

Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the situation of human rights defenders; and the Special Rapporteur on minority issues

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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; Special Rapporteur on extrajudicial, summary or arbitrary executions; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the rights to freedom of peaceful assembly and of association; Special Rapporteur on the situation of human rights defenders; and Special Rapporteur on minority issues, pursuant to Human Rights Council resolutions 40/16, 35/15, 34/18, 41/12, 34/5 and 34/6.

In this connection, we offer the following comments on the United Nations (Anti-Terrorism Measures) Ordinance, Cap. 575 (“Anti-Terrorism Law”)¹ and Crimes Ordinance, Cap. 200, Sections 9 and 10 (“Sedition Law”).² We respectfully address a number of the human rights challenges evidenced in the legislation and advance our view on these ordinances, encouraging review and reconsideration of certain key aspects to ensure that the ordinances are in compliance with China’s international human rights obligations in respect of Hong Kong SAR.

Overview of international human rights law standard applicable

International human rights law and standards applicable, particularly under the International Covenant on Civil and Political Rights (ICCPR), remains in force in Hong Kong SAR in accordance with Section XI of Annex I to the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong³ and Article 39 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China.⁴ No derogations being in place in respect of the ICCPR, we affirm the recommendation of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while counter terrorism that counter-terrorism

¹ United Nations (Anti-Terrorism Measures) Ordinance, Cap. 575, available at <https://www.elegislation.gov.hk/hk/cap575>.

² Crimes Ordinance, Cap. 200, §§ 9, 10, available at https://www.elegislation.gov.hk/hk/cap200?xid=ID_1438402821397_002.

³ Available at <https://www.cmab.gov.hk/en/issues/jd3b.htm>.

⁴ Xianggang Jiben Fa art. 39, available at https://www.basiclaw.gov.hk/en/basiclawtext/chapter_3.html.

law must not be used as a form of *de facto* or covert emergency power (A/HRC/37/52, para 30-39). In particular, we refer to the general international legal obligation in the ICCPR art. 2, whereby the State is under a duty to adopt laws that give domestic legal effect to the rights and adopt laws as necessary to ensure that the domestic legal system is compatible with the Covenant.

Article 19 of the ICCPR protects the right to freedom of opinion and expression. Whereas the right to freedom of opinion in article 19(1) is absolute, the right to freedom of expression in 19(2) is subject to certain restrictions based on the requirements in article 19 (3), which are narrowly tailored and have narrow application. The scope of art. 19 (2) is broad. It protects the right to seek, receive and impart information and ideas of all kinds regardless of frontiers. This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, only subject to the provisions in article 19, paragraph 3, and article 20. The scope of paragraph 2 embraces even expression that may be regarded as offensive (CCPR/C/GC/34 para. 11). Furthermore, it protects all forms of expression and the means of their dissemination: “Such forms include spoken, written and sign language and such non-verbal expression as images and objects of art. [...] They include all forms of audio-visual as well as electronic and internet-based modes of expression.”⁵

Any restrictions on the right to freedom of expression must be compatible with the requirements of article 19(3). It is up to the State to demonstrate that a particular restriction is compatible with the requirements of the Covenant.⁶ Under no circumstance can restrictions jeopardize the right itself, for example by reversing the relationship between norm and exception.⁷ In addition, they must:

1. *pursue a legitimate aim*, limited to those specified under article 19(3).
2. *be provided by law*, in that any restriction “must be made accessible to the public” and “formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.” Moreover, it “may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution”.⁸
3. *be proportionate to the legitimate aim pursued*: the requirement of proportionality entails that restrictions “must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated”.⁹ Beyond prohibiting overbroad restrictions, restrictions must be “appropriate to achieve their

⁵ [CCPR/C/GC/34](#), paragraph 12.

⁶ [CCPR/C/GC/34](#), paragraphs 27 and 35.

⁷ [CCPR/C/21/Rev.1/Add.13](#), paragraph 6; [CCPR/C/GC/34](#), paragraph 21.

⁸ [CCPR/C/GC/34](#), paragraph 25.

⁹ [CCPR/C/GC/34](#), paragraph 22.

protective function; they must be the least intrusive instrument [...]; they must be proportionate to the interest to be protected”.¹⁰

We further recall ICCPR Art. 20 whereby the state has a duty to prohibit certain forms of expression. The provision reads: “1. Any propaganda for war shall be prohibited by law, 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”. All measures of prohibition, including criminalisation of speech, within the scope of article 20 must meet the standards of legitimacy, legality and proportionality.¹¹ Whereas the State has a duty to prohibit speech under Art. 20, the prohibition of speech that falls outside the scope of Article 20 and Article 19 (3) is not permitted.

Articles 21 and 22 of the ICCPR protect the right of peaceful assembly and the right to freedom of association. The importance of these rights are rooted in the role they play “as a platform for the exercise of other rights, inter alia the right to freedom of expression, cultural rights and the right to political participation.”¹² No restrictions may be placed on the right of peaceful assembly and of association unless they comply with the principles of necessity, as enumerated in articles 21 and 22 (and exercised with due proportionality and non-discrimination). These interests are limited to interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

Concerns relating to the compatibility of the Anti-Terrorism Law with international human rights law

As applied in the legislation, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism underscores that “Terrorism”, “terrorists”, and “terrorists act” must be limited to the purpose of countering terrorism and must be properly defined.¹³ We caution against broad and overly inclusive definitions of terrorism acts, which may result in unintended human rights abuses.¹⁴ We caution against the loose characterization of protests and collective acts of assembly as “terrorism” or “national security threats”, and note that the ordinary administrative and criminal law should be used as necessary and appropriate to address the regulation of such actions. We note that the definition of “terrorist acts” must comply with the principles of necessity and proportionality that govern the legality of human rights restrictions. The definition of terrorism and related offences must be “accessible,

¹⁰ [CCPR/C/GC/34](#), paragraph 34.

¹¹ See [CCPR/C/GC/34](#), paragraph 50.

¹² [A/61/267](#), paragraph 9. The Mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has recognized that the freedom of association does not distinguish between different kind of associations and covers “associations whose purposes are religious, political, labour related or cultural.”

¹³ [A/HRC/16/51](#), paragraph 26.

¹⁴ [A/HRC/16/51](#), paragraph 26.

formulated with precision, non-discriminatory and non-retroactive.”¹⁵ Consequently, we are of the view that the terms as used in the United Nations (Anti-Terrorism Measures) Ordinance, Cap. 575 (“Anti-Terrorism Law”) is overly broad and imprecise. To guide the Government in ensuring its domestic legislation is human rights compliant, we offer the model definition of terrorism formulated from a human rights perspective by the mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism and encourage its use and guidance.¹⁶ With these principles in mind, we turn to the content of the Anti-Terrorism Law.

The Anti-Terrorism law defines a “terrorist act” to include “causing serious damage to property.”¹⁷ Unlike other actions listed under the definition of a “terrorist act”, the Law does not exclude actions taken or threatened “in the course of any advocacy, protest, dissent or industrial action.”¹⁸ We would caution that an emphasis on damage to property harm steers the domestic legal standard away from the core emphasis found in agreed international treaties on terrorism and UN Security Council Resolution 1566 on the targeting of civilians.¹⁹ In her 2019 thematic report (A/HRC/40/52), the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism cautioned that “[d]efinitions of terrorism that include damage to property, including public property . . . seriously affect the right to freedom of assembly . . . [and] can be used against individuals engaging in social movements where damage to property is unwittingly incurred.”²⁰ We urge the Government to maintain a definition of terrorism consistent with the core legal meanings adopted by the Security Council and by State Parties who have signed relevant multilateral terrorism conventions and commend the definition of terrorism developed by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism for your re-consideration.²¹

The Anti-Terrorism law also includes reference to “seriously interfering with or seriously disrupting an essential service, facility or system, whether public or private.”²²

¹⁵ [A/HRC/16/51](#), paragraph 27 (citing International Covenant on Civil and Political Rights, art. 15, General Assembly resolution 63/185, para. 18, and E/CN.4/2006/98, para. 49).

¹⁶ [A/HRC/16/51](#).

¹⁷ United Nations (Anti-Terrorism Measures) Ordinance, Cap. 575, §2(1), available at <https://www.elegislation.gov.hk/hk/cap575>.

¹⁸ United Nations (Anti-Terrorism Measures) Ordinance, Cap. 575, §2(1), available at <https://www.elegislation.gov.hk/hk/cap575>.

¹⁹ OP 3 of UNSCR 1566 (2004), “Recalls that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature”.

²⁰ [A/HRC/40/52](#), paragraph 41.

²¹ [A/HRC/16/51](#).

²² United Nations (Anti-Terrorism Measures) Ordinance, Cap. 575, §2(1), available at <https://www.elegislation.gov.hk/hk/cap575>.

Although we note that the Law “does not include the use or threat of action in the course of any advocacy, protest, dissent or industrial action,” we caution that the definition of “essential service” may be applicable to a wide-ranging including but not limited to infrastructure, electronics, information, communication, information telecommunications. We urge the Government to narrow this definition to a specific and narrow class consistent with the severity of the offence of terrorism to avoid forms of protest or action involving engagement with public services being captured inappropriately as terrorism.²³ This would provide a degree of legal certainty currently absent with respect to this offence in the legislation.

We stress that special attention that must be given to the definition of a “terrorist act” act to pursue an effective counterterrorism strategy. We note the importance role of States to protect their citizens from genuine terrorist attacks, and we stress that the dual requirements of countering terrorism and maintaining compliance with international human rights law are not mutually exclusive.²⁴ We note that imprecise and overly broad definitions of terrorist actions can include actions protected by human rights law, such as peaceful actions to protect, inter alia, labour rights, minority rights or human rights, and, particularly, the right of association and peaceful assembly.²⁵ We respectively remind the Government that counterterrorism laws are not the appropriate mechanism for the restriction of human rights, and “a State shall not invoke national security as a justification for measures aimed at suppressing opposition or to justify repressive practices against its population.”²⁶ Application of counterterrorism laws that restrict associations and assemblies should be assessed case by case, and we emphasize the important role of independent judicial oversight of the law’s compliance with international human rights law.²⁷

²³ See Compendium of Best Practice on the Protection of Critical Infrastructure from Terrorist Attack (2018) available at https://www.un.org/sc/ctc/wp-content/uploads/2018/06/CompendiumCIP-final-version-120618_new_fonts_18_june_2018_optimized.pdf (recommending that States comply with international human rights obligations in any efforts to protect critical infrastructure and encouraging States to “... conduct regular human rights assessments of measures taken to tackle the terrorist threat to critical infrastructure and ensure that such measures are evidence based ...”).

²⁴ [A/61/267](#), paragraph 10.

²⁵ [A/HRC/37/52](#), paragraph 33; [A/61/267](#), paragraph 18.

²⁶ [A/61/267](#), paragraph 20.

²⁷ [A/61/267](#), paragraph 29. See, e.g., CCPR/C/122/D/2270/2013-CCPR/C/122/D/2851/2016, paragraph 8.3, available at <https://undocs.org/en/CCPR/C/122/D/2851/2016> (holding that the State concerned, who convicted a citizen under its vague counterterrorism law and without a proper independent and impartial judiciary protections, had violated the human rights of the convicted under the ICCPR); Jorge Luis Bronstein and others (Argentina), report No. 2/97, 11 March 1997, para. 11, in IACHR Annual Report 1997, op. cit. at note 38, available at <https://www.cidh.oas.org/annualrep/97eng/Argentina11205.htm> (“In order to ensure effective judicial oversight of the detention, the competent court must be quickly apprised of the persons who are held in confinement. One of the purposes of such action is to protect the well-being of the persons detained and to avoid any violation of their rights.”); ECHR, Brogan v. United Kingdom, application No. 11209/84, judgement of 29 November 1988, Series A No. 145-B, p. 33, para. 62, available at <https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%22001-57450%22%7D> (holding that the U.K.’s detention of suspects under counterterrorism laws were not within acceptable time periods and violated the human rights of the detained).

We reiterate our concern about the use of anti-terrorism legislation to regulate protest. We underscore that States, including China, have an array of ordinary police powers available to them to regulate protests, including protests which may be violent and/or not legally authorized. The fact that violence occurs during a protest does not make the violence that has occurred *per se* ‘terrorist’. Terrorism is a specific and unique crime, associated with certain specific acts directed primarily at the civilian population.²⁸ We again recall the model definition of terrorism provided by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.²⁹

We underscore the challenges when “[s]tates resort to the deliberate misuse of the term [terrorism]...”.³⁰ We remind the Government of some of the legitimate criteria that can be used to characterize actions as ‘terrorist’, including the direct linkage of the prohibited acts to existing conventions on terrorism.³¹ In addition, the tight and narrow definition of terrorism provided by United Nations Security Council 1566 (2004) identifies three cumulative characteristics for an act to be considered as terrorism:

- (a) Acts, including against civilians, committed with the intention of causing death or serious bodily injury, or the taking of hostages; and
- (b) Irrespective of whether motivated by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, also committed for the purpose of provoking a state of terror in the general public or in a group of persons or particular persons, intimidating a population, or compelling a Government or an international organization to do or to abstain from doing any act; and
- (c) Such acts constituting offences within the scope of and as defined in the international conventions and protocols relating to terrorism.³²

This cumulative approach acts as a safety threshold to ensure that it is only conduct of a terrorist nature that is identified as terrorist conduct.³³ Given this relevant contextualization to the international legal definitions of terrorism, we strongly encourage

²⁸ Here the Special Rapporteur reminds States that the unique characteristics of terrorism are found in the specificity of the relevant treaty law regulating terrorism, cf. Conventions regulating terrorism including but not limited to the Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention) of 1963; the Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention) (1970); The International Convention on the Taking of Hostages (Hostages Convention) of 1979; The Convention on the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971; and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 1973.

²⁹ [E/CN.4/2006/98](#), paragraphs 26-50, 72.

³⁰ [E/CN.4/2006/98](#), paragraph 27.

³¹ [E/CN.4/2006/98](#), paragraphs 32-33. Qualified in one respect, to note that this linkage is not applicable in the case of the Convention on the Marking of Plastic Explosives for the Purpose of Detection.

³² [S/RES/1566](#), paragraph 3.

³³ [E/CN.4/2006/98](#), paragraph 38.

review and reconsideration of the definition included in this legislative enactment, which appears to contravene existing international law standards.

Recalling that this legislation is purportedly designed to implement the State's obligations under United Nations Security Council Resolution 1373, we highlight that the proposed legislation appears to go beyond what has been agreed by the Security Council in its articulation of what constitutes 'terrorism' under international law. The preamble to the resolution affirms the need to combat terrorist acts "by all means, in accordance with the Charter of the United Nations".³⁴ As the Charter makes substantial references to human rights protection, this affirms the reference to the need to promote and respect human rights norms including when addressing terrorism domestically. The Security Council now consistently includes language on the need for States to ensure that "any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law" in chapter VI and chapter VII resolutions addressing terrorism.³⁵ The Council resolutions also incorporate language according to which "effective counter-terrorism measures and respect for [...] the rule of law are complementary and mutually reinforcing" and that they are "an essential part of a successful counter-terrorism effort."³⁶ Moreover, some resolutions have emphasized the need to address the conditions conducive to the spread of terrorism,³⁷ including, but not limited to, "(...) the need to promote the rule of law, the protection of human rights and fundamental freedoms ...".³⁸

Concerns relating to the compatibility of the Sedition Law with international human rights law

We respectfully recommends the Government to bring the Sedition Law in compliance with international human rights law. We recognize with concern a growing trend for States criminalizing expression that "articulates a view contrary to the official position of the State, addresses human rights violations and comments on ways to do things better, in accordance with international human rights obligations"³⁹ under the label

³⁴ [S/RES/1373](#).

³⁵ See Security Council resolution [1535 \(2004\)](#). See also Security Council resolutions [1456 \(2003\)](#), paragraph 6 ("States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law . . ."), and [1624 \(2005\)](#), paragraph 4 ("States must ensure that any measures . . . comply with all of their obligations under international law, in particular international human rights law, refugee law, and humanitarian law . . .").

³⁶ See Security Council resolutions [2129 \(2013\)](#), [2170 \(2014\)](#). See also [2178 \(2014\)](#) ("[T]he rule of law [is] complementary and mutually reinforcing with effective counter-terrorism measures, and [is] an essential part of a successful counter-terrorism effort . . ."); [2395 \(2017\)](#) ("[T]he rule of law [is] an essential component[] of counterterrorism, and recognizing that effective counterterrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing . . ."); and [2396 \(2017\)](#) ("[T]he rule of law [is] complementary and mutually reinforcing with effective counter-terrorism measures, and [is] an essential part of a successful counter-terrorism effort . . .").

³⁷ See resolution [60/288](#), annex, sect. I.

³⁸ See Security Council resolutions [1963 \(2010\)](#) and [2129 \(2013\)](#).

³⁹ [A/HRC/40/52](#), paragraph 8.

of protecting national security. Civil society and human rights defenders, depending on the nature of their work, often have their views conflated with “extremism” in this regard, putting them at particular risk of being silenced by counter-terrorism legislation. We respectfully remind the Government that there is a “need to ensure that invocation of national security, including counter-terrorism, is not used unjustifiably or arbitrarily to restrict the right to freedom of opinion and expression,” as stressed by the Human Rights Council.⁴⁰ Freedom of expression is a critical component of maintaining a robust civil society; disproportionate restrictions to the freedom of expression chills speech, especially online.⁴¹

Specifically, we respectfully remind the Government that limitations on rights must be (a) necessary; (b) impinge only minimally on rights (least restrictive alternative); (c) demonstrate proportionality between means and clearly stated objectives; and (d) be consistent with other fundamental rights and non-discriminatory in purpose and practice.

We express our grave concern with the broad definition of what constitutes seditious speech, concerned that the broad definition may restrict legitimate expression. The Human Rights Committee, in its Third, Second, and First Reviews of Hong Kong, Special Administrative Region, expressed similar concerns about the Sedition Law’s definition⁴². In each case, the Committee recommended that measures to enact article 23 of the Basic Law must be in line with the Covenant. The State Party addressed this in its report of 2011, stating: "In paragraph 14 of its previous concluding observations, the Committee expressed concerns that the current definition of offences of treason and sedition in the Crimes Ordinance (Cap. 200) is too broad, and suggested the HKSAR to amend the relevant legislation. We consider that the offences of treason and sedition should preferably be dealt with in the context of the legislative exercise for article 23 of the Basic Law. We will take into account the Committee’s views when the legislative exercise for article 23 of the Basic Law is launched in future." (para 205).

We recommend a review and revision of this legislation and offer technical assistance to this purpose. This would offer the Government an important opportunity to ensure that the definition of terrorism contained in national laws is appropriately narrow and tailored, and that use of counterterrorism law and practice is in conformity with international human rights standards.

⁴⁰ [A/HRC/RES/7/36](#).

⁴¹ [A/HRC/40/52](#), paragraph 27.

⁴² [A/HRC/40/52](#), paragraph 27.

ion in the context of the new legislation implementing article 23 of the Basic Law. However, it remains concerned at the broad wording of the definition of the offences of treason and sedition currently in Hong Kong, China’s Crimes Ordinance (arts. 19, 21 and 22).”); CCPR/C/HKG/CO/2, paragraph 14 (“The Committee is concerned that the current definition of the offences of treason and sedition in the Crimes Ordinance is too broad (articles 19, 21, 22).”); CCPR/C/79/Add.117, paragraph 18 (“The Committee is concerned that the offences of treason and sedition under the Crimes Ordinance are defined in overly broad terms, thus endangering freedom of expression guaranteed under article 19 of the Covenant.”).

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned concerns.
2. Please explain how the definition of terrorism found in the Anti-Terrorism law complies with the UN Security Council Resolution 1566, and the definition of terrorism contained in multilateral terrorism treaties.
3. Please explain how the Anti-Terrorism Law and Sedition Law (and any changes made to it since the date of this communication) is compatible with Your Excellency's Government's obligations under Articles 2, 19, 21, and 22 of the International Covenant on Civil and Political Rights.
4. Please explain whether the legislation on sedition and terrorism, which is the subject of this letter, is used in relation to demonstrations and protests in Hong Kong SAR, and the potential for their retroactive application in this context. If it is used in this context, please explain why, and how this is consistent with Honk Kong SAR's international human rights obligations, in particular the ICCPR.

This communication, as a comment on legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) within 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of our highest consideration.

Fionnuala Ní Aoláin
Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

Agnes Callamard
Special Rapporteur on extrajudicial, summary or arbitrary executions

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

Clement Nyaletsossi Voule
Special Rapporteur on the rights to freedom of peaceful assembly and of association

Michel Forst
Special Rapporteur on the situation of human rights defenders

Fernand de Varennes
Special Rapporteur on minority issues