



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

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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 joint communication [OL CHN 7/2020] dated 23 April 2020, 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, 23 July 2020

Office of the High Commissioner for Human Rights  
**GENEVA**

联合国人权理事会在反恐中促进和保护人权问题特别报告员、法外处决问题特别报告员、言论自由问题特别报告员、和平集会与结社自由问题特别报告员、“人权卫士”问题特别报告员和少数群体问题特别报告员 2020 年 4 月 23 日联合来函【OL CHN 7/2020】收悉。中国政府对来函答复如下：

## 一般原則

1. 在香港特別行政區(“香港特區”)，基本權利和自由受《中華人民共和國香港特別行政區基本法》(“《基本法》”)充分保障。在憲制層面，言論自由、和平集會和結社自由的權利受《基本法》第二十七條保障。《基本法》第三十九條更訂明，《公民權利和政治權利國際公約》(“《公約》”)等適用於香港的有關規定繼續有效，通過香港特區的法律予以實施。

2. 在本地法例層面，適用於香港的《公約》條文已藉《香港人權法案條例》(香港法例第 383 章)中的《香港人權法案》在本地實施，《香港人權法案條例》對政府具有約束力。《香港人權法案條例》第 8 條載列《香港人權法案》全文。發表自由、和平集會和結社自由的權利分別受《香港人權法案》第十六、十七及十八條保障，而這三項條文以《公約》第十九、二十一及二十二條為藍本。這些權利和自由並非絕對，受制於依法規定且為維護公共秩序或保障他人權利自由等所必要的限制。

## 反恐怖主義

### **《聯合國(反恐怖主義措施)條例》背景**

3. 《聯合國(反恐怖主義措施)條例》(“《反恐條例》”) (香港法例第 575 章)最初於 2002 年制定，以實施聯合國安全理事會(“安理會”)第 1373(2001)號決議中關於防止恐怖主義行為的措施。美國於 2001 年 9 月 11 日發生恐怖襲擊後，安理會第 1373(2001)號決議於 2001 年 9 月 28 日獲得通過。該決

議要求採取的措施包括防止和制止資助恐怖分子的活動、把蓄意為這些活動提供或籌集資金的行為列作刑事罪行、凍結恐怖分子的資產，以及禁止為恐怖分子或與恐怖分子有聯繫者的利益提供資金。安理會第 1373(2001)號決議沒有界定“恐怖主義行為”。《反恐條例》於 2004 年、2012 年及 2018 年修訂，以實施與恐怖主義有關的相關多邊公約(即聯合國《制止恐怖主義爆炸的國際公約》、聯合國《制止危及海上航行安全非法行為公約》及聯合國《制止危及大陸架固定平台安全非法行為議定書》)、財務行動特別組織(“特別組織”)的某些建議，以及安理會第 2178(2014)號決議中關於防止以恐怖主義行為或恐怖主義培訓為目的的旅程的規定。

### **“恐怖主義行為”的定義**

4. 就《反恐條例》而言，《反恐條例》第 2 條把“恐怖主義行為”界定為：

“(a) 除(b)段另有規定外，指作出或恐嚇作出行動，而—

(i) 該行動是懷有達致以下結果的意圖而進行的，或該恐嚇是懷有作出會具有達致以下結果的效果的行動的意圖而進行的—

(A) 導致針對人的嚴重暴力；

(B) 導致對財產的嚴重損害；

(C) 危害作出該行動的人以外的人的生命；

(D) 對公眾人士或部分公眾人士的健康或安全造成嚴重危險；

(E) 嚴重干擾或嚴重擾亂電子系統的；或

(F) 嚴重干擾或嚴重擾亂基要服務、設施或系統(不論是公共或私人的)的；及

(ii) 該行動的作出或該恐嚇—

(A) 的意圖是強迫特區政府或國際組織的，或是威嚇公眾人士或部分公眾人士的；及

(B) 是為推展政治、宗教或思想上的主張而進行的；

*(b) (如屬(a)(i)(D)、(E)或(F)段的情況)不包括在任何宣揚、抗議、持異見或工業行動的過程中作出或恐嚇作出行動。”*

5. 上文關於“恐怖主義行為”的定義，以英國《2000年恐怖主義法令》(摘錄於附件 A)為藍本。草擬該法定定義中第(a)(i)(F)和(b)段時，亦參考了於2001年藉加拿大《反恐怖主義法令》修訂的《加拿大刑法》(摘錄於附件 B)。該定義與許多其他地區的反恐怖主義法例，例如南非《2004年針對恐怖主義和相關活動的憲政民主保護法》(摘錄於附件 C)所載定義一致。

6. 在2002年制定《反恐條例》前，“恐怖主義行為”的定義已經立法會詳細討論，以確保言論自由和公民權利不會受損。其後在2012年修訂“恐怖主義行為”的定義把國際組織加入為強迫的對象時，立法會亦已再詳細討論該定義。根據《反恐條例》的定義，“恐怖主義行為”必須符合以下三項準則：

- (a) 涉及作出或恐嚇作出行動，以強迫特區政府或國際組織，或威嚇公眾人士<sup>1</sup>；
- (b) 作出或恐嚇作出的行動是為了達到推動政治、宗教或思想上的主張的目的而進行；及
- (c) 進行或作出該行動或恐嚇行動懷有指明結果的意圖，例如導致嚴重暴力、嚴重損害財產，或對公眾人士的健康或安全構成嚴重危險。

7. 得出上述定義的公認考慮因素是，恐怖主義行為(能對公眾造成大規模和無差別傷害和破壞)在本質上有別於普通的刑事罪行(例如刑事毀壞、傷人或甚至謀殺)。按此定義，除非所涉的非法行為符合全部三項準則，否則不會被界定為恐

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<sup>1</sup> 根據《反恐條例》第2(2)條，在“恐怖主義行為”的定義中，對特區政府或公眾人士的任何提述，包括在特區以外地方的政府或公眾人士。

怖主義行為。無論如何，如禁止行為是在示威或工業行動中作出，並只懷有達致在法定定義中第(a)(i)(D)、(E)或(F)段所載的結果(例如嚴重干擾或嚴重擾亂基要服務、設施或系統)，這些行為不會被視為《反恐條例》下的恐怖主義行為。

### ***遵行安理會第 1566(2004) 號決議、反恐怖主義多邊條約和《公約》的情況***

8. 特別報告員關注到，《反恐條例》對“宣揚、抗議、持異見或工業行動”的豁免，不適用該條例下“恐怖主義行為”定義中“導致對財產的嚴重損害”的情況，以致可能“導致本地法律標準偏離就恐怖主義所議定的國際條約及...[安理會]第 1566 號決議中關於以平民為目標的核心重點”。特別報告員亦對“嚴重干擾或嚴重擾亂基要服務、設施或系統(不論是公共或私人的)”的提述表示關注，尤其提醒“‘基要服務’的定義可泛指且不限於基建設施、電子、資訊、通訊和資訊科技”。我們必需指出，這些關注毫無根據，也無必要，原因如下：

#### 《反恐條例》下“恐怖主義行為”的定義

- (a) “恐怖主義”現無統一認可的定義，亦無針對恐怖主義和反恐怖主義的基礎條約或全面的法律體制<sup>2</sup>。聯合國大會就恐怖主義所擬定的全面公約草案(“《全面公約草案》”)和當中恐怖主義的統一定義的辯論仍陷僵局，因此，有關定義由本地當局靈活詮釋<sup>3</sup>。儘管有此靈活性，仍要留意本地法例必須遵照安理會根據《聯合國憲章》所作出針對恐怖主

<sup>2</sup> 聯合國毒品和犯罪問題辦公室，E4J 大學模組系列：反恐怖主義，模組 4：刑事司法應對恐怖主義：主要問題—根據條約所指的恐怖主義罪行—通用的反恐文書，《反國際恐怖主義的全面公約草案》(2018 年 7 月)第 1 段，取自 [www.unodc.org/e4j/en/terrorism/module-4/key-issues/treaty-based-crimes-of-terrorism.html](http://www.unodc.org/e4j/en/terrorism/module-4/key-issues/treaty-based-crimes-of-terrorism.html)。

<sup>3</sup> 國際人權聯會發表題為聯合國反恐事務的複雜官僚制度下政治影響力與公民自由(2017 年 9 月 / N°700a)第 16 頁第 1 段，取自 [www.fidh.org/IMG/pdf/9.25\\_fidh\\_final\\_compressed.pdf](http://www.fidh.org/IMG/pdf/9.25_fidh_final_compressed.pdf)。

義的決定、適用的國際人權公約，以及與恐怖主義有關的公約；

- (b) 特別報告員認為，將所涉行為定性為“恐怖主義”的部分合法準則，包括安理會第 1566(2004)號決議第 3 段所載的三項累積特性。根據該段用語，該段並無宣稱要為“恐怖主義”訂下確切定義，或強制規定會員國在界定安理會第 1373(2001)號決議中“恐怖主義行為”一詞時必須採納該段的構想<sup>4</sup>。無論如何，安理會第 1566(2004)號決議第 3 段(或就此事而言，特別報告員所指恐怖主義的標準定義)並無如特別報告員所倡議的，要明確排除“在任何宣揚、抗議、持異見或工業行動”中採取或恐嚇採取的行動；
- (c) 在上述背景下，我們必須強調《反恐條例》無意訂立一項關於恐怖主義的一般罪行。安理會第 1566(2004)號決議第 3 段所提及的恐怖主義行為，以及與恐怖主義有關的個別公約所涵蓋及所界定構成犯罪的恐怖主義行為，已藉實施有關公約而制定的具體法例，或藉適用的刑事法，在香港特區定為刑事罪行(例子見附件 D)；
- (d) 由於香港特區的法律沒有訂立一項恐怖主義的一般刑事罪行，故在實施《制止向恐怖主義提供資助的國際公約》(“《資恐公約》”)和特別組織的有關建議時，《反恐條例》訂明“恐怖主義行為”的定義，把資助構成該定義下“恐怖主義行為”的行為定為刑事罪行；這與《資恐公約》要求成員國把資助公約第 2(1)條指明的行為定為刑事罪行的做法一致。此外，《反恐條例》下“恐怖主義行為”的定義，亦與公約第 2(1)條的規定相符；

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<sup>4</sup> Ben Saul 教授在評論安理會第 1566(2004)號決議中恐怖主義的概念時寫道：“安理會決議提出的恐怖主義定義只是工作定義，並無要求會員國在訂立反恐怖主義法例時遵行。”見 Ana Maria Salinas de Frias、Katja Samuel 及 Nigel D White 編撰題為反恐怖主義：國際法與實務第 6 章第 145 頁。

- (e) 因此，“恐怖主義行為”一詞在《反恐條例》中與以下各項相關：就資助方面，把資助恐怖分子的行為刑事化及相關的條文，例如指明恐怖分子和恐怖分子財產、凍結及禁止處理恐怖分子財產、禁止以恐怖主義行為或恐怖主義培訓為目的旅程，以及把資助這些旅程的行為定為刑事罪行；

#### 特別組織第 5 項建議的規定

- (f) 亦應注意的是，特別組織第 5 項建議也訂明，應以《資恐公約》為基礎把資助恐怖分子的行為應定為刑事罪行；
- (g) 特別組織近期就香港實施的反恐融資措施進行相互評核，當中就第 5 項建議而言，評核確定了《反恐條例》下“恐怖主義行為”的定義，除了該條例予以豁免的地方外（下文(h)段將作闡釋），定義符合特別組織的相關規定。具體而言，特別組織指出“恐怖主義行為”的定義範圍內，其效力之廣足以“涵蓋各類事實情況，而該等情況或可預期為與《資恐公約》附件所列條約訂立的罪行有關聯”；
- (h) 《反恐條例》下“恐怖主義行為”的定義，其實較《資恐公約》和特別組織的相關建議所訂的狹窄。該條例的定義訂明豁免在任何宣揚、抗議、持異見或工業行動的過程中所作出對健康或公眾安全造成嚴重危險，或嚴重干擾或嚴重擾亂電子系統、基要服務、設施或系統的非暴力行為。特別組織認為，上述豁免屬香港特區反恐融資措施的缺口；

#### 關於“對財產的嚴重損害”的提述

- (i) 關於《反恐條例》下“恐怖主義行為”的定義中“對財產的嚴重損害”的提述，“對財產的損害”在上文

第 5 段所提及若干普通法適用地區的相關法律和國際反恐的文書中，一般獲承認及列作恐怖主義行為，包括：

- (1) 《全面公約草案》<sup>5</sup>第 2(1)條制裁涉及導致“公共或私人財產，包括公用場所、國家或政府設施、公共運輸系統、基礎設施或環境受到嚴重損害”，或“.....財產、場所、設施或系統受到的損害造成或可能造成重大經濟損失”的刑事行為；
  - (2) 英聯邦秘書處《反恐措施立法條文範本》<sup>6</sup>就“恐怖主義行為”的定義提供不同立法選項，而各選項均把“對財產的嚴重損害”納入定義<sup>7</sup>；
  - (3) 再者，上述《全面公約草案》的條文和英聯邦秘書處《反恐措施立法條文範本》均沒有把“宣揚、抗議、持異見或工業行動”納入例外情況；上文第 5 段提及的《加拿大刑法》和南非《2004 年針對恐怖主義和相關活動的憲政民主保護法》亦無就重大財產損害訂明此等例外情況；
- (j) 我們懇請特別報告員在考慮作出或恐嚇作出“導致對財產的嚴重損害”的行為是否“恐怖主義行為”的合理後果一事上，作出明智判斷。否則，即使有人大規模毀壞全幢樓宇(程度與世界貿易中心事件相若)，也不會被視作恐怖主義行為，除非樓宇有人

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<sup>5</sup> 聯合國大會 A/59/894 號文件附錄 2《反國際恐怖主義的全面公約草案》(2005 年 8 月 12 日)，取自 [undocs.org/zh/A/59/894](http://undocs.org/zh/A/59/894)。

<sup>6</sup> 英聯邦秘書處《反恐措施立法條文範本》(2002 年 9 月)第 4-6 頁，取自 [www.unodc.org/pdf/crime/terrorism/commonwealth\\_model\\_english.pdf](http://www.unodc.org/pdf/crime/terrorism/commonwealth_model_english.pdf)。

<sup>7</sup> 該等選項已獲認可並載於聯合國毒品和犯罪問題辦公室編撰的《世界反恐怖主義公約和議定書立法指南》(2003 年)第 8-9 頁。



佔用且事件涉及人命傷亡。作出或恐嚇作出“導致對財產的嚴重損害”的行為可嚴重擾亂社會民生，應當在“恐怖主義行為”的層面上予以充分考慮；

關於“嚴重干擾或嚴重擾亂基要服務、設施或系統”的提述

- (k) 從上文第 5 段可見，《反恐條例》下“恐怖主義行為”的定義中關於“嚴重干擾或嚴重擾亂基要服務、設施或系統”的提述，以《加拿大刑法》第 83.01(1) 條(摘要見 **附件 B**)為藍本；該刑法於 2001 年藉加拿大《反恐怖主義法令》予以修訂。有關提述的解釋視乎個別案件的情況而定，但絕非寬鬆的提述。干擾或中斷基要服務、設施或系統的行為如要構成《反恐條例》下的恐怖主義行為，須屬性質嚴重且為政治、宗教或思想上的主張而作出，並符合多項準則，包括為訂明禁止的目的而進行(即其意圖是強迫特區政府或國際組織的，或是威嚇公眾人士或部分公眾人士的)，但不包括在任何宣揚、抗議、持異見或工業行動的過程中作出的行為。有關提述與反恐公約所施加的義務一致，例如《資恐公約》附件載列的反恐公約，包括關乎爆破公用場所、國家或政府設施、公共運輸系統或基建設施的《制止恐怖主義爆炸的國際公約》；及
- (l) 值得注意的是，聯合國反恐怖主義委員會執行局和反恐怖主義辦公室於 2018 年編撰的《保護重要基礎設施免受恐怖主義襲擊的良好做法簡編》<sup>8</sup>中，指出《加拿大刑法》第 83.01(1)條，亦即《反恐條例》就制定基要服務的藍本，是良好做法的例子：該條文就重要基礎設施受到恐怖襲擊確定刑事責

<sup>8</sup> 聯合國反恐怖主義辦公室和安理會反恐怖主義委員會執行局編撰的《保護重要基礎設施免受恐怖主義襲擊的良好做法簡編》(2018 年)第 76 頁，取自 [www.un.org/sc/ctc/wp-content/uploads/2018/06/Compendium-CIP-final-version-120618\\_new\\_fonts\\_18\\_june\\_2018\\_optimized.pdf](http://www.un.org/sc/ctc/wp-content/uploads/2018/06/Compendium-CIP-final-version-120618_new_fonts_18_june_2018_optimized.pdf)。

任，以實施安理會第 2341(2017)號決議第 3 段的規定，當中就若干民事、政治或社會權利下作出的行為<sup>9</sup>訂明豁免情況，以充分顧及該等權利的合法行使。

9. 我們亦需指出，一如香港所有其他法例，在《反恐條例》的整個立法程序中，已充分顧及可能對人權造成的影響。政府信納該條例下“恐怖主義行為”的定義及其他條文，均與《基本法》中對基本權利的憲制保障和本地法律《香港人權法案》中對人權的保障一致。按照上文的討論，政府亦信納該定義與安理會第 1566(2004)號決議和反恐怖主義多邊條約所載恐怖主義的定義相符。

### **根據《反恐條例》作出檢控**

10. 《反恐條例》於 2002 年制定以來，至今未曾據之作出檢控。在香港，只有當可接納和可靠的證據足以證明有合理機會達至定罪，以及當作出檢控符合公眾利益，才會提出檢控。一般而言，控方須負舉證責任。因此，法院只在信納控方在無合理疑點下證明有關罪行的所有元素時，才會裁定該人罪名成立。

11. 《基本法》第六十三條訂明，“香港特別行政區律政司主管刑事檢察工作，不受任何干涉”。在執行檢控工作時，檢控人員務必遵行和提倡法治、公正客觀地協助法庭找出真相，以及依法秉公行義。專業、無私和獨立地執行檢控工作，對於維護法治，即香港的核心價值，至為關鍵。

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<sup>9</sup> 亦請留意，同一簡編第 76 及 77 頁毫無疑問地參考了南非《2004 年針對恐怖主義和相關活動的憲政民主保護法》下“恐怖主義活動”的定義；該定義涵蓋的多項行為中，包括“作出任何經設計或經計算以導致嚴重干擾或嚴重擾亂基要服務、設施或系統，或該等服務、設施或系統的提供(不論是公共或私人的)的行為……”。儘管上述條文接着列出屬此範圍的多個例子，但從“包括但不限於”這個詞組可見，所列清單並非詳盡無遺；該條文中“基要服務”的範圍，看來並非不及《反恐條例》中“基要服務”的範圍廣泛。

12. 由律政司編訂並已公布的《檢控守則》<sup>10</sup>為檢控人員在執行檢控工作方面提供參考基準和指引。公正執行公義之法，維護公正法治精神十分重要，該守則通篇內容皆奉此為圭臬<sup>11</sup>。當中訂明，檢控人員的責任是以最高的專業標準處理刑事案件。根據該守則第 1.2 段，檢控人員不得受多項因素影響，包括任何涉及調查、政治、傳媒、社羣或個人的利益或陳述。作出檢控與否的決定時，律政司必須就所得證據和適用法律進行客觀及專業評估，並按照該守則行事。案件的處理不會因涉案者的政治信念、訴求或背景而有所不同。該守則明確指出，如有聲稱指干犯的罪行同時涉及行使言論自由、和平集會的自由和結社自由，或需作出特別考慮，並特地提出政府有明確責任採取合理而適當的措施，讓合法的集會和平進行。只有當有關行為超出理智範圍或合理界線的限度，才應提出刑事檢控。檢控人員必須求取平衡，既要符合社會利益維持公眾秩序，亦要讓公眾合法及和平地行使自身權利<sup>12</sup>。

### **香港自 2019 年 6 月出現的社會動盪**

13. 2019 年 6 月以來，香港發生超過 1 400 場公眾活動，當中很多演變為示威者使用暴力的情況。暴力程度不斷升級，加上衝突愈加頻繁，市民的生命財產受到重大威脅。自去年 7 月發現首宗自製的三過氧化三丙酮(TATP)烈性炸藥後，至今已有多於 10 宗炸藥案件，例如去年 12 月在灣仔華仁書院附近檢獲兩個總重量約為 10 公斤的無線電遙控土製炸彈，該炸彈一旦引爆，其殺傷力足以波及附近 50 至 100 米範圍，使建築物倒塌；以及本年 5 月初在九龍灣聖若瑟英文中學舊校舍發現重量超過 10 公斤的製造炸彈原料和爆炸裝置。此外，警方曾檢獲壓力煲炸彈和爆炸物品，類似的炸彈曾被用於 2013 年美國波士頓馬拉松爆炸案，造成 3 人死亡；警方亦曾

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<sup>10</sup> 載於 [www.doj.gov.hk/eng/public/pubsoppaproc.html](http://www.doj.gov.hk/eng/public/pubsoppaproc.html) 以供公眾查閱。

<sup>11</sup> 《檢控守則》第 3 頁。

<sup>12</sup> 《檢控守則》第 19 章。

檢獲水喉管炸彈，類似的炸彈曾被用於 2017 年美國地鐵站爆炸案，造成 3 人受傷。此外，去年 7 月以來，警方檢獲五支槍和大量子彈；其中一支檢獲的槍是 AR-15 長距離步槍。同一款步槍曾於 2017 年在拉斯維加斯用於射向正在聽音樂會的羣眾，導致超過 50 人死亡和 500 人受傷。

14. 迄今，我們相信只有少數極端分子參與涉及本土恐怖主義的案件。目前，香港受恐怖襲擊的風險維持在“中度”級別。然而，政府會繼續致力遏止本土恐怖主義滋長，以防患於未然。打擊本土恐怖主義亦有賴社會攜手協力，保持警惕和在安全的情況下舉報，以及支持警方的行動和措施。

15. 一如既往，警方會全面調查每宗案件以追查檢獲的爆炸品和槍械的來源，亦會密切留意並謹慎審視案件可能涉及本土恐怖主義的風險。

## 煽動

16. 有關《刑事罪行條例》(香港法例第 200 章)第 9 及 10 條的條文(“《煽動法》”)是否符合《基本法》第二十七條和《香港人權法案》第十六、十七及十八條的問題，不能憑空回答，必須視乎事情存在的背景，因應每宗案件的事實和情況予以考慮。法院至今並無裁定《煽動法》與上述條文所保障的權利不符。因此，《煽動法》與《基本法》相關條文或通過《香港人權法案條例》在香港適用並施行的《公約》條文不符的說法，毫無理據。

17. 香港特區設有充分而有效的保障，防止市民的基本權利和自由受到非法及無理的侵擾。一如上文闡述，《基本法》訂明香港特區律政司主管刑事檢察工作，不受任何干涉。檢控人員在執行檢控工作時有責任依法行事，尊重和保護人的尊嚴及維護人權。

18. 香港特區的司法機構以其獨立及公正地審判案件見稱。在司法程序中出現有關保障基本權利和自由的問題時，情況也是一樣。《基本法》第三十五條保證所有香港居民有權對行政部門和行政人員的行為向法院提起訴訟，以及尋求司法補救。任何人如認為其權利受到侵犯，可向政府興訟。任何被控人如認為其被控的罪名與其憲制保障的權利不符，亦可向法庭挑戰控罪的合法性。香港的終審法院已確立發表自由和示威自由是香港的制度的核心，法院對這些自由的憲制保障應採納寬鬆的解釋<sup>13</sup>。任何對這些憲制保護的權利和自由施加的限制，必須依法規定，並符合四個程序的相稱性分析，即有關限制必須為達致某合法目的、與該合法目的有理性聯繫、沒有超越為達致該合法目的所需的相稱程度，以及在所獲得的社會利益與有關個別人士的憲制保護的權利所受到的影響之間已取得合理平衡，尤其須審視追求該等社會利益會否導致該人承受不可接受的嚴苛負擔<sup>14</sup>。政府須證明有關限制的理據。

19. 特別報告員可以放心，《煽動法》不會被用作壓制市民行使發表自由、和平集會及結社自由的權利。

20. 就特別報告員關注煽動的定義，以及人權事務委員會提出《基本法》第二十三條立法的措施須與《公約》相符的建議，一如政府先前指出<sup>15</sup>，煽動罪在日後開展的《基本法》第二十三條立法工作中處理較為合適<sup>16</sup>。

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<sup>13</sup> 楊美雲訴香港特別行政區(2005) 8 HKCFAR 137 一案第 1 段。

<sup>14</sup> 希慎興業有限公司訴城市規劃委員會(2016) 19 HKCFAR 372 一案第 134 至 135 段。

<sup>15</sup> 例如在香港特區參照《公約》提交的第三次報告(第 205 段)、香港特區對人權事務委員會就第三次報告提出的事項所作的回應(第 20 段)，以及香港特區參照《公約》提交的第四次報告(第 116 段)。

<sup>16</sup> 全國人民代表大會在 2020 年 5 月 28 日通過《關於建立健全香港特別行政區維護國家安全的法律制度和執行機制的決定》沒有取代或排斥《基本法》第 23 條規定香港特區應自行立法禁止危害國家安全行為的憲制責任和立法義務，因此特區仍有盡早完成《基本法》第 23 條規定的立法責任。

The Chinese Government received the joint communication [OL CHN 7/2020] dated 23 April 2020 by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Special Rapporteur on extrajudicial, summary or arbitrary executions, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Special Rapporteur on the rights to freedom of peaceful assembly and of association, Special Rapporteur on the situation of human rights defenders and Special Rapporteur on minority issues. The reply to the joint communication is as follows,

### **General principles**

1. Fundamental rights and freedoms are well protected in the Hong Kong Special Administrative Region (“HKSAR”) by the Basic Law of the HKSAR of the People’s Republic of China (“Basic Law”). At the constitutional level, the right to freedom of expression, the right of peaceful assembly, and the right to freedom of association are protected under Article 27 of the Basic Law. Article 39 of the Basic Law further provides, amongst others, that the provisions of the International Covenant on Civil and Political Rights (“ICCPR”) as applied to Hong Kong shall remain in force and shall be implemented through the laws of the HKSAR.

2. At the domestic legislation level, the provisions of the ICCPR as applied to Hong Kong have been implemented domestically by way of the Hong Kong Bill of Rights under the Hong Kong Bill of Rights Ordinance (Chapter 383 of the Laws of Hong Kong), which binds the Government. The full text of the Hong Kong Bill of Rights is set out in section 8 of the Hong Kong Bill of Rights Ordinance. The right to freedom of expression, the right of peaceful assembly, and the right to freedom of association are protected under Articles 16, 17, and 18 of the Hong Kong Bill of Rights respectively, which are modelled on Articles 19, 21 and 22 of the ICCPR. These rights and freedoms are not absolute and are subject to restrictions as prescribed by law and necessary in the interests of, *inter alia*, public order and protection of the rights and freedoms of others.

## **Anti-terrorism**

### ***Background of the United Nations (Anti-Terrorism Measures) Ordinance***

3. The United Nations (Anti-Terrorism Measures) Ordinance (“UNATMO”) (Chapter 575 of the Laws of Hong Kong) was originally enacted in 2002 to implement United Nations Security Council Resolution (“UNSCR”) 1373 (2001) relating to measures for the prevention of terrorist acts. UNSCR 1373 (2001) was passed on 28 September 2001 subsequent to the terrorist attacks in the United States on 11 September 2001. It requires, among other things, the prevention and suppression of terrorist financing, criminalisation of the wilful provision or collection of funds for terrorist acts, freezing of terrorist assets, and prohibition from making funds available for the benefit of terrorist or terrorist associate. UNSCR 1373 (2001) did not define “terrorist act”. UNATMO was amended in 2004, 2012 and 2018 to implement the relevant terrorism-related multilateral conventions (namely, the United Nations International Convention for the Suppression of Terrorist Bombings, the United Nations Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, and the United Nations Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf), some of the Financial Action Task Force (“FATF”) recommendations, as well as UNSCR 2178 (2014) relating to the prevention of travel for the purpose of terrorist acts or terrorist training.

### ***Definition of “terrorist act”***

4. Under section 2 of UNATMO, “terrorist act” is defined as follows for the purposes of UNATMO –

*“(a) subject to paragraph (b), means the use or threat of action where –*

*(i) the action is carried out with the intention of, or the threat is made with the intention of using action that would have the effect of –*

- (A) causing serious violence against a person;*
  - (B) causing serious damage to property;*
  - (C) endangering a person’s life, other than that of the person committing the action;*
  - (D) creating a serious risk to the health or safety of the public or a section of the public;*
  - (E) seriously interfering with or seriously disrupting an electronic system; or*
  - (F) seriously interfering with or seriously disrupting an essential service, facility or system, whether public or private; and*
  - (ii) the use or threat is –*
    - (A) intended to compel the Government or an international organization or to intimidate the public or a section of the public; and*
    - (B) made for the purpose of advancing a political, religious or ideological cause;*
- (b) in the case of paragraph (a)(i)(D), (E) or (F), does not include the use or threat of action in the course of any advocacy, protest, dissent or industrial action.”*

5. The above definition of “terrorist act” was modelled on the United Kingdom Terrorism Act 2000 (extract at **Annex A**). Reference was also drawn from the Canada Criminal Code (extract at **Annex B**) as amended by the Canada Anti-terrorism Act in 2001 for drafting paragraph (a)(i)(F) and paragraph (b) of the statutory definition. It is in line with the definition in anti-terrorism laws of many other jurisdictions, including South Africa’s Protection of Constitutional Democracy against Terrorist and Related Activities Act 2004 (extract at **Annex C**).

6. The definition of “terrorist act” had been thoroughly deliberated by the Legislative Council (“LegCo”) to ensure that it would not undermine the freedom of speech and civil rights before UNATMO was enacted in 2002. The definition had again been thoroughly deliberated by LegCo in 2012 when the definition of “terrorist act” was amended to include international organisations as a target of compulsion. According to the definition under UNATMO, a “terrorist act” must satisfy the following three criteria –



- (a) it involves the use of action or threat of action to compel the Government or an international organisation or to intimidate the public<sup>17</sup>;
- (b) the use or threat of action is for the purpose of advancing a political, religious or ideological cause; and
- (c) the action or threat of action is carried out or made with the intention of the specified consequences such as causing serious violence, serious damage to property, or serious risk to public health or safety.

7. Behind this definition is the commonly acknowledged consideration that there is a qualitative difference between terrorist acts (which are capable of inflicting massive and indiscriminate injury and damage to the public) and ordinary criminal activities (such as criminal damage, assault or even murder). In accordance with this definition, unlawful acts are not caught by the definition of “terrorist act” unless all three criteria are met. In any event, in cases where the proscribed acts are done in the course of demonstration or industrial action with the intention of leading to consequences set out under paragraph (a)(i)(D), (E) or (F) of the statutory definition (such as serious interference with or serious disruption of an essential service, facility or system) only, such acts will not be regarded as terrorists acts for the purpose of UNATMO.

***Compliance with UNSCR 1566 (2004), multilateral terrorism treaties and ICCPR***

8. The Special Rapporteurs have expressed concern that as the exemption of “advocacy, protest, dissent or industrial action” does not apply to “causing serious damage to property” in the definition of “terrorist act” under UNATMO, it may “steer the domestic legal standard away from the core emphasis found in agreed international treaties on terrorism and ... [UNSCR] 1566 on the targeting of civilians”. Concern is also expressed over the reference to “seriously interfering with or

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<sup>17</sup> Under section 2(2) of UNATMO, any reference in the definition of “terrorist act” to the Government or public includes the government, or the public, of a place outside the HKSAR.

seriously disrupting an essential service, facility or system, whether public or private” with the caution that “the definition of ‘essential service’ may be applicable to a wide-ranging including but not limited to infrastructure, electronics, information, communication, information telecommunications.” We must point out that such concerns are ungrounded and unnecessary because of the following reasons –

*The definition of “terrorist act” in UNATMO*

- (a) There is no universally agreed definition of “terrorism”. There is no foundational treaty or comprehensive legal regime currently existing for terrorism and counter-terrorism<sup>18</sup>. The debate concerning a draft comprehensive convention on terrorism (“Draft Comprehensive Convention”) with a universal definition of terrorism remains deadlocked in the General Assembly and the definition is therefore up to flexible domestic interpretation<sup>19</sup>. Despite the flexibility, it is noted that domestic legislation needs to comply with decisions of the Security Council addressing terrorism in accordance with the Charter of the United Nations and the applicable international human rights conventions and terrorism-related conventions;
  
- (b) The Special Rapporteurs consider that some of the legitimate criteria that can be used to characterise actions as “terrorist” include the three cumulative characteristics identified in paragraph 3 of UNSCR 1566 (2004). With reference to its terms, that paragraph did not purport to provide a definitive meaning for “terrorism” or to impose any mandatory obligation on Member States to adopt its formulation in defining the term “terrorist act” in UNSCR 1373 (2001)<sup>20</sup>. In any case, paragraph

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<sup>18</sup> United Nations Office on Drugs and Crime, E4J University Module Series: Counter-Terrorism, Module 4: Criminal Justice Responses to Terrorism: Key Issues - Treaty-based crimes of terrorism - universal counter terrorism instruments, “Draft Comprehensive Convention on International Terrorism”, first paragraph, July 2018, retrieved from [www.unodc.org/e4j/en/terrorism/module-4/key-issues/treaty-based-crimes-of-terrorism.html](http://www.unodc.org/e4j/en/terrorism/module-4/key-issues/treaty-based-crimes-of-terrorism.html)

<sup>19</sup> International Federation for Human Rights, The United Nations Counter-Terrorism Complex Bureaucracy, Political Influence and Civil Liberties, first paragraph at p.16, September 2017 / N°700a at [www.fidh.org/IMG/pdf/9.25\\_fidh\\_final\\_compressed.pdf](http://www.fidh.org/IMG/pdf/9.25_fidh_final_compressed.pdf)

<sup>20</sup> Professor Ben Saul, when commenting on the conception of terrorism in UNSCR 1566 (2004), wrote that “[t]he definition of terrorism presented by the Security Resolution is only a working definition

3 of UNSCR 1566 (2004) (or for that matter, the model definition of terrorism referred to by the Special Rapporteurs) does not expressly exclude actions taken or threatened “in the course of any advocacy, protest, dissent or industrial action” as advocated by the Special Rapporteurs;

- (c) Against the above background, it is important to emphasise that UNATMO does not aim to create a general offence of terrorism. The specific terrorist acts referred to in paragraph 3 of UNSCR 1566 (2004) and constituting offences within the scope of and as defined in individual terrorism-related Conventions are criminalised in the HKSAR either under specific legislation enacted for implementation of such Conventions or by applicable criminal law (see the examples in **Annex D**);
- (d) In the absence of a general criminal offence of terrorism under the HKSAR law, in the implementation of the Convention for the Suppression of the Financing of Terrorism (“the TF Convention”) and the relevant Recommendations of FATF, UNATMO provides for a definition of “terrorist act” and criminalises the financing of conduct which constitutes terrorist acts within the said definition. Such an approach is in line with the approach adopted for the TF Convention which requires member States to criminalise the financing of conduct specified in Article 2.1, and the UNATMO definition of “terrorist acts” is in line with the requirement provided for in Article 2.1 of the TF Convention;
- (e) Such being the case, the terminology “terrorist act” in UNATMO is relevant to the financing aspect as in the criminalisation of terrorist financing, and the related provisions such as designation of terrorists and terrorist property; the freezing and prohibition in dealing in terrorist property; prohibition on travel for the purpose of terrorist acts or terrorist training and criminalisation of financing such travels;

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which does not require states to conform with anti-terrorism legislation to it.” See, Ana Maria Salinas de Frias, Katja Samuel, Nigel D White (eds), Counter-Terrorism: International Law and Practice, Chapter 6, p 145.

*A requirement under Recommendation 5 of the FATF*

- (f) It should also be noted that it is also a requirement under Recommendation 5 of FATF that terrorist financing should be criminalised on the basis of the TF Convention;
- (g) As confirmed in FATF’s recent mutual evaluation (ME) of Hong Kong’s counter-terrorism financing measures under Recommendation 5, the definition of “terrorist act” in UNATMO accords with the relevant FATF requirements, save and except with regard to the exemption provided for in UNATMO (to be explained in paragraph (h) below). Specifically, FATF recognises that the range of effects within the definition of “terrorist act” are broad enough to “cover an array of factual settings that might be expected to be associated with offences created by the treaties listed in the annex to the TF Convention”;
- (h) The definition of “terrorist act” in UNATMO is actually narrower than that prescribed by the TF Convention and the relevant FATF recommendation, in that the UNATMO definition provides for an exemption to non-violent acts involving a serious risk of health or public safety, or serious interference with or serious disruption of an electronic system or an essential service, facility or system in the course of any advocacy, protest, dissent or industrial action. Such an exemption is considered by FATF to be a gap in HKSAR’s counter-terrorist financing measures;

*On the reference to “serious damage to property”*

- (i) As to the reference to “serious damage to property” in the UNATMO definition of “terrorist act”, “damage to property” is commonly recognised and included as acts of terrorism in the relevant law of several common law jurisdictions mentioned in paragraph 5 above and also in international anti-terrorism instruments, including –
  - (1) The Draft Comprehensive Convention<sup>21</sup> which sanctions

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<sup>21</sup> United Nations, General Assembly, A/59/894. Appendix II Draft Comprehensive Convention

under Article 2.1 criminal acts involving “serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment” or “damage to property, places, facilities or systems... resulting or likely to result in major economic loss”;

- (2) In the legislative options for defining “terrorist acts” provided in the Commonwealth Secretariat’s Model Legislative Provisions on Measures to Combat Terrorism<sup>22</sup>, “serious damage to property” is included in the different options for the definition of “terrorist act”<sup>23</sup>;
- (3) Moreover, the provisions in the Draft Comprehensive Convention and the Commonwealth Secretariat’s Model Legislative Provisions on Measures to Combat Terrorism mentioned above do not include an exception of “advocacy, protest, dissent or industrial action”. Nor is such exception provided for with respect to substantial property damage in the Canada Criminal Code and the South Africa’s Protection of Constitutional Democracy against Terrorist and Related Activities Act 2004 mentioned in paragraph 5 above;

(j) We implore the Special Rapporteurs to exercise sensible judgement in considering the act or threat of “causing serious damage to property” a rightful consequence of “terrorist act”. Should that be correct, even massive destruction of an entire building to the extent similar to that of the World Trade Center would then not be regarded as a terrorist act unless the building was occupied and there were deaths or injuries involved. The act or threat of “causing serious damage to property” can have

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against International Terrorism, 12 August 2005, retrieved from [undocs.org/en/A/59/894](http://undocs.org/en/A/59/894)

<sup>22</sup> Commonwealth Secretariat, Model Legislative Provisions on Measures to Combat Terrorism, pp.4-6 September 2002 at [www.unodc.org/pdf/crime/terrorism/commonwealth\\_model\\_english.pdf](http://www.unodc.org/pdf/crime/terrorism/commonwealth_model_english.pdf)

<sup>23</sup> These options were endorsed in the Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols prepared by the United Nations Office on Drugs and Crime in 2003, pp 8-9.

substantial disruptive effects on the local community and should be duly considered in the context of “terrorist act”;

*On the reference to “seriously interfering with or seriously disrupting an essential service, facility or system”*

- (k) As noted in paragraph 5 above, the reference to “seriously interfering with or seriously disrupting an essential service, facility or system” in the definition of “terrorist act” in UNATMO is modelled upon section 83.01(1) of the Canada Criminal Code (extract at **Annex B**) as amended by the Canada Anti-terrorism Act in 2001. While the construction of the reference depends on the circumstances of individual cases, the reference is by no means a wide one. For an act of interference or interruption to an essential service, facility or system to constitute a terrorist act under UNATMO, the act must be of a serious nature and be done for a political, religious or ideological cause, and must, amongst other things, be done for a proscribed purpose (that is, with the intention to compel the Government or an international organisation, or to intimidate the public or a sector of the public). It must not be an act done in the course of any advocacy, protest, dissent or industrial action. The reference is consistent with the obligations imposed under anti-terrorism Conventions such as those set out in the annex to the TF Convention including the International Convention for the Suppression of Terrorist Bombings which relates to bombings of places of public use, a State or government facility, a public transportation system or an infrastructure facility; and
- (l) It is worth noting that in “The Protection of Critical Infrastructures against Terrorist Attacks: Compendium of Good Practices” compiled by the Counter-Terrorism Committee Executive Directorate and the United Nations Office of Counter-Terrorism in 2018, section 83.01(1) of the Canada Criminal Code, upon which the formulation of essential service in UNATMO was modelled, was cited as an example of good practices on establishing criminal responsibility for terrorist attacks against critical infrastructure in implementation of

paragraph 3 of UNSCR 2341 (2017)<sup>24</sup>, with due regard to legitimate exercise of certain civil, political or social rights by providing exemptions for action taken in the context of those rights<sup>25</sup>.

9. We must also point out that same as all other pieces of legislation in Hong Kong, due regard has been given to the possible human rights implications throughout the entire legislative process of UNATMO. The Government is satisfied that the definition of “terrorist act”, as well as other provisions in UNATMO, are consistent with the constitutional protection of fundamental rights under the Basic Law and the human rights protection in our domestic legislation under the Hong Kong Bill of Rights. Further, in light of the discussion above, the Government is also satisfied that the above definition is consistent with UNSCR 1566 (2004) and the definition of terrorism contained in multilateral terrorism treaties.

### ***Prosecution under UNATMO***

10. Thus far, there has been no prosecution under UNATMO since its enactment in 2002. In Hong Kong, prosecution is initiated only when evidence that is admissible and reliable demonstrates a reasonable prospect of a conviction, and if it is in the public interest to do so. The prosecution generally bears the burden of proof. Accordingly, the court only convicts when it is satisfied that the prosecution has proven beyond reasonable doubt all the elements of the relevant offence.

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<sup>24</sup> United Nations Office of Counter-Terrorism and United Nations Security Council Counter-Terrorism Committee Executive Directorate, *The Protection of Critical Infrastructure against Terrorist Attacks: Compendium of Good Practices*, 2018, p.76, available at [www.un.org/sc/ctc/wp-content/uploads/2018/06/Compendium-CIP-final-version-120618\\_new\\_fonts\\_18\\_june\\_2018\\_optimized.pdf](http://www.un.org/sc/ctc/wp-content/uploads/2018/06/Compendium-CIP-final-version-120618_new_fonts_18_june_2018_optimized.pdf)

<sup>25</sup> It may also be noted that at pp 76-77 of the same publication, reference was made without queries to the definition of “terrorist activity” in South Africa’s Protection of Constitutional Democracy against Terrorist and Related Activities Act 2004, which is defined to cover (inter alia) any act committed which is designed or calculated to cause serious interference with or serious disruption of an essential service, facility or system, or the delivery of such service, facility or system, whether public or private ...”. While the above provision goes on to list a number of examples which fall within its scope, they are not meant to be exhaustive as indicated by the phrase “including, but not limited to”. It appears that the scope of “essential service” in that provision is no less broad than the scope of “essential service” in UNATMO.

11. Article 63 of the Basic Law provides that “the Department of Justice of the Hong Kong Special Administrative Region shall control criminal prosecutions, free from any interference”. When conducting prosecutions, a prosecutor is required to comply with and promote the rule of law, fairly and objectively assisting the court to arrive at the truth and to do justice in accordance with the law. Professional, impartial and independent prosecution work is pivotal in safeguarding the rule of law, which is a core value of Hong Kong.

12. The published Prosecution Code (“the Prosecution Code”) compiled by the Department of Justice (“DoJ”)<sup>26</sup> provides reference points and guidance for prosecutors in conducting prosecution. The golden thread that runs through the fabric of the Prosecution Code is the importance of upholding the just rule of law by the just application of just laws.<sup>27</sup> It states that the responsibility of prosecutors is to apply the highest of professional standards in handling criminal cases. According to paragraph 1.2 of the Prosecution Code, a prosecutor must not be influenced by, among others, any investigatory, political, media, community or individual interest or representation. In making decisions of whether or not to prosecute, DoJ must make an objective and professional assessment of the available evidence and applicable law, and act in accordance with the Prosecution Code. Cases will not be handled differently owing to the political beliefs, demands or backgrounds of the persons involved. The Prosecution Code expressly points out that offences alleged to have been committed in conjunction with the exercise of the right to freedom of expression, the right of peaceful assembly, and the right to freedom of association may give rise to special considerations, and specifically refers to the Government’s positive duty to take reasonable and appropriate measures to enable lawful assemblies to take place peacefully. Criminal prosecution should only be pursued when the relevant conduct exceeds sensible proportions or the bounds of reasonableness. Prosecutors must strike a balance between the interest of society in maintaining public order and the right of a person lawfully and peacefully to exercise his or her rights.<sup>28</sup>

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<sup>26</sup> Publicly accessible at [www.doj.gov.hk/eng/public/pubsoppaptoc.html](http://www.doj.gov.hk/eng/public/pubsoppaptoc.html)

<sup>27</sup> Prosecution Code, at p. 3.

<sup>28</sup> Chapter 19 of the Prosecution Code.



### *Social unrest in Hong Kong since June 2019*

13. There have been more than 1 400 public order events since June 2019, with many of them ended up in the use of violence by protestors. The continuous escalation of violence, as well as the increasingly frequent confrontational situations, have caused grave threat to people's lives and properties. Since the first case of self-produced powerful explosive of TATP was found in July last year, there have been more than ten explosives cases. For example, in December last year, two radio-controlled improvised explosive devices weighing about 10 kilogrammes in total were found in the vicinity of Wah Yan College in Wan Chai. Ignition of the devices would pose lethal damage to the surrounding 50- to 100-metre range and lead to collapse of buildings; in early May this year, more than ten kilogrammes of bomb-making materials and bomb devices were found in the old school building of St. Joseph's Anglo-Chinese School in Kowloon Bay. In addition, a pressure cooker similar to the one used in the US Boston Marathon bomb attack in 2013 in which three people were killed was seized in a premise together with explosive items. In another case, a pipe bomb was seized similar to the type used in a subway attack in the US in 2017 where three people were injured. In addition, since July last year, the Police have also seized five guns and a large quantity of bullets. One of the seized guns was the AR-15 long-range rifle. The same rifle model was used to fire at the crowd listening to a concert in Las Vegas in 2017, causing more than 50 deaths and 500 injuries.

14. By far, it is believed that only a small number of extremists were involved in cases involving elements of local terrorism. At present, the terrorist threat level of Hong Kong remains "moderate". That said, the Government will continue to make every effort to stop the breeding of local terrorism and nip it in the bud. The fight against local terrorism also requires the common efforts of the whole society to exercise vigilance and report under safe conditions, as well as to support the actions and measures of the Police.

15. As always, the Police will conduct full investigation into each

case to track the source of explosives and guns seized, as well as closely monitor and cautiously examine the cases to identify any possible risk of local terrorism.

## **Sedition**

16. The question of whether the provisions of sections 9 and 10 of the Crimes Ordinance (Chapter 200 of the Laws of Hong Kong) (“Sedition Law”) are compatible with Article 27 of the Basic Law and Articles 16, 17, and 18 of the Hong Kong Bill of Rights is one to be answered not in a vacuum, but only in context, with reference to the facts and circumstances of each case. There is no court case ruling that the Sedition Law are incompatible with the rights protected under the above provisions. Therefore, there is no reason to suggest that the Sedition Law are incompliant with the relevant provisions of the Basic Law or the provisions of the ICCPR as applied and implemented by the Hong Kong Bill of Rights Ordinance in Hong Kong.

17. In the HKSAR, there are adequate and effective safeguards against unlawful and unjustifiable interference with our people’s fundamental rights and freedoms. As explained above, the Basic Law provides that the DoJ of the HKSAR shall control criminal prosecutions free from any interference. In conducting prosecution, prosecutors are under a duty to, in accordance with law, respect and protect human dignity and uphold human rights.

18. The judiciary in the HKSAR is renowned for its independence and impartiality in adjudicating cases. This is the same when the issue of protection of fundamental rights and freedoms arises in the judicial process. Article 35 of the Basic Law guarantees that all Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel and to seek judicial remedies. Any person who believes that his rights have been infringed may bring proceedings against the Government. An accused person, who believes that he has been charged with an offence that is incompatible with his constitutionally protected rights, may also mount a collateral challenge on the legality of the offence before the court. Our

Court of Final Appeal has held that the freedom of expression and the freedom to demonstrate are at the heart of Hong Kong's system and the courts should give a generous interpretation to the constitutional guarantees for these freedoms.<sup>29</sup> Any restriction on these constitutionally protected rights and freedoms must be prescribed by law and justified under a four-stage proportionality test, namely the restriction must pursue a legitimate aim, be rationally connected to the legitimate aim, be no more than is necessary to achieve the legitimate aim, and strike a reasonable balance between the societal benefits and the inroads made into the constitutionally protected rights of the individual, asking in particular whether pursuit of the societal interest resulted in an unacceptably harsh burden on the individual.<sup>30</sup> The Government bears the burden to justify the restriction.

19. The Special Rapporteurs can rest assured that the Sedition Law would not be used to stifle the exercise of the right to freedom of expression, the right of peaceful assembly, and the right to freedom of association.

20. On the Special Rapporteurs' concern over the definition of sedition and the Human Rights Committee's recommendation that measures to enact Article 23 of the Basic Law must be in line with ICCPR, as what the Government has pointed out previously<sup>31</sup>, the offence of sedition should more appropriately be dealt with in the context of the legislative exercise for Article 23 of the Basic Law when it is launched in future<sup>32</sup>.

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<sup>29</sup> *Yeung May Wan v HKSAR* (2005) 8 HKCFAR 137 at para. 1.

<sup>30</sup> *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372, at paras. 134-135.

<sup>31</sup> For example, in the third report of HKSAR in the light of ICCPR (at para. 205), the HKSAR's Responses to the List of Issues raised by the Human Rights Committee on the third ICCPR Report (at para. 20), and the fourth report of HKSAR in the light of ICCPR (at para. 116).

<sup>32</sup> The Decision on establishing and improving the legal system and enforcement mechanisms for the HKSAR to safeguard national security adopted by the National People's Congress on 28 May 2020 is not replacing or repealing Article 23, which stipulates the constitutional duty and legislative obligation that the HKSAR shall enact laws on its own to prohibit acts that endanger national security. The HKSAR still has the obligation to complete legislation to implement Article 23 of the Basic Law as soon as possible.

