香港未来 言弃尚早——论《香港国安法》的实施

中国人权白皮书 (附《香港国安法》最新双语注释表)

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执行概要

2020年6月30日,全国人民代表大会常务委员会一致通过了涵盖面甚广的《中华人民共和国香港特別行政区维护国家安全法》(简称"香港国安法")。这是一个史无前例地仓促、隐秘和完全缺乏公众咨询的立法过程。《香港国安法》禁止分裂国家、顛覆国家政权、实施恐怖活动和勾结外国势力,并新设立了一套实际全部由中央人民政府控制的实施机构。

犹如一个没有彻底检查燃油或完成其他必要准备就起飞的飞行员,中央人民政府将其感到 的攸关存亡的国家安全威胁列为优先事项,却有可能无法解决该法所造成的不可避免的复 杂的法律、结构和治理性的挑战。

这些直接和严重的影响正在香港被广泛而深刻地体现出来,其中最明显的是在公共领域和教育领域的审查和自我审查(一位知名香港法律学者表示:"软性洗脑会影响这整个一代的人"),还有港府紧紧跟着中央人民政府脚本的言辞。

但我们认为,对香港未来言弃为时尚早。

面对《香港国安法》可能造成的侵蚀权利的骇人行径和香港特区政府在政治上背弃人民的作为,能够起到抵御作用的有:香港司法和法律系统固有的制度性和规范性的保障,以及国际人权机制提供的保障,包括条约、盟约、宣言、指导方针、建议和原则。许多联合国独立人权专家在他们发布的指导方针和发给北京政府的信函中援引了这些保障措施,提醒其有义务尊重和保障香港人民的权利。

事实上,《香港国安法》本身也要求香港特別行政区"尊重和保障人权",包括"根据《基本法》……和《公民权利和政治权利国际公约》、《经济、社会及文化权利国际公约》适用于香港的规定(第4条),以及有关法治的规定(第5条)。

为解决这些拉锯关系和确保实施《香港国安法》不会不当地限制或损害受香港特別行政区、国家和国际法保护的权利,国际人权标准和规范需要成为根本,无论是进行监督、评估影响、制定有效保障措施、为所需的立法改革献计献策,还是确保民间社会安全和有利的环境。

除了通过公开声明、国家立法和为那些必须或选择离开香港的人士设立安全港和提供其他选择来应对《香港国安法》造成的人权问题,国际社会还必须要制定具体措施支持香港社

会的各类群体,特别是在严重受限的大环境下挣扎的年轻人。在他们继续为塑造香港的未来奋斗之时,他们需要国际社会的声援和具体的、精神上的支持。

建议摘要

给中央和香港特别行政区政府的建议

- ▶ 发布一个经过纠正的和具有法律权威的《香港国安法》的英文翻译文本
- ▶ 通过具体步骤加强与联合国人权机制的合作
 - 向人权事务高级专员和特别程序发出长期有效的访问邀请。
 - 采取具体步骤来落实联合国条约机构和专家提出但尚未被执行的建议,包括 联合国儿童权利委员会的建议,即香港政府对有关的当地法律进行改革,并 将刑事责任的最低年龄提高至国际可接受的水平。
- ▶ 举行包容各方的公众咨询,并将意见汇入到香港特区对人权事务委员会《问题清单》的答复中

人权事务委员会特别指出了与国家安全、反煽动和反恐法律有关的问题,并要求澄清紧急状态和国家安全、反煽动和反恐的法律,包括有关以下方面的信息:

- 。 《公民权利和政治权利国际公约》与 2020年 6月 30 日通过的《香港国安法》之间的关系:
- 为确保《香港国安法》的适用和执行不违反《公约》规定而采取或计划采取的措施;
- o 为执行《香港国安法》第56条和第57条所计划采取的程序和立法措施:
- o 《香港国安法》的适用范围,包括其域外适用范围;
- o 《香港国安法》第29条规定的"勾结外国或者境外势力危害国家安全罪" 一语的含义:
- 。《香港国安法》赋予香港特别行政区维护国家安全委员会和中央人民政府驻香港特别行政区维护国家安全公署的权力和豁免,以及监管这些机构的问责机制:以及
- 根据《香港国安法》对中国香港的法律作出了或计划作出哪些修订。
- ▶ 接受联合国专家提供的技术援助,包括国家安全、刑事和反恐立法方面的援助

▶ 中华人民共和国应批准《公民权利和政治权利国际公约》

给立法者、法院和政策制定者的建议

▶ 善用模糊用语这把双刃剑

虽然《香港国安法》中含糊的规定存在任意行使酌处权和限制权利的风险,但也应 将其视为定义、澄清和界定不同行为者行使酌处权和决策的机会。人权事务委员会 在其《问题清单》中提出的具体问题为法律改革和修正工作提供了建设性的明确议 程,也为当前的学术研究和分析划清了重点,以为这些立法工作献计献策。

1. 引言

在中国全国人民代表大会(简称"全国人大")于 2020 年 5 月 28 日发布的《决定》授权之下¹,全国人大常务委员会起草了涵盖面甚广的《中华人民共和国香港特别行政区维护国家安全法》(简称"《香港国安法》"),并于 2020 年 6 月 30 日一致通过²。这是一部在"前所未有的隐秘和仓促³"之下通过的,没有任何透明度和公众咨询的法律。《香港国安法》禁止分裂国家、颠覆国家政权、实施恐怖活动和勾结外国势力⁴,并新设立了一套实际全部由中央人民政府控制的实施机构。

当晚 11 时,香港特别行政区(简称"香港特区")政府将此颇具争议的法律刊宪发布,香港市民这才首次看到该法的文本。《香港国安法》在国际社会广泛的谴责声浪中出台,香港人更是担心它会违背"一国两制"的原则及香港宪制性文件《基本法》所规定的"高度自治"。或许最重要的是,中国在国际法和条约下有义务保护的香港人的基本权利和自由,以及香港的法治恐将不保。

尽管该法的涵盖范围甚广,并在目前带来了即时和广泛的影响,但我们认为,对于侵害基本权利、削弱香港的自主权和机构独立性的行为,我们仍然有建设性的反击空间。本法律摘要的目的是:

- 对《香港国安法》颁布以来的实施情况进行回顾;
- 对该法设立的主要机构进行概述,并突出指出相关的治理和问责问题;

¹ 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 renmindaibiao dahui guanyu jianli jianquan xianggang tebie xingzhengqu weihu guojia anquan de falv zhidu he zhixing jizhi de jueding*, 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, 3rd Session (May 28, 2020). Available at: http://www.xinhuanet.com/politics/2020-05/28/c_1126046490.htm.

² 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.

³ 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.

⁴ 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.

- 对国际人权框架进行概述,并将其作为监督、评估和促进中央和香港特区政府遵守 情况的根本;以及
- 为各利益攸关方的进一步参与提出具体建议。

我们还在附件一中提供了一份最新的《香港国安法》双语注释表(原版已于 7月 5 日发布)。虽然<u>新华社</u>在 2020 年 7 月 1 日发布了一个英文版本,且香港特区政府随后在 7 月 3 日将其<u>刊宪发布</u>,但这一所谓的"官方"英文译本并不具法律权威性。这一缺失对不懂中文或无法熟读中文的律师、法官、记者和香港居民,以及可能受到《香港国安法》影响的外国人士、组织和其他中国境外人士来说,从根本上阻碍了他们对该法的实质性理解。

在更新后的注释表中,我们对照中文原文对现有的英文译文进行了审校,指出了错误和遗漏,并加入了我们认为更准确的译文更正建议。我们希望这一新版注释能成为任何想要或需要仔细和准确阅读《香港国安法》的英文读者的实用工具,也欢迎您提出意见和建议。(请您将意见发至 communications@hrichina.org 并在主题栏注明"NSL translation")。

2. 《香港国安法》迄今为止的实施情况

尽管香港人的多项权利不断遭到侵害,且《香港国安法》蕴含着复杂的结构性和概念性的 拉锯和冲突,但宣告香港和法治"死亡"的结论仍然为时过早。不仅香港司法和法律体系中的固有制度和规范保障仍然存在,香港人在重重困难面前更是一如既往地坚韧不拔。此外,中央政府和香港特区政府仍有义务确保国际人权标准在行文上和实践中得到有效和有意义的实施,被授权履行《香港国安法》主要职责的主要行为者也不例外。伴随 2019 冠状病毒病大流行疫情的全球性影响,《香港国安法》还改变了地缘政治格局,增强了通过集体行动应对国际法保护下的权利和自由所受威胁的政治意愿。

值得注意的是,正如中央人民政府和香港特区政府当局多次指出的,《香港国安法》还明确规定香港特区要"尊重和保障人权",包括"香港特别行政区居民根据香港特别行政区基本法和《公民权利和政治权利国际公约》、《经济、社会与文化权利的国际公约》适用于香港的有关规定享有的包括言论、新闻、出版的自由,结社、集会、游行、示威的自由在内的权利和自由"(第4条),并坚持法治原则(第5条)。《香港人权法案条例》(《香港法例》第383章5)将《公民权利和政治权利国际公约》纳入香港本地法律6。

尽管基本权利的和平行使遭受打击,但民众仍然坚持不懈

《香港国安法》在 6 月 30 日一经通过,其主要打击目标立即明确。翌日 7 月 1 日,警方以新冠大流行危害公众健康为由,自 1997 年以来首次禁止了香港当日一年一度的民主大游行。警方向数千名不顾禁令上街的民众举起了新增的警告"紫旗",旗帜上写道:

这是警方发出的警告。你们现在展示旗帜或横额/叫喊口号/或其他行为,有分裂国家和颠覆国家政权等意图,有可能构成《港区国安法》的罪行,你们可能会被拘捕及刑事检控⁷。

⁵ 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.

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

⁷ 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.

当天被警方逮捕的 370 人中,有 10 人因展示或持有带有政治口号的标语或其他物品而涉嫌分裂国家,依据《香港国安法》被捕⁸。 在噤若寒蝉的大环境之下,任何有悖于官方论调的言论或意见现在都有可能遭到刑事检控,或最起码受到威胁、骚扰和警告⁹。 然而,中央人民政府和香港特区政府当局一再坚称,《香港国安法》针对的"仅仅是少数人"。暂且不论侵害权利的客观事实与受害人数多少无关,《香港国安法》目前的主要影响并非刑事检控,而是当局以刑事制裁和行动为威胁,用该法律在香港乃至海外造成的自我审查和恐惧之风。

自7月以来,中央和香港特区政府以骇人的速度着手削减或取缔使香港成为法治自由社会的诸多权利和制度保障。这些举措时常以采取卫生措施防范2019冠状病毒病的必要性为由,以发布公告为主要形式。当局已经实行的举措有:

- 禁唱香港抗议歌曲《愿荣光归香港》;
- 将立法会选举延后一年;
- 打压独立媒体,包括逮捕媒体大亨兼民主人士黎智英,以及收窄对"传媒代表"的 定义¹⁰和到场报道政府新闻发布会的条件¹¹;
- 从公共图书馆撤走书籍,特别是民主派人士的书籍¹²;以及

⁸ 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.

⁹ 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. https://www.ohchr.org/CH/NewsEvents/Pages/DisplayNews.aspx?NewsID=26033&LangID=E.

¹⁰ 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.

¹¹ 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 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.

¹² 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.

■ 指责教师对不断增多的被禁敏感话题处理 "不当",包括六四、2019年的社会抗议活动、地方主义和自决等。

上述当局的持续行动<u>直接影响了多项权利的和平行使,包括言论自由、和平集会的权利、参与权、获取信息权,以及媒体的独立性和学术自由</u>。至于香港政府以公共卫生风险为由,未向民间社会咨询便将立法会选举推迟长达一年之久的决定,香港大律师公会对此举在法律和证据上的依据提出严重怀疑。其在声明中强调:"国际人权专家多次警告,政府不得以 2019 冠状病毒病为借口打压人权¹³。"许智峰(立法会议员)¹⁴、黄之锋、周庭等民主派人士还表示遭到了不明身份的人士和车辆跟踪。

然而,尽管面临如此限制和恐吓,香港人继续高唱《愿荣光归香港》,近期集会同样歌声依旧¹⁵。民主派议员就其是否在政府延长的立法会任期中继续任职进行了公众咨询¹⁶。在

¹³ 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

¹⁴ 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.

¹⁵ 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. Available at: https://coconuts.co/hongkong/news/arrested-twice-weapons-charge-glory-hong-kong-busker-oliver-ma-stopped-performing/.

¹⁶ 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-opposition-poll-shows-supporters-narrowly-back.

警方拒绝发放游行许可后,仍有数百人在 10 月 1 日中国国庆当日集会,而就在一天前,中央人民政府驻香港特别行政区联络办公室(简称"香港中联办")主任骆惠宁警告说,爱国不是一种选择,而是一种义务¹⁷。

至于大众普遍担心的中央人民政府当局行使管辖权的问题,自《香港国安法》生效以来,第一批在境外被拘留人员的起诉依据并非该法本身,而是内地的刑事罪名。8月23日,中国当局在中国海域扣留了12名企图乘快艇逃往台湾的香港人(年龄在16岁至33岁之间)¹⁸,将他们拘留一个多月后,在9月30日才正式逮捕:其中10人涉嫌偷越边境,2人涉嫌帮助他人逃港¹⁹。中国当局并未援引《香港国安法》第55条的管辖权,这或许反映出中国当局认识到这种管辖权将不可避免地在法律、程序和机制上带来复杂的问题,而他们尚未做好应对的准备。

该法在香港建立了一个中央政府对国家安全进行直接和间接监督、监视和控制的架构, 并造成了管辖权之间的拉锯

除了对基本权利和自由的公然侵害外,中央还通过《香港国安法》建立了国家安全架构,将香港人置身于全面的社会控制之下。该法在香港新设立了四个政府机构以及相应的监督和问责架构,使中央人民政府能直接或间接地控制香港的所有国家安全事务,不论是政策、调查,还是起诉和审判。这些机构的工作层层保密,从制定香港的国家安全政策到情报收集,再到案件调查和起诉都有涉及。

机构、职能及架构概览

这四个机构是(这四个机构任命人员的背景概况请见附件 A):

¹⁷ "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-hasended-unrest/.

¹⁸ 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.

¹⁹ 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-protest-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-whilst-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.

■ 维护国家安全委员会(简称香港国安委)(第 12-15 条、第 43 条)

香港国安委主要"负责香港特别行政区维护国家安全事务"(第12条),本质上是中央在香港设立的国家安全事务行政和政策分部。委员会由香港行政长官林郑月娥担任主席,成员包括香港特区政府的高层官员(第13条)。其国家安全事务顾问"由中央人民政府指派"(第15条),现由中央驻港高官香港中联办主任骆惠宁担任。

■ 中央人民政府驻香港特别行政区维护国家安全公署(简称"驻港国安公署")(第 48-60条)

驻港国安公署人员全部由中央派出(第48条第2段),经费由中央财政保障(第51条),是实地工作职责最为广泛的机构,具体领域包括:

- o 行动和协调: 收集情报和办理案件(第49条),协调香港所有国家安全机构的 行动和信息共享(第53条第2段)
- o 监督:与香港国安委共同监督香港的国家安全工作(第53条第1段)
- o 政策:为重大战略和政策提供意见(第49条第1款)
- 与中央主要驻港代表机构的合作:与香港中联办、外交部驻港特派员公署、解放军驻港部队进行合作(第52条)

驻港国安公署、外交部驻港特派员公署和香港特别行政区政府这三个机关有权"采取必要措施"对香港的外国政府使团、国际非政府组织、外国非政府组织和新闻机构加强管理(第54条)。

驻港国安公署最具争议的职能或许要数<u>它在三种情况下对案件行使管辖权的权力</u>: "涉及外国或者境外势力介入的复杂情况"、香港特区政府无力执行《香港国安 法》的"严重情况"和"国家安全面临重大现实威胁的情况"(第 55 条)。

在驻港国安公署对案件行使管辖权时,诉讼事项适用中国刑事诉讼法和其他相关国家法律,由最高人民检察院指定的检察机关进行检控,由最高人民法院指定的法院进行审判(第56条)。

■ 香港警务处维护国家安全处(简称"香港警务处国安处")(第 16、17 条)

香港警务处国安处由香港警务处人员领导和任职,既负责执行以刑事调查为中心的 有关国家安全的执法任务,还负责情报收集和"反干预调查"(第17条)。它的 职责包括执行香港国安委"交办"的任务(第17条第5款)并接受其监督(第43条第2段)。该处的负责人由行政长官在征求驻港国安公署的"意见"后任命(第16条第2段)。

《香港国安法》还授权香港警务处国安处从香港以外"聘请合格的专门人员和技术人员"提供协助(第16条第3段),从而为中国特工履行执法职责提供了空间。

■ 专门的国家安全犯罪案件检控科(简称"专门检控科")(第18条)

专门检控科"负责危害国家安全犯罪案件的检控工作和其他相关法律事务",其检控官由律政司长在"征得香港特别行政区维护国家安全委员会同意"后任命。该科负责人由行政长官在征求驻港国安公署的"意见"后任命。

领导、监督和问责架构中的问题

由中央领导的机关对香港所有国家安全事务的直接和间接控制,破坏了香港受宪法保障的"高度自治"

- 香港国安委和驻港国安公署作为香港最高的两个国家安全机构,共同监督、指导和 支持香港所有的国家安全工作,直接对中央负责:
 - o 香港国安委"接受中央人民政府的监督和问责"(第12条)。
 - o 驻港国安公署人员"接受国家监察机关的监督"(第50条)。
- 由于《香港国安法》规定行政长官在委任香港警务处国安处和专门检控科的负责人 之前,必须先征求驻港国安公署的意见,因此后者具有影响这两个机构的权力。
- 由于香港警务处国安处须执行香港国安委指派的工作并接受其监督,因此该处真正的上级是香港国安委,而非香港警务处。

《香港国安法》将香港国安委和驻港国安公署凌驾于香港法律之上引发的相关问题

驻港国安公署人员全部由内地派往香港,有权按照中国内地的司法体系对待办案件行使管辖权。由于条款语意不明且相互矛盾,《香港国安法》的多项规定也引发了对这些新设机构及其人员是否接受香港法律或司法管辖的担忧。第50条规定,驻港国安公署人员要接受国家监察机关的监督,"除须遵守全国性法律外,还应当遵守香港特别行政区法律"。(强调为作者添加。)

然而,《香港国安法》还规定: "驻香港特别行政区维护国家安全公署·····的行为,不受香港特别行政区管辖" (第 60 条第 1 段);驻港国安公署证件的持有人及其使用的物品"在执行职务时不受香港特别行政区执法人员检查、搜查和扣押" (第 60 条第 2 段)。可是"在执行职务时"的具体界定是什么?如果驻港国安公署证件和物品(包括使用的车辆)的持有人不受检查、搜查和扣押,那么<u>有什么保障措施</u>能确保该署如第 50 条所规定的那样"不得侵害任何个人或组织的合法权益"呢?

此外,香港国安委的工作还不受香港特区任何"机构、组织和个人"的干涉,也不予公开披露,其决定"不受司法复核"(第14条第2段)。有什么保障措施能确保香港国安委的工作不违反《基本法》和其他香港特区法律?虽然香港国安委在严格意义上是由香港特区政府成立,但它也直接受到中央人民政府的监督和问责(第12条)。《基本法》第22条禁止中央人民政府各部门干涉香港特区事务,并规定中央人民政府各部门设立的办事机构"均须遵守香港特别行政区的法律"²⁰。是否可以说,驻港国安公署在事实上是中央人民政府的一个"部门",因此其人员必须遵守香港法律呢?

²⁰ 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. 实施上的挑战: 权利绝非小事

以国际人权框架为中心

正如我们在上文介绍《香港国安法》所设立的实施机构时所强调的,该法本身在一个将一党制国家的统治地位宪法化的列宁主义法律制度²¹,与具有成熟的普通法法理和独立司法机构的香港法律制度之间形成了不可避免的拉锯。该法对国家安全罪的定义模糊且过于宽泛,对域外管辖权的规定广泛,对该法的适当适用及其与香港特区和全国的其他法律及相关国际法的关系缺乏明确界定,从而加剧了这些结构和意识形态上的拉锯。

犹如一个没有彻底检查燃油或完成其他必要准备就起飞的飞行员,中央人民政府将其感到的攸关存亡的国家安全威胁列为优先事项,却有可能无法解决该法所造成的不可避免的复杂的法律、结构和治理性的挑战。为解决这些拉锯关系和确保实施《香港国安法》不会不当地限制或损害受香港特別行政区、国家和国际法保护的权利,<u>国际人权标准和规范需要成为根本</u>,无论是进行监督、评估影响、制定有效保障措施、为所需的立法改革献计献策,还是确保民间社会安全和有利的环境²²。

人权标准和规范在由条约、公约、宣言、准则、建议和原则组成的国际人权文书中有所规定。这套成熟且不断发展的标准和规范由各国、民间社会,以及联合国独立专家和人权机制适用,以监督、评估和促进各国政府的遵守情况。核心文件包括《世界人权宣言》²³、《公民权利和政治权利国际公约》²⁴和《经济、社会、文化权利国际公约》²⁵。国际人权原则还明确指出,"自由、开放、安全和有保障的互联网"及其提供的信息获取渠道,对于"个人作出知情的决定和动员人们呼吁正义、平等、问责和更好地尊重人权"至关重要

²¹ 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: <u>Jerome A. Cohen's blog</u>: http://www.jeromecohen.net/jerrys-blog?offset=1597258389940

²² "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

²³ The *Universal Declaration of Human Rights* (UDHR) (1948). Available at: https://www.ohchr.org/EN/UDHR/Documents/UDHR Translations/eng.pdf.

²⁴ 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.

²⁵ 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.

²⁶。(强调为作者添加。)《维也纳宣言和行动纲领》²⁷重申,权利是"<u>普遍的</u>"(强调 为作者添加),"民主、发展和尊重人权和基本自由是相互依存、相辅相成的"。

在世界与上世纪以来最严重的全球大流行疫情抗争之际,国际专家和联合国人权机构²⁸特别强调,<u>尊重人权</u>,包括经济、社会和文化权利以及公民和政治权利等各个范畴的人权,<u>是公共卫生应对措施取得成果和从大流行疫情中复苏的根本</u>。联合国大会强调:"各国需确保在抗击疫情期间所有人权都得到尊重、保护、实现,并确保各国应对冠状病毒病大流行的措施尊重并充分遵守国际法规定的义务,包括国际人道主义法和国际人权法规定的义务,同时强调所有人权都是普遍、不可分割、相互关联、相互依存、相辅相成的。²⁹"

联合国人权事务高级专员米歇尔·巴切莱特近期也警告: "在 2019 冠状病毒病疫情下,一场快速发展的全球健康危机与世界各地许多更为缓慢却更根深蒂固的政治、社会和经济危机发生了碰撞。这些多重的潜在裂痕使我们在病毒面前更加脆弱,也为其危害创造了切入口,这主要是将民众声音排除在外的政治进程以及人权保护方面的缺口造成的。30"(强调为作者添加。)

²⁶ "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. 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.

²⁷ 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.

²⁸ 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.

²⁹ 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 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.

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

《香港国安法》与国际人权——纸面上和实践中

《香港国安法》有两条有关权利的关键条款31,将其纳入国家法律具有重要的现实意义。

第4条:

"香港特别行政区维护国家安全应当尊重和保障人权,依法保护香港特别行政区居 民根据香港特别行政区基本法和《公民权利和政治权利国际公约》、《经济、社会 与文化权利的国际公约》适用于香港的有关规定享有的包括言论、新闻、出版的自 由,结社、集会、游行、示威的自由在内的权利和自由。"

第5条:

"防范、制止和惩治危害国家安全犯罪,应当坚持法治原则。法律规定为犯罪行为的,依照法律定罪处刑;法律没有规定为犯罪行为的,不得定罪处刑。"

"任何人未经司法机关判罪之前均<u>假定无罪</u>。保障犯罪嫌疑人、被告人和其他诉讼 参与人依法享有的<u>辩护权和其他诉讼权利</u>。任何人已经司法程序被最终确定有罪或 者宣告无罪的,不得就同一行为再予审判或者惩罚。"(强调为作者添加。)

从字面上解读,这两项条款都纳入了国际标准并提及了受保护的权利,其中还包括国际上关于可允许的权利限制的标准。《世界人权宣言》第29条规定,对这些权利和自由的任何限制"只受法律所确定的限制,确定此种限制的唯一目的在于保证对旁人的权利和自由给予应有的承认和尊重,并在一个民主的社会中适应道德、公共秩序和普遍福利的正当需要"³²。(强调为作者添加。)

然而,国际人权条约规定的国家义务包括采取<u>立法或其他措施以实现</u>被承认的权利,<u>包括</u> <u>获得有效救济的权利,以及由主管司法、行政或立法当局裁决的权利</u>³³。因此,为了遵守 国际标准和义务,中央和香港特区政府不仅要确保在纸面上保护权利,还要采取有效措施

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

³² 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.

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

尊重和保护这些权利保障。《香港国安法》在行文上和实际实施中都必须符合适用的国际标准,包括合法、必要和相称的原则——这些原则确立了对权利的任何合理限制的可许性以及香港特区的国际义务。任何安全法的规定还必须遵守有关国家安全立法的国际标准和规范,包括《约翰内斯堡关于国家安全、言论自由和获取信息自由原则》³⁴。

但是,面对当地和国际上对于《香港国安法》对香港权利和法治影响的批评,中央政府和香港特区当局一贯以"每个国家都有国家安全法"反驳,并指责批评者采用双重标准、将人权政治化以及干涉内政³⁵。这些论断呼应了中央政府行使其话语权,在国际上提出的官方叙事——从大处看,这是一种挑战普世价值和原则,以将国家问责边缘化的做法³⁶。

此外,当局以《香港国安法》第 4 条为依据,宣称人权确有受到尊重和保护,并援引第 5 条作为将会坚持法治的保证。这种单纯引用法律条文却不提出更具体的实施措施的做法,不仅将纸上的正式法律与实际的实施进展混为一谈,也没有对该法的实质性条款及其实施是否实际符合国际人权标准,以及中央和香港特区政府在国家、地方和国际法下的义务作出有意义的回应。

香港特区《基本法》³⁷和《香港人权法案条例》(《香港法例》第 383 章)³⁸将《公民权利和政治权利国际公约》适用于香港的条款纳入了本地法律。中华人民共和国在 1998 年

³⁴ 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.

³⁵ 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 <a href="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.

³⁶ 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. "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).*

³⁷ 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.

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

10月5日签署了《公约》,而至今仍未批准(尽管中国一再表示有意批准)³⁹。但根据国际法,中国有义务不采取任何有违《公约》目的和宗旨的行动⁴⁰。然而,将《公约》纳入《香港安全法》这部国家法律(适用于香港特区)的第4条,意味着被指定根据内地刑事诉讼法处理第55条所规定案件的内地检察官和法官也需要适用《公约》的标准。这也给香港成熟的普通法体系和权利法理将扮演何种角色留下了未知的可能。

虽然这在法理上带来了复杂的挑战,但将《公约》纳入《香港国安法》可能是一个潜在的 重要机会,可以扩大对内地法官和检察官的国际人权法培训,以促进该法的有效实施,使 其符合国际标准以及中央和香港特区政府的义务。

当前在结构上、政策上和与权利有关的执行问题

七位联合国特别程序任务执行人明确认可了《香港国安法》积极纳入《公民权利和政治权利国际公约》和《经济、社会、文化权利国际公约》一举。在近期致中国的一份法律函件中,他们还概述了对该法具体条款的关切,突出指出了模糊和过于宽泛的条款,以及其新设立的安全机构缺乏透明度和问责制的问题。他们促请中央政府审议并重新考虑《香港国安法》,以确保中国遵守《世界人权宣言》、《公民权利和政治权利国际公约》、1984年《中英联合声明》及《基本法》中有关香港的国际人权义务⁴¹。

正如国际人权标准所确立和联合国专家所强调的,应对包括恐怖威胁⁴²在内的国家安全风险的最有效方法是解决根源问题,以及充分尊重和保护人权。联合国人权事务委员会在定

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³⁹ 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.

⁴⁰ 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).

⁴¹ 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.

⁴² "... 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

期审议香港特区政府履行《公民权利和政治权利国际公约》义务的情况时,不断对其在<u>确</u>保真正的普选、参与公共事务的权利,以及参选权方面缺乏有意义的进展提出关切⁴³。

在《香港国安法》通过之前,香港政府在 2019 年提出了一部引渡法案⁴⁴。该法案会将香港人暴露于缺乏独立司法机构和健全正当程序保护的大陆法律制度,引发了大规模的社会抗议⁴⁵。政府拒绝解决这些担忧的顽固态度和香港警察随后的行动,使抗议诉求从最初的撤回引渡法案,扩大到包括民主改革和对警方过度使用武力的问责⁴⁶。香港社会各界越来越多地大规模动员以声援 2019 年抗议的五大诉求⁴⁷,还有一些团体呼吁香港独立。这显然加剧了中央关于香港对其两项国家安全要务——维护领土完整以及中共的政治领导和意识形态主导地位——所构成的威胁的担忧。《香港国安法》清楚反映了这些安全担忧,并以中央认为会带来这些国家安全威胁的行动为打击目标。

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.

⁴³ 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-kong/article/1612900/timeline-how-occupy-centrals-democracy-push-turned-umbrella; *BBC News*, "Hong Kong protests: What is the 'Umbrella Movement'?" September 28, 2019. Available at: https://www.bbc.co.uk/newsround/49862757.

⁴⁴ 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.to%20fully%20allay%20public%20concerns.

⁴⁵ 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.

⁴⁶ 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.

⁴⁷ 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.

在此背景下,我们在下文中概述了一些当前在结构上、政策上和与权利有关的执行问题:

对保密性的要求和允许破坏了透明度、问责和善治

正如国内和国际法所承认的,对信息或程序保密在某些情况下具有合法理由,例如香港法律规定的涉及青少年的法庭程序,或者对个人信息、行业或商业秘密的保护(第 63 条)。然而,《香港国安法》中要求保密的条款让人对<u>正当程序、实施该法的透明度和主</u>要行为者的问责产生了切实的担忧。

- 根据第47条,香港特区法院必须取得行政长官发出的具有约束力的证明书,证明 被指控的犯罪行为是否涉及国家安全或证据是否涉及国家秘密。
- 前文所述的新设机构直接受中央人民政府的监督并向其报告,<u>没有任何权利保护的</u>保障或措施,且其行动不受法院或任何独立机构的审查⁴⁸。
- 香港律政司的国家安全犯罪专门检控科(第18条)和香港警务处维护国家安全处 (第16条)⁴⁹的负责人必须宣誓遵守法律和保守秘密。
- 第41条禁止新闻界和公众旁听涉及国家秘密或公共秩序的全部或部分审理程序。
- 第 63 条规定, 执法、司法机关及其人员, 以及辩护人或诉讼代理人除了对在办案 过程中知悉的商业或个人信息保密之外, 还必须保守国家秘密。

该法的前线执行者是不受限制地和任意行使酌处权的香港警务处。

除了对仍受香港法院司法管辖的案件(即《香港国安法》第55条规定以外的案件)作出 裁决的法院之外,香港警务处是《香港国安法》的主要前线执行者。

《香港国安法》第43条授权香港特区行政长官会同香港特区维护国家安全委员会制定相关实施细则,以采取该条规定的措施⁵⁰。于7月6日发布、7月7日生效的《第四十三条实施细则》详细列明了实施这些措施的程序要求、审批条件等,以确保执行人员既实现法律目标,又符合《香港国安法》对依法尊重和保护权利的要求。

香港未来 言弃尚早——论《香港国安法》的实施

⁴⁸ "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)

⁴⁹ "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)

⁵⁰ 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.

然而,鉴于该法对保密的要求及其由中央人民政府领导的集中化统属体系,《实施细则》似乎只会对香港警务处任意行使酌处权进行赋能和合法化,这在警方持续镇压和平行使权利的行为模式中就有所凸显⁵¹。《实施细则》还提及了香港特区本地的一些其他法律⁵²。这些法律需要受到严格审视,不仅因为其颁布背景截然不同,还因为它们具有不同的立法目的,针对不同的问题,而且在某些情况下,它们的实施条款似乎与《香港国安法》的规定有所冲突,例如批准某些行动和措施所需的警官级别,以及所援引的法律与整个《香港国安法》关系的明晰度。

保护年轻人的权利53

年轻人是香港未来的关键。如果社会不能与他们有效交流并提供建设性的保护,则将导致一代年轻人更加心灰意冷,不论他们是离开还是留下。这是一个将对香港未来产生负面影响的因素。正如在"占领中环"运动和 2019 年社会抗议期间有力彰显的,年轻人既身处两场运动的前线,也是抗议诉求的一般参与者和支持者。他们仍在默默奋斗,寻找继续为保护和捍卫香港的价值观和生活方式努力的途径。

中国人权白皮书

⁵¹ 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.

⁵² The Firearms and Ammunition Ordinance (Cap. 238) (1981): EN: https://www.elegislation.gov.hk/hk/cap238, CH: 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, CH: 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!zh-Hant-HK?INDEX_CS=N; Organized and Serious Crimes Ordinance (Cap. 455) (1994): EN: https://www.elegislation.gov.hk/hk/cap455, CH: 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, CH: https://www.elegislation.gov.hk/hk/cap151!zh-Hant-HK?INDEX_CS=N.

⁵³ 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, CH: 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.

从《香港国安法》颁布后的第一天开始⁵⁴至今,许多年轻人(有的年仅 12 岁)已经遭到警方的逮捕、骚扰、恐吓和肢体暴力。7 月 29 日,4 名年龄为 16 至 21 岁的前学生动源⁵⁵ 成员因涉嫌分裂国家罪被捕⁵⁶。8 月 23 日,12 名年龄为 16 至 33 岁的人士在海上被捕,并被禁止会见律师⁵⁷。8 月 31 日,在至少 12 名被捕者中,警方称有一名自称是记者的 17 岁 男生⁵⁸。在 9 月 5 日的逮捕行动中,一段在网上疯传的视频记录了一名 12 岁女孩被防暴警察用膝盖压住制伏的情景⁵⁹。女孩和她的哥哥后来因违反社交距离规定遭到罚款。

《香港国安法》迄今的实施情况引发了对遵守青少年、儿童权利和被羁押的未成年人相关国际标准的严重担忧。儿童权利委员会在对中国第三和第四次合并定期报告的结论性意见中提出了若干关切,包括缺乏体现儿童最大利益的一般性立法,以及需要在所有立法、行政和司法程序中适当纳入并始终贯穿这一标准。委员会还建议香港特区将最低刑事责任年龄提高到国际可接受的水平⁶⁰。

⁵⁴ 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.

⁵⁵ 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.

⁵⁶ 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.

⁵⁷ *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.

⁵⁸ 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.

⁵⁹ 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-protests-small-groups-heed-online-calls-rally.

⁶⁰ 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. 改进空间和建议: "让飞机平稳着陆"

2020年5月的全国人大《决定》⁶¹授权全国人大常委会仓促通过这部国家安全法,是为了应对中央认为的香港对中国构成的两个国家安全威胁:一是分裂主义主张的兴起对中国领土完整的威胁;二是利用香港作为据点危害中国国家安全的行动,这在广义上被定义为利用香港对内地进行渗透和破坏活动⁶²。《香港国安法》自6月30日通过至今已有100多天,这些威胁是否得到了有效解决,或者该法的实施是否符合国际标准都令人生疑。而中央人民政府和香港特区官员却声称香港的稳定和公共秩序已经恢复。但是,将对和平行使权利的镇压噤声和对社会各界的恐吓震慑误认为是稳定和公共秩序是不可行的。

虽然香港警务处采取了严厉行动和强硬的公共秩序论调,但好在香港人仍有空间可以利用,以回击实施《香港国安法》造成的权利限制影响。在个人层面,民众持续用创意方式表示反抗,例如当众阅读被当局视为反对派报纸的《苹果日报》和声援被捕人士。此外,重要的讨论和辩论也正在展开。尤其值得注意的是,香港的律师和学者在对《香港国安法》作出回应时,着重于从行文上关注该法和适用的国际人权标准,对《香港国安法》的实施进行了实际分析,有助于今后案件的有力法律辩护。

一些大学、高等院校和独立智库也举办了各种网络讲座和研讨班,讨论与《香港国安法》 有关的广泛主题,如学术自由、新闻自由、政策协作策略、国际外交,以及与例如新加坡 《国内安全法》等其他法律的比较分析。本着为应对人权挑战作出建设性贡献的精神,我 们向各利益攸关方提出了一些建议。

对各利益攸关方作进一步交涉的建议

除了通过公开声明、国家立法和为那些必须或选择离开香港的人士设立安全港和提供其他 选择来应对《香港国安法》造成的人权问题,国际社会还必须要制定具体措施支持香港社 会的各类群体,包括正在奋力应对《香港国安法》对权利的限制的年轻人。

给中央和香港特别行政区政府的建议

▶ 请务必发布一个经过纠正的和具有法律权威的《香港国安法》的英文翻译文本

⁶¹ 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/.

⁶² 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.

《香港国安法》仍然没有具有法律权威的英文版本。对于不会阅读中文的香港居民、律师协会成员或任何可能受到该法全面和广泛主张(包括治外法权)影响的人来说,第一要务就是准确理解该法所规定的内容。中央和香港特别行政区当局应该<u>发布该法的正确英文译本并将其指定为具有法律权威的版本</u>。

- ▶ 通过具体步骤加强与联合国人权机制的合作
 - 向人权事务高级专员和特别程序发出长期有效的访问邀请。

长期以来,联合国人权事务高级专员和联合国独立特别程序任务执行人有要求政府发出访问邀请和长期有效的邀请,这是许多成员国和民间社会都支持的建设性交涉步骤。中国应给予联合国独立观察员和特别程序任务执行人"立即、有意义和不受限制的准入渠道"⁶³。如果没有任命完全独立的监督机制,则至少应该有一个独立的监督和交涉程序。此外,中央和香港特区政府需要在各个层面与相关的联合国条约机构和机关积极接触⁶⁴。在此过程中,最紧迫的任务之一是解决多个联合国独立专家在9月1日的联名信中提出的多重法律和遵守问题⁶⁵。

采取具体步骤来落实联合国条约机构和专家提出但尚未被执行的建议

联合国条约机构已经敦促作为所有主要人权条约缔约国的中央政府⁶⁶,以及香港特区政府落实有关促进和保护各项人权的建议。

香港未来 言弃尚早——论《香港国安法》的实施

⁶³ 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.

⁶⁴ 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.

⁶⁵ 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.

⁶⁶ 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.

《联合国保护被剥夺自由少年规则》规定,少年司法制度的作用是维护少年的权利和安全,促进他们的身心健康⁶⁷。香港法律制度下的<u>犯罪年龄</u>为10岁⁶⁸。联合国儿童权利委员会建议香港政府对相关的本地法律进行改革,将最低刑事责任年龄提高到国际可接受的水平⁶⁹。

香港政府应对相关的本地法律进行审议和改革,并落实这一建议。

▶ 举行包容各方的公众咨询,并将意见汇入到香港特区对人权事务委员会《问题清单》 的答复中

鉴于其接下来将对香港特区的第四次定期报告进行审议,联合国人权事务委员会就香港特区实施《公民权利和政治权利国际公约》的进展发表了问题清单。为了确保香港特区所拟备的答复能反映香港民间社会的担忧和意见,<u>香港特区政府应该采取措施,</u>不仅要确保公众的参与和意见,还要将此过程的包容性和多样性最大化。

人权事务委员会特别指出了与国家安全、反煽动和反恐法律有关的问题,并要求澄清 紧急状态和国家安全、反煽动和反恐的法律⁷⁰,包括有关以下方面的信息:

⁶⁷ 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/.

⁶⁸ 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 12h-Hant-HK?INDEX CS=N&xpid=ID 1438402847902 002.

⁶⁹ 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/HN/CO/3-4." Available at: http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhso23wCwLcI6mikolpecekJiKxokT9 PZd%2bAIuwnAS9cTQ8odgT3SN5r8b2fwEGfzcssJ8eKxAFqJbvyE3s8JRY4Uw7I4nkOnElqvaQajNCXsj. October 29, 2013. <a href="http://docstore.ohchr.org/selfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhso23wCwLcI6mikolpecekJiKxokT9PZd%2bAIuwnAS9cTQ8odgT3SN5r8b2fwEGfzcssJ8eKxAFqJbvyE3s8JRY4Uw7I4nkOnElqvaQajNCXsj. October 29, 2013. <a href="http://docstore.ohchr.org/selfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhso23wCwLcI6mikolpecekJiKxokT9PZd%2bAIuwnAS9cTQ8odgT3SN5r8b2fwEGfzcssJ8eKxAFqJbvyE3s8JRY4Uw7I4nkOnElqvaQajNCXsj. October 29, 2013. <a href="http://docstore.ohchr.org/selfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhso23wCwLcI6mikolpecekJiKxokT9PZd%2bAIuwnAS9cTQ8odgT3SN5r8b2fwEGfzcssJ8eKxAFqJbvyE3s8JRY4Uw7I4nkOnElqvaQajNCXsj. October 29, 2013. http://docstore.ohchr.org/selfservices/FilesHandler.ashx? http://docstore.ohchr.org/selfservices/FilesHandler.ashx? http://docstore.ohchr.org/selfservices/FilesHandler.ashx? http://docstore.ohchr.org/selfservices/FilesHandler.ashx? http://docstore.ohchr.org/selfservices/FilesHandler.ashx? http://d

⁷⁰ 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.

- 。 《公民权利和政治权利国际公约》与 2020 年 6 月 30 日通过的《香港国安法》之间的关系;
- 为确保《香港国安法》的适用和执行不违反《公约》规定而采取或计划采取的措施;
- o 为执行《香港国安法》第56条和第57条所计划采取的程序和立法措施;
- 《香港国安法》的适用范围,包括其域外适用范围;
- o 《香港国安法》第29条规定的"勾结外国或者境外势力危害国家安全罪"一语的 含义:
- 《香港国安法》赋予香港特别行政区维护国家安全委员会和中央人民政府驻香港特别行政区维护国家安全公署的权力和豁免,以及监管这些机构的问责机制,以及
- o 根据《香港国安法》对中国香港的法律作出了或计划作出哪些修订。

▶ 接受联合国专家提供的技术援助

自 2019年以来,多个联合国特别程序就香港的权利状况发表了关切声明,其中最近的一次是 2020年9月1日。它们还提出了技术咨询和援助的提议和/或建议,包括与国家安全、刑事和反恐立法有关的事项。值得注意的是,所有有关技术咨询和援助的建议措施都包括任命一名完全独立的审查员,或至少建立一个独立的审查和修订程序⁷¹。联合国人权事务高级专员也强调,她的优先事项之一是向各国提供技术援助。

▶ 中华人民共和国应批准《公民权利和政治权利国际公约》

鉴于《公民权利和政治权利国际公约》已被纳入《香港国安法》这部国家法律,中国应正式批准《公约》。

批准《公民权利和政治权利国际公约》是在人权对话中推进的,由人权机制、特别程序和民间社会团体提出的主要建议之一。在中国 2013 年的普遍定期审议中,30 多个

⁷¹ 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.

联合国成员国也提出了有关批准《公约》的意见和建议⁷²。老年人享有所有人权问题独立专家的前任务执行人罗莎·科恩菲尔德-马特女士在对中国进行国别访问后重申,鼓励中国批准所有尚未缔约的人权条约,特别是《公民权利和政治权利国际公约》。这与其他许多就中国问题撰写报告或就各项人权问题访问中国的独立专家的观点一致⁷³。

给立法者、法院和政策制定者的建议

▶ 善用模糊用语这把双刃剑

正如法律专家和评论员广泛关注的,过于宽泛或定义模糊的罪行是《香港国安法》的一大缺陷,而且《香港国安法》、其他香港特区法律和其他国家法律之间的衔接也不明确。虽然《香港国安法》中含糊的规定存在任意行使酌处权和限制权利的风险,但也应将其视为定义、澄清和界定不同行为者行使酌处权和决策的机会。

许多学者认识到,《香港国安法》的模糊性对有效促进和保护人权构成了严峻的规范性和结构性挑战。同时,他们也继续开展艰巨而必要的工作,<u>探寻对该法进行改革或修订的可能空间,以及司法解释和其他工具</u>,以解决任意和歧视性地行使酌处权和决策的严重风险(特别是作为前线执行者的香港警务处),并限制过于宽泛或相互冲突的条款,包括普通法法理的适用。

在这一方面,人权事务委员会在其《问题清单》中提出的具体问题为法律改革和修正工作提供了建设性的明确议程,也为当前的学术研究和分析划清了重点,以为这些立法工作献计献策。

结论: 当前局势的风险

《香港国安法》通过仅有数月。为了对香港未来的任何预测提供背景,我们有必要回顾一下内地、香港乃至世界仅在过去的几年里发生的剧变。在国内,在习近平的领导下,国家和党的权力急剧集中化,并扩大了对中国社会各个群体的全面社会和意识形态控制。在全球,中国加大了对现有国际规范秩序的重塑力度;中美两大经济强国展开了影响全球的贸易战;整个世界在被 2019 冠状病毒病疫情和气候危机钳住,无人能逃的同时,还面临着

⁷² See China's 2013 UPR. *Human Rights in China*, "UN Treaty Bodies and China". Available at: https://www.hrichina.org/en/untreaty-bodies-and-china.

⁷³ 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.

独裁主义、民族主义、排外民粹主义抬头带来的威胁。在本世纪初,或者早在 1997 年,很少有人能够预料到我们现在的处境。

在此期间,香港人经历了社会问题的加剧,包括经济不平等、可负担住房危机、环境的可持续性,以及现在关于香港年轻人和教育政策的激烈政策辩论。然而,尽管北京不断侵犯香港的自治权,香港仍然是中国唯一一个有多元化独立民间社会组织和参与大规模公众集会和年度集会的地方,包括纪念六四的集会——直到今年生变。

对香港人来说,当前局势的最终风险就是香港能否有一个在法治之下权利受到尊重的未来,而这对中国内地也有重大影响。正如陈文敏教授所言,香港对中国社会、经济、政治发展能作出的最佳贡献,就是保留香港的不同之处和坚持香港的核心价值⁷⁴。现在,距离1984年《联合声明》和《基本法》所规定的香港自治、核心价值和生活方式受到保护的50年期限还剩27年。谁能预测未来会怎样呢?

除了大呼香港已亡、法治已死等论调的新闻头条之外,《香港国安法》的逐步实施可能让香港人感到气馁,但他们并没有放弃。随着国家利益断层线的变化和全球大流行疫情给国际社会敲响警钟,有令人鼓舞的迹象表明,国际社会有更大的政治意愿来共同应对内地和香港的人权挑战。

除了通过公开声明、国家立法和为那些必须或选择离开香港的人士设立安全港和提供其他 选择来应对《香港国安法》造成的人权问题,国际社会还必须要在这些重要努力之外制定 具体措施支持香港社会的各类群体,特别是在严重受限的大环境下挣扎的年轻人。在他们 继续为塑造香港的未来奋斗之时,他们需要国际社会的声援和具体的、精神上的支持。

香港未来言弃实属尚早。

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⁷⁴ 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.



我们的使命:

促进在中国实现国际公认的人权, 并使之受到制度性的保护。

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中国人权是由来自中国大陆的学生和学者于1989年3月创建成立的非政府 组织。中国人权善用地方、区域和全球性的机会,支持民间社会成为中国可 持续变革的驱动力。

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