Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the right to education; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

Ref.: OL CHN 5/2024
(Please use this reference in your reply)

22 March 2024

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the right to education; Special Rapporteur on the rights to freedom of peaceful assembly and of association; Special Rapporteur on the situation of human rights defenders; Special Rapporteur on the independence of judges and lawyers and Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, pursuant to Human Rights Council resolutions 52/9, 53/7, 50/17, 52/4, 53/12 and 49/10.

We offer the following comments on the Safeguarding National Security Ordinance, under article 23 of the Basic Law of the Hong Kong Special Administrative Region (HKSAR) of the People's Republic of China, introduced by the gazette on 8 March 2024 and adopted by the Hong Kong Special Administrative Region's Legislative Council on 19 March 2024.

It is our expert opinion that the Ordinance includes numerous measures that would significantly and unduly limit the exercise of human rights and fundamental freedoms and would be incompatible with the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These include freedoms of opinion and expression (article 19 of the ICCPR), peaceful assembly and association (articles 21 and 22 of the ICCPR), freedom from arbitrary detention (article 9 of the ICCPR), the right to a fair trial (article 14 of the ICCPR), freedom of movement (article 12 of the ICCPR), the right to privacy (article 17 of the ICCPR), and the right to take part in the conduct of participation in public affairs (article 25 of the ICCPR) and the right to academic freedom. Several provisions of the Ordinance have extra-territorial effect with impact on Hong Kong residents, activists and human rights defenders in exile.

The Ordinance follows the adoption on 1 July 2020 by the National People's Congress Standing Committee ('NPCSC') of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region ('the HK National Security Law'). We are disappointed that in the drafting of this Ordinance, the HKSAR authorities seem to have ignored our previous recommendations regarding the compatibility of the national security legislation in Hong Kong SAR with international human rights standards.

Specifically, we note that the Ordinance lacks precision in key respects and may as a result infringe numerous human rights. We recommend that a full review and reconsideration of the Ordinance is carried out to ensure that it complies with

international human rights norms and standards which are binding on the Hong Kong SAR.

The national security legislation related to the Hong Kong SAR was the subject of previous communications sent by Special Procedures, including but not limited to AL CHN 2/2024, JOL CHN 16/2023, OL CHN 2/2023, JAL CHN 1/2023, OL CHN 3/2022 and JOL CHN 7/2020, and was considered by the UN Human Rights Committee following the fourth periodic report of the Hong Kong SAR, China, in 2022. In this respect, we remind your Excellency's Government that in 2022, the UN Human Rights Committee recommended Hong Kong SAR, China, to "take concrete steps to repeal the current National Security Law and, in the meantime, refrain from applying it".[1] We also note the references to the impact and application of the national security legislation in the 2023, 2022 and 2021 reports[2] of the Secretary-General on intimidation and reprisals for cooperation with the United Nations, its representatives and mechanisms in the field of human rights.

I. Background: Safeguarding National Security Ordinance

In contrast to the Hong Kong SAR National Security Law, the Ordinance was passed through the legislative procedures of the Hong Kong SAR rather than the NPCSC in Beijing. Article 23 of the Basic Law instructs the HKSAR authorities to: "…enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organisations or bodies from conducting political activities in the Region, and to prohibit political organisations or bodies of the Region from establishing ties with foreign political organisations or bodies." It is in this context that a bill was tabled on 8 March 2024 in the Hong Kong SAR's Legislative Council.

The Ordinance amends existing legislation or creates new criminal offences in relation to acts of **treason** (part 2 clause 10-12), **secession** (part 1 clause 7), **sedition** (part 9 – division 17 - clause 147), **subversion** (part 1 clause 7), **insurrection, incitement to mutiny and disaffection** (part 3), or the offence of "revealing **state secrets**" (part 4 – division 1), with sanctions that go up to life imprisonment. Organisations engaging in activities endangering national security are subject to separate sanctions. A new offence related to "sabotage endangering national security" (part 5) carries a penalty of imprisonment for up to 20 years. Another new offence, "external interference in activities endangering national Security" (part 6 – division 1), seeks to restrict acts of collaborating with "external force". This carries a potential prison sentence of up to 14 years.

II. Applicable International Human Rights Law

We would like to reiterate the obligation of your Excellency's Government to respect and protect individual rights guaranteed under the UDHR, the ICCPR and the ICESCR. Both Covenants are applicable to the HKSAR pursuant to Section XI of Annex I to the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong and article 39 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China. In addition,

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1 CCPR /C/CHN-HKG/CO/4, para. 14 (27 July 2022), available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FCHN-HKG %2FCO%2F4&Lang=en.

2 A/HRC/54/61, Annex I, paras. 22-32; A/HRC/51/47, Annex I, paras. 31-33; A/HRC/48/20, Annex I, paras. 20-24.

provisions of the Universal Declaration of Human Rights reflect customary international law that are binding on all Member States, including China.

We recall that under article 2 of the ICCPR and of the ICECSR, the HKSAR is under a duty to ensure that individuals under its jurisdiction enjoy the rights in the Covenant, free from any discrimination or distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Similarly, article 7 of the UDHR guarantees that "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination".

The right to a fair trial is protected in the UDHR and the ICCPR. Article 14 of ICCPR stipulates that: "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". This article also provides a set of procedural guarantees that must be made available to persons charged with a criminal offence, including the right of accused persons to have access to, and communicate with, a counsel of their own choosing. Article 10 of the Universal Declaration on Human Rights also recognises that everyone has the right to a fair and public hearing by an independent and impartial tribunal. The guarantees of fair trial may never be circumvented through reference to national security concerns.

The right to freedom of opinion, enshrined in article 19(1) of the ICCPR is absolute, permitting no restriction. The right to freedom of expression in article 19(2) of the ICCPR is broad and protects the freedom of expression and access to information. Any restriction to the right to freedom of expression must be made in accordance with the requirements of articles 19(3) of the ICCPR. Restrictions must pursue a legitimate aim, be provided by law, and be necessary and proportionate. The right to freedom of opinion and expression is also guaranteed under the UDHR (article 19).

The rights to freedom of peaceful assembly (article 21 of the ICCPR) and to freedom of association (article 22) are also broad. In its resolution 24/5, the Human Rights Council reminded States of their obligation to respect and fully protect the rights of all individuals to assemble peacefully and associate freely, online as well as offline, including for individuals espousing minority or dissenting views or beliefs and human rights defenders (A/HRC/26/29, para. 22.). We also recall that article 22 of the ICCPR protects the right to freedom of association, under which everyone has the right to associate with others and pursue common interests. We also recall that the ability of associations to access financial resources constitutes a vital part of the right to freedom of association (A/HRC/23/39). Freedom of association and of peaceful assembly are closely linked to the right to freedom of expression and are critical means for individuals and groups of individuals to participate in public affairs (A/68/299 para. 6). We would like to remind your Excellency's Government that any restrictions of the rights to peaceful assembly and to association need to fulfil the requirements of legitimacy, legality, necessity and proportionality. These rights are also protected under article 20 of the UDHR.

Article 25 of the ICCPR protects the right of every citizen to take part in the conduct of public affairs, directly or through freely chosen representatives. The right to participation in political affairs is protected in numerous other human rights treaties, including the Convention on the Elimination of All Forms of Discrimination

against Women (article 7).

The ICESCR also recognises the right of everyone to education in its article 13. According to the Committee on Economic, Social and Cultural Rights, the right to education can only be enjoyed if accompanied by the academic freedom of staff and students. This means, notably, that members of the academic community, individually or collectively, are free to pursue, develop and transmit knowledge and ideas through research, teaching, study, discussion, documentation, production, creation or writing. (General comment 13, paras. 38-9).

Additionally, we refer your Excellency's Government to the fundamental principles set forth in 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, also known as the United Nations Declaration on Human Rights Defenders. In particular, article 2 of the Declaration reaffirms each State's responsibility and duty to protect, promote and implement all human rights and fundamental freedoms, including every person's right, individually and in association with others, "at the national and international levels [...] to form, join and participate in non-governmental organisations, associations or groups" (article 5(b)); "(…) individually and in association with others, to unhindered access to and communication with international bodies with general or special competence to receive and consider communications on matters of human rights and fundamental freedoms" (article 9.4.); and "to solicit, receive and utilise resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means" (article 13).

III. Compatibility of the Ordinance with International Law

We welcome the commitment in clauses 2(b) and 2(c)(i)-(iv) of the Ordinance to respect the rights and freedoms under the Basic Law, the ICCPR, and the International Covenant on Economic, Social and Cultural Rights.[3] We also recall that article 39 of the Basic Law of the Hong Kong SAR itself holds that "The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region. The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this article".

Nonetheless the constitutional and legal framework of the Hong Kong SAR seems to fail to give effect to the primacy of international human rights law. In particular, we recall the observation of the Human Rights Committee following the fourth periodic report of the Hong Kong SAR that the Hong Kong SAR National Security Law 'prevails over other local laws in case of conflicts and consequently overrides fundamental rights and freedoms protected by the Covenant.'[4] This is

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[3] Article 4 of the existing National Security Law also states that: "Human rights shall be respected and protected in safeguarding national security in the Hong Kong Special Administrative Region [...] including the freedoms of speech, of the press, of publication, of association, of assembly, of procession and of demonstration".

[4] CCPR/C/CHN-HKG/CO/4, [4].

despite that law explicitly purporting to safeguard human rights.[5] It is anticipated that the Ordinance would likewise be interpreted and applied to so as to override international human rights law in the event of inconsistency. In addition to the observations in relation to the Ordinance itself, therefore, we urge your Excellency's Government urgently to take steps to guarantee that its human rights obligations are not only respected in its legislative measures but also that adequate constitutional protections are enacted to ensure that human rights protections contained in such legislation are not capable of being supervened by the national security legislation.

IV. Definitions in the Ordinance

Definition of 'national security'

We note that clause 4 defines national security as 'the status in which the state's political regime, sovereignty, unity and territorial integrity, the welfare of the people, sustainable economic and social development, and other major interests of the state are relatively free from danger and internal or external threats, and the capability to maintain a sustained status of security.' Cross-references are then made to the concept of 'national security' throughout the remainder of the Ordinance.'[6] We note that the United Nations Human Rights Committee has previously criticised the vagueness of the definition of 'national security' in the Hong Kong SAR National Security Law.[7]

We consider that the definition in the Ordinance is also inadequate in its reliance upon vague and inherently contestable concepts such as 'the welfare of the people' and 'sustainable economic and social development.' These concepts may reasonably mean different things to different individuals and groups, such that legitimate disagreement with respect to, say, whether a particular set of changes in social customs represent a beneficial step in social development or, on the contrary, a threat to human welfare, may be capable of characterisation as either supportive of, or threatening to, national security. Where fundamental concepts in legislation are capable of a wide range of differing interpretations, this fails to comply with the principle of legal certainty under article 15(1) of the ICCPR, which requires that criminal laws are sufficiently precise so that it is clear what types of behaviour and conduct constitute a crime. In light of the fact that criminal charges, detention, imprisonment and special powers and procedures are connected to the definitions in the Ordinance, we further refer to your Excellency's Government's human rights obligations related to judicial guarantees and deprivation of liberty under articles 6, 7, 8, 9, 10, and 11 of the UDHR and articles 9, 10, 14, and 15 of the ICCPR.

The vagueness of domestic legislation relating to national security and counter-terrorism has been a frequent concern of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism[8] and a consistent subject of criticism of governments worldwide

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5 Article 4 of the existing National Security Law also states that: "Human rights shall be respected and protected in safeguarding national security in the Hong Kong Special Administrative Region [...] including the freedoms of speech, of the press, of publication, of association, of assembly, of procession and of demonstration".

6 See, for instance: Bill, clauses 35, 47-48, 97-105, and 107-110.

7 CCPR/C/CHN-HKG/CO/4, [13(a)].

8 See, for instance: A/HRC/31/65, [21], [24], and [27]; A/HRC/37/52, [33], [36], and [66]; A/HRC/40/52, [34]-[35]; and A/70/371, [46].

in the decisions of regional human rights courts.[9] The extension of national security legislation to conduct which ought not properly to fall within the definition is to be avoided given that overbroad definitions necessarily entail risks of arbitrary and discriminatory enforcement, particular in respect of communities which constitute a minority along the lines of political, religious, gender, or other affiliation. Relatedly, respect for the law is built upon the community's understanding that it is necessary and that the sanctions it imposes are subject to proper limits. Once communities – particularly communities who are, or perceive themselves to be, disproportionately the target of focus by authorities – call into question the legitimacy of those national security measures, respect for, and compliance with, the law may be jeopardised. Given that effective policing in the field of national security and counter-terrorism (as in all spheres) depends upon community engagement, intelligence, and cooperation, any measures which undermine community respect and engagement risk becoming counter-productive.

Definition of 'colluding with external force'

Clause 5 of the Ordinance defines the concept of 'colluding with external force' and other provisions of the Ordinance cross-refer to it.[10] We consider that this definition requires reconsideration so as to avoid its potential application outside the proper context of legitimate threats to national security. We note that, while various substantive offences in the Ordinance which incorporate the concept of collusion do properly specify the mental element required for the offence to be made out, the definition of collusion in clause 5 does not itself specify the mental element (if any) required to make out the circumstance of collusion itself. As an example, clause 35(2) creates an offence which requires the elements of: (i) collusion with an external force; (ii) intent to endanger national security; (iii) disclosure of certain information without lawful authority; and (iv) non-application of the defence (set out in clause 35(3)) of reasonable grounds to believe that the information was of the relevant type. Proof of that offence requires proof of collusion but does not stipulate whether collusion requires intent or recklessness, or whether it operates by way of strict liability. The Hong Kong SAR is required, in compliance with the principle of legal certainty, to specify precisely the conditions (including the required mental element) upon which a person may become liable for criminal punishment.

Article 6 of the Ordinance defines "external force" to refer to: "(a) a government of a foreign country; (b) the authority of a region or place of an external place; (c) a political party in an external place; (d) any other organisation in an external place that pursues political ends; (e) an international organisation; (f) a related entity of a government, authority, political party or organisation mentioned in paragraph (a), (b), (c), (d) or (e); or (g) a related individual of a government, authority, political party, organisation or entity mentioned in paragraph (a), (b), (c), (d), (e) or (f)." This definition fails to provide the necessary degree of specificity to ensure that individuals are aware of the scope of the law and are able to regulate their actions accordingly. For example, clause 6(d) refers to 'any other organisation in an external place that pursues political ends' which clause 6(e) refers to 'an international organisation.' Neither 'political ends' nor 'international organisation' are defined, which is inadequate in circumstances where those terms are broad, vague, and capable of reasonably disagreement.

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9 See, for instance: *Big Brother Watch v United Kingdom* [2021] ECHR 439 and *OOO Flavus and ors v Russian Federation* [2020] ECHR 463.

10 Bill, clauses 18, 19, 20, 23, 35, 41, and 47.

The Ordinance appears to extend liability for external collusion to cooperation not only with legitimate non-governmental organisations but also with the United Nations, its human rights mechanisms, despite the fact that the People's Republic of China is a Member State of the United Nations and actively engages with its human rights bodies and mechanisms, including its decision-making processes. The definition may also apply to research collaboration and academic exchange with universities located abroad.

We note that several United Nations human rights mechanisms[11] have requested clarifications from the Government specifically on whether those cooperating with the United Nations would face criminal liability under the Hong Kong SAR National Security Law (see also CHN 1/2023 and the Government reply thereto). We recall that during the review of HKSAR before the Human Rights Committee in 2022, Committee Experts raised concerns and asked several times if NGOs engagement with the Committee and other UN mechanisms may be interpreted as "collusion with external forces" as enshrined in the National Security Law. The Committee also explicitly sought assurances against any form of intimidation and reprisals for cooperation with the Committee (CCPR/C/SR.3891, para. 14; CCPR/C/SR.3893 para. 11).

Clause 6 of the Ordinance, therefore, creates legal uncertainty and could affect cooperation with the United Nations, including its Special Procedures, contrary to the international obligations and practice of the People's Republic of China. Again, in circumstances where the element of external collusion meaningfully increases a person's liability to punishment pursuant to the Ordinance, it behoves the Hong Kong SAR to avoid the use of general language, which may undermine cooperation with the United Nations, its human rights mechanisms and bodies.

V. Offences in the Ordinance

The offences in the Ordinance may impinge impermissibly on the principle of legality (under article 15 of the ICCPR) and consequently on freedom from arbitrary detention (article 9 of the ICCPR), as well as on the rights to freedom of opinion, expression, peaceful assembly, association and participation in public affairs as protected under international human rights law, including the UDHR and the ICCPR.

The "principle of legal certainty" under article 15(1) of the ICCPR requires that criminal laws must be sufficiently precise so that it is clear what types of behaviour and conduct constitute a criminal offence and what would be the legal consequences of committing such an offence. Compliance with the principle of legality is essential to prevent the possibility that the law may be arbitrarily applied. In a report A/70/371, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has called on States to ensure that their counter-terrorism and national security legislation is sufficiently precise in order to comply with the principle of legal certainty, so as to prevent the possibility that it may be used to target civil society on political or other unjustified grounds (para. 46).

[11] E/C.12/2023/SR.5 paras. 15 and 25; E/C.12/2023/SR.7 para. 78.

Similarly, we recall that the principle of legality under article 19(3) of the ICCPR requires that "a norm, to be characterised as a "law", must be formulated with sufficient precision and intelligibility to enable an individual to regulate his or her conduct accordingly[12] and it must be made accessible to the public. It must not confer unfettered discretion for the restriction of freedom of expression on those charged with the law's execution.[13] Legitimate restrictions on freedom of expression (but not freedom of opinion) may only be imposed for the purposes of respect of the rights or reputations of others, the protection of national security, public order, or public health or morals, and conform to the strict tests of necessity and proportionality.[14] In terms of proportionality, criminal offences must not be misused against individuals exercising their rights to freedom of expression, should 'target a specific objective and not unduly intrude upon the rights of targeted person'.[15] The application of criminal law to the exercise of the right to freedom of expression should be limited to the most grave situations provided for under articles 19(3) and 20 of the ICCPR. The State has the burden of proof to demonstrate that any such restrictions are compatible with the ICCPR. When this requirement is not fulfilled, the excessively broad language makes the law amenable to abuse or arbitrary application.

We further recall that articles 9, 10, and 11 of the UDHR stipulate that all individuals have the right to be free from arbitrary arrest, are entitled to a fair and public hearing by an independent and impartial tribunal and should be presumed innocent until proven guilty at a trial with all the guarantees necessary for his or her defense. Similarly, article 9 (1) of the ICCPR establishes that no one shall be deprived of his or her liberty except on such grounds and in accordance with such procedure as established by law. Article 9(2) and (3) specify that anyone arrested shall be informed, at the time of the arrest, of the reasons for such arrest and be brought promptly before a judge for the purpose of legal assessment and challenge of the detention. We would like to stress that detention can be considered arbitrary when based on vague or imprecise legislation, on discriminatory grounds, or when it is imposed without a legal process or through one that is in clear violation of international fair trial standards (Human Rights Committee, general comment no. 35, para 66).

Offence of 'external interference'

The offence of "external interference" (clause 50) is committed by an individual who collaborates with an external force to do an act, with intent to bring about an "interference effect" and uses "improper means" when doing the act. An "interference effect" is defined as "influencing" the HKSAR authorities in relation to policies or decisions (clause 51). "Collaborating with external force" includes situation where a person merely "participates in an activity planned or otherwise led by an external force", acts on behalf of, cooperates with, is controlled by, or is financially or otherwise supported by an external force (clause 52). Article 55 of the Ordinance provides for the extraterritorial effect of this offence.

The offence set a low threshold due to a combination of the over-broad and vague definition of "national security", no requirement that any physical harm be caused or intended, the requirement to merely "influence" the HKSAR authorities, and the incrimination of potentially innocent associations with legitimate "external

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12 *De Groot v The Netherlands*, CCPR/C/54/D/578/1994 (1995).
13 CCPR/C/GC/34, [25], citing CCPR/C/21/Rev.1/Add.9, [13].
14 CCPR/C/GC/34, [22].
15 A/HRC/29/32, [35].

forces", including ordinary advocacy and lobbying activities in democratic society. This offence goes beyond the limited grounds for restrictions on freedom of expression (national security, public order, or public health or morals) under international human rights law. Lobbying public authorities through peaceful means to influence their policies and decisions is a vital manifestation of civil and political rights under international human rights law. As mentioned earlier, the offence extends to cooperation with the United Nations, its human rights mechanisms and bodies, thus potentially limiting the rights to freedom of expression, peaceful assembly and association in a manner that would be inconsistent with the international standards highlighted above as well as with the resolutions of the Human Rights Council and other organs.

In light of the typification of the offence of "external interference" in the ordinance, it would appear that civil society actors and organizations engaging with the United Nations would be at risk of criminal liability under this ordinance for this cooperation. As noted above, international organizations are listed as "external force." Hence, when civil society actors participate in United Nations activities or processes, co-organize activities or receive United Nations funding, according to the ordinance, may fall under "collaboration with an external force" (clause 52). Likewise, other typical forms of engagement with the organization, such as participation in United Nations fora, meetings, events and related human rights advocacy targeting the authorities, legislative bodies or the judiciary risks being interpreted as falling under "bringing about interference effect" (clause 51) and "using improper means" if, for instance, human rights related advocacy is perceived to damage a person's reputation or to misrepresent information.

The broad categories of speech-based offenses in the proposed legislation, particularly when considered in combination with the broad definition contained in the Hong Kong SAR's National Security Law, on which several communications were already sent to your Excellency's Government, may unnecessarily and disproportionately limit the exercise of the freedom of expression, including the work of journalists, civil society actors, human rights defenders and anyone seeking to exercise her/his rights and freedoms. Media plays a crucial role in society by informing the public on issues of public interest, while civil society can make valuable inputs and recommendations to State entities on a number of policy areas, including economic, cultural and social rights.

Expression-related offences

[16] Affirming the finding in relation to sedition of the Hong Kong Court of Appeal in *HKSAR v Tam Tak Chi* (CACC 62/2022) ("Tam Tak Chi case").

In addition to the observations raised above, the Ordinance also criminalises a number of information or expression-related offences, including inciting public officials to disaffection, namely to abandon upholding the Basic Law and allegiance to the HKSAR (clauses 19 and 20); possessing documents the distribution of which would constitute such incitement (clause 21); importing or possessing documents which display seditious intentions (clauses 23(1)(c) and 23(3)); state secrets (part 4, division 1); and espionage (clause 41). These offences all entail information and the promulgation of information which challenge, and encourage challenges to, political and national allegiance. They may be committed without any requirement of an intent to incite public disorder or violence (see clause 24[16]), incite violence, or otherwise harm persons within the Hong Kong SAR.

These over-broad offences fail to provide sufficient safeguards or exceptions for the legitimate activities of individuals, associations, and non-government organisations protected under international law. With regard to the offenses which engage criticism of, and disobedience to, established political and governmental institutions, the Human Rights Committee has recommended that States parties exert "extreme care […] to ensure that treason laws and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise, are crafted and applied in a manner that conforms to the strict requirements of paragraph 3 [of article 19 of the ICCPR]. It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information".

Concerning the vague offences of **inciting officials to abandon their duties or change their allegiance** (clauses 19-21), it is well-settled that the right to freedom of expression 'includes political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse.'[17] It includes speech that offends, shocks, and disturbs.[18] The importance of freedom of expression in the context of politics and government has been repeatedly emphasized. The Human Rights Committee, in its general comment *25*, explained the importance of freedom of expression for the conduct of public affairs and the effective exercise of the right to vote.[19] Freedom of expression is recognized in human rights law as particularly important, since it provides the mechanism by which other rights, such as participation in public affairs, may be exercised.[20] As the Human Rights Committee put it in its general comment 34, '[f]reedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society … Freedom of expression is a necessary condition for the realisation of the principle of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.'[21] We note that the offences created by clauses 19, 20, 21, and 23 may all arise in the context of persons engaging in political

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16 Affirming the finding in relation to sedition of the Hong Kong Court of Appeal in *HKSAR v Tam Tak Chi* (CACC 62/2022) ("Tam Tak Chi case").

17 CCPR/C/GC/34, [11].

18 *Ross v Canada*, CCPR/C/70/D/736/1997 (2000).

19 CCPR/C/21/Rev.1/Add.7, [25].

20 *Gauthier v Canada*, CCPR/C/65/D/633/1995, [13.4]; and *Aduayom, Diasso, and Dabou v Togo*, CCPR/C/57/D/422-4/1990, [7.4].

21 CCPR/C/GC/34, [2].

debate and persuasion of other citizens and government officers: it is in that context of political debate, disagreement, and persuasion that the legitimacy of the restrictions which the offences impose fall to be considered.

In relation to the principle of legality, the Ordinance displays lack of clarity in relation to basic concepts involved in these offences, such as what constitutes 'abandonment' by an official of their duties or allegiance, and what is sufficient to bring persons into 'hatred', 'contempt' or 'disaffection against' their governments for the purposes of **sedition** (clause 22). These undefined concepts seem to raise very real risks of discretionary misuse and arbitrary application against individuals with whom officials disagree on political matters. In this regard, we recall the concerns of the Human Rights Committee with respect to the use of sedition charges in the Hong Kong SAR, China, in 2020 against 'academics, journalists and representatives of civil society … for having legitimately exercised their right to freedom of speech by, for example, chanting slogans in public, clapping in courts and expressing criticism of government activities.'[22] The potential for misuse of broadly-defined principles used in national security legislation has been long recognized internationally – we would remind your Excellency's Government that, in its resolutions, the Human Rights Council has noted its grave concern that 'in some instances, national security and counter-terrorism legislation and other measures … have been misused to target human rights defenders or have hindered their work and endangered their safety in a manner contrary to international law.'[23]

Further, the **prohibition on the import and possession of documents that has a seditious intention** (clause 23) may violate freedom of expression enshrined under article 19(2) of the ICCPR. In the absence of a strict definition of the offense of "seditious", legitimate activities may be criminalized. Further, even accepting that measures may be enacted in pursuit of the legitimate aim of protecting national security, the offences relating to incitement of officials and possession of seditious documents do not appear to satisfy the tests of necessity and proportionality. With respect to necessity, it is crucial to draw the distinction between an unlawful threat to national security and legitimate challenges to governmental and political authority. Challenge and disagreement in the political and governmental sphere over not just individual policies but also the whole constitutional order of a country must be accepted as necessary elements of legitimate political discussion, argument, reform, and evolution in any society. Accordingly, offences which are broad and capable of being used to target political dissidents are not strictly necessary to address the separate objective of protecting national security. The antiquated concept of a seditious intention, originating in the colonial era of the British monarchy, for example, does not require the incitement of any violence or physical harm against the HKSAR but is concerned with suppressing expressions of disagreement with the governmental system.

Under clause 26 of the Ordinance authorities have the power to enter any premises, place or conveyance to "remove or obliterate" seditious publications and to "remove by reasonable force" anyone who obstructs the power. Given the over-breadth of the underlying concept of sedition, the power of entry would likely constitute an unlawful violation of the freedom from arbitrary or unlawful interference with privacy, the home and correspondence under article 17 of the ICCPR.

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22 CCPR/C/CHN-HKG/CO/4, [15].
23 A/HRC/RES/25/18; A/HRC/RES/27/31; A/HRC/RES/32/31; and A/HRC/RES/34/5.

The **offences of unlawful acquisition, possession or disclosure of state secrets** (part 4, division 1) raise further issues of incompatibility with international human rights law. The Ordinance defines a "state secret" inter alia as one concerning a "major policy decision", "economic or social development," "technological development or scientific technology", and "diplomatic or foreign affair activities". The HKSAR Chief Executive determines what constitutes a state secret. The offences can be committed either with an intention to endanger national security or with recklessness as to that result. The definition of state secrets, read in conjunction with the underlying definition of "national security", is so broad and vague that it could potentially encompass imparting information about ordinary matters of public interest in social, economic, political, scientific and foreign affairs, including matters which may already be public (such as media reports). Such over-reach may also have a chilling effect on civil society. In this context, the Global Principles on National Security and the Right to Information (Tshwane Principles) recommend that "it is not sufficient for a public authority simply to assert that there is a risk of harm; the authority is under a duty to provide specific, substantive reasons to support its assertions".

The **offence of espionage** (clause 41) applies to those who "with intent to endanger national security" obtain, collect, or possess information that is "directly or indirectly useful to an external force". Again, given that the vague underlying definition of "national security" is so wide, and "external force" is defined expansively to include legitimate social and political organisations, the offence of espionage is likely to capture legitimate expression which bears no plausible or reasonable relationship to any genuine national security threat, and invites abuse against civil society actors.

We stress that political expression is permissible speech under article 19 of the ICCPR. Limiting expression beyond the scope of article 19(3) of the ICCPR is not only a direct and undue restriction to the right to freedom of expression, but it is also likely to have broader negative implications on human rights, inter alia through its likely chilling effect on other individuals who wish to express themselves, demonstrate peacefully, engage with international human rights mechanisms and bodies, and participate in public and political life in or related to Hong Kong SAR.

Sabotage

Clause 47 establishes the offence of "sabotage" involving acts that "damage or weaken" public infrastructure with intent to endanger national security or at a substantially lower standard of recklessness. Public infrastructure is defined very broadly as any HKSAR items (in Hong Kong SAR or abroad), including infrastructure, facilities or equipment, networks or computers or electronic systems, office premises, or military or defence facilities or equipment; public transport; or public facilities providing public services. The offence may incriminate activities protected under international human rights law due to the broad and ill-defined scope of such infrastructure, the vague definition of "national security" examined earlier, and the lack of any requirements to physically harm infrastructure or to do so to any minimum level of gravity. To "weaken" infrastructure, it is sufficient, for example, that the act makes the infrastructure "vulnerable to abuse or damage" (without actual abuse or damage), to impair its functionality or operability.

Prohibited organisations and related offences

Clause 58 provides for the Secretary of Security to prohibit the operation or of an organisation if they reasonably believe that it is necessary for national security. It is an executive power and not one exercised by a court, the Ordinance itself does not provide for judicial review, and minimal due process protections apply. The Ordinance then establishes consequential offences in relation to prohibited organisations, including participation in them, hosting their meetings, inciting membership of them, or procuring subscription or aid for them (clauses 60-63), with heavy penalties. The power may apply to certain organisations established and organised in HKSAR as well as organisations outside HKSAR with certain connections to it. This proscription power and the related offences would unjustifiably infringe on freedoms of association, peaceful assembly, expression (including media), and political participation, due to the broad definition of "national security", the low threshold for executive proscription (reasonable belief), the lack of due process and judicial safeguards, and the heavy penalties involved.

VI. Powers and Procedures under the Ordinance

Arbitrary detention

As mentioned above, where detention is based on overly-broad offences which do not satisfy the principle of legality under article 15 of the ICCPR, or which otherwise impermissibly restrict other protected rights and freedoms, the resulting deprivation of liberty will be arbitrary under international law.[24]

Separately, clauses 71-75 of the Ordinance allow for the pre-charge detention of a person to be extended beyond the initial period of 48 hours by a magistrate for two further seven-day periods – a total of 16 days' detention without charge. We believe that this provision does not comply with the obligation under article 9(2) of the ICCPR to 'promptly' inform an arrested person of any charges against them, which necessarily implies that the charges themselves must be promptly laid or that otherwise, the person must be released. Protracted detention without charge is further likely to constitute arbitrary deprivation of liberty contrary to article 9(1) of the ICCPR. State practice indicates that only a short initial period of detention without charge after an arrest is permissible. The requirement to give notice of charges serves to facilitate the determination of whether the provisional detention is appropriate or not.[25]

We further observe that in establishing additional bail restrictions, such as movement restrictions (clause 81), where the underlying "national security" basis is vague and does not satisfy the principle of legality, the Ordinance may separately violate the right to liberty of movement under article 12 of the ICCPR.

Restrictions on lawyers

Restrictions in the Ordinance on consultation with lawyers appear to violate a significant number of international human rights norms and standards. Article 76 enables the Hong Kong Police Force to ban certain lawyers from representing clients on the basis that such legal representation would harm national security or hinder

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24 A/HRC/36/38.
25 CCPR/C/GC/35, para. 30.

police investigations. This broad ability, which apparently can be exercised without appeal, would allow the police to hinder individuals' access to a lawyer of their choosing on an entirely uncertain basis. Further, the spectre of being banned in this manner is likely to have a chilling effect on lawyers more generally, as they may wish to avoid the scrutiny and reputational harm that could accompany representation in national security cases.

When a magistrate so decides, an individual arrested for being reasonably suspected of having committed an offence endangering national security may be prevented from consulting with a lawyer. Article 77 of the Bill states that the same restriction "applies if a person is investigated for being reasonably suspected of having committed an offence endangering national security, regardless of whether the person has been arrested". Not only does this provision unduly restrict access to legal advice, it could also plausibly be used to remove attorney-client privilege, which would arguably dissolve if consultations are barred, rendering communications personal and thus discoverable in legal proceedings.

We stress that article 14(3) of the ICCPR lists, among the procedural guarantees available to persons charged with a criminal offence, the right to have adequate time and facilities to communicate freely with counsel of choice and to effectively prepare their defense (article 14(3)(b) and (d)). In its general comment no. 32 (2007), the Human Rights Committee explained that the right to communicate with counsel enshrined in article 14(3)(b) requires that the accused is granted prompt access to counsel. The right of access to counsel is also protected by the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the UN Basic Principles on the Role of Lawyers, and the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.

The broad scope of clauses 76-77 allows restrictions on access by individuals to a lawyer of their choosing, and to a lawyer at all, on an entirely uncertain basis, particularly given the over-broad and vague definition of 'national security' in the Ordinance. Further, the spectre of being banned in this manner is likely to have a chilling effect on lawyers more generally, as they may wish to avoid the scrutiny and reputational harm that could accompany representation in national security cases. Not only does this provision unduly restrict access to legal advice, it could also plausibly be used to remove attorney-client privilege, which would arguably dissolve if consultations are barred, rendering communications personal and thus discoverable in legal proceedings.

Further, article 86 gives the Secretary for Security the power to summarily suspend from an "absconder" (defined in part 7(2)) charged with a national security crime any professional qualification granted under a Hong Kong SAR ordinance (article 90). This authority could be used to deprive lawyers granted the right to practice their profession in Hong Kong SAR. The Ordinance thus negates the due process guarantees set out in the Legal Practitioners Ordinance.

Article 93 allows authorities to cancel HKSAR passports without due process. Article 16(b) of the Basic Principles on the Role of Lawyers makes clear that lawyers must have the freedom to undertake professional travel both domestically and internationally. This article thus poses a threat to Hong Kong lawyers' ability to exercise their profession free from undue interference.

In its general comment 32 (2007), the Human Rights Committee stressed that States must respect the guarantees contained in article 14, regardless of their legal traditions and their domestic law (para. 4). In this context, we recall that the right to a fair trial requires that a case be heard before an independent and impartial tribunal. Courts should be established by law, be independent of the executive and legislative branches of government and enjoy independence in deciding legal matters in proceedings that are judicial in nature.

Security clearance of judges

The Ordinance's provisions on the security clearance of judges are not consistent with the requirement of judicial independence under article 14(1) of the ICCPR. Clause 97 of the Ordinance requires cases concerning national security to be adjudicated by designated judges, with reference to article 44 of the National Security Law. Under article 44 of the National Security Law, Hong Kong's Chief Executive is the authority with the power to appoint judges to hear national security cases. Judges are designated as eligible to hear such cases by the Chief Executive for a period of one year and may be removed if they have made 'any statement or behaved in any manner endangering national security'. The list of designated judges is not public, allegedly due to security concerns. No judge who has not been specially designated by the Chief Executive may hear or determine national security cases. Article 97, by importing the judge-designation scheme set out in the National Security Law, allows for the interference of both the executive and the legislative branches in judicial matters.

Clause 97 allows for the interference of the executive and the legislative branches in the independence of the judiciary, on the basis of the over-broad and vague definition of 'national security' in the Ordinance. This is contrary to article 14(1) of the ICCPR, which requires tribunals to be independent of the executive and legislative branches of government and must enjoy independence in deciding legal matters in proceedings that are judicial in nature (Human Rights Committee, general comment no. 32, para. 18).

Extraterritorial application

In light of the observations above, numerous provisions of the Ordinance will have extraterritorial effect.

We recommend that the provisions on extraterritorial application of offences and other measures in the Ordinance be repealed, in the light of the numerous communications on security legislation regarding restrictions imposed on the pro-democracy movements from 2019, which our mandates have sent to your Excellency's Government in the past several years. It is our view that such provisions may aggravate risks of transnational repression against human rights defenders outside of Hong Kong SAR.

In relation to so-called "absconders", the Ordinance permits the HKSAR authorities to suspend qualifications to practice a profession (clause 90), suspend passports (clause 93), remove directors from office (clause 92), prohibit joint ventures or partnerships (clause 89), prohibit dealings with funds or immoveable property (clauses 87-88), and suspend permission or registration to carry on a business or employment (clause 91). Such measures may unjustifiably infringe on a range of

internationally protected human rights, including in relation to the right to work, privacy, and freedom of movement.

Sanctions

Concerning the penalty provided for in the Ordinance, we reiterate that international human rights law requires that sanctions must be both necessary and proportionate to the offences. The requirement of proportionality entails that restrictions must be "appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected". In this context, the severity of the punishments contained in the Ordinance may contribute to further self-censorship and may erode further an already devastated civic space in Hong Kong SAR. For example, the Ordinance increases the penalty for sedition from two to seven years, despite the vagueness of the offences concerned and the lack of any necessary connection to the incitement of physical violence or harm. Further, national security prisoners may be excluded from their current right to apply for a review of their sentence (clause 168) and thereby to receive a reduction of sentence for good behaviour.

Absence of regular review of national security and counter-terrorism legislation

We note with regret that the Ordinance does not include any mechanism for a regular independent review of its operation and effect, despite the potential significance of the Ordinance for policing, intelligence, and national security practice in the Hong Kong SAR and its impact a wide range of human rights. We consider that the best international practice, as exemplified by the UK Independent Review of Terrorism Legislation and Australia's Independent National Security Legislation Monitor, is for States to subject laws which concern national security and terrorism to regular independent review so as to ensure that they remain necessary and proportionate and compliant with international law. The process of regular independent review represents a necessary check upon counter-terrorism law-making. Independent review is particularly important where legislation such as this Ordinance is enacted swiftly.

We accordingly recommend the appointment of an independent mechanism to conduct regular reviews of the Hong Kong SAR's counter-terrorism and national security legislation, and to make recommendations for amendments and modifications of practices in light of the findings of such reviews, and our own observations highlighted in this and previous communications.

VII. Conclusion

We reiterate that the observations above are not exhaustive. In our view, the Ordinance fails to conform to the international human rights obligations of the Hong Kong SAR, China. In its current form, the proposed law appears to create a significant risk of unnecessary and arbitrary curtailment of the freedoms of opinion, expression, peaceful assembly, association, and participation in public affairs, as well as fair trial and the right to liberty. It also risks impeding the right of the ability of individuals and groups to cooperate with our own mandates and other international human rights mechanisms and may thus constitute a form of reprisals for cooperation with the

United Nations in the field of human rights.

We emphasise that broad and ill-defined national security legislation risks a severe impact on the legitimate activities of civil society, including journalists, activists, human rights defenders, lawyers, minorities and others, as well as curtailing participation in public affairs. In a 2019 thematic report the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism cautioned that overly broad definitions of what constitutes a threat to national security results may have a chilling effect on civic space, the stigmatization of civil society actors, and an exclusion of civil society in political discourse.[26] Such impacts are unacceptable given the role that civil society plays in advancing the protection of rights contained in the ICCPR, and in advancing the 2030 Agenda, and in particular SDG 16. The rights of freedom of expression and opinion, of association and of peaceful assembly enable persons to hold and share ideas and experiences, form new ones, and join with others to claim their rights. Empowered civil society, and empowered individuals, are essential to the development of secure and sustainable societies.

We strongly believe that the Ordinance requires thorough review to ensure its compliance with international law, in light of the serious human rights risks and deficiencies highlighted above. We encourage further consultation with our mandates, human rights experts and civil society organizations and full review of the recommendations issued by international human rights mechanisms and bodies, especially those related to the shortcomings of the current legislation related to national security, including the National Security Law. We reiterate our availability to assist your Excellency's Government in this process.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all matters brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned assessment of this Ordinance.

2. Please explain how you will ensure the compatibility of the Ordinance with your Excellency's Government's obligations under articles 9, 12, 14, 15, 17, 19, 21 and 25 of the ICCPR, article 13 of the ICESCR, and articles 11, 19 and 20 of the UDHR, and how you intend to remediate the identified inconsistencies with human rights law.

3. Please provide information on how you bring into line with international human rights standards the definitions of national security, collusion with external force, political ends, international organization, abandonment of duties or allegiance to ensure compatibility with the principle of legal certainty established under the ICCPR.

4. Please confirm that the offense of "colluding with external forces" provided for in clause 5 and article 6 of this Ordinance excludes

[26] A/HRC/40/52, [60], [61], and [65].

instances of cooperation with the United Nations, in particular its human rights bodies and mechanisms, in line with international human rights standards.

5. Please identify the positive measures and oversight which your Excellency's Government intends to provide on the exercise of the powers in the Ordinance, including regular and independent review of the impact and human rights compliance of the Ordinance.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting website within 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of our highest consideration.

Irene Khan
Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

Farida Shaheed
Special Rapporteur on the right to education

Clement Nyaletsossi Voule
Special Rapporteur on the rights to freedom of peaceful assembly and of association

Mary Lawlor
Special Rapporteur on the situation of human rights defenders

Margaret Satterthwaite
Special Rapporteur on the independence of judges and lawyers

Ben Saul
Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism