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International Human Rights Scrutiny of China's Treatment of Human Rights Lawyers and Defenders: The committee Against Torture

Felice Gaer*

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ARTICLE

INTERNATIONAL HUMAN RIGHTS SCRUTINY OF
CHINA’S TREATMENT OF HUMAN RIGHTS
LAWYERS AND DEFENDERS:

THE COMMITTEE AGAINST TORTURE

*Felice Gaer**

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I. INTRODUCTION

As a State party to the Convention against Torture since 1988, the People’s Republic of China (“PRC” or “China”) has the obligation to present periodic reports on its compliance with the Convention for review by a committee of experts, the Committee against Torture (“CAT” or “the Committee”), which examines the reports in public sessions. From its first review of China in 1990, the ten-member

* The author is a member and Vice-Chair of the Committee and, in that capacity, participated in the 2000, 2008, and 2015 reviews of China’s periodic reports. The views outlined here are her own, prepared in her personal capacity as Director, Jacob Blaustein Institute for the Advancement of Human Rights.

Committee pressed China for assurances that it guarantees, in law and practice, a fundamental legal safeguard against torture and other ill-treatment – namely, that persons detained or in custody have the right to access a lawyer.¹

This article examines the approach taken by the Committee against Torture over the course of its reviews of China's compliance with the Convention, in 1990, 1993, 1996, 2000, 2008, and 2015. It finds that the review questions have changed from asking general questions about the legal entitlement to have access to a lawyer to an approach that examines specific concerns not only about whether this right is provided in practice for criminal suspects and others in custody, but also whether it is countermanded by threats, reprisals and other attacks – physical or legal – against lawyers and human rights defenders. The Committee has raised individual cases in which such reprisals have been brought to its attention. This article also examines China's approach to the Committee over time, finding that while Chinese authorities have been willing to submit periodic reports in accord with the Convention requirements and to discuss access and related matters affecting lawyers in the abstract, they have been increasingly unwilling to facilitate the Committee's examination of human rights practices of the government or to discuss specific alleged cases of harassment of defense lawyers and human rights defenders when raised by the Committee members. This article also examines China's approach to the Committee over time, finding that Chinese authorities have been willing to submit periodic reports in accord with the Convention requirements and to discuss access and related matters affecting lawyers in the abstract, but that they became increasingly unwilling to facilitate the Committee's examination of human rights practices of the government or discuss specific alleged cases of harassment of defense lawyers and human rights defenders when raised by the Committee members.² It also reveals that the Chinese authorities displayed a hostility towards the use by the Committee (and other UN human rights bodies) of sources of information other than that provided

1. G.A. Res. 39/46, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 19 (Dec. 10, 1984).

2. *See generally* Committee Against Torture, Consideration of Rep. Submitted by States Parties under Article 19 of the Convention, U.N. Doc. CAT/C/7/Add.5 (1989); *see also* Committee Against Torture, Summary Rec., U.N. Doc. CAT/C/SR.50 (1990); Committee Against Torture, Summary Rec., U.N. Doc. CAT/C/SR.51 (1990).

by the government, and particularly the work of non-governmental human rights organizations.

The members of the Committee against Torture routinely explore whether all persons deprived of their liberty have certain basic guarantees or fundamental legal safeguards which they view as essential to the core purposes of the Convention and obligations of State parties. Among these are that all detainees should be informed orally and in writing of their fundamental rights, that all detainees should have the right to contact a family member or other person of their choice to inform them about their detention and whereabouts and that all detainees should have the right promptly to receive independent legal assistance. These issues are addressed in the Committee's General Comment 2³ and in the conclusions of most countries reviewed by the Committee. As will be described, the Committee has repeatedly raised these issues with China and while its recommendations on some occasions have motivated Chinese authorities to change certain legal provisions, China has been unwilling to present the Committee with additional information it has requested or to undertake investigations into individual cases that the Committee raised with Chinese officials.

The Convention against Torture ("the Convention") stipulates in Article 13 that persons deprived of their liberty must have a right to make complaints about torture or ill-treatment, and the Committee considers this right to be impaired by harassment of defense lawyers and human rights defenders. Over the years, the Committee has repeatedly recommended that States parties take action to correct breaches of the Convention regarding access to a lawyer and reprisals against defense lawyers and human rights defenders. In response, the government of China has argued that its laws protect defense lawyers and the rights of the suspect to have access to a lawyer. But it has commonly denounced non-governmental organizations ("NGOs") working on the defense of human rights in China, engaging in public and private criticism of NGOs and individual defenders to diminish their status and role in the UN reviews.

China's attitudes and actions in UN human rights negotiations and reviews of the country's adherence to universal human rights norms

3. Committee Against Torture, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: General Comment No. 2, ¶ 13, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008).

have been the subject of several recent studies.⁴ Observers ask what China seeks to accomplish by engaging with the United Nation, and what it seeks to achieve by interacting with the world body's human rights councils and mechanisms. This essay, by delving into China's interaction with the Committee against Torture concerning the issues of access to lawyers and the treatment of defense lawyers and human rights defenders, adds to this body of scholarship by demonstrating how China has responded to increasingly specific scrutiny by a UN human rights treaty monitoring body.

II. CAT'S EARLY REVIEWS OF CHINA: 1990 - 2000

China submitted its first periodic report to CAT⁵ to the United Nations just a year after it ratified the Convention against Torture – and just six months after the notorious suppression of its Democracy Movement in Beijing, following the massive demonstrations that took place in Tiananmen Square. Despite the awkward timing and the criticism being directed against the country for this major human rights crackdown including “disappearances” or detention of leaders associated with it, China's report to the Committee against Torture began with the ill-timed statement that “The People's Republic of China has always attached great importance to protecting the rights of the person and democratic rights of citizens, and is resolute in opposing torture and other cruel, inhuman or degrading treatment or punishment.”⁶

This eleven-page Chinese report has been characterized by China scholar Ann Kent as “a brief monument to formalism.”⁷ Indeed, it outlined constitutional and other legal provisions concerning the

4. ANN KENT, *CHINA, THE UNITED NATIONS AND HUMAN RIGHTS: THE LIMITS OF COMPLIANCE* (University of Pennsylvania Press, 1999); *Engaging China on Human Rights: the UN Labyrinth*, HUM. RTS. IN CHINA (Oct. 29, 2010), www.hrichina.org/en/content/3261; Sonya Sceats & Shaun Breslin, *China and the International Human Rights System*, CHATHAM HOUSE (Oct. 2012), https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/r1012_sceatsbreslin.pdf; see also *The Costs of International Advocacy: China's Interference in United Nations Human Rights Mechanisms*, HUM. RTS. WATCH (Sept. 5 2017), <https://www.hrw.org/report/2017/09/05/costs-international-advocacy/chinas-interference-united-nations-human-rights>.

5. See Committee Against Torture, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Consideration of Reports Submitted by States Parties Under Article 19 of the Convention*, ¶ 3, U.N. Doc. CAT/C/7/Add.5 (Dec. 6, 1989).

6. *Id.*

7. KENT, *supra* note 4, at 92.

prohibition of torture in China.⁸ The CAT, composed of ten independent experts elected by the fifty-two States party to the Convention in 1990, relying on materials from unofficial sources including a detailed and well-documented critique of China's report prepared by the New York based International League for Human Rights and the Hong Kong based Ad Hoc Study Group on Human Rights in China,⁹ asked a series of probing and detailed questions about China's law and practice.¹⁰

Although the examination of the report took place less than a year after the shocking crackdown at Tiananmen, China's representative told CAT that following the 1989 "political disturbances," there were no summary arrests or detention of peaceful demonstrators or widespread torture;¹¹ and no political prisoners or prisoners of conscience in China.¹²

The Committee members asked a number of questions on the role of lawyers in defending detainees and including questions on the treatment of non-governmental human rights defenders and attorneys. China's representative responded to these inquiries at the initial review by claiming that "prisoners enjoyed the right to legal defense . . ." ¹³ but offered no cases nor verifiable data to back up how this right was realized in practice or when it was exercised. Presented with these sweeping and imprecise claims, including remarks about the reverence for the law – but nothing about what the lawyers themselves did in a criminal case, or about other issues raised by the Committee – the CAT Committee concluded that the Chinese report was inadequate. Committee members criticized China's report as "too general," and "failed to give details of the practical application" of the Convention's provisions. Furthermore, the report "did not conform to the general guidelines" for an initial report.¹⁴ China was asked to submit a

8. See Committee Against Torture, Consideration of Rep. Submitted by States Parties under Article 19 of the Convention, ¶¶4-55, U.N. Doc. CAT/C/7/Add.5 (1989).

9. Torture in China: Comments on the Official Report of China to the Committee against Torture (Apr. 1990). The author was Executive Director of the International League 1982-1991.

10. Report of the Committee Against Torture, ¶¶ 471-502. U.N., Doc. A/45/44 (June 21, 1990).

11. *Id.* ¶ 497.

12. *Id.* ¶ 494.

13. *Id.* ¶ 485.

14. *Id.* ¶¶ 476; see also Committee Against Torture: Summary Record of the 51st Meeting, CAT/SR/51 (Apr. 27, 1990).

supplemental report because so many issues remained in need of clarification.¹⁵

China presented the requested supplemental report to the Committee in 1993.¹⁶ At that time, China's representative Jin Yongjian argued that, in his view, the initial report had been prepared "in accordance" with the Committee's general guidelines for periodic reports.¹⁷ He emphasized China's history, pointing out that most of the relevant laws were only put in place by the PRC government since 1979, and that there was a genuine commitment to continue to place "top priority" on strengthening China's legal system and democratic institutions.¹⁸

The supplemental report that was submitted in response to the Committee's request provided a little additional information about the role of the lawyer in criminal cases: it stated briefly that a detainee would be able to contact a defense counsel after the people's court pressed charges and in any event, within seven days of the start of their trial.¹⁹ Three members of CAT probed further on this issue, asking when detainees themselves were actually entitled to choose or make contact with a lawyer.²⁰ Although China's delegation participated in several hours of face-to-face discussions and affirmed that a detainee should have more guarantees and his/her family and lawyer should have "prompt access" to him/her, it provided no reply to the Committee's questions about contacting a lawyer, and hence this issue was highlighted as the first of seven Committee recommendations to the government.²¹

15. *See* Report of the Committee Against Torture, ¶¶ 471-502. U.N. Doc. A/45/44 (June 21, 1990); *see also* Committee Against Torture, Summary Rec., ¶¶ 49, 51, U.N. Doc. CAT/C/SR.51 (1990).

16. *See generally* Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, U.N. Doc. CAT/C/7/Add.14 (Jan. 18, 1993).

17. Committee Against Torture, Summary Record of the Third Part (Public)* of the 143rd Meeting, ¶ 2, U.N. Doc. CAT/C/SR.143/Add.2 (Apr. 22, 1993).

18. *Id.* ¶ 10.

19. Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, ¶ 91, U.N. Doc. CAT/C/7/Add.14 (Jan. 18, 1993) ("All defendants enjoy their rights conferred by law, such as the right to a defence A defendant . . . may also appoint a lawyer.").

20. *Id.* ¶¶ 21, 41; Committee Against Torture, Summary Record of the Third Part (Public)* of the 144th Meeting, ¶ 11, U.N. Doc. CAT/C/SR.144Add.2 (Apr. 22 1993).

21. Committee Against Torture, Summary Record of the Fifth Part (Public)* of the 146th Meeting, U.N. Doc. CAT/C/SR.146/Add.4 (Apr. 23, 1993).

China's representative claimed that many "misunderstandings" by the Committee (and others) seemed to be a result of the fact that "much of the information" cited by CAT members had been supplied by NGOs, some of whom were "particularly biased against China."²² (Amnesty International was mentioned specifically in this context.) According to China's representative, the credibility of this material was "questionable."²³ This theme continued to be pressed by China's representatives throughout the subsequent CAT reviews of China's periodic reports, not only in the formal public review, but also through private communications to the UN Secretariat before and after the dialogues.

When the Committee examined China's second periodic report in May 1996, Ambassador Wu Jianmin explained that participation of lawyers in criminal proceedings had been expanded since the earlier review.²⁴ A CAT member asked for clarity as to the stage at which a detainee has access to a lawyer and, again, a reply wasn't provided.²⁵ The Committee's conclusions referred to the "failure to provide access to legal counsel at the earliest time."²⁶

Ambassador Wu complained during the review about the "undue weight" given by the Committee to the views of "so-called dissidents" and charged that the critiques by NGOs amounted to "an abuse of their privileged status."²⁷ After the Committee presented its conclusions publicly on May 6, he returned to this theme, stating he regretted that CAT members had "relied on information provided by NGOs."²⁸ He characterized some of them as "biased" since they drew their information from "so-called dissidents who made their living out of accusing and blaming China."²⁹ This caused him to question the conclusions as not being "objective," which in turn evoked a comment from CAT's Chairperson who pointed out that the Committee's

22. *Id.* ¶ 22.

23. *Id.*

24. Committee Against Torture, Summary Record of the 251st Meeting, ¶ 4, U.N. Doc. CAT/C/SR.251 (May 3, 1996).

25. *Id.* ¶ 15.

26. Committee Against Torture, Summary Record of the Public Part* of the 254th Meeting, ¶ 7, U.N. Doc. CAT/C/SR 254 (May 6, 1996).

27. Committee Against Torture, Summary Record of the Public Part* of the 252nd Meeting, ¶ 4, U.N. Doc. CAT/C/SR 252/Add.1 (May 3, 1996).

28. Committee Against Torture, Summary Record of the Public Part* of the 254th Meeting, ¶ 3, U.N. Doc. CAT/C/SR 254 (May 6, 1996).

29. *Id.*

conclusions had also drawn attention to a range of favorable developments in China.³⁰

When China submitted its third report to the Committee in May 1999, there appeared to have been progress regarding access of detainees to lawyers. The government reported there had been changes in the Criminal Procedure Law which would now allow lawyers “to be present during an investigation” and not merely as before, at the trial stage.³¹ This “early presence of a lawyer” would, according to the government, act “as a powerful deterrent against incidents of torture.”³² This action seemed to be a substantive response to the repeated recommendations of CAT on this matter. But at least one scholar, Byorn Ahl, argues that there is no evidence the CAT Convention or the positions of CAT members have had any influence on the reforms adopted.³³ On the other hand, a clear-cut area of impact in addition to revisions in access to attorneys in the Law on Lawyers was the 2010 revision of the Law on Compensation which was directly influenced by China’s exchange with the Committee members in 2008 concerning the definition of torture, and the absence of “mental suffering” from the Chinese understanding of torture and ill-treatment. This seemingly progressive reform was, however, accompanied by information from the government clarifying that there were limitations: if the case concerned a “State secret,” then “the suspect must receive permission from the investigating authority before he can engage a lawyer.”³⁴ Moreover, in such cases, a lawyer “must receive permission . . . before

30. *Id.* ¶¶ 3, 4.

31. Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, ¶ 70, U.N. Doc. CAT/C/39/Add.2 (Jan. 5, 2000).

32. *Id.* ¶ 71.

33. Byorn Ahl, *Interaction of National Law-making and International Treaties: The Implementation of the Convention against Torture in China*, in *CHINESE LEGAL REFORM AND THE GLOBAL LEGAL ORDER: ADOPTION AND ADAPTATION* (Zhao Yun and Michael Ng, eds., 2016).

34. See Human Rights in China, Submission to the Committee Against Torture, ¶¶ 12-13, 45-46 (2015) (Article 35 of the Law on State Compensation declares that “psychological harm in persons caused by acts violating the stipulations of Art. 3 or Art. 17 should be compensated for, within the extent of the effects of the violation, by means of eliminating the impact on the victims, restoring their reputation, and a formal apology; where the consequences [of the violation] are serious, consolation money corresponding to the psychological harm should [also] be paid [to the victims].” Law of the People’s Republic of China on State Compensation (adopted by the Standing Comm. of the Nat’l People’s Cong., promulgated by President of the People’s Republic of China, Jan. 1, 1995, amended Apr. 29, 2010, effective Dec. 1, 2010), art. 35.); Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, ¶ 72, U.N. Doc. CAT/C/39/Add.2 (Jan. 5, 2000).

he can visit the suspect.”³⁵ The government was not questioned in 2000 about what constituted a State secret or who could make such a determination; the government simply explained to the Committee members that this was now the provision in the revised law.

The Committee reviewed this report in May 2000 at which time three Committee members asked questions probing the availability of a lawyer to assist accused detainees: Mavromatis,³⁶ Gaspar,³⁷ and the author³⁸ (who asked whether detainees in Re-education through Labor Camps could also consult attorneys³⁹). The Chinese ambassador mentioned the change in the Criminal Procedure law, as cited in the written report, but explained that detainees’ right to access a lawyer changed when a State secret is involved.⁴⁰ As a result, the Committee’s conclusions and recommendations following the review recognized as positive the change regarding “timely access to defense counsel”⁴¹ during the investigative stage, but also urged the government to consider “abolishing the need to apply for permission . . . before a suspect can have access to a lawyer whilst in custody.”⁴² Once again, China’s representative, this time Qiao Zonghuai, complained that all allegations made by NGOs regarding denial of access to a lawyer were ‘groundless.’⁴³

III. CAT’S 2008 REVIEW OF CHINA: A GREATER FOCUS ON LAWYERS AND HUMAN RIGHTS DEFENDERS

China submitted its fourth report to the Committee against Torture in February 2006⁴⁴ and the Committee examined it in public in

35. Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, ¶ 72, U.N. Doc. CAT/C/39/Add.2 (Jan. 5, 2000).

36. Committee Against Torture. Summary Record of the 416th Meeting, ¶ 16, U.N. Doc. CAT/C/SR.416 (May 18, 2000).

37. *Id.* ¶ 21.

38. *Id.* ¶ 28.

39. *Id.* ¶ 28.

40. Committee Against Torture, Summary Record of the 419th Meeting, ¶ 33, U.N. Doc. CAT/C/SR.419, (May 12, 2000).

41. Committee Against Torture, Summary Record of the Second Part (Public)* of the 423rd Meeting, ¶ 5, SR 423/Add.1 (May 9, 2000).

42. *Id.*, ¶ 21.

43. *Id.* ¶ 4.

44. See generally Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, CAT/C/CHN/4 (June 27, 2007).

November 2008.⁴⁵ In a recounting of newly adopted laws and regulations, it cited some December 2003 Regulations aimed at “strengthening the role of lawyers in criminal prosecutions”⁴⁶ and later, offered some information about the Committee’s previous concerns about access to a lawyer and the requirement of applying for permission.⁴⁷ The new report explained that, except in cases involving State secrets, persons in custody did not need to apply for permission to “get the help of a lawyer,” and that Article 96 of the Criminal Procedure law allowed suspects to retain a lawyer to petition or complain for him/her, and to provide legal advice.⁴⁸ In cases involving State secrets, there was a requirement to obtain approval of “the investigatory organ.”⁴⁹ But in practice, the report claimed, there were “very few” such cases, and in practice such requests were routinely granted, to the point where the right to access a lawyer was “not therefore subject to any substantive restrictions at all.”⁵⁰

By the time the Committee reviewed the report, China had adopted an October 2007 amendment to the Law on Lawyers. Ambassador Li Baodong, the head of the Chinese delegation to the Committee’s review, announced that this demonstrated that China had “accepted the suggestions of the Committee,” by addressing the access of detainees to lawyers, providing lawyers a role at key points in investigations, and, he claimed, providing them with the needed immunity from prosecution for their role defending criminal suspects.⁵¹ The new elements of this law “guaranteed the protection of lawyers in the exercise of their profession,” the Ambassador explained, and thus safeguarded “[the] legitimate rights and interests of suspects.”⁵²

Yet even prior to its 2008 Review of China’s report, the Committee had received substantial information from NGO sources

45. See generally Committee Against Torture, Summary Record of the 844th Meeting, SR.844 (Apr. 27, 2009); Committee Against Torture, Summary Record of the 846th Meeting, SR.846 (May 6, 2009).

46. *Id.* ¶ 21.

47. *Id.* ¶¶ 146-47.

48. *Id.* ¶ 146.

49. *Id.* ¶ 147.

50. *Id.*

51. H.E. Ambassador Li Baodong, Head of Chinese Delegation, Introductory Statement at the consideration of the Committee Against Torture on China’s 4th and 5th Periodic Reports (Nov. 2008) at 4 (“The Law has clear provisions on the lawyers’ right to meet with criminal suspects during investigation, to exchange views with criminal suspects and defendants, to investigate, collect evidence and defend, and on lawyers’ immunity privilege.”).

52. *Id.*

providing further – and often quite different – information about the rights and the roles of lawyers in Chinese criminal cases. They challenged the claims that access to lawyers in criminal cases had been resolved, pointed out that the overbroad definition of State secrets largely cancelled out any progress on access provided in the Law on Lawyers and was used in practice to prevent access to counsel. NGO submissions also expressed concern that the independence of lawyers was threatened by Article 306 of the Criminal Code which criminalized statements made by lawyers in court. In presenting this analysis, the NGOs also documented a wide array of attacks, both physical and legal, on defense lawyers and human rights defenders. Over a dozen NGOs submitted documentation addressing a wide array of concerns and cases including many about lawyers and human rights defenders.⁵³

While the government stated that the Law on Lawyers “established the immunity of lawyers in the expression of their opinions in court hearings,”⁵⁴ the NGOs explained that lawyers were routinely dissuaded from taking on sensitive cases not only because of harassment, but also because under Article 306 of the Criminal Code and Article 37 of the Law on Lawyers, what lawyers said in court could be prosecuted “as dangerous, maliciously slanderous, and a disturbance

53. See Chinese Human Rights Defenders, A Civil Report on China’s Implementation of the United Nation’s Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment for consideration during the 41st session of the Committee against Torture, at 4-5, 11-12 (The NGO Chinese Human Rights Defenders [“CHRD”] explained that “access to legal counsel is routinely limited and arbitrarily denied” and provided examples of human rights defenders forbidden access to counsel. They pointed out that complaints about harassment and arbitrary detention of human rights defenders are not investigated and complained of persecution, retaliation, torture, enforced disappearances and other abuses directed against human rights lawyers. The cases of Teng Biao and Li Heping were described in detail, as was the case of Chen Guangchen in Lingyi, as well as the harassment and detention of lawyers who helped them); see also Human Rights in China, Implementation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in the People’s Republic of China, at 10 (Oct. 2008) (Human Rights in China supporting this point, noting that “in practice, most criminal defendants do not have legal representation,” and citing a study by the Beijing Lawyers Association.) [hereinafter HRIC]; Amnesty Int’l, People’s Republic of China: Briefing for the Committee against Torture in advance of their consideration of China’s fourth periodic report at 3, 5 (Nov. 2008) (Amnesty International explained that provisions on access “fall short” of the Convention’s standards, are often countermanded by the State Secrets law, and continued, “The criminal justice system remains highly vulnerable to political interference” which is manifested most commonly in politically sensitive cases.”). See generally The Office of the United Nations High Commissioner for Human Rights, TREATY BODY DATABASE, http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=CHN&Lang=EN [https://perma.cc/GR3G-U77Y] (last visited Apr. 25, 2017) (NGO submissions, including joint submission, and other documentation related to the 2008 review).

54. China’s Response to the List of Issues, at 6.

of the order of the court.”⁵⁵ As a result, contrary to the government’s claim that the new law provided safeguards for lawyers, the provisions of the articles cited above, in sensitive cases, may have the opposite effect and may be misused to intimidate and target human rights defense lawyers.

Human Rights in China claimed that about 500 lawyers were detained between 1997 and 2002 and more than one hundred were specifically accused of violating Article 306 by “fabricating evidence.”⁵⁶ HRIC reported that in the end ninety percent of these latter cases had been cleared.⁵⁷ HRIC and Amnesty International also provided information about how the State secrets law could offset protections of immunity for lawyers as well as data on the cases of human rights defenders who were harassed and imprisoned.⁵⁸

The Committee drew on these and other NGO submissions as well as other information available to it in preparing an eleven-page single-spaced “List of Issues” that it shared with the State party several months in advance of the public review of its report in November 2008.⁵⁹ The document contained numerous detailed questions about the treatment of lawyers and human rights defenders in China and asked about a number of specific allegations of abuse. In many of these questions the Committee pressed China to provide further information about laws and practices that it had claimed had already been revised or were working well.⁶⁰

55. Chinese Human Rights Defenders, *supra* note 53, at 13-14.

56. HRIC, *supra* note 53, at 11.

57. *Id.*

58. *Id.* at 6, annex 1; Amnesty Int’l, *supra* note 53, at 3, 5.

59. See generally Committee Against Torture, List of Issues to be Considered During the Examination of the Fourth Periodic Report of China, U.N. Doc. CAT/C/CHN/Q/4 (Sept. 9, 2008.)

60. Specifically, in the List of Issues, the Committee asked for the number and nature of cases annually “in which State secrets have served as the basis for delaying access to a lawyer,” and about reports that following the March 2008 demonstrations in Tibetan areas, that “lawyers who offered to defend Tibetan protesters were warned that they would have their professional licenses suspended if they attempted to do so” and requesting clarification as to what counsel was provided to persons detained after these protests, and whether they were allowed to meet with defense counsel in private, in advance of trials. *Id.* at ¶ 2(a-b). The List of Issues also inquired about allegations in information provided to the Committee regarding the whereabouts of human rights lawyer Gao Zhisheng, and allegations that human rights defenders are often harassed by personnel of the Public Security Bureau and other law enforcement personnel who detain them without any judicial warrant, and highlighting the case of Teng Biao. *Id.* at ¶ 2(1), (n). The government was specifically asked to clarify allegations about the alleged ill-treatment of human rights defender Chen Guangcheng and attacks on lawyers who came to his defense (Li Fangping and Li Subin) and others. *Id.* at ¶ 2(n). In many of the cases it was

Not surprisingly, the role and treatment of lawyers and human rights defenders in China was a prominent focus of the Committee's public review of China's fourth report in November 2008.⁶¹ The author, who was one of the Committee's two Country Rapporteurs for China, thanked the delegation for the information about the Law on Lawyers and access to defense counsel, but pressed the Chinese government for more information about its scope (said to be very broad) and practical application, particularly regarding reported conflicts when State secrets were identified (including the claims that it was vague and undefined, that its use was overbroad, and that there was often retroactive classification of items as State secrets).⁶² She also asked about the definition of State secrets and who was empowered to decide on such classifications. Citing its overbroad reach as well as a reported tendency to assign information to a "black hole," HRIC had argued to CAT that the "State secrets system stands as the single most significant obstacle to preventing torture in the PRC."⁶³ The author also asked about pressures put on lawyers because of a tax now imposed on them by the new law.⁶⁴ and about a number of cases, including some involving alleged lack of access to lawyers for persons involved in the widespread Tibetan protests of March 2008.⁶⁵

The Committee's Co-rapporteur for the review of China, Nora Sveaass, inquired about reports that petitioners in China were intimidated, detained, and held in "black jails" for prolonged periods and asked whether there were any measures envisaged that would allow such petitioners access to lawyers.⁶⁶ Sveaass also asked about reports that some lawyers refused to defend petitioners because of reprisals.⁶⁷ Three other Committee members also asked about some of the issues

alleged that there had been not been any investigations, such as the case of human rights defender Yang Chunlin. *Id.* at ¶ 20. Information on any investigations into allegations of torture or ill-treatment of these lawyers or defenders was requested. *See generally id.*

61. *See generally* Committee Against Torture, Summary Record of the 844th Meeting, SR.844 (Apr. 27, 2009); Committee Against Torture, Summary Record of the 846th Meeting, SR.846 (May 6, 2009).

62. Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, ¶¶ 28, 33-34, CAT/C/SR.844 (Nov. 7, 2008).

63. *Id.* ¶ 8.

64. Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, ¶ 41, CAT/C/SR.844 (Nov. 7, 2008).

65. *Id.* ¶¶ 39, 41 (regarding Teng Biao, Yang Maodong, and various Tibetans unable to access lawyers).

66. *Id.* ¶ 50.

67. *Id.* ¶¶ 46, 53.

pointed out by the NGO and other submissions on the rights of lawyers: Abdoulaye Gaye inquired about reports of pressures against defense lawyers,⁶⁸ Fernando Marino Menendez expressed concern about the reported State Secrets Act making the accused's right to legal assistance conditional,⁶⁹ and Claudio Grossman expressed concern about the restrictions on the rights of lawyers to speak during trials dealing with national security. He asked for examples of cases where lawyers' freedom of expression had been curtailed, and about whether the State's courts had defined the concept of national security precisely.⁷⁰

In response the next day, Ambassador Li Baodong offered a long explanation of the incidents that had occurred in Tibetan areas in March 2008, claiming some 1,307 persons had been arrested or detained, sixty-nine of whom were sentenced for arson, theft, acts of violence and seven for treason or illegal communication of information to persons outside the country. Another 1,231 suspects were released after undergoing "education measures and administrative punishments." In these cases, he explained, all laws were strictly upheld, and "defense lawyers had been able to express themselves freely." Allegations were "incorrect and unfounded," he stated, "that lawyers who had attempted to defend suspects had not had their licenses removed."⁷¹ [sic]

This statement was followed by further replies from Judge Zhu Erjun, of the Office of Judicial Interpretation at the Supreme People's Court. Mr. Zhu stated that the State Secrets Law had "clear provisions" on definition and scope.⁷² When a case involving State secrets proceeded, "the chosen defense lawyer must be duly approved by the competent authority . . ."⁷³ He presented no case examples. This was followed by Mr. Li Shouwei, Director of the Department of Criminal Legislation, Legislative Affairs, Division, National People's Congress, who claimed that the Chinese constitution and Law on Legislation had rules clearly establishing a hierarchy.⁷⁴ So in addressing the issue of contradictions between the Law on Lawyers and the Code of Criminal

68. *Id.* ¶ 56.

69. *Id.* ¶ 58.

70. *Id.* ¶ 65.

71. Committee Against Torture, Summary Record of the 846th Meeting in its Forty-First Session, ¶ 7, U.N. Doc. CAT/C/SR.846 (Nov. 10, 2008).

72. Committee Against Torture, Summary Record of the 844th Meeting, ¶ 13, U.N. Doc. CAT/C/SR.844 (Apr. 27, 2009)

73. *Id.* ¶¶ 11, 13.

74. *Id.* ¶ 16.

Procedure, he explained that new laws take precedence over older ones.⁷⁵ However, legal opinions differed on the precise scope and application of the Law on Lawyers and the authorities were “looking into the problem.”⁷⁶

Ambassador Li Baodong said the government was well aware of the important role of lawyers in protecting and promoting human rights.⁷⁷ The Law on Lawyers aimed to ensure protection of their activities and rights.⁷⁸ Another delegation member, Liu Gioxiang explained that efforts had been made “to ensure petitioners were dealt with humanely.”⁷⁹

The Chinese delegation provided little or no information on specific cases – although the List of Issues and the CAT members themselves had asked for this – leading the author to press for more information.⁸⁰ The co-rapporteur, Sveaass, inquired whether human rights activists had been able to celebrate the 60th anniversary of the Universal Declaration of Human Rights.⁸¹ Mr. Marino-Menendez who inquired whether a judicial authority was involved in the decision to classify information as confidential⁸² and Mr. Grossman, remarking that the new Law on Lawyers represented “progress” regarding freedom of expression of lawyers and State secrets (i.e., the topic of immunity of lawyers from prosecution), also expressed concern at information he had received that any lawyer who advised a client to retract a confession on the grounds it was coerced was liable to prosecution under the Law on State Secrets.⁸³

The Committee’s 2008 Concluding Observations on China⁸⁴ reflected concerns about the issues raised regarding lawyers and human rights defenders – especially cases discussed – but which were not addressed in the Chinese replies. The Committee welcomed ongoing legal changes⁸⁵ including the 2007 amended Law on Lawyers

75. *Id.*

76. *Id.*

77. *Id.* ¶ 26.

78. *Id.*

79. *Id.* ¶ 33.

80. *Id.* ¶ 36.

81. *Id.* ¶ 41.

82. *Id.* ¶ 42.

83. *Id.* ¶ 48.

84. *See generally* Committee Against Torture, Concluding Observations of the Committee against Torture, on Its Forty-First Session, U.N. Doc. CAT/C/CHN/CO/4 (Dec. 12, 2008).

85. *Id.* ¶ 4(b).

guaranteeing their right to meet with criminal suspects. It expressed deep concern about continued allegations of widespread torture, especially to extract confessions⁸⁶ and about the lack of legal safeguards for persons detained including among others, “restricted access to lawyers.”⁸⁷ The Committee’s recommendation followed this by calling on the State party to ensure all suspects are afforded, in practice all fundamental safeguards including the right to have access to a lawyer.⁸⁸

The Committee then identified three “main obstacles to the effective implementation of the Convention,” which included the Law on State Secrets, “the reported harassment of lawyers and human rights defenders” and “the abuses carried out by unaccountable ‘thugs’ who use physical violence against specific defenders but enjoy de facto immunity.”⁸⁹ These stand in the way of ensuring legal safeguards necessary for the prevention of torture, the Committee explained.⁹⁰ It further remarked that “the classification of a case falling under the State secrets law allows officials to deny detainees access to lawyers, a fundamental safeguard for preventing torture,” which, it further stated, appears to be in contradiction to the 2007 amended Law on Lawyers.⁹¹ The Committee called for a review of the legislation and to ensure the information on the Law and its application are made available to the Committee, especially with regard to the criteria used to establish that a piece of information is a State secret, and to ensure that any determination of a State secret can be appealed before an independent tribunal.⁹² Finally, the Committee asked the State party to “ensure that every suspect is afforded the right to have prompt access to an independent lawyer” including in cases of State secrets.⁹³

The Committee also devoted two lengthy paragraphs in its Concluding Observations to the issue of harassment of defense lawyers.⁹⁴ They address concerns about arrests of lawyers under Article 306, reportedly used for intimidation.⁹⁵ The Committee cited

86. *Id.* ¶ 11.

87. *Id.* ¶ 11(c).

88. *Id.* ¶ 11.

89. *Id.* ¶ 15.

90. *Id.*

91. *Id.* ¶ 16(d).

92. *Id.* ¶ 16.

93. *Id.*

94. *Id.* ¶ 18.

95. *Id.*

cases of harassment of prominent lawyers whose cases had been raised but not addressed by the Chinese government, such as Teng Biao and Gao Zhisheng.⁹⁶ It called for an end to legal provisions undermining the independence of lawyers and for investigations of all attacks against lawyers and petitioners, and investigations into complaints of such cases.⁹⁷ The Committee also expressed its concern at information on a pattern of harassment and violence against human rights defenders, such as Hu Jia (and his wife) and the resulting lack of accountability.⁹⁸ It recommended that China “take all necessary steps to ensure that all persons, including those monitoring human rights, are protected from any intimidation or violence as a result of their activities and exercise of human rights guarantees, and to ensure the prompt, impartial and effective investigation of such acts.”⁹⁹ It further called for an end to the use of unofficial personnel used to harass lawyers, petitioners, and human rights defenders.¹⁰⁰

IV. CHINA’S REJECTION OF THE COMMITTEE’S CONCERNS

The government of China responded to the Committee’s 2008 concluding comments by promptly attacking the Committee’s country rapporteurs as politically biased, stating that the information sources they used were “fabricated.” China wrote that the rapporteurs “groundlessly accuse China of attacking ‘human rights defenders’ . . .” and that “the Chinese government strongly rejects all of these slanders and untrue allegations.” Further, it warned that “abuse of the rapporteur’s role by individual Committee members and using the consideration of a State party’s report as an opportunity to maliciously attack the State party severely compromises the fairness and objectivity of the exercise . . . Such acts are contrary to the objectives of the Convention.” In conclusion, the government declared it “will unwaveringly persist in its efforts to protect human rights and it seeks to engage in international cooperation in this area on the basis of equality and mutual respect. This position is immutable.”¹⁰¹

96. *Id.*

97. *Id.*

98. *Id.* ¶ 19.

99. *Id.*

100. *Id.* See generally Committee Against Torture, Concluding observations of the Committee against Torture, U.N. Doc. CAT/C/CHN/CO/4 (Dec. 12, 2008).

101. Committee Against Torture, Consideration of Reports Submitted By States Parties Under Article 19 of The Convention: Comments by the Government of the People’s Republic

While just before the review two diplomats attached to the Chinese Mission to the United Nations in Geneva had complained privately to the Secretariat about the two country rapporteurs, no delegation members nor personnel from the Chinese Mission to the United Nations in Geneva ever mentioned this concern formally to the Committee itself or in the public review. Once the procedure was completed, however, they launched an unusually personal attack on the two country rapporteurs, mixing it with criticism of NGOs and information provided on human rights defenders and other matters.¹⁰²

This led the Committee to issue a statement at its next session “on the adoption of its Concluding observations”¹⁰³ in which the “Committee strongly rejects any allegation that it does not discharge its function in an independent and expert manner” and “considers that unfounded allegations about the Committee or its members harm the achievement of the Committee’s goals.” The Committee pointed to its Rules of Procedure and explained that the Concluding Observations “are adopted by the Committee as a whole and not by individual members.” It reminded States parties of their “obligation . . . to cooperate with the Committee and to respect the independence and objectivity of its members.”¹⁰⁴ The statement, which was attached to the 2009 Annual Report of the Committee against Torture as Annex IX offered no indication of the motivation for making this statement nor any mention of China’s criticisms.¹⁰⁵ But its genesis and focus was crystal clear to all Committee members, which at the time included a person who was also serving as an Ambassador in the Chinese foreign ministry.¹⁰⁶

With regard to the specific recommendations from the review of China’s fourth report to CAT, about a year following its initial rejection of the 2008 CAT Concluding Observations, China submitted an additional twenty-three page set of its “official comments” concerning

of China to the Concluding Observations and Recommendations of the Committee Against Torture, at 2, U.N. Doc. CAT/C/CHN/Co/4/Add.1 (Dec. 17, 2008) (stating in part that “country rapporteurs, displaying a strong bias against China, paid no heed to the facts and disregarded the . . . information . . . provided by the Chinese [g]overnment Instead they cited an extremely small number of ‘reports’ and ‘sources’ fabricated by groups whose goal is the overthrow of the Chinese [g]overnment, thereby deliberately politicizing the review process.”).

102. *Id.*

103. Committee Against Torture, Statement of the Committee Against Torture on the adoption of its Concluding Observations, U.N. Doc. CAT/C/42/3 (May 14, 2009).

104. *Id.*

105. Committee Against Torture, Annual Report, at 255, U.N. Doc. A/64/44.

106. *Id.* at 216.

CAT's 2008 conclusions and recommendations.¹⁰⁷ Because some parts of the CAT's observations "did not square with the objective facts" and were "not acceptable" to China, it offers one by one comments to specific issues raised. With regard to access to lawyers, China again explains that under Article 96 of the Criminal Procedure Law a "criminal suspect may appoint a lawyer" and that approval is required if the case involves State secrets.¹⁰⁸ The government states that "in practice" the law enforcement organs will assist any such suspect in arranging a lawyer or free legal aid if needed.¹⁰⁹ No cases are cited.¹¹⁰ With regard to the issue of coerced confessions, China says the law prohibits this and its judicial organs work to rectify any "isolated cases."¹¹¹ Because the CAT conclusions explicitly mentioned the case of Yang Chunlin in this regard, China actually begins in this document for the first time to offer comments to CAT on the individual cases – in this one, however, while the government provides details such as the date of the case, the verdict and sentence, its "official comments" indicate no evidence of any investigation, and simply state that "The public security organ handled the case in strict accordance with the Criminal Procedure Law and there is no evidence of a confession by torture."¹¹²

China also addressed the Committee's concern that "the classification of a case falling under the State secrets law allows officials to deny detainees access to lawyers." Once again, it stated that approval from the investigating body is required before a suspect in a case involving State secrets can hire a lawyer, explaining this is to prevent disclosure of such secrets.¹¹³ While mentioning "the Lawyers Law as amended in 2007," the government merely states that it also has provisions about meetings, but the submission does not discuss conflicts that may arise or their resolution, nor does it address any case where an individual might be or has been denied access to a lawyer as

107. Committee Against Torture, Consideration of Reports Submitted by State Parties under Article 19 of the Convention: Comments by the Government of the People's Republic of China* concerning the concluding observations and recommendations of the Committee against Torture, U.N. Doc. CAT/C/CHN/Co4/Add.2 (Dec. 18, 2009).

108. *Id.* at 4.

109. *Id.*

110. *See id.* § 1(c).

111. *Id.* at 5.

112. *Id.* § (d).

113. *Id.* ¶ 5(d).

outlined by the Committee.¹¹⁴ It addresses the recommendation regarding the legal provisions that criminalize a lawyer's statements during judicial proceedings and hampers their independence and immunity. China again simply describes the law: namely, that Article 37 of the Lawyers Law establishes immunity of lawyers regarding their statements during judicial proceedings, but cites exceptions if the statements are malicious, touch on national security concerns, etc.¹¹⁵ Article 306 of the Criminal Law sets out the criminal responsibility of lawyers who destroy or fabricate evidence, suborn perjury, etc.; but China claimed the law guarantees "the full exercise by lawyers of their right to provide a defence."¹¹⁶

China's submission also commented on the recommendation to conduct investigations into attacks against lawyers and petitioners, addressing the four specifically mentioned cases of alleged harassment of lawyers/human rights defenders: Teng Biao, Gao Zhisheng, Hu Jia, and Li Heping. The submission never addressed the specific claims of harassment nor suggested that there had been any investigation into the allegations presented to (and by) the Committee. China simply seemed to check off the four names by stating that there was no harassment of lawyers because several of them weren't lawyers or at least not full-time lawyers. It does not address "petitioners" or human rights defenders. Instead, the submission points out that Hu Jia was not a lawyer at all and that he was punished for inciting subversion of State power and that Gao Zhiseng was "formerly a lawyer" who was found guilty of the same crime of inciting subversion. On Teng Biao, China notes that he was "formerly a part-time lawyer," and stopped practicing law when the university disapproved of his part time arrangement at a Beijing law firm but says nothing about harassment or incommunicado detention or conviction. Finally, regarding Li Heping, the government's comments say he was "formerly a lawyer" who he failed the assessment exam at the law firm where he had been working and his law license/registration was not renewed.¹¹⁷

China's submission also mentioned the case of the blind lawyer, Chen Guangchen. After stating that he was sentenced for the crimes of "willful destruction of property and assembling a crowd to disrupt traffic," it asserts only that the "allegation of harassment against Chen

114. *Id.*

115. *Id.* ¶ 7.

116. *Id.*

117. *Id.* ¶ 7.

and his counsel . . . is inconsistent with the facts.”¹¹⁸ Once again, while it is notable that an individual case is addressed in the Chinese response, no details about the alleged harassment nor about any investigation into the allegations are in fact presented.

CAT had established a “follow-up” procedure in 2003, whereby some three to five Committee recommendations would be identified as protective and achievable after every country’s periodic report was reviewed, and for which a report was requested within one year.¹¹⁹ China’s “comments” on the 2008 review were received about a year after the review took place.¹²⁰ Since they addressed the four topics identified for follow up alongside all the other issues raised in the Concluding Observations, the “comments” became the focus of a CAT letter dated October 29, 2010 seeking further clarifications.¹²¹ The Committee’s follow up rapporteur requested, *inter alia*, further information on any investigations into the alleged harassment and coerced confession of Yang Chunlin, statistics and criteria used in the application of the State secrets law, and information on alleged harassment of lawyers, human rights defenders and petitioners.¹²² On the latter, the Committee requested further information on the ongoing claims that Article 306 of the Chinese Penal Code and Article 39 of the Criminal Procedure Law were used to intimidate and repress some lawyers, impeding their efforts to defend clients or take on “sensitive” cases. While welcoming China’s articulation of efforts to revise or abolish these provisions in order to ensure the independence of lawyers, the Committee inquired about ongoing reported assaults and beatings of human rights lawyers. Six cases were cited in its letter, which asked if any had been investigated. The Committee also requested

118. *Id.* ¶ 13.

119. Rep. of the Committee Against Torture, 29th and 30th Sess., ¶ 12, U.N. Doc. A/58/44/SUPP., (2003) (“At its thirtieth session the Committee decided to identify in its recommendations to States parties, as appropriate, specific issues on which the State party concerned should provide information within one year. The rapporteurs on follow-up, appointed under rule 61, paragraph 3, of the rules of procedure, will brief the Committee about the information received under this procedure, whereupon the Committee will decide on the action to be taken.”).

120. *See generally* Committee Against Torture, U.N. Doc. CAT/C/CHN/CO4/Add.2 (Dec. 18, 2009).

121. Letter from the Rapporteur for Follow-up on Conclusions and Recommendations Committee against Torture to the Representative of the People’s Republic of China to the U.N. (Oct. 29, 2010), http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/CHN/INT_CAT_FUF_CHN_11989_E.pdf [<https://perma.cc/9RRA-DA7J>].

122. *See id.*

information on the number of complaints from lawyers or human rights defenders alleging abuse, as well as any investigations, prosecutions, and outcomes. The Committee pressed for further information about the cases of Gao Zhisheng – who had been released and detained again a month later—and Hu Jia, both human rights defenders, and whether there had been any related investigations. Similarly, it sought more information about the alleged harassment of human rights defenders by unofficial, unaccountable persons. No response was received to this follow up letter.¹²³

V. CHINA'S ROLE IN THE "TREATY BODY STRENGTHENING" PROCESS

In the years that followed the 2008 review China took its dissatisfaction with the Committee's approach public in the context of meetings to reform all ten of the UN human rights treaty bodies. Shortly before the CAT statement cited above was adopted, on April 28, 2009, the Committee against Torture had a public meeting with representatives of States parties at which the Chairperson invited the representatives to address the Committee's follow-up procedure and its new optional procedure—the preparation of a List of Issues Prior to Reporting ("LOIPR").¹²⁴ At this session, China's representative, Mr. Qian Bo, declared he intended to discuss the Committee's "recent practice" and launched into criticism of the questions asked to China at the previous session which he called "entirely unrelated to the substance of the Convention" and more significantly, "a violation of the professional ethics by which the members of the Committee were bound."¹²⁵ China then proposed some changes in working methods of the CAT – changes it would pursue in subsequent years in the UN General Assembly's intergovernmental "treaty strengthening process" which began in 2012 and resulted in 2014 in Resolution 68/268.¹²⁶

123. See Committee Against Torture, ¶ 35, U.N. Doc. CAT/C/CNH/CO4 (concerning "widespread torture and ill-treatment and insufficient safeguards during detention," "main obstacles to the effective implementation of the Convention," "1989 Democracy Movement," and "Events in the Tibetan Autonomous Region and neighboring prefectures and counties: widespread reported excessive use of force and other abuses").

124. Committee Against Torture, 41st Sess., 869th Meeting, ¶¶ 1-2, U.N. Doc. CAT/C/SR.869 (Jul. 3, 2009).

125. *Id.* ¶ 4.

126. See *Treaty Body Strengthening – Submissions by States parties*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, <https://www.ohchr.org/EN/HRBodies/HRTD/>

Although the CAT members are independent experts with the authority under the Convention to set their own working methods, the Chinese representative asked that any change in working methods be “the outcome of consultation with States parties” and that the principles of “impartiality, transparency and objectivity” were respected.¹²⁷ He further asked that any dissenting or even diverse opinions of individual members of the Committee be reflected in the concluding observations and that more attention be paid to the views of States parties.¹²⁸ On the issue of NGO information, Qian Bo complained that “some NGOs claimed to protect and promote human rights and yet distorted facts and provided false information.”¹²⁹ Later, citing “uneven practices observed in the past,” he asked the Committee to develop “specific practical rules for guaranteeing the reliability of information from NGOs.”¹³⁰ The Chairperson expressed regret over the amount of State concern about appointment of country rapporteurs, pointed out that CAT followed a systematic practice for all countries in such appointments, and remarked that the Committee decisions on concluding observations was a “collective” decision, which in itself was a form of protection “against the partisan slide that some apparently feared.”¹³¹

In the months and years that followed, China continued to speak out at States parties’ meetings, complaining about rapporteurs, NGOs, and demanding a greater role and even a veto of some treaty body decisions by the State under review. China engaged actively in the “cross regional group” at the intergovernmental “treaty strengthening process.”¹³² There, China and its allies worked actively to assert the preeminence of the States parties—their “ownership” of the reform of treaty bodies—and focused specifically on proposals for States parties to bring this about by taking decisions that would define and limit treaty body working methods, the selection of country rapporteurs, the availability on-line and use of NGO information, and to establish a

Pages/StatesPartiesSubmissions.aspx [https://perma.cc/HK2U-38HA] (last visited July 13, 2018).

127. *Id.* ¶ 5.

128. *Id.* ¶¶ 6, 8.

129. *Id.* ¶ 7.

130. *Id.* ¶ 26.

131. *Id.* ¶ 46.

132. *Id.*

code of conduct for members of treaty bodies which China wanted States parties to monitor and enforce.¹³³

VI. CHINA'S FIFTH REPORT TO CAT – 2015

China's fifth report to CAT updated the earlier ones and discussed some of the 2008 conclusions at the end, clarifying the relevant laws, but once again dismissing inquiries about restrictions in practice as based on inaccurate NGO sources.¹³⁴ As China had declined the Committee's offer to prepare a LOIPR under its simplified reporting procedure, the Committee released a List of Issues needing further clarification following submission of the new Chinese report and aimed at facilitating a robust conversation with the delegation on those topics.¹³⁵ China then prepared and submitted a written reply to the List of Issues.¹³⁶ After the oral dialogue, the Committee adopted concluding observations containing lengthy sections on "restrictions on the rights to access a lawyer" and the "reported crackdown on defence lawyers and activists."¹³⁷

Access to lawyers and the procedures applied in cases deemed to fall under the State Security Law remained a focus of China's report and the discussion that followed. In its report, China presents the news that the Criminal Procedure Law was amended as of March 14, 2012, clarifying procedures for defense lawyers to meet with criminal suspects or others held in detention.¹³⁸ The report explained that Article 37 of the amended Criminal Procedure Law now stipulates that when

133. See, e.g., Statement of China following the Vote on Res 66/254, creating the intergovernmental process, U.N. GA, 66th Sess., 98th plen. mtg. U.N. Doc. A/66/PV.98 (Feb. 23, 2012); *Views of the Chinese government regarding the human rights treaty strengthening process*, U.N. HUM. RTS. OFFICE OF THE HIGH COMMISSIONER <http://www.ohchr.org/EN/HRBodies/HRTD/Pages/StatesPartiesSubmissions.aspx> [https://perma.cc/URP7-KGJU] (last visited Jul. 3, 2018).

134. Committee Against Torture, Consideration of Reports Submitted by the Parties under Article 19 of the Convention, ¶¶ 101-113, CAT/C/CHN/5 (Apr. 3, 2014).

135. Committee Against Torture, 54th Sess., U.N. Doc. CAT/C/CHN/Q/5/Add.1 (June 15, 2015).

136. See *China's Response to the List of Issues*, U.N. HUM. RTS. OFFICE OF THE HIGH COMMISSIONER, https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCAT%2fR1%2fCHN%2f22225&Lang=en [https://perma.cc/DW5B-T2ZS] (last visited July 13, 2018).

137. Committee Against Torture, 56th Sess., ¶¶ 12-13, 18-19, U.N. Doc. CAT/C/CHN/CO/5 (Feb. 3, 2016).

138. Committee Against Torture, Consideration of Reports Submitted by the Parties under Article 19 of the Convention, ¶ 103, CAT/C/CHN/5 (Apr. 3, 2014).

lawyers request a meeting with their client the meeting should be arranged promptly and in any event within forty-eight hours. If State Security concerns arise in the investigation phase, the lawyer must seek permission of the investigating authority to hold a meeting with the suspect.¹³⁹ At the CAT review, Chinese head of delegation Wu Hailong described this amendment as one of the elements showing “significant progress” with regard to the right to defense.¹⁴⁰ Mr. Wu further explains that in adopting these and other new policies, “the Government had taken . . . the Committee’s recommendations into account.”¹⁴¹

China’s Reply to the List of Issues presented a longer list than previously submitted explaining the legal grounds for which an official may possibly decide *not* to permit a meeting with a lawyer in cases involving State Security issues. These include such reasons as destroying or forging evidence, making a false confession in collusion, or obstructing an investigation.¹⁴² But the Reply also asserted that in practice the public security bureau cannot obstruct such meetings—which it also declared are not monitored by State authorities.¹⁴³ These seeming contradictions in the response, along with the substantial evidence presented from NGOs about the practical impediments to a detainee or suspect obtaining access to a lawyer, were probed in detail in the oral dialogue with the representatives of the State party by the CAT’s country rapporteurs, George Tugushi and Jens Modvig. Country rapporteur Tugushi asked for more details of the procedure followed: who could actually approve access in cases involving “State security,” what criteria were actually used, how many actual cases were received annually claiming State Security issues and how many were approved and denied and for what reasons.¹⁴⁴ CAT member Grossman asked whether complaints could be lodged by lawyers denied access to a case on the grounds of State security.¹⁴⁵ Grossman later remarked that meetings with defense counsel were always based on the request of the lawyer but not the suspect.¹⁴⁶

139. China’s Response to the List of Issues, *supra* note 54, at 33.

140. Committee Against Torture, 56th Sess., 1368th mtg., ¶ 2, U.N. Doc. CAT/C/SR.1368, ¶2 (Nov. 20, 2015).

141. *Id.* ¶ 8.

142. China’s Response to the List of Issues, *supra* note 54, at 4.

143. *Id.* at 5.

144. *Id.* ¶ 27.

145. *Id.* ¶ 71.

146. *Id.* ¶ 56.

In addition, harassment of lawyers and human rights defenders took on even more prominence in the Committee's questions at the 2015 review than in 2008, in part because of information received about a crackdown involving the reported arrest and detention of at least two-hundred such lawyers and defenders that had begun that year.¹⁴⁷ Country rapporteur Tugushi inquired about measures to prevent retaliation against lawyers in cases involving alleged police abuse.¹⁴⁸ Co-rapporteur Modvig cited information received alleging that the State "was making it difficult for lawyers to defend cases involving human rights violations," citing the annual review of lawyers' licenses and charges against lawyers for "picking quarrels" or "making trouble."¹⁴⁹ On the latter, he asked for specifics on criteria used to determine such crimes, and data on penalties applied.¹⁵⁰ CAT member Domah inquired into who decides about the removal of a lawyers license¹⁵¹ and Chairperson Grossman questioned whether there was an alternative to removing a lawyers license when an attorney had been disruptive in court.¹⁵² The author asked the delegation to comment on reports that seven Chinese human rights defenders had been threatened by Chinese authorities with negative professional consequences if they traveled to Geneva to attend the CAT review of China and that some who intended to communicate with CAT had been detained as a threat to national security.¹⁵³

147. See Amnesty Int'l, Submission to the United Nations Committee Against Torture, at 6-7 (Dec. 2015), http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/CHN/INT_CAT_CSS_CHN_22118_E.pdf ("As of 13 October, 248 lawyers and activists had been targeted . . ."); Human Rights Watch, Submission to the United Nations Committee Against Torture, at 1-2 (Dec. 2015), http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/CHN/INT_CAT_CSS_CHN_22121_E.pdf [<https://perma.cc/NBS6-J6QT>] ("Since President Xi Jinping came to power in March 2013, his government has detained and imprisoned hundreds of critics and activists, if not more, and vowed to clamp down on human rights and civil liberties. Between July and September 2015 alone, about 280 human rights lawyers and activists were briefly detained and interrogated across the country . . ."); Int'l Service for Human Rights, Report submitted to the UN Committee against Torture ahead of its review of the 5th and 6th periodic reports from the Government of the People's Republic of China," at 4 (Oct. 2015), http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/CHN/INT_CAT_CSS_CHN_22136_E.pdf.

148. Committee Against Torture, 56th Sess., 1368th mtg., ¶2, U.N. Doc. CAT/C/SR.1368, ¶28 (Nov. 20, 2015).

149. *Id.* ¶37.

150. *Id.*

151. *Id.* ¶57.

152. *Id.* ¶72.

153. *Id.* ¶92.

Rapporteur Tugushi also questioned what the government had actually done “to amend legal provisions that undermined the issue of independence of lawyers,” again citing contradictory provisions of articles of the Penal Code and the Criminal Procedure Law.¹⁵⁴ Tugushi further asked about what had actually been done to prevent and combat unlawful or unjustified interference with the work of human rights lawyers, such as evicting them from the courtroom for allegedly speaking too loudly, or defending their clients.¹⁵⁵ CAT members Gaye¹⁵⁶ and Pradham-Malla¹⁵⁷ also probed for explanations of actions that would ensure the independence of lawyers, which was in question. Pradham-Malla explicitly asked what measures were being taken to ensure the release of lawyers in detention.¹⁵⁸

In reply, China’s representatives reiterated points in the written submission mainly about what the law permits—Mr. Li Zhongcheng said the Criminal Procedure Law was amended in 2012 “to remove the need for the investigator to approve a suspect’s request for a lawyer.” Meetings with lawyers were approved “immediately . . . or within 48 hours.”¹⁵⁹ In cases involving national security, the lawyers had to apply to the investigative authorities for meetings with detainees and could only be denied if there were concerns, as stated in the Reply to the List of Issues, about obstruction of the investigation or disclosure of national secrets.¹⁶⁰ Once again, the Chinese delegation avoided mention of specific cases and practical experiences. Mr. Yang Jian said the new provisions safeguarding the rights of lawyers included the right to complain, meet with clients, collect evidence, defend their clients and a number of other important functions.¹⁶¹ Mr. Li Xiao pointed out that destruction or falsification of evidence applied not only to lawyers but all court staff; he mentioned an additional case (e.g., Li Qinghong) of disrupting a court, and argued that such behavior would be unacceptable everywhere.¹⁶²

154. *Id.* ¶ 31.

155. *Id.*

156. *Id.* ¶ 59.

157. *Id.* ¶ 67.

158. *Id.*

159. Committee Against Torture, 56th Sess., ¶ 19, U.N. Doc. CAT/C/SR.1371 (Nov. 23, 2016).

160. *Id.* ¶ 23.

161. *Id.* ¶ 26.

162. *Id.* ¶ 13.

The Committee's Concluding Observations reflected the increased detail provided related to issues dealing with access to lawyers and reprisals against them. The Committee provided longer and more detailed comments than in 2008 on the concerns and recommendations expressed by the country rapporteurs and other CAT members about what was problematic and how to correct these matters to bring China into compliance with the Convention.¹⁶³

NGOs continued to play a key role in the fifth review of China's compliance with the Convention. Even more NGO submissions were presented to the Committee in connection with the 2015 report than previously.¹⁶⁴ In fact, about twenty-five different non-governmental organizations presented submissions to the Committee compared to fifteen organizations in 2008. Several of these were official Chinese-organized NGOs but the overwhelming number were not. Their submissions are posted on the UN website along with all the other official documentation related to the review. In 2008 the Chinese delegation had privately challenged the CAT Secretariat for posting materials from two NGOs, World Uyghur Congress and Free Tibet, in oral and written demarches, claiming the first had "direct links" with another group designated as a terrorist organization by the UN Security Council, and the second was a "separatist organization advocating Tibet independence from China."¹⁶⁵ China claimed that "posting materials from such organizations on the official website of an UN organ is once again a gross violation of China's sovereignty and territorial integrity and runs counter to the purposes and principles of the United Nations Charter as well as the mandates and the rules of procedure of the Committee."¹⁶⁶ China urged the Committee "to correct the above-mentioned mistakes immediately" and reserved the "right to take further actions."¹⁶⁷ Those reports were posted on the CAT website and remain there to this day. In 2015, World Uyghur Congress

163. See Committee Against Torture, 56th Sess., ¶¶ 18-19, U.N. Doc. CAT/C/CHN/CO/5 (Feb. 3, 2016).

164. See *Treaty Body Database (China)*, U.N. HUM. RTS. OFFICE OF THE HIGH COMMISSIONER, http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=CHN&Lang=EN (last visited Apr. 24, 2018) [https://perma.cc/YNJ6-C8PK].

165. See, e.g., Demarche from Permanent Mission of the PRC to the UN Office at Geneva, Nov. 5, 2008.

166. *Id.*

167. *Id.*

again submitted information and it is posted on the CAT site along with all the other NGO materials.¹⁶⁸

The Committee's Concluding Observations in 2015 expressed appreciation for the 2012 amendment to the Criminal Procedure Law but raised concern that in cases of State security the lawyer has to obtain permission for a meeting with the suspect (e.g., his client) from the public security officials and that such permission can be withheld for an indefinite period if there is suspicion that it could result in disclosure of State secrets or hinder the investigation.¹⁶⁹ The Committee expressed concern at "consistent reports indicating that public security officials constantly refuse lawyers' access to suspects" on State secret grounds—even when such crimes are not charged.¹⁷⁰ The Committee urged the government to "repeal the provisions in the Criminal Procedure Law that allow restrictions on the right to counsel . . . in cases of 'endangering State security'" or cases involving State secrets.¹⁷¹ More broadly, it called on China to give detainees access from the outset of deprivation of liberty and ensure detainees can communicate with a lawyer in full confidentiality.¹⁷²

Regarding reprisals and the harassment of lawyers and activists, the Concluding Observations cite deep concern about the "unprecedented detention and interrogation" of more than 200 lawyers since July 2015. This crackdown was seen to follow "escalating abuses on lawyers for carrying out their professional responsibilities." The Committee continued here, if not more broadly, to cite cases of interference with lawyers' representation rights, mentioning three (e.g., Weng Quanzhang, Wu Liangshu, Zhang Keke). Disruption in court by lawyers was noted, and amended Article 309 of the Criminal law was cited in the Conclusions as "overbroad, undermines the principle of legal certainty," and is "open to abusive interpretation and application."¹⁷³ CAT recommended that there should be prompt, thorough and impartial investigations into all violations perpetrated against lawyers and called for measures, including a review of all

168. See *Treaty Body Database (China)*, *supra*, note 164.

169. Committee Against Torture, 56th Sess., ¶ 12, U.N. Doc. CAT/C/CHN/CO/5 (Feb. 3, 2016).

170. *Id.*

171. *Id.* ¶ 13(d).

172. *Id.* ¶¶ 13(a-b).

173. *Id.* ¶ 18.

legislation, to ensure the independence of the legal profession and that its functions can be carried out without intimidation¹⁷⁴

China addressed the issue of access to a lawyer once again in its follow-up submission sent in one year after the 2015 review. It mainly reiterated the legal impediments in national security cases but stated these apply solely in “a few, extraordinary cases” and that they apply only in the investigation phase.¹⁷⁵ They further claim that in practice “investigative bodies . . . comply strictly” with the law.¹⁷⁶ However, no examples were cited. This leaves China and the Committee to wrestle with the facts in the interim years before the next report by China, due December 9, 2019, and a public review by the Committee at some point thereafter.¹⁷⁷

VII. CONCLUDING OBSERVATIONS

The CAT reviews have provided scrutiny of China’s treatment of defense lawyers and human rights defenders over a period of 25 years. During that time, China has engaged in a manner which is formally correct, discussing its law and sometimes revising it. But China has rejected discussion of most individual cases, sometimes formally—by arguing that any comment on individual cases would imply that the government accepts Article XXII of the Convention against Torture, which they do not—and, more often, informally by simply ignoring the case examples presented and specific requests about complaints, investigations, etc. China also has routinely demeaned information from NGOs and challenged the aims of such organizations and has tried to keep their influence limited. But China has also been quite robust behind the scenes with regard to the United Nations’ intergovernmental process on treaty strengthening, working to limit the treaty monitoring bodies substantively and financially.

In its periodic reviews, the Committee appears to have demonstrated an intensification of detailed inquiries about both law and practice. However, China has remained reluctant to address much more than the law itself, while it has been willing to present a number of amendments in its laws dealing with access to lawyers by criminal

174. *Id.* ¶ 19. For the full set of Concluding Observations on access to lawyers and those on the reported crackdown on lawyers and activists, *see id.* ¶¶ 12-13, 18-19.

175. Committee Against Torture, 56th Sess., ¶ 2, U.N. Doc. CAT/C/CHN/CO/5/Add.1 (Feb. 7, 2017).

176. *Id.*

177. *Id.* ¶ 66.

suspects, and to claim these responded specifically to the Committee's recommendations. From the Committee's perspective, based on its practices from 1990 to the present, an emphasis on specific cases—and names of persons harassed or intimidated—and the results of complaints and investigations into alleged ill-treatment and torture is likely to continue in the future.

