

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

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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; 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 34/6.

In this connection, we offer the following comments on the Decision of the National People's Congress on Establishing and Improving the Legal System and Enforcement Mechanisms for Safeguarding National Security in the Hong Kong Special Administrative Region (Draft) ("the Decision of the National People's Congress"). We express serious concern that the proposed changes to the Hong Kong SAR's legal system and enforcement mechanisms proposed in the Decision of the National People's Congress, fail to include assurances that the measures will be fully compliant with international human rights law, in particular the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR). Furthermore, we express concern that a lack of a precise definition in the Decision of the National People's Congress for what types of conduct qualify as seriously endangering national security may result in the limiting or infringement of fundamental freedoms. We recommend review and reconsideration of this draft legislation to ensure that the law is in compliance with China's international human rights obligations with respect to the Hong Kong SAR.

Similar concerns regarding the human rights challenges of previously issued anti-terrorism and national security legislation related to the Hong Kong SAR were the subject of a previous communication sent by Special Procedures dated 23 April 2020 (CHN 7/2020).

Overview of international human rights law standard applicable.

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 Kong¹ and Article 39 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China.² Under ICCPR art. 2, 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.

In particular we respectfully recall 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 would like to emphasize that any restriction on freedom of expression, including freedom to seek, impart and receive information, that a government seeks to justify on grounds of national security or counter terrorism, must have the genuine purpose and the demonstrable effect of protecting a legitimate national security interest.³ We would also like to stress that security and/or counter terrorism legislation with penal sanctions should not be misused against individuals peacefully 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 non-violent exercise of these rights is not a criminal offence. Counter terrorism and/or security legislation should not be used as an excuse to suppress peaceful minority groups and their members. National security legislation must also not be used to hinder the work and safety of individuals, groups, and organs of society engaged in promoting and defending human rights.⁴

We also bring your Excellency's Government attention to the "principle of legal certainty" under ICCPR article 15(1), 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.

¹ Available at <https://www.cmab.gov.hk/en/issues/jd3b.htm>.

² Xianggang Jiben Fa art. 39, available at https://www.basiclaw.gov.hk/en/basiclawtext/chapter_3.html.

³ Human Rights Committee, General comment No. 34, Article 19: Freedoms of opinion and expression; CCPR/C/GC/34.

⁴ A/HRC/RES/22/6, para. 10.

Concerns relating to the compatibility of the Decision of the National People's Congress with international human rights law.

We express serious concern that the Decision of the National People's Congress includes no references or assurances that the measures proposed will be in compliance with international human rights law. In particular, the Decision of the National People's Congress does not include any indications that the law will comply with the provisions of the ICCPR. Any law adopted by Your Excellency's Government with respect to the Hong Kong SAR must be consistent with the rights protected under the ICCPR.

We also express concern at the broad conceptualization of conduct that could be criminalized under the Draft National Security Law. Article VI authorizes the Standing Committee of the National People's Congress to make changes to the Hong Kong SAR's legal system and enforcement mechanisms in order to "prevent, stop, and punish any conduct that seriously endangers national security," including conduct such as "separatism, subversion of state power, or organizing or carrying out terrorist activities, as well as activities by foreign and overseas forces that interfere in the affairs of the Hong Kong Special Administrative Region." The Decision of the National People's Congress provides no specific definitions to limit what types of conduct qualify under these broad categories. For instance, there is no definition of what conduct is considered a "terrorist activit[y]" nor for what types of activities engaged in by foreign forces qualify as "interfer[ing] in the affairs of the Hong Kong Special Administrative Region of the People's Republic of China."

We respectfully draw your Excellency's Government's attention to the fact although there is no multilateral treaty definition of terrorism, 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 Suppression Conventions,⁵ 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.⁶ 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.⁷ We reiterate our earlier reference to the model definition of terrorism advanced by the Special Rapporteur on the promotion and protection of human rights and fundamental

⁵ 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 for 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

⁶ [S/RES/1566](#); [A/RES/51/210](#).

⁷ S/RES/1566, para. 3.

freedoms while countering terrorism which provides clear guidance to States on appropriate conduct to be proscribed as best practice.⁸ Those elements include,

- a) Acts, including against civilians, committed with the intention of causing death or serious bodily injury, or the taking of hostages,
- 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
- c) Such acts constituting offences within the scope of and as defined in the international conventions and protocols relating to terrorism.⁹

This cumulative approach functions as a safety threshold to ensure that it is only conduct of a terrorist nature that is identified as terrorist conduct.¹⁰

We express concern that the Decision of the National People's Congress' lack of specific definitions for what conduct "seriously endangers national security" may result in the criminalization or restriction of fundamental freedoms protected by the ICCPR, and in particular, the rights to freedom of expression and of peaceful assembly (art. 19 & 21). In resolution 7/36, the Human Rights Council stressed "the 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 . . ."¹¹ We respectfully remind your Excellency's Government that national security laws are not an 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."¹² By defining the range of conduct that "seriously endangers national security" so broadly, the Decision of the National People's Congress risks the conflation of the lawful exercise of civil disobedience and expression of opinions critical of or contrary to that of the government, with conduct that is appropriately addressed through extraordinary legal measures—such as terrorism.

Furthermore, we express concern that general assertions of conduct that threatens "national security" without proper definitions and limitations may severely curtail civic space and the rights of minorities and other civil society actors. 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,

⁸ A/59/565 (2004), para. 164 (d).

⁹ E/CN.4/2006/98, para 37.

¹⁰ E/CN.4/2006/98, para.38.

¹¹ [A/HRC/RES/7/36](#).

¹² A/61/267, paragraph 20.

the stigmatization of civil society actors, and excludes civil society from engaging in national and international fora.¹³ 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”¹⁴ 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.

The Decision of the National People's Congress' lack of specificity also implicates the right to legal certainty as protected by article 15(1) of the ICCPR. Criminal laws must be sufficiently precise to define what types of behaviour and conduct constitute a criminal offence and the consequences of committing such an offence. The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has called on States to ensure that their counter-terrorism and national security legislation in particular, is sufficiently precise in order to comply with the principle of legal certainty, so as to prevent the possibility that it may be used to target civil society on political or other unjustified grounds.¹⁵ The failure to restrict counter-terrorism laws and implementing measures to counter conduct which is truly terrorist in nature, has the potential to restrict and infringe upon the enjoyment of rights and freedoms in absolute ways including the exercise of freedoms of expression, opinion and of peaceful assembly.¹⁶

Finally, any detention of individuals resulting from changes to the legal system or enforcement mechanisms implemented in order to “prevent, stop, and punish” conduct that “seriously endangers national security” must be in compliance with international law. We would like to stress that detention can be considered arbitrary when based on vague or imprecise legislation, on discriminatory grounds, when it is imposed without a legal process or through one that is in clear violation international fair trial standards.¹⁷

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 assessment of the Decision of the National People's Congress.
2. Please explain how the Decision of the National People's Congress is compatible with Your Excellency's Government's obligations under

¹³ A/HRC/40/52, paras. 60, 61, 65.

¹⁴ A/HRC/40/52, para. 46.

¹⁵ [A/70/371](#), para. 46(b).

¹⁶ [E/CN.4/2002/18](#), Annex, para. 5.

¹⁷ GC 35, paras 17 and 22.

articles 2, 19, 20 and 27 of the Universal Declaration of Human Rights as well as articles 2, 19, 21, and 22 of the International Covenant on Civil and Political Rights.

3. Please explain whether the Decision of the National People's Congress will be used in relation to demonstrations in the Hong Kong Special Administrative Region of the People's Republic of China, and the potential for their retroactive application in this context. If it will be used in this context, please explain why, and how this is consistent with the Hong Kong Special Administrative Region of the People's Republic of China's international human rights obligations, in particular the ICCPR.
4. Please provide information, in detail, of how your Excellency's Government's counter-terrorism efforts comply with the United Nations Security Council resolutions 1373 (2001), 1456(2003), 1566 (2004), 1624 (2005), 2178 (2014), 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, 72/180 and 73/174, in particular with international human rights law.
5. Please provide further information of how the definition of terrorism in the Draft National Security Law will be construed so as to guarantee that measures taken pursuant to it do not unduly interfere with the Hong Kong Special Administrative Region of the People's Republic of China's international human rights obligations under the ICCPR, while complying with the principles of legality, necessity, proportionality and non-discrimination.
6. Please explain what kinds of oversight mechanisms will be implemented to ensure that the national security institutions that are to be set up by organs of the Central People's Government do not infringe upon the human rights of the Hong Kong Special Administrative Region of the People's Republic of China's residents.

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.

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