

***TOO SOON TO CONCEDE THE FUTURE: THE IMPLEMENTATION OF  
THE NATIONAL SECURITY LAW FOR HONG KONG***

**An HRIC White Paper with updated annotated bilingual chart of the NSL**

**October 16, 2020**



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## EXECUTIVE SUMMARY

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On June 30, 2020, culminating a legislative process marked by unprecedented haste, secrecy, and a complete lack of public consultation, the Standing Committee of the National People's Congress (NPCSC) unanimously passed the sweeping *Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (National Security Law or NSL)*. The NSL prohibits acts of secession, subversion, terrorism, and collusion with foreign forces and creates a set of new implementing entities, all effectively under the control of the Central People's Government (CPG).

Like the pilot of a plane who has rushed to take off without fully checking fuel or completing other essential preparations, the CPG has prioritized perceived existential security threats at the risk of failing to address the inevitable and complex legal, structural, and governance challenges the Law has created.

The immediate and serious impacts are being widely- and deeply-felt in Hong Kong, most visible among them are censorship and self-censorship in the public sphere and in education ("soft-brainwashing that will affect an entire generation," as one Hong Kong legal scholar observes), accompanied by government rhetoric that faithfully follows the script by the CPG.

But we believe it is too soon to concede the future of Hong Kong.

Against the troubling rights erosion made possible by the NSL and the political abandonment by the Hong Kong SAR government of its people are: the institutional and normative safeguards inherent in Hong Kong's judicial and legal system, and the safeguards provided by international human rights instruments, including treaties, covenants, declarations, guidelines, recommendations, and principles. Many UN independent human rights have invoked these safeguards in their published guidelines and communications to the Beijing government reminding it of its obligation to respect and guarantee the rights of the Hong Kong people.

Indeed, the NSL itself also requires the Hong Kong SAR to "respect and guarantee human rights," including those "under the Basic Law ... and the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong" (Art. 4), and to adhere to the rule of law (Art. 5).

To address these tensions and to ensure that the implementation of the NSL does not impermissibly restrict or undermine rights protected under HKSAR, national, and international law, *international human rights standards and norms must serve as the foundation for*

monitoring, assessing impact, developing effective safeguards, informing needed legislative reforms, and ensuring a safe and enabling environment for civil society.

In addition to the important international efforts to address the rights problems posed by the NSL, including public statements, national legislation, and the creation of safe harbors and other options for individuals who must or choose to leave Hong Kong, the international community must develop concrete approaches to support the diverse sectors of Hong Kong society, in particular the young people as they grapple with a severely restricted climate. They need solidarity and concrete and spirit support from the international community as they continue to struggle to shape the future(s) of Hong Kong.

## Summary of Recommendations

### RECOMMENDATIONS FOR THE CENTRAL AND HKSAR GOVERNMENTS

- *Issue a corrected and legally authoritative English translation of the NSL*
- *Strengthen cooperation with UN human rights mechanisms through concrete steps*
  - Issue standing invitations to visit to the High Commissioner for Human Rights and special procedures.
  - Take concrete steps to implement outstanding recommendations of UN treaty bodies and experts, including the UN Committee on the Rights of the Child's recommendation that the Hong Kong government reform relevant local laws and raise the minimum age of criminal responsibility to an internationally acceptable level.
- *Convene inclusive and diverse public consultation and input into the HKSAR's responses to The Human Rights Committee List of Issues*

The Committee specifically identified issues related to laws on national security, anti-sedition and anti-terrorism and requested clarification of state of emergency and laws on national security, anti-sedition, and anti-terrorism, including information regarding:

- *the relationship between the Covenant and the National Security Law adopted on June 30, 2020;*
- *measures in place or envisaged to ensure that the application and enforcement of the Law are not contrary to the provisions of the Covenant;*
- *procedural and legislative measures envisaged to enforce NSL Articles 56 and 57;*

- the scope of the NSL application, including its *extraterritorial application*;
  - the meaning of the phrase “*collusion with a foreign country or with external elements* to endanger national security” provided for in NSL Article 29;
  - the powers and immunities given under the NSL to the *Committee for Safeguarding National Security* of the Hong Kong Special Administrative Region and the *Office for Safeguarding National Security* of the Central People’s Government in the Hong Kong Special Administrative Region and the *accountability mechanisms* overseeing these bodies; and
  - information *on any amendments made or envisaged* to the laws of Hong Kong, China, in accordance with the National Security Law.
- *Accept technical assistance offered by UN experts including on matters in relation to national security, criminal, and counter-terrorism legislation*
  - *The People’s Republic of China should Ratify the ICCPR*

#### **RECOMMENDATION FOR LEGISLATORS, COURTS AND POLICYMAKERS**

- *Take on the dual-edged sword of vagueness*

Vague provisions in the NSL present the risk of the exercise of arbitrary discretion and restrictions on rights, but they should also be treated as an opportunity to define, clarify, and cabin the exercise of discretion and decision-making by the different actors. The specific issues raised by the Human Rights Committee in its List of Issues is a constructive clear agenda for legal reforms and amendment exercises, as well as focus for ongoing academic research and analyses to inform these legislative efforts.

*Note: Where applicable, quotations from the National Security Law reflect HRIC’s suggested alternate translation rather than the existing “official” English translation. (See Annex A: Updated HRIC annotated bilingual chart of The Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region with highlights of translation issues and suggested translation changes.)*

## 1. Introduction

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Authorized by the Decision of the National People’s Congress (NPC) of the People’s Republic of China (PRC) on May 28, 2020,<sup>1</sup> the Standing Committee of the National People’s Congress (NPCSC) drafted and then on June 30, 2020 unanimously passed the sweeping *Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (National Security Law or NSL)*.<sup>2</sup> Passed with an “unprecedented level of secrecy and haste”<sup>3</sup> without any transparency and public consultation, the NSL prohibits acts of secession, subversion, terrorism, and collusion with foreign forces<sup>4</sup> and creates a set of new implementing entities, all effectively under the control of the Central People’s Government (CPG).

The controversial law went into effect at 11:00 p.m. that night, when it was gazetted by the Hong Kong Special Administrative Region (HKSAR) government, marking the first time the people of Hong Kong saw the text. The NSL was promulgated against the background of widespread condemnation from the international community and fears among the Hong Kong people that it would violate the “one country, two systems” principle, the “high degree of autonomy” enshrined in Hong Kong’s constitution, the *Basic Law*, and, perhaps most importantly, the

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<sup>1</sup> The Decision authorizes the NPC Standing Committee (NPCSC) to draft the legislation, to be added directly into Annex III of the Basic Law—which contains a list of national laws relating to defense and foreign affairs that are applicable to Hong Kong. In effect, the Decision prescribes a legislative process that will bypass the HKSAR’s own legislative process. 全国人民代表大会关于建立健全香港特别行政区维护国家安全的法律制度和执行机制的决定 (*Quanguo renmindai biao dahui guanyu jianli jianquan xianggang tebie xingzhengqu weihu guojia anquan de falv zhidu he zhixing jizhi de jue ding*, Decision of the National People’s Congress on establishing and completing the Hong Kong Special Administrative Region’s legal system and implementing mechanisms for protecting national security), 13th National People’s Congress of the People’s Republic of China, 3<sup>rd</sup> Session (May 28, 2020). Available at: [http://www.xinhuanet.com/politics/2020-05/28/c\\_1126046490.htm](http://www.xinhuanet.com/politics/2020-05/28/c_1126046490.htm).

<sup>2</sup> *Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region* (2020). Available at: <https://www.elegislation.gov.hk/hk/A406>.

<sup>3</sup> Hualing Fu, “National Security Law: Challenges and Prospects,” in Johannes Chan and C.L. Lim, eds., *Law of the Hong Kong Constitution*, 3rd edition, Sweet & Maxwell Asia Ltd, forthcoming in 2021.

<sup>4</sup> For the key offences, there is no requirement of violence or use of force, which distinguishes the NSL from both Macau’s National Security Law and Hong Kong’s 2003 Draft National Security Bill, which required use of force and major unlawful means. Hualing Fu, “National Security Law: Challenges and Prospects,” in Johannes Chan and C.L. Lim, eds., *Law of the Hong Kong Constitution*, 3rd edition, Sweet & Maxwell Asia Ltd, forthcoming in 2021.

fundamental rights and freedoms for Hong Kong's people that China is obligated to protect under international law and treaties, and the rule of law in Hong Kong.

Despite the law's expansive scope and immediate and widely-felt impact so far, we believe there is still space for constructively pressing back against the encroachments on fundamental rights and the erosion of Hong Kong's autonomy and the independence of its institutions. This legal brief:

- reviews the implementation of the *National Security Law* since its promulgation;
- provides an overview of the key entities established by the law and highlights related governance and accountability concerns;
- outlines an international human rights framework as a foundation for monitoring, assessing, and promoting compliance by the central and HKSAR governments; and
- offers concrete suggestions for further engagement by diverse stakeholders.

We also present in Annex A, an *updated* annotated bilingual chart of the NSL (we issued the original annotated chart on July 5). Although an English version was released by [Xinhua](#) News Agency on July 1, 2020, which was then [gazetted](#) by the HKSAR government on July 3—that “official” English translation is not a legally authoritative version. The lack of a legally authoritative English version of the NSL presents a fundamental obstacle to meaningfully understanding the law for non-Chinese speaking/fluent lawyers, judges, journalists, and Hong Kong residents, as well as for the universe of foreign persons, organizations, and others outside the territory of China who are potentially impacted by the NSL.

In the updated chart, we have reviewed the existing English translation against the Chinese source text and noted errors and omissions and inserted suggested replacement translation which we consider to be more accurate. We hope our updated annotation will serve as a useful tool for any English reader who would like or need to read the *National Security Law* closely and accurately. We welcome comments and suggestions. (Please send your comments to [communications@hrichina.org](mailto:communications@hrichina.org), with “NSL translation” in the subject line.)

## 2. Implementation of the National Security Law to Date

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Despite the ongoing assault on rights, and complex structural and conceptual tensions and conflicts embedded in the NSL, the pronouncement of the “death” of Hong Kong and the rule of law remains a premature conclusion. In addition to the survival of the institutional and normative safeguards inherent in Hong Kong’s judicial and legal systems, the people of Hong Kong have remained resilient against all odds. And it remains the obligation of the central and HKSAR governments to ensure that international human rights standards are effectively and meaningfully implemented both formally and in actual practice by the key actors empowered to carry out key roles set out in the NSL. The NSL, together with the global impacts of the COVID-19 pandemic, has also shifted the geopolitical landscape, resulting in greater political will for collective action to address the threats posed to the rights and freedoms protected by international law.

Significantly, and as repeatedly pointed out by the CPG and HKSAR authorities, the NSL also specifically includes provisions that require the HKSAR to “respect and guarantee human rights,” including “freedoms of speech, of the press, of publication, of association, of assembly, of procession and of demonstration, which the residents of the Region enjoy under the Basic Law . . . and the provisions of the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* as applied to Hong Kong” (Art. 4), and to adhere to the rule of law (Art. 5). The *Hong Kong Bill of Rights Ordinance* (Cap. 383)<sup>5</sup> incorporates the ICCPR into Hong Kong domestic law.<sup>6</sup>

### ***Despite targeting of peaceful exercise of fundamental rights, yet still—people persist***

The chief target of the NSL was made immediately clear after its passage on June 30. On the following day, July 1, the day of the annual pro-democracy march in Hong Kong, which the police had banned for the first time since 1997 (citing public health risks amid the coronavirus pandemic), thousands who took to the streets defying the ban encountered a new police warning flag, “the purple flag,” which announced:

This is a police warning. You are displaying flags or banners/chanting slogans, or conducting yourselves with an intent such as secession or subversion, which may

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<sup>5</sup> *Hong Kong Bill of Rights Ordinance* (Cap. 383) (1991): EN: <https://www.elegislation.gov.hk/hk/cap383>, CH: [https://www.elegislation.gov.hk/hk/cap383!zh-Hant-HK?INDEX\\_CS=N&xpid=ID\\_1438403137033\\_001](https://www.elegislation.gov.hk/hk/cap383!zh-Hant-HK?INDEX_CS=N&xpid=ID_1438403137033_001).

<sup>6</sup> The *Hong Kong Bill of Rights Ordinance* was enacted in June 1991, prior to hand-over, but remains effective post 1997.

constitute offences under the ‘HKSAR National Security Law.’ You may be arrested or prosecuted.<sup>7</sup>

Of the 370 people arrested by the police that day, ten were arrested under the NSL, on suspicion of secession for displaying or possessing signs or other items with political slogans.<sup>8</sup> Within the chilled local climate, any expression or opinion that does not toe the officially mandated line now risks criminal prosecution or at the very least, threats, harassment, and warnings.<sup>9</sup> Yet, the CPG and HKSAR authorities have repeatedly insisted that the NSL would target “only a small number of people.” Leaving aside the issue that violations of rights are violations of rights no matter how many people are targeted, the NSL’s main impact so far is not criminal prosecutions but a climate of self-censorship and fear (both in Hong Kong as well as abroad) that the law has created with the threat of criminal sanctions and actions by the authorities.

With alarming speed in the months since July, and often invoking the necessity of COVID-19 health measures, the central and HKSAR governments have, largely through proclamation, moved to curtail or disavow many of the rights and institutional safeguards that have made Hong Kong a free society with a rule of law. The authorities have:

- banned the singing of the Hong Kong protest anthem, “Glory to Hong Kong”;
- suspended elections of the Legislative Council (LegCo) by one year;
- targeted independent media, including the arrest of media tycoon and democracy supporter Jimmy Lai, and narrowed the definition of “media representatives”<sup>10</sup> and access to government press briefings;<sup>11</sup>

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<sup>7</sup> *South China Morning Post Video*, “New purple flag warning protesters about breaking national security law used by Hong Kong police.” July 1, 2020. Available at: <https://www.scmp.com/video/hong-kong/3091340/new-purple-flag-warning-protesters-about-breaking-national-security-law>.

<sup>8</sup> See databases maintained by Kong Tsung-gan tracking the total number of protesters arrested and prosecuted since August 2019, with the names and brief information of those arrested. Updated frequently. Available at: [Arrests and trials of Hong Kong protesters](#).

<sup>9</sup> On July 3, the spokesperson for the High Commissioner for Human Rights stated: “[w]e are alarmed that arrests are already made under the [NSL] . . . when there is not full information and understanding of the scope of the offences.” Among the concerns expressed are the vague and overly broad definition of the offenses which “may lead to discriminatory or arbitrary interpretation and enforcement”; and the “collusion” offense which “may lead to a restriction of civic space and of the possibility for civil society actors to exercise their right to participate in public affairs.” *United Nations Human Rights Office of the High Commissioner*, Press briefing note on China / Hong Kong SAR by Spokesperson for the UN High Commissioner for Human Rights on the National Security Law Rupert Colville, July 3, 2020. Available at: [EN](#): <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26033&LangID=E>, [CH](#): <https://www.ohchr.org/CH/NewsEvents/Pages/DisplayNews.aspx?NewsID=26033&LangID=C>.

<sup>10</sup> *Channel News Asia*, “Hong Kong press body says new police media rules could limit scrutiny.” September 24, 2020. Available at: <https://www.channelnewsasia.com/news/asia/hong-kong-press-body-says-new-police-media-rules-could-limit-scrutiny-13141422>.

<sup>11</sup> Leung, Christy, and Cheung, Tony, “Hong Kong police limit access to press briefings to news outlets recognised by government, sparking concern and criticism from media groups.” *South China Morning Post*, September 22, 2020. Available at: <https://www.scmp.com/news/hong-kong/law-and-crime/article/3102527/who-qualifies-media-hong-kong-police-revising>. In response to the increasingly restrictive environment, foreign media and business have also moved some of their operations out of

- pulled books from public libraries, particularly books by pro-democracy figures;<sup>12</sup> and
- accused teachers of “inappropriately” addressing an expanding list of prohibited sensitive topics, including June Fourth, the social protest movement in 2019, localism, and self-determination.

These ongoing actions by the authorities have *directly impacted the peaceful exercise of rights, including freedom of expression, the right to peaceful assembly, the right to participate, access to information, and the independence of the media, and academic freedom.* The Hong Kong Bar Association (HKBA) has also raised serious doubts about the legal and evidential basis of the Hong Kong government’s decision, citing public health risks, to postpone the LegCo election by one year instead of a shorter period, and without consulting civil society. Their statement highlights that “international human rights experts have repeatedly warned that governments must not use COVID-19 as a pretext to suppress human rights.”<sup>13</sup> Pro-democracy figures, including LegCo member Ted Hui,<sup>14</sup> Joshua Wong, Agnes Chow, and others also report being followed by unidentified persons and vehicles.

Yet despite these restrictions and intimidation, Hong Kong people continue to sing “Glory to Hong Kong,” including at recent gatherings.<sup>15</sup> Pro-democracy lawmakers engaged a public

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Hong Kong, e.g., the NYT moved its digital news section to Seoul, South Korean tech firm Naver Corp moved its servers in Hong Kong to Singapore to protect user data. *Mercator Institute for China Studies*, “Transforming Hong Kong: 100 days of the National Security Law,” October 7, 2020. Available at: <https://merics.org/en/graphic/transforming-hong-kong-100-days-national-security-law>.

<sup>12</sup> Westbrook, Laura, “National security law: Hong Kong libraries pull books by some localist and democracy activists for review.” *South China Morning Post*, July 4, 2020. Available at: <https://www.scmp.com/news/hong-kong/politics/article/3091842/national-security-law-hong-libraries-pull-books-some>.

<sup>13</sup> Statement of the Hong Kong Bar Association on the Hong Kong Government's Decision to Postpone the Legislative Council Election, August 2, 2020. Available at: <https://www.hkba.org/sites/default/files/20200802 - HK Government Decision to Postpone the Legislative Council Election %28Eng%29.pdf>

<sup>14</sup> Ted Hui was struck by a car in Kennedy Town, Hong Kong, on August 14, 2020 by the same vehicle that had been following him for days. According to Hui, when the police arrived they did not search the vehicle or ask the driver to step out. The Hong Kong police force said that the men were journalists and that the driver passed a breath test, though it was not confirmed which media outlet the journalists are from. Grundy, Tom, “Video: Hong Kong democrat Ted Hui tackled by police after confronting vehicle he said was following him.” *Hong Kong Free Press*, August 15, 2020. Available at: <https://hongkongfp.com/2020/08/15/video-hong-kong-democrat-ted-hui-tackled-by-police-after-confronting-vehicle-he-said-was-following-him/>. A widely circulated video on social media shows the police failing to search the vehicle or speak with the driver, but instead clearing the crowd gathering so that the vehicle could drive away.

<sup>15</sup> Teenage boy played popular protest tunes on a recorder at a crowded intersection as some demonstrators sang along. Ramzy, Austin, Yu, Elaine, and May, Tiffany, “On China’s National Day, Hong Kong Police Quash Protests.” *The New York Times*. October 1, 2020. Available at: <https://www.nytimes.com/2020/10/01/world/asia/hong-kong-protests-china.html>; Ho, Kelly, “Protest anthem ‘Glory to Hong Kong’ will survive despite tough new security law and ban in schools, composer says.” *Hong Kong Free Press*, September 19, 2020. Available at: <https://hongkongfp.com/2020/09/19/protest-anthem-glory-to-hong-kong-will-survive-despite-tough-new-security-law-and-ban-in-schools-composer-says/>; Mullany, Gerry, “Hong Kong Bans Protest Song and Other Political Expression at Schools.” *The New York Times*, July 8, 2020. Available at: <https://www.nytimes.com/2020/07/08/world/asia/hong-kong-students-protests-china.html>. Sadly, Oliver Ma, who was arrested twice for singing protest anthem on street, has stopped performing. Coconuts Hong Kong, “Arrested twice and facing a dubious weapons charge, ‘Glory to Hong Kong’ busker says he’s stopped performing.” *Coconuts Hong Kong*, September 10, 2020.

consultation exercise on whether they should continue to serve in the government extended LegCo term.<sup>16</sup> After the police denied a permit for a march, hundreds of people still assembled on October 1, National Day of the PRC, and this following a warning the day before by Luo Huining, Director of the Liaison Office of the Central People's Government in Hong Kong (LOCPG), that patriotism is a duty, not a choice.<sup>17</sup>

Regarding the widely-feared exercise of CPG authorities assuming jurisdiction, the first group of individuals detained outside Hong Kong since the NSL came into effect was not charged under the NSL, but under mainland criminal offences. After detaining 12 Hong Kong individuals aboard a speedboat in Chinese waters attempting to flee to Taiwan on August 23,<sup>18</sup> the Chinese authorities held them, aged 16 to 33, for more than a month until officially arresting them on September 30: ten under suspicion of making illegal border crossings, and two of helping others to escape Hong Kong.<sup>19</sup> That Chinese authorities stopped short of invoking Article 55 jurisdiction may reflect a recognition of the complex legal, procedural, and institutional issues such jurisdiction will inevitably present and that they are not yet prepared to address.

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Available at: <https://coconuts.co/hongkong/news/arrested-twice-weapons-charge-glory-hong-kong-busker-oliver-ma-stopped-performing/>.

<sup>16</sup> When Carrie Lam postponed the LegCo election due to COVID-19 and Beijing extended the current LegCo term for a year, pro-democracy lawmakers were divided as to whether they should stay on to serve another term. Raymond Chan and Eddie Chu announced they would not serve out their extended terms, Tanya Chan quit politics for personal reasons, and the remaining 19 out of 22 democratic lawmakers decided to remain in the legislature. Cheung, Tony, Wong, Natalie, and Chung, Kimmy, “Hong Kong leader delays legislative elections, asks Beijing to resolve legal questions, citing coronavirus pandemic dangers.” *South China Morning Post*, July 31, 2020. Available at: <https://www.scmp.com/news/hong-kong/politics/article/3095461/hong-kong-legislative-council-elections-be-postponed>; Cheung, Tony, Cheung, Gary, and Chung, Kimmy, “Beijing extends Hong Kong’s Legislative Council term by ‘at least one year’ but kicks ball back to Carrie Lam to decide how disqualified lawmakers can continue their duties.” *South China Morning Post*, August 11, 2020. Available at: <https://www.scmp.com/news/hong-kong/politics/article/3096895/chinas-top-legislative-body-passes-resolution-extending>; Wong, Natalie, and Cheung, Tony, “Most of Hong Kong’s opposition lawmakers to serve out extended term in Legislative Council, after supporters narrowly back move in poll.” *South China Morning Post*, September 29, 2020. Available at: <https://www.scmp.com/news/hong-kong/politics/article/3103434/hong-kong-opposition-poll-shows-supporters-narrowly-back>.

<sup>17</sup> “As a Chinese person, being a patriot is never by choice. It is an obligation and it is the correct way.” Wong, Rachel, “Beijing’s Liaison Office Chief Luo Huining says security legislation ended unrest in Hong Kong,” *Hong Kong Free Press*, September 30, 2020. Available at: <https://hongkongfp.com/2020/09/30/beijings-liaison-office-chief-luo-huining-says-security-legislation-has-ended-unrest/>.

<sup>18</sup> Chung, Kimmy and Leung, Christy, “National security law: arrested Hong Kong activist among group caught by China’s coastguard while fleeing to Taiwan, sources confirm.” *South China Morning Post*, August 23, 2020. Available at: <https://www.scmp.com/news/hong-kong/politics/article/3099094/national-security-law-arrested-hong-kong-activist-among>.

<sup>19</sup> Wen, Gang, “Arrest of 12 HK fugitives approved by mainland authorities,” *China Daily*, October 4, 2020. Available at: <https://www.chinadaily.com.cn/a/202010/04/WS5f79b276a31024ad0ba7d2b3.html>. They have all been denied access to lawyers of their choice and family visits. Feng, Gao, and Man, Sing, “Hong Kong Detainees in China Denied Meetings With Defense Lawyers,” *Radio Free Asia*, September 7, 2020. Available at: <https://www.rfa.org/english/news/china/hongkong-protect-09072020154801.html>; Wong, Rachel, “Rights lawyer says China may have appointed ‘state lawyers’ to Hongkonger arrested whilst fleeing by boat,” *Hong Kong Free Press*, September 9, 2020. Available at: <https://hongkongfp.com/2020/09/09/rights-lawyer-says-china-may-have-appointed-state-lawyers-to-hongkonger-arrested-while-fleeing-by-boat/>. On October 9, media reports citing leaked document and flight records of Hong Kong’s Government Flying Service (GFS) suggest Hong Kong police’s involvement in the group’s capture.

***The Law creates an architecture of direct and indirect Central Government supervision, monitoring, and control of national security in Hong Kong—and jurisdictional tensions***

In addition to the overt assault on fundamental rights and freedoms, the people of Hong Kong are also facing comprehensive social control under a Beijing-installed national security architecture established under the NSL. The NSL establishes four new government entities in Hong Kong and a corresponding new structure of oversight and accountability that allow Beijing to assert direct and indirect control over all national security matters—from policy to investigation to prosecution and adjudication—in Hong Kong. Shrouded in secrecy, the work of these entities ranges from formulating national security policies for Hong Kong to intelligence-gathering to case investigation to prosecution.

OVERVIEW OF ENTITIES, FUNCTIONS, AND STRUCTURE

The four entities are (see Annex B for an overview of the background of appointed personnel of these four entities):

- The Committee for Safeguarding National Security (CSNS) (Arts. 12-15, 43)

The CSNS, with “primary responsibility for safeguarding national security” in Hong Kong (Art. 12), is essentially the executive and policy arm of Beijing’s national security enterprise in Hong Kong. The Committee is chaired by Hong Kong Chief Executive Carrie Lam and composed of top-level HKSAR government officials (Art. 13). Its National Security Advisor, “designated by the Central People’s Government” (Art. 15), is Luo Huining, Director of the Liaison Office of the Central People’s Government in Hong Kong (LOCPG), Beijing’s top official in Hong Kong.

- The Office for Safeguarding National Security (OSNS) (Arts. 48-60)

The OSNS, staffed entirely by personnel sent from Beijing (Art. 48, para. 2) and directly funded by the CPG (Art. 51), is the entity with the most expansive on-the-ground roles, including in the following areas:

- *operation and coordination*: collecting intelligence and handling cases (Art. 49), and coordinating actions and information sharing among all Hong Kong national security authorities (Art. 53, para. 2)
- *oversight*: overseeing, in conjunction with the CSNS, Hong Kong’s national security work (Art. 53, para. 1)
- *policy*: providing input into major strategies and policies (Art. 49 (1))

- *cooperation with key Beijing representative bodies in Hong Kong*: works with the LOCPG, Office of the Commissioner Office of Commissioner of the Ministry of Foreign Affairs in Hong Kong, and the HK Garrison of the People’s Liberation Army (Art. 52)

The OSNS is also a part of a tripartite authority—along with the Office of the Commissioner of the MFA in Hong Kong and the Hong Kong SAR government—empowered to “*take necessary measures to strengthen the management*” of all foreign government missions, INGOs, and foreign NGOs and news operations in Hong Kong (Art. 54).

Perhaps the most controversial function of the OSNS is its *power to assert jurisdiction over cases under three circumstances*: a “complex” case involving “a foreign country or overseas forces,” “a serious situation” where the HKSAR government is unable to enforce the NSL, and “a situation of actual major and imminent threat to national security” (Art. 55).

When the OSNS asserts jurisdiction over a case, PRC criminal procedure law and other related national laws shall apply to the procedural matters, and the case will be prosecuted by a prosecuting body designated by the Supreme People’s Procuratorate and tried by a court designated by the Supreme People’s Court (Art. 56).

- The Department for Safeguarding National Security of the Hong Kong Police Force (DSNS) (Arts. 16, 17)

Led by and staffed with Hong Kong Police Force (HKPF) personnel, the DSNS is tasked with *both* national security-related law enforcement duties centered on criminal investigation *and* intelligence-gathering and “anti-interference investigation” (Art. 17). It is mandated to undertake tasks “assigned” by the CSNS (Art. 17 (5)) and accept its supervision (Art. 43, para. 2). The head of DSNS is appointed by the Chief Executive after seeking “the opinion” of the OSNS (Art. 16, para. 2).

The NSL also authorizes the DSNS to “recruit qualified specialists and technical personnel” from outside Hong Kong for assistance (Art. 16, para. 3), opening up room for PRC agents to undertake law enforcement duties.

- The Specialised National Security Crimes Prosecution Division of the Department of Justice (SPD) (Art. 18)

The SPD is “responsible for the prosecution of offences endangering national security and other related legal work,” with prosecutors appointed by the Secretary of Justice “after obtaining the consent” of the CSNS. The head of the SPD is appointed by the Chief Executive after seeking “the opinion” of the OSNS.

#### CONCERNS PRESENTED BY THE COMMAND, OVERSIGHT, AND ACCOUNTABILITY STRUCTURE

*Beijing-led authorities with direct and indirect control over all national security matters in Hong Kong undermine Hong Kong’s constitutionally guaranteed “high degree of autonomy”*

- The CSNS and OSNS—the top two national security authorities in Hong Kong, which jointly *oversee, guide, and support* all the national security work in Hong Kong—answer directly to Beijing:
  - CSNS is “under the supervision of and accountable to the Central People’s Government.” (Art. 12)
  - OSNS staff are “subject to the supervision of the national supervisory authorities.” (Art. 50)
- The OSNS has the power to shape both the DSNS and the SPD, since the Law requires the Chief Executive to seek OSNS’s opinion before appointing the respective heads.
- Required to perform tasks assigned by the CSNS and accept its supervision, the DSNS answers not to the HKPF but to the CSNS.

*The NSL provisions putting the CSNS and OSNS above Hong Kong law raise related questions*

The OSNS is entirely staffed by mainland agents sent to Hong Kong who are empowered to assert jurisdiction over cases for handling by the mainland Chinese judicial system. Various provisions of the Law also raise concerns regarding *whether the new entities and their staff are subject to Hong Kong law or jurisdiction* in light of unclear and conflicting provisions. Article 50 states that the staff of the OSNS are subject to the supervision of national supervisory bodies and shall “*abide by the laws of the HKSAR as well as national laws.*” (Emphasis added.)

However, the NSL also states that “. . . acts performed in the course of duty [by the OSNS] *shall not be subject to the jurisdiction*” of the HKSAR (Art. 60, para 1); and a holder of an OSNS identification document and articles used by the holder “shall not be subject to inspection, search or detention” by Hong Kong law enforcement officers (Art. 60, para. 2). *But what are the parameters of “course of duty”?* If the holders of OSNS identification documents and articles, including vehicles used, are not subject to inspection, search or

detention, *what are the safeguards* for ensuring that the OSNS “does not infringe on the lawful rights and interests of any individual or organization” as required by Article 50?

The CSNS’s work is also not subject to interference by any “institution, organization or individual” in the HKSAR or public disclosure; and its decisions “shall not be subject to judicial review” (Art. 14, para. 2). What are the safeguards for ensuring that the CSNS’s work is in compliance with the *Basic Law* and other HKSAR laws? Although the CSNS is technically established by the HKSAR government, it is also directly under the supervision of and accountable to the CPG (Art. 12). Article 22 of the *Basic Law* prohibits interference in the affairs of HKSAR by departments of the CPG and states that all offices set up by departments of the CPG “shall abide by the laws of the Region.”<sup>20</sup> Can it be argued that the OSNS is a de facto “department” of the CPG and therefore its staff are subject to Hong Kong law?

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<sup>20</sup> Article 22 of the *Basic Law* states that “[n]o department of the Central People’s Government and no province, autonomous region, or municipality directly under the Central Government may interfere in the affairs which the Hong Kong Special Administrative Region administers on its own in accordance with this Law.”

### 3. Implementation Challenges: Taking Rights Seriously

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#### *Centering an international human rights framework*

As our description above of the implementing entities created under the NSL highlights, the Law contains within itself the inevitable tensions between a Leninist legal system that constitutionalizes the dominance of a one-party state,<sup>21</sup> and Hong Kong's legal system with its developed common law jurisprudence and independent judiciary. These structural and ideological tensions are exacerbated by the Law's vague and overbroad definitions of national security crimes, expansive extraterritorial jurisdiction, and lack of clarity on its appropriate application and on its relationship to other HKSAR and national laws and relevant international law.

Like the pilot of a plane who has rushed to take off without fully checking fuel or completing other essential preparations, the CPG has prioritized perceived existential security threats at the risk of failing to address the inevitable and complex legal, structural, and governance challenges the Law has created. To address these tensions and to ensure that the implementation of the NSL does not impermissibly restrict or undermine rights protected under HKSAR, national, and international law, *international human rights standards and norms must serve as the foundation* for monitoring, assessing impact, developing effective safeguards, informing needed legislative reforms, and ensuring a safe and enabling environment for civil society.<sup>22</sup>

Human rights standards and norms are set out in international human rights instruments which consist of treaties, covenants, declarations, guidelines, recommendations, and principles. This well-developed and evolving body of standards and norms is applied by states, civil society, and United Nations independent experts and human rights mechanisms to monitor, assess, and promote compliance by governments. Core documents include the *Universal Declaration of Human Rights* (UDHR),<sup>23</sup> the *International Covenant on Civil and Political Rights* (ICCPR),<sup>24</sup>

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<sup>21</sup> For critical analyses of impact or the relationship of mainland criminal law and procedure law to the NSL HKSAR, see series of articles posted by long-time Chinese law expert, Professor Cohen, available at: [Jerome A. Cohen's blog: http://www.jeromecohen.net/jerrys-blog?offset=1597258389940](http://www.jeromecohen.net/jerrys-blog?offset=1597258389940)

<sup>22</sup> "International human rights law requires States and other duty bearers to create and support a safe and enabling environment that allows civil society to exercise fully the rights and freedoms that are indispensable for them to fulfil their essential role of bringing the voices of all parts of society to the table." See: Para. 57 of the *Report of the United Nations High Commissioner for Human Rights*, "Procedures and practices in respect of civil society engagement with international and regional organizations," April 18, 2018. Available at: <https://undocs.org/A/HRC/38/18>

<sup>23</sup> The *Universal Declaration of Human Rights* (UDHR) (1948). Available at: [https://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf).

<sup>24</sup> The ICCPR was adopted by the General Assembly in 1966 and entered into force in March 1976. Available at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).<sup>25</sup> International human rights principles also clearly state that a “*free, open, safe and secure Internet*” as well as the access it gives to information are critical for “individuals to make well-informed decisions and to mobilize people to call for justice, equality, accountability and better respect for human rights.”<sup>26</sup> (Emphasis added.) The *Vienna Declaration and Programme of Action*<sup>27</sup> reaffirmed that rights are “*universal*” (emphasis added), and that “democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing.”

As the world grapples with the most serious global pandemic since the last century, international experts and UN human rights bodies<sup>28</sup> have especially highlighted the importance of *respect for human rights* across the spectrum, including economic, social, and cultural rights, and civil and political rights, as *fundamental to the success of public health response and recovery from the pandemic*. The UN General Assembly has emphasized that “States need to ensure that all human rights are respected, protected and fulfilled while combating the pandemic and that their responses to the COVID-19 pandemic respect and are in full compliance with their obligations under international law, including international humanitarian law and international human rights law, while emphasizing that all human rights are universal, indivisible, interrelated, interdependent, and mutually reinforcing.”<sup>29</sup>

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<sup>25</sup> The ICESCR was adopted by the General Assembly in 1966 and entered into force in January 1976. Available at: <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>.

<sup>26</sup> “The same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one’s choice, in accordance with article 19 of the Universal Declaration of Human Rights and of the International Covenant on Civil and Political Rights.” *Human Rights Council*, “The Promotion, Protection and Enjoyment of Human Rights on the Internet” (A/HRC/38/L.10). July 2, 2018., Available at: [http://ap.ohchr.org/documents/E/HRC/d\\_res\\_dec/A\\_HRC\\_38\\_L10.docx](http://ap.ohchr.org/documents/E/HRC/d_res_dec/A_HRC_38_L10.docx). See also UN Human Rights Council, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue,” (A/HRC/17/27). May 16, 2011. Available at: <https://documents-ddsny.un.org/doc/UNDOC/GEN/G11/132/01/PDF/G1113201.pdf>.

<sup>27</sup> Adopted by consensus at the World Conference, endorsed by the forty-eighth session of the General Assembly (resolution 48/121, of 1993). Available at: <https://www.ohchr.org/Documents/ProfessionalInterest/vienna.pdf>.

<sup>28</sup> *Chairpersons, Ten UN Treaty Bodies*, “UN Human Rights Treaty Bodies call for human rights approach in fighting COVID-19,” March 24, 2020. Available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25742&LangID=E>. The UN Human Rights Committee also issued a statement reminding states parties to the ICCPR that any derogations from the rights protected must be in compliance with their treaty obligations and with standards on derogations. See *UN Human Rights Committee*, “Statement on derogations from the Covenant in connection with the COVID-19 pandemic,” April 24, 2020, by clicking “Committee adopts statement on derogations from the Covenant in connection with the COVID-19 pandemic, 24 April 2020”. Available at: <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx>.

<sup>29</sup> The omnibus Resolution was adopted by the General Assembly on September 11, 2020. Preamble of the General Assembly resolution A/74/L.92, “Comprehensive and coordinated response to the coronavirus disease (COVID-19) pandemic,” September 10, 2020. Available at: <https://undocs.org/A/74/L.92>. See also Statement by UN Special Procedures holder: “While we recognize the severity of the current health crisis and acknowledge that the use of emergency powers is allowed by international law in response to significant threats, we urgently remind States that *any emergency responses to the coronavirus must be proportionate, necessary and non-discriminatory*... The use of emergency powers must be publicly declared and should be notified to the relevant treaty bodies *when fundamental rights including movement, family life and assembly are being significantly limited*... Moreover, emergency declarations based on the Covid-19 outbreak should not be used as a basis to target

Michelle Bachelet, UN High Commissioner for Human Rights, also recently warned: “With COVID-19, a fast-moving and global health crisis has collided with many slower, and more entrenched, political, social and economic crises around the world. Those multiple underlying fractures, which have made us more vulnerable to this virus – and create entry points for its harms – *result primarily from political processes that exclude people’s voices, as well as gaps in human rights protection.*”<sup>30</sup> (Emphasis added.)

### ***The NSL and international human rights—on the books and in practice***

Two key rights-related NSL provisions<sup>31</sup> are relevant and significant for their inclusion in a national law:

#### Article 4:

“The rights and freedoms, including the freedoms of speech, of the press, of publication, of association, of assembly, of procession and of demonstration, which the residents of the Region enjoy under the *Basic Law* of the Hong Kong Special Administrative Region and the provisions of the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* as applied to Hong Kong, shall be protected in accordance with the law.”

#### Article 5:

“The principle of the rule of law shall be adhered to in preventing, suppressing, and imposing punishment for offences endangering national security. A person who commits an act which constitutes an offence under the law shall be convicted and punished in accordance with the law. No one shall be convicted and punished for an act which does not constitute an offence under the law”.

“*A person is presumed innocent until convicted by a judicial body. The right to defend himself or herself and other rights in the legal process that a criminal suspect, defendant, and other parties in judicial proceedings are entitled to under the law shall be guaranteed. No one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in judicial proceedings.*” (Emphases added.)

Both provisions technically read as incorporating international standards and referencing protected rights that also include international standards for permissible limitations on rights.

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particular groups, minorities, or individuals. It *should not function as a cover for repressive action under the guise of protecting health nor should it be used to silence the work of human rights defenders.* (Emphasis added). Available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25722&LangID=E> March 16, 2020.

<sup>30</sup> Statement during Item 2 of the 45<sup>th</sup> session of the Human Rights Council on September 14, 2020. Available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26226>.

<sup>31</sup> HRIC translations of NSL provisions are cited. Please see Appendix A for full annotations.

Article 29 of the UDHR states that *any restrictions on these rights and freedoms* are subject “only to such limitations as are *determined by law* solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare *in a democratic society*.”<sup>32</sup> (Emphases added.)

However, international human rights treaty obligations of states include undertaking *legislative or other measures to give effect* to the rights recognized, including the *right to an effective remedy* and to have *claims determined by competent, judicial, administrative, or legislative authorities*.<sup>33</sup> So, in order to comply with international standards and obligations, the central and HKSAR governments must ensure not only rights protections on paper, but also take effective measures to respect and protect those rights guarantees. On its face and in practice as implemented, the NSL must comply with applicable international standards, including the principles of legality, necessity, and proportionality that govern the permissibility of any reasonable restrictions on rights as well as with the HKSAR’s international obligations. The provisions of any security law must also adhere to international standards and norms on national security legislation, including the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*.<sup>34</sup>

Yet, faced with domestic and international criticisms of the impact of the NSL on rights and rule of law in Hong Kong, CPG and HKSAR authorities invariably counter that “every country has national security laws” and accuse critics of double standards, politicizing human rights, and interference with domestic affairs.<sup>35</sup> These assertions echo the central government’s official

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<sup>32</sup> The term “*necessary in a democratic society*” is explicitly cited in ICCPR in Article 14 (Right to a free trial), Article 22 (Freedom of Association), and Article 21 (Freedom of Assembly). Available at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>. Although it is not explicitly mentioned in ICCPR Article 17 (Right to Privacy), the Special Rapporteur on the Right to Privacy has cogently argued that the same standard applies and any interference with the right to privacy must also be consistent with “the principles of legality, necessity and proportionality”, reflecting the terms used in the jurisprudence of the Human Rights Committee. See: Para. 17 of the Report of the Special Rapporteur on the Right to Privacy, (A/HRC/40/63), October 16, 2019. Available at: <https://undocs.org/A/HRC/40/63>.

<sup>33</sup> See, e.g., Article 2, ICCPR (2), (3)(a)-(c). Available at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

<sup>34</sup> *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information*. (November, 1996). Available at: <https://www.article19.org/wp-content/uploads/2018/02/joburg-principles.pdf>.

<sup>35</sup> See for example PRC representative Geng Gai, at the Human Rights Council: “[n]ational security legislation is a common practice in all countries including those countries that accuse China. Isn’t it China’s right to legislate our own national security in its own land?” Statement during General Debate under Item 4, UN Human Rights Council 45th session, Geneva, September 28, 2020. See 35:40-35:50, available at <http://webtv.un.org/meetings-events/human-rights-council/watch/item4-general-debate-contd-22nd-meeting-45th-regular-session-human-rights-council/6195218409001#player>; Hong Kong Chief Executive Carrie Lam said in a video message to the UN Human Rights Council on June 30, 2020: “[f]or those foreign governments or politicians raising objection to the legislation, one could only lament the double standards they are adopting. All those countries which have pointed their fingers at China have their own national security legislation in place. We could think of no valid reason why China alone should be inhibited from enacting a national security legislation to protect every corner of its territory and all of its nationals.” Video message of Hong Kong Chief Executive Carrie Lam to UN Human Rights Council, June 30, 2020. See 00:28-00:55, available at <https://www.scmp.com/video/china/3091249/carrie-lam-defends-national-security-law-speech-united-nations>.

narrative advanced internationally in its exercise of *huayuquan* (discourse power), in particular, as part of a campaign to challenge universal values and principles to marginalize the accountability of states.<sup>36</sup>

And the authorities point to Article 4 of the NSL to assert that human rights *are* respected and protected, and to Article 5 as reassurance that the rule of law will be adhered to. The naked citing of black letter law without more concrete implementation measures conflates formal law on the books with actual implementation progress, and does not meaningfully address *whether* the Law's substantive provisions and their implementation *comply in practice* with international human rights standards and the obligations of the central and the HKSAR governments under national, local, and international law.

The *Basic Law* of the HKSAR<sup>37</sup> and the *Hong Kong Bill of Rights Ordinance* (BORO), (Cap. 383)<sup>38</sup> domestically enact the ICCPR as applied to Hong Kong. While the People's Republic of China signed the ICCPR on October 5, 1998, and has not yet ratified the treaty (despite repeated statements of its intention to do so),<sup>39</sup> it is obligated under international law to not take any actions that would defeat the object and purpose of the treaty.<sup>40</sup> However, the incorporation of the ICCPR in Article 4 of the NSL, a national law (as applied to Hong Kong SAR), means that mainland prosecutors and judges designated to handle Article 55 cases, in accordance with mainland criminal procedure law, would also need to apply ICCPR standards. This also leaves open questions regarding the role of the developed body of common law and Hong Kong jurisprudence on rights.

While this poses complex jurisprudential challenges, the incorporation of the ICCPR in the NSL, may signal a potentially significant opportunity to expand international human rights law training

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<sup>36</sup> See e.g., Nadege Rolland, "China's Vision for a New World Order", *The National Bureau of Asian Research*, January 2020. Available at: [https://www.nbr.org/wp-content/uploads/pdfs/publications/sr83\\_chinasvision\\_jan2020.pdf](https://www.nbr.org/wp-content/uploads/pdfs/publications/sr83_chinasvision_jan2020.pdf). "The Chinese leadership's efforts to increase China's discourse power should not be dismissed or misconstrued as mere propaganda or empty slogans. Rather, they should be seen as evidence of the leadership's determination to alter the norms that underpin existing institutions and put in place the building blocks of a new international system coveted by the Chinese Communist Party... The Chinese leadership's critique of the existing international order reveals its unswerving objection to the values on which this order has been built." (Emphasis added).

<sup>37</sup> *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, adopted at the Third Session of the Seventh National People's Congress (April 4, 1990), Available at: [https://www.basiclaw.gov.hk/en/basiclawtext/images/basiclaw\\_full\\_text\\_en.pdf](https://www.basiclaw.gov.hk/en/basiclawtext/images/basiclaw_full_text_en.pdf).

<sup>38</sup> *Hong Kong Bill of Rights Ordinance* (Cap. 383) (1991): EN, CH. <https://www.elegislation.gov.hk/hk/cap383>.

<sup>39</sup> In response to recommendations by UN member states, treaty bodies, and civil society groups, to ratify the ICCPR, including during all three of its UPRs, China has consistently responded that it will do so when the domestic conditions for its ratification are present. Available at: <https://www.upr-info.org/en/review/China>.

<sup>40</sup> *Vienna Convention on the Law of Treaties*, Art. 18(a): "[o]bligation not to defeat the object and Purpose of a treaty prior to its entry into force. A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) *it has signed the treaty*...until it shall have made its intention clear not to become a party to the treaty."(Emphasis added).

for mainland judges and prosecutors to promote effective implementation of the NSL in conformity with international standards and the obligations of the central and HKSAR governments.

### ***Ongoing structural, policy, and rights-related enforcement issues***

Seven UN special procedures mandate-holders specifically recognize the positive inclusion of the ICCPR and ICESCR in the NSL. In a recent legal communication to China, they also outline their concerns with the technical provisions of the law and highlight vague and overbroad provisions and the lack of transparency and accountability of the new NSL security entities. They urge the central government to review and reconsider the NSL to ensure China's compliance with international human rights obligations in respect of Hong Kong under the UDHR, ICCPR, the *1984 Sino-British Joint Declaration*, and the *Basic Law*.<sup>41</sup>

As international human rights standards establish and UN experts underscore, the most effective approach to responding to national security risks, including terrorist threats<sup>42</sup> is to *address the root causes* and fully respect and protect human rights. During its periodic reviews of the HKSAR government's implementation of ICCPR obligations, the UN Human Rights Committee has consistently raised its concerns regarding the lack of meaningful progress in *ensuring genuine universal suffrage* and the *right to participate in public affairs* and to stand and run for election.<sup>43</sup>

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<sup>41</sup> Seven UN experts' communication to China urging review and reconsideration of National Security Law to comply with international law, September 1, 2020, Available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25487>; See also *Human Rights in China*, "UN Legal Experts Urge China to Review, Reconsider National Security Law to Comply with Its International Obligations," September 6, 2020. Available at: <https://www.hrichina.org/en/press-work/hric-law-bulletin/un-legal-experts-urge-china-review-reconsider-national-security-law>.

<sup>42</sup> "... 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 counterterrorism instruments and is *strictly guided by the principles of legality, necessity and proportionality*. National legislation should be guided by the acts defined in the Suppression Conventions, 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. 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*. 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: the model definition's *three-pronged set of elements* for the regulation of terrorism acts 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." (Emphases added). Seven UN experts' communication to China urging review and reconsideration of National Security Law to comply with international law, September 1, 2020. Available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25487>.

<sup>43</sup> Starting on September 26 and lasting 79 days until the police cleared all the sites by December 15, 2014, the Occupy Central movement—led by students and actively supported by the original OCLP leaders—grew into the largest-scale sustained citizen protest in Hong Kong history, drawing over 100,000 people at its height. This peaceful protest, later also called the Umbrella Movement for the signature yellow umbrellas protestors used to protect themselves from tear gas and other attacks by the police, drew wide attention and support from people around the world. *South China Morning Post*, "TIMELINE: How Occupy Central's democracy push turned into an Umbrella Revolution." October 9, 2014. Available at: <https://www.scmp.com/news/hong->

In the lead up to the passage of the NSL, the introduction of an extradition bill by the Hong Kong administration in 2019<sup>44</sup> that would have exposed Hong Kong people to a mainland legal system lacking an independent judiciary and robust due process protections triggered mass social protests.<sup>45</sup> The intransigent refusal of the administration to address these concerns and the subsequent actions of the HKPF expanded the initial demand to withdraw the extradition bill to include broader demands for democratic reforms and police accountability for its excessive use of force.<sup>46</sup> The mass mobilizations of increasingly diverse sectors of Hong Kong society to support the five demands<sup>47</sup> of the 2019 protests and calls for independence by some groups apparently exacerbated the fears of Beijing of the threats that Hong Kong posed to its two national security imperatives—maintaining territorial integrity and the political leadership and ideological dominance of the Communist Party of China. The NSL clearly reflects these security concerns and targets actions perceived to bring about those national security threats.

In this context, we outline select ongoing structural, policy, and rights-related enforcement issues below:

#### REQUIREMENTS OF AND ALLOWANCE FOR SECRECY UNDERMINE TRANSPARENCY, ACCOUNTABILITY, AND GOOD GOVERNANCE

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[kong/article/1612900/timeline-how-occupy-centrals-democracy-push-turned-umbrella](https://www.bbc.com/news/world-asia-china-51111111); *BBC News*, “Hong Kong protests: What is the ‘Umbrella Movement’?” September 28, 2019. Available at: <https://www.bbc.co.uk/newsround/49862757>.

<sup>44</sup> Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019, was formally withdrawn by the government in October 2019. Available at: <https://www.legco.gov.hk/yr18-19/english/bills/b201903291.pdf>. See also, *HKSAR government press release* “CE announces withdrawal of Fugitive Offenders Bill among “four actions” to help society move forward.” September 4, 2019. Available at: <https://www.info.gov.hk/gia/general/201909/04/P2019090400704.htm#:~:text=The%20Chief%20Executive%2C%20Mrs%20Carrie,withdraw%22%20the%20Fugitive%20Offenders%20Bill.&text=%22First%2C%20the%20Fugitive%20Offenders%20Bill,to%20fully%20allay%20public%20concerns>.

<sup>45</sup> See a timeline of selected key protests and events in the Hong Kong protest movement from February 2018 to February 2020 compiled by writer, educator, and activist Kong Tsung-gan. Kong Tsung-gan, *Medium*. March 11, 2020. Available at: <https://medium.com/@KongTsungGan/a-timeline-of-the-hong-kong-protests-1d13422ce006>. See also two excellent books by Kong Tsung-gan, *Umbrella: A Political Tale from Hong Kong*, Pema Press, September 12, 2017; and *As long as there is resistance there is hope: Essays on the Hong Kong freedom struggle on the post-Umbrella Movement era, 2014–2018*, Pema Press, March 18, 2019.

<sup>46</sup> The widely discredited “fact-finding study” by the Independent Complaints Council (IPCC) (2020) aimed to provide a broader picture of the incidents related to the police use of force that generated large number of complaints. The 900 plus page report concluded there was no systemic problem with policy but room for improvement. Lum, Alvin, and Lok-kei, Sum, “Hong Kong protests: no systemic problem with policing, but room to improve, watchdog concludes”, *South China Morning Post*, May 15, 2020. Available at: <https://www.scmp.com/news/hong-kong/law-and-crime/article/3084550/hong-kong-anti-government-protests-police-use-force>. See also, *Research Office, Legislative Council Secretariat*, “Information Note: Policy on police use of force in public order events in selected places, IN14/19-20.” Available at: <https://www.legco.gov.hk/research-publications/english/1920in14-policy-on-police-use-of-force-in-public-order-events-in-selected-places-20200713-e.pdf>.

<sup>47</sup> The five demands: withdrawal of the extradition bill, an investigation into alleged police brutality and misconduct, the release of all the arrested, a retraction of the official characterisation of the protests as “riots”, and the resignation of Carrie Lam as HKSAR Chief Executive.

As recognized by domestic and international law, there are legitimate reasons for protecting confidentiality of information or procedures in certain cases, for example, in court proceedings involving juveniles under Hong Kong law, or to protect personal information, trade or commercial secrets (Art. 63). However, NSL provisions requiring safeguarding of secrets raise specific concerns related to *due process*, *transparency of NSL implementation*, and *accountability of the key actors*.

- Under Article 47, the HKSAR courts must obtain a *binding certificate* from the Chief Executive certifying whether the alleged criminal act involves national security or whether the evidence involves state secrets.
- The new entities described above are directly supervised by and report to the CPG in the *absence of any safeguards or measures* for protection of rights, and are *shielded from review* of their actions by courts or by any independent authority.<sup>48</sup>
- The heads of the DOJ's Special National Security Crimes Prosecution Division (Art. 18), HKPF's Department for Safeguarding National Security (Art. 16)<sup>49</sup> are required to swear to abide by the law and *safeguard secrets*.
- Article 41 states that *the media and the public shall be prohibited from attending* all or part of a trial involving state secrets or public order.
- Under Article 63, law enforcement and judicial authorities and their staff, and defense counsel or legal representatives are required to *keep confidential state secrets* (in addition to trade or personal information) which they come to know during the process of handling the cases.

THE FRONTLINE OF ENFORCEMENT IS CARRIED OUT BY THE HKPF EXERCISING UNRESTRICTED AND ARBITRARY DISCRETION.

In addition to courts deciding NSL cases that remain within the jurisdiction of Hong Kong courts (i.e., other than Article 55 cases), the HKPF is the key frontline actor in the enforcement of the NSL.

Article 43 of the NSL authorizes the Chief Executive of the HKSAR, in conjunction with the Committee for Safeguarding National Security of the HKSAR, to make relevant implementation rules for the purpose of applying the measures under Article 43.<sup>50</sup> The Implementation Rules

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<sup>48</sup> "Information relating to the work of the Committee [CSNS] *shall not be subject to disclosure. Decisions made by the Committee shall not be subject to judicial review.*" (Art. 15)

<sup>49</sup> "When assuming office, the *head of the department* for safeguarding national security of the Hong Kong Police Force shall . . . *swear to abide by the law and to safeguard secrets.*" (Art. 16, para. 2)

<sup>50</sup> *Implementation Rules for Article 43 of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region*, gazette July 6, effective July 7, 2020. Available at: <https://www.info.gov.hk/gia/general/202007/06/P2020070600784.htm>.

(IR43), issued July 6 and effective on July 7, set out in detail the procedural requirements, conditions for approval and so forth when implementing those measures to ensure that the officers are achieving the objectives of the law while complying with the NSL requirements to respect and protect rights in accordance with law.

However, in light of the Law’s requirement to safeguard secrets and the centralized chain of command headed by the CPG, IR43 appears to only serve to enable and legalize the HKPF’s exercise of arbitrary discretion, as highlighted by an ongoing pattern of police conduct in repression of peaceful exercise of rights.<sup>51</sup> IR43 also references a number of other local HKSAR laws.<sup>52</sup> Aside from very different promulgation contexts, these other Hong Kong laws referenced need rigorous examination as they serve different legislative objectives, target different problems, and their implementation provisions appear in some cases to conflict with NSL provisions, e.g., the rank of police officer required for approvals of certain actions and measures, and clarity regarding how the cited laws related to the overall NSL.

#### PROTECTION OF RIGHTS OF YOUNG PEOPLE<sup>53</sup>

Young people are the key to Hong Kong’s future. Failure as a society to effectively engage and protect them constructively will contribute to the further demoralization of a generation of young people—those who leave and those who stay—a factor that will negatively impact the future of Hong Kong. As was powerfully demonstrated during the Occupy Central Movement and the 2019 social protests, young people were at both frontlines as well as the general participants and

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<sup>51</sup> As a prominent Chinese legal scholar also notes, “[h]istorically . . . a unified intelligence, security and police power was regarded as the trademark of totalitarian policing, often associated with the Gestapo or the KGB,” and expresses concern that such “fusion” . . . “presents a significant danger to Hong Kong’s rule of law-based criminal justice system.” Hualing Fu, “National Security Law: Challenges and Prospects,” in Johannes Chan and C.L. Lim, eds., *Law of the Hong Kong Constitution*, 3rd edition, Sweet & Maxwell Asia Ltd, forthcoming in 2021.

<sup>52</sup> The *Firearms and Ammunition Ordinance* (Cap. 238) (1981): [EN: https://www.elegislation.gov.hk/hk/cap238](https://www.elegislation.gov.hk/hk/cap238), [CH: https://www.elegislation.gov.hk/hk/cap238!zh-Hant-HK?INDEX\\_CS=N](https://www.elegislation.gov.hk/hk/cap238!zh-Hant-HK?INDEX_CS=N); *Import and Export Ordinance* (Cap. 60) (1972): [EN: https://www.elegislation.gov.hk/hk/cap60](https://www.elegislation.gov.hk/hk/cap60), [CH: https://www.elegislation.gov.hk/hk/cap60!zh-Hant-HK?INDEX\\_CS=N&xpid=ID\\_1438403512990\\_002](https://www.elegislation.gov.hk/hk/cap60!zh-Hant-HK?INDEX_CS=N&xpid=ID_1438403512990_002); *Prevention of Bribery Ordinance* (Cap. 201) (1971): [EN: https://www.elegislation.gov.hk/hk/cap201](https://www.elegislation.gov.hk/hk/cap201), [CH: https://www.elegislation.gov.hk/hk/cap201!zh-Hant-HK?INDEX\\_CS=N](https://www.elegislation.gov.hk/hk/cap201!zh-Hant-HK?INDEX_CS=N); *Organized and Serious Crimes Ordinance* (Cap. 455) (1994): [EN: https://www.elegislation.gov.hk/hk/cap455](https://www.elegislation.gov.hk/hk/cap455), [CH: https://www.elegislation.gov.hk/hk/cap455!zh-Hant-HK?INDEX\\_CS=N](https://www.elegislation.gov.hk/hk/cap455!zh-Hant-HK?INDEX_CS=N); and *Societies Ordinance* (Cap. 151) (1949): [EN: https://www.elegislation.gov.hk/hk/cap151](https://www.elegislation.gov.hk/hk/cap151), [CH: https://www.elegislation.gov.hk/hk/cap151!zh-Hant-HK?INDEX\\_CS=N](https://www.elegislation.gov.hk/hk/cap151!zh-Hant-HK?INDEX_CS=N).

<sup>53</sup> Under Hong Kong’s Juvenile Offenders Ordinance, a “child” is defined as anyone aged 13 or younger. A “young person” is aged 14 and 15, and anyone 16 years old and above is no longer considered a juvenile offender, and are tried in court same as adults. Young persons are entitled to same rights as adults when being detained by police, although there are a few differences. A child or young person should not be arrested or interviewed at school, and they must be accompanied by a parent or guardian when being detained or interviewed by police. Under Section 11 of the Juvenile Offenders Ordinance Ordinance, children aged between 10 to 13 cannot be sentenced to imprisonment. Young persons aged between 14 and 15 inclusive, cannot be sentenced to imprisonment if they can be “suitably dealt with in any other way”. *Juvenile Offenders Ordinance* (Cap. 226); [EN: https://www.elegislation.gov.hk/hk/cap226?pmc=0&m=0&pm=1](https://www.elegislation.gov.hk/hk/cap226?pmc=0&m=0&pm=1), [CH: https://www.elegislation.gov.hk/hk/cap226!zh-Hant-HK?pmc=0&m=0&pm=1&INDEX\\_CS=N](https://www.elegislation.gov.hk/hk/cap226!zh-Hant-HK?pmc=0&m=0&pm=1&INDEX_CS=N). See also: Lee, Joshua, “Can children be arrested and sentenced in court? A breakdown of how Hong Kong law deals with juvenile offenders.” *South China Morning Post*, May 3, 2018. Available at: <https://www.scmp.com/yp/discover/lifestyle/features/article/3071859/can-children-be-arrested-and-sentenced-court>.

supporters of the protest demands. They are also quietly still struggling to find ways to continue working to protect and defend Hong Kong's values and way of life.

Beginning with the first day following the promulgation of the *National Security Law*<sup>54</sup> and continuing to the present, many young people, some as young as 12, were arrested, harassed, intimidated, and subjected to physical violence at the hands of the police. On July 29, four former members of Studentlocalism<sup>55</sup>, aged 16-21, were arrested on suspicion of secession.<sup>56</sup> On August 23, 12 were arrested at sea, aged 16-33, and have been deprived access to lawyers.<sup>57</sup> On August 31, among the at least 12 individuals arrested was a 17-year-old boy who police said claimed to be a reporter.<sup>58</sup> During the arrests on September 5, a 12-year-old girl was seen in a viral video being pinned down by a riot police officer using his knee in an effort to subdue her.<sup>59</sup> She and her brother were later fined for violating social-distancing rules.

The implementation to date of the NSL raises serious concerns regarding compliance with international standards on juveniles, rights of the child, and minors in detention. In its *Concluding observations on the combined third and fourth periodic reports of China*, the Committee on the Rights of the Child raised several concerns including the lack of general legislation providing for the best interests of the child, and the need to appropriately integrate and consistently apply this standard in all legislative, administrative, and judicial proceedings. The Committee also recommended that the HKSAR raise the minimum age of criminal responsibility to an internationally acceptable level.<sup>60</sup>

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<sup>54</sup> A 15-year-old student was arrested for carrying a "Hong Kong Independence" flag and is being investigated for secession under the national security law. On the same day, a 17-year-old student was allegedly found with one intact petrol bomb and two broken ones and two others, aged 16 and 17, were arrested for criminal damage. Lau, Chris, and Lo, Clifford, "National security law: at least five people under investigation for secession offences after Hong Kong protest, sources say." *South China Morning Post*, July 2, 2020. Available at: <https://www.scmp.com/news/hong-kong/politics/article/3091559/national-security-law-three-hong-kong-customs-officers>.

<sup>55</sup> Kang-chung, Ng, "Who are Studentlocalism and are they a national security threat for Hong Kong?" *South China Morning Post*, July 31, 2020. Available at: <https://www.scmp.com/news/hong-kong/politics/article/3095412/who-are-studentlocalism-and-are-they-really-national>.

<sup>56</sup> Chan, Erin, "Police still holding four activists under new law." *The Standard*, July 31, 2020. Available at: <https://www.thestandard.com.hk/section-news/section/11/221458/Police-still-holding-four-activists-under-new-law>.

<sup>57</sup> *Aljazeera*, "Hong Kong's Lam says 12 arrested at sea 'not democracy activists.'" September 14, 2020. Available at: <https://www.aljazeera.com/news/2020/9/15/hong-kongs-lam-says-12-arrested-at-sea-not-democracy-activists>; Ramzy, Austin, and Yu, Elaine, "Families of Hong Kong Activists Arrested at Sea Plead for Access to Lawyers." *The New York Times*, September 12, 2020. Available at: <https://www.nytimes.com/2020/09/12/world/asia/hong-kong-activists-china.html>.

<sup>58</sup> *Channel News Asia*, "At least 12 arrested after protest in Mong Kok." August 31, 2020. Available at: <https://www.channelnewsasia.com/news/asia/hong-kong-police-arrested-protest-mong-kok-13069450>.

<sup>59</sup> Siu, Phila, and Ho-him, Chan, "Hong Kong protests: at least 289 arrested as scattered groups heed online calls to rally on postponed election day." *South China Morning Post*, September 6, 2020. Available at: <https://www.scmp.com/news/hong-kong/politics/article/3100426/hong-kong-protests-small-groups-heed-online-calls-rally>.

<sup>60</sup> Committee on the Rights of the Child, "Final Concluding Observations and recommendations, adopted by the Committee at its sixty-fourth session (16 September–4 October 2013): [CRC/C/CHN/CO/3-4](#)." October 29, 2013. *The Committee also invited the State party to submit its fifth and sixth periodic reports in one combined report by 31 March 2019*.

## 4. Openings and Recommendations: “Landing the Plane”

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The May 2020 NPC Decision<sup>61</sup> authorized the NPCSC to rush through a national security law to address what Beijing perceived as two national security threats that Hong Kong poses to China: threat to China’s territorial integrity posed by emerging secessionist advocacy; and the use of Hong Kong as a base to endanger China’s national security, defined broadly as using Hong Kong to carry out infiltration and sabotage activities against the mainland.<sup>62</sup> With over 100 days since the passage of the NSL on June 30, it is questionable whether these threats have been addressed effectively or if implementation of the NSL is in compliance with international standards. Yet, CPG and HKSAR officials claim that stability and public order have been restored to Hong Kong. But repression and chilling of peaceful exercise of rights and intimidation of all sectors of society cannot be mistaken for stability and public order.

Despite the draconian actions of the HKPF and hardline public order rhetoric, the good news is that there is still space that Hong Kong people are leveraging to press back against the rights-restricting impacts of the implementation of the NSL. In addition to ongoing creative individual gestures of resistance, such as reading the *Apple Daily* newspaper (viewed by the authorities as an opposition paper) in public and expressions of support for individuals arrested, important discussion and debates are also being convened. Hong Kong lawyers and academics, in particular, have responded to the NSL by focusing technically on the law and applicable international human rights standards, developing practical analyses on the implementation of the NSL that will contribute to robust legal defense of future cases.

Several universities, institutions of higher learning, and independent think tanks have also conducted various webinars and workshops on a wide range of topics relevant to the NSL, such as academic freedom, freedom of press, policy engagement strategies, international diplomacy, and comparative analyses, for example, with Singapore’s *Internal Security Act*. In the spirit of contributing constructively to addressing the human rights challenges, we identify some recommendations aimed at various stakeholders.

### ***Recommendations for further engagement by diverse stakeholders***

In addition to the important international efforts to address the rights problems posed by the NSL, including public statements, national legislation, and the creation of safe harbors and other

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<sup>61</sup> *NPC Observer*, “2020 NPC Session: NPC’s Decision on National Security in Hong Kong Explained (Updated),” May 28, 2020. Available at: <https://npcobserver.com/2020/05/22/2020-npc-session-npcs-imminent-decision-on-national-security-in-hong-kong-explained/>.

<sup>62</sup> Hualing Fu, “China’s Imperatives for National Security Legislation,” in Cora Chan and Fiona de Londras, eds., *China’s National Security: Endangering Hong Kong’s Rule of Law?*, Hart Publishing, March 2020.

options for individuals who must leave or choose to leave Hong Kong, the international community must develop concrete approaches to support the diverse sectors of Hong Kong society, including young people's efforts to grapple with the rights restrictions under the NSL.

#### RECOMMENDATIONS FOR THE CENTRAL AND HKSAR GOVERNMENTS

➤ *Issue a corrected and legally authoritative English translation of the NSL, please*

The NSL still does not have a legally authoritative English language version. For non-Chinese reading Hong Kong residents, members of the bar, or anyone who can be impacted by the Law's assertion of its comprehensive and broad scope, including extraterritorial reach, the first priority is to understand accurately what the Law prescribes. The central and HKSAR authorities should *issue a corrected English translation of the Law and designate it as a legally authoritative version.*

➤ *Strengthen cooperation with UN human rights mechanisms through concrete steps*

- Issue standing invitations to visit to the High Commissioner for Human Rights and special procedures

Invitations for missions as well as standing invitations have long been requested by the UN High Commissioner of Human Rights and independent UN special procedures mandate-holders, a constructive engagement step supported by many member states and civil society. China should allow “immediate, meaningful and unfettered access” of UN independent observers and special procedures mandates-holders.<sup>63</sup> In the absence of the appointment of a fully independent oversight mechanism, there should at least be a process of independent monitoring and engagement. Additionally, the central and HKSAR governments need to actively engage with the relevant UN treaty bodies and organs at all levels.<sup>64</sup> In doing so, one of the most pressing tasks is to address the

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<sup>63</sup> See also joint statement delivered by German Ambassador Christoph Heusgen on October 6, 2020, on behalf of 39 countries in the General Assembly Third Committee General Debate, expressing grave concerns about the human rights situation in Xinjiang and recent developments in Hong Kong. The joint statement called on China to uphold autonomy, rights and freedoms in Hong Kong, and to respect the independence of the Hong Kong judiciary and to allow “immediate, meaningful and unfettered” access to Xinjiang for independent observers including the UN High Commission for Human Rights and her Office, and relevant special procedure mandate holders to urgently implement CERD's eight recommendations related to Xinjiang, including by refraining from the arbitrary detention of Uyghurs and members of other minorities. See: *Permanent Mission of the Federal Republic of Germany to the United Nations*, “Statement by Ambassador Christoph Heusgen on behalf of 39 Countries in the Third Committee General Debate.” October 6, 2020. Available at: <https://new-york-un.diplo.de/un-en/news-corner/201006-heusgen-china/2402648>.

<sup>64</sup> The UN High Commissioner of the Human Rights, Michelle Bachelet, has reportedly been encouraging Hong Kong authorities to monitor closely the enforcement of the *National Security Law* and to take necessary steps to review it. See *Reuters*, “U.N. rights chief discussing visit to Xinjiang with China.” September 14, 2020. Available at: <https://www.reuters.com/article/us-un-rights-china-idUSKBN2651D6>.

multifold legal and compliance concerns raised by the UN independent experts in their joint communication of September 1.<sup>65</sup>

- Take concrete steps to implement outstanding recommendations of UN treaty bodies and experts

UN treaty bodies have urged the central government, as a state party to all the major human rights treaties,<sup>66</sup> and the HKSAR government to implement recommendations in relation to the promotion and protection of various human rights.

The *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* sets out that the role of the juvenile justice system is to uphold the rights and safety and promote the physical and mental well-being of juveniles.<sup>67</sup> The *age of criminality* in the Hong Kong legal system is ten.<sup>68</sup> The UN Committee on the Rights of the Child recommended that the Hong Kong government reform relevant local laws and raise the minimum age of criminal responsibility to an internationally acceptable level.<sup>69</sup>

The Hong Kong government should review and reform relevant local laws and implement this recommendation.

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<sup>65</sup> Seven UN experts' communication to China urging review and reconsideration of National Security Law to comply with international law, September 1, 2020. Available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25487>.

<sup>66</sup> As pointed out in this brief, while China has not yet ratified the ICCPR which it signed on October 5, 1998, as a signatory, it has an obligation under the *Vienna Convention on the Law of Treaties*, Art 18(a), to refrain from acts which would defeat the object and purpose of the treaty.

<sup>67</sup> A juvenile is defined as every person under the age of 18, the age limit below which it should not be permitted to deprive a child of his or her liberty should be determined by law. Imprisonment should be used as a last resort. *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, adopted by General Assembly resolution 45/113 of 14 December 1990. Available at: <https://www.un.org/ruleoflaw/blog/document/united-nations-rules-for-the-protection-of-juveniles-deprived-of-their-liberty/>. Juveniles should only be deprived of their liberty in accordance with the principles and procedures set forth in these Rules and in the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (The Beijing Rules). *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, adopted by General Assembly resolution 45/113 of 14 December 1990. Available at: <https://www.un.org/ruleoflaw/blog/document/united-nations-rules-for-the-protection-of-juveniles-deprived-of-their-liberty/>.

<sup>68</sup> The Hong Kong *Criminal Procedure Ordinance* states that courts cannot sentence a young person from age 16 to 20 to imprisonment unless “the court is of opinion that no other method of dealing with such person is appropriate.” This does not apply to “excepted offences,” which include serious crimes like manslaughter, robbery, and indecent assault. *Criminal Procedure Ordinance* (Cap. 221) (1899), available at: EN: <https://www.elegislation.gov.hk/hk/cap221>; CH: [https://www.elegislation.gov.hk/hk/cap221!zh-Hant-HK?INDEX\\_CS=N&xpid=ID\\_1438402847902\\_002](https://www.elegislation.gov.hk/hk/cap221!zh-Hant-HK?INDEX_CS=N&xpid=ID_1438402847902_002).

<sup>69</sup> Committee on the Rights of the Child, “Final Concluding Observations and recommendations, adopted by the Committee at its sixty-fourth session (16 September–4 October 2013): [CRC/C/CHN/CO/3-4](https://www.unhcr.org/refugees/crc/c/chn/co/3-4).” Available at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6OkG1d%2fPPRiCAqhKb7yhso23wCwLcl6mikolpecekJiKxokT9PZd%2bAIuwnAS9cTQ8odgT3SN5r8b2fwEGfzcssJ8eKxAFqJbvvyE3s8JRY4Uw7I4nkOnElqvaOajNCXsj>. October 29, 2013. *The Committee also invited the State party to submit its fifth and sixth periodic reports in one combined report by 31 March 2019*.

- *Convene inclusive and diverse public consultation and input into the HKSAR's responses to the Human Rights Committee List of Issues*

The UN Human Rights Committee issued its List of Issues in relation to the next Committee review of the HKSAR's progress in implementing the ICCPR as set forth in the HKSAR's fourth periodic report. To ensure that the responses prepared by the HKSAR reflect the concerns and input of Hong Kong civil society, the *HKSAR government should take steps to not only ensure but maximize inclusive and diverse public participation and input.*

The Human Rights Committee specifically identified issues related to laws on national security, anti-sedition, and anti-terrorism, and requested clarification of the state of emergency and laws on national security, anti-sedition, and anti-terrorism<sup>70</sup> including information regarding:

- *the relationship between the Covenant and the National Security Law* adopted on June 30, 2020;
- measures in place or envisaged to ensure that the application and enforcement of the Law *are not contrary* to the provisions of the Covenant;
- *procedural and legislative measures* envisaged to enforce NSL Articles 56 and 57;
- the scope of the NSL application, including its *extraterritorial application*;
- the meaning of the phrase “*collusion with a foreign country or with external elements* to endanger national security” provided for in NSL Article 29;
- the powers and immunities given under the NSL to the *Committee for Safeguarding National Security* of the Hong Kong Special Administrative Region and the *Office for Safeguarding National Security* of the Central People's Government in the Hong Kong Special Administrative Region and the *accountability mechanisms* overseeing these bodies; and
- information *on any amendments made or envisaged* to the laws of Hong Kong, China, in accordance with the National Security Law.

- *Accept technical assistance offered by UN experts*

Since 2019, various UN special procedures have issued statements of concern regarding the rights situation in Hong Kong, including most recently on September 1, 2020. They have also advanced offers and/or suggestions on technical advice and assistance including on matters in relation to national security, criminal, and counter-terrorism legislation. Notably, all the

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<sup>70</sup> *UN Human Rights Committee*, “List of issues in relation to the fourth periodic report of Hong Kong, China (Advance unedited version): CCPR/C/CHN-HKG/Q/4”, August 6, 2020. Available at: [https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/HKG/CCPR\\_C\\_CHN-HKG\\_Q\\_4\\_42807\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/HKG/CCPR_C_CHN-HKG_Q_4_42807_E.pdf).

recommended measures in relation to technical advice and assistance include the appointment of a fully independent reviewer or at least putting in place a process of independent review and revision.<sup>71</sup> The UN High Commissioner for Human Rights has also underscored one of her priorities is to provide technical assistance to states.

➤ *The People’s Republic of China should ratify the ICCPR*

In light of the incorporation of the ICCPR in the NSL, a national law, *China should formally ratify the ICCPR.*

Ratification of the ICCPR is one of the key recommendations advanced in human rights dialogues, by human rights mechanisms, special procedures, and by civil society groups. Comments and recommendations related to ratification of the ICCPR were also advanced by over 30 UN member states at China’s 2013 UPR.<sup>72</sup> The former mandate holder of the Independent Expert on the enjoyment of all human rights by older persons, Ms. Rosa Kornfeld-Matte, reiterated after her country visit to China, that China is encouraged to ratify all human rights treaties to which it is not yet party to, especially the ICCPR. This echoes the sentiment of many other independent experts who have written on China or visited China on various human rights issues.<sup>73</sup>

#### RECOMMENDATION FOR LEGISLATORS, COURTS AND POLICYMAKERS

➤ *Take on the dual-edged sword of vagueness*

As has been extensively focused upon by legal experts and commentators, the NSL suffers from overbroad or vaguely-defined crimes, and lacks clarity regarding the interface between the NSL, other HKSAR laws, and other national laws. Vague provisions in the NSL present

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<sup>71</sup> See for example: Recommendation for 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. *We remain open and willing to provide technical advice and assistance* to the establishment and operation of such a body.” (Page 11, UN Special Procedures Joint Statement to China dated September 1); *Recommendation “to tighten and ensure that the definition of terrorism* contained in national law is appropriately narrow and tailored, and that use of counterterrorism law and practice is in conformity with international human rights standards, and strictly contained to those specifically violent acts that constitute terrorism under international law. *We offer technical assistance to this purpose and affirm our goal to engage positively* with your Government.” (Page 18, UN Special Procedures Joint Statement to China dated November 1, 2019) (Emphases added.) Seven UN experts’ communication to China urging review and reconsideration of National Security Law to comply with international law, September 1, 2020. Available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25487>.

<sup>72</sup> See China’s 2013 UPR. *Human Rights in China*, “UN Treaty Bodies and China”. Available at: <https://www.hrichina.org/en/un-treaty-bodies-and-china>.

<sup>73</sup> *UN General Assembly*, “Report of the Independent Expert on the enjoyment of all human rights by older persons: A/HRC/45/14/Add.1,” UN Human Rights Council 45th session, August 7, 2020. Available at: <https://undocs.org/A/HRC/45/14/Add.1>.

the risk of the exercise of arbitrary discretion and restrictions on rights, but they should also be treated as an opportunity to define, clarify, and cabin the exercise of discretion and decision-making by the different actors.

Many academics recognize the steep normative and structural challenges that the NSL's vagueness poses to the effective promotion and protection of human rights. At the same time, they also continue to engage the difficult but necessary task of *identifying possible space for reforming or amending the law, as well as judicial interpretation and other tools* to address the serious risks of arbitrary and discriminatory exercise of discretion and decision-making, especially by the frontline enforcement actor, the HKPF, and to limit the overbroad or conflicting provisions, including the application of common law jurisprudence.

In this regard, the specific issues raised by the Human Rights Committee in its List of Issues would be a constructive clear agenda for legal reforms and amendment exercises, as well as a focus for ongoing academic research and analyses to inform these legislative efforts.

### ***Conclusion: What's at Stake***

It is now just a few months since the passing of the NSL. To put any predictions about the future of Hong Kong in context, we need to recall the seismic changes that have occurred in the mainland, Hong Kong, and the world just over the past several years. Domestically, there has been an intensified centralization of state and Party power under Xi Jinping and expanded comprehensive social and ideological control over all sectors in Chinese society. Globally, China has intensified its efforts to remake the existing international normative order; two major economic powers have been engaged in a trade war with consequences of global magnitude; and the entire world is gripped by the COVID-19 pandemic and a climate crisis that no one can escape from, while facing threats posed by the rise of authoritarianism, nationalism, and xenophobic populism. Few in the beginning of this decade—or back in 1997—could have predicted where we are now.

Throughout this period, Hong Kong people have seen the intensification of social problems, including economic inequality, an affordable housing crisis, environment sustainability, and now sharp policy debates regarding Hong Kong's youth and education policy. Still, despite steady encroachment by Beijing on Hong Kong's autonomy, Hong Kong has remained the only place in China with a diverse independent civil society that organized and participated in massive public assemblies and annual rallies, including to commemorate June Fourth—until this year.

What is at stake ultimately for Hong Kong people is a rights-respecting future in a Hong Kong governed by the rule of law, which also has significant impacts on mainland China. As Professor Johannes Chan suggests, the best contribution Hong Kong can make to the social, economic, and

political development of China is to retain Hong Kong's differences and uphold its core values.<sup>74</sup> There is now another 27 years left of the projected fifty-year period during which Hong Kong's autonomy, core values, and way of life should be protected under the 1984 *Joint Declaration* and the *Basic Law*. Who can predict what the future holds?

Beyond the headlines proclaiming Hong Kong's demise and the end of the rule of law and so forth, Hong Kong people may be demoralized as the NSL implementation rolls out, but they have not given up. With shifting national interest fault-lines and a global health pandemic delivering a wakeup call for the international community, there are encouraging signs of greater political will to collectively address the human rights challenges on the mainland and in Hong Kong.

In addition to the important international efforts to address the rights problems posed by the NSL, including public statements, national legislation, and the creation of safe harbors and other options for individuals who must or choose to leave Hong Kong, the international community must develop concrete approaches to support the diverse sectors of Hong Kong society, in particular the young people as they grapple with a severely restricted climate. They need solidarity and concrete and spirit support from the international community as they continue to struggle to shape the future(s) of Hong Kong.

It is indeed too soon to concede that future.

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<sup>74</sup> Johannes Chan, "Maintaining Institutional Strength: the Court, the Act of State and the Rule of Law." In Cora Chan and Fiona de Londras, eds., *China's National Security: Endangering Hong Kong's Rule of Law?*, Hart Publishing, March 2020.



### OUR MISSION:

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Human Rights in China (HRIC) is a non-governmental organization founded in March 1989 by overseas Chinese students and scientists. HRIC leverages local, regional, and global opportunities to support civil society as the driving force for sustainable change in China.

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