

[Translated from Chinese]

Receipt is hereby acknowledged of the communication dated 19 April 2023 addressed by the United Nations Human Rights Council's Special Rapporteur on the independence of judges and lawyers (ref. OL CHN 2/2023). The Chinese Government wishes to make the following reply:

1. With respect to the concerns raised by the Special Rapporteur on the independence of judges and lawyers regarding several matters related to the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (*hereinafter referred to as* "the Hong Kong National Security Law"), the Legal Aid Schemes and amendments to the Legal Practitioners Ordinance (Cap. 159), the following responses are aimed at providing correct information in order to preclude the Special Rapporteur from being misled into making erroneous observations. Even if specific concerns raised in the communication are not addressed below, the Chinese Government should not be seen as agreeing with the negative views of the communication on specific matters.

## **The Hong Kong National Security Law**

### **Guaranteeing fundamental rights and freedoms**

2. Regarding the concerns about rights and freedoms expressed in the communication, the Chinese Government has often pointed out that the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (*hereinafter referred to as* "the HKSAR Basic Law") fully guarantees fundamental rights and freedoms at the Constitutional level in the Hong Kong Special Administrative Region (HKSAR), including freedoms of expression, press, publication, association, assembly, procession and demonstration, and the right and freedom to form and join trade unions, and to strike<sup>1</sup>; the right to a fair trial<sup>2</sup>; and the rights related to freedom of the person and protection from arbitrary infringement of privacy<sup>3</sup>. Chapter III art. 39 of the HKSAR Basic Law specifies that the relevant provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force and shall be implemented through the laws of the HKSAR.

3. At the level of local law, the provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong have been implemented through the Hong Kong Bill of Rights Ordinance (Cap. 383), which is binding on the government. Accordingly, all related rights and freedoms under the International Covenant on Civil and Political Rights are guaranteed by the Hong Kong Bill of Rights enshrined in Section 8 of that Ordinance<sup>4</sup>.

4. During the process of enacting the Hong Kong National Security Law (and the Implementation Rules for Article 43 of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (*hereinafter referred to as* "the Article 43 Implementation Rules"), full consideration was given to the relevant provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural

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<sup>1</sup> [HKSAR Basic Law, Chapter III, art. 27.](#)

<sup>2</sup> [HKSAR Basic Law, Chapter IV Sec. 4, art. 85.](#)

<sup>3</sup> [HKSAR Basic Law, Chapter III, arts. 28, 29 and 30.](#)

<sup>4</sup> The Universal Declaration of Human Rights (*hereinafter referred to as* "the Declaration") cited in the communication is not legally binding on the HKSAR, but since the relevant rights and freedoms guaranteed under the Declaration are broadly identical to those guaranteed under the International Covenant on Civil and Political Rights, these rights and freedoms are also indirectly guaranteed under the Hong Kong Bill of Rights.

Rights as applied to Hong Kong.

5. It is important to emphasize that since the implementation of the Hong Kong National Security Law, Hong Kong residents continue to enjoy all the fundamental rights and freedoms guaranteed by the HKSAR Basic Law and the Hong Kong Bill of Rights Ordinance (Cap. 383). In fact, article 4 of the Hong Kong National Security Law specifies that human rights shall be respected and protected in the safeguarding of national security in the HKSAR. The rights and freedoms of residents of the HKSAR, including freedom of speech, the press, publication, association, assembly, procession and demonstration, are protected in accordance with the law and the relevant provisions of the HKSAR Basic Law and the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong.

6. Article 5 of the Hong Kong National Security Law clearly stipulates that law enforcement agencies must adhere to the principle of the rule of law when taking law enforcement actions against offences endangering national security. This article specifies that the prevention, suppression and punishment of offences endangering national security shall adhere to the principle of the rule of law. 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. Furthermore, any person is presumed innocent until convicted by a judicial body. The right to defend himself or herself and other rights in judicial proceedings to which criminal suspects, defendants, and other parties in judicial proceedings are entitled 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.

7. Any measures or enforcement actions taken under the Hong Kong National Security Law shall be in accordance with the above policy. Just as the Hong Kong Court of Final Appeal noted in the case of *HKSAR v. Lai Chee Ying* (2021) 24 HKCFAR 67, articles 4 and 5 of the Hong Kong National Security Law emphasize that human rights shall be respected and protected and the value of the rule of law shall be upheld in the safeguarding of national security in the HKSAR, and this is essential to an overall understanding of that Law.

8. With regard to legal practitioners, Chapter III, art. 35 of the HKSAR Basic Law stipulates that Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and judicial remedies. Professional lawyers play a key role in the legal system of the HKSAR and have the primary responsibility for upholding the rule of law. In the performance of their duties, the fundamental rights and freedoms of legal practitioners are guaranteed by law, as are those of others. This basic guarantee ensures that they should act without fear or favour and with professionalism.

#### **Freedoms are not absolute**

9. Chapter III, art. 42 of the HKSAR Basic Law stipulates that Hong Kong residents and other persons in Hong Kong shall have the obligation to abide by the laws in force in the HKSAR.

10. Article 6(1) of the Hong Kong National Security Law stipulates that safeguarding the sovereignty, unity and territorial integrity of the State is the common obligation of the entire Chinese people, including Hong Kong fellow citizens. Article 6(2) further stipulates that all institutions, organizations and individuals in the HKSAR shall comply with the Hong Kong National Security Law and other laws of the HKSAR relating to the maintenance of national security.

11. Chapter I, art. 1 of the HKSAR Basic Law stipulates that the HKSAR is an inalienable part of the People's Republic of China. According to Chapter II, art. 12

of the HKSAR Basic Law, the HKSAR is a local administrative region of the People's Republic of China that enjoys a high degree of autonomy and is directly administered by the Central People's Government. According to article 2 of the Hong Kong National Security Law, articles 1 and 12 of the HKSAR Basic Law on the legal status of the HKSAR are fundamental provisions of the HKSAR Basic Law; no institution, organization or individual in the HKSAR shall contravene those provisions in the exercise of their rights and freedoms.

12. Hong Kong residents enjoy the freedoms of speech, press, publication, association, assembly, procession and demonstration. However, these freedoms are not absolute. Both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights allow for legal restrictions on non-absolute human rights in the interest of national security. Formal legal precedents (including the Hong Kong National Security Law) can be followed in imposing reasonable and necessary restrictions on the exercise of these rights for reasons of maintaining national security, public peace and order, or the rights and freedoms of others. This is a common practice in all countries and is allowable under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

### **Independence of the judiciary**

13. The Special Rapporteur raised a number of concerns regarding the independence of the judiciary in the HKSAR. Before responding to those concerns, we must seriously emphasize that the rule of law and the independence of the judiciary in Hong Kong are guaranteed by the HKSAR Basic Law. Chapter I art. 2, Chapter II art. 19 and Chapter IV Section 4 art. 85 of the HKSAR Basic Law clearly stipulate that the Hong Kong Special Administrative Region shall be vested with independent adjudicatory power, including that of final adjudication, and that the courts shall exercise adjudicatory power independently, free from any interference.

### **Designation of judges**

14. With regard to the concern about the appointment of judges expressed in the communication, it must be stressed that none of the procedures in question would prejudice the independence of the judiciary or the right to a fair trial under article 14 of the International Covenant on Civil and Political Rights. Rather than selecting a particular judge to preside over a specific case, the Chief Executive merely designates a number of judges by name, from among the existing pool of judges, for inclusion on a list of those dealing with offences endangering national security. The appointment of a particular judge as designated to hear an individual case remains an independent decision of the judiciary (and not the Chief Executive).

15. In fact, it is not uncommon to appoint ad litem judges to deal with specific areas of law. In Hong Kong, there are judges who specialize in dealing with construction and arbitration cases, or commercial and maritime cases. Arranging for judges who are familiar with specific areas of law can help improve the chances of achieving legal predictability and certainty, while reducing the risk of misapplication of the law. Generally speaking, such arrangements are conducive to the rule of law.

16. At the same time, in dealing with the cases concerned, and irrespective of whether the cases involve national security or not, such judges nevertheless perform their judicial functions independently and without any interference, as is fully stipulated in article 85 of the HKSAR Basic Law<sup>5</sup>. As the court stated in the [REDACTED]: "In the case of offences under the provisions of the Hong

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<sup>5</sup> On the basis of Article 85 of the HKSAR Basic Law, the courts of the Hong Kong Special Administrative Region conduct trials independently and without any interference.

<sup>6</sup> See [REDACTED] v. *Hong Kong Special Administrative Region* [2020] HKCFI 2133 (judgment at following link): [https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=130336&currpage=T](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=130336&currpage=T)

Kong National Security Law, the defence has no proper or sufficient grounds to state that the Chief Executive or the government has been able 'to interfere in matters which are directly or closely related to the functioning of the trial (for example, the assignment of judges, the organization of hearings and the list of cases to be heard)', or the Chief Executive may, or shall, interfere with the freedom of the judicial officers of Hong Kong 'to try cases and uphold legal and Constitutional values' by exercising the powers conferred by article 44 of the Hong Kong National Security Law." Courts would not lose their independence solely as a result of a national security endangerment case being handled by a judge appointed under article 44. The right of everyone to a fair trial by an independent and impartial statutory tribunal, as provided for in article 14 of the International Covenant on Civil and Political Rights, remains suitably guaranteed. Therefore, the arrangements for the appointment of judges under the Hong Kong National Security Law are in no way prejudicial to judicial independence in the HKSAR, which has always been respected. The then Chief Justice of the HKSAR Court of Final Appeal made it clear in his statement of 2 July 2020 (when the Hong Kong National Security Law was first implemented) that "The appointment of designated judges, like all judges, must be based on their personal judicial and professional qualities. These are the only criteria relevant to the appointment of judges. This therefore means, for example, that judges should not be designated on the basis of any political considerations. This reinforces the principle that in the handling or determination of any legal dispute, only the law and legal principle will be considered."<sup>7</sup> At the ceremonial opening of HKSAR Legal Year 2022, the current Chief Justice also noted that "designated judges, like all other judges, are subject to the Judicial Oath which all judges are required to take under Chapter IV Section 6, Art. 104 of the HKSAR Basic Law. Under the Judicial Oath, a judge swears to serve Hong Kong conscientiously, dutifully, in full accordance with the law and with integrity, and to safeguard the law and administer justice without fear or favour, self-interest or deceit. In particular, this means that no political or other personal considerations of the judge can be entertained in the judicial decision-making process. The Judicial Oath is binding on a designated judge when he or she sits on a national security case, just as it is binding on them when hearing other types of cases."<sup>8</sup>

17. As to publicly releasing the list of designated judges, the list of designated judges is subject to the relevant provisions of the local laws of the HKSAR. Before such designated judges hear cases of offences endangering national security, it is in the public interest to keep their identities confidential and protected by law. Designated judges trying cases of offences endangering national security have received threats of violence and even death. Recently, there have also been initiatives by foreign agencies to impose unilateral so-called "sanctions"<sup>9</sup> on designated judges, flouting the principles of the sovereign equality of States and of non-intervention established in the Charter of the United Nations. Threats against the judiciary are even more clearly contrary to such internationally recognized norms as the Basic Principles on the Independence of the Judiciary, adopted at the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1985. We believe that as Special Rapporteur on the independence of judges and

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<sup>7</sup> See <https://www.info.gov.hk/gia/general/202001/13/P2020011300622.htm>

<sup>8</sup> See <https://www.info.gov.hk/gia/general/202201/24/P2022012400378.htm>

<sup>9</sup> See, for example, the "research report" entitled "One City, Two Legal Systems: Hong Kong Judges' Role in Rights Violations under the National Security Law", published by the United States "Congressional-Executive Committee on China" on 10 May 2023 (<https://www.cecc.gov/publications/commission-analysis/one-city-two-legal-systems-hong-kong-judges%E2%80%99-role-in-rights>); the committee also held a "hearing" on 11 May 2023 at which several participants explicitly requested that United States Government authorities impose "sanctions" on judges in the Hong Kong SAR (<https://www.cecc.gov/events/hearings/one-city-two-legal-systems-political-prisoners-and-the-erosion-of-the-rule-of-law-in>). Also, members of the United States Congress wrote to the President of the United States in 2022 calling for "sanctions" against designated judges (<https://www.politico.com/f/?id=00000180-a050-dd36-a38c-e75ce9380000>).

lawyers, you will condemn the coercive attempts by the countries concerned to interfere in the judicial process of the HKSAR by overriding the law with politics, adversely influencing the independence of judges. In summary, we see no overriding public interest or need to publicly releasing the list of appointed judges.

### **Bail arrangements in cases of offences endangering national security**

18. As for bail arrangements and pretrial detention in cases of offences endangering national security, the communication asserts that “Authorities may now detain without trial almost any individual for months at a time, without effective judicial oversight, as long as that person has been accused of a national security crime”, which is completely incompatible with the facts. Under section 52 of the Police Force Ordinance (Cap. 232), it is the duty of the police to bring persons detained in custody to a magistrate as soon as practicable. It is the duty of the courts to consider whether to grant bail to all persons (including persons charged with offences endangering national security) brought before it. In an appeal involving article 42(2) of the National Security Law<sup>10</sup>, the Hong Kong Court of Final Appeal has clearly stated that it is the extreme importance of maintaining national security and of preventing and suppressing acts that endanger national security that explain why stricter conditions for granting bail for offences endangering national security were introduced in the National Security Law. In that case, the Court also stated that, in applying for bail in cases of offenses endangering national security, as referred to in article 42(2), of the Hong Kong National Security Law, the judge must first decide whether there are “sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security.” If, having considered all relevant information, the judge deems that there is insufficient reason to believe that the accused person will not continue to commit acts endangering national security, he shall refuse the application for bail. On the other hand, if, after considering all relevant information, the judge deems that there is sufficient reason, he or she shall then proceed to consider all matters relating to the granting or denial of bail. Moreover, the Court of Final Appeal has held that, to the extent possible, the provisions of article 42(2), of the Hong Kong National Security Law relating to bail must be given meaning and effect consistent with the rights, freedoms and values protected in articles 4 (on protecting human rights) and 5 (on upholding the rule of law) of that Law.

19. The courts will handle bail applications in strict accordance with the provisions of the Hong Kong National Security Law and relevant local laws. In deciding whether or not to grant bail, the courts will consider all relevant factors, including the positions and arguments of both prosecution and defence and all relevant information presented to the court according to the individual circumstances of each case; and, if bail is to be granted, of the conditions for it. The granting of bail and the imposition of any bail conditions are judicial decisions based on the individual circumstances of each case. If a defendant is dissatisfied with the magistrate’s bail decision (including bail conditions or decision to revoke bail), he or she may apply to the Court of First Instance of the High Court for review or amendment of that decision<sup>11</sup>. The Court of First Instance shall also consider and decide on the application in strict accordance with the provisions of the Hong Kong National Security Law and relevant local laws.

20. The Special Rapporteur refers to article 9(3) of the International Covenant on Civil and Political Rights, which provides that pretrial detention of accused persons should be an exception rather than a rule. In its *General comment No. 35*, the United Nations Human Rights Committee stated that “Pretrial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances”, having noted that decisions on pretrial detention must be

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<sup>10</sup> See *HKSAR v. [REDACTED]* (2021) 24 HKCFAR 67, at following link: [https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=133491](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=133491)

<sup>11</sup> See [Criminal Procedure Ordinance \(Cap. 221\), article 9J](#).

based on an individualized determination that it is reasonable and necessary, taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime.<sup>12</sup> As stated above, when deciding whether or not to grant bail, the Court needs to take into account the specific circumstances of each case, and not simply deny bail across the board to all accused of offences endangering national security. Article 42(2) of the Hong Kong National Security Law is therefore consistent with the provisions of article 9(3) of the International Covenant on Civil and Political Rights. In fact, some defendants have been released on bail after due consideration by the courts of the provisions of the Hong Kong National Security Law and relevant local laws. For example, as reported in the media, some of those accused of conspiracy to subvert State power were granted bail by the courts and are currently discharged. Conversely, there are jurisdictions that even have mechanisms in place to permit prolonged detention without prosecution on national security grounds, depending on the circumstances of the case. The communication's criticism of HKSAR bail arrangements in national security endangerment cases is therefore unfounded.

21. Moreover, when the Department of Justice of the HKSAR government deals with offences endangering national security, it does so in strict compliance with the provisions of article 42(1) of the Hong Kong National Security Law: "The law enforcement and judicial authorities of the Hong Kong Special Administrative Region shall ensure that cases concerning offenses endangering national security are handled in a fair and timely manner." All prosecutions are carried out in strict accordance with relevant laws. The time required for each case from prosecution through to trial depends on a number of factors, such as whether the case requires further investigation, whether the defendant needs time to seek legal advice to consider a defence, whether the defence needs court certification for translated documents, or whether the defence has the right under the law to make an application that needs to be processed prior to trial. It must be stressed that all applications are processed in accordance with established procedures and in full compliance with due process. If a defendant (whether or not he or she has obtained legal advice beforehand) disregards whether or not sufficient justification exists, and insists on making all applications which may be made in connection with the procedures concerned, then he or she cannot simultaneously be deliberately provocative and complain that the case was "delayed", because this process took place under a fair criminal justice system and was the logical consequence of the full exercise, under all feasible circumstances, of the rights conferred upon him or her. As stated by the Appeal Committee of the Hong Kong Court of Final Appeal in a case in 2021<sup>13</sup>, it is incumbent upon all litigants and tribunals to cooperate fully and to do everything possible to expedite the handling of offences endangering national security. Therefore, "indefinite detention without trial" is absolutely untenable.

#### **Trial of cases without a jury**

22. The concerns regarding the conduct of trials without a jury referred to in the communication are actually an overblown and erroneous focus, as the arrangements concerned in no way derogate from any lawful rights and interests of the accused, including the right to a fair trial under article 14 of the International Covenant on Civil and Political Rights. The special provisions of the Hong Kong National Security Law relating to juries were established on the basis of the particularities and complexities of some national security endangerment cases, and are applied in cases of offences endangering national security. Article 46 of the Hong Kong National Security Law provides that in criminal proceedings in the Court of First Instance of the High Court concerning offences endangering national security, the Secretary for

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<sup>12</sup> See United Nations Human Rights Committee *General comment No. 35* (document [CCPR/C/GC/35](#)), paragraph 38.

<sup>13</sup> See *HKSAR v. [REDACTED]* (2021) 24 HKCFAR 417 (judgment at following link): [https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=140898&QS=%2B&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=140898&QS=%2B&TP=JU)

Justice may issue a certificate directing that the case shall be tried without a jury on the grounds of, among others, the protection of State secrets, involvement of foreign factors in the case, and the protection of personal safety of jurors and their family members. Where the Secretary for Justice has issued the certificate, the case shall be tried in the Court of First Instance without a jury by a panel of three judges.

23. In practice, when considering whether to issue a certificate under article 46 of the Hong Kong National Security Law directing that the proceedings shall be conducted without a jury, the Secretary for Justice will follow relevant laws in accordance with the Hong Kong National Security Law and the individual circumstances of each case (including the grounds of protecting state secrets, involvement of foreign factors in the case, and protecting the personal safety of jurors and their family members); in such circumstances, the relevant provisions specify the arrangement of a three-judge trial chamber, with the aim of ensuring a fair trial and upholding justice. As we have reiterated above, there is absolutely no derogation from any lawful rights or interests of the defendant, including the right to a fair trial under article 14 of the International Covenant on Civil and Political Rights. From the perspective of foreign judicial practice, a number of States have adopted a similar approach in trial proceedings for offences endangering national security.

24. Moreover, it is important to note that although the HKSAR Basic Law preserves the original jury system, the HKSAR can make provisions regarding the use of juries in criminal proceedings. The provisions of the HKSAR Basic Law relating to the jury system and the principles of criminal procedure do not prohibit the HKSAR from making any changes to the principles of the current jury system, as long as they are not fundamental or abolish the entire jury system.

25. In addition, procedural safeguards applicable to trials with jury participation also apply to such [non-jury] trials, ensuring that the accused is given a fair hearing and that he or she may appeal under an equivalent appeal procedure if convicted and sentenced. Under the guarantees of the HKSAR Basic Law and the Hong Kong Bill of Rights, all persons accused of criminal offences, including those involving offences under the Hong Kong National Security Law, enjoy the right to a fair trial by a judiciary exercising its right to independent adjudication. The arrangements involved derogate in no way from any lawful rights or interests of the accused. Article 41(4) of the Hong Kong National Security Law also provides that trial verdicts shall be made public. Judges are ordinarily required to issue the reasons for their decisions, to ensure the principle of open administration of justice.

26. A court had earlier rejected an application for leave for judicial review of the Secretary for Justice's decision to issue a certificate under article 46 of the Hong Kong National Security Law directing the proceedings to proceed without a jury. In his verdict, the judge ruled<sup>14</sup> that the applicant did not have the Constitutional right to be tried by jurors. The judge also ruled that the decision was one of the criminal prosecution decisions provided for under Chapter IV Section 2, art. 63 of the HKSAR Basic Law and was therefore not to be interfered with. In this context, with a full understanding of the foregoing legal views, the allegations that "the jury may be removed without restraint" and that "the administration interferes in the administration of justice" are undoubtedly alarmist.

### **Arrangements for the exercise of jurisdiction in criminal cases under the National Security Law**

#### *Authorization of HKSAR to exercise jurisdiction in cases of offences under the National Security Law*

27. In response to the concerns expressed in the communication regarding article 55 of the Hong Kong National Security Law, we strongly reject any opinion that the

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<sup>14</sup> See [REDACTED] v. *Secretary for Justice* [2021] HKCA 912 (judgment at following link): [https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=136672&currpage=T](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=136672&currpage=T)

exercise of jurisdiction by the Central People's Government is a de facto breach of the International Covenant on Civil and Political Rights. To understand the arrangements accurately, the Special Rapporteur must first correctly understand the Constitutional order in China, its "one country, two systems" principle, and the arrangements under the Hong Kong National Security Law for authorizing the HKSAR to exercise its jurisdiction.

28. All over the world, whether countries are unitary or federal in form, the maintenance of national security is always a function of the central authority and an inherent right exercised by sovereign states. Generally speaking, therefore, national security maintenance matters are carried out directly by central or federal Governments, while local or state governments play only an assistive role<sup>15</sup>.

29. The General Principles of the Hong Kong National Security Law clearly state that the Central People's Government has the fundamental responsibility for the affairs of the HKSAR related to national security, and that the HKSAR has the Constitutional responsibility for safeguarding national security. In accordance with the Hong Kong National Security Law, the HKSAR exercises jurisdiction over cases under the Hong Kong National Security Law except in the circumstances specified in article 55 of that Law (see details below). This pioneering and unique arrangement is unique in the world and embodies both the "one country, two systems" principle and the high level of confidence and trust on the part of the Central People's Government within this one country that the HKSAR will fulfil its Constitutional responsibility to safeguard national security.

30. Chapter IV of the Hong Kong National Security Law is worth noting. First, with the exception of the three categories of circumstances specified in article 55 of the Hong Kong National Security Law (see para. 32 below), the vast majority of cases fall within the jurisdiction of the HKSAR. Secondly, the Hong Kong National Security Law and the local laws of Hong Kong shall apply when the HKSAR has jurisdiction over such procedural matters as investigation, prosecution, trial and execution of penalties for offences endangering national security. The Department of Justice makes prosecution decisions in accordance with the law and is secured by the HKSAR Basic Law.

*The Central People's Government exercises jurisdiction under certain circumstances*

31. As mentioned above, national security belongs to the central authority, and it is the fundamental interests of the entire country and people that are injured by national security offences. The Central Government bears fundamental responsibility for the maintenance of national security, a principle that is reflected in the Hong Kong National Security Law. In accordance with the relevant decisions of the National People's Congress of the People's Republic of China and with the Hong Kong National Security Law, the Central People's Government established an Office for Safeguarding National Security of the Central People's Government of the People's Republic of China in the Hong Kong Special Administrative Region (*hereinafter referred to as* "the National Security Office in Hong Kong"), and authorized that Office to exercise jurisdiction in accordance with the law under certain circumstances, so as to meet the practical need to safeguard national security and effectively investigate and deal with criminal cases related to the endangerment of national security.

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<sup>15</sup> In the United States, for example, national security laws are enacted exclusively by the United States Congress, and states do not have the power to enact such laws. Enforcement and case jurisdiction also remains exclusively at the federal level, and is undertaken by the Federal Department of Homeland Security, the Federal Bureau of Investigation, and the Central Intelligence Agency. Federal prosecutors are responsible for national security prosecutions, while federal courts are responsible for trying cases involving threats to national security.

32. The three specific circumstances listed in article 55 of the Hong Kong National Security Law under which the National Security Office in Hong Kong is to exercise its jurisdiction are: (1) if the case is complex owing to the involvement of a foreign country or external elements, thus making it difficult for the HKSAR to exercise jurisdiction over the case; (2) if a serious situation occurs where the government of the HKSAR is unable to effectively enforce the National Security Law; or (3) a major and imminent threat to national security has occurred.

33. Under the three aforementioned specific circumstances, the National Security Office in Hong Kong may initiate the procedure for exercising its jurisdiction only if a request by the HKSAR government or by the Office itself has been submitted to and approved by the Central People's Government. Under these circumstances, article 40 of the Hong Kong National Security Law provides that the HKSAR has no jurisdiction over the cases concerned; and article 57 of that Law provides that the National Security Office in Hong Kong, the procuratorial and adjudicatory organs appointed by the Supreme People's Procuratorate and the Supreme People's Court, respectively, will conduct the investigation, prosecution, trial and execution proceedings in accordance with the Criminal Procedure Law of the People's Republic of China and other relevant laws. The institutions, organizations and individuals involved must comply with the measures taken by the National Security Office in Hong Kong in accordance with the law.

34. Article 60 of the Hong Kong National Security Law provides that the conduct of the National Security Office in Hong Kong and its personnel in performing their duties under the Law shall not be subject to the jurisdiction of the HKSAR; article 50 of that Law clearly stipulates that the National Security Office in Hong Kong shall perform its mandate in accordance with the law, be subject to supervision in accordance with the law, and shall not infringe upon the lawful rights and interests of any individual or organization. It is worth noting that the personnel of the National Security Office in Hong Kong are subject to the supervision of the relevant bodies, including the commissions of supervision under Chapter III, Section VII, of the Constitution of the People's Republic of China (*hereinafter referred to as "the Constitution"*).

*Applicability of the International Covenant on Civil and Political Rights with regard to the exercise of jurisdiction by the Central People's Government*

35. We reiterate that the Central Government authorizes the HKSAR to administer the vast majority of cases, only exercising direct jurisdiction over a very small number of cases of offences endangering national security that the HKSAR itself cannot handle, and must undergo very rigorous approval procedures to do so, so that the whole arrangement is in conformity with the Constitution and the laws.

36. Article 4 of the Hong Kong National Security Law stipulates that human rights shall be respected and protected in safeguarding national security in the Hong Kong Special Administrative Region. 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 HKSAR Basic Law and the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong, shall be protected in accordance with the law. As noted in our responses to OL CHN 17/2020 on 30 October 2020 and OL CHN 3/2022 on 10 August 2022, when the law enforcement and judicial organs of the State, such as the National Security Office in Hong Kong, exercise jurisdiction over offences endangering national security in accordance with the provisions of article 55 of the Hong Kong National Security Law, there is no essential difference in the standards of human rights protection observed by law enforcement and the judiciary in the HKSAR. The Constitution provides Constitutional guarantees for fair trials and human rights protections; its provisions stipulate that the State respects and guarantees human rights and that the principle of openness is the principle followed at trial. The accused

has the right to defence, and the people's courts exercise their adjudicatory power independently in accordance with the law. The relevant principles and provisions of the Criminal Procedure Law and the arrangements for its procedural execution provide further legal basis for fair trials and human rights guarantees. There are many similarities between the relevant laws of mainland China and the laws of the Hong Kong Special Administrative Region regarding the protection of human rights in criminal justice, including that torture or other cruel or inhuman treatment be prohibited; that no person be deprived of liberty without legal grounds and procedures; that persons accused of criminal offences be presumed innocent before their guilt has been duly determined in accordance with the law; that such persons be promptly notified of the charges against them; that the accused be given adequate time and facilities to obtain translation; that no person be compelled to self-incriminate; that special procedures be followed in cases involving juvenile offenders; that the right of appeal be guaranteed, and so on. It can be said that both mainland Chinese law and the laws of the HKSAR are, in principle, in conformity with the standards of the United Nations for the protection of human rights in criminal justice. In addition, article 58 of the Hong Kong National Security Law specifies that in cases over which jurisdiction is exercised pursuant to Article 55 of that 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 an inquiry made by the National Security Office in Hong Kong or from the day a mandatory measure is taken against him or her; that a defence lawyer may provide legal assistance to a criminal suspect or defendant in accordance with the law, and that 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.

37. Therefore, cases in which the Central People's Government (including the National Security Office in Hong Kong) exercises jurisdiction, the individual rights of suspects and the accused (including the rights relevant to different stages of the handling of the case) are fully protected and are consistent with the object and purpose of the International Covenant on Civil and Political Rights.

#### **Oversight of law enforcement powers**

38. The concerns expressed in the communication regarding law enforcement powers, in particular the Article 43 Implementation Rules, are also inaccurate. In actuality, those Rules itemize clearly and in detail all the powers and procedural requirements for the implementation, the circumstances to be met and the conditions for approval, etc. for each of the measures stipulated therein. Their aim is to ensure that, when implementing each of these measures, the personnel concerned are able to effectively prevent, suppress and punish acts and activities that endanger national security, and are also able to meet the requirements for respecting and protecting human rights and ensuring rights and freedoms in accordance with the General Provisions of the Hong Kong National Security Law.

39. The Article 43 Implementation Rules document outlines the Rules concerned in seven Schedules, which bear the following primary characteristics:

(a) The provisions on the exercise of each measure are mainly extended to the handling of offences endangering national security, and take existing legislation into account;

(b) Each Rule sets out in detail the strict procedural requirements for the implementation of the measures, the circumstances to be met and the conditions for their approval, ensuring adequate safeguards for law enforcement operations. For example:

(i) Most applications must be made to a magistrate, unless the circumstances prevent that being reasonably practicable (such as search warrants, requests for persons concerned to surrender travel documents, etc.); or to the Court of First Instance (e.g. restraining orders or seizure orders on property related to the case);

(ii) The exercise of each measure must meet certain prescribed conditions, and the Secretary for Security has also issued operating principles and guidelines setting out in detail the operating principles and guidelines to be followed by officers of the Hong Kong Police Force in the performance of their related functions;

(iii) Each Rule also provides defences for persons or organizations unable to comply with the provisions, such as police officers authorized to request the removal, by the persons or service providers issuing it, of information harmful to national security, provided that the technology needed to do so is not reasonably available to the issuing party or service provider concerned, or that the service provider concerned is at risk of incurring substantial loss or damage to the rights of a third party by complying with the request. Additionally, if foreign and Taiwan political organizations or agents do not provide information to the police as required, but can prove that they did their best to comply but were unable to do so owing to reasons beyond their possible control, that constitutes a defence.

40. The HKSAR, in particular its law enforcement authorities and judicial bodies, will ensure that when safeguarding national security, rights and freedoms are protected in accordance with the law and in conformity with the provisions of article 4 of the Hong Kong National Security Law. Any action taken by police officers pursuant to the Article 43 Implementation Rules may be challenged by judicial review, including allegations of human rights violations in relation to such action.

41. In actuality, the HKSAR courts have issued search warrants under Schedule 1 of the Rules (e.g. items claimed to have been seized being subject to legal professional privilege)<sup>16</sup>, the written notice of the freezing of property issued under Schedule 3<sup>17</sup>, and orders under Schedule 7 to make material available (e.g. a series of legal challenges relating to the application for the variation of such an order)<sup>18</sup>.

42. In these cases, the courts, having considered all the evidence, ruled impartially in accordance with the applicable law. Any person who reads the relevant rulings fairly and objectively will find that the courts have given due consideration to the rights and freedoms guaranteed by the HKSAR Basic Law and the International Covenant on Civil and Political Rights as applied to Hong Kong, and will strike a reasonable balance between safeguarding national security and safeguarding rights and freedoms. It is therefore untenable to claim that police enforcement measures lack procedural safeguards and judicial oversight.

43. Members of the public may also make complaints to the Complaints Against Police Office, whose investigative work is overseen by the Independent Police

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<sup>16</sup> See [REDACTED] v. *Commissioner of Police* [2022] HKCFI 374 (judgment at following link): [https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=142179&currpage=T](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=142179&currpage=T), and [REDACTED] v. *Commissioner of Police* [2022] HKCFI 3003 (judgment at following link): [https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=148577&currpage=T](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=148577&currpage=T)

<sup>17</sup> See [REDACTED] v. *Secretary for Security* [2021] HKCFI 2804. The Court of First Instance issued a judgment on 17 September 2021, stating that it had considered the property freezing system set out in Schedule 3 of the Article 43 Implementation Rules and that the affected persons could obtain a licence to dispose of the property in accordance with the requirements, and that they should strike a balance between preventing, suppressing and punishing offences endangering national security and safeguarding property rights. After considering the legislative purpose of the property freezing system, the court held that the relevant notification prohibited the “disposal” of the property, including the direct or indirect exercise of the voting rights of the shares of the company. See judgment (English only) at the following link: [https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=138813&currpage=T](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=138813&currpage=T)

<sup>18</sup> See [REDACTED] v. *Commissioner of Police* [2021] HKCFI 1801 (judgment at following link: [https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=136704&currpage=T](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=136704&currpage=T), and [REDACTED] v. *Commissioner of Police* [2021] HKCFI 3586 (judgment at following link: [https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=140487&currpage=T](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=140487&currpage=T)

Complaints Council. The Council is an independent body established under the Independent Police Complaints Council Ordinance (Cap. 604).

### **Legal Aid Schemes**

44. The communication alleges that the HKSAR government's 2021 review of the legal aid system resulted in limited access to legal aid and the right to choose a lawyer, thereby adversely affecting the interests of recipients. We firmly assert that the opinions involved are baseless and incompatible with the facts.

45. The rule of law is the core value of Hong Kong and the cornerstone of its success. Hong Kong has an internationally respected and comprehensive legal aid system, which is indispensable for upholding the rule of law in Hong Kong. In order to ensure the enjoyment of the rights conferred by Chapter III, art. 25 of the HKSAR Basic Law, namely that "all Hong Kong residents shall be equal before the law," it is essential to ensure that no one be unable to seek justice for lack of economic capacity. The legal aid system in Hong Kong has always played an important role in this regard. Notably, the Hong Kong Court of Final Appeal stated in a May 2018 judgment that: "Hong Kong's relatively generous system of legal aid (compared with many other jurisdictions) has ensured that most cases of public importance have over the years been determined by the courts."<sup>19</sup> The judgement also states that since 1997, in particular, legal aid has played an important role in the vast majority of litigation cases involving the public interest.

46. In October 2021, the HKSAR government undertook a review of the operation of the legal aid system in response to growing concern among the public that the system was vulnerable to abuse, in particular with regard to certain categories of legal aid cases being handled by a limited minority of lawyers. By no means was this review undertaken to suppress the rights and freedoms enjoyed by the public in accordance with the law, as alleged in the communication. We have consequently implemented a series of improvement measures to strengthen the prevention of possible abuses of the legal aid system and to increase transparency, thereby increasing public awareness of the work of the Legal Aid Department and confidence in the legal aid system. The improvement measures include direct assignment of criminal legal aid cases by the Director of Legal Aid to lawyers, setting quotas for the number of judicial-review legal aid cases lawyers can take on, and lowering quotas for the number of civil legal aid cases lawyers handle. The improvement measures in question were reported to the HKSAR Legislative Council Panel on Administration of Justice and Legal Services on 28 October 2021 and received unanimous support. The improvement measures comply with the relevant provisions of the HKSAR Basic Law and the Hong Kong Bill of Rights Ordinance (Cap. 383).

### **Right to choose a lawyer**

47. The right to choose a lawyer is not absolute. This is not the right of legal aid applicants to be able to have access to a particular lawyer of their choice. A fair trial is not necessarily contingent on representation by a lawyer who must be of the litigant's own choosing. With regard to the appointment of counsel in criminal legal aid cases, to ensure that a foreign counsel has sufficient qualifications and levels of professional expertise to deal with criminal legal aid cases, that foreign counsel must have at least three years of professional experience and have handled at least five related cases in the past three years. In cases before higher courts, such as appeals to the Court of Final Appeal, the level of relevant criminal experience required will be raised accordingly, where foreign barristers and solicitors need to have at least ten and seven years of relevant criminal proceedings experience, respectively. The Legal Aid Department will appoint the most suitable counsel according to the type and

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<sup>19</sup> **Sec** [REDACTED] . v. [REDACTED] *and Secretary for Justice* (2018) 21 HKCFAR 237, paragraph 27(5) at following link:  
[https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=115161&QS=%2B&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=115161&QS=%2B&TP=JU)

complexity of each case. In addition, the Solicitors' Practice Rules and the Code of Conduct of the Bar of the Hong Kong Special Administrative Region clearly stipulate that all lawyers shall refrain from endangering or impairing their independence, integrity and professional standards of work in the course of their duties as representatives and in the best interests of their clients.

48. At the same time, foreign counsel handling civil litigation cases, especially the new limits on the number of cases related to judicial review, effectively relieve the public of doubts about the excessive concentration of cases in the hands of some foreign counsel, and strike a balance between more evenly allocating cases to equally qualified lawyers and allowing legal aid recipients to nominate lawyers. The new limit increases the number of lawyers who can handle cases related to judicial review. Given the relatively small number and complexity of cases related to judicial review, if more lawyers are assigned to deal with these cases, they can accumulate relevant experience and professionalism, which in the long run will benefit both recipients and the legal aid system. We must also point out that all lawyers handling judicial review-related cases need to have sufficient qualifications and levels of professional expertise to qualify. They need at least three years of professional experience and have handled at least five related cases in the past three years.

#### **Right to legal aid**

49. In fact, persons who comply with the requirements of the Legal Aid Ordinance (Cap. 91) and who have reasonable grounds in Hong Kong courts for litigation or defence will not be denied justice for lack of funds. Legal aid will be provided to all those who can pass the Means and Merits Tests under the Ordinance.

50. In order to increase access to legal aid services for those in need, the HKSAR Government reviews the legal aid system from time to time, for example by reviewing and adjusting the financial eligibility limits of the legal aid schemes on a regular basis. The Legal Aid Department also makes necessary adjustments to the coverage of legal aid services in due course. For example, in 2012 and 2020, we significantly expanded the coverage of the Supplementary Legal Aid Scheme, thereby further facilitating public access to legal aid services.

#### **Interpretation of Articles 14 and 47 of the Hong Kong National Security Law by the Standing Committee of the National People's Congress (NPC Standing Committee)**

51. In September 2022, a British Queen's Counsel filed an application for special admission in the Court of First Instance to represent the defendant in a case of conspiracy to collude with a foreign country or with external elements to endanger national security, and of conspiracy to distribute seditious publications. At the time, there was major disagreement in the Hong Kong community over the questions of whether foreign lawyers without full local qualifications could participate in national security cases and of how the Hong Kong National Security Law would be applied in such cases. In order to effect a timely and appropriate resolution of the practical problems encountered in the implementation of the Hong Kong National Security Law, and to ensure the correct and effective implementation of that Law, the Standing Committee of the National People's Congress (NPC), in accordance with the provisions of article 67(4) of the Constitution and article 65 of the Hong Kong National Security Law, issued an interpretation of articles 14 and 47 of the Hong Kong National Security Law, to clarify the question of "whether, based on the original legislative intent and purpose of the Hong Kong National Security Law, foreign lawyers or barristers without full local professional qualifications can be involved in any form in dealing with offences endangering national security".

52. The exercise by the Standing Committee of the NPC of its power of interpretation in accordance with the relevant provisions of the Constitution and the Hong Kong National Security Law is an important component of the "one country,

two systems” principle and embodies the principle of the rule of law. This legislative interpretation by the Standing Committee of the NPC does not deal directly with specific judicial cases, but rather clarifies the meaning of the relevant legal provisions and the basis of the applicable law; there is absolutely no question of impairing the rights of Hong Kong courts to exercise adjudicatory power independently and to the power of final adjudication as guaranteed under the HKSAR Basic Law. This legislative interpretation stems from the dispute over whether foreign lawyers who are not fully qualified to practise in Hong Kong may apply to participate in national security cases on a case-by-case basis. By means of its interpretation of articles 14 and 47 of the Hong Kong National Security Law, the Standing Committee of the NPC has provided a clear path for the HKSAR to effect its own resolution of the dispute concerned.

53. The interpretation by the Standing Committee of the NPC states that the question of whether a foreign lawyer who is not fully qualified to practise in the Hong Kong Special Administrative Region can act as a defender or litigation agent in a national security case is a matter for the Chief Executive to determine as required under article 47 of the Hong Kong National Security Law. On the basis of this article, in cases before the courts, where the issue arises of a determination as to whether the act relates to national security or whether the relevant evidentiary material relates to State secrets, a certificate issued by the Chief Executive in respect of those acts shall be applied for and obtained from the Chief Executive, and the certificate shall be binding on the court concerned. This legislative interpretation granted no additional powers to the Chief Executive in this regard, but simply clarified that the provision could be applied to deal with the dispute concerning foreign lawyers. This certification system not only has a solid legal basis, but is also reasonable and appropriate. National defence, foreign affairs and national security issues belong to the central authority. And in actuality, given the nature of national security affairs, the executive organs are far better placed than the courts to make appropriate assessments, so the courts will respect the assessments of the executive organs on national security matters, a principle that is also a general rule for safeguarding national security around the world. It is important to note that the certificates issued by the Chief Executive merely provide a binding determination to the courts on the issues referred to in article 47 of the Hong Kong National Security Law, and are not a substitute for the courts’ handling of other disputes during the proceedings, nor are they a substitute for the decisions of the courts.

### **Amendment of the Legal Practitioners Ordinance — 2023 Legal Practitioners (Amended) Ordinance, Cap. 159 (the “draft Ordinance”)**

#### *Right of the accused to appoint a lawyer*

54. The concerns raised in the communication regarding the draft Ordinance and the practice of foreign lawyers in Hong Kong indicate that you have a significant misunderstanding of the regulatory regime for legal practitioners in Hong Kong, in particular the special accreditation system for foreign lawyers. This draft Ordinance was approved by the Legislative Council on 10 May 2023. We would like to clarify the situation here.

55. First of all, it must be noted that no defendants in criminal cases have ever had the right to be represented in court by foreign barristers. HKSAR residents have the right to choose a lawyer; article 35 of the HKSAR Basic Law and section 11 of the Hong Kong Bill of Rights Ordinance guarantee the right of defendants in criminal cases to choose a lawyer. However, court cases<sup>20</sup> have made it clear that this right

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<sup>20</sup> See [REDACTED] (HCMP2762/1984); judgment at following link:  
[[https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=28729jsp?DIS=28729&QS=%2B&TP=JU%2B&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=28729jsp?DIS=28729&QS=%2B&TP=JU%2B&TP=JU)] and

refers only to the right to choose a lawyer or barrister who is fully qualified to practise in Hong Kong as a legal representative, and does not include foreign lawyers who are not fully qualified to practise in Hong Kong. There are currently over 100 senior barristers and over 1,500 barristers in Hong Kong, as well as over 11,000 practising lawyers, from among whom parties to court proceedings may choose. Moreover, foreign lawyers, of course, have never had any right to require a court in Hong Kong to authorize them to practise in Hong Kong, nor do parties to court proceedings have the right to require the court to admit foreign lawyers as their legal representatives.

#### **System of accreditation for foreign lawyers in the HKSAR**

56. Under Section 27D of the Legal Practitioners Ordinance, notwithstanding that a person is not fully qualified to practise in the HKSAR, if the court considers that the person concerned is an appropriate person to act a barrister, is satisfied that the person has particular qualifications and that it is in the public interest of Hong Kong that the person be admitted as a barrister on an ad hoc basis, the court shall have the power to admit or approve the person as a barrister in any particular case or cases.

57. A foreign lawyer who is not fully qualified to practise in the HKSAR may constitute a national security risk when practising or acting as a barrister in a national security case in the HKSAR. Article 3 of the Hong Kong National Security Law stipulates that the HKSAR has a Constitutional responsibility to safeguard national security, and the executive, legislature and judiciary of the HKSAR shall effectively prevent, suppress and punish acts and activities that endanger national security in accordance with the provisions of the Hong Kong National Security Law and other relevant laws. We must take a prudent approach to avoid creating national security risks. While the government highly values the ad hoc accreditation system, because it allows foreign lawyers to participate in court proceedings in Hong Kong and contributes to the development of jurisprudence in Hong Kong, it must nevertheless be balanced against the fundamental importance and overriding nature of national security, as well as the potential national security risks associated with the participation of foreign lawyers in national security cases. For this reason, the draft amendment of the Legal Practitioners Ordinance proposed by the HKSAR government introduces a new mechanism to deal with the participation of foreign lawyers in national security cases on a case-by-case basis. If the Chief Executive is satisfied that a foreign lawyer practising or acting as a barrister in a national security case will not be detrimental to national security, his or her application for ad hoc recognition will be considered by the court. The new mechanism has struck the most appropriate balance between the two considerations. It is important to note that the draft Ordinance mechanism does not completely prohibit accreditation of foreign lawyers in national security cases on a case-by-case basis. It is therefore not true that the draft Ordinance, as alleged in the communication, categorically bans foreign lawyers from acting in national security cases.

58. We absolutely disagree with the allegation in the communication that the draft Ordinance affects the right of the defendant to hire counsel or violates the ad hoc accreditation system that has been in use in the HKSAR for many years. As mentioned above, the right to choose a lawyer, as guaranteed in article 35 of the HKSAR Basic Law and section 11 of the Hong Kong Bill of Rights Ordinance, never included the right to appoint a foreign lawyer who is not fully qualified to practise in Hong Kong. The accreditation of foreign lawyers shall be governed solely by the local laws of the HKSAR (i.e. the Legal Practitioners Ordinance). Any legal system needs to be adapted and refined according to new circumstances, which is in complete accordance with the principle of the rule of law. Furthermore, the new mechanism does not affect the appointment of foreign lawyers on a case-by-case

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[2021]1HKLRD715; judgment at following link:  
[\[https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=132834&QS=%2%28%7Bsimpson+QC%7D+%25parties%29&TP=JU\]](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=132834&QS=%2%28%7Bsimpson+QC%7D+%25parties%29&TP=JU)  
**TR note: links as cited in source document are inactive; neither is otherwise traceable.**

basis in criminal and other civil cases that do not involve national security. In fact, most jurisdictions do not have a similar ad hoc accreditation mechanism, let alone one that permits the application of the ad hoc accreditation method in national security cases. In contrast, the current HKSAR ad hoc accreditation mechanism is very open.

#### **Definition of “cases involving national security”**

59. We absolutely disagree with the allegation in the communication that the definition of “national security cases” under the draft Ordinance is overly broad. “National security” is a complex and dynamic concept, There is no consistent international definition, and local law in many jurisdictions does not provide any legal definition of “national security,” because its definition must be able to respond to a variety of new forms of national security threats that may evolve or arise over time. Thus, whether or not a case involves national security will depend on the facts and circumstances of that case, the claims being debated, the evidence to be invoked, etc. To properly carry out the responsibility to safeguard national security under article 3 of the Hong Kong National Security Law, the term “cases involving national security” in the draft Ordinance should not be given a limited or exhaustive definition. We need to retain flexibility in the application of this term to respond to rapidly-changing national security threats and to cover a wide range of national security-related cases. In addition to criminal cases involving offences endangering national security, the involvement of foreign lawyers in cases that are not criminal in nature but nevertheless involve national security or the Hong Kong National Security Law (e.g. judicial review of the exercise of statutory powers to safeguard national security, etc.) may also pose a similar national security risk.

#### **Decisions taken by the Chief Executive**

60. We must point out that while the decisions taken by the Chief Executive under the provisions of new article 27F<sup>21</sup> of the draft Ordinance are not liable to legal challenge, that does not affect the independent exercise of the adjudicatory power of the courts. The mechanism under the draft Ordinance is designed to give effect to the spirit of its articles 2 and 3 as well as article 47 of the Hong Kong National Security Law, as interpreted by the Standing Committee of the NPC, emphasizing the role of the Chief Executive as head of the HKSAR executive organs, and whose binding certificate establishes whether or not the practice or conduct of foreign lawyers as barristers in national security cases implicates national security or would be detrimental to national security. This interpretation, and the spirit of article 47 of the Hong Kong National Security Law, are in full conformity with the principles established in Hong Kong and other jurisdictions, which are based on the essence of national security affairs. The executive organs are far better placed than the courts to make appropriate assessments, so the courts will respect the assessments of the executive organs on national security matters. At the same time, the decisions taken by the Chief Executive in the pre-application screening procedures and in the ad hoc accreditation procedures shall be considered as a whole and shall be equally binding on the court.

#### **Visa applications for foreign lawyers**

61. The Immigration Department continuously reviews all visa applications, including those for foreign lawyers, on the basis of established legislation and procedures. Immigration control is carried out by the Immigration Department in accordance with Chapter VII, art. 154 of the HKSAR Basic Law and the Immigration Ordinance (Cap. 115). Applicants with special skills, knowledge or experience needed and lacking in the HKSAR may apply to come to Hong Kong in accordance

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<sup>21</sup> [Section 27F](#) stipulates that “A decision made by the Chief Executive under section 27C, 27D or 27E is not liable to be questioned in any court of law, and no legal proceedings of any form may be instituted in respect of the decision.” (*TR note: online text dated 2 July 2023*)

with the General Employment Policy. Security considerations are among the criteria by which the Immigration Department considers applications for employment in Hong Kong under that Policy. As a component of the executive authority of the HKSAR, the Immigration Department must effectively prevent, suppress and punish acts and activities that endanger national security, and for that reason, national security is necessarily included among overall security considerations.

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