-legal measures examined in this report. See, e.g., Jerome A. Cohen, *Not a pretty picture*, SOUTH CHINA MORNING POST, May 10, 2011, www.scmp.com (“The picture that emerges is one of a Communist Party-led, police-dominated criminal justice system in which prosecutors and especially judges play generally passive and restricted roles.”)

13 See *infra* Section II(c).

14 Fu Hualing, *The Varieties of Law in China*, 12 CHINA RIGHTS FORUM, no. 1–2, 2011, <http://bit.ly/vNP660>.

15 In many of the proposed revisions, there are exceptions for cases where individuals are accused of crimes of endangering state security, terrorism and major crimes of bribery. For example, article 37 states that lawyers must seek permission to meet with clients in cases where crimes of endangering state security, terrorism, and major crimes of bribery are alleged. See Draft CPL, *supra* note 5.

16 Jerome A. Cohen, *Not a pretty picture*, *supra* note 12.

17 For example, the number of crimes for which the death penalty can be imposed was reduced on February 25, 2011, from 68 to 55. This amendment to the PRC Criminal Law by the National People’s Congress Standing Committee was praised in official Chinese media as a step towards the better protection of human rights. See Congressional-Executive Commission on China, *Annual Report 2011* 93 (Oct. 10, 2011), <http://bit.ly/nX3YGn>. Regulations have also been passed in recent years to increase transparency in government. See, e.g., Regulations of the People’s Republic of China on Open Governmental Information, *adopted by State Council* Apr. 5, 2007, effective May 1, 2008.

18 Ki-Man Chan, *Harmonious Society*, INTERNATIONAL ENCYCLOPEDIA OF CIVIL SOCIETY 821–825 (2009).

troubling “retreat” or “turning away from the law,”¹⁹ with this apparent subordination of the rule of law and the legal profession to social stability. The result is approaching two legal systems—one recognized formally in Chinese laws and regulations, and the other driven by political expediency and populist concerns, a “campaign system where all laws are forgotten.”²⁰

This report examines the shrinking space for legal activism and advocacy in China with a specific focus on the increase in enforced disappearances, secret detentions, and arrests of a core group of rights lawyers beginning in February 2011. In the majority of these cases, unlawful seizure led to many other human rights abuses committed against these individuals; although many of these lawyers have been understandably cautious in speaking out about their treatment, others have reported being subjected to torture, cruel and inhumane treatment, and acts of retaliation against family members. The escalated use of these harsh, extra-legal measures amounts to the security apparatus repudiating written laws and regulations—deliberately placing Chinese rights lawyers precariously beyond the protection of the law. Within this context, the report considers the wider role of lawyers in the “socialist rule of law”²¹ system. It examines how authorities use the law as a silencing tool to control criticisms of the government, as in the case of rights lawyers such as Tang Jitian. The report will also consider the politicization of the criminal justice system as a whole, as in the case of Li Zhuang, a lawyer defending an accused Chongqing mob boss.

One of the most disturbing consequences of this year’s events has been their disabling effect on a vanguard of lawyers committed to the public interest, human rights, and rights defense work, many of whom are part of a cohesive public community. This report discusses how the crackdown impacted this community by creating distance, both physical (through forced relocations) and virtual (by silencing online discussions). By September 2011 many of these lawyers began to re-emerge publicly, but the comprehensiveness of the recent crackdown, coupled with the introduction of proposed amendments to the CPL that would make lawful the kinds of actions taken by authorities during this period, signals a possible systemization of these secretive measures against lawyers and activists in future.²²

In examining the crackdown in 2011, this report will use the term “rights lawyers” to refer to the core group of lawyers who have been especially targeted. These lawyers have referred to themselves as public interest lawyers, rights lawyers, “rights defense” [维权, *weiquan*] lawyers, activists, advocates, human rights lawyers, or human rights defenders. They all take on cases that seek to promote and defend fundamental human rights, including the rights to freedom of religion, freedom of expression, access to housing, environmental justice, and access to information. Their willingness to consistently take on these specific cases despite retaliation in the form of surveillance, detentions, and procedural obstacles, sets them apart as a group. Some scholars demonstrate how the experiences of rights lawyers are in contrast to the day-to-day experiences of most Chinese lawyers.²³ Others

19 See, e.g., Carl Minzner, *China’s Turn Against Law*, 59 AM. J. OF COMP. LAW 935 (2011); Jerome A. Cohen and Eva Pils, *The Disappearance of Gao Zhisheng*, WALL STREET JOURNAL ASIA, Opinion Asia, Feb. 9, 2009, <http://on.wsj.com/toyPBc>.

20 Ng Tze-wei, *Concern over mainland rule of law*, SOUTH CHINA MORNING POST, May 9, 2011, available at <http://www.scmp.com> (quoting Jerome Cohen).

21 The socialist concept of rule of law consists of “governance according to law, enforcing the law for the people, equality and justice, and leadership of the CPC (Communist Party of China).” People Daily, *China to launch education of “socialist concept of rule of law”*, Apr. 14, 2006, <http://bit.ly/vMkDtK>. In March 2011, the National People’s Congress proclaimed that a “legal system with Chinese characteristics” (based on China’s national conditions) had been established in China. Li Lin, *Socialist rule of law shaped*, CHINA DAILY, Mar. 11, 2011, <http://bit.ly/sXEhkz>.

22 See *infra* Section II(e)(iii).

23 Sida Liu and Terence Halliday, *Political Liberalism and Political Embeddedness: Understanding Politics in the Work of Chinese Criminal Defense Lawyers* 14–15 forthcoming 2011 LAW & SOC’Y REV.) (“Taken together, these preliminary results suggest that Chinese lawyers’ professional difficulty is negatively associated with political embeddedness, but positively associated with political liberalism”).

argue that the work of these rights lawyers lies on the fringes of the legal community.²⁴ These comments belie the importance of the small number of lawyers willing to represent clients unpopular with the authorities in the face of intense pressure and potential harm. Although the “rights lawyer” community is a comparatively small part of China’s legal community,²⁵ rights lawyers play a fundamental role within the legal system, protecting the rights of other civic

actors, vulnerable citizens, and activists—representing the “only source of legal resistance”²⁶ to the capriciousness of a developing legal system. Targeting these rights lawyers leaves many vulnerable groups with far fewer advocates able to defend their rights. Moreover, attacks on these lawyers for carrying out their professional duties threaten the legal profession as a whole.

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- 24 Calum MacLeod, *Chinese Rights Lawyers Say They’re Persecuted Along with Clients*, USA TODAY, Dec. 10, 2010, <http://usat.ly/tCcDP0> (quoting one professor, Ethan Michelson, as saying that China’s most outspoken rights lawyers “are on the lunatic fringe, almost guaranteed to get arrested or detained”).
- 25 The number of China’s licensed lawyers has reached 200,000, while there are more than 250,000 people practicing law and more than 17,000 registered law firms in China, XINHUA NEWS, *Number of China’s licensed lawyers reaches 200,000*, Oct. 18, 2011, <http://bit.ly/qf2ERG>.
- 26 See, e.g., Paul Mooney, *Silence of the Dissidents*, July 4, 2011, <http://bit.ly/rXRKnD> (an edited version of this article was published in the South China Morning Post on July 4, 2011) (quoting Jerome Cohen as saying “These people are the only source of legal resistance It’s a small group, and if you can disable them, people can’t defend their rights.”).
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II. ANATOMY OF A CRACKDOWN: DISABLING COMMUNITY AND OPPOSITION

The 2011 crackdown was sweeping in the volume and range of those targeted. Yet, the disappearances and detentions of rights lawyers and activists is not a new phenomenon, nor is the use of extra-legal measures.²⁷ Rights lawyers in China face a range of challenges to their work. For example, authorities limit the ability of lawyers to practice their profession through arbitrary application of the law governing lawyers—using mechanisms like suspensions, disbarments,²⁸ and the shuttering of whole firms.²⁹

Extra-legal measures, such as short-term house arrests and physical violence at the hands of thugs, have also been used to prevent lawyers from performing their professional functions.³⁰ Lawyers deemed to

be particularly threatening to authorities have faced extremely repressive measures—Gao Zhisheng has been disappeared multiple times and has been missing since April 2010, while Zheng Enchong and Chen Guangcheng are illegally confined to their homes despite having served their prison sentences.³¹

In a number of cases, prosecutors appear to have detained and convicted lawyers on criminal charges in retaliation for taking on politically sensitive clients.³² That rights lawyers in China continue to practice and take on these cases despite the inherent risks speaks to their commitment to the profession and the rule of law.³³

27 See, e.g., Human Rights Watch, *Walking on Thin Ice: Control, Intimidation and Harassment of Lawyers in China*, 40 (2008), <http://bit.ly/vPreZU>.

28 For example, in 2010, lawyers Liu Wei and Tang Jitian were permanently disbarred after being accused by the Beijing municipal bureau of justice of “disrupting order in court and interfering with proper litigation procedure” while defending a Falun Gong practitioner. See Lucy Hornby, *China disbars two rights defense lawyers*, REUTERS, May 9, 2010, <http://reut.rs/hgZOPb>. Other lawyers consistently face difficulties passing the annual license review. In May 2009, many lawyers faced difficulties getting their law licenses renewed, including Jiang Tianyong. See Leslie Hook, *China’s Lawyers Face a Crackdown*, WALL STREET JOURNAL, May 28, 2009, at A13, available at <http://on.wsj.com/14kXxz>.

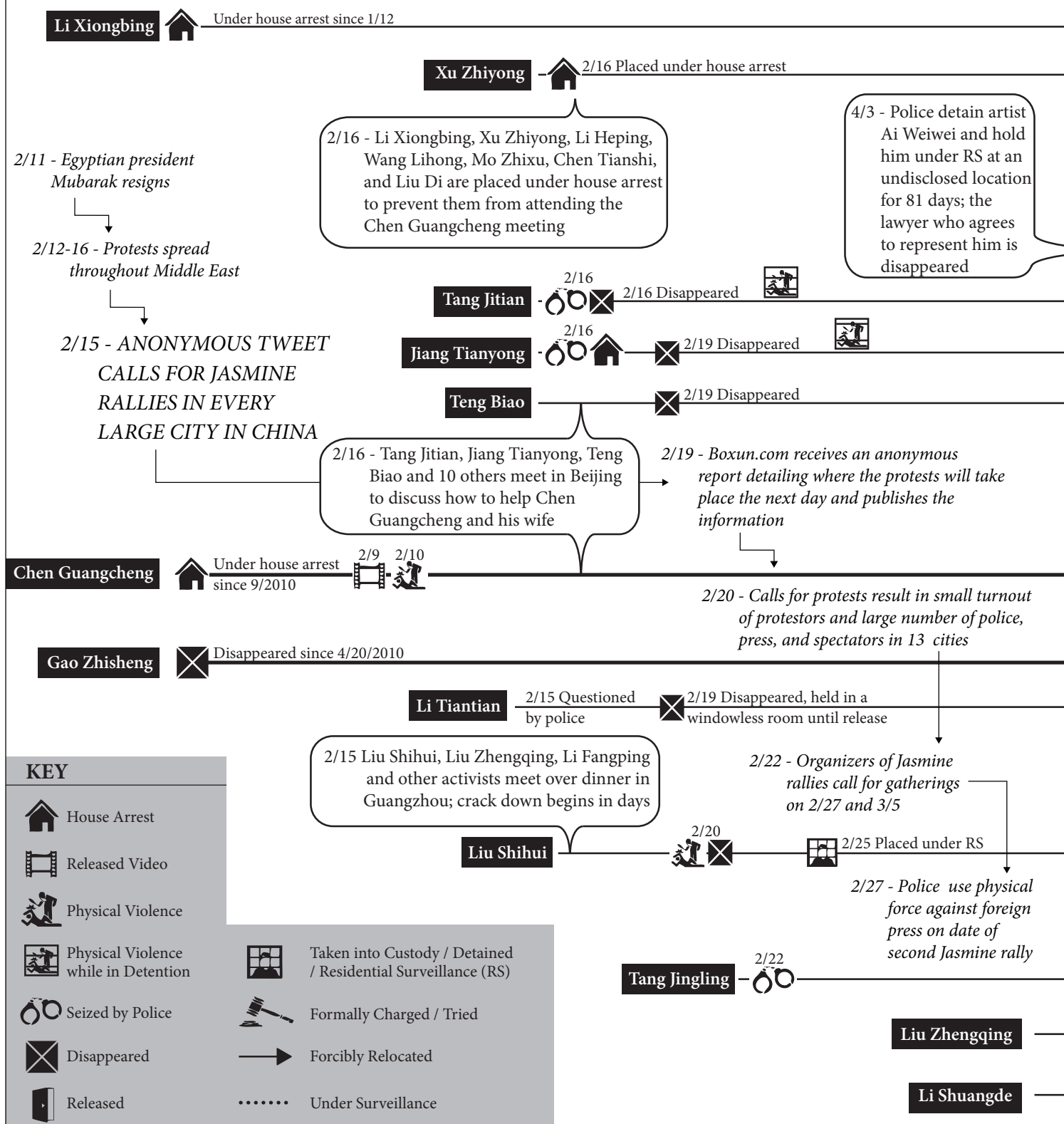
29 For example, administrative measures have been used to prevent law firms and legal organizations from operating—Gao Zhisheng’s Beijing law firm, Shengzhi Law Firm, had its operating license suspended for year in Nov. 2005. See Donna Sawyer, *Shengzhi closed down after making human rights stand*, LAWYER, Nov. 21, 2005, <http://bit.ly/tNGKRp> (noting that the firm’s closure was believed to be linked with the open letter Gao sent to Hu Jintao calling for an end to the persecution of Falun Gong practitioners in China). Open Constitution Initiative (Gongmeng) was shut down in July 2009 after it was accused of tax evasion by the authorities. See ECONOMIST, *China, the law and NGOs: Open Constitution closed*, July, 23, 2009, <http://econ.st/rGoSLD>.

30 Many examples of such incidents exist. For an overview of previous incidents, see Human Rights Watch, *Walking on Thin Ice*, *supra* note 27.

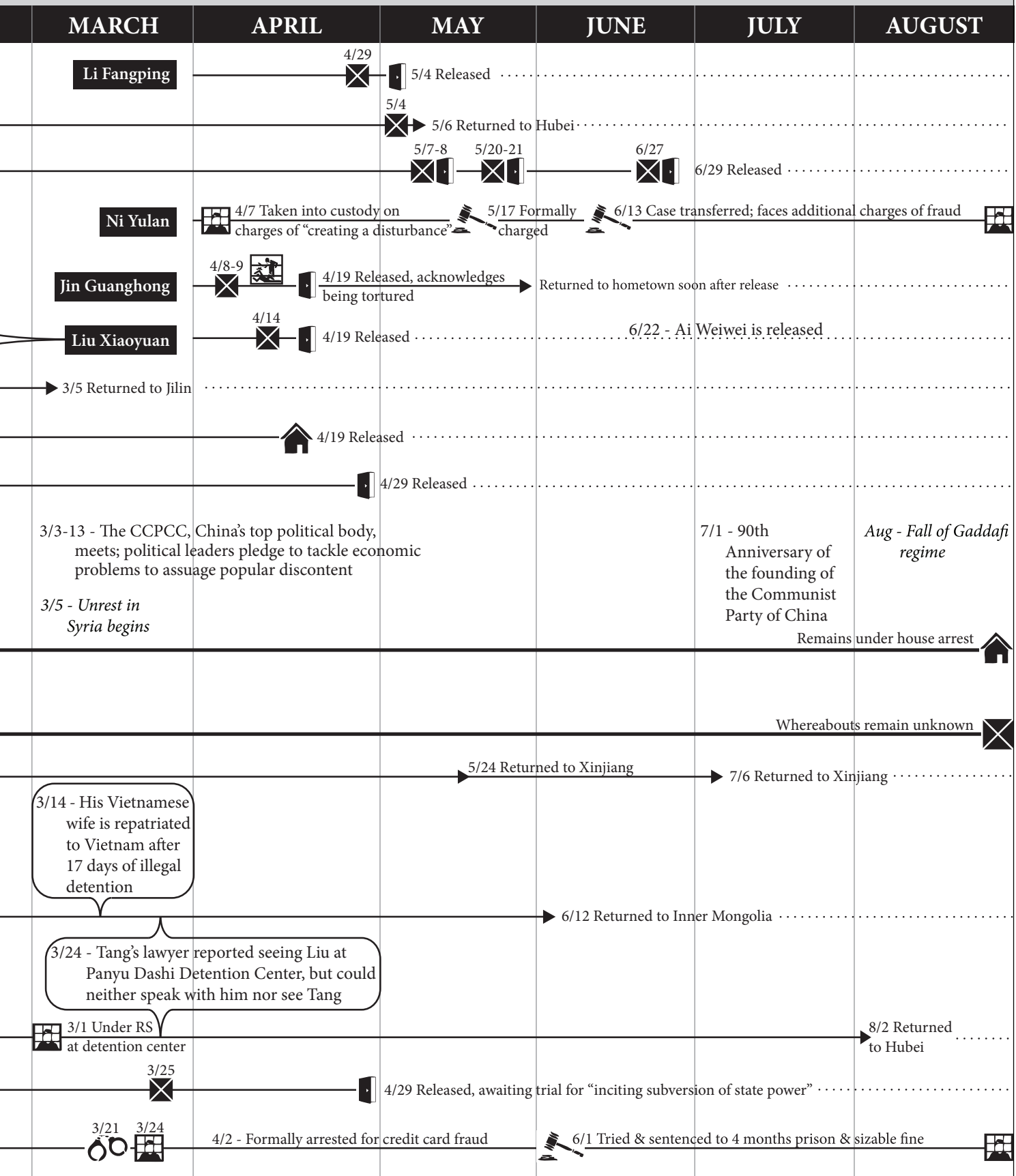
31 Jerome A. Cohen, *The Fate of China’s Rights Lawyers*, US-Asia Law Institute NYU, Dec. 4, 2009 (originally published in *Far Eastern Economic Review* 12.4.2009), <http://bit.ly/tj1fzl>.

ANATOMY OF A CRACKDOWN

FEBRUARY



As popular protests threatened (and toppled) authoritarian regimes in the Middle East, the Chinese government escalated a crackdown on rights lawyers and activists. These lawyers had previously faced harassment, intimidation and persecution by Chinese authorities in retaliation for the legal advocacy on behalf of clients unpopular with the government.



Authorities frequently identify events, or anniversaries of politically sensitive events, as potential triggers for dissent,³⁴ and typically heighten surveillance and institute restrictive measures against specific individual activists and lawyers in the periods surrounding those dates.³⁵ In 2011, protests and uprisings in the Middle East and North Africa may have been used as a pretext to crack down on rights lawyers and other activists.³⁶

a. Pretext for a Crackdown: Overview of Events

On February 12, 2011, the day after Hosni Mubarak resigned as President of Egypt, members of the Politburo met in Beijing to discuss the extraordinary uprisings in North Africa and the Middle East and how to adjust foreign policy to squelch any rumblings of similar dissent in China.³⁷ A call for “Jasmine” rallies

in China was put out online that week and spread via Twitter and microblogs,³⁸ leading to small, dispersed actions across a number of cities on February 20.³⁹ While online calls for subsequent “Jasmine” rallies persisted, their impact was far less than the organizers hoped—international media reports indicated that domestic security forces deployed to stop the rallies far outweighed those seeking to attend.⁴⁰

Chinese authorities used the Arab Spring as a pretext to unleash what Fan Yafeng later called one of the worst crackdowns on Chinese civil society in 20 years,⁴¹ even though the overwhelming majority of individuals targeted in the crackdown had no connection to Jasmine-related activities. The official narrative that China was being threatened by external forces obscures the reality that lawyers and activists were already being harassed, intimidated and detained; the events in the spring provided an op-

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- 32 For example, advocates allege that lawyer Zheng Enchong was targeted and ultimately criminally charged with “illegally providing state secrets outside of the country,” because of his efforts to assist a community that was displaced by real estate developer Zhou Zhengyi, who had close ties to senior officials in the central government. *See, e.g., HUMAN RIGHTS IN CHINA, STATE SECRETS: CHINA’S LEGAL LABYRINTH* 28 (2007). Zheng continues to face harassment, despite the fact that he has completed his sentence. *See China Human Rights Lawyers Concern Group, Strongly Condemn Shanghai Public Security Officers’ Unlawful Violent Detention of Lawyer Zheng Enchong*, June 22, 2009, <http://bit.ly/utsMgM>; International Bar Ass’n’s Human Rights Institute, *China: Treatment of Mr. Zheng Enchong*, Apr. 27, 2009, <http://bit.ly/uTxlrl>. *See also* case of Ni Yulan, *available at* Alice Xin Liu, *Rights Lawyer Ni Yulan – from prison to a Beijing Park*, DANWEI, July 7, 2010, <http://bit.ly/92P8WM>.
- 33 Human Rights Watch, *Walking on Thin Ice*, *supra* note 27 at 40 (“... these lawyers are also adamant that these cases were emblematic of the prevalent problems that lawyers and legal advocates face in their work: physical danger, surveillance and intimidation by state security personnel, refusal by law enforcement agencies to protect lawyers or entertain complaints, impunity for the attackers, and media censorship surrounding the cases”).
- 34 These sensitive events have included the annual anniversary of the June 1989 Tiananmen crackdown, visits of foreign dignitaries, National Day (October 10), and the lead-up to and duration of the Olympic Games in 2008. *See, e.g., Amnesty International, The Olympics countdown – crackdown on activists threatens Olympics legacy*, 1, 2008, <http://bit.ly/vkPP4q>. *See also* Zan Aizong, *The Chinese Communist Party Prepares for the 60th Anniversary Celebration: Nervous as an Army Going to Battle*, *China Rights Forum* No. 3 (2009), <http://bit.ly/v5QFWT>.
- 35 *See, e.g., Ariana Eunjung Cha and K.C. Ng, Tiananmen Anniversary Muted in Mainland China*, WASHINGTON POST, June 5, 2009, <http://wapo.st/vRhCfQ>.
- 36 *See infra* Section II(a).
- 37 Perry Link, *The Secret Politburo Meeting Behind China’s New Democracy Crackdown*, NEW YORK REVIEW OF BOOKS, Feb. 20, 2011, <http://bit.ly/ihARxw>.
- 38 *Id.*; Anita Chang (AP), *China Tries to Stamp out ‘Jasmine Revolution’*, WASHINGTON TIMES, Feb. 20, 2011, <http://m.washingtontimes.com/news/2011/feb/20/china-tries-stamp-out-jasmine-revolution>.
- 39 *A Report On Jasmine Revolution in China*, BOXUN NEWS, Feb. 21, 2011, http://www.boxun.us/news/publish/chinanews/A_report_on_Jasmine_Revolution_in_China.shtml; Geoff Dyer and Kathrin Hille, *Chinese Steer Clear of Jasmine Revolution*, FINANCIAL TIMES, Feb. 20, 2011, <http://on.ft.com/e5WExO>.
- 40 *See* Andrew Jacobs, *Chinese Government Responds to Call for Protests*, NY TIMES, Feb. 20, 2011, <http://nyti.ms/dXUfZb>; Chris Hogg, *China’s Security Tsar Warns over ‘Jasmine Revolution’*, BBC NEWS, Feb. 21, 2011, <http://bbc.in/vYP6gR>.
- 41 Ananth Krishnan, *Measured Response Greeted Ai Weiwei Release*, HINDU, June 24, 2011, <http://bit.ly/kqFfaH>.
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portunity to isolate and incapacitate this small community. Graphic 1, *Anatomy of a Crackdown* (above pages 6-7), strikingly portrays the intensification of this clampdown on rights lawyers.

Two meetings of lawyers and activists in mid-February reveal how interwoven the fate of the small group of lawyers practicing human rights and defense work in China has become. The official response to these two meetings also anticipated a crackdown marked by the escalated use of severe extra-legal measures in the following weeks and months.

On February 16, 2011, a group of activists and lawyers gathered over lunch to strategize about how to come to the aid of Chen Guangcheng (陈光诚), a blind, self-taught legal activist facing an extraordinary level of government abuse. A week earlier, on February 9, Chen and his wife Yuan Weijing (袁伟静) publicly released a series of videos describing the 24-hour surveillance and house imprisonment he and his family had been subjected to since his release from prison on September 9, 2010.⁴² There was absolutely no legal basis for these measures or the ongoing deprivation of liberty of Chen and his family. The following day, Chen and his wife were beaten in their home in retribution for releasing the videos online.⁴³ (For more details on Chen's case, see Box B.)

Authorities barred seven individuals from leaving their homes to attend the February 16 meeting,⁴⁴

including Li Xiongbing (黎雄兵), Li Heping (李和平), and Xu Zhiyong (许志永), three lawyers whom authorities would proceed to illegally detain at various times in the following months. Another person prevented from attending the meeting, Internet activist and rights defender Wang Lihong (王荔虹), was detained sometime before March 26 and has since been convicted for "assembling a crowd to disturb social order" and sentenced to nine months imprisonment.⁴⁵ The February 16 meeting mirrored other gatherings held during the period of Chen's pre-trial detention in 2006, making Chen's case notable because it inspired lawyers, human rights defenders, and activists to coalesce as a community in his support.⁴⁶

Enforced disappearance is defined under international law as the arrest, detention, abduction or any other form of deprivation of liberty of a person either by state agents or with official support, followed by a refusal to acknowledge the detention or by concealment of the fate or whereabouts of the disappeared person.⁴⁷ Chinese authorities proceeded to employ this illegal measure against many of the lawyers who managed to attend the meeting. Police seized lawyers Jiang Tianyong (江天勇) and Tang Jitian (唐吉田) that afternoon. Tang was disappeared for three weeks, while Jiang was interrogated and beaten before being released in the evening, only to be disappeared for 2 months from February 19 to April 19. Beijing-based rights lawyer and university lecturer

42 Tania Branigan, *Fears Chinese lawyer beaten over house arrest video*, GUARDIAN (UK), Feb. 10, 2011, <http://bit.ly/hugK8z> (describing the conditions under which Chen and his wife are living, noting that they are not allowed to leave the house, friends and family have been threatened for trying to help, and communication with the outside world has been cut off by cutting their phone line and installing jamming equipment to ensure that there is no mobile phone signal).

43 *China activist Chen Guangcheng 'beaten'*, BBC, Feb. 11, 2011, <http://bbc.in/iaSX2u>.

44 Human Rights in China, *Lawyers Beaten, Detained after Meeting Regarding Chen Guangcheng*, Feb. 16, 2011, <http://bit.ly/uZvyhB>.

45 Chinese Human Rights Defenders, *Chinese Court Sends to Jail Activist and '2011 Crackdown' Detainee Wang Lihong*, Sept. 12, 2011, <http://bit.ly/sghSxs>.

46 Jennifer Chou, *Out for Justice: Chinese lawyers are opening a new front in the nation's struggle for human rights*, WEEKLY STANDARD, Aug. 24, 2006, <http://bit.ly/rq47uh>.

47 Convention for the Protection of All Persons from Enforced Disappearance, art. 2, G.A. Res. A/61/177, entered into force Dec. 23, 2006.

48 Brian Spegele, *China Releases Rights Activist Teng Biao*, WALL STREET JOURNAL, May 1, 2011, <http://on.wsj.com/iwIOdS>. In his last Twitter post on February 18, Teng states that he was stopped by police and asked to show his identity card after visiting Ni Yulan, a legal activist under criminal detention. The police officers pulled at his clothes and said they suspected his clothes were stolen, and that made him a criminal suspect. Twitter Post of Teng Biao, Feb. 18, 2011, <http://bit.ly/vPvbWq>.

Teng Biao (滕彪) was disappeared for 69 days between February 19 and April 29.⁴⁸

Just a day before the February 16 meeting about Chen, another group of individuals had met over dinner in Guangzhou—and within days authorities initiated another cascading series of detentions and enforced disappearances. The Guangzhou-based lawyer Liu Shihui (刘士辉) was disappeared on February 20, reportedly after being severely beaten on his way to the site of a Jasmine Rally action at People's Park.⁴⁹ Liu was reportedly released on June 12 and then forcibly returned to his hometown in Inner Mongolia in poor physical condition.⁵⁰ (For more on a pattern of forced relocations, see Section III(a) and Map 1.) Liu Zhengqing (刘正清), a Guangzhou-based rights lawyer, was also disappeared for a month before being released on bail on April 29 to await trial on suspicion of “inciting subversion of state power” [煽动颠覆国家政权罪, *shandongdianfu guojiazhenquanzui*].⁵¹ Before his disappearance, state security officials investigating the dinner issued Liu a criminal summons. Beijing-based lawyer Li Fangping (李方平), who also attended the February 15 Guangzhou meeting, was disappeared by Beijing authorities for a week

between April 29 and May 4.⁵² Authorities detained Sun Desheng (孙德胜), a young Guangzhou rights defender, on suspicion of inciting subversion of state power by writing anti-corruption slogans and taking photos during the dinner.⁵³

Measures such as enforced disappearance and torture lie squarely outside any legal framework or constraints, and can therefore be tailored to maximize intimidation in any individual case.⁵⁴ By placing the community of rights lawyers completely beyond any protection of the law, Chinese authorities appear to have calibrated their tactics to overwhelm this group's ability to withstand them. This is especially troubling considering that these individuals are engaged in strengthening legal protections and shouldering great professional and personal risk in a weak and arbitrary legal system.⁵⁵

The following sections will review the extra-legal measures taken against lawyers during the 2011 crackdown (including enforced disappearances, excessive residential surveillance, and the imposition of collective responsibility to extend punishment to their families), as well as criminal charges levied against lawyers during that period.

49 失踪数月广东维权律师唐荆陵或被判刑 [*Missing Guangdong Lawyer Tang Jingling Might Be Sentenced To Prison*], EPOCH TIMES, <http://bit.ly/reDORA> (in Chinese) (describing events surrounding Liu Shihui's beating and disappearance).

50 刘仕辉获释王宇出狱 [*Liu Shihui Released, Wangyu Leaves Prison*], RADIO FREE ASIA, June 16, 2011, <http://bit.ly/vDIYJX> (in Chinese).

51 China Human Rights Defenders, *Individuals Affected by the Crackdown Following Call for "Jasmine Revolution"*, *supra* note 10.

52 *See id.*

53 China Human Rights Defenders, *China Human Rights Briefing*, July 20-26, 2011, <http://bit.ly/rvZHLw>. Sun was reportedly released on bail around July 10, 2011. His criminal detention reportedly stemmed from pro-democracy posters that he had made; these posters were left at the home of Tang Jingling, the possession of which resulted in Tang's own detention on subversion charges. Sun was reportedly sent back to Zhejiang, where he was born. *Id.*

54 Fu Hualing, *The Varieties of Law in China*, *supra* note 14.

55 *See*, Mooney, *Silence of the Dissidents*, *supra* note 26.

56 Charles Hutzler, *Missing Chinese lawyer told of abuse*, Associated Press, Jan. 10, 2011, <http://abcn.ws/eKNgdp>.

57 Geng He (Op-Ed Contributor), *The Dissident's Wife*, NY Times, Mar. 27, 2011, at A27, available at <http://nyti.ms/fbKvD8>.

58 Joseph Kahn, *Legal Gadget Bites Hard, and Beijing Slaps Him*, NY Times, Dec. 13, 2005, <http://nyti.ms/vvAZJ9>.

59 *Id.* In its written notice regarding the suspension of the operation of Gao's law firm, the Beijing Judicial Bureau had stated that Gao's law firm had moved offices and failed to promptly register the new address thus committing a “serious violation of the Law on Managing the Registration of Law Firms.” Joseph Kahn, *Legal Gadget Bites Hard, and Beijing Slaps Him*, NY Times, Dec. 13, 2005, <http://nyti.ms/vvAZJ9>.

60 *See* Committee to Support Chinese Lawyers, *Gao Zhisheng Case Summary*, Mar. 28, 2011, <http://bit.ly/s4Hl7O>.

BOX A: THE EXPERIENCE OF GAO ZHISHENG

*“You going to prison, that’s a dream. You’re not good enough for that.
Whenever we want you to disappear, you will disappear.”*

— Police to Gao Zhisheng during his enforced disappearance
between February 2009 and March 2010⁵⁶

Prior to the 2011 Crackdown, Gao Zhisheng (高智晟) was subjected to the full spectrum of legal and extra-legal abuses perpetrated to dismantle an individual’s work and life. Gao Zhisheng’s case encompasses the most abusive treatments meted out by Chinese authorities to any defense lawyer, ranging from professional sanctions—including personal disbarment and the closure of the firm he founded—to torture and disappearance.

Once heralded as one of the ten best lawyers in China by the Ministry of Justice,⁵⁷ in 2005 Gao began to receive threats aimed at himself and his family, including his 12-year-old daughter.⁵⁸ By the end of 2005, Gao’s law firm was ordered by the Beijing Judicial Bureau to cease operations for a year, and his personal law license was suspended.⁵⁹ In 2006, the authorities escalated their tactics, which grew to include surveillance, detention, and beatings.⁶⁰ On August 15, Gao disappeared during a family visit in Shandong Province; authorities formally arrested him on Sept. 21.⁶¹ He was in custody for over four months, during which police harassed his family, threatened them with retaliation if they spoke to the press, and attempted to kidnap his children.⁶² On December 22, 2006, the Beijing Number One Intermediate People’s Court sentenced Gao to three years for inciting subversion,⁶³ with a five year reprieve and an additional year of deprivation of political rights.⁶⁴

Over the following year, though under house imprisonment and heavy surveillance, Gao remained politically outspoken: in April of 2007 he publicly described the torture he suffered while in custody,⁶⁵ and on September 13, he published an open letter to the U.S. Congress drawing attention to the deteriorating human rights situation in China.⁶⁶ On September 22, 2007, Gao was disappeared for two months, during which he was subjected to severe beatings that included electric shocks to his genitals, and lit cigarettes held to his eyes.⁶⁷ After his release, Gao returned to live with his family under constant police surveillance. In early February 2009, Gao’s wife, Geng He, and his two children fled China, and sought asylum in the United States.⁶⁸ On February 4, 2009, Shaanxi public security officers once again took Mr. Gao into secret, incommunicado detention under the guise of residential surveillance.⁶⁹

Gao was disappeared for over a year, resurfacing on March 18, 2010. He reported that during the previous 14 months, he had been brutally tortured while being continually shuffled between hostels, farmhouses, apartments, and prisons in Beijing, Shaanxi, and Xinjiang.⁷⁰ Gao told reporters that he would no longer undertake human rights activism. He spent April 15, 2010, with his father-in-law in Urumqi, in the Xinjiang Uyghur Autonomous Region; after leaving for a flight back to Beijing on April 20, he once again vanished.⁷¹

His current status and whereabouts remain unknown.

- 61 Joseph Kahn, *China Charges a Lawyer With Inciting Subversion*, NY Times, Oct. 16, 2006, <http://nyti.ms/uSM25T>.
- 62 See Committee to Support Chinese Lawyers, *Gao Zhisheng Case Summary*, *supra* note 60.
- 63 中国外交部长表示高智晟被判刑 [*Chinese Foreign Minister said that Gao Zhisheng was sentenced*], New Century News, Mar. 17, 2010, <http://bit.ly/rsBOMG> (IN CHINESE).
- 64 Joseph Kahn, *China Gives Rights Lawyer Light Sentence*, NY Times, Dec. 23, 2006, <http://nyti.ms/uLJLQV> (noting that a five-year reprieve means that Gao did “not have to serve his sentence in prison as long as he [did] not commit another crime in the next five years,” and an additional year of deprivation of political rights is “often interpreted to include the freedom to publish or speak out on sensitive topics, for one year. It also places him under heavy scrutiny for another four years. . . . [I]t is designed so that he will not be able to express himself in public”).
- 65 RFA Video, *Video Interview: Gao Zhisheng was kidnapped in 2006 and Tortured in Prison*, May 17, 2009, available at <http://bit.ly/sHu147>.
- 66 *Gao Zhisheng's Open Letter to the United States Congress*, Epoch Times, Sept. 27, 2007, <http://bit.ly/tPS7gt>; Jerome A. Cohen and Eva Pils, *supra* note 19.
- 67 Gao Zhisheng, *Dark Night, Dark Hood and Kidnapping by Dark Mafia (My account of more than 50 days of torture in 2007)*, Human Rights in China, <http://bit.ly/tzqfCK>. Human Rights In China translated Gao's account of his experience, written on November 28, 2007, and was authorized to release the account and its translation to the international community on Feb. 9, 2009, after he disappeared.
- 68 Geng He, *supra* note 57.
- 69 Hao Xiang, 维权律师高智晟已失踪120多天 [*Lawyer Gao Zhisheng missing for over 120 days*], VOICE OF AMERICA NEWS, June 13, 2009, <http://bit.ly/vg74D2> (in Chinese).
- 70 Charles Hutzler, *Missing Chinese lawyer told of abuse*, *supra* note 56; Tania Branigan, *Missing Chinese Human Rights Lawyer Describes Being Tortured by Police*, GUARDIAN, Jan. 20, 2011, <http://bit.ly/gRVfRC>.
- 71 Michael Wines, *Chinese Rights Lawyer Disappears Again*, NY TIMES, May 1, 2010, <http://nyti.ms/9RYQPb>.
- 72 Li Tiantian Twitter Post, June 5, 2011, <http://bit.ly/rXgBjY>.
- 73 See, e.g., China Human Rights Lawyers Concern Group, *List of Chinese Human Rights Lawyers being disappeared, imprisoned, criminally detained, and under house arrest*, Aug. 8, 2011, <http://bit.ly/rsABGh> (describing a range of cases where individuals were detained during the crackdown, including without detention notices within the legally prescribed time period, or others disappearing with no information for weeks).
- 74 See, e.g., Working Group on Arbitrary Detention, Report of the Working Group on Arbitrary Detention, Addendum, Mission to China, Comm'n on Human Rights, ¶¶ 73–76, U.N. Doc. E/CN.4/2005/6/Add.4 (Dec. 29, 2004) (providing an overview of the inconsistencies between the domestic and international standards relating to detention); Human Rights in China, STATE SECRETS: CHINA'S LEGAL LABYRINTH, *supra* note 31 at 27 (describing the way in which Chinese legal procedures under the state secrets framework denies the right to counsel).
- 75 *Id.* at ¶¶ 23, 73.
- 76 *Id.* at ¶¶ 28–32, 74.
- 77 *Id.* at ¶¶ 33–34, 74.
- 78 *Id.* at ¶¶ 35–38.
- 79 *Id.* at ¶¶ 39–42, 75.
- 80 See, e.g., Joseph Kahn, *supra* note 61; Mooney, *Silence of the Dissidents*, *supra* note 26.
- 81 See, e.g., Working Group on Arbitrary Detention, Opinion No. 26/2010 (People's Republic of China) Concerning Zhisheng Gao ¶¶ 18–19 (Nov. 19, 2010). The Working Group determined that human rights lawyer Gao Zhisheng is in detention arbitrarily because he has not benefited from fair trial standards and because he is in detention as a result of exercising freedoms guaranteed under the UDHR. *Id.*
- 82 UN General Assembly, Universal Declaration of Human Rights (*hereinafter* UDHR), 217 A (III), art. 9, adopted Dec. 10, 1948. See International Covenant on Civil and Political Rights (*hereinafter* ICCPR), 999 U.N.T.S. 171, art. 9, adopted Dec. 16, 1966, entered into force Mar. 23, 1976; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (*hereinafter* Body of Principles), Principles 2, 4, G.A. Res. U.N. Doc. A/RES/43/173, adopted Dec. 9, 1988.
- 83 Human Rights Council, *Report of the Working Group on Arbitrary Detention (hereinafter 16th Session WGAD Report)*, U.N. Doc. A/HRC/16/47 (Jan. 19, 2011), Annex, Revised methods of work of the Working Group (*hereinafter* WGAD Report Annex on Revised Methods of Work), ¶ 8. The Working Group, which is mandated by the Human Rights Council to investigate cases where liberty has been deprived arbitrarily, has established five distinct legal categories. These are (a) where it is “clearly impossible to invoke any legal basis justifying the deprivation of liberty” (Category I); (b) where “deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21” of the UDHR and for states parties to the ICCPR, by articles 12, 18, 19, 21, 22, 26, 26 and 27 of that document (Category II); (c)

b. Illegal Detentions and Enforced Disappearances: A Place Beyond the Law

“The law is not a shield.”

– State security officer to Li Tiantian during her enforced disappearance⁷²

One of the most alarming aspects of the 2011 crack-down in China was the detention (open or secret) of hundreds of individuals.⁷³ Of greatest concern was the dramatic increase of detentions where family members and friends were unable to find out any information about whether an individual was in detention, why, and where, in some cases amounting to an enforced disappearance.

China has been repeatedly criticized by international legal bodies as well as non-governmental organizations (NGOs) for having a range of laws and practices concerning deprivation of liberty that violate international standards.⁷⁴ The inconsistencies between domestic Chinese and international standards include overbroad terms in the PRC Criminal Law that allow for criminal detention and charges without exemptions from criminal responsibility for those who are peacefully exercising their human rights;⁷⁵ rules that allow for lengthy periods of detention without judicial approval;⁷⁶ legal provisions placing the prosecution in a superior position to the courts;⁷⁷ restrictions on the right to defense;⁷⁸ and

the lack of a genuine right to challenge administrative detention,⁷⁹ among others. Moreover, in practice, Chinese authorities have been found to detain individuals whose cases or causes are unpopular with authorities,⁸⁰ but who are exercising rights guaranteed under international law.⁸¹

International law prohibits any deprivation of liberty (including detention and arrest) which is arbitrary.⁸² This includes detentions that result from the exercise of specific freedoms guaranteed under the Universal Declaration of Human Rights, where fair trial standards are not observed, and where the deprivation of liberty results from discrimination.⁸³ In other words, detentions that are not carried out strictly in accordance with domestic and international legal provisions,⁸⁴ or that are carried out as a means to silence the individual concerned,⁸⁵ have an arbitrary or unlawful nature. Enforced disappearances, themselves arbitrary, are specifically defined as the “arrest, detention, abduction or any other form of deprivation of liberty” by authorities or forces acting at the behest of the State, “followed by a refusal to acknowledge

where “the total or partial non-observance of the international norms relating to the right to a fair trial . . . is of such gravity as to give the deprivation of liberty an arbitrary character” (Category III); (d) where “asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy” (Category IV); and where “the deprivation of liberty constitutes a violation of the international law for reasons of discrimination . . .” (Category V). *Id.*

84 See Body of Principles, *supra* note 82 at Principle 2.

85 WGAD Report Annex on Revised Methods of Work, *supra* note 83 at ¶ 8.

86 International Convention for the Protection of All Persons from Enforced Disappearance, *supra* note 47 at art. 2. Almost twenty years earlier, the UN General Assembly adopted the Declaration on the Protection of all Persons from Enforced Disappearance, which expressed deep concern that

“in many countries, . . . enforced disappearances occur, in the sense that persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law.”

U.N. General Assembly, Declaration on the Protection of all Persons from Enforced Disappearance, art. 1, U.N. Doc. A/RES/47/133 (Dec. 18, 1992), <http://bit.ly/vRJazx>. Enforced Disappearances have also been recognized as a Crime Against

the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person.”⁸⁶ Detentions of any duration can amount to an enforced disappearance.⁸⁷

During the 2011 crackdown, many activists and human rights defenders, including lawyers, were detained without the procedures laid out under domestic law.⁸⁸ Eleven of the 24 individuals known to have been disappeared since February 2011 are prominent rights lawyers.⁸⁹ Of these lawyers, seven were subject to enforced disappearance for over a week, and several for much longer periods of time: Liu Shihui was confirmed as missing for nearly four months, after which he was sent to Inner Mongolia;⁹⁰ Teng Biao was missing for 69 days; and Jiang Tianyong was disappeared for two months between February 19 and April 19, 2011.⁹¹

The act of enforced disappearance itself violates a range of fundamental human rights, including the right to recognition as a person before the law, the right to information and truth, liberty and security of person, minimum trial guarantees, and right to review of conviction.⁹² It has been called the “ultimate silencing tactic,” because a disappeared person is aware she or he has been placed outside the protection of the law,⁹³ and is therefore at far greater risk of torture and other forms of cruel, inhuman, and degrading treatment and punishment.⁹⁴ Jiang later told reporters that as he went “from expecting to be released after 24 hours, then three days, seven days and 37 days—all legal time limits for different stages of processing a criminal—[he] slowly lost hope.”⁹⁵

Some individuals were disappeared and released consecutively, suggesting that their disappearances

Humanity, when carried out as part of a widespread or systematic attack. Working Group on Enforced or Involuntary Disappearances, *General Comment on Enforced Disappearances as a Crime Against Humanity*, ¶ 1, reprinted in Human Rights Council, *Report of the Working Group on Enforced or Involuntary Disappearances*, at U.N. Doc. A/HRC/13/31 (Dec. 21, 2009).

87 Working Group on Enforced or Involuntary Disappearances, *General Comment on the Definition of Enforced Disappearance*, ¶ 8, reprinted in Human Rights Council, *Report of the Working Group on Enforced or Involuntary Disappearances*, at U.N. Doc. A/HRC/7/2 (Jan. 10, 2008), <http://bit.ly/uzN9OX>.

88 See, e.g., China Human Rights Lawyers Concern Group (CHRLCG), *List of Chinese Human Rights Lawyers being disappeared, imprisoned, criminally detained, and under house arrest*, Aug. 8, 2011, <http://bit.ly/rsABGh> (describing a range of cases where individuals were detained during the crackdown, including without detention notices within the legally prescribed time period, or others disappearing with no information for weeks).

89 China Human Rights Defenders, *Individuals Affected by the Crackdown Following Call for “Jasmine Revolution”*, *supra* note 10.

90 China Human Rights Lawyers Concern Group, *List of Chinese Human Rights Lawyers being disappeared, imprisoned, criminally detained, and under house arrest*, *supra* note 88.

91 For a more detailed description of these cases, see Amnesty International, *Against the Law: Crackdown on China’s Human Rights Lawyers Deepens* 25, June 30, 2011, <http://bit.ly/mIXZtC>.

92 See Working Group on Enforced or Involuntary Disappearances, *General Comment on Enforced Disappearance as a Continuous Crime*, ¶ 2, reprinted in Human Rights Council, *Report of the Working Group on Enforced or Involuntary Disappearances*, at U.N. Doc. A/HRC/16/48 (Jan. 26, 2011); Working Group on Enforced or Involuntary Disappearances, *General Comment on the Right to the Truth in Relation to Enforced Disappearances*, ¶ 2, reprinted in Human Rights Council, *Report of the Working Group on Enforced or Involuntary Disappearances*, at U.N. Doc. A/HRC/16/48 (Jan. 26, 2011); Amnesty International, Press Release, “Whereabouts Unknown—Thousands Still Missing Worldwide,” Aug. 30, 2007, available at <http://bit.ly/vgkgLt>.

93 International Convention on Enforced Disappearances, *supra* note 47 at art. 2.

94 Human Rights Council, *Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment*, ¶¶ 10–15, U.N. Doc. A/56/156 (July 3, 2011). The Declaration on the Protection of all Persons from Enforced Disappearance also states that acts of enforced disappearances violate guarantees against torture. U.N. General Assembly, *Declaration on the Protection of all Persons from Enforced Disappearance*, *supra* note 86. See also *infra* Section II(c).

were orchestrated to prolong a climate of fear.⁹⁶ Liu Zhengqing was disappeared for a month before being released on bail to await trial on charges of inciting subversion of state power on April 29.⁹⁷ On that day, Teng Biao was also released, but unidentified individuals seized Li Fangping. On the same day that Li Fangping was released on May 4, Li Xiongbing was disappeared until May 6. On May 7, Xu Zhiyong went missing for one day.⁹⁸

Chinese authorities have introduced what one journalist has dubbed “a new vocabulary of fear” through these enforced disappearances. While many lawyers have remained silent about their experience, Shanghai-based lawyer Li Tiantian (李天天) has publicly released information through her Twitter account and blog⁹⁹ that describes a story of being abducted by plainclothes domestic security officers [国保, *guobao*] and taken to an undisclosed location,¹⁰⁰ being watched and accompanied by police at all times, and finally forcibly returned to her hometown in Xinjiang Uyghur Autonomous Region (Xinjiang).¹⁰¹ Li was taken by a group of seven to ten domestic security police while others seized her phone, home computer, and laptop.¹⁰² For over three months,

from February 19 to May 24, Li was held in a hotel room without being allowed to see the sun or go near a window.¹⁰³ After her release in her hometown in Xinjiang, Li attempted on multiple occasions to return to Shanghai, but domestic security authorities intercepted her and forced her back.¹⁰⁴

Current Chinese law actually enables the practice of enforced disappearance by allowing police to waive the family notification requirements if such notification would “hinder the investigation.”¹⁰⁵ This broad carve-out allows police to conceal information about a person’s whereabouts from her family and, by extension, the outside world. Some of the draft revisions to the CPL that were put forward in August 2011 narrow this broad exception slightly—allowing the police to waive such notification where they are investigating crimes of national security, terrorism, or major bribery offenses.¹⁰⁶ Given the common practice of accusing rights lawyers and their clients of inciting subversion of state power—a national security offense under the criminal law—there would remain ample legal justification for disappearing a person to a place outside the law.

95 Ng Tze-Wei, “Making people vanish,” SOUTH CHINA MORNING POST, September 14, 2011, <http://bit.ly/vtUS8Y>.

96 China Human Rights Defenders, *Individuals Affected by the Crackdown Following Call for “Jasmine Revolution”*, *supra* note 10.

97 广州唐荆陵将被判刑 [*Guangzhou’s Tang Jingling to be Sentenced*], BOXUN NEWS, June 14, 2011, <http://bit.ly/rIn81R> (in Chinese).

98 Tania Branigan, *Ai Weiwei lawyer reappears in China*, GUARDIAN (UK), Apr. 19, 2011, <http://bit.ly/fZEAKX>.

99 See Twitter Account of Li Tiantian, <http://twitter.com/#!/litiantian>. Li Tiantian’s Sina Weibo blog was shut down after her revelations about her experiences while detained.

100 Mooney, *Silence of the Dissidents*, *supra* note 26.

101 See *infra* Section III(a).

102 Li Tiantian Twitter post, June 5, 2011, <http://bit.ly/twBQd5>.

103 Li Tiantian Twitter post, June 5, 2011, <http://bit.ly/tC3xda>.

104 Li Tiantian Twitter post, June 30, 2011, <http://bit.ly/v9ktZQ> (in which Li Tiantian discussed one such incident).

105 中华人民共和国刑事诉讼法 [Criminal Procedure Law of the People’s Republic of China] (*hereinafter* CPL), art. 64, issued by the National People’s Congress Mar. 17, 1996, effective Jan. 1, 1997, <http://1.usa.gov/vDo7xa> (English translation available at <http://bit.ly/sI16Li>).

c. Increase in Use of Physical Abuse and Torture

Documenting torture and human rights abuses that occur during detention, particularly secret detention, is intrinsically difficult. Where victims have been threatened or fear that speaking out may lead to greater abuse in the future, the problem is magnified. The reports of torture and other cruel and inhumane treatment that have surfaced since the beginning of the 2011 crackdown, however, strongly suggest that these practices have become routine when attempting to silence outspoken rights lawyers in China.

From the accounts of these disappearances that have been published since February, certain details coalesce into a pattern:¹⁰⁷ individuals were hooded and driven to a secret location, beaten severely and deprived of sleep in the first week,¹⁰⁸ and throughout their detention they were under constant surveillance and forced to undergo repeated interrogations without rest,¹⁰⁹ not allowed to approach windows or see the sun,¹¹⁰ forced to sit motionless for hours, or blasted relentlessly with air-conditioning.¹¹¹

Specific details of mistreatment emerged in several of this year's cases:

- In September 2001, despite pledging not to speak to media as one of the conditions of his release, Jiang Tianyong revealed the details of his physical and mental torture during his enforced

disappearance from February 19 to April 19.¹¹² After being hooded and taken to a secret location, Jiang was severely beaten during the first few days, sometimes with filled water bottles used to hit his face and body.¹¹³ He was interrogated and deprived of sleep for five nights. Jiang was verbally abused, humiliated, and threatened, including by being forced to sit facing the wall for hours without moving, or undergoing “re-education” through tactics such as being forced to sing patriotic song lyrics without the slightest error.¹¹⁴ Jiang, who suffered some memory loss on release, said authorities had called his sessions “remedial education” [挽救教育, *wanjiu jiaoyu*], but he considered them to be brainwashing. Jiang said that during those two months he felt he could break with reality at any time.¹¹⁵

- Tang Jitian was deprived of adequate food and clothing and forced to withstand strong air conditioning during the 21 days he was disappeared. Upon his release, he was diagnosed with tuberculosis.¹¹⁶
- Jin Guanghong (金光鸿), a Beijing-based lawyer who disappeared for over a week in April, was escorted by family members to his hometown upon his release, and was confirmed to be in an extremely poor state.¹¹⁷ Jin was reportedly tortured in a psychiatric hospital where he was “beaten by unidentified individuals, tied to a bed, given injections of unknown substances

106 Draft CPL, *supra* note 5.

107 Tania Branigan, *Chinese activists seized in human rights crackdown accuse authorities of torture*, GUARDIAN (UK), Sept. 13, 2011, <http://bit.ly/q08fOc>.

108 中华人民共和国刑法 [Criminal Law of the People's Republic of China] (*hereinafter* Criminal Law), art. 105, *enacted by the National People's Congress* March 14, 1997, <http://bit.ly/tTjrpJ>, English translation available at <http://bit.ly/Y0TrG>.

109 Liu Shihui Twitter post, Aug. 21, 2011, <http://bit.ly/oNpN7Q>.

110 Qi Yongming, *Jiang Tianyong Breaks Silence, Exposes Official Persecution* (China Aid Association trans.). China Aid Association, Sept. 14, 2011, <http://bit.ly/nGHUrz>.

111 Mooney, *Silence of the Dissidents*, *supra* note 26.

112 Tse-wei Ng, *Lawyer reveals detention ordeal*, SOUTH CHINA MORNING POST, Sept. 14, 2011, <http://bit.ly/pMI4qW>.

113 Liu Yongming, 江天勇首度打破沉默揭露当局迫害 [Lawyer Jiang Tianyong breaks silence to expose repression by authorities], VOA NEWS, Sept. 14, 2011, <http://bit.ly/pmo0nV>.

114 *See id.*

115 *See id.*

116 Mooney, *Silence of the Dissidents*, *supra* note 26.

and forced to ingest unidentified medicine.”¹¹⁸ Jin suffered memory loss after his detention.

- Another unidentified lawyer was beaten while in detention over two days, forcing him to sit motionless for hours.¹¹⁹

China has been a party to the Convention Against Torture since 1988,¹²⁰ which prohibits torture and other forms of cruel, inhuman, or degrading treatment or punishment. The definition of torture is limited to instances where severe pain or suffering is intentionally inflicted for the purpose of obtaining information or a confession, punishment, intimidation, or for reasons based on discrimination, where the act is committed by an official or at the behest of an official.¹²¹ This includes instances where officials have paid extra-legal forces to carry out detentions or acts of violence.¹²² China has been praised for some reduction in the instances of torture in official detention facilities, including prisons and detention centers.¹²³ However, reviews of China’s performance under the Convention by the Committee Against Torture have consistently found systematic violations of obligations under the Convention, including routine use of torture against criminal suspects, abuses leading to deaths in custody, administrative

detention and the use of “reeducation through labor,” and secret detentions.¹²⁴ In cases of enforced disappearance, individuals are particularly at risk of torture because the disappeared individual is, by design, typically held in an unofficial detention facility with no monitoring mechanisms in place. In a statement expressing serious concern about the enforced disappearances of human rights activists, lawyers and students during the 2011 crackdown, the United Nations Working Group on Enforced Disappearances pointed to a pattern where “persons suspected of dissent are taken to secret detention facilities, and are then often tortured and intimidated, before being released or put into ‘soft detention’ and barred from contacting the outside world.”¹²⁵

d. Lawyers as Defendants: Using the Law to Suppress Lawyers

While much of this report deals with the use of extra-legal measures against members of the Chinese legal community, the rise in the use of criminal charges to silence rights lawyers is also deeply disturbing. In a mature and independent legal system, being charged affords a suspect legal protections and recourse to fight those charges. In the Chinese legal system,

117 Jin Guanghong Twitter post, Apr. 17, 2011, <http://bit.ly/rCr9Yb>.

118 China Human Rights Defenders, *China Human Rights Briefing*, Apr. 20–27, 2011, <http://bit.ly/kcS9EM>. Jin had been representing democracy activist Li Tie against subversion charges when he was disappeared. Because his lawyer was detained, Li was represented by a lawyer appointed by public security officials at his trial on April 18. World Organization Against Torture, Case CHN 030611, June 3, 2011, <http://bit.ly/s6cACR>.

119 Mooney, *Silence of the Dissidents*, *supra* note 26.

120 Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (*hereinafter* CAT), *entered into force* June 26, 1987, 1465 U.N.T.S. 85. Other people reportedly tortured include Liu Dejun, an Internet activist. *See Liu Dejun, Civil Rights Activist, Kidnapped by Police and Left in Mountains*, BOXUN NEWS, June 16, 2010, <http://bit.ly/aC8i4n>.

121 As defined in CAT, “torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.” CAT, *supra* note 120 at art. 1.

122 *See id.*

123 UN Commission on Human Rights, *Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Mission to China*, Mar. 10, 2006, E/CN.4/2006/6/Add.6, <http://bit.ly/tpIwbA>.

124 UN Commission on Human Rights, *Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment addendum*, Feb. 18, 2008, A/HRC/7/3/Add.2, <http://bit.ly/vcY45Q>.

however, even where measures to protect accused persons have been codified in the criminal procedure laws, prosecuting bodies in politically sensitive cases often ignore or override them to achieve the desired result.

One charge that was frequently used during the 2011 crackdown has been the offense of “creating a disturbance” [寻衅滋事行为, *xunxinzhishixingwei*]¹²⁶—particularly in Beijing.¹²⁷ According to Article 293 of the PRC Criminal Law, acts constituting “creating disturbances” are:

1. Beating another person at will and to a flagrant extent;
2. Chasing, intercepting or hurling insults to another person to a flagrant extent;
3. Forcibly taking or demanding, willfully damaging, destroying or occupying public or private money or property to a serious extent; or
4. Creating disturbances in a public place, thus causing serious disorder in such place.¹²⁸

In 2009, however, a revision to the PRC Criminal Law broadened the definition under section 4 so that the result of “serious disorder” is no longer required to occur in the same place as the disturbance—thus allowing the prosecuting authority far more leeway in proving cause and effect under the statute.¹²⁹ In February 2011, Article 293 was broadened again, and the act of threatening or intimidating another person [恐吓他人, *konghetaren*] can now amount

to creating a public disturbance.¹³⁰ Further, working in concert with others to commit any of these acts is now punishable by a sentence of between five and ten years imprisonment.¹³¹ As a result of these expansions of the statute, authorities can now level this charge at individuals engaged in a broader range of activities.

e. Residential Surveillance: Detention in Disguise

The treatment of several lawyers during the 2011 crackdown demonstrates how Chinese authorities can effectively transform the non-custodial measure of “residential surveillance” [监视居住, *jianshijuzhu*] into disguised detention—an alarming practice based on the exercise of police discretion in the face of ambiguities in Chinese law.

i. Legal Framework

According to the CPL, the police have a maximum of 37 days after detaining a criminal suspect to either arrange for a formal arrest or for non-custodial measures.¹³² The only non-custodial measures permitted under the law are to place suspects under residential surveillance or to “obtain a guarantor pending trial” [取保候审, *qubaohoushen*].¹³³ Under residential surveillance, an individual cannot meet with others (other than her lawyers and family members with whom they reside) or leave her domicile without permission of the executing organ, which can be any of the courts, procuratorates, or public security or-

125 Office of the High Commissioner for Human Rights, *China: UN expert body concerned about recent wave of enforced disappearances*, Apr. 8, 2011, <http://bit.ly/ie4N5D>.

126 Criminal Law, *supra* note 108 at art. 293.

127 China Human Rights Defenders, *Individuals Affected by the Crackdown Following Call for “Jasmine Revolution”*, *supra* note 10 (referring to cases of Wang Lihong, Cheng Li, Yang Qiuyu, Cheng Wanyun, Huang Xiang, Li Hai, Li Yongsheng, Liu Zhengxing, Wei Qiang, Weng Jie, Zhang Yongpan, Zhou Li).

128 Criminal Law, *supra* note 108.

129 Criminal Law, *supra* note 108 at art. 293(4), *amended by the National People’s Congress* Feb. 28, 2009, <http://bit.ly/4xvwXD>.

130 Criminal Law, *supra* note 108 at art. 293 (2), *amended by the National People’s Congress* Feb. 25, 2011, <http://bit.ly/vm3A0j>.

131 Criminal Law, *supra* note 108 at art. 293(4), *amended by the National People’s Congress* Feb. 28, 2009.

132 See Appendix II: Chart of Domestic and International Standards on Access to Counsel.

gans involved.¹³⁴ There is no explicit requirement for family notification in residential surveillance procedures. A serious violation of these conditions empowers the executing organs to make a formal arrest on the underlying charges.¹³⁵

A person under residential surveillance is generally confined to their “fixed domicile” [固定住处, *guding zhuchu*], but the law does not adequately define what qualifies as a “fixed domicile.” The *Rules of Procedure for the Handling of Criminal Cases by Public Security Organs* explain “fixed domicile” as the suspect’s lawful residence where authorities handling the case are located.¹³⁶ This provision has been used by the police to mean that if an individual does not have their “household registration” [户口, *hukou*] in their place of habitual residence, they do not have “fixed domicile” there, even if they have been living there for years. The case of reform activist and Nobel laureate Liu Xiaobo (刘晓波) demonstrates this practice, as do several of the cases that emerged this year, as described below.¹³⁷

If it is determined that an individual has no fixed domicile, she can be assigned to a designated resi-

dence.¹³⁸ However, police are explicitly forbidden from establishing special sites specifically for holding suspects under residential surveillance, a practice the regulations describe as tantamount to placing suspects in “disguised criminal detention.”¹³⁹ Proscribed locations for designated residencies include detention centers [看守所, *kanshousuo*], administrative detention centers [行政拘留所, *xingzheng juliushuo*], detention rooms [留置室, *liuzhishi*], or other places of business for public security organs [公安机关其他工作场, *gonganjiguan qita gongzuochang*].¹⁴⁰

Residential surveillance is inseverable from the requirements of the criminal process implemented by the courts, procuratorate, or public security bureau. Residential surveillance is represented in Chinese law as an intermediary measure between bail and detention. It is also a practice limited by law¹⁴¹—residential surveillance may only be imposed on a criminal suspect or defendant for a maximum of six months before trial.¹⁴² Several of the cases in 2011 highlight the ways in which these procedural protections were manipulated or violated, and may have signaled reforms to the CPL that were introduced this fall.

133 This is commonly understood as a form of bail. See CPL, *supra* note 105 at art. 50–56.

134 CPL, *supra* note 105 at art. 57.

135 *Id.*, art. 134.

136 *Rules of Procedure for the Handling of Criminal Cases by Public Security Organs* [No. 95] [公安机关办理刑事案件程序规定] (*hereinafter Rules of Procedure*), art. 98, Ministry of Public Security of the People’s Republic of China, *effective* Dec. 1, 2007, <http://bit.ly/rx1W7O>.

137 Liu was detained on December 8, 2008, and was held under “residential surveillance” in incommunicado detention for over six months before being formally arrested. Liu’s household registration is in Liaoning Province, and the police classified his Beijing home as a “temporary residence,” rather than a “fixed domicile.” Duihua Human Rights Journal, *Some Thoughts on China’s Hukou System & Its Impact on Criminal Justice*, March 8, 2010, <http://bit.ly/rS2fdQ>. Liu was sentenced to 11 years’ imprisonment on December 25, 2009 for incitement to subvert state power, the longest known sentence to have been imposed on an individual for that charge. See Andrew Jacobs, *Leading China Dissident Gets 11-Year Term for Subversion*, NY TIMES, Dec. 24, 2009, <http://nyti.ms/6LTDFh>. See also Human Rights in China, *Case Update: International Community Speaks Out on Liu Xiaobo Verdict*, Dec. 30, 2009, <http://bit.ly/sFNQ7H> (including English translation of court’s verdict). On appeal, Liu’s lawyers Shang Baojun (尚宝军) and Ding Xikui (丁锡奎) argued that while the notice of residential surveillance issued by the Beijing Municipal Public Security Bureau on December 9, 2008, provided no information on where Liu would be held, he was actually kept in solitary confinement in an undisclosed location resembling a room in a guesthouse, contrary to the legal restrictions on residential surveillance. Human Rights in China, *Concerning Liu Xiaobo’s Appeal against the Charge of Inciting Subversion of State Power*, Jan. 28, 2010, <http://bit.ly/vOvfff> (HRIC’s English translation of the *Defense Statement in the Second Instance*). Further resources on Liu Xiaobo’s case, as well as translations of his writings, can be found at Human Rights in China’s website, at <http://bit.ly/tXJyUF>.

138 CPL, *supra* note 105 at art. 58.

139 *Rules of Procedure*, *supra* note 136, at art. 98.

140 *Id.*

ii. 2011 Cases of *Incommunicado Detention Under Residential Surveillance*

The case of Guangzhou-based lawyer Tang Jingling (唐荆陵) illustrates how the mechanism of residential surveillance can be manipulated to create de facto conditions of incommunicado detention. Authorities detained Tang in Guangzhou on February 22, 2011, on suspicion of inciting subversion of state power,¹⁴³ and then placed him under residential surveillance at the Dashi Police Training Center in Guangzhou's Panyu district from March 1 to August 2.¹⁴⁴ Presuming that Tang did not have "household registration" status in Guangzhou, police had the discretion to declare that he had no lawful "fixed domicile" and could choose a "designated residence" for him. Whether or not a police training center constitutes a place of police business and therefore a lawful "designated residence" was also subject to police discretion. Finally, if the case had "involved state secrets," he would have had no right to meet with his lawyer. Prior to his release, his wife Wang Yanfang (汪燕芳) told news media that he might face prosecution for gathering with lawyers and providing funds to poor families,¹⁴⁵ offenses less serious than inciting subversion of state power.¹⁴⁶ Regardless, authorities allowed neither Tang's lawyers nor his wife,

herself under extra-legal house imprisonment, to meet with him.¹⁴⁷ After Tang's conditional release in August 2011, authorities reportedly sent Tang back to his hometown in Hubei Province, and permitted his return to Guangzhou only in September.¹⁴⁸ Authorities reportedly only lifted the conditions of tight surveillance around Tang's family's Guangzhou home on the same day Tang was released.¹⁴⁹

In very similar circumstances, Liu Shihui was seized in Guangzhou on February 25 and disappeared for 108 days, during which he was held under residential surveillance on suspicion of "incitement to subvert state power" at an unknown location outside his Guangzhou home.¹⁵⁰ On June 12, he was released on guarantee pending investigation and returned to his hometown in Inner Mongolia.¹⁵¹ No one knew of his whereabouts and his newlywed Vietnamese wife was deported after being detained for 17 days.¹⁵²

Several lawyers, including Tang Jitian and Liu Zhengqing, were also placed under residential surveillance or qubaohoushen [取保候审, translated as "to obtain a guarantor pending trial," and commonly understood as a form of bail] following secret detention or enforced disappearance,¹⁵³ forms of detention that are unlawful per se.¹⁵⁴

141 *Rules of Procedure*, *supra* note 136, at art. 97 and 98. .

142 CPL, *supra* note 105 at art. 58.

143 China Human Rights Defenders (CHRD), *China Human Rights Briefing* July 27–Aug. 2, 2011, <http://bit.ly/tCOBht>. According to CHRD, Tang's charges of "inciting subversion of state power" were allegedly due to possession of his pro-democracy posters.

144 广州唐荆陵将被判刑 [*Guangzhou's Tang Jingling to be Sentenced*], BOXUN NEWS, June 14, 2011, <http://bit.ly/rIn81R> (in Chinese); China Human Rights Defenders, *China Human Rights Briefing* Jul 27–Aug. 2, 2011, *supra* note 143.

145 Tang Jingling and Li Tiantian have been subject to such detentions. See 广州唐荆陵将被判刑, [*Guangzhou's Tang Jingling to be Sentenced*], BOXUN NEWS, June 14, 2011, <http://bit.ly/uAfZgu> (in Chinese).

146 *Id.*

147 China Human Rights Defenders, *China Human Rights Briefing* July 27–Aug. 2, 2011, *supra* note 143.

148 China Human Rights Defenders, 广州维权律师唐荆陵被送回湖北老家 [*Guangzhou Weiquan Lawyer Tang Jingling Forcibly Relocated to Hubei Hometown*], Aug. 2, 2011, <http://bit.ly/p9quLe> (in Chinese). Tang Jingling Twitter post, Sept. 24, 2011, <http://bit.ly/u3yU4S>.

149 *Id.* See also Andrew Jacobs, *China Releases Dissident Blogger, With Conditions*, NY TIMES, Aug. 10, 2011, <http://nyti.ms/pTMBte>.

150 Liu Shihui Twitter post, Aug. 21, 2011, <http://bit.ly/q3SDtM>. For translations of Liu Shihui's Twitter posts, see Siweiluozi's Blog, "I've Only Begun to Scratch the Surface": Liu Shihui Reveals Details of 108-Day Detention, Aug. 22, 2011, <http://www.siweiluozi.net/>.

151 Liu Shihui Twitter post, Aug. 21, 2011, <http://bit.ly/pAUc61>.

*iii. Formalizing Enforced Disappearances
Under the 2011 Proposed CPL
Amendments*

One of the proposed amendments to the CPL would legally formalize the way in which residential surveillance has been manipulated in the 2011 crackdown to carry out de facto incommunicado detention or enforced disappearances. The proposed amendment to Article 73 would allow the authorities to hold individuals suspected of state security, terrorism, or major bribery crimes residential surveillance for up to six months at an undisclosed location, without the right to meet with her lawyer or of family notification.¹⁵⁵ While this measure is limited to individuals who would be considered to impede the investigation if held at their own homes, the only procedural safeguard is the requirement for prior approval by a higher procuratorate or public security organ.¹⁵⁶ The individual herself has no recourse to challenge the decision. Because police are prohibited from holding suspects under residential surveillance at detention centers or other administrative centers, this measure would be the legitimization of detention in disguise. It also accommodates the longstanding practice of procuratorates and police to target dissidents, activists, and lawyers for crimes of state security.

The treatment of Jiang Tianyong during his enforced disappearance amplifies fears that enabling police with extraordinary powers of secret detention also places individuals at increased risk of torture and abuse. Authorities flaunted their impunity to Jiang, saying: “Don’t think of procedures, detention cen-

ters, or fantasize about going to court . . . this type of situation can last a month, six months, even longer than a year.”¹⁵⁷ The reform of the CPL as drafted could reinforce, rather than discourage, such wholesale impunity.

f. Collective Responsibility: Punishing Family and Friends

“Rights lawyers are well aware, as police occasionally remind them, that not only is their own welfare at stake but also that of their family.”

– Legal scholar Jerome Cohen¹⁵⁸

Extra-legal measures intended to silence and punish targeted individuals have assumed an expansive role in the Chinese criminal justice system. Not only are lawyers themselves targeted, but their family members and associates have also become collateral targets of harassment, intimidation, and in some cases, criminal punishment in a dragnet of collective responsibility.

Collective responsibility in criminal law is liability that attaches to family members for the serious criminal activity of one of their own.¹⁵⁹ Although abolished in 1905, collective responsibility has deep roots as an established feature of Chinese law. Under the Qing dynasty (1644–1911), collective responsibility was imposed in criminal cases that “directly or indirectly affected the state—in other words, rebellion and treason, including dissidence and sedition.”¹⁶⁰

152 Luo Ya, *Chinese Lawyer Loses Wife and House for Posting a Jasmine Revolution Message*, EPOCH TIMES, Aug. 27, 2011, <http://bit.ly/n9gNKU>.

153 中国维权律师刘正清取保刘士辉监视居住 [Chinese Weiquan lawyers Liu Zhengqing awaiting trial, Liu Shihui under residential surveillance], DWNWS, Apr. 29, 2011, <http://bit.ly/tlbWU>.

154 See WGAD Report Annex on Revised Methods of Work, *supra* note 83 at ¶ 54.

155 Draft CPL, *supra* note 5 at art. 37

156 *Id.*

157 Liu Yongming, *supra* note 113.

158 Jerome A. Cohen, *The Suppression of China’s Human Rights Lawyers: Do Foreign Lawyers Care?* June 6, 2011, <http://bit.ly/lIdAuVx> (an edited version of the article was published as in the South China Morning Post on June 7, 2011, with the title *Turning a Deaf Ear*).

159 Joanna Waley-Cohen, *Collective Responsibility in Qing Criminal Law*, THE LIMITS OF THE RULE OF LAW IN CHINA 171

Over a hundred years after repudiating collective responsibility, however, Chinese authorities continue to impose punishment on the family members of those it deems inimical to state interests. During the 2011 crackdown, authorities have expanded the use of tactics aimed at rights lawyers that can be grouped under the umbrella of collective responsibility, applying sanctions to their spouses, parents, siblings, and children. The clear intent of collective responsibility is to make the price of dissent unbearably high, by instilling fear of retaliation against one's loved ones that will be unchecked by law.

The examples below demonstrate how collective punishment continues to be imposed today as a means of dissuading rights lawyers from doing their work.

- Tang Jingling's wife, Wang Yanfang was placed under house imprisonment for months until Tang was released from residential surveillance.¹⁶¹
- The experience of Chen Guangcheng and his family demonstrates the range of experiences that families can be made subject to. While Chen was in prison for "disturbing public order and destroying public property" in 2007, police continued to harass his wife, Yuan Weijing, and his family.¹⁶² Since his release from prison in September 2010, Chen and his wife have been subject to harsh extra-judicial measures, living under extra-legal "house imprisonment."¹⁶³ The conditions under which Chen and his family are living are described in Box B.
- The measures taken against legal activist Ni Yulan (倪玉兰) and her husband Dong Jiqin (董继勤) provide another example of collective punishment. Ni, who ran afoul of authorities as a legal activist for tenant's rights, has struggled with nearly a decade of governmental abuse and harassment. In 2011 her husband Dong also be-

(Karen Turner-Gottschang, James Vincent Feinerman, and R. Kent Guy eds., 2000).

160 *Id.* at 122–131, 117.

161 唐荆陵可能面临起诉 [*Tang Jingling might face prosecution*], RADIO FREE ASIA, June 7, 2011, <http://bit.ly/v3qXCZ> (in Chinese).

162 Jerome A. Cohen, *Access to Justice in Shandong's Countryside: A barefoot lawyer's struggle*, Sept. 13, 2010, <http://bit.ly/dk7Z4n>. Article 275 of the PRC Criminal Law criminalizes "intentionally damaging property," Criminal Law, *supra* note 108 at art. 275, and Article 291 criminalizes "gathering crowds to disturb traffic." Criminal Law, *supra* note 108 at art. 291.

163 Ian Johnson and Jonathan Ansfield, *Chinese Officials Beat Activist and His Wife, Group Says*, NY TIMES, June 17, 2011, <http://nyti.ms/jsuDBh>.

164 Paul Mooney, *Silence of the Dissidents*, *supra* note 26.

165 Peter Ford, *Why Chinese activist Ni Yulan lost nearly everything*, CHRISTIAN SCIENCE MONITOR, July 6, 2010, <http://bit.ly/h2pN8S>.

166 *Id.*

167 Stacy Mosher and Patrick Poon, A SWORD AND A SHIELD: CHINA'S HUMAN RIGHTS LAWYERS 14–15 (2009).

168 Jerome A. Cohen, *Access to Justice in Shandong's Countryside: A barefoot lawyer's struggle*, *supra* note 162. Art. 275 of the PRC Criminal Law criminalizes "intentionally damaging property"; Art. 291 criminalizes "gathering crowds to disturb traffic."

169 Stacy Mosher and Patrick Poon, *supra* note 174.

170 Jerome A. Cohen, *supra* note 162.

171 Ian Johnson and Jonathan Ansfield, *Chinese Officials Beat Activist and His Wife, Group Says*, *supra* note 163.

172 *China's Intimidation of Dissidents Said to Persist After Prison*, NY Times, Feb. 17, 2011, <http://nyti.ms/hfPpnR>.

173 *Id.*

174 *Id.*

175 Ian Johnson and Jonathan Ansfield, *supra* note 163.

176 *Id.*

177 Radio Free Asia, *'Jail' Built for Activist, Family*, Aug. 30, 2011, <http://bit.ly/nqm13i>.

178 Washington Post, *Chinese supporters of blind lawyer held under house arrest make new push to visit him*, Oct. 10, 2011, <http://wapo.st/ulBBex>.

BOX B: THE EXPERIENCE OF CHEN GUANGCHENG

Chen Guangcheng is a blind, self-educated lawyer from Shandong who has faced illegal detention, conviction and harsh extra-judicial measures as a result of his human rights work. Chen is most well-known for his persistent campaign against an official policy of forced abortions and sterilizations by Linyi municipal authorities in Shandong.¹⁶⁷ Chen was convicted of “disturbing public order and destroying public property” in the course of a skirmish involving thugs and villagers hired by officials.¹⁶⁸ In November 2006, he was sentenced to four years and three months in prison following a trial on marked by procedural irregularities.¹⁶⁹ Police harassment against Chen’s wife, Yuan Weijing, and his family, continued while Chen was in prison.¹⁷⁰

Since his Sept. 9, 2010 release from prison, Chen and his wife has been subject to harsh extra-judicial measures, living in his home in Dongshigu village in Shandong province under “soft detention” [软禁, *ruanjin*], a form of house arrest whose euphemistic name belies the severity of confinement faced by people who have not violated the law.¹⁷¹ Chen and his family are confined to their home 24 hours a day by security agents and hired peasant men armed with sticks, bricks and walkie-talkies.¹⁷² Their home is flooded with lights at night, and security cameras have been installed inside and outside his home.¹⁷³ None of Chen’s family members is allowed out of the home, save for his elderly mother who is allowed out of the house to shop for necessities while accompanied by a guard.¹⁷⁴

After a series of Internet videos revealed the harsh conditions that Chen and his family live under—authorities have blocked phone and cell phone service within the home, disallowed visitors and prevented Chen from seeking medical help for ongoing health problems¹⁷⁵—Chen and his wife were harshly beaten, and then denied medical aid for their injuries.¹⁷⁶ Local Shandong officials have reportedly constructed a house especially for the Chen family, allegedly with the intention of moving Chen and his wife into the building so as to keep tighter controls over them.¹⁷⁷ Physical force also continues to be used by security agents surrounding the Chen home to prevent visitors from seeing Chen.¹⁷⁸ In Feb. 2011, foreign journalists seeking to visit Chen after the Feb. 9 video release were violently pushed away by “members of [Chen’s] village’s ‘law and order brigade.’”¹⁷⁹ In Oct. 2011, activists and netizens seeking to visit Chen and his family were also attacked, beaten and detained.¹⁸⁰ Until October 2011, authorities had also barred Chen’s 6-year-old daughter from leaving the home, even to attend school.¹⁸¹ On-going efforts by activists to bring attention to Chen’s plight have resulted in a small victory, where Chen’s daughter was allowed to attend school, albeit under supervision.¹⁸² However, at time of press, visitors were still unable to visit Chen without being physically barred from getting to his home, while activists were beaten in the course of trying to visit him.¹⁸³

179 Reporters Without Borders, *Three French journalists physically attacked for trying to approach human rights lawyer*, Feb. 16, 2011, <http://bit.ly/pP0wYe>.

180 Reporters Without Borders, *Activists Attacked While Trying to Visit Human Rights Lawyer Under House Arrest*, Sept. 20, 2011, <http://bit.ly/pP0wYe>; Washington Post, *Chinese supporters of blind lawyer held under house arrest make new push to visit him*, *supra* note 185.

181 Washington Post, *Chinese supporters of blind lawyer held under house arrest make new push to visit him*, *supra* note 185.

182 Chinese Human Rights Defenders Network, *China Human Rights Briefing*, Oct. 21–26, 2011, <http://bit.ly/w0zGAd>.

183 Human Rights in China, *Dozens of People Beaten while Attempting to Visit Blind Legal Advocate Chen Guangcheng*, Oct. 31, 2011, <http://bit.ly/trdurg>.

came a target. Authorities began to harass Ni in 2002 after she took on multiple cases representing people who lost their homes to construction for the 2008 Olympic Games.¹⁶⁴ On April 15, 2008, a police-directed demolition crew knocked down a wall surrounding Ni's own home. She was hit in the head with a brick and dragged away; she was then arrested for allegedly filing a false report. Officials also detained Ni's husband Dong who was released several days later, whereas his wife was formally charged and convicted of obstructing public duty, receiving a sentence of two years.¹⁶⁵

- In November 2008, while Ni was serving her sentence, authorities demolished the couple's home and Dong began sleeping in the streets. On Ni's release in April 2010, the police initially would not allow them to live indoors, and Ni and Dong thus spent 60 days or so in a tent in a park. When they moved to a guest house, police repeatedly cut off the couple's electricity, water, phone, and Internet service.¹⁶⁶
- Since the beginning of 2011, the restrictions against Ni and Dong have intensified, and now both have been criminally detained on suspicion of creating a disturbance after they were found to have hung a banner outside of the Yuxinyuan Guest House, where they were living.¹⁸⁴ Ni was formally arrested on May 17; Dong was reportedly arrested around the same time.¹⁸⁵ Around July 13, the cases against Ni and Dong were transferred to Xicheng District Procuratorate; Ni faces additional charges of fraud.¹⁸⁶

i. House Imprisonment

"I've come out of a small jail and entered a bigger one."

— Chen Guangcheng, on his ongoing house imprisonment after being released from prison¹⁸⁷

An increasingly common method for targeting activists and family members is the extra-legal and informal use of "house imprisonment," where relatives are deprived of their personal liberty along with the targeted individual. Increasingly, authorities impose house imprisonment in tandem with other extra-legal measures, as when they placed Tang Jingling's wife under house imprisonment for months until Tang was released from residential surveillance.¹⁸⁸ Like the extra-legal tactics of constant surveillance and forced relocation, house imprisonment has been referred to as "soft detention" [软禁, *ruanjin*] or "house arrest."¹⁸⁹ Prolonged periods of house imprisonment are also common: Fan Yafeng, as well as Chen Guangcheng and his family have been under house imprisonment since 2010.¹⁹⁰ Authorities have also imposed house imprisonment in tandem with measures so sweeping and invasive as to approach martial law for entire communities. The experience of Chen and his family in particular provides a great deal of detail as to what conditions have been imposed on the family and surrounding community, as Box B describes.

184 China Human Rights Defenders, *Individuals Affected by the Crackdown Following Call for "Jasmine Revolution"*, *supra* note 10.

185 China Human Rights Defenders, *China Human Rights Briefing*, July 20–26, 2011, *supra* note 53.

186 *Id.*

187 China activist Chen Guangcheng 'under house arrest', BBC, Feb. 10, 2011, <http://bbc.in/dJKOJZ>.

188 唐荆陵可能面临起诉 [*Tang Jingling might face prosecution*], RADIO FREE ASIA, *supra* note 161.

189 Ian Johnson and Jonathan Ansfield, *Chinese Officials Beat Activist and Wife, Groups Says*, *supra* note 163.

190 Fan Yafeng has been under house arrest since December 2010. Christian Solidarity Worldwide, *China: early release of pastor of China for Christ church welcomed by CSW*, CHRISTIAN TODAY, Sept. 20, 2011.

ii. Family Separation

*"I had no place to turn.
So I fled with my children."*
— Geng He, wife of Gao Zhisheng¹⁹¹

The harassment and intimidation that form the bedrock of collective responsibility can also break families physically apart. In a reminder of how arbitrariness permeates even government organs outside the criminal justice system, the Vietnamese wife of Liu Shihui was first detained illegally for 17 days and then reportedly repatriated during the period of his enforced disappearance.¹⁹² In a series of Twitter posts after his release, Liu described his detention because he had his newlywed wife stolen from him.¹⁹³ While she never understood why he was arrested, he also did not know what happened to her during her 17 days of detention. Li Tiantian's boyfriend and his family were harassed during her disappearance, reportedly with the goal of inducing him to end their relationship.¹⁹⁴ Even the threat of separation or punishment for family members was used: Jiang Tianyong was warned that if he broke the pledges he signed to secure his release, his wife could be detained.¹⁹⁵

Earlier cases of collective punishment leading to family separation provide further insight into the impact it can have on a family. In March 2009, after releasing Gao Zhisheng from his first illegal detention and proceeding to keep him and his family under surveillance for months, Gao's wife, Geng He, and their two children felt compelled to take the extraordinary step of fleeing the country.¹⁹⁶ Gao's teenage daughter had previously attempted suicide multiple times after constant police surveillance drove her to drop out of school.¹⁹⁷ The family now lives in the United States.

191 *Chinese dissident lawyer Gao Zhisheng's family defects to US*, THE AUSTRALIAN, Mar. 13, 2009, <http://bit.ly/t1vqLo>.

192 唐荆陵可能面临起诉 [*Tang Jingling might face prosecution*], RADIO FREE ASIA, *supra* note 161.

193 Li Shihui Twitter post, Aug. 21, 2011, <http://bit.ly/oAnNQo> (Translation by Siweiluozi, available at <http://www.siweiluozi.net/>).

194 Li Tiantian Twitter post, June 25, 2011, <http://bit.ly/ssPRNr>.

195 Tse-wei Ng, *Lawyer reveals detention ordeal*, SOUTH CHINA MORNING POST, Sept. 14, 2011.

196 David Chen, *How the Family of a Dissident Fled China*, NY TIMES, May 10, 2009, <http://nyti.ms/I1ClC>.

197 *Id.*

12/23. A police officer said to me: "Why waste words on this sort of person? Let's beat him to death and dig a hole to bury him in and be done with it. How lucky we've got a place to put him away here."
@tengbiao, describing his detention after visiting Fan Yafeng's mother in Beijing

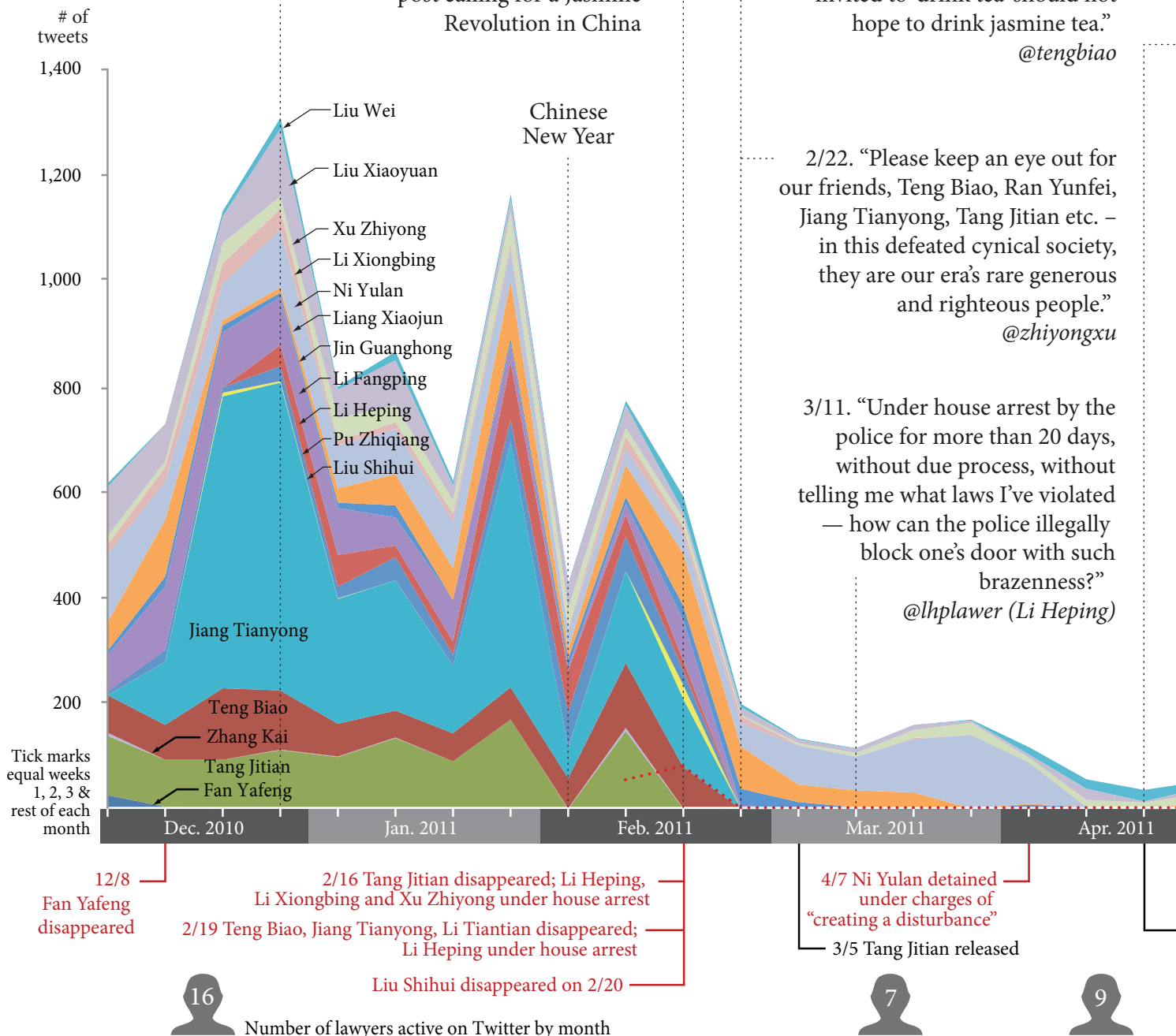
2/15. "If you don't let us get on with our work in peace," they said, "we won't let you get on with anything. No, don't argue; this is the Communist Party's China."
@litiantian on her questioning by the Domestic Security Department officials

2/15 Anonymous Twitter post calling for a Jasmine Revolution in China

2/19. "In the future, anyone who is invited to 'drink tea' should not hope to drink jasmine tea."
@tengbiao

2/22. "Please keep an eye out for our friends, Teng Biao, Ran Yunfei, Jiang Tianyong, Tang Jitian etc. – in this defeated cynical society, they are our era's rare generous and righteous people."
@zhiyongxu

3/11. "Under house arrest by the police for more than 20 days, without due process, without telling me what laws I've violated — how can the police illegally block one's door with such brazenness?"
@lhplawer (Li Heping)



LAWYERS TWEETING THE 2011 CRACKDOWN

Although Twitter is currently blocked in China by the Great Firewall, users can access it through censorship circumvention software. Twitter can therefore be a platform on which netizens communicate with and meet like-minded individuals. China's rights lawyers have used Twitter to disseminate information about their cases as well as beleaguered colleagues and personal encounters with Chinese authorities, describing their experiences in detention and house arrest. The graphic below traces the tweets of 16 of the most vocal lawyers from December 2010 to September 2011. The silence of these lawyers on Twitter following the 2011 Crackdown demonstrates one aspect of its chilling effect on that community.

4/21. "I am well, please rest assured my friends. I am not prepared to accept any media interviews on the matter, please forgive me."

@jtyong1 (Jiang Tianyong)

5/4. "Li Fangping is out, Li Xiongbing has disappeared again, it's unbearable these days!"

@liuweilawyer

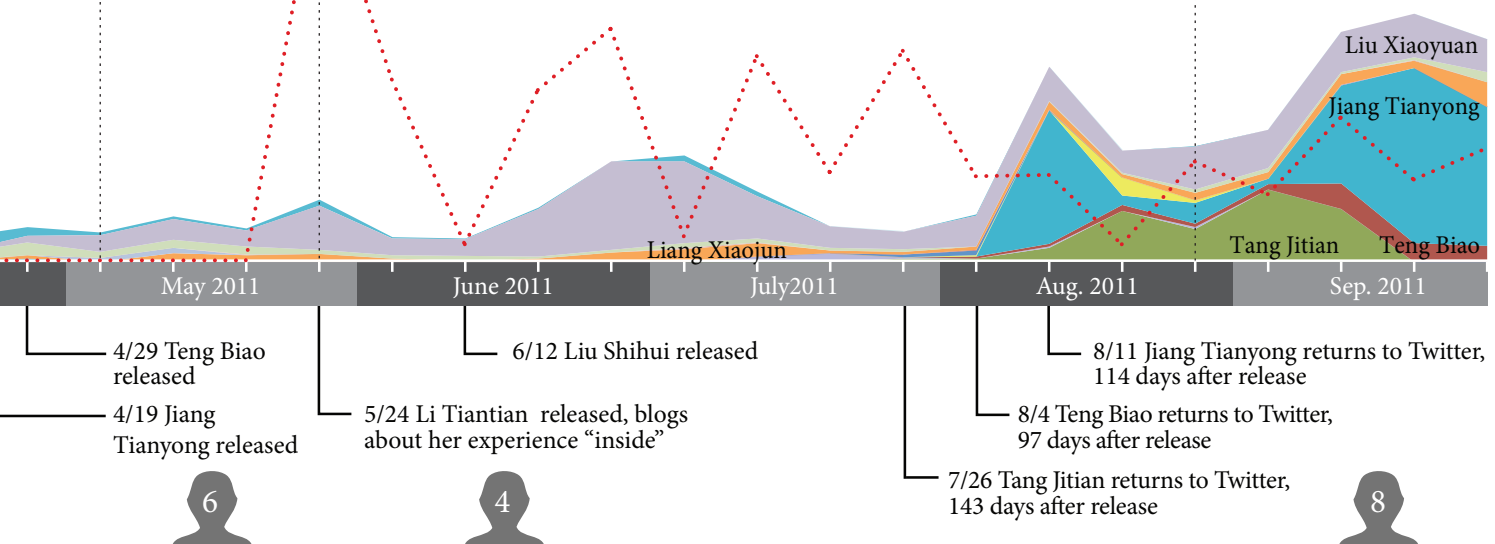
8/22. "If I don't even dare reveal the humiliation of having my newlywed wife stolen from me, then God wasted his time making me a human! Haven't I been 'released pending further investigation'? Whatever they do to me, it'll still be the same lousy fate!"

@liushihui after his Vietnamese wife was repatriated to Vietnam after 17 days of illegal detention

5/24. "I'll bet that there will be others in the future who, like me, will become increasingly mute, and I now know why many online friends from before have vanished from the Internet."

Li Tiantian on her Sina blog, which was subsequently shutdown

Li Tiantian presents an exception from other lawyers because she continued to tweet after her release



III. CHILLING EFFECT OF THE CRACKDOWN

“Since I came out, I have never wavered about whether or not to resist their orders, only about how to resist. These pledges are preventing me from breathing. How could I possibly comply?”

— *Jiang Tianyong*¹⁹⁸

Fear and terror silence lawyers well after their release from enforced disappearance.¹⁹⁹ Many rights lawyers were conduits by which information about rights violations in China could be made known to domestic or international media.²⁰⁰ Their unique role likely contributed to authorities apparently forcing many of these lawyers to write, sign, or videotape criminal confessions or letters of repentance. Authorities required some detained lawyers to guarantee they would refrain from a wide menu of activities, including not only engaging in rights defense work, but also having any contact with foreigners, opposition groups, or media.²⁰¹ Li Tiantian was told to stop writing, or speaking to journalists,

for three months.²⁰² Jiang Tianyong reported that he wrote and signed eight pledges, most of which relate to his role beyond that of a lawyer merely adjudicating cases, stifling his public profile and activist voice.

a. Dispersal: A Community Scattered

In addition to targeting the developing community of human rights defenders with tactics of retribution, Chinese authorities have worked to fragment that community geographically. Many lawyers have returned to their hometowns outside the ac-

EIGHT PLEDGES

Jiang Tianyong reported that he wrote and signed eight pledges:

1. Promising not to work on his rights-advocacy cases;
2. To cut off ties with his original circle of friends;
3. Not to accept media interviews-especially those of “reactionary” media (“People’s Daily is all right,” they said)
4. Not to meet with foreigners and foreign organizations;
5. Not to access illegal or “reactionary” websites;
6. Not to make any comments online that might “affect the image of the party or the government”;
7. Not to tell others what happened during his detention; and
8. To communicate regularly with his minders on his whereabouts and provide information as requested.”²⁰³

tivist hubs of Beijing and Guangzhou, as a result of both forced relocations and nominally voluntary relocations made out of a sense of personal necessity or inevitability. These relocations speak to the authorities' general aversion to unregulated grassroots groups and gatherings.²⁰⁴

The ramifications of the geographical isolation of the individual members of this group of outspoken lawyers, particularly when coupled with harsh surveillance and limitations on communication, goes beyond the consequences for each individual being relocated. The clear intent of the measures of residential surveillance, house imprisonment, and forced relocation is to put a halt to their work to make the rule of law a functioning check on the arbitrary exercise of power in China.

b. Silenced Voices

The “gag order” in the form of pledges placed on lawyers during the crackdown in 2011 also had repercussions for China’s online public sphere. Over the last five years, many rights lawyers have enriched

their contributions as commentators and public intellectuals through online personal publishing platforms. The Internet has given individuals in China a public arena for expression, despite the government’s longstanding commitment to creating one of the most sophisticated and extensive systems of media and Internet censorship in the world.²⁰⁸ Under surveillance and with their freedom of movement restricted, many activists and lawyers in recent years have used platforms like Twitter to maintain a lifeline to the outside world, alert others to fast-developing events, and also engage in dialogue with other netizens (or “online supporters,” 网友, *wangyou*) with some intimacy.²⁰⁵ Far from having an anonymizing effect, the Internet has enabled activist lawyers to cultivate a global readership, broadening the reach of legal news and debate, and in some cases enrich their contributions as public intellectuals.²¹⁰ Within the community of rights lawyers, the use of online and social media tools has engendered a greater awareness of their collective work, allowing them to build on one another’s successes and to effectively deepen their impact beyond what might be expected of their small numbers.

198 Ng Tze Wei, *Making People Vanish*, *supra* note 95.

199 Andrew Jacobs, *China’s Intimidation of Dissidents Said to Persist After Prison*, NY TIMES, Feb. 17, 2011, <http://nyti.ms/hfPpnR>.

200 See, e.g., *id.* (quoting Jiang Tianyong and Teng Biao discussing Chen Guangcheng’s case).

201 Li Tian Tian Twitter post, June 9, 2011, <http://bit.ly/sQO8eS>. Mooney, *Silence of the Dissidents*, *supra* note 26. See also Cang Hai, 黎雄兵律师突然回老家临行前表示“我错了” [*Lawyer Li Xiongbing Admits Fault Before being Abruptly Returned to His Home Town*], BOXUN NEWS, May 20, 2011, <http://bit.ly/uFLmG6> (in Chinese).

202 Li Tian Tian Twitter post, June 9, 2011, <http://bit.ly/sQO8eS>; Li Tian Tian Twitter post, June 4, 2011, <http://bit.ly/s65G0D>.

203 Ng Tze Wei, *Making People Vanish*, *supra* note 95.

204 See Sharon Liang, *Walking the Tightrope: Civil Society Organizations in China*, China Rights Forum, No. 3, 2003, <http://bit.ly/saExpQ> (noting that the Chinese government had developed “an enormous paranoia against grassroots organizations and groups” after the June 4 incident). See also Congressional-Executive Commission on China, Annual Report 2011, Oct. 11, 2011, p. 151 (noting that Chinese authorities “look upon many groups with suspicion,” fearing that these groups are a vehicle for Western intervention in Chinese internal affairs.”)

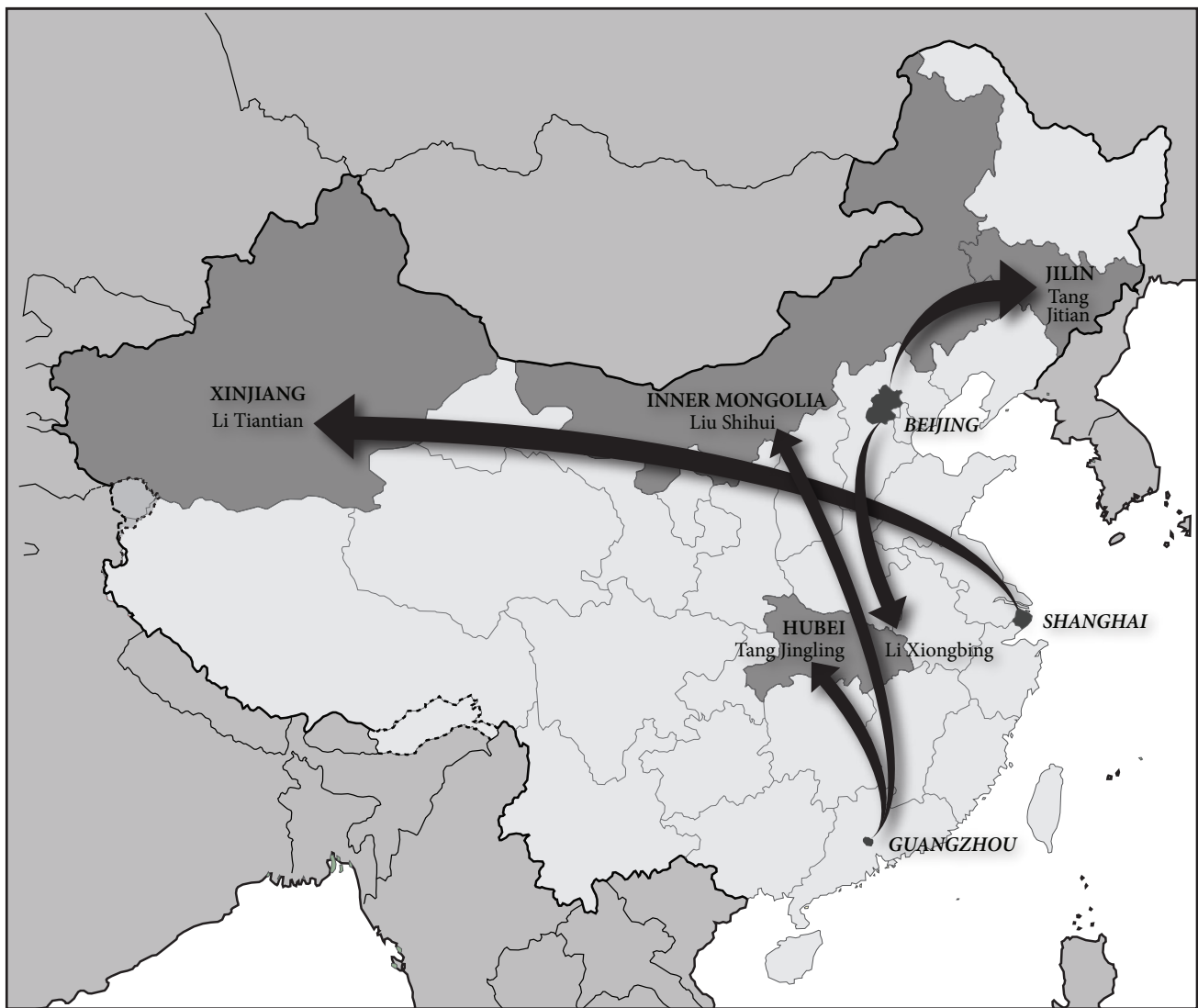
205 For discussion on Twitter and public intellectuals, see Hu Yong, *The Revolt of China’s Twittering Classes*, Project Syndicate, Oct. 14, 2010, <http://bit.ly/bIK7HY>.

205 China Human Rights Defenders, *China Human Rights Briefing* July 27–Aug. 2, 2011, *supra* note 143.

206 刘仕辉获释王宇出狱 [*Liu Shihui Released, Wang Yu Leaves Prison*], Radio Free Asia, June 16, 2011, <http://bit.ly/vDIYJX> (in Chinese).

207 Li Tian Tian Twitter Post, July 24, 2011, <http://bit.ly/txIU24>.

208 While steadfastly maintaining that China has encouraged the development of the Internet and protected freedom of speech



Graphic 3: Fragmenting Community through Relocations

This graphic shows how forced or nominally voluntary relocations place physical distance between individual lawyers and their community. Examples include:

- Authorities held Tang Jingling unlawfully under residential surveillance for five months, before forcing him back to his hometown in Hubei province.²⁰⁶ Tang was able to return to his home in Guangzhou in September.
- Authorities returned Liu Shihui to his family's home in Inner Mongolia on June 12 despite his being based in Guangdong.²⁰⁷
- Authorities returned Beijing-based Tang Jitian to his family's home in Jilin province.
- Authorities forced Li Tiantian, who now lives in Shanghai, to move back to Xinjiang province after her disappearance. Despite being under a writing ban for three months, she tweeted about her multiple unsuccessful attempts to return to Shanghai.²⁰⁸

Thus, the chilling effect on the lawyers targeted in the crackdown is also evident in the changes in certain individuals' online activity and expression for prolonged periods. As a study in contrasts, in December 2010, Teng Biao and his friend, Zhang Yongpan, visited Fan Yafeng's mother-in-law. Fan Yafeng, a prominent legal scholar and leader of a house church as well as the Chinese Christian Lawyers' Association had been under illegal house imprisonment since December 2010. As state security police harassed and threatened him, Teng managed to fire off two Twitter alerts. He was then seized and taken to a police station for interrogation.²¹¹ Teng credits his quick release, unharmed, to the quick mobilization and support of netizens. He proceeded to publish the entire account in international media.²¹² His account, in which he cited specific provisions of the Police Law and the National Identity Card Law to demonstrate the unlawfulness of tactics of the state security police, provided a glimpse into authorities' potential motivation for resorting to more expedient extra-legal measures against lawyers.

However, from Teng Biao's disappearance in February until August 2011 he did not speak out publicly.²¹³

Jiang Tianyong was previously an active micro-blogger, and his last Weibo post, on February 18, 2011, discussed the need for human rights protections, democracy and the rule of law.²¹⁴ After his disappearance and release in 2011, however, Jiang tweeted only that he wasn't ready to talk to media and would not give interviews.²¹⁵

Graphic 2 (above pages 26-27) vividly shows the effects of enforced disappearances and criminal

detentions of rights lawyers on their community as seen through the lens of the Twitter activity of sixteen of the most vocal rights lawyers. Tracing their tweets from December 2010 to September 2011, the graphic shows the drastic drop in Twitter discussion from the end of February 2011 to July 2011. Many of those disappeared remained silent for months after they were released; several others who were not disappeared also fell silent.

At the same time, despite enduring incredible pressure and abuse, these lawyers continue to demonstrate their resilience through their online activity. Perhaps the most distinct reminder of this resilience has been provided by Teng Biao, Jiang Tianyong, Tang Jitian and others who have all since reemerged online in the fall of 2011, seemingly catalyzed by the continued abusive treatment of Chen Guangcheng under house imprisonment.²¹⁶ Li Xiongbing, Liu Xiaoyuan, and others continue to post regularly. Li Tiantian has publicly acknowledged the help she receives from Liu Xiaoyuan as well as other online supporters (网友, *wangyou*) who have offered financial assistance or places to stay.²¹⁷ Jiang described how he began with forwarding other people's messages and then slowly started to comment on microblogs and finally returning to Twitter, a process of "looking at what everyone else is doing, then trying to push for more."²¹⁸

And yet the implications for a long-term chilling effect remain unclear. The gag orders placed on these lawyers caused a clear disruption in public activism, and authorities could readily institute such measures again. The small community of rights lawyers in China presents the last line of defense for individuals facing recrimination for demanding social justice

online, China has exercised tight control and censorship over the Internet, including banning foreign social media sites like Facebook and Twitter, as well as foreign media outlets. Reuters, *Beijing leaps to defence of "Great Firewall of China"*, Oct. 20, 2011, <http://reut.rs/nPBWwA>.

210 *Id.*

211 Teng Biao, "A Hole to Bury You," *supra* note 1.

212 *Id.*

213 Peter Lee, *The Ghosts of Wenchuan*, ASIAONLINE, May 16, 2011, <http://bit.ly/ikHs52>.

214 Jiang Tianyong Weibo post, Feb. 18, 2011, <http://bit.ly/sK3qNJ>.

215 Jiang Tianyong Twitter post, Apr. 21, 2011, <http://bit.ly/tdrLbW>.

DOUBTS ON BEING A LAWYER

Despite her determination and resilience in resisting the ban on talking to media or writing after her release, Li Tiantian has also used Twitter to convey her doubts about remaining a lawyer under the conditions of the 2011 crackdown:²²⁰

“律师工作总是让我的精神紧张，心情愤怒，身心快不能承受了。”

“A lawyer’s work always makes me nervous and angry, I’m on the verge of not being able to take it anymore.”

做律师不想与权利勾结就不赚钱，勾结就精神痛苦。

“You’ll never make any money as a lawyer unless you collude with power, but the collusion will make you crazy.”

律师这花必须在民主的土壤上才芳香艳丽，否则律师的成功都象塑料假花，让人闻不出香气，越漂亮的律师花，越是发出恶臭味

“For color and fragrance, this lawyer-flower must blossom in the soil of democracy, otherwise a lawyer’s success is like a fake plastic flower, it has no fragrance and the prettier that lawyer-flower is, the worse it smells.”

and democratic reform. They also provide critical support, and often inspiration, to Chinese citizens challenging the government on important (but also politically sensitive) issues including labor rights, environmental justice, corruption, and outlawed religious and spiritual activities, among others. By detaining and intimidating this community,

enforcing periodic gag orders and coercing them to leave the cities where they worked as lawyers, the Chinese government has made it exponentially more difficult for those facing politically-motivated criminal charges in 2011 to find a lawyer able to defend them.²¹⁹

216 See Andrew Jacobs, “*Taking Big Risks to See a Chinese Dissident Under House Arrest*”, NY TIMES, October 18, 2011, <http://nyti.ms/pvbgSE>.

217 Li Tiantian Twitter post, June 30, 2011, <http://bit.ly/s8HCUi>.

218 Ng Tze-Wei, *Making people vanish*, supra note 95.

219 Mooney, *Silence of the Dissidents*, supra note 26.

220 Li Tiantian Twitter Post, May 26, 2011, <http://bit.ly/uyDmzu>.

221 United Nations, *Basic Principles on the Role of Lawyers* (hereinafter Basic Principles), adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 Aug. to 7 Sept. 1990.

IV. LAWYERS IN CHINA: LAW, ROLE, AND FUTURE

The 2011 Crackdown has directed a new level of legal and extra-legal measures against the nascent community of rights lawyers in China. These measures directly violate both international and domestic standards concerning the role of lawyers and the rule of law. They also call into question the future of the rule of law in China—whether the legal system will mature into an independent framework that governs all actors, or remain a politically controlled tool that furthers the agenda of the Party. The role of Chinese lawyers, similarly, is very much at stake in the current crackdown. If current practices against lawyers remain the norm, the price of working within the legal system to protect and promote the rule of law may be set prohibitively high, even for individuals as idealistic as Chinese rights lawyers have demonstrated themselves to be.

This section describes the fundamental rights granted to lawyers under the law, and examines what China's systematic deficiencies in fulfilling its obligations may mean for the future.

a. The Law Governing the Rights of Lawyers

The Universal Declaration on Human Rights and the major international human rights treaties emphasize the importance of access to justice and the right to a fair trial. The Basic Principles on the Role of Lawyers outlines the rights that law-

yers must have in order to make those frameworks a reality. The Basic Principles recognize that the adequate protection of human rights and fundamental freedoms as a core element of lawyers' roles and responsibilities. For all persons, the ability to protect their full array of rights requires that they have effective access to legal services provided by an independent legal profession.²²¹ This includes the right to effective assistance of counsel in criminal proceedings; mechanisms for effective and equal access to lawyers; and for poor and disadvantaged persons, sufficient funding and other resources for legal services.²²² Lawyers, as people, are entitled to the same human rights and fundamental freedoms, but as agents of legal systems, they must also be able to:

1. Perform all of their professional functions without intimidation, hindrance, harassment or improper interference;
2. Travel and to consult with their clients freely both within their own country and abroad; and
3. Be free from suffering from or being threatened with prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.²²³

²²² *Id.*

²²³ *Id.* at art. 16.

Governments are required to ensure and safeguard the ability of lawyers to discharge these professional functions. The Basic Principles specifically prescribe that lawyers must be allowed to take part in public discussion of matters concerning the law, the administration of justice, and the promotion and protection of human rights—as well as permitted to participate in civil society without suffering professional restrictions in retribution for either lawful actions or their memberships in lawful organizations.²²⁴ Lawyers are explicitly protected from being identified with their clients or their clients' causes, and hold civil and penal immunity for good-faith statements made while discharging their professional duties.²²⁵

Compared to international principles, Chinese law and practice in regards to lawyers' roles and responsibilities are notably and systemically deficient.²²⁶ The lack of an independent judiciary and autonomous lawyers' associations, along with a retreat from legal reforms in recent years, are well documented.²²⁷

b. Limitations on Criminal Defense Lawyers

The revised PRC Law on Lawyers (Lawyers Law),²²⁸ which came into force in 2008, lays out the various rights and responsibilities of Chinese lawyers, including rights to access evidence, meet with clients in criminal proceedings, and annual registration requirements. However, a number of conflicts exist between the Lawyers Law and the 1996 CPL,

which is controlling and offers weakened protections for lawyers and their clients.

Some of the amendments in the draft revisions to the CPL released on August 30 finally bring criminal procedure in line with the Lawyers Law, such as lawyers' right to meet with their clients without police presence or surveillance (Article 37). The amended CPL also strengthens some provisions in the Lawyers Law, including an important revision that would compel a witness to testify in court if his testimony has a major influence on the case and any of the parties raise objections (Art. 186). The 1996 CPL enabled the widespread practice of witnesses refusing to testify in court and allowing their statements to be read into evidence at trial, with no opportunity for cross-examination.²²⁹

Another major improvement in the draft CPL is the exclusion of confessions obtained through torture or other illegal means, as well as witness testimony and victims' statements obtained illegally through violence or intimidation (Art. 53). Coerced or illegally obtained confessions must be excluded at the investigation, examination for prosecution, and trial stages, and correspondingly cannot be used by law enforcement to recommend an indictment, indict a suspect, or reach a court verdict (Art. 53). The 1996 CPL prohibited the use of torture and other illegal means to collect evidence, but did not mandate excluding such evidence. Other illegally obtained physical or documentary material or documented evidence that has a serious influence on judicial impartiality must also be excluded (Art.

224 *Basic Principles*, *supra* note 221 at art. 23.

225 *Basic Principles*, *supra* note 221 at arts. 18, 20.

226 See, e.g., China Human Rights Lawyers Concern Group (CHRLCG), *Translations: Three Mainland Human Rights Lawyers on the Amended PRC Law on Lawyers*, May 2008, <http://bit.ly/rUQMhs>.

227 China Law and Policy, Translation: Speech by Mo Shaoping Discussing the Dangers for China's Lawyers, Feb. 16, 2011, <http://bit.ly/fuT3Vp>. (The Chinese original is available at Mo Shaoping: 莫少平: 中国律师面临的制度风险 [*The Dangers Faced by China's Lawyers*], July 20, 2010, <http://bit.ly/u9Fi8q>.)

228 中华人民共和国律师法 [Law on Lawyers of the People's Republic of China], National People's Congress, *effective* June 1, 2008, <http://bit.ly/tch2fA>.

229 See Sun Jibin, “刑事辩护“三难”为何变“十难” [*How “Three Difficulties” of Criminal Defense Became “10 Difficulties”*], *LEGAL WEEKLY*, Jan. 20, 2011, <http://bit.ly/fnT6N7> (in Chinese), translation available at <http://bit.ly/h1Ybrw>.

230 Flora Sapio and Annabel Egan, Human Rights Implications of the Draft Amendments to the Criminal Procedure Law of the People's Republic of China, October 2011, p. 5 (manuscript on file with author).

53). However, an important gap in the rules of evidence remains—there are no exclusionary rules for evidence obtained “as a result of knowledge obtained through torture or other illegal means, including illegal searches and surveillance.”²³⁰

The draft amendments to the CPL also empower various legal stakeholders to act on illegally obtained evidence. Primarily, judges have the discretion to exclude evidence that they determine, strongly suspect, or cannot rule out was obtained illegally (Art. 57), while all court personnel [审判人员, *shenpan ren*yuán] who suspect evidence was obtained illegally may ask the court to investigate (Art. 55). Criminal defendants and their lawyers can also request the exclusion of evidence obtained illegally (Art. 55). However, legal scholars have pointed out that the attendant obligation to provide related evidence of these illegal means constitutes a burden of proof on the defendant, without any meaningful protections for witnesses in such instances.²³¹

Lawyers have expressed disappointment with certain provisions of the proposed CPL revision. In addition to the alarming change to residential surveillance procedures, the amended CPL would potentially expand police power to deny permission for criminal defendants and suspects the right to meet with their lawyers in cases of endangering state security, terrorism or major crimes of bribery (Art. 37). In the 1996 CPL, lawyers had to get permission to meet with clients in cases “involving state secrets” (Article 96). The state secrets provision was frequently used as a catch-all to prevent lawyers from meeting with clients in politically sensitive cases. While its elimination is a positive

development, many rights lawyers, dissidents and activists have also been accused of “inciting subversion” or other ill-defined and politically motivated crimes of endangering state security. Thus, the draft CPL stands as an example of legislation that would simultaneously “extend and undermine the rule of law,” relying on the use of vaguely worded exceptions to ensure that state power remains paramount despite a legal system that has become more generally aligned with international standards.²³²

c. Politicization of the Criminal Justice System

The shift towards harsher policies during the 2011 Crackdown demonstrates the Party’s attempt to rein in the effects of the legal system—to reduce its use to that of another instrument of Party control. Official policy and practice in recent years have not emboldened Party interference in the legal system so much as attempted to politicize the system in its own image as another tool of its leadership,²³³ perhaps even revealing that establishing rule of law was never the object.²³⁴ The crackdown on organized crime in Chongqing is emblematic of the current politicization of the criminal justice system, illustrating trends with troubling implications for Chinese lawyers, the criminal justice system, and the rule of law in China.

After becoming the Party Secretary of Chongqing in 2008, Bo Xilai launched a far-reaching crackdown against organized crime [打黑, *dahēi*], part of a nationwide crackdown initiated in 2006.²³⁵ By the end of 2010, this enforcement blitz resulted in the detentions of more than 3,000 people; the

231 *Id.*

232 *Id.*

233 See Willy Lam, *The Politicisation of China’s Law-Enforcement and Judicial Apparatus*, 2 CHINA PERSPECTIVES 42–51 (2009).

234 Chinese Law Prof Blog, *China’s 2011 Crackdown and the Legal System*, May 26, 2011, <http://bit.ly/mLj6jx>.

235 PEOPLE’S DAILY, *228 criminal gangs sentenced in 2010 Chongqing crackdown*, March 4, 2011, <http://bit.ly/eySEKj>.

236 Wang Huazhong, *Crackdown ends reign of organized crime boss*, CHINA DAILY, January 25, 2011, <http://bit.ly/tuH79W>; PEOPLE’S DAILY, *228 criminal gangs sentenced in 2010 Chongqing crackdown*, March 4, 2011, <http://bit.ly/eySEKj>; Austin Ramzy, *China’s Dark City: Behind Chongqing’s Crime Crackdown*, TIME MAGAZINE, Mar. 15, 2010, <http://ti.me/ttwkAJ>; Joseph Fewsmith, *Bo Xilai Takes on Organized Crime*, 32 CHINA LEADERSHIP MONITOR 2 (2010), <http://bit.ly/rK3pXt>.

arrest of more than 1,000; the prosecution of 782, including 87 government officials; and the sentencing of members of 231 criminal gangs, including 57 death sentences (with 37 reprieves to life imprisonment).²³⁶ These staggering figures were achieved through “movement-style” [运动式执法, *yundongshizhifa*] administration of justice, characterized by the widespread use of informants (or through so-called “letters and denunciations by the masses”); “special case teams” [专案组, *zhuan'an zu*] carrying out wholesale arrest, prosecution and trial proceedings with so-called “Chongqing speed” [重庆速度, *Chongqing sudu*]; and high-level coordination and cooperation between police, prosecutors, and the courts that render formal proceedings into mere formalities.²³⁷

The Chongqing crackdown embodied the “Three Supremes” [三个至上, *sange zhishang*],²³⁸ an ideological doctrine introduced by President Hu Jintao in December 2007.²³⁹ The Three Supremes direct that judges and procurators “shall always regard as supreme the Party’s cause, the people’s interest, and the constitution and laws,”²⁴⁰ guided

under the “absolute leadership” of the Party.²⁴¹ In this doctrine where the constitutional supremacy of law is rendered an abstract empty concept to be informed by “public opinion” or “public policy,” the legal system was fundamentally reoriented to serve as subordinate functionaries of a “socialist rule of law” [社会主义法治, *shihuizhuyifazhi*], imprinted with the overt political consciousness of the Party.²⁴²

Accordingly, as public opinion appeared to favor swift and heavy punishment of Chongqing’s criminal elements,²⁴³ this movement-style justice flouted constitutional principles of checks and balances within the legal system and abnegated criminal due process requirements under Chinese law.

i. Pre-Determined Outcomes

At the height of the Chongqing crackdown, in late November 2009, the alleged crime boss Gong Gangmo hired Li Zhuang (李庄), an experienced criminal defense lawyer.²⁴⁵ Li met with his client at the Chongqing Jiangbei District Detention center

237 See He Weifang, 为了法治, 为了我们心中的那一份理想 [For the Rule of Law, For that Ideal in Our Hearts], Apr. 12, 2011, <http://bit.ly/fqzi16> (in Chinese). For English translation, see He Weifang, *A letter to Chongqing colleagues*, CHINA MEDIA PROJECT, Apr. 12, 2011, <http://bit.ly/hgRQ1U>. He Weifang provides some examples of this: As the diary of Judge Wang Lixin (王立新), posted to the official website of the Supreme People’s Court ahead of the hearing of the Wen Qiang case (文强案) on appeal, clearly shows, police, prosecutors and the courts (in Chongqing) worked in concert, preparing cases without any separation of responsibilities. It’s not just this, but so-called “three chiefs conferences” (大三长会议, *dasanzhanghuiyi*) have actually appeared too. For a number of important cases, the chief judge, the attorney-general and the police chief will hold meetings and work in a coordinated fashion, so that the cases are decided before they ever even go to trial.

238 Sanmenxia City Intermediate People’s Court, *The People’s Court “Three Supremes” Guiding Ideology*, ChinaCourt.org, June 23, 2006, <http://bit.ly/vFEHKV>.

239 Zhu Liheng, 一个至上与“三个至上”辨思 [The Three Primes Debate], People’s Network, May 26, 2009, <http://bit.ly/9h6Ojm>.

240 Jerome Cohen, *Jerome Cohen on the “Three Supremes”*, Oct. 22, 2008, <http://bit.ly/w0khtC>.

241 Sanmenxia City Intermediate People’s Court, *supra* note 238.

242 Zhu Liheng, *supra* note 239.

243 See Zhang Wen, *Bo Xilai and Mao Zedong*, Zhang Wen’s Blog, June 4, 2010, <http://bit.ly/aRwAFA> (noting that “at first, the public opinion was very one-sided; no one could find any fault with Bo”).

244 See He Weifang, *A letter to Chongqing colleagues*, CHINA MEDIA PROJECT, Apr. 12, 2011, <http://bit.ly/hgRQ1U>.

245 Ian Johnson, *Trial in China Tests Limits of Legal System Reform*, NY TIMES, Apr. 19, 2011, <http://nyti.ms/vzDGW3>; 重庆市江北区人民检察院起诉书 [Chongqing Jiangbei District People’s Procuratorate’s Indictment of Li Zhuang], 东方法眼 [DONGFANG FAYAN], Jan. 3, 2010, <http://bit.ly/uDcyOU> (in Chinese).

246 重庆市江北区人民检察院起诉书 [Chongqing Jiangbei District People’s Procuratorate’s Indictment of Li Zhuang], 东方法眼 [DONGFANG FAYAN], Jan. 3, 2010, <http://bit.ly/uDcyOU> (in Chinese).

“Now, thirty years have passed, and so many things have happened in this city [Chongqing] with which we are so intimately familiar, things that cause one to feel that time has been dialed back, that the Cultural Revolution is being replayed, and that the ideal of rule of law is right now being lost.”

— Legal scholar He Weifang²⁴⁴

on three occasions, with each meeting monitored by police. These meetings formed the basis for criminal allegations that Li induced Gong to falsely state that police had coerced his confession through torture.²⁴⁶ Li was also accused of inducing another of Gong’s defense lawyers to bribe police, and for knowingly arranging for witnesses to falsely testify that Gong had control over his company’s operations.²⁴⁷ On December 12, 2009, within weeks of taking on representation of Gong, Li was detained on suspicion of destroying and fabricating evidence for his client²⁴⁸ under Article 306 of the Criminal Law, which provides that a defense lawyer in a criminal proceeding who destroys or forges evidence, helps any of the parties destroy or forge evidence, or coerces the witness or entices him into changing his testimony in defiance of the facts or give false testimony, can be sentenced to up to seven years imprisonment.²⁴⁹

No witnesses testified at Li’s trial on December 30, 2009—all had been taken into police custody and were apparently “unwilling” to appear.²⁵⁰ Li disputed the guilty plea during trial. As Li’s defense

lawyers Chen Youxi and Gao Zicheng argued, Li was accused of inducing Gong to present false evidence of torture—but Gong’s trial had not taken place, and Gong had yet to testify.²⁵¹ Similarly, Li was charged with inducing witness perjury, when the witnesses had yet to be called or even named by the defense. On December 28, Li was convicted and sentenced to two and a half years, essentially for criminal acts that had yet to take place.²⁵²

On March 28, 2011, mere months before completing his sentence, Li was charged a second time with obstructing evidence, this time for “omitted” offenses that he allegedly committed in his representation of a past case.²⁵³ In this case, prosecutors (again from the Jiangbei District Procuratorate) alleged that Li “lured and instigated” his client, Shanghai businesswoman Xu Lijun, to falsify her testimony.²⁵⁴ By his “second season” [第二季, *erji*], Li had become a potential harbinger of an expanded threat against lawyers that could not only reach unaccountably into the future, but also the past—where they may even be held responsible for cases already resolved.²⁵⁵

247 *Id.*

248 *Id.*

249 Criminal Law, amended by the National People’s Congress Feb. 25, 2011, *supra* note 108.

250 Chen Youxi and Gao Zicheng, 李庄律师被控辩护人伪造证据妨害作证罪第一审辩护词 [Defense statement of the first instance], Jan. 8, 2010, <http://bit.ly/vig17j> (in Chinese).

251 *Id.*

252 重庆市江北区人民法院刑事判决书, (2009) 江法刑初字第711号 [Criminal Judgment of the Chong Jiangbei District People’s Court No. 711 (2009)], Jan. 8, 2010, <http://bit.ly/vig17j>.

253 Li Zhuang announced the indictment along with misappropriation of funds involved in the case of Shanghai, XIANG MORNING POST, Apr. 8, 2011, <http://bit.ly/vVwrls> (in Chinese).

254 *Id.*

255 Jiang Ping, *Li Zhuang’s Chilly Seasons for Rule of Law*, CAIXIN ONLINE, May 9, 2011, <http://bit.ly/vfADcX>.

256 Sida Liu, 废除“306大棒”, 还律师辩护一片蓝天——一评李庄案 [If the ‘306 big stick’ is abolished, will lawyers still defend a piece of sky—a critique of the Li Zhuang case], Dec. 21, 2009, <http://bit.ly/vxxkUa> (in Chinese); see, e.g., CHRLCG, *Translations: Three Mainland Human Rights Lawyers on the Amended PRC Law on Lawyers*, *supra* note 226.

Despite relatively few convictions, the “306 big stick” has been called the Sword of Damocles for Chinese lawyers.²⁵⁶ Though Li Zhuang’s conviction for Article 306 offenses was exceptional, Article 306 has been the basis of the arrest and prosecution of hundreds of lawyers in China.²⁵⁷ Furthermore, Li’s high-profile case spotlights typical and ongoing problems in the Chinese legal system that put criminal defense and rights lawyers at continual risk. Scholars and advocates frequently identify Article 306 as one of the reasons increasingly fewer Chinese lawyers are willing to engage in criminal defense work, so that a Chinese lawyer, on average, handles less than one criminal defense per year.²⁵⁸

The Li Zhuang case demonstrates a fundamental schism over the most basic assumptions about law held by key actors in the Chinese legal system. In essence, the procuratorate and courts considered Li’s motive—to exonerate his client—to be criminal, because it directly conflicted with the goals of the state in prosecuting Gong. Thus, although the CPL stipulates that a defendant can present witness testimony, it became a crime for Li to explore potential witness testimony that exculpated a person the state wished to punish.²⁵⁹ For a lawyer, however, working to exonerate a client is a core professional duty—there is nothing criminal or

subversive about working within the legal system, or providing the safeguards the Chinese Constitution purports to grant those being prosecuted. While the draft CPL no longer states that defense lawyers who conceal, destroy or falsify evidence shall be investigated for legal responsibility,²⁶⁰ Article 306 remains a significant challenge for the Chinese legal profession.

The successive prosecutions of Li Zhuang may also signal something more dire emerging in the Chinese legal system: a systemic retrogression into rule by man, not law.²⁶¹ Correspondingly, the dropping of the “second-season” charges against Li on April 23, 2011 were also believed to be the result of political maneuvering.²⁶² In his statement on Li’s second prosecution, Li’s defense lawyer Chen Youxi (陈有西) argued that Li’s case was significant for informing Chinese citizens of this truth: if a country’s justice is controlled by power, and if the police, procuratorates, and courts [together, public security authorities, 公检法, *gongjianfa*] are commanded by only one authority, the oppression of the people is inevitable.²⁶³

257 Human Rights Watch, “*Walking on Thin Ice*”: Control, Intimidation and Harassment of Lawyers in China, *supra* note 27 at 58. (“According to a prominent lawyer interviewed by Human Rights Watch, a survey by the All-China Lawyers Association showed that over 500 lawyers were detained, accused, or sanctioned for falsification of evidence under article 306 between 1997 (when the article was introduced) and 2002, but 80% of them were ultimately cleared of any wrongdoing.”)

258 Sida Liu, *supra* note 256; CHRLCG, *Translations: Three Mainland Human Rights Lawyers on the Amended PRC Law on Lawyers*, *supra* note 226.

259 Chen Youxi and Gao Zicheng, *supra* note 250.

260 Draft CPL, *supra* note 5, art. 42.

261 Chen Youxi, 李庄案, 还有必要陪练吗? [*Li Zhuang’s case, is sparring still necessary?*], Apr. 2, 2011, <http://www.chinaelections.org/newsinfo.asp?newsid=203625> (in Chinese).

262 Jeremy Page, *China Drops Charges Against Lawyer*, Apr. 23, 2011, WALL STREET JOURNAL ASIA <http://on.wsj.com/rwR8XL>.

263 Chen Youxi, *supra* note 261.

V. CONCLUSION

Although many Chinese rights lawyers had previously been singled out for harassment, intimidation and punishment, it was not until February 2011 that authorities orchestrated a fierce crackdown on over a dozen prominent members of this small and highly visible community.

These lawyers were known to each other and often connected in some way, having represented dissidents, activists, religious practitioners and other politically sensitive cases at increasing personal risk. They operated in a legal system, formally controlled by the Chinese Communist Party, which could wield an arsenal of tools to frustrate their professional work. However, in the 2011 Crackdown, authorities led by domestic security police deployed draconian and extra-legal measures to disable this entire community of lawyers. At least 11 lawyers were subject to enforced disappearance, from a few days to as long as four months. A few of these individuals have risked further punishment by speaking out about the torture, physical abuse, and constant surveillance they experienced while being “black-hooded,” raising concerns that these abuses were far more widespread. Some of these enforced disappearances took place under the cover of residential surveillance, a non-custodial measure that was taken well beyond its legal limitations during the 2011 Crackdown. It is likely that most, if not all, of these lawyers were compelled to sign agreements that effectively silenced them for a period after their release from enforced disappearance—no longer allowed to take on these sensitive cases, speak publicly, or have unreported communications with each other for extended periods. Many were forcibly returned

to their hometowns outside of epicenters like Beijing and Guangzhou where they worked, enhancing their physical and mental isolation. Furthermore, authorities expanded their dragnet of responsibility to lawyers’ family members, using extra-legal methods of collective responsibility such as house imprisonment, shared criminal responsibility, deportation, and constant harassment and surveillance.

These lawyers continue to reveal a surpassing resilience and tenacity in their commitment to improving their profession and the legal system they work in. However, taken together, these extreme measures demonstrated that it was possible to effectively disable this community of lawyers for a sustained period, opening up the possibility of future and even harsher crackdowns with the goal of diminishing the profile of these individuals as a vanguard of legal reform in Chinese society. Any lasting chilling effect on this small community of lawyers would also further marginalize vulnerable individuals and groups fighting for social justice—leaving them defenseless in a legal system that is already stacked against them.

The 2011 crackdown on Chinese lawyers is also resonant in the context of broader ideological debate on roles and functions of the Chinese legal system. In retreating from a longstanding declared commitment to establishing rule of law, the Chinese government has moved towards the subjugation of the legal system under Party and public opinion, valuing dominant interests and swift political campaign-style justice over procedural fairness, transparency, and limited police powers.

VI. RECOMMENDATIONS

A. TO THE CHINESE GOVERNMENT:

Current laws and practices in China must be revised in order to ensure that fundamental human rights are respected and protected. Specifically, the Chinese government must:

1. Make changes to its current practices through providing access to independent international experts, investigators, and trainers;
2. Make changes to its laws and regulations, by strengthening fair trial guarantees and protecting lawyers so that they may carry out their professional responsibilities without fear of reprisal; and
3. Review the individual cases mentioned in this report and take immediate action to release rights lawyers detained simply for carrying out their professional duties and cease the use of extra-legal measures targeting rights lawyers generally.

These recommendations are outlined in detail, below.

1. Changes to Current Practice

To ensure that changes are made to current practices that violate international standards, the Chinese government should:

- (i) Invite the United Nations Special Rapporteur on the independence of judges and lawyers to conduct an independent examination of the laws, regulations, and practices that impede lawyers' professional duties;
- (ii) Invite independent international lawyers and bar associations to provide trainings in international law for police, prosecuting organs, and judges, relating to fair trial guarantees, the rights of criminal suspects and defendants, with emphasis on the importance of ensuring access to counsel;
- (iii) Establish monitoring mechanisms to review and report on practices that deviate from regulations established by law, including limits on secret detentions and disappearances, and other detentions where individuals are detained and held without adherence to established procedures; and
- (iv) Establish monitoring mechanisms to review and report on extralegal sanctions imposed on rights lawyers. This review should in particular ensure that family members of individuals under investigation are not targeted or punished for their relationship to those individuals. All prac-

tices that target family members and associates who are not themselves under investigation must be stopped immediately.

2. Legislative and Other Legal Reforms

To bring its national laws and regulations into conformity with international standards, the Chinese government should:

- (i) Ratify the International Covenant on Civil and Political Rights, as it has repeatedly promised to do, as well as the International Convention for the Protection of All Persons from Enforced Disappearance, to demonstrate its commitment to the promotion and protection of the human rights of all its citizens
- (ii) Bring domestic laws related to criminal defense and fair trial guarantees into conformity with international standards. To do so, the Chinese government must, at a minimum, take the following steps to address the gaps between international and domestic standards:

a) Criminal Law

Professional rights of lawyers: Repeal Article 306 of the Criminal Law.

Article 306 is an unnecessary and redundant provision criminalizing perjury and witness tampering specifically for lawyers, and is often used to harass attorneys defending unpopular clients.

Specificity in legal provisions: Revise articles in the Criminal Law to increase specificity in legal definition.

Greater precision in legal provisions will prevent their use to detain individuals for acts protected under human rights law. The Chinese government should:

- Amend Article 293 which criminalizes “creating disturbances.” The article should be amended to include a precise definition of acts that constitute a crime and reduce the current wide leeway provided to police and prosecuting authorities in making detentions and leveling charges;
- Amend articles in the Criminal Law that relate to state secrets and national security, including Articles 102–106 and 110–113. These articles use vague, undefined, and imprecise terms that have been used to target human rights advocates and create some of the most difficult cases for their lawyers. The articles should be amended to include more specific definitions that carve out protections for rights guaranteed under international law.

b) Criminal Procedure Law

Duty to clients—defendant access to counsel: Amend articles in the Criminal Procedure Law to guarantee individuals’ access to counsel.

The Chinese government should:

- Amend Article 96 of the Criminal Procedure Law to state explicitly that all criminal suspects have prompt access to a lawyer.

- Revise the proposed amendments to Article 37 to ensure that individuals have access to their lawyer directly after their first interrogation or on the day when coercive measures are adopted. This would ensure that the proposed Article 37 (demanding that criminal detainees have access to their attorneys within 48 hours) is not in conflict with Article 33 of the Lawyers Law.
- Undertake further revisions to bring the Criminal Procedure Law into compliance with international standards, as follows:
 - Include an explicit statement that all criminal suspects must have access to counsel at all stages of the criminal process;
 - Include an explicit statement that all criminal suspects must have access to counsel regardless of the nature of the criminal charge levied against them, including if their charges “involve State secrets” (as in Article 96);
 - Remove the provision demanding that client-lawyer meetings must be approved in certain circumstances as in Article 96 (cases “involving State secrets”) and the proposed amendment to Article 37 (cases of endangering state security, terrorism, or major crimes of bribery).
 - Make the proposed amendment to Article 37 more robust by stating that client meetings should take place without interception, censorship, and in full confidentiality, in line with the Basic Principles on the Role of Lawyers;
 - Ensure that all revisions to the law are in conformity with protections for lawyers in the Lawyers Law. Without revision, Article 33 of the Lawyers Law stating that client-lawyer meetings shall not be monitored conflicts with Article 96 of Criminal Procedure Law which allows the monitoring of such meetings in certain circumstances.

Duty to clients—attorney access to evidence: Amend relevant articles on access to relevant evidence.

The Chinese government should:

- Amend Article 45. Article 45, stating that “evidence involving State secrets shall be kept confidential,” should be amended to ensure that lawyers can access all information in the possession of authorities that will enable them to provide an effective defense;
- Amend Article 37 to ensure that defense attorneys have the same right of access to evidence as their prosecutorial counterparts;
- Adopt the proposed Article 186. The proposed Article 186 would compel a witness to testify in court if his or her testimony has a major influence on the case and any of the parties raise objections, while current law allows witness testimony to be read into evidence, with no opportunity for cross-examination.

Due process: Amend legal provisions to ensure that the due process rights of individuals are guaranteed.

The Chinese government should:

- Amend provisions on the imposition of non-custodial measures.
 - Amend provisions on non-custodial measures, including residential surveillance, to require family notification, and to limit the extent of measures that may be imposed.
 - Revise regulations related to these procedures, including the Rules of Procedure for the Handling of Criminal Cases by Public Security Organs, to ensure that “fixed domicile” cannot be manipulated to allow the police to remove individuals from their home cities.
 - Amend provisions to prevent police from using guesthouses as temporary detention facilities as a means of curtailing the freedoms of suspects who may ordinarily be detained in their homes.
- Reject the proposed Article 73 to the Criminal Procedure Law which allows residential surveillance to be imposed on an individual at any location where crimes of endangering national security, terrorism, or major crimes of bribery are suspected. This revision would effectively enable authorities to disappear persons to undisclosed locations, without any family notification, and without providing access to counsel, for up to six months, where it would be, in the judgment of the prosecuting organs, an impediment to the investigation to hold the individual at their home. As such, this proposed revision must be rejected.
- Adopt provisions that condemn the use of torture and other illegal means to extract evidence.
 - Adopt the proposed Article 53 which will exclude from trial confessions obtained through torture or other illegal means, as well as witness testimony and victims’ statements obtained illegally through violence or intimidation.
 - Adopt proposed amendments that empower judges and lawyers to question the legality of evidence
 - Strengthen proposed amendments by enhancing protections for witnesses.

c) Law on Lawyers

Access to counsel: Revise the Law on Lawyers to ensure that all criminal suspects have access to counsel in all stages of criminal proceedings.

The Chinese government should:

- Amend Article 33 to ensure that an individual can assert his or her right to counsel during the interrogation stage.

Professional rights of lawyers: Increase the protections guaranteed to lawyers for the performance of their professional functions.

The Chinese government:

- Make Article 37 of the Law on Lawyers more robust. It currently states that “a lawyer’s right of the person is inviolable” and which states that a lawyer “shall not be legally liable for the opinions he presents . . . in court.” This provision should be made more robust by stating in more detail the protections guaranteed to lawyers for the performance of their professional functions. With reference to international standards in the Basic Principles on the Role of Lawyers, these additions should include:
 - That lawyers may perform all their professional duties without intimidation, hindrance, harassment, or improper interference;
 - That lawyers can travel and consult with their clients freely;
 - That lawyers can perform their duties without reprisals taken against them simply because the cases and causes they represent are unpopular.

Freedom of expression and Association: Amend Law on Lawyers to allow lawyers to join independent lawyers associations that representing their professional interests and integrity.

The Chinese government should:

- Amend the articles under “Chapter V: Lawyers Associations,” to ensure that lawyers may join associations that are independent and aimed at representing their interests and professional integrity.
- Amend the law on lawyers to ensure that lawyers, like other citizens, have the right to freedom of expression and can take part in public discussion on matters concerning the law, the administration of justice, and the promotion and protection of human rights, as outlined in the Basic Principles on the Role of Lawyers.

3. Individual Cases

The cases of each of the rights lawyers targeted in the 2011 crackdown and in previous years must be reviewed to rectify the targeting of lawyers for simply carrying out their professional duties.

The Chinese government should:

- (i) Produce information about the current status and whereabouts of Gao Zhisheng, and take steps to secure his immediate release;
- (ii) Immediately cease the house imprisonment, harassment and surveillance of Zheng Enchong as well as Chen Guangcheng and his family;
- (iii) Terminate any ongoing criminal investigation of Liu Shihui and Tang Jingling that stem from their professional duties or arise as a result of their ongoing work as rights lawyers;
- (iv) Withdraw the prosecution of Ni Yulan and Dong Jiqin for “creating a disturbance”;

- (v) Investigate the incidents of enforced disappearances of Fan Yafeng, Gao Zhisheng, Jiang Tianyong, Tang Jitian, Teng Biao, Li Tiantian, Liu Shihui, and others, and take steps to hold the perpetrators criminally responsible;
- (vi) Investigate instances where rights lawyers' licenses have been suspended or revoked, allegedly in retaliation against their professional duties as part of unpopular cases. These instances include the cases of Tang Jitian and Liu Wei;
- (vii) Investigate all allegations of physical abuse, including allegations of torture during the disappearances of lawyers profiled in this report, and the beatings of Chen Guangcheng and his family at their homes, and take steps to hold the perpetrators criminally responsible;
- (viii) Immediately lift all restrictions on the constitutionally guaranteed rights of all rights lawyers, including Liu Shihui, Tang Jitian, Tang Jiling, Li Tiantian, Li Fangping, Li Heping, Teng Biao, and others.

B) TO THE INTERNATIONAL COMMUNITY

The international community, including governments, non-governmental and international organizations, professional organizations, academic institutions, lawyers associations, and individuals, have an important role to play in calling for a strengthening of the rule of law in China.

The international community should:

- (i) Continue to press Chinese officials in both official and unofficial settings to strengthen protections for an independent legal profession and judiciary;
- (ii) Increase opportunities for legal exchanges and trainings between China and other legal jurisdictions, at bar associations, law firms, and law schools, to provide for further training and understanding of human rights concerns, independent legal standards, and non-criminal professional sanctions;
- (iii) Build relationships and cooperation between independent bar associations outside of China and the All-China Lawyers Association and city lawyers associations, and working to create a stronger independent bar inside China;
- (iv) Speak out on behalf of individual colleagues in China who have been subjected to criminal prosecution, have had their licenses stripped, or have otherwise been punished for carrying out their professional responsibilities through statements, letters, and the media; and
- (v) Promote the rights of lawyers as a professional group at home and abroad in meetings with other lawyers, businesses, law firms, bar associations, and governments, such as those adopted by the New York City Bar Association (**See Appendix III**).

Appendix I: United Nations Basic Principles on the Role of Lawyers

Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia , their determination to establish conditions under which justice can be maintained, and proclaim as one of their purposes the achievement of international cooperation in promoting and encouraging respect for human rights and fundamental freedoms without distinction as to race, sex, language or religion,

Whereas the Universal Declaration of Human Rights enshrines the principles of equality before the law, the presumption of innocence, the right to a fair and public hearing by an independent and impartial tribunal, and all the guarantees necessary for the defence of everyone charged with a penal offence,

Whereas the International Covenant on Civil and Political Rights proclaims, in addition, the right to be tried without undue delay and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenant on Economic, Social and Cultural Rights recalls the obligation of States under the Charter to promote universal respect for, and observance of, human rights and freedoms,

Whereas the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that a detained person shall be entitled to have the assistance of, and to communicate and consult with, legal counsel,

Whereas the Standard Minimum Rules for the Treatment of Prisoners recommend, in particular, that legal assistance and confidential communication with counsel should be ensured to untried prisoners,

Whereas the Safeguards guaranteeing protection of those facing the death penalty reaffirm the right of everyone suspected or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings, in accordance with article 14 of the International Covenant on Civil and Political Rights,

Whereas the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power recommends measures to be taken at the international and national levels to improve access to justice and fair treatment, restitution, compensation and assistance for victims of crime,

Whereas adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession,

Whereas professional associations of lawyers have a vital role to play in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements, providing legal services to all in need of them, and cooperating with governmental and other institutions in furthering the ends of justice and public interest,

The Basic Principles on the Role of Lawyers, set forth below, which have been formulated to assist Member States in their task of promoting and ensuring the proper role of lawyers, should be respected and taken into account by Governments within the framework of their national legislation and practice and should be brought to the attention of lawyers as well as other persons, such as judges, prosecutors, members of the executive and the legislature, and the public in general. These principles shall also apply, as appropriate, to persons who exercise the functions of lawyers without having the formal status of lawyers.

Access to lawyers and legal services

1. All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.
2. Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.
3. Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources.
4. Governments and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms. Special attention should be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers.

Special safeguards in criminal justice matters

5. Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.
6. Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.
7. Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.
8. All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.

Qualifications and training

9. Governments, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law.
10. Governments, professional associations of lawyers and educational institutions shall ensure that there is no discrimination against a person with respect to entry into or continued practice within the legal profession on the grounds of race, colour, sex, ethnic origin, religion, political or other opinion, national or social origin, property, birth, economic or other status, except that a requirement, that a lawyer must be a national of the country concerned, shall not be considered discriminatory.
11. In countries where there exist groups, communities or regions whose needs for legal services are not met, particularly where such groups have distinct cultures, traditions or languages or have been the victims of past discrimination, Governments, professional associations of lawyers and educational institutions should take special measures to provide opportunities for candidates from these groups to enter the legal profession and should ensure that they receive training appropriate to the needs of their groups.

Duties and responsibilities

12. Lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.
13. The duties of lawyers towards their clients shall include:
 - (a) Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients;
 - (b) Assisting clients in every appropriate way, and taking legal action to protect their interests;
 - (c) Assisting clients before courts, tribunals or administrative authorities, where appropriate.
14. Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.
15. Lawyers shall always loyally respect the interests of their clients.

Guarantees for the functioning of lawyers

16. Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.
17. Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.
18. Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.
19. No court or administrative authority before whom the right to counsel is recognized shall refuse to

recognize the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles.

20. Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.
21. It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.
22. Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

Freedom of expression and association

23. Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession.

Professional associations of lawyers

24. Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.
25. Professional associations of lawyers shall cooperate with Governments to ensure that everyone has effective and equal access to legal services and that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognized professional standards and ethics.

Disciplinary proceedings

26. Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national law and custom and recognized international standards and norms.
27. Charges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures. Lawyers shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice.
28. Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review.
29. All disciplinary proceedings shall be determined in accordance with the code of professional conduct and other recognized standards and ethics of the legal profession and in the light of these principles.

Appendix II: Chart of Domestic and International Standards on Access to Counsel and Due Process

| Issues | International Standards ¹ | Lawyers Law ² | Criminal Procedure Law (1997) ³ | 2011 proposed revisions to Criminal Procedure Law ⁴ |
|---|---|--|--|--|
| <u>Investigation Stage:</u> Access to Counsel/ Role of Defense Counsel | <p>All persons are entitled to call upon the assistance of a lawyer of their choice in all stages of criminal proceedings. (Basic Principles on Role of Lawyers, Art. 1.)</p> <p>Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction or discrimination of any kind. (Basic Principles on Role of Lawyers, Art. 2.)</p> | <p>After a criminal suspect is interrogated by an investigation organ for the first time or from the date on which compulsory measures are adopted against him, the authorized lawyer shall . . . have the right to meet with the criminal suspect or defendant and enquire about the case (Art. 33)</p> | <p>Criminal suspect may appoint a lawyer to provide him with legal advice and to file petitions and complaints on his behalf.</p> <p>The appointed lawyer shall have the right to find out from the investigation organ about the crime suspected of. Arrest: the appointed lawyer may apply on his behalf for obtaining a guarantor pending trial. If a case involves State secrets, the criminal suspect shall have to obtain the approval of the investigation organ for appointing a lawyer. (Art. 96)</p> | <p>Defense lawyer may provide criminal suspect with legal advice, file petitions and complaints on his behalf, and find out the crime and relevant circumstances of the case from the investigating organ. (Art. 36)</p> |
| <u>Investigation Stage:</u> Client Meetings | <p>All persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention. (Basic Principles on Role of Lawyers, Art. 7.)</p> <p>All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. (Basic Principles on Role of Lawyers, Art. 8.)</p> | <p>After a criminal suspect is interrogated by an investigation organ for the first time or from the date on which compulsory measures are adopted against him, the authorized lawyer shall . . . have the right to meet with the criminal suspect or defendant and enquire about the case (Art. 33)</p> | <p>Lawyer may meet with the criminal suspect in custody to enquire about the case. If a case involves State secrets, before the lawyer meets with the criminal suspect, he shall have to obtain the approval of the investigation organ. (Art. 96)</p> | <p>Defense lawyers may meet and correspond with the suspect/defendant in custody to learn about the case, provide legal advice, etc. Meetings must take place within 48 hours of request. (Art. 37).</p> <p>For crimes of endangering state security, terrorism or major crimes of bribery, lawyers must get permission from the investigating organ to meet with clients. (Art. 37)</p> <p>Lawyers for criminal suspects or defendants under residential surveillance are subject to the above provisions, with the exception of the requirement that client meetings take place within 48 hours after request.</p> |

| Issues | International Standards ¹ | Lawyers Law ² | Criminal Procedure Law (1997) ³ | 2011 proposed revisions to Criminal Procedure Law ⁴ |
|--|--|--|--|---|
| <u>Investigation Stage:</u> Monitoring of Client Meetings. | All consultations between arrested, detained or imprisoned persons and their lawyer, shall be without interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials. (Basic Principles on Role of Lawyers, Art. 8.) Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential. (Basic Principles on Role of Lawyers, Art. 22.) | The meeting between a lawyer and a criminal suspect or defendant shall not be monitored. (Art. 33.) | When the lawyer meets with the criminal suspect in custody, the investigation organ may, in light of the seriousness of the crime and where it deems it necessary, send its people to be present at the meeting. (Art. 96) | A lawyer who meets with a criminal suspect or defendant shall not be under surveillance (Art. 37) |
| <u>Prosecution examination:</u> Access to Counsel/ Role of Defense Counsel | It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time. (Basic Principles on Role of Lawyers, Art. 21.) | An authorized lawyer shall, from the date on which a case begins to be examined for prosecution, have the right to consult, extract, and duplicate litigation documents and case file[s] pertaining to the case. (Art. 34) | Lawyers may consult, extract and duplicate the judicial documents pertaining to the current case and the technical verification material. (Art. 36) | Lawyers may verify evidence with the suspect/defendant. (Art. 37). Lawyers may consult, extract and duplicate the judicial documents pertaining to the current case (Art. 38) Lawyers who believe that public security organs and procuratorates (in the investigation and prosecution examination stage) have not provided evidence collected to show that the suspect/defendant is innocent or committed a lesser crime may petition to the court or procuratorate to obtain the relevant evidence. (Art. 39) |

Footnotes

- 1 The international standards on access to counsel draw especially on the UN Basic Principles on the Role of Lawyers, United Nations, Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 Aug. to 7 Sept. 1990. The Basic Principles are founded in the human rights enshrined in the Universal Declaration of Human Rights and codified in the International Covenant on Civil and Political Rights, Universal Declaration of Human Rights (UDHR), G.A. res. 217A (III), UN. Doc A/810 at 71 (1948); International Covenant on Civil and Political Rights (ICCPR), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force, Mar. 23, 1976. As a signatory to the ICCPR, the Chinese government is obligated not to defeat the object and purpose of the treaty.

| Issues | International Standards ¹ | Lawyers Law ² | Criminal Procedure Law (1997) ³ | 2011 proposed revisions to Criminal Procedure Law ⁴ |
|--|--|---|---|--|
| <u>Prosecution examination:</u> Client Meetings | All persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention. (Basic Principles on Role of Lawyers, Art. 7.) All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. (Basic Principles on Role of Lawyers, Art. 8.) | Authorized lawyer has the right to meet the suspect. (Art. 33) | Defense lawyers may meet and correspond with the defendant in custody (Art. 36) | Defense lawyers may meet and correspond with the suspect/defendant in custody to learn about the case, provide legal advice, etc. Meetings must take place within 48 hours of request. (Art. 37). For crimes of endangering state security, terrorism or major crimes of bribery, lawyers must get permission from the investigating organ to meet with clients. (Art. 37) |
| <u>Acceptance of Case by People's Court:</u> Access to Counsel/ Role of Defense Counsel | It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time. (Basic Principles on Role of Lawyers, Art. 21.) | An authorized lawyer shall, from the date on which the people's court accepts the case, have the right to consult, extract, and duplicate all materials pertaining to the case. (Art. 34) | Defense lawyers may, from the date on which the People's Court accepts a case, consult, extract and duplicate the material of the facts of the crime accused in the current case, and may meet and correspond with the defendant in custody. (Art. 36) | Lawyers may consult, extract and duplicate the judicial documents pertaining to the current case (Art. 38) |
| <u>Collection of Evidence</u> | It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time. (Basic Principles on Role of Lawyers, Art. 21.) | An authorized lawyer shall, depending on the circumstances of the case, apply to the people's procuratorate or people's court for the collection and delivery of evidence, or apply, to the people's court for telling the witnesses to appear in court and give testimony. (Art. 35) | Defense lawyers may, with the consent of the witnesses or other units and individuals concerned, collect information pertaining to the current case from them and they may also apply to the People's Procuratorate or the People's Court for the collection and obtaining of evidence, or request the Court to inform the witnesses to appear in court and give testimony. (Art. 37) | Defense lawyers may, with the consent of the witnesses or other units and individuals concerned, collect information pertaining to the current case from them and they may also apply to the People's Procuratorate or the People's Court for the collection and obtaining of evidence, or request the People's Court to inform the witnesses to appear in court and give testimony. (Art. 41) |

| Issues | International Standards ¹ | Lawyers Law ² | Criminal Procedure Law (1997) ³ | 2011 proposed revisions to Criminal Procedure Law ⁴ |
|--|--|--|--|---|
| Collection of Evidence (cont'd) | | Where a lawyer investigates and takes evidence on his own, he may, on the strength of his lawyer's practice certificate and the papers issued by his law firm, inquire of the unit or individual concerned about the legal matters which he has undertaken to handle. (Art. 35) | With permission of the People's Procuratorate or the People's Court and with the consent of the victim, his near relatives or the witnesses provided by the victim, defense lawyers may collect information pertaining to the current case from them. (Art. 37) | With permission of the People's Procuratorate or the People's Court and with the consent of the victim, his near relatives or the witnesses provided by the victim, defense lawyers may collect information pertaining to the current case from them. (Art. 41) |
| Witness Testimony | N.A. | An authorized lawyer shall, depending on the circumstances of the case, apply to the people's procuratorate or people's court for the collection and delivery of evidence, or apply, to the people's court for telling the witnesses to appear in court and give testimony (Art. 35) | The public prosecutor and the defenders shall show the material evidence to the court for the parties to identify; the records of testimony of witnesses who are not present in court, the conclusions of expert witnesses who are not present in court, the records of inquests and other documents serving as evidence shall be read out in court. The judges shall heed the opinions of the public prosecutor, the parties, the defenders and the agents ad litem. (Art. 157) | Where a written statement by a witness has material influence on the determination of a sentence and where the public prosecutor, the party or the defender, or the agent ad litem objects to such statement, or the people's court believes it to be necessary for a witness to appear before court to testify, the witness shall do so. This also applies to police who are eye-witnesses to criminal activity whilst on duty. (Art. 186) |
| Expert witnesses shall testify in court if the procurator, parties, defenders, or legal representatives have objections to expert testimony, or the court deems it necessary. If the expert witness is notified by the court but refuses to testify in court, the testimony of that expert witness may not be used in determining a verdict. | | | | |
| Footnotes | | | | |
| 2 | Law of the People's Republic of China on Lawyers (2007), http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471604.htm . | | | |
| 3 | Criminal Procedure Law of the People's Republic of China, adopted Jan. 1, 1997, http://www.cecc.gov/pages/newLaws/criminalProcedureENG.php | | | |
| 4 | 中华人民共和国刑事诉讼法修正案（草案）[Draft Criminal Procedure Law of the People's Republic of China], issued by the National People's Congress, Aug 30, 2011, http://www.npc.gov.cn/npc/xinwen/lfgz/2011-08/30/content_1668503.htm . | | | |

| Issues | International Standards ¹ | Lawyers Law ² | Criminal Procedure Law (1997) ³ | 2011 proposed revisions to Criminal Procedure Law ⁴ |
|--|---|--------------------------|---|--|
| Use of Torture to Extract Evidence and Illegally Obtained Evidence | <p>No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. (Universal Declaration of Human Rights, Art. 5).</p> <p>1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment. 2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person. (Convention Against Torture, Art. 10)</p> <p>Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture. (Convention Against Torture, Art. 11)</p> <p>No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. (Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 6)⁵</p> | Not addressed. | <p>It shall be strictly forbidden to extort confessions by torture and to collect evidence by threat, enticement, deceit or other unlawful means. Conditions must be guaranteed for all citizens who are involved in a case or who have information about the circumstances of a case to objectively and fully furnish evidence and, except in special circumstances, they may be brought in to help the investigation. (Art. 43)</p> | <p>Confessions extracted by torture or other illegal means, as well as statements of victims or witnesses collected by the use of force, threats or other illegal means shall be excluded, and shall not be used as a basis for opinions or decisions of the prosecution or the courts. (Art. 53)</p> <p>Illegally obtained physical or documentary evidence that seriously influences judicial impartiality shall be excluded. (Art. 53)</p> <p>Evidence that should have been excluded during the investigation, examination for prosecution, or prosecution stages cannot be used as evidence for recommending indictment, indictment, or judgment. (Art. 53)</p> <p>If the procuratorate suspects, or receives a case report, an accusation or information that the investigator collected evidence illegally, it shall conduct an investigation and verification. (Art. 54) If evidence is determined to be illegally obtained the procuratorate shall issue a rectifying opinion, and where necessary, recommend that the investigator be replaced. Where illegal gathering of evidence constitutes a crime, criminal liability shall be pursued in accordance with the law. (Art. 54)</p> <p>In court proceedings, where court personnel believe that evidence has been illegally obtained (in accordance with Art. 53), they shall investigate the lawfulness of such evidence. (Art. 55)</p> <p>Parties and defenders may apply to the court to exclude illegally obtained evidence. They shall provide related clues or evidence when applying for the exclusion of illegally obtained evidence. (Art. 55)</p> <p>In court investigations of the lawfulness of evidence, the procuratorate shall provide testimony of the lawfulness of the evidence. Courts may notify relevant investigative personnel or other personnel to testify in court, and upon such legal notification, investigative or other personnel must appear in court. Investigative or other personnel may also apply to testify in court. (Art. 56)</p> <p>Evidence that the court determines to be illegally obtained, has strong suspicion of being illegally obtained, or cannot rule out has been illegally obtained, shall be handled in accordance with Article 53. (Art. 57)</p> |

| Issues | International Standards ¹ | Lawyers Law ² | Criminal Procedure Law (1997) ³ | 2011 proposed revisions to Criminal Procedure Law ⁴ |
|-----------------------------------|---|---|---|--|
| Professional Functions of Lawyers | <p>Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics. (Basic Principles on Role of Lawyers, Art. 16.)</p> <p>Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities. (Basic Principles on Role of Lawyers, Art. 17.)</p> <p>Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions. (Basic Principles on Role of Lawyers, Art. 18.)</p> <p>Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority. (Basic Principles on Role of Lawyers, Art. 20.)</p> | <p>In legal practice, a lawyer's right of the person is inviolable. (Art. 37)</p> <p>A lawyer shall not be legally liable for the opinions he presents as an agent ad litem or defender in court, with the exception of the views he presents to endanger State security, maliciously slander another person, or seriously disrupt court order. (Art. 37)</p> <p>Where a lawyer is, in accordance with law, detained or arrested because he is suspected of committing a crime when participating in litigation, the organ that detains or arrests him shall, within 24 hours after the execution of detention or arrest, have his family members, his law firm and the lawyers association to which he belongs informed of the fact. (Art. 37)</p> | <p>Defense lawyers and other defendants shall not help the criminal suspects or defendants to conceal, destroy or falsify evidence or to rally their confessions, and shall not intimidate or induce witnesses to give false testimony or conduct other acts to interfere with the proceedings of judicial organs. (Art. 42)</p> <p>Whoever violates the provisions of the preceding paragraph shall be investigated for legal responsibility according to law. (Art. 38)</p> | <p>Defenders or any other person shall not help criminal suspects or defendants to conceal, destroy or falsify evidence or rally their confessions, and shall not intimidate or induce witnesses to give false testimony or conduct other acts to interfere with the proceedings of judicial organs. (Art. 42)</p> |

Footnotes

- United Nations General Assembly, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, U.N. Doc. A/RES/43/173, Dec. 9, 1988, <http://www.un.org/documents/ga/res/43/a43r173.htm> Principle 6 states in full that "No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment. The term "cruel, inhuman or degrading treatment or punishment" should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time."

Appendix III: The Association of the Bar of the City of New York Lawyers' Statement of Principles Regarding China

In February 2011, the Chinese Government greatly escalated its previous efforts to intimidate lawyers who are well-known rights defenders or who simply represent clients whom the government regards as objectionable, because of their challenges to Government policies involving religious freedom, population control, environmental pollution or other social concerns. Many lawyers, some prominent, some unknown to the public, some from Beijing or Shanghai and some from smaller cities, have been arrested or simply abducted and held in harsh, often secret, detention without trial and subjected to highly abusive interrogation practices. As of July 1, 2011, many of these lawyers remain in detention or are unaccounted for.

Such arrests, abductions, detentions without trial, physical abuse and other practices designed to intimidate lawyers (including surveillance both at home and in public), violate the Constitution of the People's Republic of China, which entitles all citizens to the rights of free speech, assembly and association. China's actions also violate the international standards set forth in the United Nations Basic Principles on the Role of Lawyers, which the members of the U.N. General Assembly, including China, adopted without dissent and also appear to violate China's own Lawyers Law as well.

Article 16 of the Basic Principles provides that "[g]overnments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics."

The Association of the Bar has become increasingly concerned by the mistreatment of lawyers in China. In December 2009, a delegation from the Association met with Bar representatives in Beijing and Shanghai to discuss areas of mutual concern, including human rights. On March 15, 2011, the President of the Association of the Bar wrote to the Chinese Ministry of Justice protesting the most recent mistreatment of lawyers and calling upon the Ministry to (i) investigate the foregoing incidents, (ii) take immediate steps to end the abuses of lawyers who are carrying out their professional duties, and (iii) reassure the rights afforded Chinese lawyers to practice their profession without governmental interference under domestic and international law. No response has been received to that request.

Recognizing the critical role that lawyers play in promoting and protecting the rule of law, we therefore call upon lawyers everywhere to join us demanding that the Chinese government respect the basic right of Chinese lawyers to practice their profession free of government interference, police harassment, and surveillance. To this end, we endorse the five Principles set forth below and ask our colleagues to do the same. We pledge to apply these Principles with integrity and to implement policies and procedures to ensure our on-going commitment to their implementation.

To that end, we will:

1. Express our support for the right of lawyers to zealously represent and defend their clients and to do so without being identified with their clients or their clients' causes as a result of that representation;
2. Promote the right of lawyers to practice law without harassment, intimidation, disbarment, detention, prosecution, or other forms of hindrance or abuse in response to lawyers' choices to defend or represent clients in asserting or defending their clients' rights under applicable law;
3. Defend the right of lawyers to voluntary freedom of association, to security of the person and to travel;
4. Work with governments and professional associations in the countries in which we practice to respect the right of all lawyers in those countries to represent their clients with the same degree of professional independence that we enjoy in our own countries; and
5. Promote the application of these Principles by other lawyers and businesses with whom we do business at home and abroad.

September, 2011

This Statement of Principles is available online at
<http://www2.nycbar.org/pdf/report/uploads/20072195-LawyersStatmentofPrinciplesRegardingChina.pdf>

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GLOSSARY OF CHINESE TERMS

| Hanyu Pinyin | Characters | English Translation |
|--------------------------------|------------|--|
| Chongqing sudu | 重庆速度 | “Chongqing speed”— term used to characterize the swift wholesale arrests, prosecutions, and trial proceedings ordered by Bo Xilai (Party Secretary of Chongqing) to combat organized crime |
| dahei | 打黑 | Term used to describe campaigns to combat triads (organized crime) |
| erji | 二季 | Literally, “second season”—second instance trial |
| falü waiwai zhixu | 法律外外秩序 | “Extra-extra law” measures—term coined by Prof. Fu Hualing to describe informal, politically-centered policies characterized by a total lack of legality |
| gonganjiguan qita gongzuochang | 公安机关其他工作场 | Other places of business for public security organs |
| gongjianfa | 公检法 | Public security authorities (police, procuratorates, and courts) |
| guobao | 国保 | Domestic security officers |
| guding zhuchu | 固定住处 | Fixed domicile |
| hexie | 和谐 | Social harmony |
| hukou | 户口 | Household registration |
| jianshijuzhu | 监视居住 | Residential surveillance, a non-custodial measure in PRC Criminal Procedure Law, where individuals are confined to their fixed domicile |
| kanshousuo | 看守所 | Detention centers |
| konghe taren | 恐吓他人 | The act of threatening or intimidating another person, included in Art. 293 of the PRC Criminal Law as “creating a disturbance” |

| Hanyu Pinyin | Characters | English Translation |
|----------------------------------|------------|--|
| laodong jiaoyang | 劳动教养 | Re-education-through-labor (RTL) |
| liuzhishi | 留置室 | Detention rooms |
| qubaothouse | 取保候审 | “To obtain a guarantor pending trial,” commonly translated as “to be released on bail” |
| ruanjin | 软禁 | Soft detention; used colloquially to mean house arrest |
| sangezhishang | 三个至上 | The “Three Supremes”—an ideological doctrine introduced by Hu Jintao in December 2007; directing that judges and procurators shall always regard as supreme the Party’s cause, the people’s interest, and the constitution and laws, guided under the absolute leadership of the Party |
| shandongdianfu guojiazhenquanzui | 煽动颠覆国家政权罪 | Inciting subversion of state power, a national security offense under Chinese criminal law |
| shehuizhuyifazhi | 社会主义法治 | Socialist rule of law |
| shenpan ren yuan | 审判人员 | Court personnel |
| wanjiu jiaoyu | 挽救教育 | Remedial education |
| wangyou | 网友 | Literally “online friends”—online supporters |
| weiquan | 维权 | Rights defense or rights protection |
| xingzheng juli suo | 行政拘留所 | Administrative detention centers |
| xunxin zishixingwei | 寻衅滋事行为 | Act of “creating a disturbance,” defined in Article 293 of the PRC Criminal Law |
| yundongshi zhifa | 运动式执法 | “Movement-style” or “political campaign-style” administration of justice, characterized by the widespread use of informants and “special case teams” |
| zhuan’an zu | 专案组 | “Special case teams” that carry out wholesale arrest, prosecution and trial proceedings |

ABOUT US

The Committee to Support Chinese Lawyers (“the CSCL”) is a group of independent lawyers from outside China whose mission is to support lawyers in China in their quest to uphold the rule of law there. The CSCL, which is housed at the Leitner Center for International Law and Justice at Fordham Law School in New York City, seeks to strengthen the role of lawyers in China and to promote their independence, through research, advocacy, capacity-building and cross-cultural exchange.

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In 2011, an unprecedented number of lawyers, legal advocates and activists in China have been subject to disappearances, arbitrary detentions, physical and mental abuse, intimidation and harassment. This crackdown intensified the pressures on civil society and legal advocacy that have increased steadily in the past several years—many of those targeted had already faced harassment, intimidation and detention at the hands of Chinese authorities.

Legal Advocacy and the 2011 Crackdown in China: Adversity, Repression, and Resilience examines the shrinking space for legal activism and advocacy in China with a specific focus on the escalation in enforced disappearances, secret detentions, and arrests of rights lawyers since February 2011. It describes individual cases and analyses international and domestic law to demonstrate how authorities have used extra-legal measures to interfere with the practice of law and eliminate a vanguard of lawyers that represent the most vulnerable groups and individuals. The report cautions that as these measures continue, these individuals will be left with far fewer advocates. It makes legal and policy recommendations to the Chinese government and international community that aim to promote the independence of the legal profession in China.

The Committee to Support Chinese Lawyers is housed at the
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