



General Assembly

Distr.: General
1 May 2023

Original: English

Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its ninety-sixth session, 27 March–5 April 2023

Opinion No. 30/2023 concerning Ms. Hang Tung Chow (Hong Kong, China)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 51/8.
2. In accordance with its methods of work,¹ on 16 December 2022 the Working Group transmitted to the Government of Hong Kong, China, a communication concerning Ms. Hang Tung Chow. The Government submitted a late response on 21 February 2023. The International Covenant on Civil and Political Rights is binding upon Hong Kong, China.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
 - (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);
 - (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);
 - (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);
 - (d) When asylum-seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);
 - (e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status that aims towards or can result in ignoring the equality of human beings (category V).

¹ [A/HRC/36/38](#).



Submissions

Communication from the source

4. Ms. Hang Tung Chow, born in 1985, is a citizen of China and a permanent resident of Hong Kong, China. She is a holder of a Hong Kong Special Administrative Region, People's Republic of China, passport.

5. According to the source, Ms. Chow is a Hong Kong barrister, pro-democracy activist and human rights defender. Ms. Chow has also provided support for labour rights and human rights defenders in mainland China and for those charged with involvement with pro-democracy demonstrations in Hong Kong.

6. The source also informs that, in 2016, Ms. Chow was appointed the Vice-Chair of the Hong Kong Alliance in Support of Patriotic Democratic Movements of China. In addition to campaigning for democratic reforms and the release of individuals in China who reportedly had been deprived of liberty for their convictions, the Alliance had been responsible for organizing annual public gatherings on 4 June to commemorate demonstrations that took place in 1989 and the events in Tiananmen Square in Beijing. In some years, the annual public gatherings attracted as many as 180,000 participants. Ms. Chow was allegedly charged by the authorities for her role within the Alliance and the abovementioned annual commemorations.

7. The source reports that Ms. Chow has been arrested four times, from 2020 onwards, as a part of wide-scale measures by the authorities against civil society following the pro-democracy demonstrations of 2019. According to the source, Ms. Chow was targeted as a prominent activist and legal professional and as the Vice Chair of the Hong Kong Alliance in Support of Patriotic Democratic Movements of China, the group responsible for a vigil that was among the most widely attended public gatherings in the city.

8. She was arrested four times and released the first three times. She was again held on remand after her latest arrest and remained in pretrial custody until being sentenced to a total of 22 months based on Public Order Ordinance charges from her earlier arrests. She has been continuously held in custody since then, serving her sentence.

9. The source provides the following details on the abovementioned arrests of Ms. Chow. On 23 June 2020, the police arrested Ms. Chow, accusing her of violating the Public Order Ordinance on the basis of her participating in a 4 June candlelight vigil in Victoria Park after the mass vigil was banned by the authorities. Officials have cited coronavirus disease (COVID-19) pandemic-related prevention measures as the reason for prohibiting public gatherings, including the annual 4 June commemoration. More specifically, Ms. Chow was arrested for "inciting others to participate in an unauthorized assembly" under section 17 A of the Public Order Ordinance, on the basis of violating a prohibition on gatherings due to COVID-19 prevention measures.

10. It is presumed that a warrant issued by Wan Chai District Court was presented at the time of the above arrest. The source informs that while the location where Ms. Chow was held is unknown, she was released shortly after her arrest. The source also notes that when she was tried for the charges connected with that arrest and sentenced on 13 December 2021 to 12 months in prison, she was already in custody on remand on another charge.

11. A year later, on 4 June 2021, the police authorities arrested Ms. Chow for the same violation based on an item she posted on social media that encouraged people in Hong Kong to light candles throughout the city to commemorate the events of 4 June. The authorities have again banned the commemorative gathering in Victoria Park as a pandemic control measure. The source notes that this restriction was implemented at a time when restrictions had largely been lifted and other mass public gatherings, including indoor festivals and retail conventions, were permitted to proceed.

12. According to the source, Ms. Chow was arrested on 4 June 2021, at around 7:40 a.m. It is presumed that a warrant issued by West Kowloon Magistrates' Court was presented at the time of the arrest. She was again accused for "inciting others to participate in an unauthorized assembly" under the section 17A of the Public Order Ordinance. Ms. Chow was held at the Tsuen Wan Police Station and subsequently released on bail of 10,000 Hong

Kong dollars (approximately \$1,280), after 33 hours in detention. The source submits that there was no legal basis for holding Ms. Chow in custody for 33 hours after her arrest. It is thought that her release on bail may have been purposefully delayed in order to prevent her from participating in the public commemoration.

13. Less than a month later, on 30 June 2021, Ms. Chow's bail was revoked and she was re-arrested and taken into pretrial detention. She was initially detained at the New Territories South Regional Police Headquarters and was later transferred to the Tsuen Wan Police Station.

14. According to the source, Ms. Chow has been accused by the authorities of encouraging the public to participate in the banned annual 1 July pro-democracy demonstration. Although no evidence of any violation by Ms. Chow was ever presented and formal charges were never brought, she was remanded in custody on the basis of article 42 of the Hong Kong National Security Law based on the reasoning that she was likely to re-offend given her previous charge for "incitement".

15. The source clarifies that article 42 of the Hong Kong National Security Law stipulates that no bail shall be granted to a criminal suspect or defendant unless the judge has sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security. According to the source, this provision has been read by the courts as reversing the legal presumption in favour of bail in national security cases, which are not limited to charges brought under the National Security Law. Ultimately, Ms. Chow was never charged based on the new allegations and was released following several repeated applications for bail and after being held in pretrial custody for 37 days.

16. The source submits that, given the lack of evidence for the charge, the aim of the arrest and the holding Ms. Chow in pretrial custody may have been intended to prevent her from participating in pro-democracy activities in Hong Kong, such as providing legal aid and advice to those seeking to engage in public assembly.

17. While in pretrial custody on the above occasion, Ms. Chow repeatedly applied for release on bail. Her application for bail was approved on 5 August 2021, by which time she had been detained for 37 days. The Court ordered her to pay a cash bail of 50,000 Hong Kong dollars (approximately \$6,400) and to offer a surety in the same amount. Ms. Chow was prohibited from leaving Hong Kong and ordered to hand over all travel documents to the authorities. She was also required to report to the Ma On Shan Police Station once a week.

18. According to the source, Ms. Chow was most recently arrested on 8 September 2021, along with four other leaders of the Hong Kong Alliance in Support of Patriotic Democratic Movements of China, for refusing to comply with a police order to provide the authorities with information about staff, funding sources and interactions with other organizations over the previous seven years. The police order reportedly stated that the information was sought in order to establish whether the Hong Kong Alliance constituted a "foreign agent" under article 43 of the National Security Law. The source submits that the police have used such investigations of other organizations to suppress the activities of civil society. The members of the Hong Kong Alliance voted to dissolve the organization on 25 September 2021.

19. Ms. Chow was initially detained at the Central District Police Station. She has been denied bail, in accordance with article 42 of the National Security Law, recommending that no bail be granted in cases suspected to constitute national security crimes, and remanded in custody. She was subsequently transferred to the Tai Lam Women's Correctional Centre.

20. Ms. Chow was tried on two charges on 9 December 2021, namely, for "incitement to knowingly take part in an unauthorized assembly", in violation of common law and section 17A (3) (a) of the Public Order Ordinance, and for "knowingly taking part in an unauthorized assembly" in violation of the same section. The charges were based on her appearance in public on 4 June 2020 to attend an unsanctioned commemoration in Victoria Park of the events that have occurred in Tiananmen Square in 1989.

21. On 13 December 2021, Ms. Chow was convicted on both counts and sentenced to two concurrent sentences of 12 months for the first charge and 6 months for the second, for a total of 12 months.

22. On 4 January 2022, Ms. Chow was tried on one charge of violating section 17A (3) (a) of the Public Order Ordinance, specifically for “inciting others to knowingly participate in an unauthorized assembly”. The charge, which was based on two social media posts and one article written by Ms. Chow that was published in a local paper, underscored the significance of continuing the annual 4 June commemoration after the authorities had rejected the petition by Hong Kong Alliance to hold a public commemoration in Victoria Park. On this occasion, Ms. Chow was convicted and sentenced to 15 months in prison, of which she served 10 months after finishing the 12-month sentence already received.

23. Ms. Chow has appealed this sentence, and it was overturned on appeal on 14 December 2022 by the Hong Kong High Court, with the judge finding that the lower court should have considered the legality of the police ban on public gatherings when considering whether Ms. Chow’s actions had broken the law. Ms. Chow’s 15-month sentence for this conviction, which would have ended in January 2023, was repealed.

24. However, Ms. Chow remains under pretrial detention at the Tai Lam Women’s Correctional Centre for two charges under the National Security Law. According to the source, the authorities have also engaged in pretrial court proceedings for the two charges under the National Security Law in connection with Ms. Chow’s role as Vice-Chair of the Hong Kong Alliance. The first charge is for failing to comply with the police request for information to assist in an investigation of the Hong Kong Alliance as a suspected “foreign agent” (art. 43 of the National Security Law). She was also charged under article 22 of the National Security Law with incitement to State subversion, after her arrest on 8 September 2021. The source notes that the penalty for the offence under the latter charge amounts to a maximum sentence of life imprisonment or to fixed-term imprisonment of not less than 10 years for a principal offender.

25. According to the source, on 6 December 2022, Ms. Chow stood trial on the charge of not providing the police with information in relation to an investigation regarding a foreign agent. The trial is ongoing, with hearings likely to take place on 22 and 23 December 2022. The trial date for the second charge of subversion under the article 22 of the National Security Law has not yet been set.

26. Ms. Chow, being a barrister, is representing herself. She does not have access to a computer or to the Internet and is not permitted to receive books with political themes, which may have impeded her ability to prepare her case.

27. The source submits that the deprivation of liberty of Mr. Chow is arbitrary, falling under categories I, II, III and V.

28. In relation to category I, the source recalls that, after being arrested on 4 June 2021, Ms. Chow was held for 33 hours before being released on bail. At that time, the authorities alleged that two social media posts she had made constituted incitement of unauthorized assembly. Ms. Chow’s social media posts did not call on people to gather at any location but rather to light candles where they were located throughout the city. According to the source, this reveals a discrepancy in the charge, indicating that the allegation may have been a pretext for arresting her. According to the source, this discrepancy also calls into question the legality of her subsequent conviction and sentencing on this charge in January 2022.

29. Further, with regard to Ms. Chow’s detention after her arrest, the source notes that 33 hours was an unusually long time to be held and then released for a public order violation. These inconsistencies suggest that the authorities intended to detain Ms. Chow to deprive her of freedom of expression and assembly for a specific period of time and, as such, would have done so without a legal basis.

30. Moreover, it is argued that when the authorities revoked Ms. Chow’s bail and re-arrested her on 30 June 2021, they did so by alleging that she had incited others to protest at the banned 1 July demonstration, in violation of the Public Order Ordinance. However, no evidence that she had done so has been presented by the authorities. The source concludes that, therefore, this arrest also lacked a legal basis. Charges based on this allegation were never brought.

31. The source recalls that Ms. Chow’s applications to be released on bail were rejected at least three times before her bail application was approved on 5 August 2021, after she had

been remanded in custody for 37 days. During her bail hearings, prosecutors cited the existing incitement charges against her as evidence that she was highly likely to reoffend and that the presumption against bail under article 42 of the National Security Law should apply. The source concludes that Ms. Chow's pretrial detention on this basis was therefore a violation of her right to the presumption of innocence under article 11 (1) of the Universal Declaration of Human Rights.

32. The source states that Ms. Chow's deprivation of liberty beginning on 30 June 2022 has rendered her unable to assemble with others to express their views ahead of a politically meaningful date for pro-democracy activists. The behaviour alleged by prosecutors to constitute the offenses, social media postings, written articles and speaking in public, were all legitimate forms of free expression and assembly under articles 19 and 20 of the Universal Declaration of Human Rights. Further, the court affirmed that remand in custody was necessary to prevent further offenses of the same nature. The source states that Mr. Chow's 37-day pretrial detention was therefore imposed expressly for the purpose of preventing her from legitimately exercising her freedom of expression and assembly. It was therefore without a legal basis.

33. Moreover, the source recalls that, in September 2021, Ms. Chow was arrested and held in pretrial detention based on two charges under the National Security Law. The source argues that there is a lack of clarity as to what constitutes "national security" under the law, and what conduct constitutes a criminal offense under the law. These definitions undermine the principle of legal certainty. It is argued, therefore, that Ms. Chow's arrest and detention under the law is without sufficient legal basis.

34. Ms. Chow's repeated requests for bail after her arrest on 8 September 2021 were rejected on the basis of article 42 of the National Security Law, which requires judges to have sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security in order to grant bail. The source reiterates its earlier argument that pretrial detention on this basis violates the suspect's right to the presumption of innocence under article 11 (1) of the Universal Declaration of Human Rights. Moreover, it is argued that acts endangering national security are not defined by the law and that, as such, the prohibition is not specific enough that it can be interpreted to hold people in pretrial detention without a particular legal basis and thus violates the principle of legality under article 11 (2) of the Universal Declaration of Human Rights.

35. The source recalls that the Human Rights Committee has recommended that the Hong Kong Government refrain from applying article 42, pending the repeal of the National Security Law.²

36. On 22 October 2021, Ms. Chow was granted release on bail for the charge under the article 43 of the National Security Law on failure to provide information, although she remained in pretrial detention for the charge of incitement to subversion under article 22. Ms. Chow refused to accept bail, saying that it was impossible to comply with one condition of bail that was too vaguely worded, that is, a requirement to refrain from speech and acts that could reasonably be suspected to constitute a national security offense. The court did not recognize her refusal and ordered her to accept bail and the conditions set by the court. The source argues that the bail condition further indicates that the purpose of pretrial custody in national security cases is expressly to limit the freedom of expression of defendants.

37. In relation to category II, the source submits that the authorities have charged and sentenced Ms. Chow based on activities that are legitimate exercises of her rights to freedom of expression, assembly and association.

38. In this context, it is recalled that on 4 June 2020, Ms. Chow participated in a candle-lighting ceremony in Victoria Park, joining other members of the Hong Kong Alliance in chanting slogans and distributing candles to members of the public. Prior to the ceremony, she had posted on social media and made public statements encouraging people to commemorate the anniversary. Based on this activity, she was sentenced to 12 months in prison, recalls the source.

² CCPR/C/CHN-HKG/CO/4, para. 35 (c).

39. On 29 May 2021, Ms. Chow posted a short essay on her Facebook and Twitter accounts, encouraging people to light candles in every corner of Hong Kong. On 4 June 2021, a local newspaper published her article highlighting the significance of continuing to commemorate 4 June. The source recalls that these publications served as the basis of Mr. Chow's 15-month sentence, 5 of which she was to serve concurrently with her previous sentence, for a total of 22 months.

40. In September 2021, Ms. Chow was arrested and charged with refusing to provide the authorities with information about the staff of the Hong Kong Alliance, its funding sources and its interactions with other organizations. The maximum sentence for that violation is 6 months. She was also charged with incitement to subvert the power of the State under the National Security Law for her role as Vice-Chair of the Hong Kong Alliance.

41. The evidence for this charge included items such as the organization's operational goals (among others, to release the democracy movement activists, to rehabilitate the 1989 pro-democracy movement and to build a democratic China). The prosecution, which presented video clips of a person reading out names of those who lost their lives in the Tiananmen Square demonstrations, claimed that the annual vigils on 4 June were used by the Alliance to incite the overthrow of the Government. The source notes that the court proceedings on this charge are ongoing, with the charge carrying a minimum sentence of 10 years for principal offenders.

42. The source notes that the justification for restricting Ms. Chow's peaceful exercise of freedom of expression and assembly in the first two instances was public safety in connection with preventing the spread of COVID-19 under the Public Order Ordinance. The source recalls that the Human Rights Committee was concerned about "the undue restrictions imposed on the exercise of the right of peaceful assembly, including the Public Order Ordinance", stating, in particular, that COVID-19 regulations have been invoked discriminatorily to infringe on the right to peaceful assembly of protestors.³

43. It is argued that the justification for restricting Ms. Chow's freedom of expression, assembly and association under the National Security Law charges is likewise overreaching. According to the source, vagueness of the provisions and failure to define items, such as acts endangering national security, make them overly broad and unduly restrictive of freedoms of expression, assembly and association. The source recalls that the Human Rights Committee has found that the law and the implementation rules under article 43 have unduly restricted a wide range of Covenant rights and directed the Government to stop applying the National Security Law against human rights defenders duly exercising their right to freedom of expression.⁴

44. The source states that, in prosecuting Ms. Chow on the charge of incitement to subvert State power under the National Security Law, the Government has scrutinized her beliefs about democratic governance and sought to use them as evidence of criminal intent to overthrow the State, therefore violating article 18 of the Universal Declaration of Human Rights.

45. In relation to category III, the source points out serious violations of Ms. Chow's due process rights as she has been subjected to prolonged pretrial detentions due to the presumption against bail imposed under article 42 of the National Security Law.

46. Furthermore, the source points out that the Magistrate misconstrued the evidence against Ms. Chow during the hearings in 2021 on charges of the breach of public order. The source states that Ms. Chow's social media post of 29 May 2021 clearly stated that the Hong Kong Alliance could not host the 4 June candlelight vigil in Victoria Park and encouraged people to light candles "in every corner of Hong Kong". The Magistrate has edited these exculpatory statements out of the post and ultimately found, in the judgment of 4 January 2022, that Ms. Chow had incited others to knowingly participate in an unauthorized assembly.

³ Ibid., para. 47.

⁴ Ibid., paras. 12 and 42.

47. Furthermore, the source states that, in all cases against her, Ms. Chow has also been denied a jury trial because of provisions under article 46 of the National Security Law, which authorizes the Secretary of Justice to determine whether a national security case may be tried by a jury. The source argues that such discretion violates the defendant's right to equality before courts and tribunals under article 14 of the International Covenant on Civil and Political Rights. It is also noted that, to date, no defendant in a case under the National Security Law has been granted trial by jury. The source argues that this provision enables the authorities to shield the prosecution for national security crimes from an important form of public accountability.

48. The source recalls that, in its general comment No. 32 (2007), the Human Rights Committee stated that equality before courts and tribunals under article 14 of the Covenant requires that similar cases be dealt with under similar proceedings and that objective and reasonable grounds must be provided to justify exceptional procedures or specially constituted tribunals, explicitly noting, with concern, the exclusion of certain categories of offenders from jury trials.⁵

49. The source notes another concern about the fairness of Ms. Chow's court proceedings that arises from provisions under the article 44 of the National Security Law, which grants authority to the Chief Executive to designate judges specifically to preside over trials under the law. A ruling by the Court of Final Appeal in December 2021 extended the purview of those judges to all national security crimes, even those not under the National Security Law. The designations of judges are limited to one year. According to the source, there is no transparent mechanism or procedure preventing the Chief Executive from selecting judges. Moreover, according to the source, the Government has announced that designations are not to be made public to avoid security risks. The source concludes that this compromises the rights of defendants in cases under the National Security Law to a trial before an impartial and independent tribunal.

50. Finally, in the context of category V, the source submits that the prosecution of Ms. Chow reveals that she has been explicitly targeted for her political opinions. According to the source, this is indicated by the fact that events associated with the pro-democracy movement have been prohibited and their organizers and attendees prosecuted under the Public Order Ordinance. The source notes that while the stated justification for the prohibitions was prevention of the spread of COVID-19, other events of comparable or greater public health risk were widely permitted at the time.

51. According to the source, discrimination is also apparent in the charge against Ms. Chow for refusing to provide information about whether the Hong Kong Alliance constituted a "foreign agent". The source submits that the requirement to disclose information on the Alliance was part of campaign targeting civil society organizations with pro-democracy views or those which expressed criticism of Government actions, with authorities asserting that such views were themselves evidence of endangering national security under the National Security Law. More than 80 civil society organizations have been shut down after the authorities took actions such as arresting their leaders, freezing bank accounts and intimidating members.

52. In addition, the source recalls that the charges of inciting subversion of the State power under the article 22 of the National Security Law against Ms. Chow rely heavily for evidence on the substance of her political opinions, asserting that some goals of her organization would itself constitute a subversion. Ms. Chow's defence argued that the prosecution did not show that Ms. Chow had ever threatened to use violence or unlawful means to pursue the goals of the organization and that, as such, her stated support for organization's goals was part of her right to freedom of expression. The Magistrate found that the prosecutor had established a *prima facie* case for subversion and the case has been transferred to the Court of First Instance for trial.

53. Finally, the source submits that Ms. Chow's prolonged pretrial detentions also had a discriminatory basis. In applying article 42 of the National Security Law, judges who grant bail are charged with finding sufficient grounds for believing that defendants in national

⁵ Human Rights Committee, general comment No. 32 (2007), paras. 2, 14 and 23.

security cases would not commit further acts endangering national security. The presiding High Court Judge explained that such grounds can be shown through past support of Government policies.

54. According to the source, this indicates that bail determinations involve scrutiny of the political opinions of defendants and that the presumption against bail expressly applies to individuals like Ms. Chow because they have political opinions that are critical of the Government.

Response from the Government

55. On 16 December 2022 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 14 February 2023, detailed information about the current situation of Ms. Chow and to clarify the legal provisions justifying her continued detention, as well as its compatibility with the obligations of Hong Kong, China, under international human rights law, in particular with regard to the treaties binding upon the State. Moreover, the Working Group called upon the Government to ensure her physical and mental integrity.

56. On 22 February 2023 the Government submitted a reply, which was late. While the Working Group welcomes the engagement of the Government, it regrets that it did not address substantive points raised by the source. Moreover, the Working Group notes that the Government did not seek an extension, in accordance with paragraph 16 of Working Group's methods of work. As such, the Working Group cannot accept the reply as if it was submitted on time.

Discussion

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

58. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a *prima facie* case for breach of international law constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations.⁶ In the present case, the Government has chosen not to challenge the *prima facie* credible allegations made by the source.

59. The source has argued that the arrest and detention of Ms. Chow is arbitrary under categories I, II, III and V of the Working Group. In its late reply, the Government denies these allegations, underlying that the proceedings against Ms. Chow are ongoing and stressing that therefore any interference with her case would be a matter consistent with the principle of *sub judice*. Arguing that there are “fallacies” throughout the submissions of the source, the Government underlines that under common law, publishing statements that are intended to interfere with or obstruct the due administration of justice or perform acts with the same intention may constitute “criminal contempt of court”. Whether the criminal charges against Ms. Chow are established would be decided by the judiciary of Hong Kong, China, upon independent and fair adjudication. As a matter of fact, fundamental rights and freedoms are fully protected in Hong Kong by the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China.

60. The Working Group reiterates its long-standing practice that, if the source has established a *prima facie* case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations.⁷

⁶ [A/HRC/19/57](#), para. 68.

⁷ *Ibid.*, para. 68; see also, for example, opinions No. 15/2017, No. 51/2017 and No. 43/2018.

61. Moreover, it is not sufficient for the Government to argue that its national legislation or domestic legal proceedings prevent it from providing a detailed explanation of the actions of the national authorities.⁸ Given that the Working Group was created to serve the needs of victims of arbitrary arrests and detention worldwide and as a way for Member States to hold each other accountable, Member States must have intended that the mechanism resolve disputes brought by victims. That was also the motivation of the Human Rights Council when it reminded States to cooperate fully with the Working Group, as it did most recently in its resolution 51/8.

62. Therefore, a reply from the Government is normally expected by the Working Group within 60 days, during which appropriate inquiries may be carried out by the Government so as to furnish the Working Group with the fullest possible information.⁹ The contention by the Government that its national legislation prevents it from providing detailed information is incompatible with this requirement.

63. Turning to the allegations made by the source and contested by the Government in its late reply, the Working Group shall consider these in turn.

i. Category I

64. The source submits that the arrest and subsequent detention of Ms. Chow is arbitrary under category I as: she was initially held for 33 hours following her arrest on 4 June 2021, which is unusually long; in her subsequent arrest, on 30 June 2021, the authorities did not present any evidence and her bail application was rejected three times until approved on 5 August 2021, by which time Ms. Chow had been detained for 37 days. The source also argues that this 37-day pretrial detention and bail refusals were based on article 42 of the National Security Law, which requires judges to have sufficient grounds for believing that suspects will not continue to engage in criminal activity. According to the source, this provision violates the right to presumption of innocence and that, moreover, acts endangering national security are not defined by the law, which is incompatible with the principle of legal certainty.

65. In its late reply, the Government contests that the arrest and detention of Ms. Chow were arbitrary but does not provide any specific arguments. Rather, the late reply of the Government consists of reciting the provisions of the National Security Law and providing an interpretation of the terms used.

66. The Working Group recalls that 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 domestic law.¹⁰ It is beyond the mandate of the Working Group to reassess the sufficiency of the evidence or to deal with errors of law allegedly committed by the domestic court.¹¹ As such, the Working Group is unable to ascertain whether the arrest of Ms. Chow on 30 June 2021 was based on sufficient evidence.

67. Turning to the arrest of 4 June 2021, following which Ms. Chow was held for 33 hours, the Working Group recalls that any time, even if measured in minutes, which an individual spends in the custody is a form of deprivation of liberty and, as such, in order to meet the requirements of article 9 of the Covenant, it is the duty of the authorities to ensure that all safeguards against arbitrary deprivation of liberty are satisfied. In the present case, the source has argued there were discrepancies in the arrest and charging of Ms. Chow, while the authorities allege that she incited unauthorized assembly through two social media posts. In fact, Ms. Chow did not call on people to gather at any particular location in her posts, but rather to light candles where they were throughout the city (see para. 28 above). While this allegation was put to the Government, it has chosen not to address it in its late reply.

68. The Working Group therefore concludes that Ms. Chow's arrest on 4 June 2021 was arbitrary as it was contrary to article 9 (1) and (2) of the Covenant.

⁸ See, for example, opinion No. 70/2018.

⁹ [A/HRC/36/38](#), para. 15.

¹⁰ Opinion No. 40/2005, para. 22.

¹¹ See, for example, opinions No. 5/2021, No. 60/2019, No. 58/2019, No. 49/2019, No. 16/2017 and No. 15/2017.

69. Turning to the allegations concerning bail, the Working Group recalls that it is a well-established norm of international law that pretrial detention shall be the exception and not the rule and that it should be ordered for the shortest appropriate period of a time.¹² Article 9 (3) of the Covenant provides that it shall not be the general rule that persons awaiting trial shall be detained, but release may be subject to guarantees to appear for trial and at any other stage of the judicial proceedings. It follows that liberty is recognized as a principle and detention as an exception in the interests of justice.¹³

70. In order to give effect to this principle, pretrial detention must be based on an individualized determination that it is reasonable and necessary, for such purposes as to prevent flight, interference with evidence or the recurrence of crime.¹⁴ Courts must examine whether alternatives to detention, such as bail, would render custodial measures unnecessary.¹⁵ In the present case, Ms. Chow's bail application was rejected repeatedly and when it was finally considered on 22 October 2021, she refused to accept bail, saying that it was impossible to comply with one bail condition that was too vaguely worded, that is, a requirement to refrain from speech and acts that could reasonably be suspected to constitute a national security offense (see para. 36 above).

71. These allegations were put to the Government, which, in its late reply, only provided a general explanation of the National Security Law and its provisions concerning bail applications, arguing that judicial decisions are made upon each bail application on a case-by-case basis.

72. The Working Group recalls that, when considering whether bail application complies with the requirements of article 9 (3) of the Covenant, it is crucial for non-custodial measures, such as bail and sureties, to be set at realistic levels.¹⁶ In the present case, this means that the bail conditions for Ms. Chow should have been set with the requisite degree of precision to enable her to direct her conduct accordingly, otherwise bail conditions would render the measures meaningless. Recalling the concerns over the bail provisions of the National Security Law expressed by the Human Rights Committee in 2022,¹⁷ the Working Group concludes that Ms. Chow's pretrial detention violated article 9 (3) of the Covenant and was therefore arbitrary.

73. Noting all the above, the Working Group concludes that Ms. Chow's arrest and detention is arbitrary under category I.

ii. Category II

74. The source has argued that the arrest and detention of Ms. Chow stems from her peaceful exercise of freedoms of expression, assembly and association. This is contested by the Government in its late reply, in which it argues that Ms. Chow has been charged with incitement to subversion under articles 22 and 23 of the National Security Law. However, the Working Group observes that while the Government denies these allegations, it only cites the legislation and provides interpretation of it. Importantly, at no time does the Government actually explain what actions and/or words of Ms. Chow have led to the very serious charge against her of "incitement to subversion".

75. The Working Group recalls that detention purely due to the peaceful exercise of rights protected by the Covenant may be arbitrary.¹⁸ In the same vein, the Human Rights Council, in its resolution 24/5, reminded States of their obligation to respect and fully protect the rights of all individuals to assemble peacefully and associate freely, online as well as offline,

¹² Opinions No. 8/2020, para. 54; No. 1/2020, para. 53; No. 57/2014, para. 26; No. 49/2014, para. 23; No. 28/2014, para. 43; see also Human Rights Committee, general comment No. 35 (2014), para. 38; and [A/HRC/19/57](#), paras. 48–58.

¹³ [A/HRC/19/57](#), para. 54.

¹⁴ Human Rights Committee, general comment No. 35 (2014), para. 38.

¹⁵ Ibid; opinion No. 83/2019, para. 68; and [A/HRC/30/37](#), guideline 15.

¹⁶ [A/HRC/39/45/Add.2](#), paras. 23 and 83 (a) (i).

¹⁷ [CCPR/C/CHN-HKG/CO/4](#), paras. 35–36.

¹⁸ Human Rights Committee, general comment No. 35 (2014), paras. 17 and 53.

including in the context of elections, and including persons espousing minority or dissenting views or beliefs, human rights defenders, trade unionists and others.

76. The above reaffirms the principle enunciated by the Human Rights Council in its resolution 12/16, calling on States to refrain from imposing restrictions that are not consistent with article 19 (3), including: discussion of government policies and political debate; reporting on human rights; engaging in election campaigns, peaceful demonstrations or political activities, including for peace or democracy; and expression of opinion and dissent, religion or belief.

77. The Working Group notes that freedom of opinion and freedom of expression, as well as freedom of assembly as expressed in articles 19 and 21 of the Covenant, are indispensable conditions for the full development of the person; they are essential for any society and in fact constitute the foundation stone for every free and democratic society.¹⁹ According to the Human Rights Committee, no derogations can be made to article 19 “since it can never become necessary to derogate from it during a state of emergency”.²⁰

78. Freedom of expression includes the right to seek, receive and impart information and ideas of all kinds regardless of frontiers and this right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, including political opinions.²¹ Moreover, article 19 (2) of the Covenant protects all forms of expression and the means of their dissemination, including all forms of audiovisual as well as electronic and Internet-based modes of expression.²²

79. The Working Group recalls that the enjoyment of the right to hold and participate in peaceful assemblies, as required by article 21 of the Covenant, entails the fulfilment by the State of its positive obligation to facilitate the exercise of this right. As stated by the Special Rapporteur on the rights to peaceful assembly and of association:

“... the exercise of fundamental freedoms should not be subject to previous authorization by the authorities ... , but at the most to a prior notification procedure, whose rationale is to allow State authorities to facilitate the exercise of the right to freedom of peaceful assembly and to take measures to protect public safety and order and the rights and freedoms of others. Such a notification should be subject to a proportionality assessment, not unduly bureaucratic and be required a maximum of, for example, 48 hours prior to the day the assembly is planned to take place.”²³

80. To that end, noting the context of the prevailing COVID-19 pandemic, the Working Group also recalls its deliberation No. 11 on prevention of arbitrary deprivation of liberty in the context of public health emergencies, which clearly stipulates that emergency powers to curb the spread of COVID-19 must not be used to deprive particular groups or individuals of liberty.²⁴

81. In the present case, the Working Group has not been presented with any exceptions that could justifiably explain interference with Ms. Chow’s peaceful exercise of the freedoms of opinion and expression and assembly, as protected by articles 19 and 21 of the Covenant. On that basis, the Working Group concludes that the present arrest and subsequent detention of Ms. Chow resulted from the exercise of the rights or freedoms guaranteed by articles 19 and 21 of the Covenant and therefore falls under category II.

82. In making this finding, the Working Group wishes to express its particular concern about the National Security Law and wishes to associate itself with the concerns expressed by the Human Rights Committee in 2022 “about the adverse effect of the overly broad interpretation and arbitrary application of the National Security Law and legislation on sedition, and its impact on the exercise of freedom of expression. This includes: (a) the closure of media outlets, in some cases voluntarily for fear of reprisals, raids on their offices

¹⁹ Human Rights Committee, general comment No. 34 (2011), para. 2.

²⁰ Ibid., para. 5.

²¹ Ibid., para. 11.

²² Ibid., para. 12.

²³ A/HRC/20/27, para. 28.

²⁴ A/HRC/45/18, para. 22.

and freezing of their assets; (b) the blocking of websites and media accounts and the removal of online content; (c) the arrest and arbitrary detention of journalists, politicians, academics, students and human rights defenders who have expressed dissenting opinions; (d) intimidation, attacks or threat of attacks against journalists; (e) censorship; (f) interference with the editorial independence of public media outlets such as Radio Television Hong Kong; and (g) difficulties in obtaining or renewing visas for foreign journalists, among others. While noting the intention of Hong Kong, China, to prepare a new law regulating disinformation, the Committee notes concerns raised about its potential adverse impact on the enjoyment of freedom of expression given the current environment (arts. 19, 20, 21 and 22).²⁵ The Human Rights Committee called upon the Government to stop the application of the National Security Law immediately.²⁶

83. The Working Group recalls its own jurisprudence, which emphasizes that the principle of legality requires that laws be formulated with sufficient precision so that the individual can access and understand the law and regulate his or her conduct accordingly.²⁷ This appears to be clearly lacking in the case of the National Security Law of Hong Kong, China. It is recalled that the failure to implement the principle of legal certainty may render any detention on the basis of any such law to be arbitrary. The Government is urged to amend the National Security Law without delay.

iii. Category III

84. Given its finding that the deprivation of liberty of Ms. Chow is arbitrary under category II, the Working Group wishes to emphasize that no trial of Ms. Chow should take place. However, the trial proceedings against Ms. Chow are ongoing and the source has submitted that there were severe violations of the fair trial rights of Ms. Chow and that her detention therefore falls under category III of the Working Group.

85. The source argued that Ms. Chow, in her social media post of 29 May 2021, stated that the Hong Kong Alliance could not host the 4 June candlelight vigil in Victoria Park and encouraged people to light candles “in every corner of Hong Kong”. The Magistrate edited these exculpatory statements out of the post and ultimately found in the judgment of 4 January 2022 that Ms. Chow had incited others to knowingly participate in an unauthorized assembly. These very detailed allegations were put to the Government, which chose not to address them directly in its late reply.

86. The Working Group recalls that the Human Rights Committee, in its general comment No. 32 (2007), stated that the requirement of competence, independence and impartiality of a tribunal, in the sense of article 14, paragraph 1, of the Covenant, is an absolute right that is not subject to any exception.²⁸ The Committee further observed that:

The requirement of impartiality has two aspects. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial. For instance, a trial substantially affected by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be impartial.²⁹

87. In the present case, the judge clearly interfered with the evidence and altered it in a way that was to Ms. Chow’s disadvantage by erasing her exculpatory statements. Under such circumstances, the Working Group considers that Ms. Chow’s right to independent and impartial tribunal encapsulated in article 14 (1) of the Covenant were violated. Given that this directly impacted Ms. Chow’s personal liberty, the Working Group considers that her detention was therefore arbitrary under category III.

²⁵ CCPR/C/CHN-HKG/CO/4, para. 41.

²⁶ Ibid, paras. 42 and 44.

²⁷ See, for example, opinion No. 41/2017, paras. 98–101.

²⁸ Human Rights Committee, general comment No. 32 (2007), para. 19.

²⁹ Ibid., para. 21.

88. Moreover, the Working Group is also very concerned about articles 44, 46 and 47 of the National Security Law. Articles 44 and 47 provide the Chief Executive with excessive power, including the power to appoint judges from a list that is not made public and, in consultation with the Committee for Safeguarding National Security of the Hong Kong Special Administrative Region and the Chief Justice of the Court of Final Appeal, to hear national security cases, as well as the power to issue a binding certificate to the courts as to whether an act involves national security or whether the relevant evidence involves State secrets when such questions arise in the adjudication of a case. The Working Group notes that this was of particular concern also to the Human Rights Committee in 2022.³⁰

89. Article 46 of the National Security Law authorizes the Secretary for Justice to decide on which cases are to be tried by jury (see para. 47 above). The source has argued, and the Government does not deny, that no national security cases have been tried by jury to date. The Working Group notes that this was of particular concern also to the Human Rights Committee in 2022.³¹

90. The Working Group calls upon the Government to revise the provisions of the National Security Law to ensure they comply with its obligations under article 9 and 14 of the Covenant. The Working Group refers the case to the Special Rapporteur on independence of judges and lawyers as well as the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism for further action.

iv. Category V

91. Finally, the source has also argued that Ms. Chow's detention was based on discrimination as she has been specifically targeted by the authorities for her political opinion (see para. 50 above). The source specifically highlights that while the pretext of curbing the spread of COVID-19 was used to justify interference with Ms. Chow's activism, it is evident that she was specifically targeted since other events were allowed to proceed at the same time. The Working Group notes that while in its late reply the Government denies that the arrest and detention of Ms. Chow were due to her peaceful exercise of rights or that she was targeted, it does not address the specific submissions of the source that other events were permitted to proceed while the activities of Ms. Chow were banned.

92. The Working Group observes that Ms. Chow is a lawyer and human rights activist with prominent engagement in pro-democracy movement spanning across decades and that for such work, she has been arrested on a number of occasions (see paras. 5–7 above). None of these facts have been contested by the Government in its late reply. Moreover, the submissions by the source that events organized by Ms. Chow were banned under the pretext of curbing the spread of COVID-19 when other events were allowed to proceed have also been left uncontested by the Government in its late reply.

93. The Working Group once again recalls the 2022 concluding observations of the Human Rights Committee in respect of Hong Kong, China, in which the Committee took note of harassment and intimidation faced by lawyers such as Ms. Chow and called upon the Government to take the measures necessary to protect lawyers, particularly those who represent opposition figures or protesters and who request judicial reviews, from harassment, intimidation and attacks.³²

94. Noting all of the above, the Working Group considers that Ms. Chow's arrest and detention stems from long-term harassment and targeting by the Hong Kong authorities and that her arrest and detention are therefore arbitrary as they are discriminatory, resulting from her political opinion and activism, in violation of articles 2 (1), 9 and 26 of the Covenant.

Disposition

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

³⁰ CCPR/C/CHN-HKG/CO/4, para. 35 (a).

³¹ Ibid., para. 35 (d).

³² Ibid., paras. 37–38.

The deprivation of liberty of Ms. Hang Tung Chow, being in contravention of articles 2, 9, 14, 19, 21 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

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

97. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Ms. Hang Tung Chow immediately and to accord her an enforceable right to compensation and other reparations, in accordance with international law. In the current context of the COVID-19 pandemic and the threat that it poses in places of detention, the Working Group calls upon the Government to take urgent action to ensure the immediate and unconditional release of Ms. Hang Tung Chow.

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

99. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Ms. Hang Tung Chow and to take appropriate measures against those responsible for the violation of her rights.

100. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on independence of judges and lawyers and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, for further action.

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

Follow-up procedure

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

103. 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.

104. 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.

105. 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.³³

[Adopted on 4 April 2023]

³³ See Human Rights Council resolution 51/8, paras. 6 and 9.