



Human Rights Council
Working Group on Arbitrary Detention**Opinions adopted by the Working Group on Arbitrary Detention at its eighty-fifth session, 12–16 August 2019****Opinion No. 35/2019 concerning Cao Sanqiang (John Cao) (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 33/30.
2. In accordance with its methods of work (A/HRC/36/38), on 10 April 2019, the Working Group transmitted to the Government of China a communication concerning Cao Sanqiang (John Cao). The Government replied to the communication on 27 May 2019. The State is not a party to the International Covenant on Civil and Political Rights.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
 - (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);
 - (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);
 - (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);
 - (d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);
 - (e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).



Submissions

Communication from the source

(a) Context

4. Cao Sanqiang (John Cao), born on 3 May 1959, is a national of China and the holder of a Chinese passport. He has also been the holder of a Permanent Resident Card from the United States of America since 1990, where he usually resides.

5. According to the source, Mr. Cao is a Protestant pastor and humanitarian worker. In addition to pastoring churches in the United States, he has established Bible schools in central and southern China, concentrating on education and missionary work. Since 2013, he has focused on humanitarian work in Wa State, Myanmar, including building schools, alleviating poverty, increasing medical access and campaigning against drug use. He and other volunteers have built 16 schools with funds raised from churches in China.

6. The source adds that, as part of this work, Mr. Cao regularly travelled between China and Myanmar, crossing a narrow river that divides the two countries. These journeys used local ferries, as Mr. Cao could not use his passport to cross the border, nor could he apply for an educational border pass. The source adds that everyone regularly and openly uses the ferries to cross the border river. The ferries are small rafts, which can shuttle two to three people at a time. They operate openly and are not subject to any prosecution. Moreover, the particular crossing point and method has been used by locals for hundreds of years, with little to no enforcement. If enforcement occurs, it is in the form of an administrative fine.

(b) Arrest and detention

7. The source notes that, in all the years that Mr. Cao travelled between China and Myanmar, he never experienced any problems with either Government, and even had frequent meetings with the local office of the Chinese National Security Police to talk about his charity work and travel to Myanmar. All that changed, however, on 5 March 2017, when Mr. Cao, along with a Chinese Christian teacher, was greeted by Chinese security agents when he stepped off a ferry on his return trip to China.

8. The source reports that approximately a dozen people arrived at the same time on separate ferries. While the others freely crossed the border, Mr. Cao and the Chinese teacher, the only two Christians, were detained, arrested and charged with illegally crossing the border. In this respect, the source also notes that Mr. Cao is a Chinese citizen with a Chinese passport and that he was entering China when he was detained.

9. According to the source, Mr. Cao was formally arrested on 28 March 2017 by the Menglian County Police of Yunnan Province on the basis of a warrant issued by the Menglian County Public Security Bureau. The authorities stated “illegal border crossing” as the basis for his arrest, reportedly referring to article 322 of the Criminal Law on crossing the border illegally. Allegedly, the article reads as follows: “Whoever, in violation of the laws or regulations on administration of the national border (frontier), illegally crosses the national border (frontier), if the circumstances are serious, shall be sentenced to fixed-term imprisonment of not more than one year, criminal detention or public surveillance and shall also be fined”. However, this initial charge was reportedly later changed to “organizing illegal border crossings”, a charge used in relation to alleged human traffickers.

10. Moreover, the source reports that Mr. Cao’s trial was not held until almost a year later, on 9 February 2018. During the intervening period, his application for bail was denied four times. On 22 March 2018, he was convicted and sentenced to seven years in prison, despite a lack of evidence to support the charges. Mr. Cao immediately appealed his conviction, but the appellate court has reportedly extrajudicially and continually delayed his case, extending the trial period well beyond the statutory limit. The source reports that, at the time of submission of the communication, the appeal hearing deadline was again delayed until 22 May 2019.

(c) Health and conditions of detention

11. The source reports that Mr. Cao has been imprisoned in the Menglian Detention Centre for over two years. He is held in a cell measuring approximately 24 m², with a dozen other prisoners, who must all share an 8 m-long slab as a bed. The detention centre in which Mr. Cao is held is reportedly designed and intended for temporary stays, so the conditions are extremely poor. The source adds that Mr. Cao currently gets no exposure to the sun, he is eating poorly with no fruits or vegetables, and he has no access to medical treatment and no visitation rights with anyone except his attorneys. Additionally, at night, he is woken up every 40 minutes, which prevents him from sleeping.

12. According to the source, noting the advanced age of Mr. Cao, who is now 60 years old, enduring detention in such poor conditions for over two years has had extremely negative effects on his health. Because of the harsh conditions of his imprisonment, Mr. Cao has experienced significant weight loss of more than 22 kg, as well as other health issues, including severe back pain, headaches and inflammation that makes it difficult for him to eat. The source submits that he is unwell both physically and emotionally. He receives no medical attention and the source submits, as an example of such denial of medical treatment, the fact that Mr. Cao was forced to pull out his own decaying teeth, as the authorities would not provide him the requisite treatment and he could not endure the pain.

(d) Legal analysis

13. The source submits that the deprivation of liberty of Mr. Cao is arbitrary under categories I, II, III and V of the Working Group.

(i) Category I

14. The source submits that the basis for the deprivation of Mr. Cao's liberty is unconstitutional and conflicts with the Passport Law. According to the Administrative Measures for the Issuance of Ordinary Passports and Entry and Exit Passes, only border trade and tourism are legitimate reasons to apply for a border pass. The scope of that law is reportedly so narrow that it leaves no room for people like Mr. Cao who want to go abroad for the purpose of helping others, even if they hold valid passports. The Measures not only conflict with the Constitution, as local citizens and non-local citizens are treated unequally in applying for border passes, but also conflict with the Passport Law, which stipulates that legitimate reasons to apply for a border pass include reasons other than border trade and tourism.

(ii) Category II

15. The source also submits that Mr. Cao has been deprived of his ability to exercise his right to freedom of religion guaranteed by article 18 of the Universal Declaration of Human Rights and article 18 of the Covenant.

16. In this respect, the source reiterates that, at the time of Mr. Cao's arrest, there were approximately a dozen people who crossed the border at the same time as him. Yet, only the two Christians were arrested and criminally prosecuted. As such, Mr. Cao's arrest and the charges against him were because of his Christian faith. The source thus asserts that Mr. Cao's right to practise and manifest his religion by serving the underprivileged population in Myanmar has been violated.

17. The source adds that China has recently also seen a marked decrease in the overall protection of freedom of religion or belief. The Government has reportedly adopted various policies in order to ensure that the Communist Party of China maintains control over religious organizations and activities. One such regulation, the revised Regulations on Religious Affairs, came into effect on 1 February 2018. The revised Regulations include further restrictions on religious practice, including online religious expression, and contain special provisions on national security and foreign connections. Under the revised Regulations, government registration is still mandatory; communities that do not register, such as house churches, have been pressured to do so through harassment, eviction, intimidation and the detention of leaders. In addition to the alleged crackdown by China on

religious activities, the Chinese officials in Yunnan Province have reportedly been working with government authorities in Wa Self-Administered Division of Shan State, Myanmar, to enforce a crackdown on Christian activities, including stopping humanitarian efforts, such as those in which Mr. Cao was engaged.

18. The source further submits that Mr. Cao has been deprived of his right to equal treatment under the law as guaranteed by article 7 of the Universal Declaration of Human Rights and article 26 of the Covenant. For instance, when he was arrested, there were approximately a dozen people who crossed the border at the same time. Yet, only the Christians were arrested and criminally prosecuted. The source asserts that Mr. Cao's arrest and the charges against him were clearly a violation of his right to equal treatment under the law. As a Christian, he was targeted for disparate treatment under the law, being arrested and ultimately sentenced to seven years in prison, as opposed to all the non-Christian border crossers.

19. Furthermore, the source submits that Mr. Cao has been deprived of his liberty as a result of his exercise of the right to freedom of movement guaranteed by article 13 of the Universal Declaration of Human Rights and article 12 of the Covenant. According to these provisions, Mr. Cao's freedom to leave and enter the country shall not be subject to any restrictions except those that are (a) provided by law, (b) necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and (c) consistent with the other rights recognized in the Covenant. In this respect, the source asserts that the restrictions set in the Measures that border trade and tourism are the only two legitimate reasons to apply for a border pass are arbitrary limitations on a citizen's freedom of movement and constitute violations of the Universal Declaration of Human Rights and the Covenant.

(iii) Category III

20. The source submits that Mr. Cao's rights to a fair trial under articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant have not been observed. As explained above, he was arrested for providing humanitarian assistance to the people in Myanmar. He even had frequent meetings with the local office of the Chinese National Security Police to talk about his charity work and travel to Myanmar. Until 5 March 2017, he had never experienced any problems with either Government. Therefore, his detention was not only arbitrary, it was the result of selective enforcement of the law. The source asserts that Mr. Cao's arrest and the charges against him were clearly arbitrary, as well as the change in charges and resulting sentence of seven years in prison.

21. As noted above, Mr. Cao was detained on 5 March 2017, but his trial was not held until almost a year later, on 9 February 2018. Additionally, his application for bail was unjustifiably denied on four occasions. The source adds that, prior to Mr. Cao's trial, the prosecutor promised that if he pled guilty to the charges against him, he would only serve one year in prison. However, despite the prosecutor's promise, not only was Mr. Cao wrongfully convicted and sentenced to seven years of imprisonment, but the charges against him were changed.

22. The source adds that, during Mr. Cao's trial in the Menglian Trial Court, his right to due process was denied. The prosecutor presented no evidence, except for questionable written witness testimonies, although there was alleged video footage, but the videos failed to play, so there was no opportunity to view the footage or provide a rebuttal. Mr. Cao was thus reportedly prohibited from cross-examining the alleged witnesses, providing rebuttal evidence or presenting a defence as guaranteed by article 61 of Criminal Procedure Law. As such, the source submits that the trial court's conviction of Mr. Cao was wrongful and unjust.

23. Furthermore, Mr. Cao immediately appealed his unjust conviction, but the appellate court has extrajudicially and continually delayed his case by extending the trial period well beyond the statutory limit. The source asserts that these groundless extensions have greatly contributed to the violation of Mr. Cao's rights and have unnecessarily lengthened his wrongful detention. The appeal hearing deadline was again recently most unjustifiably delayed until 22 May 2019. Mr. Cao has been wrongfully detained for more than two years.

24. The source adds that none of the extensions of the trial period are allowed under the Criminal Procedure Law. According to articles 156 and 232 of the Criminal Procedure Law, there are only four circumstances in which a court can extend a trial period: (a) grave and complex cases in outlying areas where transportation is inconvenient; (b) grave cases that involve criminal gangs; (c) grave and complex cases that involve persons who commit crimes in various locations; and (d) grave and complex cases that involve various quarters (i.e., multiple jurisdictions) and for which it is difficult to obtain evidence. The source asserts that Mr. Cao's case does not fall into any of the above circumstances.

25. The source thus submits that the unlawful delay of Mr. Cao's trial and his continued detention casts reasonable doubt on whether the courts in his case are independent and impartial, whether a fair and public hearing will be held and whether a fair judgment will be rendered.

(iv) Category V

26. The source notes that, based on a discussion with the Menglian County Procuratorate office, there is a strong indication that the arrest of Mr. Cao was ordered by an authority higher than the local police and that the prosecution of Mr. Cao is caused by his religious and humanitarian work in both China – for over two decades – and in Myanmar.

27. The source adds that it is common in China for individuals who are targeted because of their religious activities to face charges that do not pertain to religion. This allegedly allows the Government to target religious individuals for seemingly unreligious reasons. For example, Chinese pastors have, in recent years, frequently been charged with fraud and State security crimes.

28. The source reiterates that China has recently also seen a marked decrease in the overall protection of freedom of religion or belief, and that the Government has adopted a number of policies in order to ensure that the Communist Party of China maintains control over religious organizations and activities (see para. 17 above). The source submits that Mr. Cao's arrest and conviction should be viewed in the context of these developments.

Response from the Government

29. On 10 April 2019 the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government to provide, by 11 June 2019, detailed information about the current situation of Mr. Cao and to clarify the legal provisions justifying his continued detention, as well as its compatibility with the obligations of China under international human rights law. Moreover, the Working Group called upon the Government to ensure his physical and mental integrity.

30. On 27 May 2019, the Government submitted a reply. In its reply, the Government states that, in a trial held by the Menglian County People's Court in Yunnan Province, the Court established that the defendant, Cao Sanqiang, violated the national laws and regulations pertaining to the national border by organizing illegal border crossings for other people on numerous occasions. His actions were in violation of the relevant regulations of the Criminal Law and constituted the offence of organizing illegal entry across the national border for others.

31. The Government further submits that, on 22 March 2018, the Menglian County People's Court, acting as a court of first instance, announced that it had sentenced the defendant to seven years of deprivation of liberty and a fine of 20,000 yuan for organizing illegal border crossings for others. Once the decision of the court of first instance was announced, Mr. Cao appealed against it. The case is currently before the Pu'er Municipal Intermediate People's Court, as the court of second instance.

32. The Government asserts that China is a country governed by the rule of law. The Constitution and the Criminal Law both establish that Chinese citizens are all, without exception, equal before the law. The finding of the court of first instance indicating that Mr. Cao had committed a criminal offence was in accordance with the law. It has nothing to do

with either his identity or his religious activities. It is understood that Mr. Cao is currently in good health. From beginning to end, the Chinese judicial bodies have consistently conducted the handling of the case in accordance with the law and have ensured that all his legal rights are protected. The court of first instance, in its procedure, fully guaranteed all of Mr. Cao's rights to appeal and, in addition, to the right of defence exercised by Mr. Cao himself. His defence counsel, too, submitted a full argument for the defence. There was no violation of international human rights law in the course of the investigation and prosecution of the case.

Further comments from the source

33. The reply of the Government was sent to the source for further comments on 6 June 2019, which the source submitted on 20 June 2019. In the further comments, the source contests the submission by the Government that Mr. Cao's actions violated relevant provisions of the criminal law and constituted illegally organizing border crossings. The source refers to the "Criminal judicial reference", written by a Justice of the People's Supreme Court, in which the Justice explains that the organization of illegal border crossings is mostly committed by criminal groups, the so-called human snake groups (traffickers). The source argues that there was no such conduct in this case as Mr. Cao did not "lead, plan or direct" anyone to illegally cross the border. Rather, Mr. Cao simply conducted humanitarian work in Wa Self-Administered Division of Shan State, including building schools, providing basic necessities and medical help and promoting drug control.

34. Additionally, the source argues that, on several occasions, Mr. Cao met directly with the local office of the Chinese National Security Police, specifically discussing his charitable work in and travel to Myanmar, and the authorities did not raise any concerns on those occasions. Moreover, the source submits that it is widely known that anyone can cross the border between China and Myanmar through Menglian. The source argues that hundreds of people cross the border every week in the exact same way as Mr. Cao did. In fact, providing a means of transport for people to cross the border river is one of the main local businesses. Drivers on the buses to Menglian, local taxi drivers and local hotel owners all have a share in this business and work actively to spread information and promote crossing the border. The rafts that transport customers across the border operate openly and freely without fear of prosecution.

35. In relation to the sentence pronounced in the case of Mr. Cao, the source argues that the Government has failed to disclose the fact that seven years is the harshest sentence available for the alleged crime (a crime the Supreme People's Court reserves for trafficking in persons) and that this harshest of sentences was imposed despite the lack of evidence against Mr. Cao.

36. The source further rejects the submission made by the Government that the appeal of Mr. Cao is being heard currently. The source submits that to date Mr. Cao's appeal has not been heard by the Pu'er Intermediate Court, as the Court has extended his appeal period five times over more than 11 months. The source argues that such extensions contradict the stipulations of article 173 of the judicial interpretation (issued by the Supreme People's Court) of the Criminal Procedure Law and therefore rejects the submission made by the Government that Mr. Cao's case is being heard on appeal, as there is now no indication that his appeal will ever be heard.

37. In relation to the Government's submission that both the Constitution and the Criminal Law stipulate that all Chinese citizens are equal before the law and that Mr. Cao's conviction was not related to either his identity or his religious activities, the source argues that the facts do not support these claims. According to the source, Mr. Cao's detention, arrest and conviction were an example of the selective enforcement of the law solely based on his identity and religious activities. When Mr. Cao was detained when entering a country of which he is a citizen and of which he holds a valid passport, there were approximately a dozen other individuals who crossed the border at the same time and in the exact same manner. Yet, only the Chinese Christian humanitarian workers, namely, Mr. Cao and another individual, were detained, arrested and criminally prosecuted. All the other individuals who crossed the border with them went freely on their way. The source thus contends that Mr. Cao's detention, arrest and the charges against him were a violation of his

right to equal treatment, as stipulated in the Constitution and the Criminal Law. He was arrested and ultimately sentenced to seven years in prison while all the non-Christian individuals crossing the border were not even detained. The source asserts that such targeted and selective enforcement deprives Mr. Cao of his right to equal treatment under the Constitution and Criminal Law and relates specifically to his religious activities.

38. The source also rejects the statement by the Government regarding Mr. Cao's health condition and argues that Mr. Cao himself has stated that his health has severely deteriorated since he was first wrongfully imprisoned in the Yunnan Province Menglian Detention Centre more than two years ago. The source submits that Mr. Cao is in a cell measuring approximately 24 m², with up to a dozen other prisoners who must all share the same 8 m-long slab as a bed. Because of the harsh prison conditions, along with the fact that he is 60 years of age, Mr. Cao has experienced significant weight loss of more than 22 kg and other health issues, including severe back pain, headaches and inflammation that makes it difficult for him to eat. The source reiterates that, despite the health issues experienced by Mr. Cao, he has not received any proper medical treatment or nutrition.

39. In relation to the Government's claim that Mr. Cao's rights during the hearings before the court of first instance were fully guaranteed and that Mr. Cao exercised his right to defence, with the help of his lawyers, the source argues that the facts do not support these claims. According to the source, during the trial, the Procuratorate only provided questionable written witness testimonies and there were no witnesses present at trial. Therefore, Mr. Cao and his lawyer were prevented from cross-examining the alleged witnesses or from providing evidence to rebut the charges. Moreover, there was video footage, but it could not be shown, so there was no opportunity for Mr. Cao or his lawyer to view the evidence or to provide a rebuttal. The source therefore reiterates that questionable written witness statements were the basis for the conviction of Mr. Cao and that consequently his right to a fair trial was denied and the trial was merely a formality used to convict him.

Further information from the source

40. On 9 August 2019, the source informed the Working Group that the appeal hearing of Mr. Cao had taken place on 25 July 2019 and that the appellate court had confirmed the judgment of the court of first instance and the sentence imposed upon Mr. Cao. The source expressed concerns over the whereabouts of Mr. Cao since, following the appeal, allegedly, his family had not been informed of his place of detention.

Discussion

41. The Working Group thanks the source and the Government for their submissions and appreciates the cooperation and engagement of both parties in this matter.

42. The source asserts that the deprivation of liberty of Mr. Cao is arbitrary under categories I, II, III and V of the categories applicable to the consideration of cases by the Working Group. While not addressing the categories of the Working Group specifically, the Government rejects these allegations. The Working Group shall proceed to examine the submissions made under each of the categories separately.

43. The source submits that the basis for the deprivation of Mr. Cao's liberty is unconstitutional and conflicts with the Passport Law. According to the Administrative Measures for the Issuance of Ordinary Passports and Entry and Exit Passes, only border trade and tourism are legitimate reasons to apply for a border pass. The source argues that the scope of the law is so narrow that it leaves no room for people like Mr. Cao who wish to go abroad for the purpose of helping others, even if they hold legitimate passports. The Measures not only conflict with the Constitution, as local citizens and non-local citizens are treated unequally in applying for border passes, but they also conflict with the higher law, the Passport Law, which stipulates that legitimate reasons to apply for a border pass include reasons other than border trade and tourism. The source therefore claims that there was no legal basis for the detention of Mr. Cao and that his detention falls under category I.

44. The Government rejects this claim and argues that Mr. Cao was detained because he violated the State border management regulations by repeatedly organizing for others to cross the border secretly.

45. The Working Group recalls that it considers a detention to be arbitrary and falling under category I if such detention lacks a legal basis. In this regard, as the Working Group has previously stated, in order for a deprivation of liberty to have a legal basis, it is not sufficient that there is a law that may authorize the arrest; the authorities must invoke that legal basis and apply it to the circumstances of the case through an arrest warrant.¹

46. The detention of Mr. Cao is rather different in that, as submitted by the source and not rebutted by the Government, he was arrested as he arrived from Myanmar using the river crossing. The Working Group accepts that this could be detention during the commission of a crime since Mr. Cao's arrest was executed as he was committing a crime. The Working Group wishes to note in particular that, as the source admits, crossing the border at that point is not legal in China and Mr. Cao was fully aware of this, having crossed the border this way numerous times before. While the Working Group appreciates the source's argument that many individuals regularly cross the border in that particular way and the authorities "turn a blind eye" to such a practice, it does not change the fact that such an activity contravenes the law. Therefore, just because Mr. Cao and others had not been detained previously does not mean, in and of itself, that his detention on 5 March 2017 lacked a legal basis.

47. The Working Group notes that the source argues that detention in the present case was unconstitutional since the Measures contradict not only the Passport Law, but also the Constitution. According to the source, this contradiction means that the detention of Mr. Cao has no legal basis.

48. While the Working Group considers that it is entitled to assess the proceedings of the court and the law itself to determine whether they meet international standards,² it has consistently refrained from taking the place of the national judicial authorities or acting as a kind of supranational tribunal when it is urged to review the application of national law by the judiciary.³ It is therefore outside of the mandate of the Working Group to evaluate whether particular laws of any country comply with the constitutional provisions of that country. Indeed, to be called upon to settle disputes about conflicting laws within national jurisdictions would be an impossible task for the Working Group. This is the sovereign domain of the highest national courts, which the Working Group respects.

49. In the present case, it therefore falls upon the Working Group to ascertain whether there was a legal basis to authorize the detention of Mr. Cao. In the light of the foregoing, the Working Group must conclude that there was. The detention of Mr. Cao was prescribed by the Measures. There are no allegations to suggest that the requisite provisions are vague or lack legal certainty; in fact, the source notes that Mr. Cao was aware that such a border crossing was not legal and relied on the de facto acceptance of such an illegal practice by the authorities. The Working Group therefore does not have sufficient information to conclude that the arrest and subsequent deprivation of liberty of Mr. Cao falls under category I.

50. However, the source argues that Mr. Cao was not the only person crossing the border between China and Myanmar using the river crossing. In fact, the source alleges, and the Government has not disputed, that there were approximately a dozen other individuals who crossed the border at the same time and in the exact same manner. Yet, only two were detained, arrested and prosecuted and those two were the Chinese humanitarian workers and Christians, Mr. Cao and another individual. Thus, the Working Group has not been presented with any reasonable explanation as to why the only individuals arrested on the day in question were two Christians, among all the others who crossed the border in the exact same manner.

¹ See, e.g., opinions No. 46/2017, No. 66/2017, No. 75/2017 and No. 35/2018.

² See opinions No. 33/2015 and No. 15/2017.

³ See opinion No. 40/2005.

51. The Working Group also notes that the source submits that the border crossing was commonly used and must have been well known to the authorities as small ferries and rafts operate openly and shuttle people between the two countries without any interference from the authorities, let alone prosecutions (see para. 6 above). The source also submits that Mr. Cao used that border crossing on numerous occasions and that the local authorities were aware of that. In fact, according to the source, Mr. Cao had frequent meetings with the local office of the Chinese National Security Police to talk about his charity work and travel to Myanmar. The Working Group once again observes that the Government had the opportunity but declined to provide an explanation as to why on this occasion Mr. Cao was arrested and why it was only him and another Christian who were arrested while all the others could walk free.

52. It is clear to the Working Group that Mr. Cao was singled out due to his Christian faith and that the Measures were implemented against him in a manner that constituted profiling and discrimination on the basis of Mr. Cao's religious identity. In this respect, the Working Group notes the latest concluding observations of the Committee on the Elimination of All Forms of Racial Discrimination on China, in which the Committee observed the practice of such profiling and discrimination in relation to the implementation of the country's anti-terrorism legislation (CERD/C/CHN/CO/14-17, para. 37). The present case indicates that such discriminatory implementation of the country's legislation is not confined to anti-terrorism legislation. In making this finding, the Working Group is particularly mindful of the fact that, in its reply, the Government makes no attempt to explain why it was that only the two Christians were arrested among the dozen others who crossed the border that day in exactly the same way.

53. The source argues that the detention of Mr. Cao falls under category II as he was detained due to his religious work. In supporting this claim, the source lists various examples of the way in which freedom of religion has been allegedly curtailed in China, which the Government chooses not to respond to. Nevertheless, the source fails to specify how any of these measures have adversely affected the ability of Mr. Cao to exercise his freedom of religion. In fact, it appears to the Working Group that he was able to exercise his freedom of religion until his detention on 5 March 2017. However, this arrest was carried out in a manner that singled out Mr. Cao on the basis of his religion and this was a clear breach of articles 7 and 18 of the Universal Declaration of Human Rights. In making this finding, the Working Group is mindful of the recommendations emanating from the third cycle of the universal periodic review of China (A/HRC/40/6, para. 28.190).

54. The Working Group therefore concludes that the detention and subsequent arrest of Mr. Cao was arbitrary and falls under categories II and V. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on freedom of religion or belief, for appropriate action.

55. Given its finding that the deprivation of liberty of Mr. Cao is arbitrary under category II, the Working Group wishes to emphasize that no trial of Mr. Cao should have taken place. However, the trial did take place. The source submits that the detention of Mr. Cao is arbitrary and falls under category III since: the trial of Mr. Cao did not commence until 11 months after his initial detention; he was denied bail four times during that time; during the trial, the only two witnesses gave written statements and neither Mr. Cao nor his lawyer were able to cross-examine them; it was impossible to view the video footage that the prosecution presented and so neither Mr. Cao nor his lawyer were able to respond to the evidence; and, finally, the appeal of Mr. Cao against his conviction by the court of first instance has been continuously delayed well beyond the statutory limit.

56. The Working Group notes that the Government dismisses these allegations and simply states that Mr. Cao was guaranteed all the relevant legal rights and that both he and his lawyer were able to exercise the right of defence.

57. The Working Group cannot accept such a summary dismissal of the allegations, especially in relation to the detailed allegations concerning the trial of Mr. Cao and his appeal. The essence of the right to a fair trial is the basic legal principle of the equality of arms. This principle presumes the ability of the accused to defend himself or herself effectively either in person or through legal representation. This, in turn, presumes that the

defendant is able to examine the evidence against him or her and cross-examine any witnesses that are presented by the prosecution. In the present case, there were only two witnesses who testified against Mr. Cao. They did so through written testimony and neither Mr. Cao nor his lawyer were provided with any opportunity to cross-examine these witnesses. Such a situation cannot be said to satisfy the principle of the equality of arms and effective exercise of the right to defence.

58. Moreover, there was also video footage used against Mr. Cao, which could not be viewed during the trial and, once again, neither Mr. Cao nor his lawyer were able to respond to this key piece of evidence in contravention of the principle of the equality of arms. The Working Group concludes that article 10 of the Universal Declaration of Human Rights was thus violated.

59. The source also submits that there was a delay of 11 months between the arrest and trial of Mr. Cao and that he was unjustly denied bail during this time. The Working Group observes, however, that 11 months is not, in and of itself, an excessive period in which to prepare a case for trial. In addition, the source does not provide any information that would suggest that the investigation phase was unduly delayed. Equally, the source only refers to the denial of bail as being unjust, without giving any further, specific explanation as to why. The Working Group cannot accept such blanket statements.

60. However, the source makes a specific allegation that, upon being sentenced by the court of first instance, Mr. Cao lodged an appeal and that the appeal hearing has been postponed on a number of occasions. The Working Group notes that the Government only states that Mr. Cao has lodged an appeal, which is ongoing but fails to provide any details on the date of the appeal or indeed the details of the progress of the appeal. The Working Group therefore finds that there has been a breach of articles 8 and 10 of the Universal Declaration of Human Rights. The Working Group views that Mr. Cao's right to an effective remedy under article 8 of the Universal Declaration of Human Rights was thus also violated.

61. Taking into consideration the serious breaches of the principle of equality of arms during the trial by the court of first instance and the denial of an effective right to appeal, the Working Group concludes that Mr. Cao's deprivation of liberty is arbitrary and falls under category III.

62. The Working Group would like to express its concern about Mr. Cao's conditions of detention and his deteriorating health. The source makes specific allegations, which are summarily dismissed by the Government. The Working Group feels obliged to remind the Government that all persons deprived of their liberty must be treated with humanity and with respect for their inherent dignity and that denial of medical assistance constitutes a violation of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), in particular, rules 24, 25, 27 and 30.

63. On 9 August 2019, the Working Group was informed that the appeal of Mr. Cao had taken place on 25 July 2019 and that on that same date the appellate court had delivered a ruling, confirming the judgment of the court of first instance and the conviction and sentence imposed upon Mr. Cao. The Working Group wishes to make it clear that this decision of the appellate court does not in any way alter the present opinion and calls upon the Government of China to implement it fully.

64. In accordance with resolution 36/21 of the Human Rights Council (para. 3), the Working Group also calls upon the Government to refrain from any form of intimidation of or reprisals against Mr. Cao, as well as those associated with him, especially his family and legal representatives. The Working Group encourages the Government to provide information on the current whereabouts of Mr. Cao, recalling that holding individuals in secret detention facilities constitutes a breach of international law.

65. In its 28-year history, the Working Group has found China in violation of its international human rights obligations in some 90 cases.⁴ The Working Group is concerned that this indicates a systemic problem with arbitrary detention in China, which amounts to a serious violation of international law. The Working Group recalls that, under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of the rules of international law may constitute crimes against humanity.⁵

66. The Working Group would welcome the opportunity to conduct a country visit to China. Given that a significant period of time has passed since its last visit to China in September 2004, the Working Group considers that it is an appropriate time to conduct another visit. The Working Group looks forward to a positive response to its country visit request of 15 April 2015.

Disposition

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

The deprivation of liberty of Cao Sanqiang (John Cao), being in contravention of articles 7, 8, 10 and 18 of the Universal Declaration of Human Rights, is arbitrary and falls within categories II, III and V.

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

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

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

71. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on freedom of religion or belief, for appropriate action.

72. The Working Group recommends that the Government accede to the International Covenant on Civil and Political Right.

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

⁴ See decisions No. 43/1993, No. 44/1993, No. 53/1993, No. 63/1993, No. 65/1993, No. 66/1993, No. 46/1995 and No. 19/1996, and opinions No. 30/1998, No. 1/1999, No. 2/1999, No. 16/1999, No. 17/1999, No. 19/1999, No. 21/1999, No. 8/2000, No. 14/2000, No. 19/2000, No. 28/2000, No. 30/2000, No. 35/2000, No. 36/2000, No. 7/2001, No. 8/2001, No. 20/2001, No. 1/2002, No. 5/2002, No. 15/2002, No. 2/2003, No. 7/2003, No. 10/2003, No. 12/2003, No. 13/2003, No. 21/2003, No. 23/2003, No. 25/2003, No. 26/2003, No. 14/2004, No. 15/2004, No. 24/2004, No. 17/2005, No. 20/2005, No. 32/2005, No. 33/2005, No. 38/2005, No. 43/2005, No. 11/2006, No. 27/2006, No. 41/2006, No. 47/2006, No. 32/2007, No. 33/2007, No. 36/2007, No. 21/2008, No. 29/2008, No. 26/2010, No. 29/2010, No. 15/2011, No. 16/2011, No. 23/2011, No. 29/2011, No. 7/2012, No. 29/2012, No. 36/2012, No. 51/2012, No. 59/2012, No. 2/2014, No. 3/2014, No. 4/2014, No. 8/2014, No. 21/2014, No. 49/2014, No. 55/2014, No. 3/2015, No. 39/2015, No. 11/2016, No. 12/2016, No. 30/2016, No. 43/2016, No. 46/2016, No. 4/2017, No. 5/2017, No. 59/2017, No. 69/2017, No. 81/2017, No. 22/2018, No. 54/2018, No. 62/2018, No. 15/2019 and 36/2019.

⁵ See opinions No. 1/2011, para. 21; No. 37/2011, para. 15; No. 38/2011, para. 16; No. 39/2011, para. 17; No. 4/2012, para. 26; No. 38/2012, para. 33; No. 47/2012, paras. 19 and 22; No. 50/2012, para. 27; and No. 60/2012, para. 21.

Follow-up procedure

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

- (a) Whether Mr. Cao has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Cao;
- (c) Whether an investigation has been conducted into the violation of Mr. Cao'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 China with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

75. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example through a visit by the Working Group.

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

77. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.⁶

[Adopted on 12 August 2019]

⁶ See Human Rights Council resolution 33/30, paras. 3 and 7.