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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 communication [OL CHN 3/2022] dated 14 February 2022, 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.



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 2022 年 2 月 14 日来文收悉，中国政府答复如下：

《香港国安法》关键内容符合国际法规的准确性、必要性、相称性及非歧视性标准

1. 就 OL CHN 17/2020 号的来函中，指称《中华人民共和国香港特别行政区维护国家安全法》（《香港国安法》）侵犯若干基本权利，我们必须重申，《香港国安法》第四条已明确规定香港特别行政区（香港特区）维护国家安全应当尊重和保障人权，依法保护香港特区居民根据《中华人民共和国香港特别行政区基本法》（《基本法》）、《公民权利和政治权利国际公约》（《公约》）和《经济、社会与文化权利的国际公约》适用于香港的有关规定享有的权利和自由。任何根据《香港国安法》所采取的措施或执法行动均须符合上述方针。正如香港终审法院于 *香港特别行政区诉黎智英* (2021) 24 HKCFAR 67 一案中提及，《香港国安法》第四和五条¹强调在维护国家安全的同时，亦保障和尊重人权并坚守法治价值，而这对于《香港国安法》的整体理解，至为重要。然而，《基本法》及《公约》所确认的许多权利和自由并非绝对的，并可以保障国家安全及 / 或公共秩序等为由受到限制。这原则在所有国

¹ 第五条规定，防范、制止和惩治危害国家安全犯罪，应当坚持法治原则。法律规定为犯罪行为的，依照法律定罪处刑；法律没有规定为犯罪行为的，不得定罪处刑。

任何人未经司法机关判罪之前均假定无罪。保障犯罪嫌疑人、被告人和其他诉讼参与人依法享有的辩护权和其他诉讼权利。任何人已经司法程序被最终确定有罪或者宣告无罪的，不得就同一行为再予审判或者惩罚。

家及地方（包括香港特区）也适用。

2. 《香港国安法》亦已清楚列出所规定的四类危害国家安全的罪行。这些罪行的定义清晰，亦与其他司法管辖区的国家安全法所订罪行相似。构成有关罪行的元素、刑罚、减刑因素和犯罪的其他后果已于《香港国安法》第三章清楚订明。法院只会在毫无合理疑点的情况下，信纳被告人兼备相关的犯罪行为 and 犯罪意图，才会裁定被告罪成。此外，在香港特区管辖的《香港国安法》案件中，香港法院可透过案例进一步厘清罪行元素含义，这亦是普通法制度中的一贯做法。举例而言，香港高等法院原讼法庭在 *香港特别行政区诉唐英杰* [2021] HKCFI 2200 一案中详细分析了《香港国安法》第二十一条煽动分裂国家罪和第二十四条恐怖活动罪的罪行元素。相关裁决理由书上载于司法机构的网站²，任何人都可查阅。特别报告员指称《香港国安法》内容缺乏准确性，丝毫没有事实根据。

香港特区获授权就《香港国安法》规定的犯罪案件行使管辖权

3. 来函所表达有关《公约》对处理《香港国安法》规定的国家安全犯罪案件的适用性和意见，显示特别报告员未能正确理解中国宪制秩序、「一国两制」及《香港国安法》下香港特区获授权行使管辖权的安排。

² 网址：

https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=137456&QS=%2B&TP=RV

4. 在世界各地，不论是单一制国家或联邦制国家，维护国家安全均属中央事权，是主权国家行使的固有权利。因此，一般而言，维护国家安全事务是由中央政府或联邦政府直接负责执行，而地方政府或州政府只有配合协助的角色³。

5. 《香港国安法》总则明确指出中央人民政府对香港特区有关的国家安全事务负有根本责任，而香港特区负有维护国家安全的宪制责任。根据《香港国安法》，除第五十五条规定的情形外，香港特区对《香港国安法》的案件行使管辖权。这个具有开创性的独特安排在世界上是绝无仅有，既体现了「一国两制」，也展示了在一国之内中央人民政府对香港特区履行其维护国家安全宪制责任的高度信心和信任。

6. 《香港国安法》第四章有两点值得留意。第一，除了《香港国安法》第五十五条订下的三类特定情况外，绝大部分案件都是由香港特区行使管辖权的。第二，香港特区管辖危害国家安全犯罪的立案侦查、检控、审判和刑罚的执行等诉讼程序事宜时，适用《香港国安法》和香港本地法律。律政司依法做出检控决定，受到《基本法》保障。

中央人民政府在特定情况下行使管辖权：《香港国安法》第五十五条有关由驻香港特别行政区维护国家安全公署（驻港国安公署）对《香港国安法》规定的危害国家安全犯罪案件行

³ 以美国为例，其国家安全法律全由美国国会制定，各州无权制定相关法律。执行和案件管辖权亦全归联邦，由联邦国土安全部、联邦调查局和中央情报局等执法，联邦检察官负责提起国家安全公诉，而联邦法院负责审判危害国家安全案件。

使管辖权的安排

7. 国家安全属于中央事权，国家安全犯罪行为危及与伤害的是整个国家与人民的根本利益。中央对维护国家安全承担根本责任，这原则已反映在《香港国安法》。中央人民政府根据中华人民共和国全国人民代表大会有关决定和《香港国安法》，在香港设立维护国家安全公署，并授权驻港国安公署在特定情形下依法行使管辖权，是维护国家安全、有效查处危害国家安全的有关犯罪案件的实际需要。

中央人民政府行使管辖权的三种特定情况

8. 《香港国安法》第五十五条所列明的三种特定情况分别是：（一）案件涉及外国或者境外势力介入的复杂情况，香港特区管辖确有困难的；（二）出现香港特区政府无法有效执行《香港国安法》的严重情况的；（三）出现国家安全面临重大现实威胁的情况的。

9. 就上述的三种特定情况而言，需要由香港特区政府或驻港国安公署提出，并报中央人民政府批准，驻港国安公署才可启动行使管辖权的程序。在这些情况下，《香港国安法》第四十条规定，香港特区对有关案件没有管辖权；而《香港国安法》第五十七条订明，驻港国安公署、由最高人民检察院和最高人民法院分别指定的检察机关和法院将根据《中华人民共和国刑事诉讼法》等相关法律进行立案侦查、检控、审判及执行刑罚等诉讼程序事宜。对于驻港国安公署依法采取的措施，有关机构、组织和个人必须遵从。

驻港国安公署必须遵守法律

10. 《香港国安法》第六十条规定，驻港国安公署及其人员依据《香港国安法》执行职务的行为，不受香港特区管辖；而《香港国安法》第五十条明确规定，驻港国安公署应当依法履行职责，依法接受监督，不得侵害任何个人和组织的合法权益，其人员除须遵守全国性法律，还应当遵守香港特别行政区法律。值得注意的是，驻港国安公署人员须依法接受相关机构监督，包括《中华人民共和国宪法》（《宪法》）第三章第七节下的监察委员会。

《公约》对由中央人民政府行使管辖权的案件的适用性

11. 我们强烈反对任何认为中央人民政府行使管辖权是旨在「规避」或绕过《公约》的意见。我们重申，中央授权香港特区管辖绝大部分案件，只在极少数案件对香港特区处理不了的危害国家安全犯罪案件行使直接管辖，而且还要经过非常严格的审批程序，整个安排合宪合法。

12. 《香港国安法》第四条规定，香港特区维护国家安全应当尊重和保障人权，依法保护香港居民根据《基本法》和《公民权利和政治权利国际公约》、《经济、社会与文化权利的国际公约》适用于香港的有关规定享有的包括言论、新闻、出版的自由，结社、集会、游行、示威的自由在内的权利和自由。正如我们于2020年10月30日就OL CHN 17/2020的来函回应指出，驻港国安公署等国家执法、司法机关根据《香

港国安法》第五十五条的规定对危害国家安全案件行使管辖权时，与香港特区有关执法、司法机关所遵从的人权保障标准并无本质差异。《宪法》为公正审判和人权保障提供了宪制保障，当中条文规定国家尊重和保障人权，审判以公开为原则，被告人有权获得辩护，及人民法院依照法律规定独立行使审判权，而中国刑事诉讼法有关原则规定和诉讼执行机制安排进一步为公正审判和人权保障提供了法律依据。内地相关法律和香港特区法律中，关于刑事司法人权保障的规定有诸多相同之处，包括禁止酷刑或者其他残忍、不人道的待遇；非因法定理由及程序，不得剥夺任何人的自由；受刑事控告之人，未经依法确定有罪之前，应假定其无罪；迅速告知指控；给予被告充分的时间和便利，准备答辩并与其选任的辩护人联络；获得法律援助；询问证人；免费获得翻译；不得被迫自证其罪；对少年犯罪案件使用特殊的诉讼程序；保障上诉权等。可以说，内地法律和香港特区法律原则上均符合联合国刑事司法人权保障标准。此外，《香港国安法》第五十八条亦特别订明，根据《香港国安法》第五十五条规定管辖案件时，犯罪嫌疑人自被驻港国安公署第一次讯问或者采取强制措施之日起，有权委托律师作为辩护人。辩护律师可以依法为犯罪嫌疑人、被告人提供法律帮助。犯罪嫌疑人、被告人被合法拘捕后，享有尽早接受司法机关公正审判的权利。

13. 因此，由中央人民政府（包括驻港国安公署）行使管辖权的案件，犯罪嫌疑人及被告人的个人权利（包括于案件处理的不同阶段的相关权利）均会得到充分的保护，并与《公约》的目的及宗旨是一致的。

The key aspects of the National Security Law meet the required thresholds of precision, necessity, proportionality and non-discrimination under international law

1. With regard to the allegation in communication No. OL CHN 17/2020 that the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (National Security Law) infringes on certain fundamental rights, we must reiterate that Article 4 of the National Security Law clearly stipulates that human rights shall be respected and protected in safeguarding national security in the Hong Kong Special Administrative Region (HKSAR), and the rights and freedoms which HKSAR residents enjoy under the Basic Law of the HKSAR of the People's Republic of China (Basic Law) and the provisions of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) as applied to Hong Kong, shall be protected in accordance with the law. Any measures or enforcement actions taken under the National Security Law must observe the above principle. As pointed out by the Hong Kong Court of Final Appeal in the case of *HKSAR v Lai Chee Ying* (2021) 24 HKCFAR 67, Articles 4 and 5⁴ of the National Security Law, which emphasise protection of

⁴ As stipulated in Article 5, the principle of the rule of law shall be adhered to in preventing, suppressing, and imposing punishment for offences endangering national security. A person who commits an act which constitutes an offence under the law shall be convicted and punished in accordance with the law. No one shall be convicted and punished for an act which does not constitute an offence under the law.

and respect for human rights and adherence to rule of law values while safeguarding national security, are centrally important to the interpretation of the National Security Law generally. However, many of the rights and freedoms recognised in the Basic Law and the ICCPR are not absolute, and may be restricted for reasons of national security and/or public order, etc. This principle applies to all countries and places including the HKSAR.

2. The National Security Law has also clearly stipulated four categories of offences that endanger national security. Such offences are clearly defined and are similar to those in the national security laws of other jurisdictions. The elements, penalties, mitigation factors and other consequences of the offences are clearly prescribed in Chapter III of the National Security Law. A defendant may only be convicted by the court if the court is satisfied beyond reasonable doubt that the defendant has the relevant *actus reus* and *mens rea* of the offence. In addition, in handling cases concerning the National Security Law under the jurisdiction of the HKSAR, the courts of the HKSAR may further clarify the elements of an offence in adjudicating cases, which is the usual practice in a common law system. For instance, in the case of *HKSAR v Tong Ying Kit* [2021] HKCFI 2200, the Court of First Instance of the High Court of the HKSAR has elaborated on

A person is presumed innocent until convicted by a judicial body. The right to defend himself or herself and other rights in judicial proceedings that a criminal suspect, defendant, and other parties in judicial proceedings are entitled to under the law shall be protected. No one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in judicial proceedings.

the elements of the offences of secession and terrorist activities under Article 21 and Article 24 of the National Security Law respectively. The reasons for verdict is available for public inspection on the website of the Judiciary of the HKSAR⁵. The Special Rapporteur's allegation that the National Security Law lacks precision is totally groundless.

The HKSAR is authorised to exercise jurisdiction over cases concerning offences under the National Security Law

3. The comments set out in the communication on the applicability of the ICCPR to cases of offences concerning national security under the National Security Law show that the Special Rapporteur does not have a correct understanding of the arrangement for the HKSAR to be authorised to exercise jurisdiction under the constitutional order of the People's Republic of China, the principle of "one country, two systems" and the National Security Law.

4. In all places around the world, be they unitary States or federal States, safeguarding national security is a matter within the purview of the central authorities, and is an inherent right of every sovereign State. Hence, generally speaking, it is either the central government or the federal government that is directly responsible for safeguarding national security, whereas the local

⁵ Website link :

https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=137456&QS=%2B&TP=RV

government or the state government can only cooperate and assist with such work⁶.

5. The General Principles of the National Security Law clearly stipulate that the Central People's Government (CPG) has an overarching responsibility for national security affairs relating to the HKSAR, and it is the constitutional duty of the HKSAR to safeguard national security. According to the National Security Law, save for the situations specified under Article 55, the HKSAR exercises jurisdiction over cases concerning offences under the National Security Law. Such ground-breaking and special arrangement is unique in the world. Apart from reflecting the adherence to "one country, two systems", it has demonstrated the high level of confidence and trust of the CPG in the HKSAR in implementing its own constitutional duty to safeguard national security.

6. Under Chapter IV of the National Security Law, two important points are worthy of note. First, the HKSAR has been entrusted to exercise jurisdiction over most of the cases, save in three specified situations stipulated under Article 55 of the National Security Law. Second, the National Security Law and the laws of the HKSAR shall apply to procedural matters, including those related to criminal investigation, prosecution,

⁶ Take the United States as an example, its national security laws are all enacted by the Congress and individual states have no right to enact such laws. Enforcement of and jurisdiction over national security laws fall under the Federal Government, with the Department of Homeland Security, the Federal Bureau of Investigation and the Central Intelligence Agency being responsible for enforcement; federal prosecutors being responsible for prosecution of national security offences; and the federal courts being responsible for the adjudication of national security related cases.

trial, and execution of penalty in respect of cases concerning offences endangering national security over which the HKSAR exercises jurisdiction. The Department of Justice conducts prosecutions in accordance with the law, which is protected under the Basic Law.

Exercising jurisdiction by the CPG under specified situations: Article 55 of the National Security Law provides for the exercise of jurisdiction by the Office for Safeguarding National Security of the CPG in the HKSAR (OSNS) over cases concerning offences endangering national security under the National Security Law

7. National security is a matter within the purview of the Central Authorities, as the offences involving national security can endanger and harm the fundamental interests of the entire State and its people. The Central Authorities has an overarching responsibility to safeguard national security and this principle has been reflected in the National Security Law. The CPG establishes the OSNS in Hong Kong pursuant to the relevant Decision of the National People's Congress of the People's Republic of China and the National Security Law, and authorises the OSNS to exercise jurisdiction in accordance with the law under specified situations. Such arrangement is based on the practical needs to safeguard national security, and to effectively investigate and deal with cases concerning offences endangering

national security.

Jurisdiction to be exercised by the CPG under three specified situations

8. The three specified situations set out under Article 55 of the National Security Law are namely: (1) the case is complex due to the involvement of a foreign country or external elements, thus making it difficult for the HKSAR to exercise jurisdiction over the case; (2) a serious situation occurs where the Government of the HKSAR is unable to effectively enforce the National Security Law; (3) a major and imminent threat to national security has occurred.

9. In respect of the three specified situations mentioned above, the jurisdiction of the OSNS can only be engaged after the CPG approves a request made by the HKSAR Government or the OSNS. In such situations, in accordance with the requirements under Article 40 of the National Security Law, the HKSAR shall have no jurisdiction over the relevant case; and pursuant to Article 57 of the National Security Law, the OSNS, the prosecuting body designated by the Supreme People's Procuratorate, and the court designated by the Supreme People's Court shall act in accordance with the Criminal Procedure Law of the People's Republic of China and other related national laws in respect of procedural matters, including those related to criminal investigation, prosecution, trial and execution of penalty. The institutions,

organisations and individuals concerned must comply with measures taken by the OSNS in accordance with the law.

The OSNS shall abide by the law

10. Article 60 of the National Security Law stipulates that the acts performed in the course of duty by the OSNS and its staff in accordance with the National Security Law shall not be subject to the jurisdiction of the HKSAR; whereas Article 50 of the National Security Law clearly stipulates that the OSNS shall perform its mandate in strict compliance with the law and be subject to supervision in accordance with the law. It shall not infringe upon the lawful rights and interests of any individual or organisation. The staff of the OSNS shall abide by the laws of the HKSAR as well as the national laws. It is worth noting that the staff of the OSNS shall be subject to supervision by relevant authorities in accordance with the law, including the commissions of supervision under Section 7 of Chapter III of the Constitution of the People's Republic of China.

The applicability of the ICCPR to the cases over which jurisdiction is exercised by the CPG

11. We strongly object to any suggestion that the CPG aims to “escape” or circumvent the ICCPR by means of exercising jurisdiction. We must reiterate that the Central Authorities

authorise the HKSAR to exercise jurisdiction over the vast majority of cases, and will only exercise direct jurisdiction to deal with an extremely small minority of cases concerning offences endangering national security which could not be handled by the HKSAR. Moreover, very stringent approval procedures must be complied with before exercising the jurisdiction. The whole arrangement is both constitutional and legitimate.

12. Article 4 of the National Security Law stipulates that human rights shall be respected and protected in safeguarding national security in the HKSAR. The rights and freedoms, including the freedoms of speech, of the press, of publication, of association, of assembly, of procession and of demonstration, which the residents of the Region enjoy under the Basic Law and the provisions of the ICCPR and the ICESCR as applied to Hong Kong, shall be protected in accordance with the law. As we have pointed out in our response to communication No. OL CHN 17/2020 on 30 October 2020, there is essentially no difference between the standards followed by the national law enforcement and judicial bodies, such as the OSNS, when they exercise their jurisdiction over cases concerning offences endangering national security under Article 55 of the National Security Law, and the human rights protection standards followed by the relevant law enforcement and judicial bodies of the HKSAR. The Chinese Constitution provides constitutional guarantees for fair trial and for the protection of human rights, with provisions establishing that the State must respect and

guarantee human rights; trials must be public and defendants have the right to a defence; and the people's courts exercise judicial power independently in accordance with the law. The relevant principles and regulations of the PRC's Criminal Procedure Law and litigation mechanisms further provide a legal basis for fair trials and the protection of human rights. The rules in the relevant laws of the mainland of China and those in the laws of the HKSAR on the protection of human rights in criminal justice have a large number of similarities, including: the prohibition of torture or other cruel or inhuman treatment; the prohibition against depriving anyone of his or her freedom except in accordance with the law and legal procedures; the fact that persons charged with a criminal offence are presumed innocent until found guilty in accordance with the law; prompt notification of charges brought against a defendant; the provision of sufficient time and opportunity for defendants to prepare their defence and choose counsel; access to legal aid; the right to question witnesses; the provision of free translation services; the right not to incriminate oneself; the use of special proceedings for cases involving youth offenders; and the right to appeal. It can be said that the principles of the laws of the mainland of China and the laws of the HKSAR are both in line with the United Nations standards for the protection of human rights in criminal justice. Besides, Article 58 of the National Security Law specifically provides that in a case over which jurisdiction is exercised pursuant to Article 55 of the National Security Law, a criminal

suspect shall have the right to retain a lawyer to represent him or her from the day he or she first receives inquiry made by the OSNS or from the day a mandatory measure is taken against him or her. A defence lawyer may provide legal assistance to a criminal suspect or defendant in accordance with the law. A criminal suspect or defendant who is arrested in accordance with the law shall be entitled to a fair trial before a judicial body without undue delay.

13. Hence, in cases where the CPG (including the OSNS) has exercised jurisdiction, the human rights (including relevant rights as pertain to different stages of the handling of such cases) of criminal suspects and defendants will be fully protected, which is consistent with the objects and purpose of the ICCPR.
