



中华人民共和国常驻联合国日内瓦办事处和瑞士其他国际组织代表团

PERMANENT MISSION OF THE PEOPLE'S REPUBLIC OF CHINA

11 Chemin de Surville, 1213 Petit-Lancy
Tel: +41 (0)22 879 56 78 Fax: +41 (0) 22 793 70 14
Email: chinamission_gva@mfa.gov.cn Website: www.china-un.ch

CHN/HR/2023/64

The Permanent Mission of the People's Republic of China to the United Nations Office at Geneva and Other International Organizations in Switzerland presents its compliments to the Office of the High Commissioner for Human Rights and with reference to the latter's communication [OL CHN2/2023], has the honor to transmit herewith the reply of 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

**Response to the letter from
the Special Rapporteur on the Independence of Judges and Lawyers
on matters concerning the Hong Kong Special Administrative Region of
the People's Republic of China (OL CHN 2/2023)**

We hereby acknowledge the receipt of communication (No.OL CHN2/2023) from United Nations Human Rights Council Special Rapporteur on the independence of judges and lawyers. The government of People's Republic of China's reply is set out below:

1.With regard to the concerns raised by the Special Rapporteur on the Independence of Judges and Lawyers (the Special Rapporteur) about matters relating to the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (the National Security Law), the legal aid system, and the amendments to the Legal Practitioners Ordinance, the ensuing paragraphs aim to provide correct information, with a view to avoiding the Special Rapporteur being misled into making wrongful comments. Even if certain concerns raised in the incoming letter have not been touched on in the following paragraphs, the government of People's Republic of China should not be regarded as agreeing with the negative views expressed in the incoming letter on those matters.

Central government's administrative authority

Jurisdiction of the Office for Safeguarding National Security of the Central People's Government in the Hong Kong Special Administrative Region

2.On whether it affects judicial independence. Article 19 of the Basic Law guarantees that the HKSAR shall be vested with independent judicial power, including that of final adjudication. In accordance with the relevant provisions of the Hong Kong National Security Law, except in the circumstances prescribed in Article 55 of the Hong Kong National Security Law, Hong Kong courts shall apply the Hong Kong National Security Law and local laws in adjudicating cases of crimes against national security in Hong Kong. Since the implementation of the Hong Kong National Security Law, all Hong Kong cases of crimes against national security have been brought to the jurisdiction of the Hong Kong courts in accordance with the law, and the independent judicial power of the courts has been fully respected.

3.At the same time, Hong Kong is a Special Administrative Region (SAR) directly under the Central People's Government (CPG). The jurisdiction of the Hong Kong SAR is conferred by the National People's Congress (NPC) through the Hong Kong Basic Law, which is inherently restrictive. For example, Article

19 of the Basic Law makes it clear that the courts of Hong Kong shall have no jurisdiction over acts of state such as national defense and foreign affairs. In all countries in the world, national security falls within the competence of the Central Authorities, which mainly includes legislative, law enforcement, judicial and administrative powers. Originally, the Central Authorities had the power to exercise direct jurisdiction over crimes against national security committed in the HKSAR. However, on the basis of the principle of “one country, two systems” and full trust in the HKSAR, the Central Authorities have authorized the HKSAR to exercise jurisdiction over the vast majority of cases, and retained direct jurisdiction over crimes against national security committed by the HKSAR only in a very small number of specific cases, which have to go through very stringent approval procedures. The Central Authorities have authorized the SAR to exercise jurisdiction over the vast majority of cases. The relevant arrangements reflect the Central Authorities’ respect for and trust in the independent judicial power and the power of final adjudication of the HKSAR, and are conducive to supporting and strengthening the HKSAR’s work in safeguarding national security, and are constitutional and lawful.

4. On whether it affects the right to a fair trial as provided for in article 14 of the International Covenant on Civil and Political Rights. The Chinese Constitution provides constitutional guarantees for fair trial and human rights safeguards, and the relevant provisions of the principles of the Criminal Procedure Law and the arrangements for the enforcement mechanism of the proceedings further provide the legal basis for fair trial and human rights safeguards. Article 4 of the Hong Kong National Security Law clearly stipulates that the rights and freedoms enjoyed by residents of the Hong Kong Special Administrative Region in accordance with the Basic Law and 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 be protected in accordance with law. Article 5 provides for adherence to the principles of the rule of law (including the principle of legality, presumption of innocence, protection for litigate rights and ne bis in idem). Article 39 provides for the principle of non-retroactivity of the law. These provisions of the Hong Kong National Security Law are consistent with the spirit of the two human rights covenants, and national law enforcement and judicial organs such as the Office for Safeguarding National Security of the Central People’s Government in the Hong Kong Special Administrative Region will strictly abide by them in exercising their jurisdiction, so as to ensure a fair trial. The relevant laws of the Mainland and the laws of the HKSAR share many similarities in respect of human rights safeguards in criminal justice, and it can be said that the laws of the Mainland and the laws of the HKSAR are in line with the United Nations standards on human rights safeguards in criminal justice. In exercising their jurisdiction over cases of crimes against national security in accordance with the provisions of article 55 of the Hong Kong National Security Law, law enforcement and judicial bodies such as the Office

for Safeguarding National Security of the Central People's Government in the Hong Kong Special Administrative Region do not differ fundamentally from the standards of human rights safeguards observed by the relevant law enforcement and judicial authorities of the HKSAR. Therefore, there is no question of the jurisdiction of national law enforcement and judicial authorities, such as the National Security Bureau in Hong Kong, over specific cases of crimes against national security in accordance with article 55 of the Law affecting the right to a fair trial as provided for in article 14 of the International Covenant on Civil and Political Rights.

NPC's law interpretation

5. On whether the independence of the judiciary is affected. Article 67 of the Chinese Constitution and Article 45 of the Legislative Law provide that the power of interpretation of laws is vested in the Standing Committee of the National People's Congress (NPCSC). The Hong Kong National Security Law is a national law enacted by the Standing Committee of the National People's Congress (NPCSC), and it is constitutional and lawful for the NPCSC to interpret it. With regard to the Hong Kong Special Administrative Region, the Standing Committee of the National People's Congress has interpreted the Nationality Law on one occasion and the Hong Kong Basic Law on five occasions, resulting in a relatively mature experience and practice of interpreting the Law, and the relevant interpretations of the Law have become an important part of the legal system of the Region. The Hong Kong Judiciary, the Bar Association and the Law Society have publicly expressed their respect for this first interpretation of the National Security Law of Hong Kong. It should be made clear that the interpretation of the Law by the Standing Committee of the National People's Congress (NPCSC) addresses the meaning of the legal provisions and is not directed at specific cases, and that the decision of the National Security Council of the HKSAR is not intended to replace or negate the exercise of judicial power by the courts of the HKSAR. The Central Authorities support and believe that the judicial organs of the HKSAR will make impartial judgments on the relevant cases in strict accordance with the Hong Kong National Security Law, the NPCSC Interpretation and the relevant local laws. There is therefore no question of the independent judicial power and the power of final adjudication enjoyed by the HKSAR under the Hong Kong Basic Law being affected.

6. On whether it affects the right to choose lawyers. The Basic Law and the Hong Kong National Security Law fully protect the right of criminal suspects and defendants to choose lawyers for their defense. Article 35 of the Basic Law provides that Hong Kong residents shall have the right to choose their own lawyers. Article 5 of the Hong Kong National Security Law explicitly guarantees the right of criminal suspects, defendants and other participants in

legal proceedings to a defense and other procedural rights in accordance with law. In practice, the right of suspects and defendants in criminal cases endangering national security to choose lawyers and to defend themselves, as well as the right of defense lawyers to practice law, have been effectively safeguarded.

7. It must be recognized that the prohibition on foreign lawyers representing national security cases is a general rule in all countries of the world. The Legal Practitioners Ordinance, as amended in accordance with the NPCSC Interpretation, still permits foreign lawyers who are fully qualified to practise in Hong Kong to continue to act in national security cases, and permits overseas barristers who are not qualified to practise in Hong Kong to apply to act in national security cases through the improved ad hoc admissions procedure, which fully reflects the respect for Hong Kong's common law traditions. The reference in the communication to "totally prohibiting" overseas lawyers from representing cases is totally inconsistent with the facts. At the same time, there are more than 1,500 barristers and 106 senior barristers in Hong Kong, many of whom are experienced in handling national security cases and other types of criminal cases, and they are fully capable of ensuring that suspects and defendants are provided with an adequate and effective defense in national security cases, and assisting the court in the fair hearing of national security cases.

8. Regarding the immunity of relevant decisions from judicial review. Decisions of the Committee for Safeguarding National Security of the HKSAR concerning the representation of national security cases by overseas lawyers are not subject to judicial review. This provision is made after taking into account the judicial practice of judicial review and the nature of the work of the the Committee for Safeguarding National Security of the HKSAR. The Committee is charged with the duty of safeguarding national security and is required to make final judgments and decisions from the perspectives of national sovereignty, foreign relations and national interests through comprehensive, professional and integrated considerations. In matters involving national sovereignty, security and development interests, judicial review often has obvious limitations, as the courts do not have a comprehensive grasp of national security information and the national security situation is ever-changing, so it is usually necessary to leave the power to decide on disputes over non-national security issues to the judiciary, while leaving the final determination, judgment and decision on issues involving national security to the organs of the Government. Therefore, the decisions of the Committee for Safeguarding National Security of the HKSAR are not subject to judicial review, which is lawful and reasonable.

9. It must be pointed out that some countries have repeatedly threatened to sanction the judges and prosecutors of the HKSAR while claiming judicial independence, thus bluntly interfering in Hong Kong's judicial process. The recent so-called "hearings" and "report" of the Congressional-Executive Commission on China is a case in point. Facts have proved that these countries have disregarded the principle of the rule of law and basic political ethics, and they are the biggest spoilers of Hong Kong's judicial independence.

The National Security Law

Protection of fundamental rights and freedoms

10. With regard to the concerns raised in the incoming letter on rights and freedoms, as pointed out repeatedly by Chinese Government, fundamental rights and freedoms are well protected in the HKSAR by the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (the Basic Law) at the constitutional level. Such fundamental rights and freedoms include the freedoms of speech, of the press, of publication, of association, of assembly, of procession and of demonstration; the right and freedom to form and join trade unions, and to strike¹; the right to a fair trial²; the freedom of the person and the relevant rights regarding the protection of privacy from arbitrary interference³. Article 39 of the Basic Law provides that the provisions of, amongst others, 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 remain in force and shall be implemented through the laws of the HKSAR.

11. At the local law level, the provisions of the ICCPR as applied to Hong Kong have been implemented by way of the Hong Kong Bill of Rights Ordinance (Cap. 383), which binds the Government. As such, the relevant rights and freedoms enumerated in the ICCPR are protected under the Hong Kong Bill of Rights set out in section 8 of the Hong Kong Bill of Rights Ordinance⁴.

12. During the adoption of the National Security Law (and the enactment of the Implementation Rules for Article 43 of the National Security Law (Implementation Rules)), the relevant provisions of the ICCPR and the ICESCR as applied to the HKSAR were fully taken into consideration.

¹ Article 27 of the Basic Law

² Article 85 of the Basic Law

³ Articles 28, 29 and 30 of the Basic Law

⁴ The Universal Declaration of Human Rights (UDHR) mentioned in the incoming letter is not legally binding on the HKSAR. Nevertheless, as the contents of the relevant rights and freedoms protected under the UDHR are largely the same as those in the ICCPR, those rights and freedoms are hence indirectly protected under the Hong Kong Bill of Rights.

13.It must be emphasised that Hong Kong residents continue to enjoy all fundamental rights and freedoms guaranteed under the Basic Law and the Hong Kong Bill of Rights Ordinance after the implementation of the National Security Law. As a matter of fact, Article 4 of the National Security Law provides 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 residents of the HKSAR 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.

14.Article 5 of the National Security Law affirms adherence to the principle of the rule of law when law enforcement agencies enforce the law against offences endangering national security. It states that 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. Furthermore, 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 criminal suspects, defendants, 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.

15.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 5 of the National Security Law, which emphasise protection of 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.

16.As far as legal practitioners are concerned, Article 35 of the 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 to judicial remedies. Lawyers acting professionally are pivotal to HKSAR's legal system and they shoulder the primary responsibility for upholding the rule of law. In carrying out their duties, the fundamental rights and freedoms of legal practitioners, like those of all other individuals, are well protected by law. This fundamental safeguard ensures that they should act professionally without fear or favour.

Freedoms not absolute

17.As stated in Article 42 of the Basic Law, Hong Kong residents and other persons in Hong Kong have the obligation to abide by the law in force in the HKSAR.

18.Article 6(1) of the National Security Law states that it is the common responsibility of all the people of China, including the people of Hong Kong, to safeguard the sovereignty, unification and territorial integrity of the People's Republic of China. Article 6(2) further states that any institution, organisation or individual in the HKSAR shall abide by the National Security Law and the laws of the HKSAR in relation to the safeguarding of national security.

19.Article 1 of the Basic Law states that the HKSAR is an inalienable part of the People's Republic of China. Article 12 of the Basic Law provides that the HKSAR shall be a local administrative region of the People's Republic of China, which shall enjoy a high degree of autonomy and come directly under the Central People's Government (CPG). Article 2 of the National Security Law provides that the provisions in Articles 1 and 12 of the Basic Law on the legal status of the HKSAR are the fundamental provisions in the Basic Law. No institution, organisation or individual in the HKSAR shall contravene these provisions in exercising their rights and freedoms.

20.Hong Kong residents enjoy freedoms of speech, of the press, of publication, of association, of assembly, of procession and of demonstration, etc. These freedoms, however, are not absolute. The ICCPR and ICESCR both permit restrictions on non-absolute human rights if they are prescribed by law and for the protection of national security. In order to protect national security or public safety, public order (*ordre public*), the rights and freedoms of others, etc., reasonable and necessary restrictions may be imposed on the exercise of such rights in the form of laws (including the National Security Law). This is a common practice in all countries and is also allowed under the ICCPR and ICESCR.

Judicial independence

21.The Special Rapporteur has raised a number of concerns regarding judicial independence in the HKSAR. Before responding to these concerns, we must seriously emphasise that the rule of law and judicial independence in Hong Kong are guaranteed under the Basic Law. Articles 2, 19 and 85 of the Basic Law specifically provide that the HKSAR shall be vested with independent judicial power, including that of final adjudication; the courts shall exercise judicial power independently, free from any interference.

Designated judges

22.Regarding the concern expressed in the incoming letter about designated judges, it should be stressed that none of the relevant arrangements would undermine judicial independence or right to a fair trial under Article 14 of the ICCPR. In particular, the designation of judges by the Chief Executive to handle cases involving offences endangering national security only involves designating a list of judges from existing judges, rather than choosing a particular judge to preside over a specific case. The assignment of specific cases to individual designated judges remains to be the independent decisions of the Judiciary, not the Chief Executive.

23.In fact, it is not uncommon to designate specialist judges dealing with a particular area of law. In Hong Kong, there are judges who are specifically in charge of the construction and arbitration list, as well as the commercial and admiralty lists. Through the provision of specialist judges who are familiar with a particular area of law, there is a better chance to achieve predictability and certainty of law. This will also reduce the risk of erroneous application of law. All in all, it is conducive to the rule of law.

24. Besides, when adjudicating relevant cases, regardless of whether the cases concern national security or otherwise, judges remain independent in performing their judicial duties, free from any interference. This has been adequately provided for in Article 85 of the Basic Law⁵. As decided by the Court in *Tong Ying Kit v. HKSAR*⁶: “There is no proper or sufficient basis to contend that, in relation to cases concerning offences under the National Security Law, the Chief Executive or the Government is in a position ‘to interfere in matters that are directly and immediately relevant to the adjudicative function, for example, assignment of judges, sittings of the court and court lists’, or that the liberty of any member of the Judiciary in Hong Kong ‘in adjudicating individual disputes and in upholding the law and values of the constitution’ is, or will be, interfered with by the Chief Executive exercising her power under Article 44 [of the National Security Law].” The court will not lose its independence merely because a case concerning offences endangering national security is handled by a judge designated under Article 44. The right of everyone to a fair hearing by a competent, independent and impartial tribunal established by law under Article 14 of the ICCPR remains well protected. Therefore, the arrangement on the designation of judges under the National Security Law absolutely does not undermine the highly respected judicial independence of the HKSAR. Indeed, the then Chief Justice of the Court of Final Appeal of the HKSAR clearly stated in a statement made on 2 July 2020⁷ (i.e. shortly after the National Security Law was implemented) that “designated judges, like all judges, are to be appointed on the basis of their 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”. The incumbent Chief Justice of the Court of Final Appeal of the HKSAR also stated at the Ceremonial Opening of the Legal Year 2022⁸ that “designated judges, like all other judges, are subject to the Judicial Oath which all judges are required to take under Article 104 of the 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

⁵ According to Article 85 of the Basic Law, the courts of the HKSAR shall exercise judicial power independently, free from any interference. Members of the judiciary shall be immune from legal action in the performance of their judicial functions.

⁶ *Tong Ying Kit v. HKSAR* [2020] HKCFI 2133. The judgment (in English only) can be found at the following link: https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=130336&QS=%2B&TP=JU

⁷ Please refer to <https://www.info.gov.hk/gia/general/202007/02/P2020070200414.htm?fontSize=1>.

⁸ Please refer to <https://www.info.gov.hk/gia/general/202201/24/P2022012400378.htm?fontSize=1>.

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.”

25. As to whether a list of the designated judges is to be disclosed to the public, this is subject to the relevant requirements of the local laws of the HKSAR. It is in the public interest that the identity of designated judges should be kept in confidence and protected by the law before the judges hear any cases concerning offences endangering national security. There have been threats of violence, including even death threats, to designated judges who handled cases concerning offences endangering national security. There have also been recent calls by foreign entities for the unilateral imposition of so-called “sanctions”⁹ on designated judges. This is in defiance of the principles of sovereign equality of States and non-intervention as established by the Charter of the United Nations. Such threats to judicial officers are also clearly in breach of internationally recognised guidelines/principles, such as the Basic Principles on the Independence of the Judiciary as adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1985. We believe that as the Special Rapporteur on the independence of judges and lawyers, your goodself will condemn the concerned countries for their coercive acts in an attempt to interfere with the judicial proceedings of the HKSAR, put political manipulation above the law and affect the independence of judges. All in all, we do not see any overriding public interest justifying disclosure of the list of designated judges.

⁹ For example, please refer to the United States Congressional-Executive Commission on China’s “staff research report” published on 10 May 2023 entitled “One City, Two Legal Systems: Hong Kong Judges’ Role in Rights Violations under the National Security Law” (<https://www.cecc.gov/publications/commission-analysis/one-city-two-legal-systems-hong-kong-judges%E2%80%99-role-in-rights>). The Commission held a “hearing” on 11 May 2023, in which a number of participants explicitly requested the United States Government to impose “sanctions” on the judges of the HKSAR (<https://www.cecc.gov/events/hearings/one-city-two-legal-systems-political-prisoners-and-the-erosion-of-the-rule-of-law-in>). Certain members of the Congress of the United States also wrote a letter to the President of the United States in 2022 requesting the imposition of “sanctions” on designated judges (<https://www.politico.com/f/?id=00000180-a050-dd36-a38c-e75ce9380000>).

Bail arrangements for cases concerning offences endangering national security

26. As regards the bail arrangements and pre-trial detention for cases concerning offences endangering national security as mentioned in the incoming letter, it is completely untrue for the incoming letter to say that “[a]uthorities 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.” According to section 52 of the Police Force Ordinance (Cap. 232), the Police shall bring a person detained in custody before a magistrate as soon as practicable. The court shall consider whether to grant bail to all persons brought before it (including persons charged with offences endangering national security). The Hong Kong Court of Final Appeal has made clear in an appeal case concerning Article 42(2) of the National Security Law¹⁰ that the cardinal importance of safeguarding national security and preventing and suppressing acts endangering national security explains why more stringent conditions to the grant of bail in relation to offences endangering national security have been introduced under the National Security Law. In that case, the court also elaborated that in applying Article 42(2) of the National Security Law when dealing with bail applications in cases involving offences endangering national security, 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 taken into account all relevant materials, the judge concludes that there are no sufficient grounds for believing that the accused will not continue to commit acts endangering national security, bail application must be refused. If, on the other hand, having taken into account all relevant materials, the judge concludes that there are sufficient grounds, the judge shall then consider all matters relating to the granting or refusal of bail. At the same time, the Court of Final Appeal ruled that as far as possible, Article 42(2) of the National Security Law on bail is to be given a meaning and effect compatible with those rights, freedoms and values guaranteed by Article 4 (protection of human rights) and Article 5 (adherence to the rule of law) of the National Security Law as mentioned above.

27. Applications for bail will be handled by the court in strict accordance with the National Security Law and relevant local laws. In deciding whether to grant bail, the court will consider all relevant factors, including the positions and arguments of the prosecution and the defence, as well as all the relevant information presented in court. The court will consider whether to grant bail based on individual merits of each case; and if so, on what conditions. The grant of bail and the imposition of any bail conditions are judicial decisions made based on the individual circumstances of each case. If the defendant is dissatisfied with the magistrate’s decision on bail (including the decision on bail

¹⁰ *HKSAR v Lai Chee Ying* (2021) 24 HKCFAR 67 (please refer to the following link: https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=133491)

conditions or revocation of bail), he or she may apply to the Court of First Instance of the High Court for review or variation¹¹. The Court of First Instance will similarly consider and decide on the application in strict accordance with the National Security Law and relevant local laws.

28. The Special Rapporteur referred to Article 9(3) of the ICCPR, which provides that pre-trial detention of defendants should be exceptional rather than the general rule. In its General Comment No. 35, the United Nations Human Rights Committee stated that “[p]retrial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances” and that the decisions on detention pending trial must be 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 crime¹². As mentioned above, when deciding whether bail should be granted, the court needs to consider the specific circumstances of each case, and not all defendants charged with offences endangering national security will be categorically denied bail. Therefore, Article 42(2) of the National Security Law is consistent with the requirements of Article 9(3) of the ICCPR. It is a matter of fact that a number of defendants have been released on bail after the courts duly considered the requirements stipulated in the National Security Law and relevant local laws. For example, as reported by the media, some defendants who were charged with conspiracy to commit subversion are currently released on court bail. On the contrary, some jurisdictions even have in place regimes that authorise prolonged detention on national security grounds without charge, depending on the specific circumstances of the case. As such, the criticism in the incoming letter against the bail arrangements for cases of endangering national security in the HKSAR is totally unfounded.

29. In addition, in handling cases concerning offences endangering national security, the Department of Justice of the HKSAR Government strictly complies with Article 42(1) of the National Security Law, which stipulates that “the law enforcement and judicial authorities of the Region shall ensure that cases concerning offence endangering national security are handled in a fair and timely manner”. All prosecutions are carried out in strict accordance with the relevant law. The time taken between the institution of prosecution and the trial of each case depends on a multitude of factors, such as whether further investigation is required, whether the defendant needs time to obtain legal advice for consideration of his/her plea, whether the defence requires court certification of translated documents or whether the defence exercises rights under the law to make any pre-trial application, etc. It must be stressed that all

¹¹ Please refer to section 9J of the Criminal Procedure Ordinance (Cap. 221).

¹² Please refer to paragraph 38 of the General Comment No. 35 of the United Nations Human Rights Committee.

arrangement absolutely does not undermine any lawful rights and interests of defendants, including the right to a fair trial under Article 14 of the ICCPR. As we can see from the judicial practice in foreign countries, some countries have also adopted similar arrangements in criminal proceedings for cases concerning offences endangering national security.

32. It must be pointed out at the same time that although the previous jury system is retained under the Basic Law, the HKSAR may still make provisions on jury trial in criminal proceedings. The provisions regarding the jury system and the principles of criminal proceedings in the Basic Law do not prohibit the HKSAR from making changes to the principles of the existing jury system, so long as these changes are not fundamental or do not abolish the entire jury system.

33. Moreover, in such trial, the same procedural safeguards are in place to ensure a fair trial for the defendant as in a jury trial, and the same appeal procedure is available to a defendant in case of a conviction and sentence. As guaranteed by the Basic Law and the Hong Kong Bill of Rights, defendants charged with criminal offences, including those offences under the National Security Law, shall have the right to a fair trial by the Judiciary exercising judicial power independently. The arrangement absolutely does not undermine any lawful rights and interests of defendants. On the other hand, as stipulated in Article 41(4) of the National Security Law, judgments shall be delivered in an open court. Judges normally have to deliver the reasons for the verdicts to ensure open justice.

34. The court earlier refused an application for leave for judicial review against the Secretary for Justice's decision to issue a certificate pursuant to Article 46 of the National Security Law, directing that the relevant case be tried without a jury. In the judgment¹⁴, the judge held that the applicant did not have any constitutional right to a jury trial. The judge also held that the decision was a prosecutorial decision falling within the ambit of Article 63 of the Basic Law and therefore free from any interference. With adequate understanding of the above legal points, it follows that the views of "unchecked authority to remove a jury" and "the interference of ...the executive...branches in judicial matters" are undoubtedly fearmongering.

¹⁴ *Tong Ying Kit v Secretary for Justice* [2021] HKCA 912. The judgment (in English only) can be found at the following link:
https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=136672&QS=%28%7Btong+ying+kit%7D+%25parties%29&TP=JU

Arrangements relating to the exercise of jurisdiction over cases concerning offences under the National Security Law

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

35.Regarding the concern expressed in the incoming letter about Article 55 of the National Security Law, we strongly object to any suggestion that the exercise of jurisdiction by the CPG would in effect violate the ICCPR. To understand the arrangements accurately, the Special Rapporteur must first have a correct understanding of the arrangement for the HKSAR to be authorised to exercise jurisdiction under the constitutional order of China, the principle of “one country, two systems” and the National Security Law.

36.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 exercised by every sovereign State. Hence, generally speaking, it is either the central government or the federal government that is directly responsible for affairs relating to safeguarding national security, whereas the local government or the state government can only cooperate and assist with such work¹⁵.

37.The General Principles of the National Security Law clearly stipulate that the 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 (see below for details), the HKSAR exercises jurisdiction over cases 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 performing its constitutional duty to safeguard national security.

38.Under Chapter IV of the National Security Law, two points are worthy of note. First, the HKSAR exercises jurisdiction over most of the cases, save in three specified situations stipulated under Article 55 of the National Security Law (see paragraph 40 below). Second, the National Security Law and the laws of Hong Kong shall apply to procedural matters, including those related to criminal investigation, prosecution, trial, and execution of penalty in respect of

¹⁵ Take the United States as an example, its national security laws are all enacted by the Congress of the United States 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 etc. 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.

offences endangering national security over which the HKSAR exercises jurisdiction. The Department of Justice makes prosecutorial decisions in accordance with the law, which is protected under the Basic Law.

Exercise of jurisdiction by the CPG under specified situations

39. As mentioned above, 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 have an overarching responsibility to safeguard national security and this principle has been reflected in the National Security Law. The CPG establishes in Hong Kong an office for safeguarding national security pursuant to the relevant Decision of the National People's Congress of the People's Republic of China and the National Security Law, and the Office for Safeguarding National Security of the CPG of the People's Republic of China in the HKSAR (OSNS) is authorised 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.

40. 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.

41. In respect of the three specified situations mentioned above, the OSNS can commence the procedures for exercising jurisdiction only 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.

42. 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 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 Constitution).

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

43. 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 legal.

44. 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 Hong Kong residents 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 responses to communication no. OL CHN 17/2020 on 30 October 2020 and communication no. OL CHN 3/2022 on 10 August 2022, 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 of 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 Constitution provides constitutional guarantees for fair trial and for the protection of human rights, with provisions establishing that the State must respect and protect human rights; trials shall in principle be public; defendants have the right to defence; and the people's courts exercise adjudicatory power independently in accordance with the provisions of law. The relevant principles and regulations of the Criminal Procedure Law of the People's Republic of China 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, etc. It can be said that, in principle, 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.

45.Hence, in cases where the CPG (including the OSNS) has exercised jurisdiction, the individual 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.

Oversight of enforcement powers

46.The concerns on enforcement powers, in particular those under the Implementation Rules, expressed in the incoming letter are also inaccurate. In fact, the Implementation Rules clearly set out in detail the powers to take the various measures as stipulated, the procedural requirements, the circumstances that must be met, the conditions for approval, etc. The purpose is to ensure that when relevant officers apply the measures, the objective of effectively preventing, suppressing and imposing punishment for any act and activity endangering national security can be achieved, while the requirements under the General Principles of the National Security Law to respect and protect human rights, as well as to safeguard the various rights and freedoms in accordance with the law, can be complied with.

47. There are altogether seven Schedules to the Implementation Rules with the following major characteristics:

- (a) the provisions regarding the exercise of the various measures were generally formulated with reference to existing legislation, mainly by extending and applying them to the handling of cases concerning offences endangering national security;
- (b) the rules set out in detail the stringent procedural requirements, circumstances that must be met and conditions for approval when implementing those measures. This is to provide adequate safeguards for law enforcement actions, for example:
 - (i) most of the applications must be made to a magistrate unless it is not reasonably practicable to do so (including a search warrant, a requirement on the subject person to surrender his/her travel documents, etc.); or applications be made to the Court of First Instance (e.g. for a restraint order or charging order against the property concerned);
 - (ii) the exercise of these measures must comply with certain specified conditions. Meanwhile, the Secretary for Security has also issued Operating Principles and Guidelines to set out the detailed operating principles and guidance for compliance by police officers when performing relevant functions;
 - (iii) the rules also provide a number of defence provisions for individuals or organizations who are unable to comply with the requirements. For instance, while police officers are authorized to require a message publisher or service provider to remove a message endangering national security, it is a reasonable excuse if the technology necessary for complying with the requirement was not reasonably available to the publisher or relevant service provider; or if compliance with the relevant requirement by the relevant service provider would give rise to a risk of incurring substantial loss to, or otherwise substantially prejudicing the right of, a third party. Furthermore, for a foreign political organization and a Taiwan political organization, or a foreign agent and a Taiwan agent, failing to provide the information required by the Police, it would be a defence if it can be proved that due diligence has been exercised and there have been reasons beyond the person's control.

48. The HKSAR, particularly the law enforcement agencies and the Judiciary, will ensure that in safeguarding national security, the rights and freedoms are protected in accordance with the law and in conformity with Article 4 of the National Security Law. Any actions taken by police officers pursuant to the Implementation Rules are subject to judicial review, including allegations that such actions have violated human rights.

49. As a matter of fact, the courts of the HKSAR have adjudicated upon a number of legal challenges against search warrants issued under Schedule 1 to the Implementation Rules (such as claims that the materials seized are subject to legal professional privilege)¹⁶, written notices on freezing of property issued under Schedule 3¹⁷, and production order made under Schedule 7 (such as applications for variation of production orders)¹⁸.

50. In each of these cases, the courts, having reviewed all evidence, adjudicated in accordance with applicable laws in an impartial manner. Anyone reading the relevant judgments fairly, objectively and conscientiously will notice that the courts have given due consideration to the rights and freedoms protected under the Basic Law and the provisions of the ICCPR as applied to Hong Kong, and that a reasonable balance has been struck between safeguarding national security and the protection of rights and freedoms. Thus, the claim that the enforcement measures of the Police lack procedural safeguards and judicial oversight is untenable.

¹⁶ *Wong Wai Keung v Commissioner of Police* [2022] HKCFI 374. The judgment (in English only) can be found at the following link: https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=142179&currpage=T

Lai Chee Ying v Commissioner of Police [2022] HKCFI 3003. The judgment (in English only) can be found at the following link: https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=148577&currpage=T

¹⁷ *Lai Chee Ying v Secretary for Security* [2021] HKCFI 2804. In the judgment handed down on 17 September 2021, the Court of First Instance had considered the freezing regime under Schedule 3 to the Implementation Rules and observed that the possibility for affected persons to obtain a licence to deal with the property in question pursuant to the provisions already provides a balance between the purposes of the preventing, suppressing and punishing offences endangering national security, and the protection of property rights. Having considered the legislative intent of the freezing regime, the court held that the notice prohibited “dealing with” property, including the direct or indirect exercise of voting rights in company shares, in accordance with the law. The judgment (in English only) can be found at the following link: https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=138813&currpage=T

¹⁸ *A v Commissioner of Police* [2021] HKCFI 1801. The judgment (in English only) can be found at the following link: https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=136704&currpage=T

J v Commissioner of Police [2021] HKCFI 3586. The judgment (in English only) can be found at the following link: https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=140487&currpage=T

51. Members of the public may also lodge their complaints to the Complaints Against Police Office. Investigation of the complaints is supervised by the Independent Police Complaints Council, an independent body established under the Independent Police Complaints Council Ordinance (Cap. 604).

Legal Aid System

52. The incoming letter suggested that the review of the legal aid system undertaken by the HKSAR Government in 2021 has restricted the right of access to legal aid and right to be assigned a lawyer of one's choice and hence has affected the interests of the aided persons. We seriously point out that such views are unsubstantiated and factually incorrect.

53. The rule of law is a core value of Hong Kong and a cornerstone of its success. Hong Kong has an internationally acclaimed and comprehensive legal aid system, which is indispensable for upholding the rule of law in Hong Kong. To ensure that residents enjoy the right enshrined in Article 25 of the Basic Law, that is, "All Hong Kong residents shall be equal before the law", it is of vital importance to ensure that no one is denied access to justice because of lack of means. The legal aid system in Hong Kong has been playing an important role in this regard. Notably, the Hong Kong Court of Final Appeal expressed in a judgment in May 2018 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 courts¹⁹". That judgment also mentioned that legal aid has, particularly since 1997, played a significant part in the vast majority of public interest litigation cases.

54. The HKSAR Government conducted a review on the operation of the legal aid system in October 2021 in response to growing community concerns over potential abuse of the legal aid system, in particular the concern that legal aid cases of certain categories were handled by only a handful of lawyers. The review was unequivocally not conducted for suppressing the rights and freedoms enjoyed by residents in accordance with the law as suggested by the incoming letter. As a result, a number of enhancement measures have been implemented to strengthen prevention of potential abuse of the legal aid system and increase transparency, thereby enhancing public understanding of the work of the Legal

¹⁹ See paragraph 27(5) of the judgment in *Designing Hong Kong Ltd v The Town Planning Board and Secretary for Justice* (2018) 21 HKCFAR 237. The judgment (in English only) can be found at the following link:
https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=115161&QS=%2B&TP=JU

Aid Department (LAD) and their confidence in the legal aid system. The enhancement measures include direct assignment of lawyers by the Director of Legal Aid for all criminal legal aid cases, imposition of limits on the number of judicial review legal aid cases to be assigned to lawyers, lowering of limits on the number of civil legal aid cases to be assigned to lawyers, etc. The enhancement measures were reported to the Legislative Council Panel on Administration of Justice and Legal Services on 28 October 2021 and were unanimously supported. The enhancement measures are consistent with the relevant provisions of the Basic Law and the Hong Kong Bill of Rights Ordinance (Cap. 383).

Right to choose lawyers

55. The right to choose lawyers is not absolute. It is not a right of legal aid applicants to have a specific legal representative of their choice. A fair trial does not necessarily mean that a party must be legally represented by a lawyer of his/her own choice. In assigning lawyers in criminal legal aid cases, to ensure that assigned lawyers have enough experience and expertise to handle criminal legal aid cases, the assigned lawyers must have at least three years of working experience in the profession, and have handled at least five relevant cases in the past three years. For cases in higher courts, the required relevant criminal litigation experience will be raised accordingly. For example, for appeal cases to the Court of Final Appeal, the assigned counsel and solicitors must have at least ten years' and seven years' relevant criminal litigation experience respectively. To protect the aided persons' interests, LAD will assign the most suitable lawyer according to the type and complexity of the particular case. Besides, as clearly specified under the Solicitors' Practice Rules and the Code of Conduct of the Hong Kong Bar, in the course of their representation and in discharging the duty to act in the best interests of their clients, all lawyers shall not compromise or impair their independence, integrity and professional standard of work.

56. Meanwhile, the new assignment limits on the number of civil litigation cases in general, and judicial review related cases in particular, imposed on assigned lawyers have effectively addressed the public's concern about over-concentration of cases among certain assigned lawyers, while striking a balance between distributing cases more evenly to equally qualified lawyers and allowing the aided persons to nominate their lawyers. The new assignment limits increase the number of lawyers who can handle judicial review related cases. Given the relative small number of judicial review related cases and

their higher level of complexity, it will in the long run be beneficial to both aided persons and the legal aid system if more lawyers are assigned to handle such cases in order to build up their relevant experience and expertise. We shall also point out that all lawyers must have enough experience and expertise in order to be qualified for taking up judicial review related cases. They must have at least three years of working experience in the profession, and have handled at least five relevant cases in the past three years.

Right of access to legal aid

57.As a matter of fact, all those who comply with the requirements of the Legal Aid Ordinance (Cap. 91) and have reasonable grounds for pursuing or defending legal action in the courts of Hong Kong will not be denied access to justice due to lack of means. Those who satisfy both the means test and merits test as stipulated in the Ordinance will be granted legal aid.

58.To enhance the accessibility to legal aid for those in need, the HKSAR Government reviews the legal aid system from time to time. For instance, the financial eligibility limits of legal aid are reviewed and adjusted in accordance with an established mechanism periodically. LAD also timely considers any necessary adjustments to the scope of legal aid services. For example, in 2012 and 2020, the scope of the Supplementary Legal Aid Scheme was widened substantially and as a result, legal aid services are more accessible to members of the public.

Interpretation of Article 14 and Article 47 of the National Security Law by the Standing Committee of the National People’s Congress (NPCSC)

59.In September 2022, a United Kingdom King’s Counsel filed an application for *ad hoc* admission with the Court of First Instance to represent a defendant in a case of conspiracy to collude with a foreign country or with external elements to endanger national security and conspiracy to publish seditious publication. At that time, there were significant differences among members of the Hong Kong community over issues such as whether overseas lawyers who are not qualified to practise generally in the HKSAR may participate in cases concerning national security, and how the National Security Law should apply in such circumstances. In order to timely and properly resolve the practical problems encountered in implementing the National Security Law and ensure proper and effective implementation of the National Security Law, the NPCSC gave an interpretation of Article 14 and Article 47 of the National Security Law

in accordance with the provisions of subparagraph (4) of Article 67 of the Constitution and Article 65 of the National Security Law to clarify: “Based on the legislative intent and objectives of the National Security Law, can an overseas solicitor or barrister who is not qualified to practise generally in Hong Kong participate by any means in the handling of work in cases concerning offence endangering national security?”.

60.The NPCSC exercises the power of interpretation in accordance with the relevant provisions of the Constitution and the National Security Law, which is a fundamental aspect of the “one country, two systems” principle, and a manifestation of the principle of the rule of law. The legislative interpretation given by the NPCSC did not directly deal with specific judicial proceedings. Rather, it clarified the meaning of the relevant legal provisions and the basis for application of the law. It does not in any way impair the independent judicial power and the power of final adjudication of the Hong Kong courts as guaranteed by the Basic Law. The interpretation stemmed from the controversial question of whether overseas lawyers who are not qualified to practise generally in Hong Kong may be admitted on an *ad hoc* basis to participate in cases concerning national security. Through the interpretation of Articles 14 and 47 of the National Security Law, the NPCSC provided clear guidance for the HKSAR to resolve the issue by itself.

61.The NPCSC’s interpretation pointed out that whether an overseas lawyer who is not qualified to practise generally in the HKSAR may act as defence counsel or litigation agent in a case concerning national security is a question that requires certification from the Chief Executive under Article 47 of the National Security Law. According to this provision, the courts shall request and obtain a certificate from the Chief Executive to certify whether an act involves national security or whether the relevant evidence involves State secrets when such questions arise in the adjudication of a case. The certificate shall be binding on the courts. The interpretation did not confer additional power on the Chief Executive in this respect, and only clarified that the provision is applicable in handling the controversy concerning overseas lawyers. The certification system is fair and reasonable, with a solid legal basis. National defence, foreign affairs, and national security are matters within the purview of the Central Authorities. In fact, owing to the inherent nature of matters concerning national security, the executive authority is in a far better position than the courts to make appropriate judgements. Hence, the courts will afford deference to the judgement of the executive authority regarding national security matters. This principle is also a general rule for safeguarding

national security practised by different places in the world. It must be stressed that the certificate issued by the Chief Executive only provides binding certification to the court on the questions stipulated in Article 47 of the National Security Law. It does not usurp the function of the court in deciding on other issues of the legal proceedings or the adjudication of the case.

Amendments to the Legal Practitioners Ordinance - the Legal Practitioners (Amendment) Bill 2023 (“Bill”)

The right of defendants to engage lawyers

62. The concerns raised by your goodself in the incoming letter about the Bill and the practice of overseas lawyers in Hong Kong show a profound misunderstanding over the regulatory regimes of legal practitioners in Hong Kong, especially the system for *ad hoc* admission of overseas lawyers. The Bill was passed by the Legislative Council on 10 May 2023. We will hereby explain the relevant situation.

63. First of all, it must be pointed out that defendants in criminal cases never have any right to be represented in court by overseas counsel. HKSAR residents have the right to choice of lawyers. Article 35 of the Basic Law and Article 11 of the Hong Kong Bill of Rights protect a defendant’s right to choice of lawyers in criminal cases. However, it is made clear in court cases²⁰ that such right only refers to the right to choose solicitors or barristers who are qualified to practise generally in Hong Kong as legal representatives, but not overseas lawyers who are not qualified to practise generally in Hong Kong. There are currently over 100 Senior Counsel and over 1 500 barristers, as well as over 11 000 practising solicitors in Hong Kong for clients to choose from. On the other hand, an overseas lawyer, of course, also never has any right to request that a court in Hong Kong must permit him to practise in Hong Kong, nor does a client have the right to request that a court must admit an overseas lawyer as his / her legal representative.

²⁰ *Re Coles QC* (HCMP 2762/1984). The judgment (in English only) can be found at the following link: https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=28729&QS=%2B&TP=JU

Re Simpson QC [2021] 1 HKLRD 715. The judgment (in English only) can be found at the following link: https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=132834&QS=%28%7Bs+impson+QC%7D+%25parties%29&TP=JU

System for *ad hoc* admission of overseas lawyers in the HKSAR

64. Under section 27(4) of the Legal Practitioners Ordinance (Cap. 159), notwithstanding that a person is not qualified to practise generally in the HKSAR, the Court has the power to admit or approve such person, on an *ad hoc* basis, as a barrister for the purpose of any particular case or cases, if the Court considers that he is a fit and proper person to be a barrister and is satisfied that he meets certain qualifications and it is in the public interest of Hong Kong to admit such person as a barrister.

65. Overseas lawyers who are not qualified to practise generally in the HKSAR may pose national security risks when practising or acting as barristers in national security cases in the HKSAR. As stipulated in Article 3 of the National Security Law, it is the constitutional duty of the HKSAR to safeguard national security, and the executive authorities, legislature and judiciary of the HKSAR shall effectively prevent, suppress and impose punishment for any act or activity endangering national security in accordance with the National Security Law and other relevant laws. We must take a prudent approach to prevent national security risks from arising. While the Government highly values the *ad hoc* admission system which allows the participation of overseas lawyers in Hong Kong court proceedings and contributes to the development of local jurisprudence, this must be balanced against the fundamental and overriding importance of safeguarding national security and the potential national security risks associated with the participation of overseas lawyers in national security cases. For this reason, the HKSAR Government proposed the Bill to amend the Legal Practitioners Ordinance and introduce a new mechanism, so as to deal with the *ad hoc* admission of overseas lawyers for national security cases on a case-by-case basis. If the Chief Executive is satisfied that an overseas lawyer practising or acting as a barrister in a case concerning national security would not be contrary to the interests of national security, his / her application for *ad hoc* admission can then be considered by the court. The new mechanism has struck the most appropriate balance between the two. It must be pointed out that the mechanism under the Bill does not categorically ban the *ad hoc* admission of overseas lawyers in national security cases. As such, the view in the incoming letter that the Bill categorically bans overseas lawyers from acting in national security cases is not true.

66. We strongly refute the views in the incoming letter that the Bill affects the right of defendants to engage lawyers or runs counter to the *ad hoc* admission system adopted in the HKSAR for many years. As mentioned above, the right to choice of lawyers as guaranteed under Article 35 of the Basic Law and Article 11 of the Hong Kong Bill of Rights has never included the right to engage overseas lawyers not qualified to practise generally in Hong Kong. The admission of overseas lawyers is wholly governed by the local law of the HKSAR, i.e. the Legal Practitioners Ordinance. It is necessary for any legal system to move with the times, making changes and improvements in the light of new circumstances. This is in full compliance with the principle of the rule of law. Moreover, the new mechanism does not affect the *ad hoc* admission of overseas lawyers in criminal cases not involving national security and other civil cases not involving national security. In fact, most jurisdictions do not have similar regimes of *ad hoc* admission, not to mention any regime which allows *ad hoc* admission for national security cases. Relatively speaking, the current *ad hoc* admission regime in the HKSAR is very open.

Definition of “cases concerning national security”

67. We strongly refute the view in the incoming letter that the definition of “cases concerning national security” under the Bill is overly broad. The concept of “national security” is complex and dynamic, without any uniform definition across the world. In the local laws of many jurisdictions, no statutory definitions of “national security” have been given as it is necessary for any such definition to be able to respond to national security threats which may evolve or emerge in various new forms over time. As such, whether a case concerns national security will depend on the facts and circumstances of the particular case, the issues in dispute, the evidence which will be adduced, etc. To properly discharge the duty to safeguard national security under Article 3 of the National Security Law, the expression “cases concerning national security” in the Bill should not be given a restrictive or exhaustive definition. It is necessary for us to preserve the flexibility to apply the expression to ever-changing national security threats and to cover all types of cases concerning national security. Apart from criminal cases concerning offences endangering national security, there are cases which are not criminal in nature but concern national security or the National Security Law (e.g. judicial review of statutory powers exercised for safeguarding national security), and the participation of overseas lawyers in those cases may also pose similar national security risks.

Decisions made by the Chief Executive

68. We must point out that the provision that the decisions made by the Chief Executive are not subject to legal challenge, under section 27F²¹ as newly added by the Bill, does not affect the courts in exercising their judicial power independently. The mechanism under the Bill seeks to implement the spirit of Articles 2 and 3 of the interpretation by the NPCSC and Article 47 of the National Security Law, which places emphasis on the role of the Chief Executive as the head of the executive authorities to make binding certifications on whether the overseas lawyer's practising or acting as a barrister for a national security case involves national security or would be contrary to the interests of national security. The spirit of the interpretation and Article 47 of the National Security Law is entirely consistent with the principle established in Hong Kong and other jurisdictions that owing to the inherent nature of matters concerning national security, the executive authority is in a far better position than the courts to make appropriate judgements. Hence, the courts will afford deference to the judgement of the executive authority regarding national security matters. Meanwhile, the decisions made by the Chief Executive in both the pre-application screening process and during the *ad hoc* admission proceedings should be treated as a coherent whole and equally binding on courts.

Visa applications of overseas lawyers

69. The Immigration Department (ImmD) has all along been assessing all visa applications in accordance with established legislation and procedures, including visa applications of overseas lawyers for employment in Hong Kong. The ImmD applies immigration controls according to Article 154 of the Basic Law and the Immigration Ordinance (Cap. 115). Applicants who possess special skills, knowledge or experience of value to and not readily available in the HKSAR may apply to come to Hong Kong under the General Employment Policy. Security consideration is one of the factors that the ImmD will consider when processing an application for coming to Hong Kong to work under the General Employment Policy. As a part of the executive authorities of the HKSAR, the ImmD shall effectively prevent, suppress and impose punishment for any act or activity endangering national security. Thus, security concern naturally includes national security considerations.

²¹ Section 27F provides 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.

* * * * *

联合国人权理事会法官与律师独立性问题特别报告员 OL CHN2/2023 号来文收悉，中国政府答复如下：

1. 对于法官和律师独立性特别报告员（特别报告员）就《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》）、法律援助制度以及修订《法律执业者条例》相关事宜的关注，下文旨在提供正确的资讯，以免特别报告员受误导，而就此作出错误的评论。即使下文没有触及来函提出的个别关注，中国政府不应被视为同意来函就个别事宜的负面看法。

《香港国安法》

保障基本权利和自由

2. 就来函对权利和自由的关注，正如中国政府曾多番指出，在香港特别行政区，《中华人民共和国香港特别行政区基本法》（《基本法》）在宪制层面充分保障基本权利和自由，包括言论、新闻、出版、结社、集会、游行、示威自由，以及组织和参加工会、罢工的权利和自由¹；公平审讯的权利²；人身自由及保障私生活免受任意侵犯的相关权利³。《基本法》第三十九条订明，《公民权利和政治权利国际公约》和《经济、社会与文化权利的国际公约》等适用于香港的有关规定继续有效，通过香港特区的法律予以实施。

3. 在本地法律层面，适用于香港的《公民权利和政治权利国际公约》条文已透过《香港人权法案条例》（第 383 章）实施，《香港人权法案条例》对政府具有约束力。因此，《公民权利和政治权利国际公约》的相关权利和自由都受《香港

¹ 《基本法》第二十七条

² 《基本法》第八十五条

³ 《基本法》第二十八条、第二十九条及第三十条

人权法案条例》第8条载列的《香港人权法案》所保障⁴。

4. 在制定《香港国安法》（及《中华人民共和国香港特别行政区维护国家安全法第四十三条实施细则》（《实施细则》）的过程中，已全面考虑《公民权利和政治权利国际公约》和《经济、社会与文化权利国际公约》适用于香港特区的相关规定。

5. 必须强调，《香港国安法》实施后，香港居民继续享有《基本法》及《香港人权法案条例》所保障的所有基本权利和自由。事实上，《香港国安法》第四条订明，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《基本法》和《公民权利和政治权利国际公约》及《经济、社会及文化权利国际公约》适用于香港的有关规定享有的权利和自由，包括言论、新闻、出版、结社、集会、游行及示威的自由。

6. 《香港国安法》第五条明确订明执法机关就危害国家安全犯罪采取执法行动时，必须坚持法治原则。该条文订明防范、制止和惩治危害国家安全犯罪，应当坚持法治原则。如某人的行为构成法律规定的犯罪行为，依照法律定罪处刑；如某行为不构成法律规定的犯罪行为，不得定罪处刑。此外，任何人未经司法机关判罪之前均假定无罪。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得到保障。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。

7. 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

⁴ 来函中提及的《世界人权宣言》（《宣言》）对香港特区并无法律约束力，但由于《宣言》与《公民权利和政治权利国际公约》所保障的相关权利和自由的内容大致相同，因此该等权利和自由亦间接受《香港人权法案》所保障。

黎智英（2021）24HKCFAR67 一案中提及，《香港国安法》第四和五条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。

8. 就法律执业者而言，《基本法》第三十五条订明香港居民有权得到秘密法律咨询、向法院提起诉讼、选择律师及时保护自己的合法权益或在法庭上为其代理和获得司法补救。行事专业的律师对香港特区法律制度起关键作用，肩负维护法治的主要责任。在履行职责的过程中，法律执业者的基本权利和自由与其他人一样受法律保障。这个基本保障确保他们应当无惧无偏，专业地行事。

自由并非绝对

9. 《基本法》第四十二条订明，香港居民和在香港的其他人有遵守香港特区实行的法律的义务。

10. 《香港国安法》第六条第一款订明维护国家主权、统一和领土完整是包括香港同胞在内的全中国人民的共同义务。第六条第二款进一步订明在香港特区的任何机构、组织和个人都应当遵守《香港国安法》和香港特区有关维护国家安全的其他法律。

11. 《基本法》第一条订明，香港特区是中华人民共和国不可分离的部分。根据《基本法》第十二条，香港特区是中华人民共和国的一个享有高度自治权的地方行政区域，直辖于中央人民政府。根据《香港国安法》第二条，关于香港特区法律地位的《基本法》第一条和第十二条规定是《基本法》的根本性条款。香港特区任何机构、组织和个人行使权

利和自由，不得违背《基本法》第一条和第十二条的规定。

12. 香港居民享有言论、新闻、出版、结社、集会、游行、示威等的自由。然而，这些自由并非绝对。《公民权利和政治权利国际公约》和《经济、社会及文化权利国际公约》均容许为维护国家安全以法律对非绝对的人权予以限制。为维护国家安全或公共安宁、公共秩序及他人权利和自由等理由，可循法律形式（包括《香港国安法》）对这些权利的行使施加合理和必要的限制，此乃各国普遍做法，也为《公民权利和政治权利国际公约》和《经济、社会及文化权利国际公约》所允许。

司法独立

13. 特别报告员就香港特区的司法独立提出多点关注。就回应有关关注前，我们必须严正强调，香港的法治和司法独立受《基本法》保障。《基本法》第二条、第十九条及第八十五条明确规定，香港特别行政区享有独立的司法权和终审权，法院独立进行审判，不受任何干涉。

指定法官

14. 就来函表达对指定法官的关注，必须强调有关程序均不会损害司法独立或《公民权利和政治权利国际公约》第十四条下公平审讯的权利。行政长官只是从现有法官中指定若干名法官纳入一份名单，以处理危害国家安全的犯罪案件，而不是就某宗具体案件选择某位主审法官；委派某指定法官审理个别案件，仍属于司法机构（而非行政长官）的独立决定。

15. 事实上，指定专责法官处理特定法律范畴的情况并不罕见。在香港，有专责处理建筑和仲裁案件、商业和海事案件的法官。透过安排熟悉特定法律范畴的专门法官，有助提高达致法律的可预测性和确定性的机会，同时减低错误适用法律的风险。总括而言，这种安排有利于法治。

16. 同时，法官在处理相关案件时，不论案件是否涉及国家安全，仍然是独立地履行司法职务，不受任何干预，这一点在《基本法》第八十五条⁵已充分订明。正如法院在*唐英杰诉 香港特区*⁶一案所述：「就《香港国安法》规定的罪行而言，辩方并无适当或充分理据指出行政长官或政府得以『干涉与审判职能有直接或紧密关系的事宜（例如指派法官的工作、开庭的安排和审讯案件列表）』，或行政长官得以或将可通过行使《香港国安法》第四十四条赋予的权力干涉『审判案件和维护法律及宪制价值』的香港司法人员的自由」。法院不会仅因为某宗危害国家安全案件由根据第四十四条指定的法官处理而失去独立性。《公民权利和政治权利国际公约》第十四条规定的人人均受独立无私之法定管辖法庭公正审问的权利，依然受到妥善保障。因此《香港国安法》就指定法官的安排，绝无损害香港特区一直备受尊崇的司法独立。香港特区终审法院时任首席法官在2020年7月2日的声明⁷（即《香港国安法》刚实施时）亦已清楚指出，「指定法官跟所有法官一样，其任命必须根据其本人的司法及专业才能。这是任命法官时须考虑的唯一准则。这亦表示法官的指定不应根据任何其他因素，例如政治上的考虑因素。这个做法巩

⁵ 根据《基本法》第八十五条，香港特区法院独立进行审判，不受任何干涉，司法人员履行审判职责的行为不受法律追究。

⁶ 见 *唐英杰诉 香港特别行政区* [2020] HKCFI2133（判决见以下链结）：
https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=130336&QS=%2B&TP=JU

⁷ 见 <https://sc.ibd.gov.hk/TuniS/www.info.gov.hk/gia/general/202007/02/P2020070200412.htm?fontSize=1>

固了一个原则，就是法庭在处理或裁断任何法律纠纷时，只会考虑法律和法律原则」。香港特区终审法院现任首席法官于2022年法律年度开启典礼中亦表示⁸，「指定法官与其他所有的法官一样，必须恪守根据《基本法》第一百零四条的规定所作出的司法誓言。根据司法誓言，法官宣誓尽忠职守、奉公守法、公正廉洁，以无惧、无偏、无私、无欺之精神，维护法制，主持正义，为香港特别行政区服务。这意味法官在作出司法决定的过程中，不容有任何政治或其个人因素的考虑。司法誓言在指定法官审理国家安全案件时具约束力，与他们审理其他类别案件并无二致。」

17. 至于是否向公众公开指定法官的名单，需依从香港特区本地法律的相关规定。在有关指定法官审理危害国家安全犯罪案件前，将其身份保密并由法律保护，符合公众利益。审理危害国家安全犯罪案件的指定法官曾收到暴力甚至死亡威吓。最近亦有外国机构倡议对指定法官实施单方面的所谓「制裁」⁹，无视《联合国宪章》确立的国家主权平等和不干涉原则，而对司法人员的威胁更明显违反1985年联合国第七届预防犯罪和罪犯待遇大会通过的《关于司法机关独立的基本原则》等受国际社会公认的准则。我们相信阁下作为法官和律师独立性特别报告员的身分，会谴责有关国家企图干预香港特区的司法程序，以政治凌驾法律，影响法官独立性的胁迫行为。总括而言，我们看不到凌驾性的公众利益，

⁸ 见 <https://sc.ibd.gov.hk/TuniS/www.info.gov.hk/gia/general/202201/24/P2022012400366.htm?fontSize=1>

⁹ 例如见美国「国会及行政当局中国委员会」于2023年5月10日发表题为“*One City, Two Legal Systems: Hong Kong Judges' Role in Rights Violations under the National Security Law*”的「研究报告」(<https://www.cecc.gov/publications/commission-analysis/one-city-two-legal-systems-hong-kong-judges%E2%80%9999-role-in-rights>)，该委员会并在2023年5月11日举行「听证会」，多名与会人士明确要求美国政府当局对香港特区的法官实施「制裁」(<https://www.cecc.gov/events/hearings/one-city-two-legal-systems-political-prisoners-and-the-erosion-of-the-rule-of-law-in>)。亦曾有美国国会议员于2022年去信美国总统，要求对指定法官实施「制裁」(<https://www.politico.com/f/?id=00000180-a050-dd36-a38c-e75ce9380000>)。

需公开指定法官的名单。

有关危害国家安全犯罪案件的保释安排

18. 至于来函提到有关危害国家安全犯罪案件的保释安排和审前羁押，来函所指，「只要相关人士被控危害国家安全罪行，行政机关可在缺乏司法监督的情况下，在没有审讯下羁押几乎任何人数个月」，完全与事实不符。根据《警队条例》（第 232 章）第五十二条规定，警方有责任在切实可行范围内尽快将被扣留羁押的人带到裁判官席前。法院有责任就所有被带到其席前的人考虑是否准予保释（包括被控危害国家安全罪行的人）。香港终审法院曾就一宗有关《香港国安法》第四十二条第二款的上诉案¹⁰中清晰说明，维护国家安全，以及防范和制止危害国家安全的行为极为重要，这解释了为何《香港国安法》对涉及危害国家安全的罪行引入更严格的批准保释条件。在该案中，法庭亦说明，在引用《香港国安法》第四十二条第二款处理危害国家安全罪行案件的保释申请时，法官必须先决定有没有「充足理由相信犯罪嫌疑人或被控人不会继续实施危害国家安全行为」。如法官考虑过所有相关资料，认为没有充足理由相信被控人不会继续实施危害国家安全行为的，自当拒绝其保释申请。另一方面，经考虑过所有相关资料后，如法官认为有充足理由时，应继而考虑所有与批准或拒绝保释相关的事宜。同时，终审法院裁定，在尽可能的情况下，关于保释的《香港国安法》第四十二条第二款必须获赋予符合上述《香港国安法》第四条（保障人权）及第五条（坚守法治）中保障权利、自由和价值的

¹⁰ 见香港特别行政区诉黎智英（2021）24 HKCFAR 67 见以下链结：
[https://legalref.judiciary.hk/lrs/common/search/search result detail frame.jsp?DIS=13349&QS=%2B&TP=JU080](https://legalref.judiciary.hk/lrs/common/search/search%20result%20detail%20frame.jsp?DIS=13349&QS=%2B&TP=JU080)

意义和效力。

19. 法庭会严格依据《香港国安法》和相关本地法律的规定处理保释申请。在决定是否准予保释时，法庭会考虑所有相关因素，包括控辩双方的立场和论据以及呈堂的所有相关资料，按每宗案件的个别情况考虑是否准予保释；以及若准予保释，条件为何。批准保释和施加任何保释条件都是因应每宗案件的个别情况而作出的司法决定。如被告人不满裁判官的保释决定（包括保释条件或撤销保释的决定），可向高等法院原讼法庭申请复核或更改¹¹。原讼法庭同样会严格依据《香港国安法》和相关本地法律的规定，考虑和决定有关申请。

20. 特别报告员提到了《公民权利和政治权利国际公约》第九条第三款，其中规定对被告人审前羁押应是例外而非规则。联合国人权事务委员会在其第 35 号一般性意见中提到「审判前拘留不应当是对所有被指控犯罪的被告都是必须的，而不考虑个别情况」，并指出审前羁押的决定必须是基于个别决定，考虑到所有情况是合理的、必要的，其目的是防止逃跑、干涉证据或再次犯罪¹²。如上所述，法庭在决定是否准予保释时需要考虑每个案件的具体情况，而并非所有被控危害国家安全罪行的被告都会一律被拒绝保释。因此《香港国安法》第四十二条第二款与《公民权利和政治权利国际公约》第九条第三款的规定是一致的。事实上，有部分被告人在法庭适当考虑《香港国安法》和相关本地法律的规定后，获得保释。举例而言，一如传媒报道，部分被控告串谋颠覆国家政权的被告人获法庭批准保释，而目前获释。反

¹¹ 见《刑事诉讼程序条例》（第 221 章）第 9J 条

¹² 见联合国人权事务委员会第 35 号一般性意见第 38 段

之，有一些司法管辖区，甚至设有机制，可以国家安全为由，因应案件的具体情况准许未经起诉而长时间拘留。因此，来函中对香港特区有关危害国家安全案件的保释安排的批评，毫无根据。

21. 此外，香港特区政府律政司处理危害国家安全犯罪案件时，严格遵循《香港国安法》第四十二条第一款所订明，「香港特别行政区执法、司法机关.....应当确保危害国家安全犯罪案件公正、及时办理」。所有检控工作均严格按照相关法律进行。每宗案件由提出检控直至审讯之间所需的时间，视乎多项因素而定，例如案件是否需要进一步调查、被告人是否需要时间征询法律意见以考虑答辩、辩方是否需要法庭核证翻译文件、或辩方是否按法例赋予的权利提出需要在审讯前先处理的申请等。必须强调，所有申请皆会根据既定程序办理，并完全依从正当程序。假如某被告人（不论事前是否已取得法律意见），不理是否有充足理据，而执意作出所有可以作出有关程序上的申请，则他/她不能同时又无事生非，投诉其案件被「拖延」，因为这是在公正的刑事司法体系下，他/她在所有可行情况下充分行使其被赋予的权利的必然结果。正如 2021 年香港终审法院上诉委员会在一宗案件¹³中指出，所有诉讼方及法庭均有责任充分合作，尽一切可能加快处理危害国家安全犯罪案件。因此，「未经审讯无限期羁押」一说绝对站不住脚。

没有陪审团的情况下就案件进行审理

¹³ 见香港特别行政区 诉 伍巧怡 (2021) 24 HKCFAR 417 (判决见以下链接):
[https://legalref.judiciary.hk/lrs/common/search/search result detail frame.jsp?DIS=140898&OS=%28%7B%E4%BC%8D%E5%B7%A7%6E6%80%A1%7D+%25parties%29&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search%20result%20detail%20frame.jsp?DIS=140898&OS=%28%7B%E4%BC%8D%E5%B7%A7%6E6%80%A1%7D+%25parties%29&TP=JU)

22. 来函提到有关没有陪审团的情况下进行审理的关注，实属过虑和错误聚焦，因有关安排绝无减损被告人的任何合法权益，包括《公民权利和政治权利国际公约》第十四条下公平审讯的权利。《香港国安法》有关陪审团的特殊规定是基于部分危害国家安全案件的特殊性和复杂性而设定的，在危害国家安全犯罪案件中适用。《香港国安法》第四十六条规定，对高等法院原讼法庭进行的就危害国家安全犯罪案件提起的刑事检控程序，律政司长可基于保护国家秘密、案件具有涉外因素或者保障陪审员及其家人的人身安全等理由，发出证书指示相关诉讼毋须在有陪审团的情况下进行审理。凡律政司长发出上述证书，高等法院原讼法庭应当在没有陪审团的情况下进行审理，并由三名法官组成审判庭。

23. 事实上律政司司长会按《香港国安法》相关法律和每宗案件的个别情况（包括保护国家秘密、案件具有涉外因素或者保障陪审员及其家人的人身安全等理由），考虑是否根据《香港国安法》第四十六条发出证书，指示相关诉讼毋须在有陪审团的情况下进行审理；而有关条文订明由三名法官组成审判庭的安排，目的正是要确保公平审讯，秉行司法公义，亦正如我们于上文重申，绝无减损被告人的任何合法权益，包括《公民权利和政治权利国际公约》第十四条下公平审讯的权利。从外国司法实践看，一些国家在危害国家安全犯罪案件的审判程序中，也采取了类似的做法。

24. 同时必须指出，虽然《基本法》保留原有的陪审制度，但是香港特区仍然可以就刑事诉讼采用陪审团的情况作出规定。《基本法》有关陪审制度和刑事诉讼原则的条文并没有禁止香港特区对现行的陪审制度的原则作出任何改变，

只要这些改变并非根本性或者废除整个陪审制度。

25. 此外，适用于有陪审团参与的审讯的程序保障措施，同样适用于这类审讯，确保被告人获得公平审讯，而被告人一旦被定罪及判刑，亦可循相同的上诉程序提出上诉。在《基本法》和《香港人权法案》的保障下，刑事罪行包括涉及《香港国安法》罪行的被告人，均享有接受行使独立审判权的司法机关进行公正审判的权利。有关安排绝无减损被告人的任何合法权益。另一方面，《香港国安法》第四十一条第四款规定，判决结果应当一律公开宣布。法官一般都需要颁发裁决理由，确保公开司法原则。

26. 法庭早前拒绝了一宗针对律政司司长根据《香港国安法》第四十六条发出证书，指示相关诉讼毋须在有陪审团的情况下进行审理的决定的司法复核许可申请。法官在判词¹⁴中裁定申请人不享有陪审员审讯的宪制权利。法官亦有裁定，该决定属于《基本法》第六十三条下刑事检察决定之一，因此不受干预。按此，在充分了解上述法律观点后，有关「无约束地可移除陪审团」及「行政机关干预司法事务」的说法无疑是危言耸听。

就《香港国安法》规定的犯罪案件行使管辖权的相关安排 *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*

27. 就来函所表达《香港国安法》第五十五条的关注，我们强烈反对任何认为中央人民政府行使管辖权，是实际上违反《公民权利和政治权利国际公约》的意见。要准确认识

¹⁴ 见 唐英杰 诉 律政司司长 [2021] HKCA912 (判决见以下链结):
[https://legalref.judiciary.hk/lrs/common/search/search result detail frame.jspsp?DIS=136672&QS=%28%7Btong+ying+kit%7D+%25parties%29&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search%20result%20detail%20frame.jspsp?DIS=136672&QS=%28%7Btong+ying+kit%7D+%25parties%29&TP=JU)

有关安排，特别报告员必须先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。

28. 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¹⁵。

29. 《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（详情见下文），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。

30. 《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（见下文第32段）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。律政司依法作出检控决定，受到《基本法》保障。

中央人民政府在特定情况下行使管辖权

31. 正如上文所述，国家安全属于中央事权，国家安全

¹⁵ 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。

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，并授权中央人民政府驻香港特别行政区维护国家安全公署（驻港国家安全公署）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。

32. 《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。

33. 就上述的三种特定情况而言，需要由特区政府或驻港国家安全公署提出，并报中央人民政府批准，驻港国家安全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，驻港国家安全公署、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。对于驻港国家安全公署依法采取的措施，有关机构、组织和个人必须遵从。

34. 《香港国安法》第六十条规定，驻港国家安全公署及其人员依据《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，驻港国家安全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，还应当遵守香港特区法律。值得注意的是，驻港国家安全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。

《公民权利和政治权利国际公约》对由中央人民政府行使管辖权的案件的适用性

35. 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。

36. 《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OLCHN 17 / 2020的来函和2022年8月10日就OL CHN 3 / 2022的来函的回应指出，驻港国家安全公署等国家执法、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，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家安全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。

37. 因此，由中央人民政府（包括驻港国家安全公署）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《公民权利和政治权利国际公约》的目的及宗旨是一致的。

对执法权力的监督

38. 来函对执法权力，特别是《实施细则》所表达的关注亦不准确。事实上，《实施细则》清晰并详细地列明执行各项规定措施的权力及程序要求、所需符合的情况和审批的

条件等，其目的是确保相关人员在执行各项措施时，既能有效防范、制止和惩治危害国家安全的行为和活动，也能同时符合《港区国安法》总则下对尊重和保障人权以及依法保护各项权利和自由的要求。

39. 有关《实施细则》共有 7 个附表，主要有以下特点：

(a) 行使各项措施的规定大体参照现行法例，主要将其延伸至适用于办理危害国家安全的犯罪案件；

(b) 各项细则详细列明执行各项措施的严格程序要求、所需符合的情况和审批的条件，确保为各项执法行动提供足够保障。例如：

(i) 大部份的申请须向裁判官申请，除非情况并非合理地切实可行（包括搜查令、要求当事人交出旅行证件等）；或向原讼法庭申请（例如对相关财产的限制令或押扣令）；

(ii) 行使各项措施必须符合若干订明条件，而保安局局长更同时发出《运作原则及指引》，列出详细的运作原则及指引，规定警务处人员在执行有关职能时须予遵守；

(iii) 各项细则亦为未能遵守规定的人士或组织提供各项免责辩护，例如警务处人员获授权要求发布人士或服务商移除危害国家安全的信息；但若所需的科技并非发布者或有关服务商合理可得，或有关服务商遵从有关要求有对第三方招致相当程度损失或损害第三方的权利的风险存在，则可为合理辩解。另外，若外国及台湾政治性组织或外国及台湾代理人未有按要求向警方提供资料，但可证明已经尽力及有非其可能控制的原因，则有免责辩护。

40. 香港特区，特别是执法部门和司法机构，会确保维护国家安全时，权利和自由依法得到保障，符合《香港国安

法》第四条的规定。警务人员依照《实施细则》采取的任何行动可受司法复核挑战，包括就有关行动违反人权的指控。

41. 事实上，香港特区法庭曾就有关根据《实施细则》附表 1 发出的搜查令（例如关于声称被检取的物品享有法律专业保密权）¹⁶、附表 3 发出的冻结财产的书面通知¹⁷，和附表 7 发出的提交物料令（例如关于申请更改提交物料令）¹⁸的一系列法律挑战作出裁决。

42. 在这些案件中，法庭在考虑所有证据后，根据适用法律，公正的作出裁决。任何人只要公平客观地仔细阅读有关裁决后，会发现法庭已适当考虑《基本法》和《公民权利和政治权利国际公约》适用于香港的有关规定保障的权利和自由，并在维护国家安全和保障权利和自由之间取得合理平衡。因此，声称警方的执法措施没有程序保障和司法监督是站不住脚的。

43. 公众亦可向投诉警察课投诉，有关投诉的调查工作受「独立监察警方处理投诉委员会」监督。该委员会是根据《独立监察警方处理投诉委员会条例》（第 604 章）成立的独立机构。

法律援助制度

¹⁶ 见 Wong Wai Keung v Commissioner of Police [2022] HKCFI 374（判决见以下链接）：

https://legalref.judiciary.hk/lrs/common/ju/ju_frame.je.jsp?DIS=142179&currpage=T;

Lai Chee Ying v Commissioner of Police [2022] HKCFI 3003（判决见以下链接）：

https://legalref.judiciary.hk/lrs/common/ju/ju_frame.js.jsp?DIS=148577&currpage=T

¹⁷ 黎智英诉保安局局长 [2021] HKCFI 2804。原讼法庭于 2021 年 9 月 17 日颁布判决，表示法庭考虑了《实施细则》附表 3 订定的冻结制度，认为受影响的人可按规定取得特许处理有关财产，已在防范、制止和惩治危害国家安全罪行与保障财产权之间取得平衡。法庭经考虑冻结制度的立法目的后，认为有关通知依法禁止「处理」财产，包括禁止直接或间接行使公司股份的投票权。判决（只有英文）见以下链接：https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?p?DIS=138813&currpage=T

¹⁸ 见 A v Commissioner of Police [2021] HKCFI 1801（判决见以下链接）：

https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?p?DIS=136704&currpage=T 和 Jv Commissioner of

Police [2021] HKCFI 3586（判决见以链接）：

https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?Dsp?DIS=140487&currpage=T

44. 来函提到香港特区政府 2021 年对法律援助（法援）制度进行的检讨限制了获取法援及选择律师的权利，影响了受助人的利益。我们严正指出，有关看法毫无根据及与事实不符。

45. 法治是香港的核心价值和赖以成功的基石。香港拥有一个备受国际推崇、全面的法援制度，对维护香港法治不可或缺。为确保市民享有《基本法》第二十五条所赋予的权利，即「香港居民在法律面前一律平等」，确保没有人会因欠缺经济能力而无法寻求公义至为重要。香港的法援制度一直在这方面担当着重要角色。值得注意的是，香港终审法院在 2018 年 5 月的一份判词中表示：「与许多其他司法管辖区相比，香港的法援制度相对慷慨，多年来确保了大多数涉及重大公众利益的案件都由法庭作出裁决¹⁹」。该判词亦提到，特别是自 1997 年以来，法援在绝大多数涉及公众利益的诉讼案件中发挥了重要作用。

46. 香港特区政府于 2021 年 10 月对法援制度的运作进行检视，以回应社会日益关注法援制度可能被滥用的问题，特别是对某些类别的法援案件只由少数律师处理的关注。有关检视绝非如来函所指为压制市民依法享有的权利和自由而进行。因此，我们实施了一系列的改善措施，以加强防范法援制度可能出现滥用的情况，以及增加透明度，从而提升公众对法律援助署（法援署）工作的了解和对法援制度的信心。有关改善措施包括由法援署署长直接委派刑事法援案件予律师、设定律师接办司法复核法援案件的限额、调低律师接办民事法援案件的限额等。有关改善措施已于 2021 年 10

¹⁹ 见 *Designing Hong Kong Ltd v The TownPlanning Board and Secretary for Justice* (2018) 21 HKCFAR 237，判决书第 27（5）段。判决见以下链结：
https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=115161&QS=%2B&TP=JU

月 28 日向立法会司法及法律事务委员会汇报，并获得一致支持。有关改善措施符合《基本法》及《香港人权法案条例》（第 383 章）的有关规定。

选择律师的权利

47. 选择律师的权利并非绝对。这并不是法援申请人必定能获得其所挑选的特定律师的权利。公平审讯并非一定建基于诉讼方必须由他自己挑选的律师代表。就刑事法援案件委派律师方面，为确保外委律师有足够资历和专业水平处理刑事法援案件，有关外委律师须具备至少 3 年的专业经验，并在过去 3 年曾处理至少 5 宗相关案件。就更高级别法院审理的案件，所须相关刑事诉讼经验亦会相应提升，例如向终审法院提出的上诉案件，外委大律师和律师须分别具备至少 10 年和 7 年相关的刑事诉讼经验。法援署会按每个案件的种类及复杂程度委派最适合的律师，保证受助人的利益。此外，《律师执业规则》和《香港大律师行为守则》下亦明确规定，所有律师在作为代表及履行为其当事人的最佳利益而行使的职责过程中，不得危及或损害他们的独立性、正直品格及专业的工作标准。

48. 与此同时，外委律师处理民事诉讼案件，特别是与司法复核有关案件数目的新限额，有效释除公众对案件过分集中由某些外委律师接办的疑虑，并在更平均地分配案件给同样符合资格的律师和容许受助人提名律师之间取得平衡。新限额增加可处理与司法复核有关案件的律师数目。由于与司法复核有关的案件相对较少及较复杂，若更多律师获委派处理这些案件，他们可累积相关经验和专业水平，长远来说，

这对受助人和法律援助都会有裨益。我们亦必须指出，所有接办与司法复核有关案件的律师均需有足够资历和专业水平才符合资格。他们需具备至少 3 年的专业经验，并在过去 3 年曾处理至少 5 宗相关案件。

获取法律援助的权利

49. 事实上，符合《法律援助条例》（第 91 章）的要求以及在香港法院有合理理据进行诉讼或提出抗辩的人士，不会因为缺乏资金而被拒司法公义。能够根据条例通过经济及案情审查的人士均会获得法律援助。

50. 为让更多有需要的人获得法律援助服务，特区政府不时检视法律援助制度，例如检视及按既定机制定期调整法律援助计划的财务资格限制。法律援助署亦会适时就法律援助服务的涵盖范围作出必要的调整。举例而言，于 2012 年及 2020 年，我们大幅扩展了法律援助辅助计划的涵盖范围，公众因而更容易获得法律援助服务。

有关全国人民代表大会常务委员会（全国人大常委会）对《香港国安法》的第十四条和第四十七条作出的解释

51. 一名英国御用大律师在 2022 年 9 月向原讼法庭提出专案认许申请，以在一宗串谋勾结外国或者境外势力危害国家安全与串谋发布煽动刊物的案件中代表被告人。当时香港社会对于没有本地全面执业资格的海外律师能否参与国家安全案件、该等情形下《香港国安法》如何适用等问题产生了重大分歧。为了及时妥善解决《香港国安法》实施中遇到的实际问题，确保《香港国安法》正确有效实施，全国人大

常委会根据《宪法》第六十七条第四项和《香港国安法》第六十五条的规定，对《香港国安法》第十四条和第四十七条作出解释，以厘清「根据《香港国安法》的立法原意和目的，没有本地全面执业资格的海外律师或大律师可否以任何形式参与处理危害国家安全犯罪案件的工作？」。

52. 全国人大常委会根据《宪法》和《香港国安法》的相关规定行使解释权，是「一国两制」原则下的重要一环，体现了法治原则。全国人大常委会是次作出的立法解释，并不直接处理具体司法案件，而是厘清有关法律规定的含义和适用法律的依据，绝不存在损害香港法院受《基本法》保障的独立审判权和终审权的问题。是次释法源自有关在香港没有全面执业资格的海外律师是否可以按专案申请方式参与涉及国安案件所引起的争议。全国人大常委会是通过解释《香港国安法》的第十四条和第四十七条，提供清晰途径让香港特区自行解决有关争议。

53. 全国人大常委会解释指出，不具有香港特区全面执业资格的海外律师是否可以担任国安案件的辩护人或者诉讼代理人问题，属于《香港国安法》第四十七条所规定的需要由行政长官认定的问题。根据该条款，法院在审理案件中，如遇有涉及有关行为是否涉及国家安全或者有关证据材料是否涉及国家秘密的认定问题，应当向行政长官提出并取得行政长官就该等发出的证明书，而证明书对法院有约束力。是次释法并没有在这方面向行政长官授予额外的权力，只是澄清了该条款可以适用于处理有关海外律师的争议。这证明书制度不单有坚实法律基础，亦合情合理。国防、外交以及国安问题均属中央事权。而事实上，基于国安事务的本质，

行政机关远比法院处于较佳位置作出合适的判断，因此法院会对行政机关就国安事务方面的判断予以尊重，这一项原则也是世界各地维护国家安全的通则。必须指出的是，行政长官发出的证明书只是就《香港国安法》第四十七条所述的问题向法院提供一项有约束力的认定，不是取代法院处理诉讼中的其他争议，也不是代替法庭判案。

有关对《法律执业者条例》的修订-《2023 年法律执业者（修订）条例草案》（《条例草案》）

被告人委聘律师的权利

54. 来函就《条例草案》以及海外律师在港执业事宜提出的关注，显示阁下对香港的法律执业者规管制度，特别是海外律师的专案认许制度，存有极大误解。该《条例草案》在 2023 年 5 月 10 日获立法会通过。我们希望在此说明有关情况。

55. 首先必须指出，刑事案件的被告人从来都没有由海外大律师代表出庭的权利。香港特区居民有权选择律师，《基本法》第三十五条和《香港人权法案》第十一条保障刑事案件被告人选择律师的权利。然而，法庭案例²⁰清楚说明，该权利仅指可以有权选择在香港有全面执业资格的律师或大律师作为法律代表，但不包括在香港没有全面执业资格的海外律师。香港现时有超过 100 名资深大律师及超过 1500 位大律师，以及超过 11000 名执业事务律师，供当事人选择。

²⁰ 见 Re Coles QC (HCMP 2762 / 1984) 判决见以下链接：
https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=28729&DIS=28729&QS=%2B&TP=JU%2B&TP=JU;
和 Re Simpson QC [2021] 1 HKLRD 715 判决见以下链接：
https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?Dsp?DIS=132834&QS=%2%28%7Bsimpson+QC%7D+%25parties%29&TP=JU

另一方面，海外律师亦当然也从来没有任何权利，要求香港法院一定批准他在香港执业，一名当事人也没有权要求法院必须认许一名海外律师，以作为其法律代表。

香港特区的海外律师专案认许制度

56. 根据《法律执业者条例》（第 159 章）第 27（4）条，即使某人没有在香港特区具有全面执业的资格，但如法院认为该人是适当作为大律师的人，且信纳该人符合特定资格，而以专案方式认许该人为大律师亦符合香港公众利益，则法院有权就任何一宗或多于一宗个别案件而认许或批准该人为大律师。

57. 不具有香港特区全面执业资格的海外律师在香港特区就国安案件以大律师身分执业或行事时，可能构成国家安全风险。《香港国安法》第三条订明，香港特区负有维护国家安全的宪制责任，而香港特区行政机关、立法机关、司法机关应当依据《香港国安法》和其他有关法律规定有效防范、制止和惩治危害国家安全的行为和活动。我们必须采取审慎的做法避免产生国家安全风险。虽然政府非常珍视专案认许制度，因其容许海外律师参与本港的法庭程序并对本港的法理学发展作出贡献，但这点必须与维护国家安全的根本重要性及凌驾性，和防范海外律师参与国安案件所带来的潜在国家安全风险取得平衡。因此，香港特区政府提出《条例草案》对《法律执业者条例》作出修订，引入新的机制，以逐案处理的方式处理海外律师以专案方式参与国安案件的事宜。若行政长官信纳海外律师就涉及国家安全案件以大律师身分执业或行事不会不利于国家安全，其专案认许申请将可被法

院考虑。新机制已在两者之间取得最合适的平衡。必须指出，《条例草案》下的机制并没有全面禁止海外律师于国安案件中以专案方式获认许。因此，来函所指《条例草案》全面禁止海外律师参与国安案件，并非属实。

58. 我们绝不同意来函指《条例草案》影响被告人委聘律师的权利或有违香港特区沿用多年的专案认许制度。如上文所述，《基本法》第三十五条和《香港人权法案》第十一条所保障的选择律师权利，从来不包括委聘在香港没有全面执业资格的海外律师的权利。海外律师的认许事宜，全由香港特区的本地法律（即《法律执业者条例》）作出规定。任何法律制度都需要因时制宜，因应新的情况作出相应的修改和完善，这完全符合法治原则。此外，新机制并不影响在不涉及国家安全的刑事案件和其他不涉及国家国家安全的民事案件中，以专案认许方式委聘海外律师。事实上，大部分司法管辖区都没有相类的专案认许机制，更遑论准许在国安案件采用专案认许方式的机制。相比之下，目前香港特区的专案认许机制甚为开放。

「涉及国家安全的案件」的定义

59. 我们绝不同意来函指《条例草案》下「涉及国家安全的案件」的定义过于宽泛。「国家安全」是一个复杂而多变的概念，在国际间没有一致的定义，而不少司法管辖区的本地法律都未有赋予「国家安全」任何法定定义，因其定义须能应对可能随时间推移而演变或出现的不同新形式的国安威胁。因此，一宗案件是否涉及国家安全，将取决于该案件的事实和情况、所争议的论点、将援引的证据等。为妥善

履行《香港国安法》第三条下维护国家安全的责任，《条例草案》中「涉及国家安全的案件」一词不应给予受局限或尽列式的定义。我们须为该词的应用保留灵活性，以应对瞬息万变的国家安全威胁，及涵盖各类涉及国家安全的案件。除危害国家安全犯罪的刑事案件外，有些案件不属刑事性质但却涉及国家安全或《香港国安法》（例如就行使法定权力以维护国家安全而提出的司法复核等），海外律师参与该等案件也可能构成类似的国家安全风险。

行政长官所作的决定

60. 我们必须指出，《条例草案》新增的第 27F 条²¹下行政长官所作的决定不受法律挑战的规定并无影响法院独立行使审判权。《条例草案》下的机制旨在落实全国人大常委会解释的第二条及第三条和《香港国安法》第四十七条的精神，当中强调行政长官作为行政机关首长的角色，以有约束力的证明书认定有关海外律师就国安案件以大律师身分执业或行事是否涉及国家安全或会不利于国家安全。该解释和《香港国安法》第四十七条的精神完全符合香港及其他司法管辖区确立的原则，就是基于国安事务的本质，行政机关远比法院处于较佳位置作出合适判断，因此法院会对行政机关就国安事务方面的判断予以尊重。同时，行政长官在申请前甄别程序中所作的决定，以及在专案认许法律程序中所作的决定，应被视为一个整体而对法院具有同等约束力。

海外律师的签证申请

²¹ 第 27F 条订明，任何人不得在任何法院对行政长官在第 27C、27D 或 27E 条下所作的决定提出质疑，亦不得对该决定提起任何形式的诉讼。

61. 入境事务处一直根据既定法例和程序，审核所有签证申请，包括海外律师来港工作的签证申请。入境处根据《基本法》第 154 条和《入境条例》（第 115 章），实行出入境管制。具备香港特区所需而又缺乏的特别技能、知识或经验的申请人，可根据一般就业政策申请来港。保安理由是入境事务处考虑根据一般就业政策来港就业的申请的其中一个准则。入境事务处作为香港特区行政机关的一部分，须有效防范、制止和惩治危害国家安全的行为和活动，故此保安理由必然包括国家安全的考虑。