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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its 100th session, 26–30 August 2024

Opinion No. 34/2024 concerning Mr. Jimmy Lai Chee-ying (Hong Kong, China)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 51/8.
2. In accordance with its methods of work,¹ on 1 March 2024 the Working Group transmitted to the government of Hong Kong, China, a communication concerning Jimmy Lai Chee-ying. The government did not reply to the communication. The International Covenant on Civil and Political Rights is binding upon Hong Kong, China.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
 - (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);
 - (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);
 - (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);
 - (d) When asylum-seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);
 - (e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status that aims towards or can result in ignoring the equality of human beings (category V).

¹ A/HRC/36/38.



1. Submissions

(a) Communication from the source

4. Jimmy Lai Chee-ying, born on 4 November 1947, is a citizen of the United Kingdom of Great Britain and Northern Ireland. Before his arrest, Mr. Lai resided in Hong Kong, China. He is the founder of Next Digital Ltd. and of *Apple Daily*, described as a popular Chinese language newspaper based in Hong Kong, until its forced closure in June 2021.

5. In 1995, Mr. Lai founded *Apple Daily*, the circulation of which quickly rose to 400,000 copies, making it the second-most-read daily newspaper in Hong Kong, China. *Apple Daily* reportedly contained pro-democracy and anti-corruption content and was highly critical of the authorities.

6. The source details that Mr. Lai is a businessman, media owner, pro-democracy campaigner and long-standing critic of the authorities. For many years, he has been subjected to intimidation intended to silence his pro-democracy campaigning and publishing work. In that context, on the night of 11 January 2015, masked men threw petrol bombs into Mr. Lai's home and, at the same time, into the headquarters of his Next Media enterprise.

(i) *Circumstances of arrests of Mr. Lai*

7. Mr. Lai was arrested at his home on 28 February and 18 April 2020 by the police. It is unknown whether the officers produced warrants on those occasions. The reasons for the arrests provided by the authorities were that Mr. Lai had allegedly organized, incited and participated in unauthorized public assemblies in 2019 and 2020.

8. On 10 August 2020, Mr. Lai was arrested again at his home. The reason for that arrest was Mr. Lai's publishing of articles containing his political opinions. It is unknown whether the officers produced a warrant.

9. Some staff members of Next Media were also arrested on 10 August 2020. On the same day, the offices of *Apple Daily* were raided by over 200 police officers. The authorities confiscated journalistic material under the arrest warrant.

10. On 17 June 2021, the police announced the prosecution of Mr. Lai's companies, froze HK\$18 million in assets of Apple Daily Ltd., Apple Daily Printing Ltd. and AD Internet Ltd. and froze accounts containing more than HK\$500 million. Five senior executives and other staff members were arrested.

11. On 24 June 2021, after significant political, legal and financial pressure, *Apple Daily* ceased publication, after 26 years in operation.

12. On 2 December 2020, Mr. Lai's police bail was revoked on the grounds of a charge of fraud and, on 3 December 2020, the bail was denied before the magistrate.

13. On 11 December 2020, Mr. Lai was charged with the additional offence of collusion with foreign forces under the new Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (National Security Law). He was also charged with sedition and fraud. On 12 December 2020, the police bail was revoked upon the charge brought under the National Security Law.

14. On 23 December 2020, Mr. Lai was released by the High Court on bail amounting to house arrest, with a condition of HK\$10 million security. Mr. Lai was returned to prison on 31 December 2020, after the prosecutor was granted leave to appeal his house arrest.

15. At present, Mr. Lai has already served sentences of imprisonment in relation to four separate criminal prosecutions arising from his attendance at and participation in various protests between 2019 and 2020. Those sentences ended in September 2022. He is now detained in solitary confinement at Stanley Prison, a maximum-security prison in Hong Kong, China, facing charges under the National Security Law.

(ii) *Proceedings against Mr. Lai and relevant domestic legislation*

16. Multiple legal proceedings have been brought against Mr. Lai.

17. Firstly, the source points to the criminal proceedings under the National Security Law and the case law on sedition offences for the alleged publication of seditious materials and collusion with foreign forces. The trial began on 18 December 2023, after a lengthy delay of three years, in which Mr. Lai remained in detention. Pursuant to the case brought under the National Security Law, an asset freeze order was issued on 14 May 2021, which prohibits Mr. Lai from managing his shares in Next Digital Ltd. This led to regulatory proceedings under the so-called voting rights and liquidation case, which prohibits him from exercising voting rights in the company or managing his shares.

18. Secondly, the source recalls the so-called assembly and protest cases, described as a group of four criminal proceedings against Mr. Lai arising from his participation in four separate gatherings in 2019 and 2020. Mr. Lai was convicted or pled guilty in all four cases and served, concurrently, all four sentences, which ended in September 2022. No sentencing guidelines were available for the charges involving unauthorized assembly for any of the four cases. Nevertheless, the court considered that deterrent sentences were warranted and that imprisonment was an appropriate sanction.

19. Thirdly, the source recalls the case pertaining to the investigation and liquidation of Next Digital Ltd., which is being forced by the authorities following the asset freeze order relating to the case brought under the National Security Law.

20. Finally, the source recalls the so-called lease violation case involving criminal proceedings on allegations of fraud said to arise from Mr. Lai's alleged breach of the lease of the premises of *Apple Daily* by allowing a consultancy company to operate from a small space on the premises without a licence.

21. According to the source, the proceedings in the case brought under the National Security Law and in the assembly and protest cases directly violated Mr. Lai's rights to freedom of association and assembly and freedom of expression, as well as his right to liberty and security of person.

22. In addition, the voting rights and liquidation case pertaining to the investigation and liquidation of Next Digital Ltd. and the lease violation case demonstrate the cumulative impact of the various cases brought against Mr. Lai, which amounts to judicial harassment of Mr. Lai. That targeting took place because Mr. Lai was exercising his right to advocate for democracy and the rule of law and for the specific purpose of preventing his ability to continue to exercise such advocacy. He was also targeted as the founder and owner of *Apple Daily*.

23. The ongoing National Security Law proceedings and the potentially lengthy sentences of imprisonment could keep Mr. Lai in prison for the rest of his life, place his life at risk and deprive him of his assets and financial resources. If convicted, Mr. Lai would face a minimum sentence of 10 years' imprisonment and a maximum of life imprisonment.

National Security Law case

24. The National Security Law case concerns *Apple Daily*. Mr. Lai was indicted with nine co-defendants, including seven former *Apple Daily* staff members.

25. Mr. Lai was initially refused bail, then granted bail on strict conditions amounting to house arrest. Upon a successful application by the prosecution for leave to appeal the decision to grant bail, Mr. Lai was returned to prison in December 2020.²

26. Mr. Lai faces the following charges:

- (a) Between 1 April 2019 and 24 June 2021, conspiracy to print, publish, sell, offer for sale, distribute, display and/or reproduce seditious publications, contrary to sections 10 (1) (c), 159A and 159C of the Crimes Ordinance, Cap. 200;

² Court of First Instance of Hong Kong, China, *Hong Kong, China v. Lai Chee Ying*, Case No. HKCFI 3161 of 2020, Judgment, 23 December 2020; and Court of Final Appeal of Hong Kong, China, *Hong Kong, China v. Lai Chee Ying*, Case. No. HKCFA 3 of 2021, Judgment, 9 February 2021.

(b) Between 1 July 2020 and 24 June 2021, conspiracy to commit collusion with a foreign country or with external elements to endanger national security, contrary to article 29 (4) of the National Security Law and sections 159A and 159C of the Crimes Ordinance, Cap. 200;

(c) Between 1 July 2020 and 15 February 2021, conspiracy to commit collusion with a foreign country or with external elements to endanger national security, contrary to the article 29 (4) of the National Security Law and sections 159A and 159C of the Crimes Ordinance, Cap. 200;

(d) Between 1 July and 1 December 2020, collusion with a foreign country or with external elements to endanger national security, contrary to the article 29 (4) of the National Security Law.

27. An offence under article 29 (4) of the National Security Law carries a sentence of imprisonment of 3 to 10 years and, if it is of “a grave nature”, carries a sentence of life imprisonment or fixed-term imprisonment of not less than 10 years. An offence under section 10 (1) (c) of the Crimes Ordinance carries a sentence “for a first offence to a fine at level 2 and to imprisonment for two years, and for a subsequent offence to imprisonment for three years; and any seditious publication shall be forfeited to the Crown”.

28. The evidence against Mr. Lai, as summarized by the prosecution, rests on material published in *Apple Daily* and conversations and meetings that Mr. Lai had with prominent politicians and opinion makers from the United States and the United Kingdom as well as with human rights campaigners. That published material and those conversations were focused on reporting on the pro-democracy demonstrations of 2019 and 2020, calling for support of the pro-democracy movement, republishing manuscripts of exiled opposition figures and having discussions about accountability for human rights violations allegedly committed by the authorities.

29. The prosecution is allegedly using the provisions of the National Security Law against Mr. Lai to criminalize journalism, free speech and advocacy for democracy and human rights accountability.

30. There are also concerns about the process by which the authorities are seeking to convict Mr. Lai. Given the vague nature of the offences as set out in the National Security Law and the risk of a life sentence, multiple witnesses who have pled guilty to offences under the same legislation are reportedly giving evidence against Mr. Lai in order to reduce their own sentences. In November 2022, six of Mr. Lai’s co-defendants pled guilty to conspiracy to collude with foreign forces; they remain in custody. The prosecutor informed the court that some of those individuals would give evidence for the prosecution in Mr. Lai’s proceedings.

31. Prior to the start of Mr. Lai’s trial on 1 December 2022, the Chief Executive reportedly took steps that effectively barred Mr. Lai’s chosen international defence counsel from representing him. After the courts confirmed that that lawyer could represent Mr. Lai, the Chief Executive referred the matter to the Standing Committee of the National People’s Congress.

32. On 30 December 2022, the Standing Committee issued its interpretation of the National Security Law, stating that determining whether an overseas lawyer may act as counsel in a case required an assessment by the Chief Executive, under article 47 of the National Security Law, as to whether the allegation or evidence involved national security, since an overseas lawyer may not act as counsel in such a case. Under article 47, if the Chief Executive determines that national security is involved, he must issue a certificate. The certificate is binding on the courts and not subject to judicial review. Should the court fail to obtain a certificate from the Chief Executive, the Standing Committee has the authority to take a decision on the question.

33. Mr. Lai applied for judicial review of the decision that his lawyer’s participation in the case would endanger national security, as well as of the decision of the Director of Immigration Services that any new visa application by his overseas lawyer should be refused. On 19 May 2023, the High Court dismissed Mr. Lai’s application for judicial review, stating that the court had no authority over the Committee for Safeguarding National Security of the Hong Kong Special Administrative Region.

34. Moreover, on 29 May 2023, the High Court refused an application from Mr. Lai for a stay of proceedings on the grounds that the proceedings were fundamentally unfair due to judicial bias and the actions of the Chief Executive, which had resulted in the denial of Mr. Lai's choice of counsel. Mr. Lai's domestic legal team had argued that, by reason of judicial bias resulting from a lack of transparency in the appointment of judges by the Chief Executive, the independence and impartiality of the court had been fundamentally undermined, namely because of the steps taken by the Chief Executive to effectively bar Mr. Lai's choice of counsel from representing him at the trial.

35. Furthermore, there are concerns regarding the reliance on evidence obtained through torture. On 31 January 2024, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment released a statement confirming that concerns had been raised with the authorities that evidence from a key prosecution witness against Mr. Lai had been obtained through torture. The authorities have reportedly not investigated the allegations. Any reliance upon evidence obtained through torture in the proceedings against Mr. Lai would thus constitute a violation of the obligations of China under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as well as under established common law principles. It would also result in the denial of justice and a breach of Mr. Lai's right to a fair trial.

Assembly and protest cases

36. The first case in the group of four assembly and protest cases³ relates to Mr. Lai's participation in a pro-democracy public protest in Victoria Park in Hong Kong, China, on 18 August 2019. The police had reportedly permitted the assembly at the starting point but objected to the public procession and the public assembly at the final destination. The organizers filed an appeal, which was dismissed. Despite the fact that the public procession and the public assembly at the final destination were unauthorized, an estimated 1.7 million people participated.

37. Mr. Lai and eight other individuals were charged with organizing an unauthorized assembly, contrary to section 17A (3) (b) (i) of the Public Order Ordinance, Cap. 245, and knowingly taking part in an unauthorized assembly, contrary to section 17A (3) (a) of the Public Order Ordinance, Cap. 245.28.

38. Mr. Lai argued, and it was not disputed, that he was not involved in planning the unauthorized assembly or intentionally or knowingly organizing it, that the protest was peaceful and that it was disproportionate for a criminal sanction and sentence to be imposed for that offence, particularly given the cited circumstances. On 16 April 2021, Mr. Lai was sentenced to a total of 12 months' imprisonment on both charges.

39. During sentencing, the judge acknowledged that previous cases for similar offences involved a financial penalty but noted that none of those cases stemmed from the social unrest and turmoil of 2019 or similar events. The judge reportedly focused on actions committed by others, not the defendants, and the traffic disruption caused by the protests.

40. In August 2023, the Court of Appeal quashed Mr. Lai's conviction for organizing the 18 August 2019 demonstration but upheld his conviction for his peaceful participation in the demonstration, reducing the sentence to nine months' imprisonment. The reduction in sentence came after Mr. Lai had already served his sentence, however, thus rendering it without any practical meaning.

41. The second case⁴ relates to another protest that took place on 31 August 2019. Mr. Lai was charged with knowingly taking part in an unauthorized assembly, contrary to section 17A (3) (a) of the Public Order Ordinance, Cap. 245.

42. On that occasion, Mr. Lai pled guilty and, on 16 April 2021, was sentenced to eight months' imprisonment. In determining the sentence, the judge reportedly accepted that the

³ District Court of Hong Kong, China, *Hong Kong, China v. Lai Chee Ying*, Case No. HKDC 457 of 2021.

⁴ District Court of Hong Kong, China, *Hong Kong, China v. Lai Chee Ying*, Case No. HKDC 447 of 2021.

assembly had been peaceful but referred to the traffic disruption caused and the risk of violence at protests. Furthermore, the judge held that the decision to march to police headquarters was provocative and that Mr. Lai's decision to participate encouraged others to join.

43. The third case⁵ concerns the protests held on 1 October 2019. Mr. Lai was charged with and pled guilty to organizing an unauthorized assembly, contrary to section 17A (3) (b) (i) of the Public Order Ordinance, Cap. 245. Despite his minor role in the protest, the fact that he had not in any way encouraged any acts of violence, his age and health concerns, his good character and professional contribution to the media industry, Mr. Lai was sentenced to eight months' imprisonment.

44. The fourth case⁶ relates to the vigil held on 4 June 2020 in commemoration of the events that occurred in Tiananmen Square in 1989. The organizers had reportedly notified the police of their intention to hold the vigil, but permission was not granted. Nevertheless, approximately 20,000 people took part. Mr. Lai, who was among 20 defendants, was charged with incitement to knowingly take part in an unauthorized assembly, contrary to common law and section 17A (3) (a) of the Public Order Ordinance, Cap. 245. The authorities alleged that Mr. Lai had encouraged people to attend the vigil. Mr. Lai reportedly had done nothing to incite or encourage others, however, having merely attended the vigil for 15 minutes to light a candle.

45. On 9 December 2021, Mr. Lai was convicted. He was sentenced on 13 December 2021 to 13 months' imprisonment, to be served concurrently with the three other sentences that he was already serving. In reaching the decision, the judge considered, as aggravating factors, the ongoing risk of violence at protests, that Mr. Lai was a well-known public figure and that he was on bail in relation to other protest-related offences.

Investigation into and liquidation of Next Digital Ltd. and voting rights cases

46. On 14 May 2021, Mr. Lai was presented with an asset freeze order issued by the Secretary for Security under schedule 3, section 3, of the Implementation Rules for article 43 of the National Security Law. The order prohibited Mr. Lai from managing his assets, including his shares in Next Digital Ltd. Mr. Lai is therefore involved in two separate regulatory proceedings relating to that company: proceedings relating to the ban on his exercising his voting rights in relation to shares in Next Digital Ltd. and the liquidation of the company.

47. Next Digital Ltd., described by the source as at one time the largest independent media company in Hong Kong, China, is now in forced administration and, on 12 January 2023, was delisted from the Hong Kong stock exchange.

48. Both regulatory proceedings reportedly demonstrate the punitive approach that the authorities have adopted towards Mr. Lai.

Lease violation case

49. Mr. Lai has also faced prosecution for fraud involving the alleged breach of the terms of the lease of the *Apple Daily* premises. The case represents the first time a contractual dispute has been prosecuted as a criminal matter.

50. On 27 April 2022, Mr. Lai entered a plea of not guilty to the charges. Although the proceedings did not concern an offence under the National Security Law, the law's restrictive legal procedures were imposed on the proceedings, including the holding of a judge-only trial before a designated national security law judge.

51. On 25 October 2022, shortly after his sentences for peaceful protest expired, Mr. Lai was convicted on the lease violation charges. On 10 December 2022, Mr. Lai was sentenced

⁵ District Court of Hong Kong, China, *Hong Kong, China v. Chan Ho Wun et al.*, Case No. HKDC 645 of 2021.

⁶ District Court of Hong Kong, China, *Hong Kong, China v. Lai Chee Ying et al.*, Case No. HKDC 1547 of 2021; and *Hong Kong, China v. Lee Cheuk-yan et al.*, Case No. HKDC 1572 of 2021.

to a term of imprisonment of five years and nine months, despite the judge's acknowledgement that the case was not one of major commercial fraud.

52. The sentence is allegedly disproportionate and the matter should not have been addressed under criminal law. Mr. Lai was sentenced to a long sentence of imprisonment for a matter ordinarily treated as a civil matter in Hong Kong.

53. When passing the sentence, the court allegedly failed to take into consideration the mitigating circumstances, such as Mr. Lai's age, the fact that he had already been detained for two years and the impact that the additional sentence would have on his health. Mr. Lai is appealing his conviction and sentence.

(iii) *Legal analysis*

a. Category I

54. According to the source, the actions taken against Mr. Lai by the authorities violate article 9 of the Covenant. The actions also constitute unnecessary and disproportionate restrictions on his exercise of his rights to freedom of expression and assembly, in violation of articles 19 and 21 of the Covenant.

55. It is an established principle that national security may be invoked as a legitimate aim in the restriction of rights only when the aim is to protect the existence of the nation or its territorial integrity or political independence against force or the threat of force.⁷ National security thus cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse.⁸

56. Any form of pretrial detention in relation to an allegation of sedition or treason is a violation of the right to freedom of expression.⁹

57. With respect to the drafting of treason and sedition laws, the Human Rights Committee has stressed that extreme care must be taken by States parties to ensure that treason laws and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise, are crafted and applied in a manner that conforms to the strict requirements of paragraph 3 of the Covenant. It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders or others for having disseminated such information.¹⁰

58. The Human Rights Committee expressed strong concern regarding overly broad restrictions on freedom of expression and freedom of peaceful assembly in its concluding observations on Hong Kong, China, in 2006.¹¹

59. Soon after the National Security Law came into force, United Nations special procedure mandate holders, including the Working Group, reiterated their concerns about the National Security Law,¹² first communicated to China before its enactment.¹³ They stressed that they were particularly troubled that the law might impinge impermissibly on the rights to freedom of opinion and expression and of peaceful assembly as protected by the Universal Declaration of Human Rights and the Covenant. In addition, with respect to article 29 of the National Security Law under which Mr. Lai was charged, they expressed concern that it set out the crime of conspiracy with a foreign State, which might also affect both assemblies and

⁷ Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, principle 29.

⁸ Ibid., principle 31.

⁹ European Court of Human Rights, *Sahin Alpay v. Turkey*, Application No. 16538/17, Judgment, 20 March 2018, paras.182 and 183. See also European Court of Human Rights, *Mehmet Hasan Altan v. Turkey*, Application No. 13237/17, Judgment, 20 March 2018.

¹⁰ Human Rights Committee, general comment No. 34 (2011), para. 30.

¹¹ CCPR/C/HKG/CO/2, para. 14.

¹² See communication OL CHN 17/2020. All communications referenced in the present document are available at <https://spcommreports.ohchr.org/Tmsearch/TMDocuments>.

¹³ See communication OL CHN 13/2020.

speech acts. The mandate holders concluded that the law implicated both serious concerns of legality.¹⁴

60. On 22 January 2024, the special procedure mandate holders expressed their alarm over the multiple and serious violations of Mr. Lai's rights to freedom of expression, peaceful assembly and association and his right to a fair trial, including the denial of access to a lawyer of his own choosing and the hand-picking of judges by the authorities, and called for Mr. Lai's immediate and unconditional release.¹⁵

61. The source argues that Mr. Lai's detention is not prescribed by law within the meaning of article 9 (1) of the Covenant and is arbitrary.¹⁶

62. The terms of the National Security Law provide for vaguely defined offences and prohibit "acts endangering national security", which are interpreted by the courts as acts "capable of constituting an offence under the National Security Law or other laws of the Hong Kong Special Administrative Region safeguarding national security".¹⁷ The legislation is imprecise and unclear, making any person who expresses their political opinion or advocates for democracy to do so at risk of severe criminal sanction.

63. Moreover, it is a well-established principle of international human rights law that detention in custody of persons awaiting trial should be the exception rather than the rule.¹⁸ The nature of the allegation does not justify mandatory pre-charge or pretrial detention. The pretrial detention of Mr. Lai, an elderly man of good character, with respect to the National Security Law proceedings, in which the legislation removes the presumption of bail,¹⁹ and all of the proceedings against him are contrary to article 9 (3) of the Covenant.

64. The prosecution's case against Mr. Lai indicates that the authorities seek to justify his detention and prosecution on evidence that he published articles reporting news and commentary on events in Hong Kong, China, and on evidence of political speech, discussing politics with politicians and calling for accountability for human rights violations, in clear violation of article 19 of the Covenant.

65. There is thus no basis for invoking national security as a legitimate aim for the imposition of the measures restricting Mr. Lai's freedom of expression and no basis upon which it can be considered that the measures are necessary or proportionate. Mr. Lai's continued detention is therefore arbitrary and in violation of article 9 of the Covenant.

66. Regarding the assembly and protest cases, the source submits that the fact that the gatherings in those cases constituted "unauthorized assemblies" according to domestic law does not justify the actions taken against Mr. Lai as necessary or proportionate interference with his rights under articles 19 and 21 of the Covenant.²⁰

67. Any restriction on the right to peaceful assembly must be grounded in the law and necessary in a democratic society only to achieve one of the legitimate aims listed and proportionate to such aims. Restrictions must not impair the essence of the right²¹ or put in jeopardy the right itself²² such that restrictions should be the exception rather than the norm.²³

¹⁴ See communication OL CHN 17/2020.

¹⁵ See <https://www.ohchr.org/en/press-releases/2024/01/hong-kong-sar-un-experts-urge-authorities-drop-all-charges-against-jimmy-lai>.

¹⁶ Human Rights Committee, general comment No. 35 (2014), para. 22.

¹⁷ Court of Final Appeal, Hong Kong, China, *Hong Kong, China v. Lai Chee Ying*, HKCFA 3 of 2021, Judgment, 9 February 2021, para. 53 (c) (ii).

¹⁸ Human Rights Committee, general comment No. 35 (2014), para. 38.

¹⁹ Article 42 of the National Security Law provides that no bail shall be granted to a criminal suspect or defendant unless the judge has sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security.

²⁰ European Court of Human Rights, *Novikova et al. v. Russian Federation*, Applications No. 25501/07, No. 57569/11, No. 80153/12, No. 5790/13 and No. 35015/13, Judgment, 26 April 2016.

²¹ Human Rights Committee, general comment No. 27 (1999), para. 13.

²² Human Rights Committee, general comment No. 34 (2011), para. 21; and general comment No. 31 (2004), para. 6.

²³ Human Rights Committee, general comment No. 37 (2020), para. 36.

68. According to the source, in Mr. Lai's cases, the courts showed little or no regard for the question as to whether Mr. Lai's prosecution, conviction and imprisonment were necessary in the pursuit of one of the legitimate aims listed in article 19 (3) or 21 of the Covenant and proportionate to that aim.

69. It is established principle that when a State invokes a legitimate ground for restriction of freedom of expression it must show in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.²⁴ In Mr. Lai's cases, however, the courts did not give any weight to the fact that he had had no violent intentions and had not been violent. Contrary to established human rights principles, the focus of the courts was on the enforcement of the rules governing unauthorized assemblies, which was, for the courts, an end in itself.²⁵

70. Although the authorities have sought to justify the proceedings against Mr. Lai on the grounds of maintaining public order and national security, Mr. Lai has been targeted because of the expression of his political opinions and his status as a prominent pro-democracy advocate. His prominence and influence do not provide justification for the restrictions on his rights and his prolonged detention. As the Human Rights Committee has stressed, article 19 (3) may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights.²⁶

71. The sentences of imprisonment imposed on Mr. Lai are disproportionate. The courts noted that there were no guidelines for sentencing on charges involving unauthorized assemblies²⁷ and sought to distinguish those cases from similar cases that had resulted in non-custodial sentences on the basis of the existence of general social unrest and the frequency of demonstrations. The fact of other demonstrations and social unrest, however, does not render necessary or proportionate criminal sanctions for the holding of a peaceful demonstration. Furthermore, sporadic and isolated acts of violence do not render a peaceful assembly unpeaceful and should not lead to the forfeiture of all participants' rights to peaceful assembly.²⁸

72. Moreover, the fact of other demonstrations and social unrest does not render permissible the enforcement of criminal laws and the imposition of severe criminal sanctions against those who advocate for democracy and human rights.

73. Nevertheless, in the case relating to the 4 June 2020 vigil, Mr. Lai was prosecuted, convicted and sentenced to imprisonment for attending a peaceful vigil commemorating events that had occurred in Tiananmen Square. The source argues that this is contrary to the principle that censorship relating to opinions about historical facts is incompatible with article 19 of the Covenant,²⁹ and therefore arbitrary and unlawful under international law, constituting a violation of article 9 of the Covenant.

74. The source claims that the enforcement of public order rules and the imposition of severe criminal sanctions in these cases, without respecting the strict and limited basis upon which a State may restrict an individual's rights under articles 19 (3) and 21 of the Covenant, are unlawful and constitute a violation of articles 19 and 21. There is no lawful basis upon which any deprivation of liberty resulting from such actions may be justified and, accordingly, Mr. Lai's detention, including his post-conviction imprisonment, is arbitrary and in violation of article 9 of the Covenant.

²⁴ Human Rights Committee, general comment No. 34 (2011), paras. 35 and 52.

²⁵ European Court of Human Rights, *Bumbes v. Romania*, Application No. 18079/15, Judgment, 3 May 2022, para. 100.

²⁶ Human Rights Committee, general comment No. 34 (2011), para. 23.

²⁷ District Court of Hong Kong, China, *Hong Kong, China v. Lai Chee Ying et al.*, Case No. HKDC 457 of 2021, para. 37; *Hong Kong, China v. Lai Chee Ying et al.*, Case No. HKDC 447 of 2021, para. 35; *Hong Kong, China v. Chan Ho Wun et al.*, Case No. HKDC 645 of 2021, para. 57; and *Hong Kong, China v. Lee Cheuk-Yan et al.*, Case No. HKDC 1572 of 2021.

²⁸ Human Rights Committee, general comment No. 37 (2020), para.19.

²⁹ *Ibid.*, para. 49.

b. Category II

75. The Human Rights Committee has made clear that arrest or detention as punishment for the legitimate exercise of the rights as guaranteed by the Covenant is arbitrary.³⁰ Mr. Lai has reportedly been targeted because of his legitimate exercise of his rights to freedom of expression and assembly. The ongoing prosecutorial and judicial harassment of Mr. Lai is of such gravity as to render arbitrary the deprivation of liberty in his case, both pretrial³¹ and post-conviction.

76. Mr. Lai has reportedly been in pretrial detention for over three years and is being prosecuted for publishing information about and discussing with others the issues of democracy, threats to democracy and the rule of law, the demonstrations against the Extradition Law Amendment Bill in 2019 and 2020 and the disproportionate use of force against protesters and for expressing criticism of the National Security Law, in violation of his rights to freedom of expression and of association.

77. Mr. Lai has also faced prosecution and conviction for his participation in demonstrations and other gatherings in the exercise of his rights to freedom of peaceful assembly and of expression, despite its having been accepted that he had no violent intentions and did not act with violence.

78. The prosecutions run parallel to other regulatory and criminal proceedings against Mr. Lai that are directly linked to his operation of his media organization and his newspaper, *Apple Daily*, which have had the effect of preventing him from exercising his rights and continuing to operate *Apple Daily*. Those actions themselves constitute separate violations of article 19 of the Covenant.

c. Category III

79. Mr. Lai has reportedly been convicted and is being prosecuted in circumstances in which there is a real and serious concern about the independence of the judiciary and the rule of law, in the light of the National Security Law under which Mr. Lai faces prosecution.

80. The Human Rights Committee has observed that the requirement of competence, independence and impartiality of a tribunal, as guaranteed by article 14 (1) of the Covenant, is an absolute right that is not subject to any exception. Judicial independence encompasses the procedure and qualifications for the appointment of judges, guarantees relating to their security of tenure and the actual independence of the judiciary from political interference by the executive. The Committee has also observed that a situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.³²

81. The terms of the National Security Law constitute an intrusion into judicial independence. For example, article 44 (designation of judges), article 47 (Chief Executive's certification of acts involving national security), article 42 (presumption against bail) and article 46 (juryless trials) taken alone and together objectively undermine judicial independence in the conduct of proceedings. Of particular concern to the source is the provision in article 44 that a judge may be removed by the Chief Executive from the list of designated National Security Law judges if the judge "makes any statement or behaves in any manner endangering national security". As the concept of "endangering national security" is not defined in the National Security Law, judges are, effectively, removable according to the will of the Chief Executive.

82. Lawyers reportedly fear that they will be targeted by the authorities under the National Security Law as reprisal for defending their clients. The same judge that has presided over Mr. Lai's fraud trial is reported to have implied that the offering of legal support to democracy activists may be a crime.

³⁰ Human Rights Committee, general comment No. 35 (2014), para. 17.

³¹ *Sahin Alpay v. Turkey*, paras. 182 and 183.

³² Human Rights Committee, general comment No. 32 (2007), para. 19.

83. There is therefore a serious concern that the judiciary does not operate independently of the executive and that the proceedings against Mr. Lai are manifestly unfair and contrary to the international norms that govern the right to a fair trial, as guaranteed by article 10 of the Universal Declaration of Human Rights and article 14 of the Covenant.

84. Recent concerns raised by the Special Rapporteur on torture that evidence from a key prosecution witness in the National Security Law trial may have been obtained through torture raises a real and serious concern that, if the evidence is admitted, Mr. Lai will be subjected to the denial of justice and a serious violation of his right to a fair trial.

85. The source calls for the authorities to investigate the allegations of torture made by the key witness, noting the incommunicado disappearance and subsequent transfer to a psychiatric facility of that witness. Any failure to do so will constitute a violation of the obligation of China under articles 12 and 15 of the Convention against Torture.

d. Category V

86. According to the source, the targeting of Mr. Lai by the authorities because of his status as one of the most prominent pro-democracy activists is emblematic of a pattern of the misuse of criminal laws to justify the prosecution and imprisonment of journalists, publishers, human rights defenders and political opponents.

87. According to the source, Mr. Lai has been discriminated against and targeted by reason of his political opinions and his status as a prominent pro-democracy advocate.

88. That discrimination is manifested in the evidence relied upon by the prosecution in its case against Mr. Lai in the National Security Law trial and the sentencing remarks of the judge in the assembly and protest cases, who placed weight on the fact that Mr. Lai and his co-defendants were, he said, well known figures that together, as the head of the procession, were guaranteed to draw a crowd and that influential people could draw a crowd and wield a certain influence.

(b) Response from the government

89. On 1 March 2024, the Working Group transmitted the allegations from the source to the government under its regular communication procedure. The Working Group requested the government to provide detailed information by 30 April 2024 about the current situation of Mr. Lai. The Working Group also requested the government to clarify the legal provisions justifying his detention, as well as their compatibility with the obligations of Hong Kong, China, under international human rights law and, in particular, with regard to the treaties binding upon China, including Hong Kong, China. Moreover, the Working Group called upon the government to ensure Mr. Lai's physical and mental integrity.

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

2. Discussion

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

92. In determining whether the detention of Mr. Lai is arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has established a *prima facie* case for breach of international law constituting arbitrary detention, the burden of proof should be understood to rest upon the government if it wishes to refute the allegations.³³ In the present case, the government has chosen not to challenge the *prima facie* credible allegations made by the source.

³³ A/HRC/19/57, para. 68.

(a) Category I

93. The source submits that the pretrial detention of Mr. Lai, an elderly man of good character, with respect to all of the proceedings against him, is contrary to article 9 (3) of the Covenant.

94. In relation to pretrial detention, article 9 (3) of the Covenant provides that it shall not be the general rule that persons awaiting trial shall be detained in custody, but that release may be subject to guarantees to appear for trial, and at any other stage of the judicial proceedings. The Working Group recalls that it is a well-established norm of international law that pretrial detention should be the exception and not the rule and that it should be ordered for the shortest appropriate period of time, a view that has been reflected repeatedly in its findings. The Working Group also recalls that the Human Rights Committee shares that view.³⁴ The Working Group further recalls that pretrial detention must be based on an individualized determination that it is reasonable and necessary, taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime.³⁵ It follows that liberty is recognized as a principle and detention as an exception in the interests of justice.³⁶ In order to give effect to this principle, courts must examine whether alternatives to detention, such as bail, would render custodial measures unnecessary.³⁷ The government has not provided information to justify Mr. Lai's pretrial detention.

95. Turning to the issue of bail, the source submits that article 42 of the National Security Law removes the presumption of bail.³⁸ When considering whether the bail application complies with the requirements of article 9 (3) of the Covenant, it is crucial for non-custodial measures, such as bail and sureties, to be set at realistic levels.³⁹ In the present case, the Working Group affirms that the bail condition was too vaguely worded ("acts endangering national security").⁴⁰ In this regard, the Working Group echoes the concerns of the Human Rights Committee that article 42 introduces a more stringent threshold for bail in national security cases than in other cases, which creates a presumption against bail for those charged under the National Security Law; approximately 74 per cent of persons charged with national security crimes have allegedly been denied bail without proper reasoning, with many held in pretrial detention, including 11 children, and some reportedly for more than a year.⁴¹ In the present case, this means that the bail conditions for Mr. Lai should have been set with the requisite degree of precision to enable him to direct his conduct accordingly, otherwise the bail conditions would render the measures meaningless.

96. Based on the foregoing, the Working Group concludes that Mr. Lai's pretrial detention was not properly constituted and violates article 9 (3) of the Covenant.⁴² Noting all the above, the Working Group concludes that Mr. Lai's arrest and detention are arbitrary under category I.

³⁴ Opinions No. 6/2021, para. 50; No. 5/2021, para. 43; No. 8/2020, para. 54; No. 1/2020, para. 53; No. 57/2014, para. 26; and No. 49/2014, para. 23. See also Human Rights Committee, general comment No. 35 (2014), para. 38; and [A/HRC/19/57](#), paras. 48–58.

³⁵ Human Rights Committee, general comment No. 35 (2014), para. 38; and opinion No. 45/2016, para. 51.

³⁶ [A/HRC/19/57](#), para. 54.

³⁷ [A/HRC/19/57](#), paras. 48–58; Human Rights Committee, general comment 35 (2014), para. 38; opinion No. 83/2019, para. 68; and United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, guideline 15.

³⁸ Article 42 of the National Security Law provides that "no bail shall be granted to a criminal suspect or defendant unless the judge has sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security".

³⁹ [A/HRC/39/45/Add.2](#), paras. 23 and 83 (a) (i).

⁴⁰ Opinion No. 30/2023, paras. 69–72.

⁴¹ [CCPR/C/CHN-HKG/CO/4](#), paras. 35 (c).

⁴² Opinions No. 36/2020, para. 51; and No. 68/2019, para. 96.

(b) Category II

97. The source submits that the arrest and detention of Mr. Lai resulted from the exercise of the rights or freedoms guaranteed by articles 19 and 21 of the Covenant.

98. The Working Group notes that freedom of opinion and freedom of expression, as well as freedom of assembly as expressed in articles 19 and 21 of the Covenant, are indispensable conditions for the full development of the person; they are essential for any society and in fact constitute the foundation stone for every free and democratic society.⁴³

99. Freedom of expression includes the right to seek, receive and impart information and ideas of all kinds regardless of frontiers and this right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, including political opinions.⁴⁴ In its resolution 12/16, the Human Rights Council called on States to refrain from imposing restrictions that were not consistent with article 19 (3), including on the discussion of government policies and political debate, reporting on human rights, engaging in election campaigns, peaceful demonstrations or political activities, including for peace or democracy, and expression of opinion and dissent, religion or belief. Moreover, in its resolution 24/5, the Council reminded States of their obligation to respect and fully protect the rights of all individuals to assemble peacefully and associate freely, online as well as offline, including persons espousing minority or dissenting views or beliefs, human rights defenders and others. In relation to the assembly and protest cases for which Mr. Lai has already served his sentences, the Working Group recalls that the enjoyment of the right to hold and participate in peaceful assemblies, as required by article 21 of the Covenant, entails the fulfilment by the State of its positive obligation to facilitate the exercise of this right.⁴⁵ The Working Group has not been presented with any exceptions that could justify interference with Mr. Lai's peaceful exercise of the freedoms of opinion, expression and assembly, as protected by articles 19 and 21 of the Covenant. Instead, he has been prosecuted and convicted for his peaceful participation in demonstrations and gatherings in the exercise of his rights to freedom of peaceful assembly and expression.

100. Noting that those prosecutions ran parallel to other regulatory and criminal proceedings against Mr. Lai (voting rights and liquidation cases, asset freeze order and lease violation case) that are directly linked to his operation of his media organization and his newspaper, *Apple Daily*, the Working Group observes that those prosecutions appear to have been intended to prevent him from exercising his right to freedom of expression and, in effect, have achieved that aim, as Mr. Lai is currently detained.

101. The source further submits that the sentences imposed on Mr. Lai are disproportionate, recalling that, for the assembly and protest cases, no sentencing guidelines were available for charges involving unauthorized assemblies. Furthermore, the court considered that deterrent sentences must prevail and that a sentence of imprisonment was an appropriate sanction. As the Human Rights Committee has stated, laws that restrict freedom of speech may have legitimate means but are prone to abuse, and violations of such laws should not be punished by detention as such punishment is disproportionate.⁴⁶ The Working Group recalls that the principle of legality requires the substance of penal law to be due and appropriate in a democratic society that respects human dignity and rights (*nullum crimen, nulla poena sine lege apta*).⁴⁷ It has previously found that penal punishment must, at a minimum, satisfy the principle of necessity, the prerequisite of injustice and the principle of guilt in the interest of formal and material justice.⁴⁸ The Working Group is concerned by the issue of the proportionality of the sentences imposed on Mr. Lai, considering the broad lack of proportionality between the power and impact of the work and activities carried out by a single individual and the power and impact of an entire State machinery, with its executive, legislative and judicial organs and its armed forces, police and security agents.⁴⁹ In this regard,

⁴³ Human Rights Committee, general comment No. 34 (2011), para. 2.

⁴⁴ Ibid., para. 11.

⁴⁵ A/HRC/20/27, para. 27.

⁴⁶ Human Rights Committee, general comment No. 34 (2011), para. 46.

⁴⁷ Opinion No.10/2018, para. 53.

⁴⁸ Ibid.

⁴⁹ Opinion No. 24/2008, para. 22.

it recalls the source's submissions that, in relation to the lease violation case, Mr. Lai was given a criminal sanction in a matter that would ordinarily be dealt with in civil proceedings.

102. The source further submits that the National Security Law provides for vaguely defined offences and is imprecise and unclear, making any person who expresses their political opinions or advocates for democracy risk severe criminal sanction. According to the source, the prosecution's case against Mr. Lai indicates that the authorities, in clear violation of article 19 of the Covenant, sought to justify his detention and prosecution on the basis of evidence that, as a newspaper owner and publisher, he had published articles containing news and commentary on events in Hong Kong, China, as well as calls for accountability for human rights violations, and that the published material constituted political speech.

103. As the Working Group has previously stated, the principle of legality requires that laws be formulated with sufficient precision so that the individual can understand the law and regulate their conduct accordingly.⁵⁰ The failure to implement the principle of legal certainty may render arbitrary any detention on the basis of such a law. The Working Group has also found that an offence should not be too vague, broad or imprecise to grant officials unfettered discretion to criminalize the peaceful exercise of the right to freedom of expression.⁵¹

104. The Working Group finds that the National Security Law lacks clarity and precision. In making that finding, the Working Group echoes the concerns expressed by the Human Rights Committee in 2022 about the adverse effect of the overly broad interpretation and arbitrary application of the National Security Law and legislation on sedition, and their impact on the exercise of freedom of expression. This includes: (a) the closure of media outlets, in some cases voluntarily for fear of reprisals, raids on their offices and the freezing of their assets; (b) the blocking of websites and media accounts and the removal of online content; (c) the arrest and arbitrary detention of journalists, politicians, academics, students and human rights defenders who have expressed dissenting opinions; (d) intimidation, attacks or threat of attacks against journalists; (e) censorship; (f) interference with the editorial independence of public media outlets such as Radio Television Hong Kong; and (g) difficulties in obtaining or renewing visas for foreign journalists, among others.⁵² The Working Group reiterates the call of the Human Rights Committee to repeal the National Security Law and refrain from applying it pending repeal.⁵³

105. Moreover, the Working Group recalls the source's submissions that special procedure mandate holders, including the Working Group, have raised concerns about that legislation, noting that the law lacks precision in key aspects and that it may impinge impermissibly on the rights to freedom of opinion and expression and of peaceful assembly as protected by the Universal Declaration of Human Rights and the Covenant and, with respect to article 29 of the National Security Law under which Mr. Lai has been charged, sets out the crime of conspiracy with a foreign State and may also affect both assemblies and speech acts, concluding that the law thus implicates both serious concerns of legality as well as undue limitations on freedom of opinion, expression and peaceful assembly.⁵⁴

106. For those reasons, the Working Group finds that the deprivation of liberty of Mr. Lai violates articles 19 and 21 of the Covenant and is arbitrary under category II. The Working Group refers the present case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the rights to freedom of peaceful assembly and of association.

(c) Category III

107. Given its finding that the deprivation of liberty of Mr. Lai is arbitrary under category II, the Working Group wishes to emphasize that no trial of Mr. Lai should take place. Mr. Lai has, however, already served sentences of imprisonment in relation to four separate criminal

⁵⁰ Opinion No. 41/2017, para. 99. See also opinion No. 62/2018, paras. 57–59; and Human Rights Committee, general comment No. 35 (2014), para. 22.

⁵¹ Opinion No. 38/2015, para. 73.

⁵² [CCPR/C/CHN-HKG/CO/4](#), para. 41.

⁵³ *Ibid.*, para. 14.

⁵⁴ See communication OL CHN 17/2020.

prosecutions arising from his attendance at and participation in various protests between 2019 and 2020 and is now detained in solitary confinement facing charges under the National Security Law.

108. The source submits that there is a serious concern about the independence of the judiciary and the rule of law, in the light of the National Security Law under which Mr. Lai faces prosecution. The source argues that the terms of the National Security Law constitute an intrusion into judicial independence.

109. The Working Group recalls that the Human Rights Committee has stated that the requirement of competence, independence and impartiality of a tribunal, in the sense of article 14 (1) of the Covenant, is an absolute right that is not subject to any exception. It has also observed that a situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal. Judicial independence encompasses the procedure and qualifications for the appointment of judges, guarantees relating to security of tenure, and the actual independence of the judiciary from political interference by the executive.⁵⁵

110. The Working Group is, therefore, extremely concerned by articles 44, 46 and 47 of the National Security Law. Articles 44 and 47 provide the Chief Executive with excessive power, including the power to appoint judges from a list that is not made public and, in consultation with the Committee for Safeguarding National Security of the Hong Kong Special Administrative Region and the Chief Justice of the Court of Final Appeal, to hear national security cases, as well as the power to issue a binding certificate to the courts as to whether an act involves national security or whether the relevant evidence involves State secrets when such questions arise in the adjudication of a case. The Working Group notes that this was also of particular concern to the Human Rights Committee in 2022.⁵⁶ Moreover, it recalls the source's submission that the same judge who presided over Mr. Lai's fraud trial is reported to have implied that offering legal support to democracy activists might be a crime. Under such circumstances, the Working Group considers that Mr. Lai's right to an independent and impartial tribunal, encapsulated in article 14 (1) of the Covenant, was violated. In reaching that conclusion, the Working Group recalls the source's submission that the steps taken by the Chief Executive to effectively bar Mr. Lai's counsel of choosing from representing him at trial is a further indication of the court's lack of independence and impartiality. The source further states that lawyers working in Hong Kong, China, fear that they will be targeted by the authorities under the National Security Law as reprisal for defending their clients.

111. As the Working Group has found, legal counsel should be able to carry out their functions effectively and independently, free from fear of reprisal, interference, intimidation, hindrance or harassment.⁵⁷ The Working Group refers to the 2022 concluding observations of the Human Rights Committee in respect of Hong Kong, China, in which the Committee took note of harassment and intimidation faced by lawyers.⁵⁸ The Working Group therefore finds that Mr. Lai's right to adequate time and facilities for the preparation of his defence under article 14 (3) (b) of the Covenant and principles 17 (1) and 18 (2) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment was violated as was his right to present an effective defence through counsel of his choosing under article 14 (3) (d) of the Covenant.⁵⁹ In this regard, the Working Group recalls that, on 22 January 2024, United Nations experts expressed their alarm over the multiple and serious

⁵⁵ Human Rights Committee, general comment No. 32 (2007), para. 19.

⁵⁶ [CCPR/C/CHN-HKG/CO/4](#), para. 35 (a).

⁵⁷ United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of their Liberty to Bring Proceedings Before a Court, principle 9, para. 15; [A/HRC/45/16](#) para. 54; Basic Principles on the Role of Lawyers, para. 16. See also opinions Nos. 70/2021, para. 94; No. 66/2019, para. 86; No. 70/2017, para. 62; No. 36/2017, para. 94; No. 34/2017, para. 41; No. 32/2017, para. 36; and No. 29/2017, para. 61.

⁵⁸ [CCPR/C/CHN-HKG/CO/4](#), paras. 37 and 38.

⁵⁹ United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of their Liberty to Bring Proceedings Before a Court, principle 9; opinion No. 14/2017, para. 55; and [CCPR/C/VNM/CO/3](#), paras. 35 and 36.

violations of Mr. Lai's freedom of expression, peaceful assembly and association and of his right to a fair trial, including the denial of access to a lawyer of his own choosing and the handpicking of judges by the authorities.⁶⁰

112. For those reasons, the Working Group concludes that the violations of Mr. Lai's fair trial and due process rights are of such gravity as to give his deprivation of liberty an arbitrary character, falling within category III. The Working Group refers the case to the Special Rapporteur on the independence of judges and lawyers for further action.

(d) Category V

113. The source submits that Mr. Lai's detention is arbitrary under category V because he has been discriminated against and targeted for his political opinions and his status as a prominent pro-democracy advocate. It alleges that the targeting of Mr. Lai by the authorities because of his status as one of the most prominent pro-democracy activists in Hong Kong, China, is emblematic of a pattern of the misuse of criminal laws to justify the prosecution and imprisonment of journalists, publishers, human rights defenders and political opponents. Mr. Lai has reportedly been subjected to various acts of intimidation intended to silence him. They include the petrol bombing of his home and his media business headquarters in 2015. He founded *Apple Daily*, which became the second-most-read daily paper and contained articles that were highly critical of the authorities. The source recalls the statement issued by the United Nations experts on 22 January 2024 that Mr. Lai's arrest and detention and the series of criminal proceedings brought against him over the past few years appeared to be directly related to his criticism of the Chinese Government and his support for democracy in Hong Kong, China.⁶¹

114. The source further argues that Mr. Lai's prominence and influence do not provide a justification for the restrictions on his rights and his prolonged detention. The source submits that that discrimination is manifested in the sentencing remarks of the judge in the assembly and protest cases, who reportedly placed weight on the fact that Mr. Lai and his co-defendants were well-known figures that together, as the head of the procession, were guaranteed to draw a crowd and that influential people could draw a crowd and wield a certain influence.

115. For those reasons, the Working Group considers that Mr. Lai's arrest and detention are discriminatory as they result from his political opinions and activism, in violation of articles 2 (1), 9 and 26 of the Covenant. They are therefore arbitrary, falling under category V.

(e) Concluding remarks

116. Cognizant of Mr. Lai's age, the Working Group recalls its deliberation No. 11, in which it noted that States should refrain from holding individuals older than 60 years of age in places of deprivation of liberty where the risk to their physical and mental integrity and life is heightened.⁶² The Working Group refers the present case to the Independent Expert on the enjoyment of all human rights by older persons.

117. Mr. Lai has been detained in solitary confinement for over three and a half years. The Working Group expresses its alarm about that prolonged use of solitary confinement and urges the government to immediately remedy the situation. The Working Group recalls that prolonged solitary confinement in excess of 15 consecutive days is contrary to rules 43 (1) (b) and 44 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). The Working Group recalls that the Special Rapporteur on torture has deemed that prolonged solitary confinement in excess of 15 days, whereby some of the harmful psychological effects of isolation can become irreversible,⁶³ or incommunicado detention in a secret place may amount to torture as described in article 1 of the Convention against Torture.⁶⁴

⁶⁰ See <https://www.ohchr.org/en/press-releases/2024/01/hong-kong-sar-un-experts-urge-authorities-drop-all-charges-against-jimmy-lai>.

⁶¹ Ibid.

⁶² [A/HRC/45/16](#), annex II, para. 15.

⁶³ [A/66/268](#), para. 26. See also [A/63/175](#), para. 56.

⁶⁴ [A/56/156](#), para. 14.

118. The source further submits that there are concerns regarding reliance on evidence obtained through torture. It recalls that, on 31 January 2024, the Special Rapporteur on torture released a statement confirming that concerns had been raised with the authorities that evidence from a key prosecution witness against Mr. Lai had allegedly been obtained through torture. The Working Group has repeatedly found that the admission into evidence of a statement obtained through torture renders the entire proceedings unfair.⁶⁵ The Working Group is deeply concerned by the allegations of torture and the reported failure of the authorities to investigate them. It urges the authorities to investigate urgently.

3. Disposition

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

The deprivation of liberty of Jimmy Lai Chee-ying, being in contravention of articles 2, 9, 14, 19, 21 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

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

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

122. The Working Group calls upon the government to revise the provisions of the National Security Law to ensure that they comply with its obligations under articles 9 and 14 of the Covenant.

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

124. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the independence of judges and lawyers and the Independent Expert on the enjoyment of all human rights by older persons, for further action.

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

4. Follow-up procedure

126. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

- (a) Whether Mr. Lai has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Lai;
- (c) Whether an investigation has been conducted into the violation of Mr. Lai's rights and, if so, the outcome of the investigation;
- (d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Hong Kong, China, with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

127. The government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and

⁶⁵ See opinions No. 59/2019, No. 52/2018, No. 43/2012 and No. 34/2015.

whether further technical assistance is required, for example through a visit by the Working Group.

128. The Working Group requests the source and the government to provide the above-mentioned information within six months of the date of transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as of any failure to take action.

129. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.⁶⁶

[Adopted on 30 August 2024]

⁶⁶ Human Rights Council resolution 51/8, paras. 6 and 9.