

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

Ref.: AL CHN 1/2023

(Please use this reference in your reply)

17 March 2023

Excellency,

We have the honour to address you in our capacities as Working Group on Arbitrary Detention; 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 independence of judges and lawyers and Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, pursuant to Human Rights Council resolutions 51/8, 43/4, 50/17, 44/8 and 49/10.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning multiple cases filed against Jimmy Lai Chee-ying (Jimmy Lai), founder of the pro-democracy newspaper Apple Daily, under various legal provisions, including the National Security Law.

Mr. Jimmy Lai, a citizen of China and the United Kingdom, is a businessman, media owner, former newspaper publisher and pro-democracy activist. In 1995 he founded the pro-democracy newspaper Apple Daily, which quickly became one of the most widely read newspapers in Hong Kong SAR. Mr. Lai is a laureate of the 2020 Reporters Without Borders Press Freedom Prize.

Mr. Lai was the subject of a previous allegation letter sent to your Excellency's Government on 4 May 2020 (AL CHN 9/2020), to which your Excellency's Government responded on 10 July 2020.

Mr. Lai is currently awaiting trial on charges brought under the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region ("National Security Law"). Concerns about this law, as well as its application to human rights defenders and pro-democracy activists, have been subject to three previous communications sent by Special Procedures to your Excellency's Government dated 19 June 2020 (CHN 13/2020), 1 September 2020 (CHN 17/2020) and 13 August 2021 (CHN 9/2021), as well as numerous statements by the High Commissioner for human rights and his spokesperson including in a press release anticipating the enactment of the National Security Law¹ and Concluding Observations from the Human Rights Committee dated 11 November 2022².

In CHN 17/2020, we expressed specific concerns that the application of the National Security Law could curtail the enjoyment of the freedoms of expression, peaceful assembly, and association, and interfere with the ability of civil society

¹ <https://www.ohchr.org/en/press-releases/2020/06/chinahong-kong-sar-security-law-must-meet-human-rights-obligations-says>

² https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FCHN-HKG%2FCO%2F4&Lang=en

organisations to perform their lawful functions. We expressed further concerns over the implications of the scope and substance of the law on the rule of law. Furthermore, in CHN 3/2022 the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism noted that the ICCPR is applicable to the Hong Kong SAR to law enforcement and judicial activity carried out under the National Security Law and applies to its implementation, including where individuals are detained in the HKSAR and subsequently transferred to mainland People's Republic of China.

We thank your Excellency's Government for the replies received to CHN 17/2020 and CHN 9/2021. However, we regret not yet having received a response to UA CHN 13/2020. While recognizing that the freedom of expression is not absolute and can be restricted under strict conditions as set out in article 19(3) ICCPR, as stated in your Excellency's Government's response, we remain concerned about the use of national security considerations to curtail legitimate expression and press freedom in Hong Kong SAR. In light of the new information received, we remain concerned at the continued application of the National Security Law, which does not appear to comply with international human rights law, including the requirements of legitimacy, necessity, and proportionality.

According to the information received:

Since 2013 up until his most recent arrest, Mr. Lai has been the subject of constant surveillance. In 2014, Mr. Lai was arrested after refusing to leave the site of a pro-democracy protest during the so-called Umbrella Movement. Prior to his subsequent arrest in 2020, Mr. Lai had for years been subjected to harassment, intimidation and attacks, including a petrol bomb attack on his home and the premises of his media outlet in 2015. No culprit has to date been held accountable for this crime.

Between June and December 2019, hundreds of thousands of demonstrators in Hong Kong SAR gathered, the vast majority of them peacefully, to protest against the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation Bill and make further political demands. Mr. Jimmy Lai was arrested first on 28 February 2020 and then on 18 April 2020, in relation to his attendance at a number of these gatherings, as outlined in AL CHN 9/2020. He was subsequently convicted of organising and taking part in 'unauthorised assembl(ies)' and sentenced to several months in prison arising for convictions in no less than four cases. This included a 13-month sentence handed down as a result of his participation in a 15-minute vigil to commemorate those killed in the military crackdown on the Tiananmen Square protests in 1989. Jimmy Lai completed these sentences in September 2022.

On 10 August 2020, Mr. Lai was arrested under article 29(4) of the National Security Law on charges of collusion with foreign powers and on charges of 'conspiracy to print, publish, sell, offer for sale, distribute, display and/or reproduce seditious publications' under the Crimes Ordinance, Cap. 200. The maximum sentence for an offence under article 29(4) of the National Security Law is life imprisonment. Although Mr. Lai was initially granted bail under stringent conditions, following an appeal by the Department of Justice, this decision was overruled by the Court of Final Appeal on 9 February 2021.

On the day of his arrest on 10 August 2020, the offices of Apple Daily were raided by over 200 police officers, its assets (HK\$18M³) were frozen and seven other company employees were also arrested. Journalistic material was seized under the arrest warrant. The newspaper was forced to shut down on 26 June 2021 as a result of the continuing freeze of its assets. On 12 January 2023, Next Digital Ltd, the parent company of Apple Daily was delisted from the Hong Kong Stock Exchange.

The collusion and sedition charges facing Mr. Lai relate to “articles published in Apple Daily, in interviews with various overseas media and in Twitter posts”.⁴ Such content was allegedly published between 1 July 2020 and 3 April 2021, and included reports on protests, opinion pieces and editorials critical of the authorities in mainland China and HKSAR and comments condemning the prosecution of protesters. This content was allegedly described by the Hong Kong SAR police as “*suspicious of requesting foreign or overseas institutions to impose sanctions, blockades or other hostile actions against Hong Kong Special Administrative Region or the People’s Republic of China*”. Mr. Lai is attracting a maximum sentence of life imprisonment.

Mr. Lai’s trial was due to begin on 1 December 2022 but was adjourned to 13 December 2022, and then adjourned again until 25 September 2023 following attempts by the Hong Kong SAR authorities to prevent a British lawyer (a member of Mr. Lai’s domestic legal team in Hong Kong) from representing Mr. Lai, denying him the right to be represented by a lawyer of his own choosing. The Hong Kong SAR government appealed to the People’s Republic of China’s Standing Committee of the National People’s Congress to interpret Hong Kong SAR’s Basic Law on whether foreign lawyers could represent clients facing national security charges, with the trial postponed awaiting the decision. A decision was communicated to the Hong Kong SAR government on 30 December 2022 stating that specific approval must be sought from Hong Kong SAR’s chief executive for any lawyer without local qualifications to work on national security cases. According to the information we received, foreign lawyers have been part of Hong Kong’s legal tradition for many years and were able to represent clients upon approval by the relevant court in Hong Kong. The NPCSC’s decision reportedly transfers this approval process from the judicial branch to the executive. Any decision to bar a lawyer is binding on the courts and not subject to judicial review. Meanwhile, Hong Kong SAR authorities had withheld the British lawyer’s application for an extension of his work visa in Hong Kong SAR, effectively forcing the lawyer to leave Hong Kong SAR.

In a separate case, on 10 December 2022, Mr. Lai was sentenced to five years and nine months in prison, having been convicted of violating the terms of a lease on a property where Apple Daily conducted business. Mr. Lai faces further two regulatory cases stemming from the national security charges against him which may strip him of property and assets, including shares in Apple Daily and the loss of his voting rights. Mr. Lai may also face a 10-year ban on the direction and management of companies.

³ Over 2 million USD

⁴ https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=132659&currpage=T

Mr. Lai's international legal team has also been subjected to acts of intimidation and harassment, seemingly in response to its advocacy on behalf of Mr. Lai. On 9 March 2020, a Chinese state-owned newspaper based in Hong Kong SAR, Wen Wei Po, published an article calling on the police in Hong Kong SAR to investigate whether Mr. Lai's lead international counsel, had violated Hong Kong SAR's National Security Law. In addition, foreign members of Mr. Lai's legal team have also received threats in the form of anonymous emails.

While we do not wish to prejudge the accuracy of these allegations, we express our grave concern relating to the arrest, detention and multiple prosecutions of Jimmy Lai and the forced closure of the news outlet Apple Daily which appear to be related to his criticism of the Chinese government and his support for democracy in Hong Kong SAR. Such political expression is permissible speech under article 19 of the ICCPR, as explained in the below Annex. Noting that Mr. Lai was charged with sedition and collusion under article 29 of the National Security Law, we recall that in CHN 17/2020 we expressed our deep concern in relation to this provision which, in our view, entails both serious problems of legality and undue limitations on freedom of expression. We further express concern on the continuous legal harassment consisting of the accumulation of legal proceedings against Mr. Lai and Apple Daily, which are not only a direct undue restriction to his freedom of expression and media freedom in Hong Kong SAR, but which also have broader negative implications on human rights in Hong Kong SAR, inter alia through the chilling effect on individuals, including journalists, media workers, human rights defenders and other civil society actors who wish to exercise their fundamental freedoms, express themselves freely, demonstrate peacefully, and participate in public and political life in Hong Kong SAR.

We are further concerned about the intimidation of members of Mr. Lai's defense team and his ability to be represented by lawyer of his choice as is guaranteed by Article 14(3)(b) of the ICCPR. The Human Rights Committee has made clear that restrictions on this right "must have an objective and sufficiently serious purpose and not go beyond what is necessary to uphold the interests of justice."⁵ Arbitrary obstacles to that choice hinder an individual's right to a fair trial and contravene the UN Basic Principles on the Role of the Lawyer. The Human Rights Committee also recommended to "take the measures necessary to protect lawyers, particularly those who represent opposition figures or protesters and request judicial reviews, from harassment, intimidation and attacks, in accordance with the Basic Principles on the Role of Lawyers. [The Committee also recommended to] ensure that all such allegations are promptly, independently and thoroughly investigated, that perpetrators are prosecuted and, if found guilty, punished with appropriate sanctions, and that victims have access to effective remedies".

We are issuing this appeal in order to safeguard the rights of Mr. Lai from irreparable harm and without prejudicing any eventual legal determination.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

⁵ Human Rights Committee, *Esergepov v. Kazakhstan* (Comm. no. 2129/2012), 29 March 2016, §11.5.

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 allegations.
2. Please clarify what are the factual and legal grounds for the arrest, detention and repeated charges against Mr. Jimmy Lai, including how these grounds comply with the legality, necessity and proportionality standards set out in article 19 (3) of the ICCPR.
3. Please explain the legal basis for the search of the Apple Daily's premises in August 2020 and the freezing of its assets, and its compatibility with articles 19 and 22 of the ICCPR.
4. Please explain how the decision to bar foreign lawyers' ability to represent clients facing national security charges unless they obtain specific approval from the Hong Kong SAR's chief executive, and not from a court, comports with guarantees of judicial independence and the rights of an individual facing criminal charges to be represented by a lawyer of their choosing.
5. Please comment on the allegations of intimidation and harassment by Chinese state-owned media of Mr. Lai's UK-based international legal team and any steps taken by the authorities against such behaviour.
6. Please clarify how your Excellency's Government ensures the implementation of the National Security Law in Hong Kong SAR respects its own article 4 and international human rights standards, including standards for freedom of opinion and expression, as well as of association.
7. Please confirm that the offense of "collusion with foreign forces" provided for in Articles 29-30 of the National Security Law excludes instances of cooperation with the United Nations, in particular its human rights bodies and mechanisms, in line with international human rights standards.
8. Please provide information about measures taken to ensure that journalists and media workers, civil society actors and human rights defenders in Hong Kong SAR, can carry out their professional activities in line with international human rights standards and in a safe and enabling environment without fear of harassment, criminalisation, or acts of intimidation of any kind.

We would appreciate receiving a response within 60 days. Past this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

We would like to inform your Excellency's Government that after having transmitted the information contained in the present communication to the Government, the Working Group on Arbitrary Detention may also transmit the case through its regular procedure in order to render an opinion on whether the deprivation of liberty was arbitrary or not. The present communication in no way prejudices any opinion the Working Group may render. The Government is required to respond separately to the allegation letter and the regular procedure.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

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

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Vice-Chair of the Working Group on Arbitrary Detention

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freedoms while countering terrorism

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, 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 Kong and article 39 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China.

Article 39 of the Basic Law of the Hong Kong Special Administrative Region holds that 'The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.' It further holds that 'The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this article.'

We also recall that article 4 of the National Security Law states that "Human rights shall be respected and protected in safeguarding national security in the Hong Kong Special Administrative Region [...] including the freedoms of speech, of the press, of publication, of association, of assembly, of procession and of demonstration".

In connection with above, we would like to refer your Excellency's Government to articles 6(1), 14, 19, 21 and 22 of the International Covenant on Civil and Political Rights (ICCPR), and articles 19 and 20 of the Universal Declaration of Human Rights (UDHR) which provides that "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. [...] Everyone has the right to freedom of peaceful assembly and association."

We would like to recall that article 19 of the ICCPR guarantees the right to opinion and expression. In the General Comment 34, the Human Rights Committee stated that States parties to the ICCPR are required to guarantee the right to freedom of opinion and expression, including inter alia 'political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism', subject only to admissible restrictions as well as the prohibition of propaganda for hatred and incitement to hatred, violence and discrimination.

Restrictions on the right to freedom of expression must be compatible with the requirements set out in article 19(3), that is, they must be provided by law, pursue a legitimate aim, and be necessary and proportionate. The State has the burden of proof to demonstrate that any such restrictions are compatible with the Covenant.

In this connection, the Human Rights Committee in General Comment 34 has held that "under any circumstance, can an attack on a person, because of the exercise

of his or her freedom of opinion or expression, including such forms of attack as arbitrary arrest, torture, threats to life and killing, be compatible with article 19. Journalists are frequently subjected to such threats, intimidation and attacks because of their activities. (...) All such attacks should be vigorously investigated in a timely fashion, and the perpetrators prosecuted (...).” Furthermore, in her report A/HRC/50/29, the Special Rapporteur for the right to freedom of opinion and expression expressed her concern about the criminalization of journalists including through laws that prohibit the criticism of state institutions or officials, negatively impacting media freedom and damaging democratic discourse and public participation.

We would like to remind your Excellency’s Government that, in its resolutions, A/HRC/RES/25/18, A/HRC/RES/27/31, A/HRC/RES/32/31 and A/HRC/RES/34/5, the Human Rights Council noted with grave concern that “in some instances, national security and counterterrorism 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”.

In this regard, we would like to bring to the attention of your Excellency’s Government that in his report to the General Assembly on the impact of counterterrorism measures on civil society, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism urged States to ensure that their counter-terrorism legislation is sufficiently precise to comply with the principle of legality, so as to prevent the possibility that it may be used to target civil society on political or other unjustified grounds (A/70/371, para 46(c)).

Article 14(1) of the ICCPR, which sets out a general guarantee of equality before courts and tribunals and the right of every person to a fair and public hearing by a competent, independent and impartial tribunal established by law. In addition, article 14 of the ICCPR provides a set of contain procedural guarantees that must be made available to persons charged with a criminal offence, including the right of accused persons to have access to, and communicate with, a counsel of their own choosing.

In its general comment no. 32 (2007), the Human Rights Committee explained that the right to communicate with counsel enshrined in article 14(3)(b) requires that the accused is granted prompt access to counsel. Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications. She should also be able “to advise and to represent persons charged with a criminal offence in accordance with generally recognised professional ethics without restrictions, influence, pressure or undue interference from any quarter” (CCPR/C/GC/32, para. 34).

In its general comment no. 35 on the Right to Liberty and Security of Person, the Human Rights Committee recalled that when national 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 international law (CCPR/C/GC/35).

Finally, we would like to refer your Excellency's Government to the Basic Principles on the Role of Lawyers, adopted on 7 September 1990 by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana (Cuba), in particular:

- Principle 16, according to which Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics;
- Principle 17, provides that “[w]here the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities”.
- Principle 18, provides that “[l]awyers shall not be identified with their clients or their clients' causes as a result of discharging their functions”.
- Principle 23, which enshrines that lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession.

We would also like to stress that national 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 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 (A/HRC/RES/22/6, para. 10).

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.