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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-seventh session, 27 April–1 May 2020

Opinion No. 32/2020 concerning He Fangmei (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 42/22.

2. In accordance with its methods of work (A/HRC/36/38), on 15 October 2019 the Working Group transmitted to the Government of China a communication concerning He Fangmei. The Government has not replied to the communication. 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

4. He Fangmei, born 8 October 1985, is a citizen of China. She usually resides in Xinxiang City, Henan Province.

5. The source submits that in March 2018, Ms. He sought legislative action and compensation from the authorities following the disability of her child, after it was determined that the disability had been caused by defective vaccines. As a result of the administration of vaccines against hepatitis A and measles as well as other illnesses, Ms. He's child was diagnosed with a number of conditions resulting in disability. Ms. He helped to establish an advocacy group, which mobilized families whose children were affected by disabilities after having received defective vaccines.

6. The source reports that on 4 March 2019, Ms. He was forcibly returned to her home town of Xinxiang City, from Beijing, where she had been demonstrating with other parents of affected children in front of the National Health Commission. According to the source, in Beijing, she was secretly detained at the Majialou "relief services centre", an extralegal detention facility, before being sent back to Henan Province.

7. The source reports that from 5 to 20 March 2019, Ms. He served a 15-day administrative detention sentence in Xinxiang City. Immediately thereafter, on 20 March 2019, Ms. He was placed in criminal detention by police officers from the Huixian City Public Security Bureau. The authorities showed a warrant issued by the Huixian City Public Security Bureau. The reason for the arrest imputed by the authorities was "picking quarrels and provoking trouble". The source notes that the legal basis for the arrest was article 293 of the Criminal Law of China, which stipulates a fixed-term imprisonment of up to five years. Ms. He has been in criminal detention continuously since 20 March 2019.

8. The source submits that the detention of Ms. He appears to have been carried out by the authorities in retaliation for her advocacy work on behalf of her family and other affected families. According to the source, at the beginning of March 2018, when her child became disabled, Ms. He faced various forms of retaliation from the authorities for the peaceful exercise of her rights of expression, assembly and association.

9. According to the information received, Ms. He initially requested the Huixian Centre for Disease Prevention and Control, located in Xinxiang City in Henan Province, to ensure accountability and compensation for her child's disability. However, the authorities have reportedly refused to take responsibility for her child's condition.

10. The source reports that, subsequently, Ms. He mobilized families with children adversely affected by vaccinations in a group called "Vaccine Baby Home". This group has sought accountability, financial compensation, assistance with medical expenses and legislative action from the central Government. From mid-2018 until the time of her detention, Ms. He travelled to Beijing to present complaints, including concerning the alleged abuse of power by government officials, to the Central Commission for Discipline Inspection, the Ministry of Public Security and the State Council. It is submitted that even though the officials eventually agreed to provide affected children with medical treatment in Beijing, the financial compensation, though also promised by the authorities, has not yet been provided.

11. According to the source, Ms. He and others who have called for the enactment of legislation regulating the administration of vaccines, and for more public information about vaccine safety and compensation to cover increasing medical costs for their children, have faced assault, intimidation and harassment by the police. It is submitted that, in some cases, the police have detained, beaten and forcibly disappeared these campaigners. The authorities have also allegedly warned Ms. He, her family and other campaigners not to give interviews to domestic and foreign journalists, after several of them did so. Furthermore, Ms. He has been warned by national security officers not to post any information about her advocacy on social media. In addition, police from Xinxiang City often monitored Ms. He when she went to Beijing, including when she visited the hospital where her child was receiving medical treatment.

12. The source reports that on 25 February 2019, shortly before Ms. He's administrative detention in March 2019, police from Henan Province detained her in Beijing when she was

demonstrating with over two dozen other parents in front of the National Health Commission. On that day, the Commission members were holding a press conference on the administration of vaccines in China. Shortly before being taken into custody, Ms. He had disseminated a video of this demonstration online.

13. According to the information received, since Ms. He was placed in criminal detention in March 2019. Her family has frequently been monitored and harassed by the authorities, who have also restricted their freedom of movement. For example, in mid-May 2019, Huixian security forces allegedly abducted Ms. He's family members after they had gone to Beijing, and forcibly sent them back to Huixian.

14. Earlier, on 3 or 4 September 2018, the police detained Ms. He, a member of her family and other individuals around Tiananmen Square in Beijing for protesting against the Government's handling of situations involving faulty vaccines and for collecting donations to help with the care of their children. After Ms. He and her family member were forcibly returned to Henan Province on 11 September 2018, the local authorities prevented them from receiving passports on the grounds that the potential travel may "endanger national security". The source notes that Ms. He had hoped to take her child overseas for medical treatment. The source also reports that, in another act of reprisal, on 13 September 2018, Ms. He's family were evicted from their home in Henan Province.

15. The source thus argues that the above-mentioned circumstances relating to the treatment and detention of Ms. He constitute violations of her rights to peacefully exercise free expression, assembly and association, including those guaranteed under articles 18, 19 and 20 of the Universal Declaration of Human Rights. Her deprivation of liberty thus falls under category II of the Working Group.

16. The source reports that the authorities have attempted to coerce Ms. He during her time in custody and violated her legal rights. The police reportedly told Ms. He that she would be released only under a condition that would constitute self-incrimination for engaging in lawful rights-defence activities. The source specifies that the police have stated to Ms. He that they will release her if she admits that she is guilty of the criminal charge against her. However, Ms. He has refused to do so.

17. The source further reports that during Ms. He's criminal detention, the police exerted pressure on her family to sign a guarantee statement pledging that Ms. He would not engage again in "illegal petitioning". The police also reportedly told the family that this would help facilitate Ms. He's release on bail. Although Ms. He's family eventually signed such a statement under duress, Ms. He remained in detention and on 26 April 2019 was placed under formal arrest. The source specifies that placing Ms. He under formal arrest took place just as the legal limit of 37 days for criminal detention under Chinese law approached. Police officers from the Huixian City Public Security Bureau verbally informed Ms. He's family that she had been formally arrested, two days after this occurred. Ms. He's family requested a written arrest notice from the police, but has reportedly never received such a notice, despite the police claiming that it was sent by mail.

18. According to the source, after Ms. He was put into criminal detention on 20 March 2019, she was deprived of access to a lawyer of her own or her family's choice for three and a half months, in violation of her rights under both article 32 of the Criminal Procedure Law and international human rights standards. Reportedly, when denying a lawyer's request to meet with Ms. He in early June 2019, the authorities claimed that such a visit would "endanger national security". The source notes that this reason is often used by the Chinese authorities without a valid legal basis in order to deprive human rights defenders of legal counsel.

19. The source reports that on 5 July 2019, a few days after Ms. He's case had been transferred to the Huixian City People's Procuratorate, a lawyer was finally able to meet with her. Following the investigation into the charges against Ms. He, on 26 July 2019 the Procuratorate indicted Ms. He and assigned the case to Huixian City People's Court. According to the indictment, prosecutors accused Ms. He of "picking quarrels" – for soliciting donations, for shouting slogans outside the offices of two government departments in Beijing, and for displaying a banner with slogans and disseminating the images from it online.

20. The source concludes that the above-mentioned circumstances constitute violations of Ms. He's rights guaranteed under article 9 of the Universal Declaration of Human Rights and fall under category III of the Working Group.

21. The source notes that in recent years, the problem of defective vaccines, which prompted Ms. He's advocacy, has been a very prominent public health issue in China. Following subsequent investigation of the matter by the authorities, a vaccine manufacturer was found to have sold a significant number of defective vaccines and fabricated inspections dating back to 2014. Another major vaccine producer, owned by the State, was also found to have been producing defective inoculations for infants. In response, the authorities dismissed numerous officials from these companies and levied fines on the manufacturers. In June 2019, the legislature passed a law on the administering of vaccines, which will go into effect on 1 December 2019. This law was among the measures campaigned for by Ms. He and other affected parents.

22. The source reports that after Ms. He was taken into custody in March 2019, her family attempted to file an administrative appeal against her detention. However, Xinxiang City Public Security Bureau officials stated that such an application required a handprint from Ms. He, which would grant the family power of attorney to launch an appeal on her behalf. Given that Ms. He was not allowed visits at the time, it was not possible to obtain her handprint, and the family was then unable to file an appeal.

23. The source further reports that in July 2019, after Ms. He's case had been transferred to the Huixian City People's Procuratorate, her lawyer applied for her release on "bail pending investigation". However, the Procuratorate turned down this request. The lawyer applied again in August 2019, after Ms. He had been indicted, but again the request was denied.

Response from the Government

24. On 15 October 2019, the Working Group transmitted the allegations made by the source to the Government through its regular communication procedure. The Working Group requested the Government to provide, by 17 December 2019, detailed information about the current situation of Ms. He and any comments on the source's allegations. Moreover, the Working Group called upon the Government to ensure Ms. He's physical and mental integrity.

25. The Working Group regrets that it did not receive a response from the Government to that communication, nor did the Government request an extension of the time limit for its reply, as provided for in the Working Group's methods of work.

Recent developments

26. It has come to the attention of the Working Group that Ms. He was released on 10 January 2020, after the Huixian City People's Procuratorate dropped the charges against her and Huixian City People's Court formally dismissed her case. Prior to her release, Ms. He had been put on trial, on 15 November 2019. At that hearing, prosecutors recommended a one-year prison sentence. Ms. He pleaded not guilty. The trial hearing ended without a sentence being pronounced. Although Ms. He was not formally convicted and given a prison sentence, she spent 10 months and 17 days in pretrial detention, from 25 February 2019 until 10 January 2020.

Discussion

27. At the outset, the Working Group welcomes the release of Ms. He on 10 January 2020 after the court's dismissal of her case. Following her release, the Working Group has the option of filing the case or rendering an opinion as to the arbitrariness of the detention, in conformity with paragraph 17 (a) of its methods of work. In this particular case, the Working Group has decided to render the present opinion, given the absence of a response from the Government, in conformity with paragraph 15 of its methods of work. In making this decision, the Working Group gives particular weight to the fact that, although Ms. He has been released, (a) the circumstances in which she was detained were serious and warrant further attention, as she was arrested for her activities as a human rights defender; (b) she was deprived of liberty for 10 months; and (c) the Government has failed to inform

the Working Group about the guarantees of non-repetition, the Government's version of events and Ms. He's release.¹

28. 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 requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

29. The Working Group wishes to reaffirm that States have the obligation to respect, protect and fulfil the right to liberty of person and that any national law allowing deprivation of liberty should be made and implemented in conformity with the relevant international and regional standards set forth in the Universal Declaration of Human Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and other applicable international and regional instruments.² Consequently, even if the detention is in conformity with national legislation, regulations and practices, the Working Group is entitled to assess the judicial proceedings and the law itself to determine whether such detention is also consistent with the relevant provisions of international human rights law.³

Category I

30. The Working Group will first consider whether there have been violations under category I, which concerns deprivation of liberty without any legal basis.

31. The source submits, and the Government does not contest, that Ms. He was not presented with an arrest warrant at the time of arrest on 3 September 2018 for her protest around Tiananmen Square in Beijing or on 25 February 2019 for her protest in front of the National Health Commission in Beijing.

32. As the Working Group has stated, in order for a deprivation of liberty to have a legal basis, it is not sufficient for there to be a law authorizing the arrest, but rather the authorities must invoke that legal basis and apply it to the circumstances of the case through an arrest warrant, which was not implemented in the present case.⁴

33. International law on detention includes the right to be presented with an arrest warrant to ensure the exercise of effective control by a competent, independent and impartial judicial authority, which is procedurally inherent in the right to liberty and security of person and the prohibition of arbitrary deprivation under articles 3 and 9 of the Universal Declaration of Human Rights and principles 2, 4 and 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.⁵ The

¹ Opinions No. 88/2017, para. 21; and No. 94/2017, para. 44.

² See General Assembly resolution 72/180, preambular para. 5; and Human Rights Council resolutions 41/2, preambular para. 2; 41/6, para. 5 (b); 41/10, para. 6; 41/17, preambular para. 1; 42/3, preambular para. 12; 42/26, preambular para. 6; and 42/27, preambular para. 4. See also Commission on Human Rights resolutions 1991/42, para. 2; and 1997/50, para. 15; Human Rights Council resolutions 6/4, para. 1 (a); and 10/9, para. 4 (b); the Working Group's methods of work, para. 7; and opinions No. 41/2014, para. 24; No. 36/2019, para. 33; No. 42/2019, para. 43; No. 51/2019, para. 53; and No. 56/2019, para. 74.

³ Opinions No. 1/1998, para. 13; No. 36/2019, para. 33; No. 42/2019, para. 43; No. 51/2019, para. 53; and No. 56/2019, para. 74.

⁴ See, for example, opinions No. 93/2017, para. 44; No. 10/2018, paras. 45–46; No. 36/2018, para. 40; No. 46/2018, para. 48; No. 9/2019, para. 29; No. 32/2019, para. 29; No. 33/2019, para. 48; No. 44/2019, para. 52; No. 45/2019, para. 51; and No. 46/2019, para. 51.

⁵ The Working Group has maintained from its early years that the practice of arresting persons without a warrant renders their detention arbitrary. See, for example, decisions No. 1/1993, paras. 6–7; No. 3/1993, paras. 6–7; No. 4/1993, para. 6; No. 5/1993, paras. 6, 8 and 9; No. 27/1993, para. 6; No. 30/1993, paras. 14 and 17 (a); No. 36/1993, para. 8; No. 43/1993, para. 6; and No. 44/1993, paras. 6–7. For more recent jurisprudence, see opinions No. 38/2013, para. 23; No. 48/2016, para. 48; No. 21/2017, para. 46; No. 63/2017, para. 66; No. 76/2017, para. 55; No. 83/2017, para. 65; No. 88/2017, para. 27; No. 93/2017, para. 44; No. 3/2018, para. 43; No. 10/2018, para. 46; No. 26/2018, para. 54;

Working Group has been presented with no valid grounds to justify exception to this principle in the present case.

34. The Huixian City Public Security Bureau issued an arrest warrant for Ms. He's criminal detention for 37 days from 20 March to 26 April 2019, however such an investigative authority cannot be considered a competent, independent and impartial office for the purpose of ensuring judicial oversight.

35. The source further maintains, and the Government does not dispute, that Ms. He was subjected to secret detention at the Majialou "relief services centre", an extrajudicial detention facility in Beijing, from 25 February to 4 March 2019. The Working Group has classified secret detention, which entails elements of incommunicado detention and enforced disappearance, as being arbitrary per se, falling within category I.⁶

36. The Working Group also recalls Human Rights Council resolution 37/3 on the integrity of the judicial system, in which, in paragraphs 8 and 9, the Council stresses that no one shall be held in secret detention and calls upon States to investigate promptly and impartially all alleged cases of secret detention. Such deprivation of liberty, entailing a refusal to disclose the fate or whereabouts of the person concerned or to acknowledge their detention, lacks any valid legal basis and is inherently arbitrary as it places the person outside the protection of the law, in violation of article 6 of the Universal Declaration of Human Rights.⁷

37. The Working Group also notes that Ms. He's secret detention at the Majialou "relief services centre" in Beijing was followed by administrative detention for 15 days from 5 to 20 March 2019, criminal detention for 37 days from 20 March to 26 April 2019 and formal arrest on 26 April 2019.

38. The Working Group observes that Ms. He was not brought promptly before a judge, within 48 hours of her arrest, barring absolutely exceptional circumstances, as is set out in the Working Group's jurisprudence.⁸ Furthermore, the pretrial detention, which should be the exception rather than the rule, lacked a legal basis, as it was not based on an individualized determination that it was reasonable and necessary taking into account all the circumstances, for such purposes specified in law as to prevent flight, interference with evidence or the recurrence of crime – accompanied by consideration of alternatives, such as bail, electronic bracelets or other conditions; consequently, detention was unnecessary in the present case.⁹ Therefore, the Government has violated article 9 of the Universal Declaration of Human Rights as well as principles 11, 37 and 38 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

39. The Working Group further observes that Ms. He was not afforded the right to take proceedings before a court so that it may decide without delay on the lawfulness of detention in accordance with articles 3, 8 and 9 of the Universal Declaration of Human Rights as well as with principles 11, 32 and 37 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court affirms that the right to challenge the lawfulness of detention before a court is a self-standing human right, the absence of which constitutes a human rights violation, and is essential to preserve legality in a democratic society.¹⁰ This right, which is a peremptory norm of international law, applies to all forms

No. 30/2018, para. 39; No. 38/2018, para. 63; No. 47/2018, para. 56; No. 51/2018, para. 80; No. 63/2018, para. 27; No. 68/2018, para. 39; and No. 82/2018, para. 29.

⁶ Opinion No. 14/2019.

⁷ Opinions No. 82/2018, para. 28; No. 18/2019, para. 33; No. 22/2019, para. 67; No. 26/2019, para. 88; No. 28/2019, para. 61; No. 29/2019, para. 54; No. 36/2019, para. 35; No. 41/2019, para. 32; No. 42/2019, para. 48; No. 51/2019, para. 58; and No. 56/2019, para. 79.

⁸ Opinions No. 57/2016, paras. 110–111; No. 2/2018, para. 49; No. 83/2018, para. 47; No. 11/2019, para. 63; No. 20/2019, para. 66; No. 26/2019, para. 89; No. 30/2019, para. 30; No. 36/2019, para. 36; No. 42/2019, para. 49; No. 51/2019, para. 59; No. 56/2019, para. 80; No. 76/2019, para. 38; and No. 82/2019, para. 76.

⁹ A/HRC/19/57, paras. 48–58.

¹⁰ See paras. 2–3.

and situations of deprivation of liberty, as clarified in guideline 1 thereof.¹¹ Judicial oversight of the deprivation of liberty is a fundamental safeguard of personal liberty and is essential in ensuring that detention has a legal basis.¹²

40. The Working Group further notes that Ms. He was effectively deprived of her right to legal counsel and representation – procedurally inherent in the right to liberty and security of person and the prohibition of arbitrary detention – for three and a half months from 20 March to 5 July 2019 on the ground that it would “endanger national security”, in violation of articles 3 and 9 of the Universal Declaration of Human Rights and principles 15, 17 and 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. According to principle 9 and guideline 8 of the Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, persons deprived of their liberty have the right to legal assistance by counsel of their choice, at any time during their detention, including immediately after the moment of apprehension, and must be promptly informed of this right upon apprehension; nor should access to legal counsel be unlawfully or unreasonably restricted.¹³ The Working Group can recognize no legal basis for deprivation of liberty without an effective guarantee of legal representation, in particular as the ability to challenge the lawfulness of detention becomes moot.

41. It is of concern to the Working Group that Ms. He was subjected to administrative detention for 15 days from 5 to 20 March 2019. Article 2 of the Public Security Administration Penalties Law authorizes the public security organ to impose a penalty upon “a person who disturbs public order, endangers public safety, infringes on the rights of persons and property or hampers social administration, which is harmful to society..., if such an act is not serious enough for criminal punishment ...”, for “administration of public security”. Penalties for acts against the administration of public security include “administrative detention”, and those who commit two or more such acts may be subjected to the maximum 20-day term (see arts. 10 (3) and 16). Specific acts against the administration of public security, and penalties, are set out in articles 23 to 76.

42. The Working Group considers that the public security organ summarily ordering an administrative detention of up to 20 days as punishment without a trial, in effect acting as prosecutor, judge and jury, with no accountability, violates the minimum due process of law for deprivation of liberty. In the Working Group’s view, such an enabling act for law enforcement officials is devoid of legal basis.

43. Ms. He was immediately afterwards held in criminal detention for 37 days, from 20 March to 26 April 2019, by the public security organ, prior to formal arrest being approved by the People’s Procuratorate under article 91 of the Criminal Procedure Law.

44. The Working Group considers that empowering the public security organ to detain a suspect without reporting to the prosecutor, let alone the judge, for 30 days, and giving the prosecuting authorities, who cannot be considered a competent, independent and impartial office for the purpose of ensuring judicial oversight at every stage of the criminal procedure because of their active involvement in the criminal investigation and the trial, another 7 days to decide under article 91 (2) and (3) of the Criminal Procedure Law, violates due process of law for deprivation of liberty. In the Working Group’s view, such an enabling act for law enforcement officials is devoid of legal basis.

45. For these reasons, the Working Group considers that Ms. He’s deprivation of liberty lacks a legal basis and is thus arbitrary, falling under category I.

Category II

46. The Working Group recalls that the rights to freedom of movement and residence; freedom to seek asylum; freedom of thought, conscience and religion; freedom of opinion and expression; freedom of peaceful assembly and association; and participation in political and public affairs; and being entitled to legal equality and non-discrimination, and

¹¹ See annex, para. 47 (a); and opinion No. 39/2018, para. 35.

¹² Opinions No. 35/2018, para. 27; No. 83/2018, para. 47; No. 32/2019, para. 30; No. 33/2019, para. 50; No. 44/2019, para. 54; No. 45/2019, para. 53; No. 59/2019, para. 51; and No. 65/2019, para. 64.

¹³ See annex, paras. 12–15 and 67–71.

protection of persons belonging to ethnic, religious or linguistic minorities, are among the most fundamental human rights, deriving from the inherent dignity of the human person, reaffirmed and ensured by the international community in articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights.

47. The source alleges, and the Government does not refute, that Ms. He founded “Vaccine Baby Home” with other parents whose children had developed disabilities after receiving defective vaccines. The group demanded accountability, public information about vaccine safety, compensation, medical assistance and legislative action. The Working Group notes that the authorities responded to the protests of the group in Beijing with harassment, detention and forced removal to Xinxiang. Ms. He’s case therefore prima facie constitutes violations of freedom of thought, freedom of expression, freedom of association and assembly, and freedom to take part in the conduct of public affairs.

48. Although freedom of opinion and expression is not without limitation, article 29 (2) of the Universal Declaration of Human Rights provides that the only legitimate limitations to the exercise of one’s rights and freedoms must be for the purposes of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

49. In the Working Group’s view, the principle of necessity and proportionality that inheres in freedom of opinion and expression does so equally in other fundamental human rights. The Working Group, in its deliberation No. 9,¹⁴ confirmed that the notion of “arbitrary” includes both the requirement that a particular form of deprivation of liberty is taken in accordance with the applicable law and procedure and that it is proportional to the aim sought, reasonable and necessary. In its jurisprudence, with regard to the application of the principle of proportionality, the Working Group has applied the four-pronged test of: (a) whether the objective of the measure is sufficiently important to justify the limitation of a protected right; (b) whether the measure is rationally connected to the objective; (c) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and (d) whether, balancing the severity of the measure’s effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.¹⁵

50. In view of the standard described above, the Working Group finds that the situation in the present case falls short of such requirement. Given the Government’s failure to produce evidence, other than a vague accusation of “picking quarrels and provoking trouble”, to reasonably implicate Ms. He in specific violent or criminal acts that pose threats to the rights and freedoms of others, morality, public order and the general welfare, the Working Group finds no legitimate aim or objective to justify her deprivation of liberty for her exercise of freedom to think, freedom to impart information and ideas, freedom to peacefully assemble and associate, and freedom to take part in the conduct of public affairs.

51. Moreover, as the Working Group has previously stated, 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.¹⁶ In the present case, the application of vague and overly broad provisions adds weight to the Working Group’s conclusion that Ms. He’s deprivation of liberty falls within category II. Moreover, the Working Group considers that, in some circumstances, laws may be so vague and overly broad that it is impossible to invoke a legal basis justifying the deprivation of liberty.

52. The Working Group also notes that in accordance with the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, adopted by the General Assembly in its resolution 53/144, everyone has the right, individually and in association with others: to promote and to strive for the protection and realization of human rights

¹⁴ A/HRC/22/44, sect. III.

¹⁵ Opinions No. 54/2015, para. 89; No. 41/2017, para. 86; No. 56/2017, para. 51; No. 58/2017, para. 48; No. 76/2017, para. 68; No. 82/2018, para. 38; and No. 87/2018, para. 64.

¹⁶ See, for example, opinion No. 41/2017, paras. 98–101. See also opinion No. 62/2018, paras. 57–59; and Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, para. 22.

(art. 1), to meet or assemble peacefully (art. 5 (a)), to form, join and participate in non-governmental organizations (art. 5 (b)), to draw public attention to the observance of human rights (art. 5 (c)), to participate in the conduct of public affairs (art. 8 (1)), to draw attention to governmental work that may hinder the promotion, protection and realization of human rights (art. 8 (2)) and to offer assistance in defending human rights (art. 9 (3) (c)).

53. The Working Group therefore finds that Ms. He's deprivation of liberty is arbitrary, falling within category II, as it violates articles 19, 20 (1) and 21 (1) of the Universal Declaration of Human Rights.

Category III

54. Given its finding that Ms. He's deprivation of liberty is arbitrary under category II, the Working Group wishes to emphasize that in such circumstances no trial should take place. However, as the investigative and judicial process has taken place, the Working Group will now consider whether the alleged violations of the right to a fair trial and due process were grave enough to give her deprivation of liberty an arbitrary character, so that it falls within category III.

55. The Working Group notes that Ms. He was deprived of access to legal counsel of her choice for three and a half months, from the start of her criminal detention by the Huixian City People's Security Bureau on 20 March 2019 to a few days after the transfer of her case to the Huixian City People's Procuratorate on 5 July 2019, on the basis of article 39 of the Criminal Procedure Law.

56. Article 39 of the Criminal Procedure Law stipulates that during the investigation period for crimes endangering State security, involving terrorist activities or involving a significant level of bribes, defence lawyers shall obtain the approval of investigating organs before they meet with the criminal suspects. The investigating organs must inform the detention houses of information relating to the aforesaid cases in advance.

57. In the Working Group's view, the authorities failed to respect Ms. He's right to legal assistance at all times, which is inherent in the right to liberty and security of person, as well as the right to a fair and public hearing by a competent, independent and impartial tribunal established by law, in accordance with articles 3, 9, 10 and 11 (1) of the Universal Declaration of Human Rights. The Working Group considers that this violation substantially undermined and compromised her capacity to defend herself in any subsequent judicial proceedings.

58. As the Working Group has stated in principle 9 and guideline 8 of its Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, persons deprived of their liberty have the right to legal assistance by counsel of their choice, at any time during their detention, including immediately after the moment of apprehension, and must be promptly informed of this right upon apprehension; nor should access to legal counsel be unlawfully or unreasonably restricted.¹⁷ The Working Group therefore finds violation in the present case of articles 10 and 11 (1) of the Universal Declaration of Human Rights as well as of principles 15, 17 and 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

59. The Working Group further notes the denial of Ms. He's due process right to be visited by her family and to be given adequate opportunity to correspond with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations, outlined in principles 15 and 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and in rules 43 (3) and 58 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).¹⁸

60. The Working Group will now elaborate on the propriety of detention under article 293 of the Criminal Law in view of the principle of legality and its effect on the right to a fair trial and other freedoms in the present case.

¹⁷ See annex, paras. 12–15 and 67–71.

¹⁸ Opinions No. 35/2018, para. 39; No. 44/2019, paras. 74–75; and No. 45/2019, para. 76.

Article 293 of the Criminal Law defines “picking quarrels and provoking trouble” as follows:

Whoever disrupts the social order by committing any of the following provocative and disturbing acts shall be sentenced to imprisonment of not more than five years, criminal detention or surveillance:

- (a) Assaulting any other person at will, with execrable circumstances;
- (b) Chasing, intercepting, reviling or intimidating any other person, with execrable circumstances;
- (c) Taking or demanding forcibly or vandalizing or occupying at will public or private property, with serious circumstances; or
- (d) Making trouble in a public place, which causes a serious disorder in the public place.

61. The Working Group finds that such vaguely and broadly worded provisions as “making trouble in a public place” or “causing a serious disorder in the public place”, which cannot qualify as *lex certa*, violate the due process of law and the principle of legality underpinned in article 11 (2) of the Universal Declaration of Human Rights. As the Working Group has previously stated, 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.¹⁹

62. The Working Group further concludes that Ms. He’s pretrial detention of 10 months in prison without an individualized judicial determination has undermined the presumption of innocence guaranteed in article 11 (1) of the Universal Declaration of Human Rights as well as in principle 36 (1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

63. The Working Group further expresses its particular concern that the authorities attempted to compel Ms. He to confess guilt in return for her release, and that her family was pressured into signing a statement pledging that she would not engage in “illegal petitioning” with a promise that this would facilitate her release on bail. The Working Group reiterates that the right not to incriminate oneself is a fundamental fair trial right and a minimum guarantee for the purpose of articles 10 and 11 (1) of the Universal Declaration of Human Rights.

64. In view of the above, the Working Group concludes that the violations of the right to a fair trial and due process are of such gravity as to give Ms. He’s deprivation of liberty an arbitrary character that falls within category III.

Category V

65. The Working Group will now examine whether Ms. He’s deprivation of liberty constitutes discrimination under international law for the purpose of category V.

66. The Working Group notes that Ms. He has been a human rights defender advocating for regulation of the administering of vaccines, public information about vaccine safety and compensation for the victims of defective vaccines. The organization that she founded, “Vaccine Baby Home”, has held online and offline demonstrations to change the Government’s policy.

67. The Working Group also notes that Ms. He’s political views and convictions are at the centre of the present case, and that the authorities have displayed an attitude towards her that can only be characterized as discriminatory. Ms. He has been the target of persecution, and there is no explanation for this other than her exercise of the right to express such views and convictions.

68. For these reasons, the Working Group considers that Ms. He’s deprivation of liberty constitutes a violation of articles 2 and 7 of the Universal Declaration of Human Rights on the grounds of discrimination based on political or other opinion, as well as on her status as

¹⁹ Opinions No. 62/2018, para. 57; and No. 42/2019, para. 60.

a human rights defender, aimed at and resulting in ignoring the equality of human beings. Her deprivation of liberty therefore falls under category V.

69. In its 29-year history, the Working Group has found China in violation of its international human rights obligations in about 100 cases.²⁰ 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.²¹

70. Lastly, 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

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

The deprivation of liberty of He Fangmei, being in contravention of articles 2, 3, 7, 9, 10, 11 (1), 19, 20 (1) and 21 (1) of the Universal Declaration of Human Rights, is arbitrary and falls within categories I, II, III and V.

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

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

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

75. The Working Group recommends that the Government ratify or accede to the International Covenant on Civil and Political Rights and its Optional Protocols.

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

²⁰ 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, No. 35/2019, No. 36/2019, No. 72/2019 and No. 76/2019.

²¹ A/HRC/13/42, para. 30; and 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; No. 60/2012, para. 21; No. 9/2013, para. 40; No. 34/2013, paras. 31, 33 and 35; No. 35/2013, paras. 33, 35 and 37; No. 36/2013, paras. 32, 34 and 36; No. 48/2013, para. 14; No. 22/2014, para. 25; No. 27/2014, para. 32; No. 35/2014, para. 19; No. 34/2014, para. 34; No. 36/2014, para. 21; No. 44/2016, para. 37; No. 60/2016, para. 27; No. 32/2017, para. 40; No. 33/2017, para. 102; No. 36/2017, para. 110; No. 51/2017, para. 57; and No. 56/2017, para. 72.

Follow-up procedure

77. 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 compensation or other reparations have been made to Ms. He;
- (b) Whether an investigation has been conducted into the violation of Ms. He's rights and, if so, the outcome of the investigation;
- (c) 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;
- (d) Whether any other action has been taken to implement the present opinion.

78. 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.

79. 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.

80. 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.²²

[Adopted on 1 May 2020]

²² Human Rights Council resolution 42/22, paras. 3 and 7.