(Translated from Chinese)

Receipt is hereby acknowledged of communication No. AL CHN 9/2017 dated 24 October 2017, from the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on the situation of human rights defenders of the United Nations Human Rights Council. The Chinese Government wishes to make the following reply:

Reply to the request for information from the United Nations Human Rights Council regarding the case of *Secretary for Justice v. Joshua Wong Chi-fung and others* (Application for Review No. 4 of 2016) and related matters

On 17 August 2017 the Court of Appeal of the Hong Kong Special Administrative Region (SAR) issued its Judgment regarding the application for review of the sentences involving Joshua Wong Chi-fung, Alex Chow Yong-kang and Nathan Law Kwun-chung, sentencing the defendants to immediately serve custodial sentences of 6 to 8 months. The defendants have indicated an intention to appeal,[1] and in order to avoid influencing the course of justice in the treatment of the appeal, it is not appropriate for the Hong Kong SAR Government to make specific comments on matters of this type. This being the case, in the text below the Hong Kong SAR Government will reply to the matters raised in the letter received on 24 October 2017 from the United Nations Human Rights Council, to the extent possible.

Regarding constitutional development in the Hong Kong SAR

The affirmation in the fourth paragraph of the letter, which states that the Government of the People's Republic of China decided "to rule out full universal suffrage for Hong Kong", is not at all correct. Article 45 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (hereunder referred to as the Basic Law) reads as follows: "The method for selecting the Chief Executive shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures." In accordance with the outcome of the first round of consultation on constitutional development and the report submitted by the Chief Executive on 15 July 2014 to the Standing Committee of the National People's Congress of the People's Republic of China, on 31 August 2014 the Standing Committee, through the Decision of the Standing Committee of the National People's Congress on Issues Relating to the Selection of the Chief Executive of the Hong Kong Special Administrative Region by Universal Suffrage and on the Method for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2016 (hereunder referred to as the Decision), confirmed that from 2017 on, the elections for Chief Executive of the Hong Kong SAR could be carried out by universal suffrage. This Decision was issued in strict accordance with article 45 of the Basic Law and in line with the actual situation in the Hong Kong SAR and the principle of gradual and orderly progress, and its legal effect is beyond any doubt. At the same time, the Decision established a clear-cut, explicit framework for a concrete means of electing the Chief Executive by universal suffrage. The Hong Kong SAR Government will do everything possible to establish an atmosphere in society conducive to constitutional development, in the framework of the Decision.

[1] On 7 November 2017, the appeals board granted Wong, Law and Chow leave to appeal before the Court of Final Appeal, and they were all released on bail.

Regarding the legal procedures and administration of justice for Application for Review No. 4 of 2016

The offence for which the defendants were prosecuted was unlawful assembly.[2] According to article 18 (1) of the Public Order Ordinance, "When 3 or more persons, assembled together, conduct themselves in a disorderly, intimidating, insulting or provocative manner intended or likely to cause any person reasonably to fear that the persons so assembled will commit a breach of the peace, or will by such conduct provoke other persons to commit a breach of the peace, they are an unlawful assembly." (This differs from the offence of *unauthorized* assembly, which does not involve disorderly conduct and breaches of the peace).[3] The offence of unlawful assembly is unrelated to the ideas advocated by a gathering of persons or participation therein (regardless of whether for political or other reasons); the charge specifically relates to the fact that the assembly must involve disorderly, intimidating, insulting or provocative behaviour. From the decision of the Court of Appeal mentioned above, it is clear that the assembly in which the defendants took part was anything but peaceful; it involved violence. Specifically, in paragraph 38 of the decision in Application for Review No. 4 of 2016, the court points out that "In the incident, a total of 10 security guards of the Central Government Offices were injured when they were trying to stop the participants from entering the Forecourt. Most of them suffered minor injuries, such as tenderness, bruising and swelling. Amongst them security guard Chan Kei Lun suffered more serious injuries. His left big toe had bruising and swelling, and mild fracture near the basis phalangis digitorum pedis. He told the doctor that somebody had pushed him from behind causing injuries to his left elbow and left big toe. Among the 10 injured security guards, 5 had to take sick leave for 4 to 6 days, and security guard Chan had to take sick leave for a total of 39 days."

The defendants in question had a fair and open trial and were convicted on 21 July 2016. They all promptly benefited from legal counsel and had ample opportunity to put forward arguments to plead their case. Once they were convicted, they at one point appealed to the court of first instance, but later waived the appeals. In other words, they were convicted following regular proceedings carried out with due process and they have no longer sought to challenge the convictions.

In the legal system of the Hong Kong SAR, the prosecution service and convicted defendants both may appeal against a sentence. The Department of Justice, acting as the prosecutorial authority, may appeal by an application for review of a sentence. In this case, the sentence was reviewed for the first time on 21 September 2016, in accordance with article 104 of the Magistrates Ordinance, by the original trial magistrate; the second time, review of the application took place on 9 August 2017[4] under article 81A of the Criminal Procedure Ordinance and was carried out by the Court of Appeal. This kind of review may take place only on the grounds that the original sentence "is not authorized by law, is wrong in principle or is manifestly excessive or manifestly inadequate". All grounds for review involve only legal issues. Regardless of whether it is at the stage where the prosecution applies for the review or the Court of Appeal deals with it, political factors are never taken into consideration.

[2] Note that Law was prosecuted for the offence of "provoking other persons to take part in an unlawful assembly", of violating Common Law and article 18 of the Public Order Ordinance. (Cap. 245); punishable under article 101I of Cap. 221, the Criminal Procedure Ordinance.

[3] Violations of the Public Order Ordinance (Cap. 245), articles 17 A (3) (a) or (b).

[4] It should be pointed out that the Department of Justice on 12 October 2016 actually received the permission of the Court of Appeal to submit an application for review of the sentence, but because the respondents submitted appeals against their convictions in August 2016, the application for review of the sentence was temporarily unable to advance, as it could only do so once the court had completed its treatment of the three respondents' appeals against their convictions. The respondents' appeal was originally scheduled for hearing on 22 May 2017 and the court instructed them to submit their cases in writing by 20 April 2017 at the latest. In the end, the three respondents did not submit their cases in writing and one day before the deadline (on 19 April 2017) they withdrew their appeals. After they withdrew their appeals, the Department of Justice requested a hearing for an application for review and the Court of Appeal held the hearing on 9 August 2017.

In the present case, according to the decision issued by the Court of Appeal, a community service order or suspended sentence is in contravention of sentencing principles; it is acutely inadequate and cannot possibly reflect the gravity of the offences (see the Court's decision of 17 August 2017, para. 15). Moreover, the Court of Appeal bore in mind that following usual practice, the starting points for sentencing could be reduced by 1 month in applications for review. The Court of Appeal also took into consideration that Wong and Law had already carried out their community service orders and that their final sentences could be further reduced; it thus reduced them by another month (see paragraph 170 of the decision). The treatment of the above case by the Court of Appeal was identical with its treatment in past reviews of sentences or appeals when respondents had completed community service orders and were ordered by the Court to immediately serve prison sentences.

It should be noted that, as clearly explained in paragraph 171[5] of the decision in this case, the reason the respondents were convicted and sentenced has nothing to do with the fact that they exercised their civil rights, but is due to the fact that their behaviour during the demonstration broke the law: "it cannot be said that the respondents were convicted and sentenced for exercising their rights to the freedom of assembly, demonstration and expression ... The reason why they were convicted and sentenced is that they had overstepped the boundaries laid down by the law by themselves entering, or inciting others including young people and students to enter, the Forecourt, a place where they and the other protesters had no right to enter at the time, by seriously unlawful means, thereby committing the offences of taking part in or inciting others to take part in an unlawful assembly ... So long as they act within the boundaries of the law, their freedom of demonstration, assembly and expression will be fully and adequately protected. But once they overstep the boundaries by breaking the law, the sanction imposed on them by the law does not suppress or deprive them of their rights to demonstration, assembly and expression as the law has never allowed them to exercise such rights through unlawful means in the first place."

Regarding the question of whether the conviction and sentencing are in line with international human rights law

The rights of assembly, demonstration and expression are guaranteed under the law of Hong Kong. However, the exercise of such rights must not go beyond the boundaries established by law.

As explained in paragraph 6 above, the defendants were found guilty because of their criminal behaviour and not because of their expression of their views or exercise of their right to freedom of association. Regarding the right to peaceful assembly, article 21 of the International Covenant on Civil and Political Rights recognizes only the right to "peaceful" assembly; restrictions may be placed on the exercise of this right if required to ensure public calm and public order or to ensure the protection of the rights and freedoms of others. Hong Kong law in this case struck a balance between the right of assembly and the need to maintain public order.

Indeed, as pointed out by the court in paragraphs 120 and 121 of its decision relating to Application for Review No. 4, once participants in an assembly overstep the bounds laid down by law, they immediately lose the protection of the law for the exercise of their right to assembly and have to bear the consequences and be sanctioned by the law. The offenders cannot say that the law deprives them of or suppresses their freedom of assembly and expression by sanctioning them. The reason is that the law has never allowed them to exercise these freedoms through unlawful means or ways. Even if what they started off doing was to hold a peaceful and lawful assembly, it is an offence for the participants of an assembly to disrupt or threaten to disrupt public order, or use or threaten to use violence.

The Hong Kong SAR Government thus believes that the convictions and sentences in this case are not in conflict with the right of free expression and the rights of peaceful

[5] See the original of the decision, here: http://legalref.judiciary.hk/lrs/common/search/search_result_detailfram.jsp?DIS=110877&QS=%2B&TP=JU (*translator's note: see also English: http://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=111053*).

assembly and free association and there was no "criminalization of peaceful assembly and freedom of expression through the arrest, detention and conviction of Mr. Wong, Mr. Law and Mr. Chow", as stated in paragraph 6 of the letter from the United Nations Human Rights Council.

Treatment of the Occupy Central cases

According to information from the police, during the Occupy Central demonstrations a total of 955 persons were arrested for various offences; in addition, 48 were arrested after the incidents. As at 31 October 2017, the justice system had dealt with, or was dealing with, cases for a total of 225 of those arrested. Of these, 145 were the subject of rulings imposing legal consequences on them (103 were convicted and 42 signed binding over orders). Convictions have been issued in respect of the following charges: unlawful assembly, arson, possession of an offensive weapon, criminal damage, wounding, assaulting a police officer, common assault, possession of imitation firearms, criminal contempt of court, theft, criminal intimidation, indecent assault, possession of dangerous drugs and possession of Part 1 poisons, etc.

The Hong Kong community is concerned about how the criminal responsibility of those suspected of offences during the Occupy Central incidents is handled. In actual fact, the Department of Justice and the police have proactively taken steps to ensure that procedures are appropriately applied.

As the criminal and contempt proceedings relating to the series of illegal acts that occurred between the end of September 2014 and mid-December 2014 (during the Occupy Movement) and the police investigations related to all the respective cases are still ongoing, it would be inappropriate at the current stage to comment on them in specific terms. That notwithstanding, we must point out that, although the prosecution authorities are responsible for deciding whether there are grounds for prosecution as soon as possible after an incident, they also bear a responsibility to carry out comprehensive, detailed and in-depth research and analysis so as to ensure that it is only with ample evidence in possession that they proceed with prosecution. In light of the fact that many people were arrested and there is a large volume of evidence, the prosecution authorities have had to spend much time studying and poring over the material in question as well as considering the legal and technical issues that arise. For example, the prosecutors have had to spend a great deal of time viewing the evidence in recordings and considering questions such as whether the evidence will be admissible in court or be found inadmissible owing to other questions under the law relating to evidence; they have had to analyse each specific situation one by one, and they have had to provide legal references justifying the approach taken to deal with the case of each of the persons in question. Moreover, unless a case can be handled separately and before the others, the mass of cases involved in the Occupy Movement are all interrelated; it is impossible to "detach" single cases of the people who were arrested and to deal with them independently. On the contrary, the Government must give comprehensive consideration to the cases of the numerous people arrested. The prosecution and law enforcement authorities will continue to cooperate to follow up on the criminal liability of the Occupy Movement.

Government of the Hong Kong SAR
November, 2017

中华人民共和国常驻联合国日内瓦办事处和瑞士其他国际组织代表团

PERMANENT MISSION OF THE PEOPLE'S REPUBLIC OF CHINA

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No.GJ/67/2017

The Permanent Mission of the People's Republic of China to the United Nations Office at Geneva and other International Organizations in Switzerland presents its compliments to the Office of the High Commissioner for Human rights and with reference to the latter's communication【AL CHN 9/2017】dated 24 October 2017 , has the honour to transmit herewith the reply by the Chinese Government.

The Permanent Mission of the People's Republic of China to the United Nations Office at Geneva and Other International Organizations in Switzerland avails itself of this opportunity to renew to the Office of the High Commissioner for Human Rights the assurances of its highest consideration.

Geneva, 8 December 2017

Office of the High Commissioner for Human Rights
GENEVA

联合国人权理事会言论自由问题特别报告员、和平集会问题特别报告员和“人权卫士”问题特别报告员2017年10月24日来函【AL CHN 9/2017】收悉。中国政府对来函答复附后。

有关联合国人权理事会就律政司司长诉黄之锋及其他人（复核申请2016年第4号）一案及相关事宜要求提供资料的回应

2017年8月17日，香港特别行政区上诉法庭就涉及黄之锋、罗冠聪及周永康的刑期复核申请（**复核申请2016年第4号**）颁下判案书，判处有关被告人即时监禁6至8个月。由于有关案件正等候上诉[1]，香港特区政府不宜就个别范畴作具体评论，以免影响有关上诉的公正处理。尽管如此，香港特区政府在可行的情况下在下文回复联合人权理事会2017年10月24日来信中所提出的事宜。

关于香港特别行政区政制发展

来函第四段提及有关中华人民共和国政府的决定"否决了在香港落实全面普选"的说法并不正确。《中华人民共和国香港特别行政区基本法》（以下简称《基本法》）第四十五条规定："行政长官的产生办法根据香港特别行政区的实际情况和循序渐进的原则而规定，最终达至由一个有广泛代表性的提名委员会按民主程序提名后普选产生的目标。"按照政制发展第一轮咨询的结果和行政长官于2014年7月15日向中华人民共和国全国人民代表大会常务委员会提交的报告，全国

[1] 黄、罗及周三人于2017年11月7日获上诉委员会批准上诉至终审法院，并均获准保释。

人大常委会在2014年8月31日通过《关于香港特别行政区行政长官普选问题和2016年立法会产生办法的决定》（以下简称《决定》），确定从2017年开始，香港特别行政区行政长官选举可以实行由普选产生的办法。该《决定》是严格按照《基本法》第四十五条的规定，根据香港特区的实际情况和循序渐进的原则而作出，具有不可置疑的法律效力。该《决定》同时为普选行政长官的具体方案定下清晰而明确的框架。香港特区政府会尽最大努力，在《决定》框架下营造有利推动政制发展的社会氛围。

关于复核申请2016年第4号一案的法律和司法程序

有关被告人被检控的罪行涉及"非法集结"[2]。依据《公安条例》第18（1）条，"凡有3人或多于3人集结在一起，作出扰乱秩序的行为或作出带有威吓性、侮辱性或挑拨性的行为，意图导致或相当可能导致任何人合理地害怕如此集结的人会破坏社会安宁，或害怕他们会借以上的行为激使其他人破坏社会安宁，他们即属非法集结。"（有别于不涉及扰乱秩序等行为和破坏社会安宁的"未经批准集结"罪行，该罪行涉及没有遵从相关通知要求而举行的公众集结[3]）。涉及"非法集结"的罪行与举行或参与集结人士所宣扬的理念（无论是政治或其他理念）无关，控罪针对的是集结中所涉及的扰乱秩序、具威吓性、侮辱性或挑拨性的行为。从上诉法庭的判

[2] 请注意，罗被裁定"煽惑他人参与非法集结"罪罪名成立，违反普通法及《公安条例》（第245章）第18条，根据《刑事诉讼程序条例》（第221章）第101I条可予惩处。

[3] 违反《公安条例》（第245章）第17A（3）（a）或17A（3）（b）条。

案书清楚可见，被告人所参与的集结完全谈不上和平，而是涉及暴力的。正如在复核申请2016年第4号的判案书第38段中指出，法庭注意到"事件中，共有10名政总的保安员在阻止集会人士进入政总前地时受伤，大部分受到轻伤，例如触痛，亦有瘀伤及肿胀等。其中保安员陈其麟的伤势较严重，他的左脚拇趾有瘀伤和肿胀，近节趾骨底有轻微骨折，他向医生说是被人从后推撞致左肘及左脚拇趾受伤。那受伤的10名保安员当中有5名需请病假4至6日，而陈姓保安员则需请病假前后共39日"。

有关被告人经过公平和公开的审讯，在2016年7月21日被定罪。他们当时均有法律代表，也有充分机会提出他们认为合适的陈词。他们曾经一度就定罪向原诉讼法庭提出上诉，但其后放弃上诉。换句话说，他们是经正常稳妥的程序后被定罪，而他们不再就定罪提出异议。

根据香港特区的法律制度，控方和被定罪的被告人均可就刑期提出上诉。律政司作为检控机关以复核申请形式就刑期提出上诉。就此案件，首次复核申请是依据《裁判官条例》第104条在2016年9月21日提出的，由原审裁判官处理。第二次复核则是依据《刑事诉讼程序条例》第81A条在2017年8月9日提出的[4]，由上诉法庭处理。这类复核只可基于原有刑

[4] 必须指出，律政司实际上是在2016年10月12日获上诉法庭许可提出复核刑期，但由于被告人于2016年8月就其定罪提出上诉，复核刑期申请当时暂不能进行，要到法院完成处理三名被告人的定罪上诉才可处理。被告人的上诉原排期于2017年5月22日聆讯，法庭并指示各被告人须在2017年4月20日或之前把其书面陈词送交存档。三名被告人最终没有把书面陈词送交法庭存档，并在限期前一日（即2017年4月19日）撤回其上诉。在被告人撤回其上诉后，律政司申请就刑期复核申请排期聆讯，上诉法庭在2017年8月9日进行复核聆讯。

罚"并非经法律认可、原则上错误、或明显过重或明显不足的理由"而提出。所有复核理据只涉及法律争议点。不论是在控方提出复核申请或上诉法庭处理复核申请的阶段，政治因素从来不在考虑之列。

就此案件，根据上诉法庭的裁定，社会服务令或缓刑令均是违反判刑原则及极为不足的判刑，绝不能反映有关控罪的严重性（参见法庭在2017年8月17日所颁判案书第15段）。再者，上诉法庭留意到申请涉及刑期复核，而法庭已根据惯常做法，将量刑起点扣减一个月。上诉法庭亦考虑到黄、罗二人已完成其社会服务令，故此再给予进一步刑期扣减至最终的判刑，即上诉法庭从黄、罗二人的量刑起点再扣减了一个月的刑期（参见判案书第170段）。法庭上述处理方法与过去处理刑期复核或上诉的案件时，当被告人已完成社会服务令，而又被上诉法庭判处即时监禁的做法一致。

须注意的是，正如本案判案书第171段[5]明确解释，上述被告人之所以被定罪和判刑，并非因为他们行使公民自由，而是因为他们在示威期间的行为抵触法律："……答辩人等不能说他们是因为行使集会、示威或言论自由而被定罪和判刑……他们之所以被定罪和判刑，是因为他们僭越了法律的界线，以严重违法的手段，自己强行非法进入或煽惑他人，当中包括年轻人及学生，强行非法进入政总前地——一个当时他们和其他示威者在法律上都没有权利可以进入的地方，

[5] 判案书的中文原文见：
http://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=110877&QS=%2B&TP=JU

而干犯了参与非法集结或煽惑他人参与非法集结……只要他们在法律的界线内行事，法律会全面、充分地保障他们示威、集会和言论自由；但一旦他们僭越了法律的界线而违法，法律制裁他们并不是剥夺或打压他们的示威、集会和言论自由，因为法律从来都不容许他们以违法的手段来行使那些自由。”

定罪和判刑是否符合国际人权法

香港的法律保护集会、示威和言论自由的权利。然而，行使这些权利，不应僭越法律所定下的界线。

正如上文第6段解释，这案件中的被告人罪成是因他们的违法行为，而不因其言论，亦无关自由结社的权利。至于和平集会权利，根据《公民权利和政治权利国际公约》第二十一条，条文只确认“和平”集会的权利；而为维护公共安宁、公共秩序或保障他人权利自由所必要，有关权利则可予限制。本港法律平衡了集会的权利和维护公共秩序的需要。

事实上，正如法庭在复核申请2016年第4号的判案书第120和121段中指出，参加集会的人士一旦僭越了法律所定下的限制，便立时丧失了法律给予他们行使集会权利的保障，并且必须承担后果而受法律制裁。违法者不能说法律制裁他们是剥夺或压制他们的集会和言论自由，因为法律从来都绝不容许他们以非法的手段或方式来行使这些自由。即使他们原先进行的是和平合法的集会，一旦参加集会的人士干扰或威胁干扰公共秩序、甚至使用或威胁使用暴力，便是犯法行为。

因此，香港特区政府认为，本案的定罪和判刑不抵触发表自由的权利、和平集会的权利及自由结社的权利。也没有如联合国人权理事会的来信第6段所指，“借拘捕、羁留黄先生、罗先生和周先生及把他们定罪，把和平集会和言论自由刑事化。”

处理“占领中环”案件

根据警方的统计数字，在“占领行动”期间，共有955人因涉嫌干犯不同罪行而被警方拘捕，另外有48人于事件结束后被警方拘捕。截至2017年10月31日，被捕人士中共有225人已经或正在经司法程序处理，其中有145人被裁定须承担法律后果（即103人被定罪及42人须签保守行为）。有关定罪所涉罪名包括非法集结、纵火、管有攻击性武器、刑事损坏、伤人、袭警、普通袭击、管有仿制火器、刑事藐视法庭、盗窃、刑事恐吓、猥亵侵犯、管有危险药物及管有第一部毒药等。

香港社会关注如何处理“占领行动”期间涉嫌违法人士的刑责问题。事实上，律政司与警方一直积极跟进案件，务求恰当地处理相关事宜。

由于关于2014年9月底至2014年12月中发生的连串违法活动（“占领行动”）的有关刑事法律程序、藐视法庭程序，以及警方就各项有关或相关事件的调查仍在进行中，现阶段不宜进一步具体评论。尽管如此，我们必须指出，虽然检控人员有责任于事发后尽快决定是否采取检控行动，但他们也有责任就案件的细节进行全面、详细、深入的研究和分析，

以确保只有在掌握充分证据的情况下，才会提出检控。鉴于有众多被捕人士和大批证据，检控当局须花大量时间研究和审视相关材料，以及可能出现的法律或技术问题。举例来说，检控人员需长时间翻看录影片段的证据，考虑可否获法庭接纳和在证据法下的其他相关问题，并逐一分析每宗事件的具体情况，且就每位相关人士的适当处理方式，提供法律指引。此外，除非相关事件可先行独立处理，“占领行动”涉及的众多事件往往环环相扣，不可将个别被捕人士作“斩件式”独立处理。恰恰相反，政府有必要就众多被捕人士作整体通盘考虑。检控及执法当局会继续合作，跟进“占领行动”的刑责问题。

香港特区政府

2017年11月

Response to request by the United Nations Human Rights Council for information regarding the case of *Secretary for Justice v. Wong Chi Fung and Others (CAAR 4/2016)* and related matters

On 17 August 2017, the Court of Appeal of the Hong Kong Special Administrative Region ("HKSAR") delivered its Judgment ("Judgment") concerning the application to review the sentences involving Wong Chi Fung (Wong), Law Kwun Chung (Law) and Chow Yong Kang Alex (Chow) ("the Defendants") **(CAAR 4/2016)**. The Court of Appeal sentenced the Defendants to immediate terms of imprisonment of 6 to 8 months. Since the case in question is pending appeal[1], it is not appropriate for the HKSAR Government to provide detailed comments on specific aspects so as not to prejudice the fairness of the pending appeals. That said and insofar as may be appropriate, HKSAR Government gives the following response to the issues raised by the United Nations Human Rights Council (UNHRC) in its letter of 24 October 2017.

Constitutional Development in Hong Kong

2. Paragraph 4 of the letter stated that the decision by the Government of the People's Republic of China was "to rule out full universal suffrage for Hong Kong" is incorrect. Article 45 of the Basic Law of the HKSAR of the PRC ("Basic Law"), the constitutional document of the HKSAR, stipulates that "[t]he method for selecting the Chief Executive shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures." On the basis of the outcome of the first round of public consultation on constitutional development and the report made by the Chief Executive ("CE") to the Standing Committee of the National People's Congress ("NPCSC") of the PRC on 15 July 2014, the NPCSC adopted on 31 August 2014 the Decision on Issues Relating to the Selection of the Chief Executive of the Hong Kong Special Administrative Region by Universal Suffrage and on the Method for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2016 ("the Decision"), deciding that the selection of the CE of the HKSAR may be implemented by universal suffrage starting from 2017. The Decision was made in accordance with the provision of Article 45 of the Basic Law in the

[1] Wong, Law and Chow were granted leave by the Appeal Committee on 7 November 2017 to appeal to the Court of Final Appeal and they have all been granted bail pending appeal.

light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress, and is undisputedly legally effective. The Decision also lays down a clear framework on the method for the selection of the CE by universal suffrage. The HKSAR Government will do the best to create a favourable social atmosphere for taking forward constitutional development under the framework of the "Decision".

The legal and judicial process in respect of CAAR 4/2016

3. The Defendants were prosecuted for offences involving "unlawful assembly"[2], which is defined in section 18(1) of the Public Order Ordinance as follows: *"When 3 or more persons, assembled together, conduct themselves in a disorderly, intimidating, insulting or provocative manner intended or likely to cause any person reasonably to fear that the persons so assembled will commit a breach of the peace, or will by such conduct provoke other persons to commit a breach of the peace, they are an unlawful assembly"* (as opposed to the offence of "unauthorized assembly"[3] involving the failure to comply with the notification requirement for holding a public assembly but not disorderly conduct (etc.) and breach of the peace). The offence of "unlawful assembly" is not related to the ideas (whether political or otherwise) that the persons who organized or participated in the assembly sought to advocate. Instead, it focuses on the disorderly, intimidating, insulting or provocative manner in which the assembly was held. And as is clear from the judgment of the Court of Appeal, the assembly in which the Defendants participated was not peaceful at all but was one that involved violence. As set out in paragraph 38 of the Judgment in CAAR 4/2016, the Court noted that *"[i]n the incident, a total of 10 security guards of the CGO were injured when they were trying to stop the participants from entering the Forecourt. Most of them suffered minor injuries, such as tenderness, bruising and swelling. Amongst them security guard Chan Kei Lun suffered more serious injuries. His left big toe had bruising and swelling, and mild fracture near the basis phalangis digitorum pedis. He told the doctor that somebody had pushed him from behind causing injuries to his left elbow and left big toe. Among the 10 injured security guards, 5 had to take sick leave for 4 to 6 days, and security guard Chan had to take sick leave for a total of 39 days."*.

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[2] Please note that Law was convicted of the offence of "inciting others to take part in an unlawful assembly", contrary to Common Law and section 18 of the Public Order Ordinance, Cap. 245 and punishable under section 101I of the Criminal Procedure Ordinance, Cap. 221.

[3] Contrary to section 17A(3)(a) or 17A(3)(b) of the Public Order Ordinance, Cap. 245.

4. The Defendants were convicted on 21 July 2016 after a fair and open trial. The Defendants were legally represented, and they had every opportunity to make such submissions as they saw fit. The Defendants at one stage lodged appeals against their convictions with the Court of First Instance. However, they subsequently abandoned their appeals. In other words, they were found guilty after a due process and they no longer seek to dispute their guilt.

5. Under the HKSAR's legal system, both the prosecution and the convicted defendant can seek an appeal against sentence. An appeal of this nature by the Department of Justice (DoJ) as the prosecution authority proceeds by way of an application for review of sentence. As to the present case, the first review took place on 21 September 2016 before the magistrate who convicted the Defendants pursuant to section 104 of the Magistrates Ordinance. The second review took place before the Court of Appeal on 9 August 2017 pursuant to section 81A of the Criminal Procedure Ordinance[4]. Such review can only be lodged if the sentence imposed by the trial judge "is not authorized by law, is wrong in principle or is manifestly excessive or manifestly inadequate". All these grounds for review only concern legal issues. Political considerations do not come into play, whether at the stage when the prosecution lodged the review or when the Court of Appeal dealt with the application for review.

6. In this case, the Court of Appeal held that sentencing the Defendants by way of a community service order or suspended sentence was in contravention of sentencing principles, manifestly inadequate and did not reflect the gravity of the offences (see paragraph 15 of the Judgment handed down on 17 August 2017[5]). Further, the Court of Appeal observed that it was an application for review and, following the usual practice, the starting points for sentencing were reduced by 1 month. The Court of Appeal had also taken into account that Wong and Law had already served their community service and allowed them further reductions in sentence to

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[4] It should be pointed out that DoJ was actually granted leave by the Court of Appeal on 12 October 2016 to review the Defendants' sentences. However, since the Defendants had lodged appeals against their convictions in August 2016, DoJ's application for review could not be heard until after the Defendants' appeals against conviction had been dealt with. The Defendants' appeals against conviction were scheduled for 22 May 2017. The court directed the Defendants to file written submissions on or before 20 April 2017. The Defendants eventually did not file any written submissions and withdrew their appeals the day before the said deadline (i.e. 19 April 2017). After the Defendants withdrew their appeals against conviction, DoJ applied to fix a date for the hearing of its application for review of sentence. The review was heard by the Court of Appeal on 9 August 2017.

[5] The English translation of the Judgement is accessible through this link : *http://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=111053&QS=%2B&TP=JU*

the ultimate sentences imposed. In particular, the Court of Appeal further reduced the starting point for each of the sentences of Wong and Law by one month (see paragraph 170 of the Judgment). This is consistent with the Court's usual practice when an immediate custodial sentence is imposed upon a review of, or an appeal against, sentence if the defendant has already completed the community service order.

7 It should also be noted that as categorically explained in paragraph 171 of the Judgment of the case, the Defendants were convicted and sentenced not because they exercised their civil liberties, but because their conduct during the protest contravened the law : *"...it cannot be said that the respondents were convicted and sentenced for exercising their rights to the freedom of assembly, demonstration and expression. ... The reason why they were convicted and sentenced is that they had overstepped the boundaries laid down by the law by themselves entering, or inciting others including young people and students to enter, the Forecourt, a place where they and the other protesters had no right to enter at the time, by seriously unlawful means, thereby committing the offences of taking part in or inciting others to take part in an unlawful assembly. ...So long as they act within the boundaries of the law, their freedom of demonstration, assembly and expression will be fully and adequately protected. But once they overstep the boundaries by breaking the law, the sanction imposed on them by the law does not suppress or deprive them of their rights to demonstration, assembly and expression as the law has never allowed them to exercise such rights through unlawful means in the first place."*

Compatibility of the convictions and sentences with international human rights law

8. The law in Hong Kong protects the right to assembly, demonstration and freedom of speech. However, any exercise of such rights should not overstep the boundaries laid down by the law.

9. As explained in paragraph 6 above, in this current case, the Defendants were convicted because of their unlawful conduct, not because of their speech. Nor is the right to freedom of association relevant. As for the right of peaceful assembly under Article 21 of the International Covenant on Civil and Political Rights, it recognizes the right to "peaceful" assembly only, and may be restricted if this is necessary in the interests of public safety, public order (*ordre public*) or the protection of the rights and freedoms of others. Our law strikes a balance between the right of assembly and the need to preserve public order.

10. Indeed, as set out in paragraphs 120 and 121 of its Judgement in CAAR 4/2016, the Court held that the participants of an assembly will lose the protection of the law on exercising their right to assembly once they overstep the bounds laid down by law, and they shall have to bear the consequences and be sanctioned by the law. The offenders cannot say that the law deprives them of or suppresses their freedom of assembly and expression by sanctioning them. The reason is that the law has never allowed them to exercise these freedoms through unlawful means or ways. It is an offence for the participants of an assembly to disrupt or threaten to disrupt public order, or use or threaten to use violence, even if what they started off doing was to hold a peaceful and lawful assembly.

11. As such, the HKSAR Government is of the view that the convictions and sentences in this case are not inconsistent with the right to freedom of expression, the right of peaceful assembly and the right to freedom of association. Nor was there any "criminalization of peaceful assembly and freedom of expression through the arrest, detention and conviction of Mr Wong, Mr Law and Mr Chow" as suggested in paragraph 6 of the UNHRC's letter.

Handling of the "Occupy Central" Cases

12 On the basis of the figures kept by the Police, a total of 955 persons were arrested for various alleged offences during the Occupy Movement, and another 48 persons were arrested after the incident. As at 31 October 2017, a total of 225 arrestees have undergone or are undergoing judicial proceedings. Amongst them, 145 persons have to bear legal consequences (i.e. 103 were convicted and 42 were bound over). The convictions include unlawful assembly, arson, possession of offensive weapon, criminal damage, wounding, assaulting police officer, common assault, possession of imitation firearms, criminal contempt of court, theft, criminal intimidation, indecent assault, possession of dangerous drugs, possession of Part I poisons, etc.

13. The Hong Kong community is concerned as to how the criminal liability of those who had been suspected of unlawful conduct during the Occupy Movement should be dealt with. As a matter of fact, the DoJ and the Police have all along been actively following up the cases, with a view to dealing with the relevant matters appropriately.

14. As the relevant criminal and contempt proceedings and police investigations into various incidents in respect of or in connection with the series of illegal activities which took place between late September 2014

and mid December 2014 ("the Occupy Movement") are still ongoing, it is not appropriate to make further specific comments at this stage. That notwithstanding, it should be pointed out that although prosecutors have the duty to decide as soon as possible after an incident whether to take prosecution action, they also have the responsibility to conduct comprehensive, detailed and in-depth research and analysis into the details of the case, so as to ensure that prosecution will be pursued only where there is sufficient evidence. As the number of arrested persons is large and the volume of evidence involved is huge, substantial time has to be spent by the prosecution authority to study and examine the relevant materials and possible legal or technical issues. For instance, a long time was required to go through the video evidence, consider admissibility and other questions relevant under the law of evidence, analyse the specific circumstances of each and every incident, and provide legal advice on the appropriate manner to handle each relevant person. Moreover, unless the relevant incidents could be handled on their own, the numerous incidents involved in the Occupy Movement are often inter-connected, rendering it impossible to handle individual arrestees separately. Quite the contrary, it is necessary to consider the cases of numerous arrestees in a comprehensive and holistic manner. The prosecution and law enforcement authorities will continue to work together to follow up on the issue of criminal liability in respect of the Occupy Movement.

HKSAR Government
November 2017