

Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Working Group on Arbitrary Detention; 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

REFERENCE:
OL CHN 17/2020

1 September 2020

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; Working Group on Arbitrary Detention; 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, 42/22, 35/15, 34/18, 41/12, 34/5 and 43/8.

In this connection, we offer the following comments on The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region ("National Security Law").¹ We express concern that the measures adopted in the National Security Law do not conform with your Excellency's Government international legal obligations, in particular the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). Specifically, we are concerned that the law lacks precision in key respects, infringes on certain fundamental rights and may not meet the required thresholds of necessity, proportionality and non-discrimination under international law. We recommend review and reconsideration of this legislation to ensure that the law is in compliance with China's international human rights obligations with respect to the HKSAR.

Similar concerns regarding the human rights challenges of previously issued anti-terrorism and national security legislation related to the HKSAR were the subject of a previous communication sent by Special Procedures dated 23 April 2020 (CHN 7/2020) and 19 June 2020 (CHN 13/2020). We thank your Excellency's Government for the reply received to CHN 7/2020, and for the ongoing and sustained dialogue on security and counter-terrorism regulation more broadly, however we regret not yet having received a response to UA CHN 13/2020.

Overview of international human rights law standard applicable.

¹ English translation available at http://www.xinhuanet.com/english/2020-07/01/c_139178753.htm.

International human rights law and standards applicable remain in force in the Hong Kong Special Administrative Region of the People's Republic of China 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 Kong² and article 39 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China.³ We remind your Excellency's Government that under article 2 of the ICCPR, Hong Kong SAR is under a duty to ensure that individuals under its jurisdiction enjoy the rights in the Covenant and adopt laws as necessary to ensure that the domestic legal system is compatible with the Covenant. Moreover, the Covenant compels States to take active and specific administrative, judicial and legislative measures to ensure that all of the rights enshrined in the Covenant are protected and that effective remedies are provided if they are breached by States. We note that articles 6, 7, 8, 11, 15 and 18 are non-derogable under the treaty.

We respectfully remind your Excellency's Government of the relevant provisions of the United Nations Security Council resolutions 1373 (2001), 1456(2003), 1566 (2004), 1624 (2005), 2178 (2014), 2242 (2015), 2341 (2017), 2354 (2017), 2368 (2017), 2370 (2017), 2395 (2017) and 2396 (2017); as well as Human Rights Council resolution 35/34 and General Assembly resolutions 49/60, 51/210, 72/123 and 72/180. All of these resolutions require that States ensure that any measures taken to combat terrorism or violent extremism, including incitement of and support for terrorist acts, must comply with all of their obligations under international law.

We also bring your Excellency's Government attention to the "principle of legal certainty" under article 15(1) of the ICCPR, which requires that criminal laws are sufficiently precise so that it is clear what types of behaviour and conduct constitute a criminal offence and what would be the consequence of committing such an offence. This principle recognizes and seeks to prevent ill-defined and/or overly broad laws which are open to arbitrary application and abuse and may lead to arbitrary deprivation of liberty.

Background

The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region was passed by the National People's Congress Standing Committee (NPCSC) and promulgated on 1 July 2020. It went into force on the same day. The law's adoption followed a formal decision on 28 May 2020 authorizing the NPCSC to draft a national security law for the HKSAR. This decision was the subject of a prior communication by Special Procedures (CHN 13/2020). The law regulates four distinct categories of offences: secession, subversion, terrorism and collusion with a foreign country or with external elements to endanger national security.

² Available at <https://www.cmab.gov.hk/en/issues/jd3b.htm>.

³ Xianggang Jiben Fa art. 39, available at https://www.basiclaw.gov.hk/en/basiclawtext/chapter_3.html.

The compatibility of the National Security Law with international human rights law.

We commend the addition of article 4 of the National Security Law, which acknowledges the need to protect the human rights and fundamental freedoms guaranteed under the Basic Law of the HKSAR, the ICCPR, and the International Covenant on Economic, Social and Cultural Rights (CESCR). We also note the commitment to the principle of the rule of law articulated in article 5 of the law. Despite these welcome and positive additions, the content of the measures adopted in the National Security Law nonetheless poses a serious risk that these fundamental freedoms and due process protections may be infringed upon. In particular, we express concern at the broad scope of the crimes defined as secession and subversion; the express curtailment of freedoms of expression, peaceful assembly, and association; the implications of the scope and substance of the security law as a whole on the rule of law; and the interference with the ability of civil society organisations to perform their lawful function. We underscore that security and human rights are intertwined and not separate.⁴ Effective security demands the protection of rights in a holistic and integrated way. Here we stress the collective interdependency of the compendium of rights set out in the ICCPR, which function to collectively complement and enhance the advancement of the security and rights of each individual in society.⁵ We recall and concur with the Human Rights Committee's view that "rules concerning the basic rights of the human person" contained in the ICCPR are *erga omnes* obligations.⁶

Additionally, while we commend the acknowledgement that the National Security Law is subject to human rights obligations under the Basic Law and the ICCPR, we express concern at the risk that good faith compliance with these obligations may be at risk by granting authority to transfer jurisdiction from the HKSAR to the Central People's Government under article 55. Every treaty in force is binding upon the parties to it and must be performed by them in good faith.⁷ Circumvention of this core obligation by means of administrative process undermines the spirit and substance of the ICCPR. Any act which gives rise to a criminal process under this legislation in the HKSAR, and individuals who are then charged with offences arising under the legislation are fully and without abrogation entitled to the right to fair trial as guaranteed under article 14 of the ICCPR in every process and every stage of process that follows (arrest, detention, charging, trial and sentencing). The People's Republic of China is not a party to the ICCPR, however, if criminal regulation of the Central People's Government is to be applied under this legislation, all such processes must be ICCPR-compliant, noting in particular the significance of article 14 of the ICCPR. Moreover, any acts of cooperation between agencies of HKSAR and government agencies (for example under article 53 whereby the Office for Safeguarding National Security of the Central People's

⁴ [A/HRC/43/46](#), para. 5; [A/HRC/37/52](#), para. 5; [A/HRC/40/52](#), para. 11.

⁵ Human Rights Committee, General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, paras 15 and 18.

⁶ *Id* at para 2, and in parallel pursuant to article 26 of the Vienna Convention on the Law of Treaties, States Parties are required to give effect to the obligations under the Covenant in good faith.

⁷ Vienna Convention on the Law of Treaties (1969), art. 26.

Government in the Hong Kong Special Administrative Region shall establish a mechanism of coordination with the Committee for Safeguarding National Security of the Hong Kong Special Administrative Region in respect of HK residents or citizens) would be subject to the requirements of the ICCPR in all respects and must also be fully ICCPR compliant in all aspects of cooperation.

We note that article 55 grants the Central People's Government the authority to exercise jurisdiction over national security cases that are complex, serious, or pose a major and imminent threat, when requested by the Government of the HKSAR. Article 56 states the Supreme People's Court shall designate a court to adjudicate the case and article 57 states that the Criminal Procedure Law of the People's Republic of China will be applied. We point out the obvious obligation to your Excellency's Government that if the Criminal Procedure Law of the People's Republic of China is applied to persons or groups from HKSAR for acts occurring in or related to HKSAR, that law would be necessarily required to be fully compliant with the ICCPR, to avoid breach of the obligations of your Excellency's Government. It should be pointed out that the application of criminal investigation, examination and prosecution, trial and execution of penalties will all need to be fully ICCPR compliant, given the positive undertakings given by your Government under article 4 of the law.

We note particularly that the authority to transfer cases out of the HKSAR risks undermining the HSKAR's good faith compliance with its obligation to provide the right to a fair trial under article 14 of the ICCPR making any cases of transfer a *de facto* breach of the ICCPR fair trial obligations, unless transfer is fully ICCPR compliant. We are also concerned about a number of procedural provisions that may undermine compliance with ICCPR obligations including article 62 (that this law which may have provisions inconsistent with the ICCPR prevails over local law which is ICCPR compliant); and article 65 (which vests the power of interpretation of the law solely with the Standing Committee of the National People's Congress) sidestepping independent judicial assessment of whether the law and action taken on the basis of it is ICCPR compliant. In this regard, we highlight the provisions which appear to undermine the independence of judges and lawyers found in article 44 which are broad and imprecise and appear to undermine the right to freedom of expression held by the legal professional under article 25 of the ICCPR, having both an individual and collective effect on the exercise of this right.

Definition of Terrorism

We respectfully remind your Excellency's Government, that States should ensure that counter-terrorism legislation is limited to criminalizing terrorism conduct which is properly and precisely defined on the basis of the provisions of international counter-terrorism instruments and is strictly guided by the principles of legality, necessity and proportionality. The definition of terrorism in national legislation should be guided by the

acts defined in the Suppression Conventions,⁸ the definition found in Security Council resolution 1566 (2004) and also by the Declaration on Measures to Eliminate International Terrorism and the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, which were approved by the General Assembly.⁹ The Security Council’s definition of a terrorist act requires intentionality to cause death or serious bodily harm and the act must be committed to provoke a state of terror.¹⁰ We reiterate that the model definition of terrorism advanced by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism provides clear guidance to States on appropriate conduct to be proscribed as best practice.¹¹ We re-affirm that the model definition’s three-pronged set of elements for the regulation of terrorism acts¹² and its cumulative approach more broadly, function as a safety threshold to ensure that it is only conduct of a terrorist nature that is identified as terrorist conduct.¹³

We commend the increased specificity in the definition of terrorist activities under article 24 of the National Security Law. Article 24 requires that the criminal act be committed with the intent to cause grave harm to the society with a view to coerce the government in order to pursue a political agenda. This obligation is aligned with the relevant provisions of the key international counter-terrorism instruments. Furthermore, many of the specific criminal acts—such as “serious violence against a person”, the use of arson or poison against the public, or dangerous activities which seriously jeopardise public health—represent well recognized categories of terrorist conduct. These activities are also aligned with the Security Council’s definition of a terrorist act which requires intentionality to cause death or serious bodily harm.¹⁴

However, we caution that terrorist activities included in article 24 describing damage to physical property—such as sabotage of transport facilities or public services—risk criminalizing conduct that goes beyond the Security Council’s definition of terrorist conduct if the damage is not committed with the intent to cause death or serious bodily harm. In her 2019 thematic report, 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

⁸ See e.g. 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; E/CN.4/2006/98 paras 25-50, 72

⁹ [S/RES/1566](#); [A/RES/51/210](#).

¹⁰ S/RES/1566, para. 3.

¹¹ A/59/565 (2004), para. 164 (d).

¹² E/CN.4/2006/98, para 37.

¹³ E/CN.4/2006/98, para.38.

¹⁴ S/RES/1566, para. 3.

used against individuals engaging in social movements where damage to property is unwittingly incurred.”¹⁵

We note that all counter-terrorism instruments must be strictly guided by the principles of legality, necessity and proportionality. Thus, the use of such instruments must be limited to address genuine threats of terrorism. China’s counter-terrorism efforts must be necessary and in proportion to the actual threat of terrorism it faces, in particular in the context where your Excellency’s Government has stated that this new legislation is designed only to target few individuals.¹⁶ The use of the National Security Law’s terrorism measures should be strictly limited to address conduct which is genuinely terrorist in nature and should not be used to restrict or limit protected fundamental freedoms, including the rights to opinion, expression, and of peaceful assembly.

National Security

The legislation establishes that it “is enacted ... for the purpose of ... safeguarding national security” (article 1). Article 8 affirms that “in order to safeguard national security effectively the law enforcement and judicial authorities of the Hong Kong Special Administrative Region shall fully enforce this Law ... concerning the prevention of, suppression of, and imposition of punishment for acts and activities endangering national security”. We recognize that your Excellency’s Government has the primary responsibility to maintain national security, consistent with the United Nations Charter and concurrent treaty obligations of States including human rights treaties. Moreover, personal security and liberty is a recognized fundamental human right as affirmed in the UDHR (article 3) and the ICCPR (article 9). We stress that national security is not set apart from the obligation to protect and ensure human rights but rather that the latter is a necessary and integral part of the right to security guaranteed to each person individually. The right to security is thus an individual right exercised in a collective context. We point out our concerns, which have been previously set out by multiple mandate holders about employing national security language in a broad and imprecise manner that diminishes and impinges in absolute ways on the rights of individuals, including in particular the arbitrary deprivation of liberty prohibited by article 9 of the ICCPR and article 3 of the UDHR.¹⁷

National security is not a term of art, nor does the use of this phrase as a legislative matter give absolute discretion to the State. Rather, when national security functions as a legal basis for criminal sanction it must, to meet the requirements of precision and clarity under the ICCPR (article 9 (1)), be expressly linked to a defined set of criminal acts and not criminalize acts and entitlements which are lawful under

¹⁵ A/HRC/40/52, para. 41.

¹⁶ <https://www.scmp.com/news/hong-kong/politics/article/3085791/two-sessions-2020-hong-kong-national-security-law-will-only>

¹⁷ [IRN 5/2016](#); [AUS 2/2018](#).

international law.¹⁸ We point out that the deployment of national security terminology to criminalize that which is protected under the ICCPR would be in breach of the treaty's obligations. We stress that the United Nations Human Rights Committee interprets article 9 affirmatively, by setting out that State Parties must take "measures to prevent future injury".¹⁹ We caution that overly broad national security legislation where the precise perimeters of individual actions to be criminalized are vague and open-ended would run counter to this aspect of your Excellency's treaty obligations.

Article 5 of the legislation sets out that "[a] person who commits an act which constitutes an offence under the law shall be convicted and punished in accordance with the law". We recall that the principle of legal certainty in conformity with the ICCPR demands that the contours of each legal act be clearly defined and ascertainable so as to ensure the rule of law and the rights of the individual are fully observed. This is particularly relevant in this case, given the significant sanctions that follow from conviction related to any offences set out in this law.

Secession and Subversion

Part I of the Act addresses the crime of secession and Part II the crime of subversion. We would first like to address the human rights dimensions of secession, which are regulated by article 20 of the law. Secession is a term which has been the subject of longstanding state practice and international judicial interpretation and has been conjoined with substantive analysis of human rights protections for minorities and groups.²⁰ Article 20 sets out three scenarios by which the crime of secession can be executed. We bring again to your Excellency's Government attention the "principle of legal certainty" enshrined in article 15(1) of the ICCPR and article 11 of the UDHR and note our concerns that certain phrases in this article including "undermining national unification", "altering by unlawful means" and "surrendering ... to a foreign country", are broad and imprecise and do not indicate precisely what kind of individual conduct would fall within their ambit. We are likewise concerned that the use of the term 'participation' constitutes an inchoate offence, namely criminalizing activities that have not as yet been committed in contravention of article 15 of the ICCPR. Moreover, the qualification that the crime of secession is undertaken "whether or not" by threat of force or use of force means that a range of acts including and not limited to speech and assembly may be construed as secession under the law. Such construction would engage the obligations of the ICCPR and may *inter alia* prejudice fair trial rights. We are thus troubled that a range of legitimate activities expressly protected by the ICCPR will be redefined domestically as secession by this legislation.

¹⁸ The Human Rights Committee's General Comment 35 on the Right to Liberty and Security of Person, CCPR/C/GC/35.

¹⁹ *Id.*, para. 9.

²⁰ See e.g., Report of the Commission of Rapporteurs on the Aaland Islands, League of Nations Doc. B.7 21/68/106 (1921); Reference re Secession of Quebec, 1998 CanLII 793 (SCC), [1998] 2 SCR 217; Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, para. 45.

Furthermore, we highlight that the term subversion is problematic given the requirement of legal certainty elucidated under article 15 of the ICCPR. Concerns about the use of subversion legislation and misuse of this terminology by your Excellency's Government have already been made on multiple occasions by the mandates of the Working Group on Arbitrary Detention, the Special Rapporteur on the Rights to Freedom of Opinion and Expression and the Special Rapporteur on the Situation of Human Rights Defenders.²¹ Subversion is almost uniformly directed towards the regulation of activity viewed as political under domestic law. Subversion is generally understood as a 'political crime' which has a legal genealogy across the globe: deployed to punish individuals for what they think (or what they are thought to think) rather than on the basis of action or activities which pose a defined criminal threat.

In this regard we bring to your Excellency's attention article 25 of the ICCPR which affirms the right and the opportunity to "each citizen, without any of the distinctions mentioned in article 2 and without unreasonable restrictions to (a) take part in the conduct of public affairs directly or through freely chosen representatives". The right to directly and indirectly participate in political and public life is essential in empowering individuals and groups, and is one of the core elements of human rights-based approaches aimed at eliminating marginalization and discrimination.²² Participation rights are inextricably linked to other human rights such as the rights to peaceful assembly and association, freedom of expression and opinion and the rights to education and to information. We stress that the phrase "directly" in article 25 underscores the individual nature of political expression and the emphasis in this provision on "public affairs" which extends to a wide array of political engagement. We also point out that article 35 of the legislation which provides that persons convicted of national security offences "shall be disqualified from standing as a candidate in the elections of the legislative council" appears to contravene article 21 of the UDHR and article 25(b) and (c) of the ICCPR, allowing for the right to be elected, and to have access on general terms of equality to public service.²³

By means of this legislation it appears that subversion operates in a multi-functional way and may be directed against individuals across a wide set of circumstances. We are concerned that subversion's application may not be limited to a narrow purpose but may instead be used to detain, try and criminalise persons engaged in political activities, as well as social and educational targets. We recall the obligation of article 2 of the ICCPR, 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

²¹ AL CHN 2/2018, UA CHN 10/2015: UA CHN 5/2015: UA CHN 5/2015: and UA CHN 7/2016.

²² A/HRC/27/29.

²³ See also, the International Covenant on Economic, Social and Cultural Rights (art. 8); the International Convention on the Elimination of All Forms of Racial Discrimination (art. 5 (c)); the Convention on the Elimination of All Forms of Discrimination Against Women (arts. 7 and 8); the Convention on the Rights of the Child (art. 15); the Convention on the Rights of Persons with Disabilities (arts. 4 (3), 29, 33 (3)).

system is compatible with the Covenant.²⁴ Noting again the “principal of legal certainty” enshrined in article 15(1) of the ICCPR and article 11 of the UDHR, which require that criminal laws are sufficiently precise so it is clear what types of behaviour and conduct constitute a criminal offence and what would be the consequence of committing such an offence. This principle recognizes that ill-defined and/or overly broad laws are open to arbitrary application and abuse. We note our resounding concern that the definition of subversion in this law is overly broad and may thus be applied in an arbitrary fashion.

We point out that regrettably the terms subversion and secession appear to be used interchangeably in national legislation, and we are concerned that this conflation may lead to the potential misuse of these legal categories against human rights defenders, journalists and civil society actors. The use of these terms in the legislation, given their opaque and ambiguous meaning leaves open the distinct possibility for application beyond unequivocal incitement to violence or specific acts of violent insurgency directed against the State. Instead, such provisions may function to interpret legitimate engagement by the governed with the State as unlawful. As a result, many human rights defenders find they are persecuted for exercising rights that are specifically guaranteed under the Declaration on Human Rights Defenders,²⁵ particularly with relation to article 6 which, among others, guarantees the right to seek information on human rights, as well as hold and disseminate their opinions on the observance of those rights within and by the State. We note that secession and subversion often function as over-inclusive legal categories, mopping up a range of acts that if placed in the counter-terrorism category would be found inconsistent with a strict reading of the global counter-terrorism obligations of the state, which are constrained by the Suppression Conventions and by United Nations Security Council Resolution 1566.

Freedom of Opinion, Expression, and Peaceful Assembly

We are particularly troubled that this legislation may impinge impermissibly on the rights to freedom of opinion, expression and of peaceful assembly as protected by the UDHR and ICCPR.²⁶ For example, articles 20 and 22 of the law which define organizing, planning committing or participating in secession or subversion, appear to criminalise speech acts, including political writing; article 27, which addresses advocacy of terrorism or incitement of terrorist activity, is also sufficiently wide so as to encompass freedoms of opinion and speech; and article 29, which sets out the crime of conspiracy with a foreign state, may also affect both assemblies and speech acts. Similarly, article 29 (5), which criminalises provocation “by unlawful means” of hatred among HK residents towards the Central People’s government; article 9, whereby the HK Special Administrative Region “shall ... take necessary measures to strengthen ... supervision and regulation over ... social organizations, the media and the internet”; and article 41, which enables national

²⁴ Article 16 of the *Guidelines for States on the effective implementation of the right to participate in public affairs* https://www.ohchr.org/Documents/Issues/PublicAffairs/GuidelinesRightParticipatePublicAffairs_web_CH.pdf

²⁵ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms [A/RES/53/144](#)

²⁶ Articles 2, 19, 20, 21 of the UDHR; articles 19, 21 of the ICCPR.

security trials to be “closed to the media and the public,” also appear to criminalize freedom of expression or any form of criticism of your Excellency’s Government in its regulation of Hong Kong. The law thus implicates both serious concerns of legality as well as undue limitations on freedom of opinion, expression and peaceful assembly. The application of such provisions runs the grave risk of being targeted at, *inter alia*, the legitimate activities of political opposition, critics, dissidents, legislators, civil society, human rights defenders, lawyers, students, bloggers, artists, and others.²⁷ We note that deprivation of liberty occasioned primarily as a result of the peaceful exercise of rights protected by the ICCPR and UDHR is arbitrary under international law.²⁸ We would like to remind your Excellency’s Government that, in its resolutions, the Human Rights Council noted its grave concern that “in some instances, national security and counter-terrorism legislation and other measures ... have been misused to target human rights defenders or have hindered their work and endangered their safety in a manner contrary to international law.”²⁹

We would like to emphasize that any restriction on freedom of expression that a government implements on grounds of national security, secession, subversion or counter terrorism, must have the genuine purpose and the demonstrable effect of protecting a legitimate national security interest.³⁰ Moreover, laws permitting such restrictions must be sufficiently clear and not afford undue discretion to the authorities in restricting speech. Lastly, even where the law pursues a legitimate aim and is sufficiently clear, the restriction would be unlawful if it constitutes a disproportionate interference in the rights of individuals. The State has the burden of proof to demonstrate the compatibility of any restriction with the requirements under the Covenant. We recall that the freedom of expression also protects speech that offends, shocks and disturbs, as long as it does not amount to incitement to national, racial or religious hatred, hostility or violence prohibited under article 20 of the ICCPR.³¹ Restrictions on the freedom of expression that silence critical voices or opinions about government would be contrary to the object and purpose of article 19 of the ICCPR.³² We would also like to stress that security and/or counter terrorism legislation with penal sanctions should never be misused against individuals exercising their rights to freedom of expression and freedom of association and of peaceful assembly, and should not be misused to deprive such individuals of their personal liberty through arrests and detention. These rights are protected under ICCPR and the application of criminal law to the non-violent exercise of these rights would for most purposes be contrary to the Covenant. Counter terrorism and/or security legislation cannot be used as an excuse to suppress peaceful groups and their members, nor can it have the chilling effect of suppressing the legitimate exercise of their rights. National

²⁷ AHRC/37/52, para. 47

²⁸ A/HRC/36/38

²⁹ [A/HRC/RES/25/18](#), [A/HRC/RES/27/31](#), [A/HRC/RES/32/31](#) and [A/HRC/RES/34/5](#).

³⁰ Human Rights Committee, General comment No. 34, article 19: Freedoms of opinion and expression; CCPR/C/GC/34.

³¹ See Human Rights Committee, general comment No. 34, para. 11.

³² *Id.* paras. 20 and 42.

security legislation cannot be used to hinder the work and safety of individuals, groups, and organs of society engaged in promoting and defending human rights.³³

Establishment of the Committee for Safeguarding National Security

A national security entity is established by article 12 of the legislation.³⁴ The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism reminds your Excellency's Government of the human rights obligations that are incumbent on such bodies, which have been addressed previously by her mandate.³⁵ In particular, she has stressed the importance of independent oversight of national security bodies, including but not limited to intelligence agencies.³⁶ She observes that independent human rights based oversight of national security is an important means to ensure that human rights are protected by all entities involved in national security regulation. This necessity for independent oversight would appear to be particularly compelling with the establishment of a new department of national security in the Hong Kong Police Force (articles 16 & 17) and the creation of a specialised division of the Hong Kong Justice department (article 18). We note our collective and profound concerns that the legislation authorizes both police and prosecutors to be subject to an oath of secrecy, which appears *per se* incompatible with the obligations to respect and ensure human rights in national security contexts. The regulation of national security does not exempt the police and prosecutors from the obligations to respect and ensure human rights under the ICCPR, rather it may heighten and affirm those obligations, precisely because of the dangers of over-reach and misuse of exceptional powers. In this regard, we bring to the attention of your Excellency's Government the Code of Conduct for Law Enforcement Officials and the *Guidelines on the Role of Prosecutors*.³⁷ We stress the importance of human rights compliant enforcement of the criminal law particularly in the national security realm, and affirm that police officers and prosecutors acting on the basis of this law, are fully responsible for your Excellency's Government human rights obligations in their actions. In this context, we suggest to your Excellency's Government the appointment of a fully independent reviewer of the application, operation, and compliance of the law with international human rights obligations as a recommended best practice by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms.³⁸ We remain open and willing to provide technical advice and assistance to the establishment and operation of such a body.

³³ A/HRC/RES/22/6, para. 10.

³⁴ The committee is established by the [Government](#) of Hong Kong based on the provisions of the national security law by the Standing Committee of the National People's Congress. It is supervised by and accountable to the Central People's Government. It is chaired by the Chief Executive of the government of Hong Kong.

³⁵ A/HRC/10/3 para 25-78; A/HRC/14/46

³⁶ [A/HRC/43/46/Add.1](#), para. 60(h); [A/HRC/40/52/Add.5](#), paras. 71-77; [A/HRC/40/52/Add.4](#), paras. 32-37.

³⁷ Adopted respectively by resolution 34/169 of 17 December 1979, which adopted the code of conduct for Law Enforcement Officials, on the recommendation of the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, and the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba (1990)

³⁸ A/HRC/16/51, para. 14, Practice 4 (2).

Civil Society

We conclude by noting our concerns pertaining to the protection and role of civil society which may be negatively impacted by the application of this legislation. We underscore that general assertions of conduct that threatens “national security” without proper definitions and limitations may severely curtail civic space, the right to participate in public affairs, the rights of minorities and the work of human rights defenders and other civil society actors and their right to associate. In her 2019 thematic report, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism cautions that overly broad definitions of what constitutes threats to national security results in a chilling effect on civic space, the stigmatization of civil society actors, and excludes civil society from engaging in national and international fora.³⁹ Specifically, she notes that legislation criminalizing acts “affecting national security, political and social stability and [are] dangerous to the political, economic or social system” criminalizes legitimate thoughts and expressions of civil society actors, including “civil society organizations, human rights defenders, journalists, bloggers and political opponents”⁴⁰ Human rights defenders may find that their right to defend human rights becomes increasingly precarious, as many legitimate avenues through which they carry out their activities are designated as terrorist activity, subversion, secession or of collusion with a foreign country or with external elements as per this legislation.

We call attention to the role that civil society plays in advancing the totality of rights contained in both the ICCPR and the CESCPR as well as in advancing the 2030 Agenda in particular SDG 16, with particular emphasis on freedom of expression and opinion, association and peaceful assembly and the right to participate in public affairs. We emphasize that these rights are human rights that enable persons to share ideas and experiences, form new ones, and join with others to claim their rights. Empowered civil society and its participation is essential to building secure societies and leaving no one behind. Conversely, restricting civil society undermines the security that builds healthy and vibrant societies. We recall that the Human Rights Committee has noted that while article 2 (2) of the ICCPR “... allows States Parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty”.⁴¹

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:

³⁹ A/HRC/40/52, paras. 60, 61, 65.

⁴⁰ A/HRC/40/52, para. 46.

⁴¹ CCPR/C/21/Rev.1/Add.13 para 3.

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned assessment of the legislation.
2. Please explain how the legislation is compatible with Your Excellency's Government's obligations under articles 2,14, 15, 17, 19, 20, 21, 22 of the ICCPR and articles 11, 12, 19 and 20 of the UDHR and how it may remediate the aforementioned inconsistencies with international human rights standards enshrined in the Act.
3. Please provide information on how the definitions of secession, subversion and collusion with a foreign country or with external elements to endanger national security are compatible with the principle of legal certainty established under the ICCPR.
4. Please provide information on how your Government intends to enforce the extra-territorial jurisdiction of the legislation as enshrined in articles 36, 37, 38, and 55 to ensure compatibility with the ICCPR
5. Please provide information on how the human rights commitment set out in article 4 of the legislation will be enforced in practice.
6. Please identify the positive measures and oversight provided by your Excellency's Government on the exercise of the powers now enumerated in the legislation.

This communication, as a comment on pending or recently adopted 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

Elina Steinerte
Vice-Chair of the Working Group on Arbitrary Detention

Agnes Callamard
Special Rapporteur on extrajudicial, summary or arbitrary executions

Irene Khan
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

Mary Lawlor
Special Rapporteur on the situation of human rights defenders

Fernand de Varennes
Special Rapporteur on minority issues