香港未來 言棄尚早——論《香港國安法》的實施

中國人權白皮書(附《香港國安法》最新雙語注釋表)

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執行概要

2020年6月30日,全國人民代表大會常務委員會一致通過了涵蓋面甚廣的《中華人民共和國香港特別行政區維護國家安全法》(簡稱「香港國安法」)。這是一個史無前例地倉促、隱秘和完全缺乏公眾諮詢的立法過程。《香港國安法》禁止分裂國家、顛覆國家政權、實施恐怖活動和勾結外國勢力,並新設立了一套實際全部由中央人民政府控制的實施機構。

猶如一個沒有徹底檢查燃油或完成其他必要準備就起飛的飛行員,中央人民政府將其感到 的攸關存亡的國家安全威脅列為優先事項,卻有可能無法解決該法所造成的不可避免的複 雜的法律、結構和治理性的挑戰。

這些直接和嚴重的影響正在香港被廣泛而深刻地體現出來,其中最明顯的是在公共領域和教育領域的審查和自我審查(一位知名香港法律學者表示:「軟性洗腦會影響這整個一代的人」),還有港府緊緊跟著中央人民政府腳本的言辭。

但我們認為,對香港未來言棄為時尚早。

面對《香港國安法》可能造成的侵蝕權利的駭人行徑和香港特區政府在政治上背棄人民的 作為,能夠起到抵禦作用的有:香港司法和法律系統固有的制度性和規範性的保障,以及 國際人權機制提供的保障,包括條約、盟約、宣言、指導方針、建議和原則。許多聯合國 獨立人權專家在他們發佈的指導方針和發給北京政府的信函中援引了這些保障措施,提醒 其有義務尊重和保障香港人民的權利。

事實上,《香港國安法》本身也要求香港特別行政區「尊重和保障人權」,包括「根據《基本法》……和《公民權利和政治權利國際公約》、《經濟、社會及文化權利國際公約》適用於香港的規定(第4條),以及有關法治的規定(第5條)。

為解決這些拉鋸關係和確保實施《香港國安法》不會不當地限制或損害受香港特別行政區、國家和國際法保護的權利,國際人權標準和規範需要成為根本,無論是進行監督、評估影響、制定有效保障措施、為所需的立法改革獻計獻策,還是確保民間社會安全和有利的環境。

除了通過公開聲明、國家立法和為那些必須或選擇離開香港的人士設立安全港和提供其他選擇來應對《香港國安法》造成的人權問題,國際社會還必須要制定具體措施支持香港社

會的各類群體,特別是在嚴重受限的大環境下掙扎的年輕人。在他們繼續為塑造香港的未來奮鬥之時,他們需要國際社會的聲援和具體的、精神上的支持。

建議摘要

給中央和香港特別行政區政府的建議

- ▶ 發佈一個經過糾正的和具有法律權威的《香港國安法》的英文翻譯文本
- ▶ 通過具體步驟加強與聯合國人權機制的合作
 - 向人權事務高級專員和特別程序發出長期有效的訪問邀請。
 - 採取具體步驟來落實聯合國條約機構和專家提出但尚未被執行的建議,包括 聯合國兒童權利委員會的建議,即香港政府對有關的當地法律進行改革,並 將刑事責任的最低年齡提高至國際可接受的水平。
- ▶ 舉行包容各方的公眾諮詢,並將意見匯入到香港特區對人權事務委員會《問題清單》的答覆中

人權事務委員會特別指出了與國家安全、反煽動和反恐法律有關的問題,並要求澄 清緊急狀態和國家安全、反煽動和反恐的法律,包括有關以下方面的信息:

- 。 《公民權利和政治權利國際公約》與 2020 年 6 月 30 日通過的《香港國安法》之間的關係;
- 為確保《香港國安法》的適用和執行不違反《公約》規定而採取或計劃採取 的措施;
- o 為執行《香港國安法》第56條和第57條所計劃採取的程序和立法措施;
- o 《香港國安法》的適用範圍,包括其域外適用範圍;
- 《香港國安法》第29條規定的「勾結外國或者境外勢力危害國家安全罪」 一語的含義;
- 《香港國安法》賦予香港特別行政區維護國家安全委員會和中央人民政府駐香港特別行政區維護國家安全公署的權力和豁免,以及監管這些機構的問責機制;以及
- 根據《香港國安法》對中國香港的法律作出了或計劃作出哪些修訂。
- ▶ 接受聯合國專家提供的技術援助,包括國家安全、刑事和反恐立法方面的援助

▶ 中華人民共和國應批准《公民權利和政治權利國際公約》

給立法者、法院和政策制定者的建議

▶ 善用模糊用語這把雙刃劍

雖然《香港國安法》中含糊的規定存在任意行使酌處權和限制權利的風險,但也應將其視為定義、澄清和界定不同行為者行使酌處權和決策的機會。人權事務委員會在其《問題清單》中提出的具體問題為法律改革和修正工作提供了建設性的明確議程,也為當前的學術研究和分析劃清了重點,以為這些立法工作獻計獻策。

1. 引言

在中國全國人民代表大會(簡稱「全國人大」)於 2020 年 5 月 28 日發佈的《決定》授權之下¹,全國人大常務委員會起草了涵蓋面甚廣的《中華人民共和國香港特別行政區維護國家安全法》(簡稱「《香港國安法》」),並於 2020 年 6 月 30 日一致通過²。這是一部在「前所未有的隱秘和倉促³」之下通過的,沒有任何透明度和公眾諮詢的法律。《香港國安法》禁止分裂國家、顛覆國家政權、實施恐怖活動和勾結外國勢力⁴,並新設立了一套實際全部由中央人民政府控制的實施機構。

當晚 11 時,香港特別行政區(簡稱「香港特區」)政府將此頗具爭議的法律刊憲發佈,香港市民這才首次看到該法的文本。《香港國安法》在國際社會廣泛的譴責聲浪中出臺,香港人更是擔心它會違背「一國兩制」的原則及香港憲制性文件《基本法》所規定的「高度自治」。或許最重要的是,中國在國際法和條約下有義務保護的香港人的基本權利和自由,以及香港的法治恐將不保。

儘管該法的涵蓋範圍甚廣,並在目前帶來了即時和廣泛的影響,但我們認為,對於侵害基本權利、削弱香港的自主權和機構獨立性的行為,我們仍然有建設性的反擊空間。本法律 摘要的目的是:

- 對《香港國安法》頒佈以來的實施情況進行回顧;
- 對該法設立的主要機構進行概述,並突出指出相關的治理和問責問題;

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. 全國人民代表大會關於建立健全香港特別行政區維護國家安全的法律制度和執行機制的決定 (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.

- 對國際人權框架進行概述,並將其作為監督、評估和促進中央和香港特區政府遵守 情況的根本;以及
- 為各利益攸關方的進一步參與提出具體建議。

我們還在附件一中提供了一份最新的《香港國安法》雙語注釋表(原版已於7月5日發佈)。雖然新華社在2020年7月1日發佈了一個英文版本,且香港特區政府隨後在7月3日將其刊憲發佈,但這一所謂的「官方」英文譯本並不具法律權威性。這一缺失對不懂中文或無法熟讀中文的律師、法官、記者和香港居民,以及可能受到《香港國安法》影響的外國人士、組織和其他中國境外人士來說,從根本上阻礙了他們對該法的實質性理解。

在更新後的注釋表中,我們對照中文原文對現有的英文譯文進行了審校,指出了錯誤和遺漏,並加入了我們認為更準確的譯文更正建議。我們希望這一新版注釋能成為任何想要或需要仔細和準確閱讀《香港國安法》的英文讀者的實用工具,也歡迎您提出意見和建議。(請您將意見發至 communications@hrichina.org 並在主題欄注明「NSL translation」)。

2. 《香港國安法》迄今為止的實施情況

儘管香港人的多項權利不斷遭到侵害,且《香港國安法》蕴含著複雜的結構性和概念性的 拉鋸和衝突,但宣告香港和法治「死亡」的結論仍然為時過早。不僅香港司法和法律體系 中的固有制度和規範保障仍然存在,香港人在重重困難面前更是一如既往地堅韌不拔。此 外,中央政府和香港特區政府仍有義務確保國際人權標準在行文上和實踐中得到有效和有 意義的實施,被授權履行《香港國安法》主要職責的主要行為者也不例外。伴隨 2019 冠 狀病毒病大流行疫情的全球性影響,《香港國安法》還改變了地緣政治格局,增強了通過 集體行動應對國際法保護下的權利和自由所受威脅的政治意願。

值得注意的是,正如中央人民政府和香港特區政府當局多次指出的,《香港國安法》還明確規定香港特區要「尊重和保障人權」,包括「香港特別行政區居民根據香港特別行政區基本法和《公民權利和政治權利國際公約》、《經濟、社會與文化權利的國際公約》適用於香港的有關規定享有的包括言論、新聞、出版的自由,結社、集會、遊行、示威的自由在內的權利和自由」(第4條),並堅持法治原則(第5條)。《香港人權法案條例》(《香港法例》第383章5)將《公民權利和政治權利國際公約》納入香港本地法律6。

儘管基本權利的和平行使遭受打擊,但民眾仍然堅持不懈

《香港國安法》在6月30日一經通過,其主要打擊目標立即明確。翌日7月1日,警方以新冠大流行危害公眾健康為由,自1997年以來首次禁止了香港當日一年一度的民主大遊行。警方向數千名不顧禁令上街的民眾舉起了新增的警告「紫旗」,旗幟上寫道:

這是警方發出的警告。你們現在展示旗幟或橫額/叫喊口號/或其他行為,有分裂國家和顛覆國家政權等意圖,有可能構成《港區國安法》的罪行,你們可能會被拘捕及刑事檢控⁷。

⁵ Hong Kong Bill of Rights Ordinance (Cap. 383) (1991): <u>EN: https://www.elegislation.gov.hk/hk/cap383</u>, <u>CH: https://www.elegislation.gov.hk/hk/cap383!zh-Hant-HK?INDEX_CS=N&xpid=ID_1438403137033_001</u>.

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.

當天被警方逮捕的 370 人中,有 10 人因展示或持有帶有政治口號的標語或其他物品而涉嫌分裂國家,依據《香港國安法》被捕⁸。 在噤若寒蟬的大環境之下,任何有悖於官方論調的言論或意見現在都有可能遭到刑事檢控,或最起碼受到威脅、騷擾和警告⁹。 然而,中央人民政府和香港特區政府當局一再堅稱,《香港國安法》針對的「僅僅是少數人」。暫且不論侵害權利的客觀事實與受害人數多少無關,《香港國安法》目前的主要影響並非刑事檢控,而是當局以刑事制裁和行動為威脅,用該法律在香港乃至海外造成的自我審查和恐懼之風。

自7月以來,中央和香港特區政府以駭人的速度著手削減或取締使香港成為法治自由社會的諸多權利和制度保障。這些舉措時常以採取衛生措施防範2019冠狀病毒病的必要性為由,以發佈公告為主要形式。當局已經實行的舉措有:

- 禁唱香港抗議歌曲《願榮光歸香港》;
- 將立法會選舉延後一年;
- 打壓獨立媒體,包括逮捕媒體大亨兼民主人士黎智英,以及收窄對「傳媒代表」的 定義¹⁰和到場報道政府新聞發佈會的條件¹¹;
- 從公共圖書館撤走書籍,特別是民主派人士的書籍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.

■ 指責教師對不斷增多的被禁敏感話題處理「不當」,包括六四、2019年的社會抗議活動、地方主義和自決等。

上述當局的持續行動<u>直接影響了多項權利的和平行使,包括言論自由、和平集會的權利、</u>參與權、獲取信息權,以及媒體的獨立性和學術自由。至於香港政府以公共衛生風險為由,未向民間社會諮詢便將立法會選舉推遲長達一年之久的決定,香港大律師公會對此舉在法律和證據上的依據提出嚴重懷疑。其在聲明中強調:「國際人權專家多次警告,政府不得以 2019 冠狀病毒病為藉口打壓人權¹³。」許智峰(立法會議員)¹⁴、黃之鋒、周庭等民主派人士還表示遭到了不明身份的人士和車輛跟蹤。

然而,儘管面臨如此限制和恐嚇,香港人繼續高唱《願榮光歸香港》,近期集會同樣歌聲依舊¹⁵。民主派議員就其是否在政府延長的立法會任期中繼續任職進行了公眾諮詢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.

警方拒絕發放遊行許可後,仍有數百人在 10 月 1 日中國國慶當日集會,而就在一天前,中央人民政府駐香港特別行政區聯絡辦公室(簡稱「香港中聯辦」)主任駱惠甯警告說,愛國不是一種選擇,而是一種義務¹⁷。

至於大眾普遍擔心的中央人民政府當局行使管轄權的問題,自《香港國安法》生效以來,第一批在境外被拘留人員的起訴依據並非該法本身,而是內地的刑事罪名。8月23日,中國當局在中國海域扣留了12名企圖乘快艇逃往臺灣的香港人(年齡在16歲至33歲之間)18,將他們拘留一個多月後,在9月30日才正式逮捕:其中10人涉嫌偷越邊境,2人涉嫌幫助他人逃港¹⁹。中國當局並未援引《香港國安法》第55條的管轄權,這或許反映出中國當局認識到這種管轄權將不可避免地在法律、程序和機制上帶來複雜的問題,而他們尚未做好應對的準備。

該法在香港建立了一個中央政府對國家安全進行直接和間接監督、監視和控制的架構, 並造成了管轄權之間的拉鋸

除了對基本權利和自由的公然侵害外,中央還通過《香港國安法》建立了國家安全架構,將香港人置身於全面的社會控制之下。該法在香港新設立了四個政府機構以及相應的監督和問責架構,使中央人民政府能直接或間接地控制香港的所有國家安全事務,不論是政策、調查,還是起訴和審判。這些機構的工作層層保密,從制定香港的國家安全政策到情報收集,再到案件調查和起訴都有涉及。

機構、職能及架構概覽

這四個機構是(這四個機構任命人員的背景概況請見附件 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-has-ended-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.

■ 維護國家安全委員會(簡稱香港國安委)(第 12-15 條、第 43 條)

香港國安委主要「負責香港特別行政區維護國家安全事務」(第 12 條),本質上是中央在香港設立的國家安全事務行政和政策分部。委員會由香港行政長官林鄭月娥擔任主席,成員包括香港特區政府的高層官員(第 13 條)。其國家安全事務顧問「由中央人民政府指派」(第 15 條),現由中央駐港高官香港中聯辦主任駱惠 甯擔任。

中央人民政府駐香港特別行政區維護國家安全公署(簡稱「駐港國安公署」)(第 48-60條)

駐港國安公署人員全部由中央派出(第48條第2段),經費由中央財政保障(第51條),是實地工作職責最為廣泛的機構,具體領域包括:

- 行動和協調:收集情報和辦理案件(第49條),協調香港所有國家安全機構的 行動和信息共享(第53條第2段)
- o 監督:與香港國安委共同監督香港的國家安全工作(第53條第1段)
- o 政策:為重大戰略和政策提供意見(第49條第1款)
- 與中央主要駐港代表機構的合作:與香港中聯辦、外交部駐港特派員公署、解放軍駐港部隊進行合作(第52條)

駐港國安公署、外交部駐港特派員公署和香港特別行政區政府這三個機關有權「採取必要措施」對香港的外國政府使團、國際非政府組織、外國非政府組織和新聞機構加強管理(第54條)。

駐港國安公署最具爭議的職能或許要數<u>它在三種情況下對案件行使管轄權的權力</u>: 「涉及外國或者境外勢力介入的複雜情況」、香港特區政府無力執行《香港國安 法》的「嚴重情況」和「國家安全面臨重大現實威脅的情況」(第 55 條)。

在駐港國安公署對案件行使管轄權時,訴訟事項適用中國刑事訴訟法和其他相關國家法律,由最高人民檢察院指定的檢察機關進行檢控,由最高人民法院指定的法院進行審判(第56條)。

■ 香港警務處維護國家安全處(簡稱「香港警務處國安處」)(第 16、17 條)

香港警務處國安處由香港警務處人員領導和任職,既負責執行以刑事調查為中心的 有關國家安全的執法任務,還負責情報收集和「反干預調查」(第17條)。它的 職責包括執行香港國安委「交辦」的任務(第17條第5款)並接受其監督(第43條第2段)。該處的負責人由行政長官在徵求駐港國安公署的「意見」後任命(第16條第2段)。

《香港國安法》還授權香港警務處國安處從香港以外「聘請合格的專門人員和技術 人員」提供協助(第 16 條第 3 段),從而為中國特工履行執法職責提供了空間。

■ 專門的國家安全犯罪案件檢控科(簡稱「專門檢控科」)(第18條)

專門檢控科「負責危害國家安全犯罪案件的檢控工作和其他相關法律事務」,其檢控官由律政司長在「征得香港特別行政區維護國家安全委員會同意」後任命。該科負責人由行政長官在徵求駐港國安公署的「意見」後任命。

領導、監督和問責架構中的問題

由中央領導的機關對香港所有國家安全事務的直接和間接控制,破壞了香港受憲法保障的「高度自治」

- 香港國安委和駐港國安公署作為香港最高的兩個國家安全機構,共同監督、指導和 支持香港所有的國家安全工作,直接對中央負責:
 - 香港國安委「接受中央人民政府的監督和問責」(第12條)。
 - 駐港國安公署人員「接受國家監察機關的監督」(第50條)。
- 由於《香港國安法》規定行政長官在委任香港警務處國安處和專門檢控科的負責人 之前,必須先徵求駐港國安公署的意見,因此後者具有影響這兩個機構的權力。
- 由於香港警務處國安處須執行香港國安委指派的工作並接受其監督,因此該處真正 的上級是香港國安委,而非香港警務處。

《香港國安法》將香港國安委和駐港國安公署淩駕於香港法律之上引發的相關問題

駐港國安公署人員全部由內地派往香港,有權按照中國內地的司法體系對待辦案件行使管轄權。由於條款語意不明且相互矛盾,《香港國安法》的多項規定也引發了對<u>這些新設機構及其人員是否接受香港法律或司法管轄</u>的擔憂。第 50 條規定,駐港國安公署人員要接受國家監察機關的監督,「除須遵守全國性法律外,<u>還應當遵守香港特別</u>行政區法律」。(強調為作者添加。)

然而,《香港國安法》還規定:「駐香港特別行政區維護國家安全公署......的行為,不受香港特別行政區管轄」(第60條第1段);駐港國安公署證件的持有人及其使用的物品「在執行職務時不受香港特別行政區執法人員檢查、搜查和扣押」(第60條第2段)。可是「在執行職務時」的具體界定是什麼?如果駐港國安公署證件和物品(包括使用的車輛)的持有人不受檢查、搜查和扣押,那麼有什麼保障措施能確保該署如第50條所規定的那樣「不得侵害任何個人或組織的合法權益」呢?

此外,香港國安委的工作還不受香港特區任何「機構、組織和個人」的干涉,也不予公開披露,其決定「不受司法覆核」(第 14 條第 2 段)。有什麼保障措施能確保香港國安委的工作不違反《基本法》和其他香港特區法律?雖然香港國安委在嚴格意義上是由香港特區政府成立,但它也直接受到中央人民政府的監督和問責(第 12 條)。《基本法》第 22 條禁止中央人民政府各部門干涉香港特區事務,並規定中央人民政府各部門設立的辦事機構「均須遵守香港特別行政區的法律」²⁰。是否可以說,駐港國安公署在事實上是中央人民政府的一個「部門」,因此其人員必須遵守香港法律呢?

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. 實施上的挑戰:權利絕非小事

以國際人權框架為中心

正如我們在上文介紹《香港國安法》所設立的實施機構時所強調的,該法本身在一個將一黨制國家的統治地位憲法化的列寧主義法律制度²¹,與具有成熟的普通法法理和獨立司法機構的香港法律制度之間形成了不可避免的拉鋸。該法對國家安全罪的定義模糊且過於寬泛,對域外管轄權的規定廣泛,對該法的適當適用及其與香港特區和全國的其他法律及相關國際法的關係缺乏明確界定,從而加劇了這些結構和意識形態上的拉鋸。

猶如一個沒有徹底檢查燃油或完成其他必要準備就起飛的飛行員,中央人民政府將其感到的攸關存亡的國家安全威脅列為優先事項,卻有可能無法解決該法所造成的不可避免的複雜的法律、結構和治理性的挑戰。為解決這些拉鋸關係和確保實施《香港國安法》不會不當地限制或損害受香港特別行政區、國家和國際法保護的權利,<u>國際人權標準和規範需要成為根本</u>,無論是進行監督、評估影響、制定有效保障措施、為所需的立法改革獻計獻策,還是確保民間社會安全和有利的環境²²。

人權標準和規範在由條約、公約、宣言、準則、建議和原則組成的國際人權文書中有所規定。這套成熟且不斷發展的標準和規範由各國、民間社會,以及聯合國獨立專家和人權機制適用,以監督、評估和促進各國政府的遵守情況。核心文件包括《世界人權宣言》²³、《公民權利和政治權利國際公約》²⁴和《經濟、社會、文化權利國際公約》²⁵。國際人權原則還明確指出,「<u>自由、開放、安全和有保障的互聯網</u>」及其提供的信息獲取渠道,對於「個人作出知情的決定和動員人們呼籲正義、平等、問責和更好地尊重人權」至關重要

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。(強調為作者添加。)《維也納宣言和行動綱領》²⁷重申,權利是「<u>普遍的</u>」(強調 為作者添加),「民主、發展和尊重人權和基本自由是相互依存、相輔相成的」。

在世界與上世紀以來最嚴重的全球大流行疫情抗爭之際,國際專家和聯合國人權機構²⁸特別強調,<u>尊重人權</u>,包括經濟、社會和文化權利以及公民和政治權利等各個範疇的人權, 是公共衛生應對措施取得成果和從大流行疫情中復蘇的根本。聯合國大會強調:「各國需確保在抗擊疫情期間所有人權都得到尊重、保護、實現,並確保各國應對冠狀病毒病大流行的措施尊重並充分遵守國際法規定的義務,包括國際人道主義法和國際人權法規定的義務,同時強調所有人權都是普遍、不可分割、相互關聯、相互依存、相輔相成的。²⁹」

聯合國人權事務高級專員米歇爾·巴切萊特近期也警告:「在 2019 冠狀病毒病疫情下,一場快速發展的全球健康危機與世界各地許多更為緩慢卻更根深蒂固的政治、社會和經濟危機發生了碰撞。這些多重的潛在裂痕使我們在病毒面前更加脆弱,也為其危害創造了切入口,這主要是將民眾聲音排除在外的政治進程以及人權保護方面的缺口造成的。30」(強調為作者添加。)

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.

《香港國安法》與國際人權——紙面上和實踐中

《香港國安法》有兩條有關權利的關鍵條款31,將其納入國家法律具有重要的現實意義。

第4條:

「香港特別行政區維護國家安全應當尊重和保障人權,依法保護香港特別行政區居 民根據香港特別行政區基本法和《公民權利和政治權利國際公約》、《經濟、社會 與文化權利的國際公約》適用於香港的有關規定享有的包括言論、新聞、出版的自 由,結社、集會、遊行、示威的自由在內的權利和自由。」

第5條:

「防範、制止和懲治危害國家安全犯罪,應當堅持法治原則。法律規定為犯罪行為的,依照法律定罪處刑;法律沒有規定為犯罪行為的,不得定罪處刑。」

「任何人未經司法機關判罪之前均<u>假定無罪</u>。保障犯罪嫌疑人、被告人和其他訴訟 參與人依法享有的<u>辯護權和其他訴訟權利</u>。任何人已經司法程序被最終確定有罪或 者宣告無罪的,不得就同一行為再予審判或者懲罰。」(強調為作者添加。)

從字面上解讀,這兩項條款都納入了國際標準並提及了受保護的權利,其中還包括國際上關於可允許的權利限制的標準。《世界人權宣言》第29條規定,對這些權利和自由的任何限制「只受法律所確定的限制,確定此種限制的唯一目的在於保證對旁人的權利和自由給予應有的承認和尊重,並在一個民主的社會中適應道德、公共秩序和普遍福利的正當需要」32。(強調為作者添加。)

然而,國際人權條約規定的國家義務包括採取<u>立法或其他措施以實現</u>被承認的權利,<u>包括</u> <u>獲得有效救濟的權利,以及由主管司法、行政或立法當局裁決的權利</u>³³。因此,為了遵守 國際標準和義務,中央和香港特區政府不僅要確保在紙面上保護權利,還要採取有效措施

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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.

尊重和保護這些權利保障。《香港國安法》在行文上和實際實施中都必須符合適用的國際標準,包括合法、必要和相稱的原則——這些原則確立了對權利的任何合理限制的可許性以及香港特區的國際義務。任何安全法的規定還必須遵守有關國家安全立法的國際標準和規範,包括《約翰內斯堡關於國家安全、言論自由和獲取信息自由原則》34。

但是,面對當地和國際上對於《香港國安法》對香港權利和法治影響的批評,中央政府和香港特區當局一貫以「每個國家都有國家安全法」反駁,並指責批評者採用雙重標準、將人權政治化以及干涉內政³⁵。這些論斷呼應了中央政府行使其話語權,在國際上提出的官方敘事——從大處看,這是一種挑戰普世價值和原則,以將國家問責邊緣化的做法³⁶。

此外,當局以《香港國安法》第4條為依據,宣稱人權確有受到尊重和保護,並援引第5 條作為將會堅持法治的保證。這種單純引用法律條文卻不提出更具體的實施措施的做法, 不僅將紙上的正式法律與實際的實施進展混為一談,也沒有對該法的實質性條款及其實施 是否實際符合國際人權標準,以及中央和香港特區政府在國家、地方和國際法下的義務作 出有意義的回應。

香港特區《基本法》³⁷和《香港人權法案條例》(《香港法例》第 383 章)³⁸將《公民權 利和政治權利國際公約》適用於香港的條款納入了本地法律。中華人民共和國在 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 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日簽署了《公約》,而至今仍未批准(儘管中國一再表示有意批准)³⁹。但根據國際法,中國有義務不採取任何有違《公約》目的和宗旨的行動⁴⁰。 然而,將《公約》納入《香港安全法》這部國家法律(適用於香港特區)的第4條,意味著被指定根據內地刑事訴訟法處理第55條所規定案件的內地檢察官和法官也需要適用《公約》的標準。這也給香港成熟的普通法體系和權利法理將扮演何種角色留下了未知的可能。

雖然這在法理上帶來了複雜的挑戰,但將《公約》納入《香港國安法》可能是一個潛在的 重要機會,可以擴大對內地法官和檢察官的國際人權法培訓,以促進該法的有效實施,使 其符合國際標準以及中央和香港特區政府的義務。

當前在結構上、政策上和與權利有關的執行問題

七位聯合國特別程序任務執行人明確認可了《香港國安法》積極納入《公民權利和政治權利國際公約》和《經濟、社會、文化權利國際公約》一舉。在近期致中國的一份法律函件中,他們還概述了對該法具體條款的關切,突出指出了模糊和過於寬泛的條款,以及其新設立的安全機構缺乏透明度和問責制的問題。他們促請中央政府審議並重新考慮《香港國安法》,以確保中國遵守《世界人權宣言》、《公民權利和政治權利國際公約》、1984年《中英聯合聲明》及《基本法》中有關香港的國際人權義務⁴¹。

正如國際人權標準所確立和聯合國專家所強調的,應對包括恐怖威脅⁴²在內的國家安全風險的最有效方法是解決根源問題,以及充分尊重和保護人權。聯合國人權事務委員會在定

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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

期審議香港特區政府履行《公民權利和政治權利國際公約》義務的情況時,不斷對其在<u>確</u>保真正的普選、參與公共事務的權利,以及參選權方面缺乏有意義的進展提出關切⁴³。

在《香港國安法》通過之前,香港政府在 2019 年提出了一部引渡法案⁴⁴。該法案會將香港人暴露於缺乏獨立司法機構和健全正當程序保護的大陸法律制度,引發了大規模的社會抗議⁴⁵。政府拒絕解決這些擔憂的頑固態度和香港警察隨後的行動,使抗議訴求從最初的撤回引渡法案,擴大到包括民主改革和對警方過度使用武力的問責⁴⁶。香港社會各界越來越多地大規模動員以聲援 2019 年抗議的五大訴求⁴⁷,還有一些團體呼籲香港獨立。這顯然加劇了中央關於香港對其兩項國家安全要務——維護領土完整以及中共的政治領導和意識形態主導地位——所構成的威脅的擔憂。《香港國安法》清楚反映了這些安全擔憂,並以中央認為會帶來這些國家安全威脅的行動為打擊目標。

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.&text=%22First%2C%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,我們在下文中概述了一些當前在結構上、政策上和與權利有關的執行問題:

對保密性的要求和允許破壞了透明度、問責和善治

正如國內和國際法所承認的,對信息或程序保密在某些情況下具有合法理由,例如香港法律規定的涉及青少年的法庭程序,或者對個人信息、行業或商業秘密的保護(第 63 條)。然而,《香港國安法》中要求保密的條款讓人對正當程序、實施該法的透明度和主要行為者的問責產生了切實的擔憂。

- 根據第47條,香港特區法院必須取得行政長官發出的具有約束力的證明書,證明 被指控的犯罪行為是否涉及國家安全或證據是否涉及國家秘密。
- 前文所述的新設機構直接受中央人民政府的監督並向其報告,沒有任何權利保護的保障或措施,且其行動不受法院或任何獨立機構的審查48。
- 香港律政司的國家安全犯罪專門檢控科(第18條)和香港警務處維護國家安全處 (第16條)⁴⁹的負責人必須宣誓遵守法律和保守秘密。
- 第41條禁止新聞界和公眾旁聽涉及國家秘密或公共秩序的全部或部分審理程序。
- 第63條規定,執法、司法機關及其人員,以及辯護人或訴訟代理人除了對在辦案 過程中知悉的商業或個人信息保密之外,還必須保守國家秘密。

該法的前線執行者是不受限制地和任意行使酌處權的香港警務處。

除了對仍受香港法院司法管轄的案件(即《香港國安法》第55條規定以外的案件)作出 裁決的法院之外,香港警務處是《香港國安法》的主要前線執行者。

《香港國安法》第43條授權香港特區行政長官會同香港特區維護國家安全委員會制定相關實施細則,以採取該條規定的措施⁵⁰。於7月6日發佈、7月7日生效的《第四十三條實施細則》詳細列明瞭實施這些措施的程序要求、審批條件等,以確保執行人員既實現法律目標,又符合《香港國安法》對依法尊重和保護權利的要求。

中國人權白皮書

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,鑒於該法對保密的要求及其由中央人民政府領導的集中化統屬體系,《實施細則》似乎只會對香港警務處任意行使酌處權進行賦能和合法化,這在警方持續鎮壓和平行使權利的行為模式中就有所凸顯⁵¹。《實施細則》還提及了香港特區本地的一些其他法律⁵²。這些法律需要受到嚴格審視,不僅因為其頒佈背景截然不同,還因為它們具有不同的立法目的,針對不同的問題,而且在某些情況下,它們的實施條款似乎與《香港國安法》的規定有所衝突,例如批准某些行動和措施所需的警官級別,以及所援引的法律與整個《香港國安法》關係的明晰度。

保護年輕人的權利53

年輕人是香港未來的關鍵。如果社會不能與他們有效交流並提供建設性的保護,則將導致一代年輕人更加心灰意冷,不論他們是離開還是留下。這是一個將對香港未來產生負面影響的因素。正如在「佔領中環」運動和 2019 年社會抗議期間有力彰顯的,年輕人既身處兩場運動的前線,也是抗議訴求的一般參與者和支持者。他們仍在默默奮鬥,尋找繼續為保護和捍衛香港的價值觀和生活方式努力的途徑。

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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.

從《香港國安法》頒佈後的第一天開始⁵⁴至今,許多年輕人(有的年僅 12 歲)已經遭到警方的逮捕、騷擾、恐嚇和肢體暴力。7月 29日,4名年齡為 16至 21 歲的前學生動源⁵⁵成員因涉嫌分裂國家罪被捕⁵⁶。8月 23日,12名年齡為 16至 33 歲的人士在海上被捕,並被禁止會見律師⁵⁷。8月 31日,在至少 12名被捕者中,警方稱有一名自稱是記者的 17 歲男生⁵⁸。在 9月 5日的逮捕行動中,一段在網上瘋傳的視頻記錄了一名 12 歲女孩被防暴警察用膝蓋壓住制伏的情景⁵⁹。女孩和她的哥哥後來因違反社交距離規定遭到罰款。

《香港國安法》迄今的實施情況引發了對遵守青少年、兒童權利和被羈押的未成年人相關國際標準的嚴重擔憂。兒童權利委員會在對中國第三和第四次合併定期報告的結論性意見中提出了若干關切,包括缺乏體現兒童最大利益的一般性立法,以及需要在所有立法、行政和司法程序中適當納入並始終貫穿這一標準。委員會還建議香港特區將最低刑事責任年齡提高到國際可接受的水平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. 改進空間和建議:「讓飛機平穩著陸」

2020年5月的全國人大《決定》⁶¹授權全國人大常委會倉促通過這部國家安全法,是為了應對中央認為的香港對中國構成的兩個國家安全威脅:一是分裂主義主張的興起對中國領土完整的威脅;二是利用香港作為據點危害中國國家安全的行動,這在廣義上被定義為利用香港對內地進行滲透和破壞活動⁶²。《香港國安法》自6月30日通過至今已有100多天,這些威脅是否得到了有效解決,或者該法的實施是否符合國際標準都令人生疑。而中央人民政府和香港特區官員卻聲稱香港的穩定和公共秩序已經恢復。但是,將對和平行使權利的鎮壓噤聲和對社會各界的恐嚇震懾誤認為是穩定和公共秩序是不可行的。

雖然香港警務處採取了嚴厲行動和強硬的公共秩序論調,但好在香港人仍有空間可以利用,以回擊實施《香港國安法》造成的權利限制影響。在個人層面,民眾持續用創意方式表示反抗,例如當眾閱讀被當局視為反對派報紙的《蘋果日報》和聲援被捕人士。此外,重要的討論和辯論也正在展開。尤其值得注意的是,香港的律師和學者在對《香港國安法》作出回應時,著重于從行文上關注該法和適用的國際人權標準,對《香港國安法》的實施進行了實際分析,有助於今後案件的有力法律辯護。

一些大學、高等院校和獨立智庫也舉辦了各種網絡講座和研討班,討論與《香港國安法》 有關的廣泛主題,如學術自由、新聞自由、政策協作策略、國際外交,以及與例如新加坡 《國內安全法》等其他法律的比較分析。本著為應對人權挑戰作出建設性貢獻的精神,我 們向各利益攸關方提出了一些建議。

對各利益攸關方作進一步交涉的建議

除了通過公開聲明、國家立法和為那些必須或選擇離開香港的人士設立安全港和提供其他 選擇來應對《香港國安法》造成的人權問題,國際社會還必須要制定具體措施支持香港社 會的各類群體,包括正在奮力應對《香港國安法》對權利的限制的年輕人。

給中央和香港特別行政區政府的建議

▶ 請務必發佈一個經過糾正的和具有法律權威的《香港國安法》的英文翻譯文本

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.

《香港國安法》仍然沒有具有法律權威的英文版本。對於不會閱讀中文的香港居民、 律師協會成員或任何可能受到該法全面和廣泛主張(包括治外法權)影響的人來說, 第一要務就是準確理解該法所規定的內容。中央和香港特別行政區當局應該<u>發佈該法</u> 的正確英文譯本並將其指定為具有法律權威的版本。

- ▶ 诵過具體步驟加強與聯合國人權機制的合作
 - 向人權事務高級專員和特別程序發出長期有效的訪問邀請。

長期以來,聯合國人權事務高級專員和聯合國獨立特別程序任務執行人有要求政府發出訪問邀請和長期有效的邀請,這是許多成員國和民間社會都支持的建設性交涉步驟。中國應給予聯合國獨立觀察員和特別程序任務執行人「立即、有意義和不受限制的准入渠道」⁶³。如果沒有任命完全獨立的監督機制,則至少應該有一個獨立的監督和交涉程序。此外,中央和香港特區政府需要在各個層面與相關的聯合國條約機構和機關積極接觸⁶⁴。在此過程中,最緊迫的任務之一是解決多個聯合國獨立專家在9月1日的聯名信中提出的多重法律和遵守問題⁶⁵。

o 採取具體步驟來落實聯合國條約機構和專家提出但尚未被執行的建議

聯合國條約機構已經敦促作為所有主要人權條約締約國的中央政府⁶⁶,以及香港特 區政府落實有關促進和保護各項人權的建議。

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-unrights-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.

《聯合國保護被剝奪自由少年規則》規定,少年司法制度的作用是維護少年的權利和安全,促進他們的身心健康⁶⁷。香港法律制度下的<u>犯罪年齡</u>為 10 歲⁶⁸。聯合國兒童權利委員會建議香港政府對相關的本地法律進行改革,將最低刑事責任年齡提高到國際可接受的水平⁶⁹。

香港政府應對相關的本地法律進行審議和改革,並落實這一建議。

▶ 舉行包容各方的公眾諮詢,並將意見匯入到香港特區對人權事務委員會《問題清單》 的答覆中

鑒於其接下來將對香港特區的第四次定期報告進行審議,聯合國人權事務委員會就香港特區實施《公民權利和政治權利國際公約》的進展發表了問題清單。為了確保香港特區所擬備的答覆能反映香港民間社會的擔憂和意見,<u>香港特區政府應該採取措施</u>,不僅要確保公眾的參與和意見,還要將此過程的包容性和多樣性最大化。

人權事務委員會特別指出了與國家安全、反煽動和反恐法律有關的問題,並要求澄清 緊急狀態和國家安全、反煽動和反恐的法律⁷⁰,包括有關以下方面的信息:

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 (2H: https://www.elegislation.gov.hk/hk/cap221 (2D: https://www.elegislation.gov

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://creativecommendations, adopted by the Committee at its sixty-fourth session (16 September–4 October 2013): CRC/C/HN/CO/3-4." Available at: http://creativecommendations, adopted by the Committee at its sixty-fourth session (16 September–4 October 2013): CRC/C/HN/CO/3-4." Available at: http://creativecommendations, adopted by the Committee at its sixty-fourth session (16 September–4 October 2013): CRC/C/HN/CO/3-4." Available at: http://creativecommendations, adopted by the Committee at its sixty-fourth session (16 September–4 October 2013): http://creativecommendations, adopted by the Committee at its sixty-fourth session (16 September–4 October 2013): http://creativecommendations, adopted by the Committee at its sixty-fourth session (16 September–4 October 2013): http://creativecommendations, adopted by the Committee at its sixty-fourth session (16 September–4 October 2013): http://creativecommendations, adopted by the Committee at its sixty-fourth session (16 September–4 October 2013): http://creativecommendations, adopted by the Committee at its sixty-fourth session (16 September–4 October 2013): http://creativecommendations, adopted by the Committee at its sixty-fourth session (16 September–4 October 20 S

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.

- o 《公民權利和政治權利國際公約》與 2020 年 6 月 30 日通過的《香港國安法》之間 的關係;
- 為確保《香港國安法》的適用和執行不違反《公約》規定而採取或計劃採取的措施;
- o 為執行《香港國安法》第56條和第57條所計劃採取的程序和立法措施;
- o 《香港國安法》的適用範圍,包括其域外適用範圍;
- o 《香港國安法》第29條規定的「勾結外國或者境外勢力危害國家安全罪」一語的 含義;
- 《香港國安法》賦予香港特別行政區維護國家安全委員會和中央人民政府駐香港特別行政區維護國家安全公署的權力和豁免,以及監管這些機構的問責機制;以及
- o 根據《香港國安法》對中國香港的法律作出了或計劃作出哪些修訂。

▶ 接受聯合國專家提供的技術援助

自 2019 年以來,多個聯合國特別程序就香港的權利狀況發表了關切聲明,其中最近的一次是 2020 年 9 月 1 日。它們還提出了技術諮詢和援助的提議和/或建議,包括與國家安全、刑事和反恐立法有關的事項。值得注意的是,所有有關技術諮詢和援助的建議措施都包括任命一名完全獨立的審查員,或至少建立一個獨立的審查和修訂程序⁷¹。聯合國人權事務高級專員也強調,她的優先事項之一是向各國提供技術援助。

▶ 中華人民共和國應批准《公民權利和政治權利國際公約》

鑒於《公民權利和政治權利國際公約》已被納入《香港國安法》這部國家法律,中國 應正式批准《公約》。

批准《公民權利和政治權利國際公約》是在人權對話中推進的,由人權機制、特別程序和民間社會團體提出的主要建議之一。在中國 2013 年的普遍定期審議中,30 多個

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.

聯合國成員國也提出了有關批准《公約》的意見和建議⁷²。老年人享有所有人權問題獨立專家的前任務執行人羅莎·科恩菲爾德-馬特女士在對中國進行國別訪問後重申,鼓勵中國批准所有尚未締約的人權條約,特別是《公民權利和政治權利國際公約》。這與其他許多就中國問題撰寫報告或就各項人權問題訪問中國的獨立專家的觀點一致73。

給立法者、法院和政策制定者的建議

▶ 善用模糊用語這把雙刃劍

正如法律專家和評論員廣泛關注的,過於寬泛或定義模糊的罪行是《香港國安法》的一大缺陷,而且《香港國安法》、其他香港特區法律和其他國家法律之間的銜接也不明確。雖然《香港國安法》中含糊的規定存在任意行使酌處權和限制權利的風險,但也應將其視為定義、澄清和界定不同行為者行使酌處權和決策的機會。

許多學者認識到,《香港國安法》的模糊性對有效促進和保護人權構成了嚴峻的規範性和結構性挑戰。同時,他們也繼續開展艱巨而必要的工作,<u>探尋對該法進行改革或修訂的可能空間,以及司法解釋和其他工具</u>,以解決任意和歧視性地行使酌處權和決策的嚴重風險(特別是作為前線執行者的香港警務處),並限制過於寬泛或相互衝突的條款,包括普通法法理的適用。

在這一方面,人權事務委員會在其《問題清單》中提出的具體問題為法律改革和修正工作提供了建設性的明確議程,也為當前的學術研究和分析劃清了重點,以為這些立法工作獻計獻策。

結論:當前局勢的風險

《香港國安法》通過僅有數月。為了對香港未來的任何預測提供背景,我們有必要回顧一下內地、香港乃至世界僅在過去的幾年裡發生的劇變。在國內,在習近平的領導下,國家和黨的權力急劇集中化,並擴大了對中國社會各個群體的全面社會和意識形態控制。在全球,中國加大了對現有國際規範秩序的重塑力度;中美兩大經濟強國展開了影響全球的貿易戰;整個世界在被2019冠狀病毒病疫情和氣候危機鉗住,無人能逃的同時,還面臨著

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.

獨裁主義、民族主義、排外民粹主義抬頭帶來的威脅。在本世紀初,或者早在 1997 年,很少有人能夠預料到我們現在的處境。

在此期間,香港人經歷了社會問題的加劇,包括經濟不平等、可負擔住房危機、環境的可持續性,以及現在關於香港年輕人和教育政策的激烈政策辯論。然而,儘管北京不斷侵犯香港的自治權,香港仍然是中國唯一一個有多元化獨立民間社會組織和參與大規模公眾集會和年度集會的地方,包括紀念六四的集會——直到今年生變。

對香港人來說,當前局勢的最終風險就是香港能否有一個在法治之下權利受到尊重的未來,而這對中國內地也有重大影響。正如陳文敏教授所言,香港對中國社會、經濟、政治發展能作出的最佳貢獻,就是保留香港的不同之處和堅持香港的核心價值⁷⁴。現在,距離1984年《聯合聲明》和《基本法》所規定的香港自治、核心價值和生活方式受到保護的50年期限還剩27年。誰能預測未來會怎樣呢?

除了大呼香港已亡、法治已死等論調的新聞頭條之外,《香港國安法》的逐步實施可能讓香港人感到氣餒,但他們並沒有放棄。隨著國家利益斷層線的變化和全球大流行疫情給國際社會敲響警鐘,有令人鼓舞的跡象表明,國際社會有更大的政治意願來共同應對內地和香港的人權挑戰。

除了通過公開聲明、國家立法和為那些必須或選擇離開香港的人士設立安全港和提供其他 選擇來應對《香港國安法》造成的人權問題,國際社會還必須要在這些重要努力之外制定 具體措施支持香港社會的各類群體,特別是在嚴重受限的大環境下掙扎的年輕人。在他們 繼續為塑造香港的未來奮鬥之時,他們需要國際社會的聲援和具體的、精神上的支持。

香港未來言棄實屬尚早。

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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.



我們的使命:

促進在中國實現國際公認的人權, 並使之受到制度性的保護。

關於我們

中國人權是由來自中國大陸的學生和學者于 1989 年 3 月創建成立的非政府組織。 中國人權善用地方、區域和全球性的機會,支持民間社會成為中國可持續變革的驅動力。

關注我們



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