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Analysis of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region

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Introduction¹

In February 2019, the government of Hong Kong proposed legal amendments that would permit the extradition of criminal suspects from Hong Kong to other countries, notably mainland China.² Many in Hong Kong viewed these amendments as undermining Hong Kong's autonomy and civil liberties, and millions took to the streets to protest,³ forcing the government of Hong Kong to withdraw the bill.⁴ However, the protests had evolved into a broader expression of resistance against mainland Chinese interference in Hong Kong's autonomy and thus continued even after the bill's withdrawal. Mainland China's officials began to cite the protests as justification for introducing sweeping national security legislation for Hong Kong.⁵ On 30 June 2020, mainland China's legislature, which has law-making competence over Hong Kong, signed and passed the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (or National Security Law, NSL).

The NSL creates four offences: secession, subversion, terrorist activities and collusion with a foreign country or with external elements to endanger national security. Secession, subversion and foreign collusion cover a litany of abstract, vague and overlapping acts, such as "undermining the basic system of the People's Republic of China" (Article 22(1)) or "provoking by unlawful means hatred among Hong Kong residents" towards the governments of mainland China or Hong Kong (Article 29(5)). The law assigns severe punishments for active engagement in or initiation of these acts but also threatens imprisonment for anyone who merely "participates in" or "assists in" in such acts (see, for example, Articles 20-22). Many of these vague terms are undefined, which permits the authorities to arbitrarily bring criminal charges to crush any form of dissent. In the nine months since the NSL has been in effect, authorities have used its broad sweep to violate the rights to free expression, association, assembly and to participate in public affairs of students,

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² Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019, <https://www.legco.gov.hk/yr18-19/english/bills/b201903291.pdf>.

³ BBC News, "Hong Kong protest: 'Nearly 2 million join demonstration'", 17 June 2019, <https://www.bbc.com/news/world-asia-china-48656471>.

⁴ BBC News, "Hong Kong formally scraps extradition bill that sparked protests", 23 October 2019, <https://www.bbc.com/news/world-asia-china-50150853>.

⁵ Helen Davidson, "China's top official in Hong Kong pushes for NSL", 15 April 2020, The Guardian, <https://www.theguardian.com/world/2020/apr/15/china-official-hong-kong-luo-huining-pushes-national-security-law>.

protesters, activists, journalists and many ordinary Hong Kongers. The law also asserts broad jurisdiction over offences against Hong Kong which are committed by any person or organisation, whether in Hong Kong or elsewhere in the world (Articles 36-38).

The NSL also has troubling implications for suspects' fair trial and due process rights. It strips away basic legal protections such as the presumptive right to bail (Article 42) and the right to a jury trial (Article 46). Hong Kong's apex court, the Hong Kong Court of Final Appeal (HKCFA), has held that Hong Kong courts cannot constitutionally review the NSL for substantive compliance with the ICCPR or the Basic Law.⁶ The NSL also permits the Chief Executive to handpick judges to try cases under the law's ambit, but gives such judges tenure of only one year and provides for their dismissal if they make any statement "endangering national security" (Article 44). The NSL grants police sweeping powers of surveillance and to takedown electronic messages, both of which may be exercised without the need for judicial warrant (Article 43). Most worryingly, it grants the authority to mainland Chinese authorities to transfer cases from Hong Kong's justice system to mainland China's (Article 55), the issue that sparked the demonstrations which led to the adoption of the NSL in the first place.

The law provides for the creation of a number of new bodies, including a very high-powered Hong Kong Committee for Safeguarding National Security of the Hong Kong Special Administrative Region (Committee, Article 12) and a Hong Kong "Office for Safeguarding National Security" (Office, Article 48) to be set up and run by mainland China's security services, essentially as a Hong Kong outpost for their operations. The latter is a key part of an extensive system of measures in the NSL which give mainland Chinese authorities extensive powers over the operation of Hong Kong's justice system with respect to national security offences. For example, the Committee is "under the supervision of and accountable to the Central People's Government" (Article 12). These systems operate under the cover of significant secrecy and a lack of accountability.

This Analysis begins by explaining the constitutional framework for Hong Kong and the relevant rights under the *International Covenant on Civil and Political Rights* (ICCPR),⁷ which is in effect in Hong Kong. Next, the Analysis explains the four offences created by the NSL and how they violate the principle of legal certainty in the criminal law; the rights to freedom of expression, assembly and association; and the right to participate in public affairs. The Analysis then explains how the NSL strips away basic legal protections and compromises the right to a fair trial by an independent and impartial tribunal. Finally, the Analysis concludes with a review of the unaccountable bodies created by the NSL and how it grants the police sweeping powers of surveillance and to takedown electronic messages.

⁶ *HKSAR v. Lai Chee Ying* (2021) HKFCA 3, para. 37, https://www.hklii.hk/en/cases/hkcfa/2021/3#_ftnref25.

⁷ UN General Assembly Resolution 2200A (XXI), 16 December 1966, in force 23 March 1976.

1. Applicable Constitutional and International Framework

The government of mainland China ceded the three regions that comprise contemporary Hong Kong – Hong Kong Island, Kowloon and the New Territories – to the British in a succession of treaties that followed the Opium Wars between 1842 and 1898.⁸ Unlike the other two regions which had been ceded in perpetuity, the New Territories were leased for 99 years.⁹ During the handover negotiations that took place as that period neared expiration, however, the British and the Chinese agreed that all three regions would be returned to mainland China.¹⁰ The product of these negotiations was the 1984 Sino-British Joint Declaration, which laid down principles for the administration of Hong Kong once it was returned to Chinese sovereignty.¹¹ In 1997, after Hong Kong was returned to China, Hong Kong’s mini-Constitution, the Basic Law, also came into effect.¹² The Basic Law establishes Hong Kong’s “one country, two systems” governing arrangement, which provides that Hong Kong is a part of China but has a significant degree of autonomy.¹³

The ICCPR and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)¹⁴ are in force in Hong Kong. This is stipulated in Section XIII of Annex I to the Sino-British Joint Declaration,¹⁵ Article 39 of the Basic Law¹⁶ and Article 4 of the NSL itself. The ICCPR is given local effect in Hong Kong through the Hong Kong Bill of Rights Ordinance.¹⁷

Despite the NSL’s affirmation of the applicability of the ICCPR in Hong Kong, the law’s provisions and system of enforcement represent significant violations of several ICCPR rights, including the following. Articles 9 and 15 of the ICCPR prevent the arbitrary deprivation of liberty, such as through incarceration, by criminal laws that are not sufficiently precise to effectively guide the conduct of those regulated; such precision prevents the abuse

⁸ Erin Blakemore, “How Hong Kong’s complex history explains its current crisis with China”, 7 August 2019, National Geographic, <https://www.nationalgeographic.com/culture/article/hong-kong-history-explain-relationship-china>.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong*, signed in Beijing, 19 December 1984, <https://www.cmab.gov.hk/en/issues/joint3.htm>.

¹² The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, 1 July 1997, <https://www.basiclaw.gov.hk/en/basiclawtext/index.html>.

¹³ *Ibid.*, Articles 2 and 12.

¹⁴ UN General Assembly Resolution 2200A (XXI), 16 December 1966, in force 3 January 1976.

¹⁵ See note 11.

¹⁶ See note 12.

¹⁷ Cap. 383, 8 June 1991,

<https://www.elegislation.gov.hk/checkconfig/checkClientConfig.jsp?applicationId=RA001>.

of overbroad and poorly defined laws.¹⁸ Article 14 of the ICCPR secures the right to a fair trial, which includes entitlement “to a fair and public hearing by a competent, independent and impartial tribunal established by law” (Article 14(1)). A fair trial also entails various due process protections, such as the right to an effective appeal (Article 14(5)).

Article 17 of the ICCPR protects against “arbitrary or unlawful interference” with “privacy”, which includes protection against illegitimate surveillance. Article 19 of the ICCPR guarantees freedom of expression, which protects the right “to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media”. Article 21 of the ICCPR protects freedom of assembly, a key underpinning of the right to protest. Article 22 of the ICCPR protects freedom of association, which guarantees the right to create organisations and also the right of those organisations to undertake activities. Article 25 of the ICCPR protects the right to directly and indirectly participate in political life, including standing for elections.

Article 2 of the ICCPR imposes an obligation on the government of Hong Kong to “respect” these rights and to “take the necessary steps” to “adopt such laws or other measures as may be necessary to give effect” to rights, including to “ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity”. While the NSL was passed by the government of mainland China, which has not ratified the ICCPR, the view of the UN Human Rights Committee, the body of independent experts that oversees compliance with the ICCPR, is that mainland China inherited an obligation to respect ICCPR rights in Hong Kong from the United Kingdom, since these obligations follow the territory.¹⁹ As this Analysis shows, the NSL fails to respect all of the aforementioned rights.

2. Secession, Subversion, Terrorism and Collusion with a Foreign Country or External Elements

2.1. Secession

¹⁸ UN Human Rights Committee, General Comment No. 35, Article 9: Liberty and Security of the Person, 16 December 2014, para. 22, <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsrdB0H115979OVGGB%2bWPAXjdnG1mwFFfPYGIInfb%2f6T%2fqwtc77%2fKU9JkoeDcTWWPIk9w2OzZSLwlub%2f%2f5eBlSksYAj5kvl4zqJZkm7wRT9ol>; and Report to the Commission on Human Rights of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 28 December 2005, para. 46, <https://undocs.org/en/E/CN.4/2006/98>.

¹⁹ UN Human Rights Committee, Report to the General Assembly, 16 September 1996, pp. 24-25, <https://undocs.org/en/A/51/40>.

The law defines three acts of secession: separating Hong Kong or other parts of China from China (Article 20(1)); unlawfully altering the legal status of Hong Kong or other parts of China (Article 20(2)); and surrendering Hong Kong or other parts of China to a foreign country (Article 20(3)). These abstractly defined acts are not further explained but appear to cover such ideas as increased autonomy or democracy for Hong Kong. Crucially, the law also includes any *expressive activity*, such as speech or protest, connected to such acts because they are illegal “whether or not” they are committed “by force or threat of force” (Article 20), while incitement to such acts is also covered (Article 21).

The law is so broadly cast that even a tenuous connection between the actor and the acts of secession is sufficient; the law catches not only a person who “organises, plans, commits” but also someone who “participates in” or “incites, assists in, abets” or otherwise provides assistance for the acts of secession (Articles 20 and 21). This broad wording could capture a student who uttered statements in support of Hong Kong autonomy, a bystander who joined a pro-independence protest for a few minutes out of curiosity or a grandmother who supplied protesters with snacks.

Secession is governed by a three-tiered sentencing system (Article 20); a “principal offender” or someone who commits “an offence of a grave nature” shall be sentenced to a maximum of life and a minimum of ten years’ imprisonment; a person who “actively participates” shall be sentenced to a maximum of ten years’ and a minimum of three years’ imprisonment; and “other participants” shall be sentenced to a maximum of three years’ imprisonment, short-term detention or other restrictions, defined as community service or detention in a reformatory school (Article 64). This tiered sentencing system further illustrates that even a trifling connection with the acts of secession could attract imprisonment under the law; that there is a sentencing tier below active participation (“other participants”) indicates that the law covers even passive or incidental “participations”. The accessory offence under Article 21 has a separate two-tiered system of penalties: between five to ten years’ imprisonment for offences of a “serious nature” and a maximum of five years, short-term detention or other restrictions for offences of a “minor nature”. A “person who conspires with or directly or indirectly receives instructions, control, funding or other kinds of support” from foreign actors to commit secession will receive a more severe penalty (Article 30).

In the nine months since the law came into force, it has been applied to criminalise a wide range of expressive activity. Charges of secession have been laid against people for holding up blank placards²⁰ and against students for shouting pro-independence slogans and waving

²⁰ Tom Grundy, “Security law: Hong Kong police arrest 8 at ‘blank placard’ silent protest”, 6 July 2020, Hong Kong Free Press, <https://hongkongfp.com/2020/07/06/security-law-hong-kong-police-arrest-8-at-blank-placard-silent-protest/>.

flags at a peaceful protest.²¹ Police officers have carried a purple flag warning protesters that “displaying flags or banners/chanting slogans/or conducting yourselves with an intent such as secession or subversion” could result in arrest:²²



**This is a police warning.
You are displaying flags or
banners / chanting slogans / or
conducting yourselves with
an intent such as secession or
subversion, which may
constitute offenses under the
"HKSAR National Security Law".
You may be arrested
and prosecuted.**

2.2. Subversion

The law defines four vague acts of subversion: “overthrowing or undermining” the basic system of mainland China (Article 22(1)); “overthrowing” the body of central power of mainland China or Hong Kong (Article 22(2)); “seriously interfering in, disrupting or undermining the performance of duties and functions” by the Chinese or Hong Kong governments (Article 22(3)); and “attacking or damaging the premises and facilities” used by the Hong Kong government to perform its duties and functions such that it is incapable of performing them (Article 22(4)). Expressive activity related to these acts is also included since the law covers such acts whether committed “by force or threat of force or other unlawful means” (Article 22). The law captures anyone who “organises, plans, commits or participates” in (Article 22) or who “incites, assists in, abets or provides pecuniary or other financial assistance or property” (Article 23) for the commission of the subversive acts.

These provisions are so vague as to cover any activity that could be viewed as opposing the governments of mainland China or Hong Kong. For example, almost anything might be viewed as “disrupting or undermining” the actions of the Chinese or Hong Kong governments under Article 22(3), from disagreeing with a government policy to contesting elections on a pro-democracy slate. The law fails to define clearly what specific actions would count as “disrupting or undermining”, for example. Thus, these provisions hand the Chinese or Hong Kong authorities a blank cheque to arrest almost anyone they view as a threat.

²¹ Gigi Lee, Lu Xi and Luisetta Mudie, “Hong Kong National Security Police Arrest Eight Over Slogans at Graduation Protest”, 7 December 2020, Radio Free Asia, <https://www.rfa.org/english/news/china/slogans-12072020110200.html>.

²² Gerry Mullany, “Hong Kong’s New Weapon Against Protesters: A Purple Warning Flag”, 1 July 2020, The New York Times, <https://www.nytimes.com/2020/07/01/world/asia/hong-kong-purple-flag.html>.

The sentencing scheme follows the same tiered structure as secession: a “principal offender” or someone who commits “an offence of a grave nature” shall be sentenced to a maximum of life and a minimum of ten years’ imprisonment; a person who “actively participates” shall be sentenced to a maximum of ten years’ and a minimum of three years’ imprisonment; and “other participants” shall be sentenced to a maximum of three years’ imprisonment, short-term detention or other restrictions (Article 22). The accessory offences under Article 23 provide for between five to ten years’ imprisonment for offences of a “serious nature” and a maximum of five years’ imprisonment, short-term detention or other restrictions for offences of a “minor nature”. As with secession, a “person who conspires with or directly or indirectly receives instructions, control, funding or other kinds of support” from foreign actors to commit subversion will receive a more severe penalty (Article 30).

Authorities have laid subversion charges against 47 activists for organising and participating in an unofficial election primary to determine which opposition candidates should stand in the legislative council elections.²³

2.3. Terrorist Activities

The “terrorist activities” offence is more clearly delineated than subversion or secession. It specifies five types of terrorist activities: serious violence against a person (Article 24(1)); explosion, arson, or dissemination of poisonous or radioactive substances, pathogens of infectious diseases or other substances (Article 24(2)); sabotage of transport, transport facilities or combustible facilities (Article 24(3)); serious interruption or sabotage of electronic control systems for public services like utilities or the Internet (Article 24(4)); and “other dangerous activities which seriously jeopardise public health, safety or security” (Article 24(5)). A person commits an offence when he or she “organises, plans, commits, participates in or threatens to commit” any of these activities while causing or intending to cause “grave harm to the society with a view to coercing” the government of mainland China, the government of Hong Kong, an international organisation or the public in pursuit of a political agenda (Article 24). The offence also covers those who are involved in any capacity with terrorist organisations (Article 25), who provide support to terrorist activities (Article 26) or who advocate for or incite the commission of terrorist activities (Article 27). The criminalisation of vague notions such as “advocating for” terrorism has been identified as a breach of the right to freedom of expression.²⁴

²³ Helen Davidson, “Hong Kong: 47 key activists charged with subversion and face life if convicted”, 28 February 2021, *The Guardian*, <https://www.theguardian.com/world/2021/feb/28/hong-kong-47-democracy-activists-charged-with-subversion-under-security-law>.

²⁴ See, for example, the 4 May 2015 Joint Declaration on Freedom of Expression and Responses to Conflict Situations of the four special mandates on freedom of expression at the UN, OSCE, OAS and African Commission, para. 3(b), http://www.law-democracy.org/live/wp-content/uploads/2012/08/15.05.04.Joint-Declaration.PR_.pdf.

Sentencing follows the same multi-tiered systems as for subversion and secession and varies between short-term detention or restrictions, at the lower end, and life imprisonment as a maximum (Articles 24-27).

The terrorist activities offence has yet to be widely used in Hong Kong. One man was charged with terrorism and inciting secession for carrying a “Liberate Hong Kong” flag while allegedly driving a motorcycle into policemen.²⁵

2.4. Collusion with a Foreign Country or with External Elements to Endanger National Security

Article 29 is comprised of two offences. The first is short and criminalises the provision of State secrets or intelligence concerning national security to foreign countries or other foreign actors. The second criminalises cooperation with foreign actors (broadly defined to include “conspiring with” or the indirect receipt of instructions or funding from such actors) to commit five specific acts: waging war against China or using force or threatening to use force to “seriously undermine the sovereignty, unification and territorial integrity” of China (Article 29(1)); “seriously disrupting the formulation and implementation of laws” by the governments of China or Hong Kong (Article 29(2)); “rigging or undermining an election” in Hong Kong (Article 29(3)); imposing sanctions, blockades or engaging in “other hostile activities” against Hong Kong or mainland China (Article 29(4)); and “provoking by unlawful means hatred among Hong Kong residents” towards the governments of China or Hong Kong (Article 29(5)). Both the individual who commits an act of collusion and the foreign colluder are guilty of an offence, and sentencing follows a two-tiered system with a minimum of three years’ and a maximum of life imprisonment (Article 29).

These offences are among the most flexible and speech-targeted from among those found in the NSL. Notions such as disrupting the formulation of laws, engaging in hostile activities against Hong Kong or China and provoking hatred against government have no place in the criminal laws of a democracy.

Charges of foreign collusion have been laid against Jimmy Lai, the founder of Apple Daily, and his staff.²⁶ Apple Daily is a tabloid known for its fierce criticism of the governments of Hong Kong and China. Lai was detained in the newsroom of Apple Daily, which was raided by the Hong Kong police,²⁷ and accused of foreign collusion for allegedly requesting the

²⁵ Jessie Pang and Anne Marie Roantree, “Hong Kong man accused of terrorism in first use of new China security law”, 3 July 2020, Reuters, <https://www.reuters.com/article/us-hongkong-protests-idUSKBN2440A6>.

²⁶ James Pomfret, “Hong Kong police raid on newspaper filmed in real time as China flexes muscles”, August 10, 2020, Reuters, <https://www.reuters.com/article/us-hongkong-security-jimmylai-raid-idUSKCN25610W>.

²⁷ *Ibid.*

United States to issue sanctions against Hong Kong.²⁸ The charge sheet cited months of expressive activity by Lai – including Twitter posts, media interviews, attending meetings with United States’ officials and opinion pieces – which allegedly involved direct or indirect calls for sanctions against the governments of Hong Kong and mainland China.²⁹ Some of this allegedly collusive activity occurred before the NSL had entered into force in June 2020.³⁰

Further context behind the foreign collusion offence is the Chinese government narrative that there is malevolent foreign influence behind the pro-democracy movement that can be traced back to foreign organisations and governments. Chinese officials have asserted that a “black hand” of Western influence is behind the protest movement.³¹ One alleged conduit of this influence is foreign NGOs or local NGOs operating in Hong Kong which receive foreign funding. For example, China Daily, a Communist Party-owned media outlet, has asserted that foreign NGOs such the U.S. National Endowment for Democracy are secretly pursuing CIA-style regime change operations in Hong Kong.³²

It may be noted that all of these offences also appear to target civil society and independent media as organisations and corporations can be liable under the law and face criminal fines and licence terminations (Article 31). This may be particularly aimed at the collusion offence for civil society and independent media that collaborate or partner with foreign actors or receive funding from foreign sources.

2.5. The Four Offences Violate Multiple ICCPR Rights

2.5.1. The Principle of Legal Certainty in the Criminal Law

The vagueness in particular of the secession, subversion and foreign collusion offences is a clear violation of the principle that the criminal law must be sufficiently precise to guide the conduct of those it regulates (Articles 9 and 15 of the ICCPR).³³ There is significant uncertainty over what type of behaviour each act would cover. The NSL is also vague regarding the connecting verbs that create liability. For example, it does not explain what it means to “participate” in secession or subversion, and it is also not clear what it means to “indirectly receive” support from external actors to “undermine” Chinese sovereignty in the

²⁸ The Stand News, “Citing tweets and op-eds, Hong Kong police charges media tycoon Jimmy Lai with foreign collusion”, 15 December 2020, translated and published in Global Voices, <https://globalvoices.org/2020/12/15/citing-tweets-and-op-eds-hong-kong-police-charges-media-tycoon-jimmy-lai-with-foreign-collusion/>.

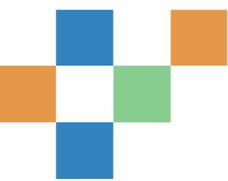
²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ Ben Westcott, “Chinese foreign minister claims ‘black hand’ of Western involvement in Hong Kong”, 20 June 2019, CNN, <https://www.cnn.com/2019/06/20/asia/china-wang-yi-hong-kong-intl-hnk/index.html>.

³² Wei Xinyan and Zhong Weiping, “Who is behind Hong Kong protests?”, 17 August 2019, China Daily, https://www.chinadaily.com.cn/a/201908/17/WS5d578b28a310cf3e355664f1_2.html.

³³ See note 18.



case of foreign collusion. The law's potential for arbitrary enforcement has been borne out in practice. Individuals have been arrested for simply uttering a pro-democratic slogan³⁴ or waving a blank sheet of paper.³⁵ Accordingly, these three offences are far too vague to serve as a guide for the behaviour of the people of Hong Kong and do not meet the standards of certainty required of the criminal law by Articles 9 and 15 of the ICCPR.

In general, the "terrorist activities" offence is sufficiently specific to meet the standard of legality under the ICCPR. For the most part, it lists specific acts that are well-recognised as forms of terrorism by bodies such as the UN Security Council.³⁶ However, its intent requirement of "grave harm to society" should be narrowed to make it clear that the offence is only made out where there is intent to cause serious physical violence or death. The UN Security Council's definition of terrorist acts require such acts to be committed with the "intent to cause death or serious bodily injury".³⁷ "Grave harm to society" is a broader formulation than the UN Security Council's definition, given that creative interpretations of the former might argue that nonviolent acts such as criticism of government or pro-independence speech cause grave harm to society. This lower bar for intent, when combined with the infrastructural damage envisioned in Article 24(3), could conceivably result in a terrorism label being applied to acts of property damage caused during an especially vigorous protest, for instance.

2.5.2. Freedom of Expression

The offences of secession, subversion and foreign collusion also broadly criminalise any expression of dissent, which is a clear violation of the ICCPR's protection for freedom of expression (Article 19). Any restrictions on freedom of expression must pass Article 19(3) of the ICCPR's three-part test, namely that such restrictions be set out in law, aim to protect one of the legitimate interests mentioned in Article 19(3) and be necessary to protect that interest. All three offences fail each limb of the test. As explained in the previous paragraph, the vagueness of the three offences disqualifies them from being prescribed by law, thus failing the first limb of the test. The UN Human Rights Committee has made it clear that, "[a] law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution."³⁸ Laws that restrict freedom of expression cannot be unduly vague because the uncertainty they create would have an unacceptably chilling effect on freedom of expression. This also avoids the core idea behind the "provided by law" part of

³⁴ See note 21.

³⁵ See note 20.

³⁶ UN Security Council Resolution 1566, adopted 8 October 2004, para. 3, <https://www.un.org/ruleoflaw/files/n0454282.pdf>. Note, however, that the reference to advocating for terrorism in Article 27 is unduly vague.

³⁷ *Ibid.*

³⁸ General Comment No. 34, Article 19: Freedoms of opinion and expression, 12 September 2011, para. 25, <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

the test, which is that the legislature should define the scope of the restriction, since interpretation of vague provisions leaves a lot of discretion to officials to determine their scope.

With respect to the second part of the test, national security may be an enumerated legitimate aim under the Article 19(3)(a) ICCPR, but it cannot be used to justify the sweeping controls on pro-democracy expression contained in the subversion, secession and foreign collusion offences. As the Human Rights Committee has pointed out:

23. Paragraph 3 may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights...

30. It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information.³⁹

The third part of the Article 19(3) test requires the government to demonstrate, in an individualised and specific fashion, that the restriction is necessary and proportionate to protect the legitimate aim.⁴⁰ The law neither defines national security nor explains why its sweeping criminalisation of basic forms of expression, such as holding up signs⁴¹ or uttering pro-democracy slogans,⁴² are necessary to protect national security. Even if a justification had been proffered, it would likely have been illegitimate given that the criminalisation of quotidian expressive behaviour is wildly disproportionate to the aim of protecting national security.

Furthermore, journalists and other media workers have been targeted under the NSL; Apple Daily, a newspaper which is critical of the governments of China and Hong Kong, was raided, and its founder Jimmy Lai was charged with foreign collusion.⁴³ The Human Rights Committee has been clear that such targeting is fundamentally incompatible with the ICCPR: “The penalization of a media outlet, publishers or journalist solely for being critical of the government or the political social system espoused by the government can never be considered to be a necessary restriction of freedom of expression.”⁴⁴

³⁹ *Ibid.*

⁴⁰ *Ibid.*, para 35.

⁴¹ See note 20.

⁴² See note 21.

⁴³ See note 26.

⁴⁴ General Comment No. 34, note 38, para. 42.

2.5.3. Freedom of Assembly

The secession, subversion and foreign collusion offences place far-reaching restrictions on peaceful assemblies, which attract the protection of Article 21 of the ICCPR.⁴⁵ The offences also criminalise peaceful protests since they cover behaviour “whether or not” they involve the use of force (Articles 20 and 22 of the NSL).

As with freedom of expression, and given their scope, the secession, subversion and foreign collusion offences are not limited to protecting national security or any other of the acceptable grounds for restricting freedom of assembly under international human rights law. Such restrictions must meet a similar three-part test to the one applied for freedom of expression: they be set out in law, aim to protect a legitimate interest and be necessary to protect that interest.⁴⁶ As a preliminary point, while the Human Rights Committee has recognised that protests may be restricted, such restrictions must apply to the specific circumstances of any assembly and cannot take the form of sweeping restrictions on expressive activity that would include any peaceful assembly:

Any restrictions on participation in peaceful assemblies should be based on a differentiated or individualized assessment of the conduct of the participants and the assembly concerned. Blanket restrictions on peaceful assemblies are presumptively disproportionate.⁴⁷

This point alone is sufficient to deem the blanket restrictions in the secession, subversion and foreign collusion offences to be violations of Article 21. However, it is also worth noting that those three offences fail all three limbs of the test for acceptable restrictions on freedom of assembly. First, they are too vague to pass the “provided by law” test (first limb). The second part of the test has been addressed above. With respect to the necessity part of the test, national security can only very exceptionally justify restrictions on a peaceful protest. The UN Human Rights Committee has made it clear that the suppression of human rights itself threatens national security. Thus, a State cannot enact a human rights-abusing law, such as the 2019 extradition law that triggered the protests, and then claim that national security is undermined by protests in opposition to that law:

42. The “interests of national security” may serve as a ground for restrictions if such restrictions are necessary to preserve the State’s capacity to protect the existence of the nation, its territorial integrity or political independence against a credible threat or use of force. This threshold will only exceptionally be met by assemblies that are “peaceful”. Moreover, where the very reason that national security has deteriorated is the suppression

⁴⁵ UN Human Rights Committee, General Comment No. 37, Article 22: Freedom of assembly, 17 September 2020, para. 11,

<https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsrdB0H115979OVGGB%2bWPAXj3%2bho0P51AAHSqSubYW2%2fRxcFiagfuwxycuvi40wJfdPcVbrA4WPex0yaMKkHN7wVTIuQBOf3GXGFq%2bIOH9e2s>.

⁴⁶ *Ibid.*, paras. 39 - 41.

⁴⁷ *Ibid.*, para. 38.

of human rights, this cannot be used to justify further restrictions, including on the right of peaceful assembly.⁴⁸ [references omitted]

2.5.4. Freedom of Association and the Right to Participate in Public Affairs

The NSL also unduly restricts the right to freedom of association (Article 22 of the ICCPR) by inhibiting the ability of organisations such as civil society or media outlets to fulfil their primary functions. While subversion and secession's vague and sweeping prohibitions collaterally criminalise many of the advocacy activities of NGOs and reporting work of media outlets, the offence of foreign collusion appears to be directly aimed at the work of any organisation that has a foreign connection. These restrictions fail to respect the protections afforded by Article 22 of the ICCPR. The UN Human Rights Committee has confirmed that this right covers "not only to the right to form an association, but also guarantees the right of such an association freely to carry out its statutory activities."⁴⁹

The offence of foreign collusion hands the authorities unduly flexible powers to target almost any civil society activity that pertains to Hong Kong and China and involves a foreign actor, whether it is receiving funds from foreign sources, consulting with foreign partners or any other form of communication with a natural or legal person outside of China. The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association has made it clear that Article 22 protects the right of civil society organisations to access foreign funding:

Under international law, problematic constraints include, inter alia, outright prohibitions to access funding; requiring CSOs to obtain Government approval prior to receiving funding; requiring the transfer of funds to a centralized Government fund; banning or restricting foreign-funded CSOs from engaging in human rights or advocacy activities; stigmatizing or delegitimizing the work of foreign-funded CSOs by requiring them to be labeled as "foreign agents" or other pejorative terms; initiating audit or inspection campaigns to harass CSOs; and imposing criminal penalties on CSOs for failure to comply with the foregoing constraints on funding. The ability of CSOs to access funding and other resources from domestic, foreign and international sources is an integral part of the right to freedom of association, and these constraints violate article 22 of the International Covenant on Civil and Political Rights and other human rights instruments, including the International Covenant on Economic, Social and Cultural Rights.⁵⁰

The NSL also violates Article 25(b) of the ICCPR, the right to participate directly in public affairs, by banning anyone convicted under the law from standing for office (Article 35 of the

⁴⁸ *Ibid.*, para. 42. See also Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, April 1985, para. 32, <http://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf>.

⁴⁹ *Korneenko et al. v. Belarus*, Communication No. 1274/2004, 31 October 2006, para. 7.2, https://www.ccrpcentre.org/wp-content/uploads/2012/12/1274_2004-Belarus.pdf.

⁵⁰ Report to the Human Rights Council of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, 24 April 2013, para. 20, https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39_EN.pdf.

NSL). The Human Rights Committee has stated: “Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation.”⁵¹ While disqualifying those with certain types of criminal convictions from standing for election is not necessarily illegitimate under international human rights law, the NSL is so broadly worded as to essentially criminalise opposition political activity and has in fact been used to charge many pro-democracy activists.⁵² It thus effectively operates as a form of discrimination on the basis of political affiliation, which violates Article 25(b) of the ICCPR.

Recommendations

- The offences of secession, subversion and foreign collusion should be removed from the NSL. Any offences that replace them should be based on clear and specific definitions of national security and should be narrowly tailored to prevent only activity that causes substantial harm to national security, in line with international standards.
- The intent requirement under the “terrorist activities” offence in Article 24 should be modified from intending to cause “grave harm to the society” to intending to “cause serious bodily harm or death” and the reference to “advocating” for terrorism in Article 27 should be removed.

3. Due Process

3.1. Violation of Basic Due Process Protections

The NSL strips key due process protections from those accused of its crimes. The text provides for bail to be denied as a matter of presumption, unless the judge has “sufficient grounds for believing” the accused will not “continue to commit acts endangering national security” (Article 42). This fails to respect the presumption of innocence contained in Article 14(2) of the ICCPR by implying that the accused has already committed acts that endanger national security. A presumed denial of bail is in any case a breach of the clear wording of Article 9(3) of the ICCPR: “It shall not be the general rule that persons awaiting trial shall be detained in custody”. The UN Working Group on Arbitrary Detention has interpreted this

⁵¹ General Comment No. 25, Article 25: Participation in Public Affairs and the Right to Vote, 12 July 1996, para. 15, <https://www.refworld.org/docid/453883fc22.html>.

⁵² BBC News, “Hong Kong charges 47 activists in largest use yet of new security law”, 1 March 2021, <https://www.bbc.com/news/world-asia-china-56228363>.

provision to mean that bail should be granted as a rule with few exceptional circumstances, not the other way around.⁵³

On 9 February 2021, the Hong Kong Court of Final Appeal (HKCFA) confirmed that the NSL reverses the presumption of bail that normally exists in Hong Kong law. The appeal judgment in *HKSAR v. Lai Chee Ying* overturned a High Court decision that had granted Jimmy Lai bail on his charge of collusion under Article 29(4) of the NSL. The HKCFA stated that the NSL's bail provision (Article 42) "displaces ... the presumption in favour of bail"⁵⁴ at the first stage of the two-step analysis that a judge must conduct when assessing a bail application. This "creates a specific exception to the HKSAR rules and principles governing the grant and refusal of bail, and imports a stringent threshold requirement for bail applications."⁵⁵

The HKCFA in *HKSAR v. Lai Chee Ying* also confirmed that the NSL was immune to constitutional review by Hong Kong courts for compliance with the ICCPR or the Basic Law. The HKCFA cited past precedent to explain that, in their application to Hong Kong, the ICCPR and Basic Law were Chinese national laws (as opposed to Hong Kong local laws) over which the mainland Chinese legislature retained final interpretive power, apart from the assessment of whether national laws for Hong Kong had been passed by mainland China in accordance with the procedural requirements of the Basic Law.⁵⁶ Those procedural requirements had been fulfilled by the mainland Chinese legislature in the case of the NSL,⁵⁷ so that the HKCFA could not strike down the NSL. However, the HKCFA did still hold that it should, to the extent possible, interpret the NSL so as to give effect to the protections of the ICCPR: "However, that is not at all to say that human rights and freedoms and rule of law values are inapplicable As far as possible, NSL 42(2) is to be given a meaning and effect compatible with those rights, freedoms and values."⁵⁸

3.2. Failure to Provide for an Independent and Impartial Tribunal

The NSL sidelines juries and the independent members of Hong Kong's judiciary for "offences endangering national security", the scope of which is not defined but would at least include any case under the NSL. The Secretary of Justice may direct that cases be tried without a jury (Article 46), while the Chief Executive of Hong Kong shall handpick certain judges with exclusive competence to handle cases involving national security, for which he

⁵³ *Opinion No. 8/2020 concerning Delankage Sameera Shakthika Sathkumara (Sri Lanka)*, 22 May 2020, paras. 78-81, https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session87/A_HRC_WGAD_2020_8_Advance_Edited_Version.pdf.

⁵⁴ *HKSAR v. Lai Chee Ying* (2021) HKCFA 3, para. 67, https://www.hklii.hk/en/cases/hkcfa/2021/3#_ftnref25.

⁵⁵ *Ibid.*, para. 70(b).

⁵⁶ *Ibid.*, para 37.

⁵⁷ *Ibid.*, para 32.

⁵⁸ *Ibid.*, para 42.

or she “may” consult with the Committee (Article 44). The “option” to consult the Committee, which is “under the supervision of and accountable to the Central People’s Government” (Article 12), is likely to be a requirement in practice.

Judges cannot be so designated if they have “made any statement or behaved in any matter endangering national security”, and a judge who “makes any statement or behaves in any manner endangering national security” during his or her term will be removed from the designation list (Article 44). This vague wording – what it means to endanger national security is undefined – appears designed to ensure not only that only pro-government judges hear cases but also that judges can be removed in retaliation for making an inconvenient ruling. In any case, judges’ tenure in this position is only for one year.

Together these measures represent direct and serious interference by the executive with judicial independence, which is a flagrant violation of Article 14(1) of the ICCPR’s guarantee of trial by an independent and impartial tribunal. As noted by the UN Human Rights Committee:

A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal...

Judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law. The dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary.⁵⁹

Perhaps most concerning for the right to a fair trial is that the NSL prescribes a process for transferring cases from Hong Kong’s justice system to mainland China’s. The Article 48 Office for safeguarding national security, which serves as an outpost for mainland China’s security services, may “exercise jurisdiction” over a case involving an offence endangering national security in broadly defined circumstances. These are if the case is “complex due to the involvement of a foreign country or external elements” (Article 55(1)), if a “serious situation occurs” that renders the Hong Kong government unable to enforce the law (Article 55(2)) or if there is a “major or imminent threat” to national security (Article 55(3)). The decision on this shall be made by the mainland government on a request by the government of Hong Kong or, importantly, by the Office itself.

⁵⁹ General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, 23 August 2007, paras. 19-20, <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsrdB0H115979OVGGB%2bWPAXhRj0XNTTvkGfHbxAcZSvX1OsJj%2fiyRmVA4IiMvUt2NIM%2faca34jcDIZX9fT%2fZidf1IcFxs ofMTw2B1mj3zj69U>.

Once jurisdiction has been exercised, the Office shall investigate the case, a mainland Chinese prosecutorial office will handle prosecution, a mainland Chinese court will try the case and mainland Chinese law will govern all aspects of the case, including criminal procedure (Articles 56-57). Although not explicitly stated in the law, the assumption of jurisdiction by mainland Chinese institutions makes it seem very likely that the accused would be physically transferred to mainland China.

The assumption of jurisdiction by mainland China's justice system is likely to deny due process rights to the accused. The government of Hong Kong continues to have an obligation under the ICCPR to respect the rights of the individual in these circumstances, even if the individual is no longer physically present in Hong Kong. Furthermore, as noted above, the UN Human Rights Committee considers mainland China to be directly responsible for respecting these rights in cases like this. However, mainland China has a justice system that scores poorly on international metrics of fundamental rights. For example, in 2020, the World Justice Project ranked China 93 out of 128 countries in terms of the impartiality of its criminal justice system and 112 out of 128 countries for protection against political interference in criminal justice systems.⁶⁰

Recommendations

- Article 42 should recognise the presumptive right to bail, with any denials of that principle being applied only exceptionally and on a case-by-case basis.
- The special designation of “national security” judges under Article 44 should be removed and, if necessary, replaced with a scheme of designation which is not controlled by the executive and is based on appointing judges with national security expertise. Such judges should be protected from arbitrary dismissal and other forms of political interference.
- The possibility for the assumption of jurisdiction by mainland China's justice system under Articles 55-57 should be removed.

⁶⁰ World Justice Project Rule of Law Index 2020: China, 11 March 2020, <https://worldjusticeproject.org/rule-of-law-index/pdfs/2020-China.pdf>.

4. Unaccountable Police and National Security Bodies and Intrusive Surveillance and Takedown Powers

The NSL grants police sweeping powers of surveillance and control, including over the digital realm. These powers have dramatic consequences for the privacy and free expression of Hong Kongers. Exercise of these powers is only limited by an undefined requirement that their use be necessary to prevent crimes against national security or to protect national security, which is likely to pose a limited barrier in practice. Another common theme across these powers is a lack of effective judicial oversight. In many cases, police can exercise intrusive powers without obtaining a judicial warrant. Even if judicial authorisation is required, the magistrates that issue such warrants are specially appointed by the Chief Executive and can be removed at her will (Article 3 of the Implementation Rules), which significantly qualifies the value of the safeguard.

According to Article 16 of the NSL, the Hong Kong police force shall establish a special “department for safeguarding national security” (department). The head of that department shall be appointed by the Chief Executive, after obtaining the opinion of the Article 48 Office in writing. When investigating offences endangering national security, the new department shall have all of the powers of the regular police under laws currently in force, as well as a number of special powers set out in Article 43 of the NSL.

4.1. Takedown of Electronic Messages

One of the special powers of the Article 16 department under Article 43(4) of the NSL is to require “a person who published information or the relevant service provider to delete the information or provide assistance”. The specifics of this power are elaborated on in Schedule 4 of the Implementation Rules for Article 43.⁶¹ These provide that the Commissioner for Police, with the approval of the Secretary for Security, may authorise a police officer to order takedown of messages if the Commissioner is satisfied that the message “is likely to constitute an offence endangering national security or is likely to cause the occurrence of an offence endangering national security” (Section 6(b), Schedule 4, Implementation Rules). Takedown orders (called a “disabling action” in Section 5, Schedule 4, Implementation Rules) can be directed at the person who placed the message or at the person who provides the platform, network or hosting service (Section 7, Schedule 4, Implementation Rules). Service providers must either delete the message or block access to it by blocking access to the platform that hosts it (Section 5, Schedule 4, Implementation Rules). The officer can order the

⁶¹ 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, 7 July 2020, <https://www.elegislation.gov.hk/hk/A406A!en>.

takedown to occur immediately (Sections 7(2), (4) and (5), Schedule 4, Implementation Rules). Such powers can be exercised without a judicial warrant and any person who ignores a takedown order can face a fine of 100,000HKD and one year's imprisonment for the publisher of the message and 6 months' imprisonment for the person who provides the platform, network or hosting service (Sections 10(1) and 12(1), Schedule 4, Implementation Rules).

The absence of a definition for or specific lists of acts that constitute an "offence that endangers national security" essentially means that police have broad discretion to order takedowns of information. Independent judicial safeguards are absent, as no warrants are needed to issue a takedown order, and any post facto judicial review of takedown orders will be conducted by judges handpicked by the Chief Executive to review national security cases (Article 44 of the NSL).

The UN Human Rights Committee has made it clear that any restrictions on freedom of expression online are subject to the standards set out in Article 19 of the ICCPR:

[R]estrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible with paragraph 3.⁶²

The failure to define clearly what type of messages would endanger national security and therefore justify a takedown order also violates the provided by law part of the test for restrictions on freedom of expression under Article 19(3) of the ICCPR. Granting administrative actors such as the police the power to order takedowns of messages is highly problematical and should be reserved, if allowed at all, for the very most harmful content the further dissemination of which needs to be stopped immediately to prevent further harm. For example, the special international mandates on freedom of expression stated:

Administrative measures which directly limit freedom of expression, including regulatory systems for the media, should always be applied by an independent body...It should also be possible to appeal against the application of administrative measures to an independent court or other adjudicatory body.⁶³

4.2. Surveillance

Article 43(6) of the NSL empowers the Article 16 department, with the approval of the Chief Executive, to undertake "interception of communications" and "covert surveillance" (which are defined broadly in Schedule 6 of the Implementation Rules). This includes the power to install surveillance devices, to conduct surveillance of and intercept telecommunications or

⁶² General Comment No. 34, Article 19: Freedoms of opinion and expression, note 38, para. 43.

⁶³ Four special mandates on freedom of expression at the UN, OSCE, OAS and African Commission, Joint Declaration on Freedom of Expression and Responses to Conflict Situations, note 24, para. 4a.

postal messages and to use force to enter any premises (Section 8, Schedule 6, Implementation Rules). No judicial authorisation is needed for the exercise of these powers.

Police who obtain a judicial warrant may order service providers to assist them to identify the author of an electronic message or assist with decrypting the message (Section 9, Schedule 4, Implementation Rules). While there is a requirement for judicial warrant, the magistrates who handle such applications must be those who are handpicked by the Chief Executive (Article 3 of the Implementation Rules). Police officers can bypass the warrant requirement if the “delay” in doing so is “likely to defeat the purpose of” the warrant or if it is not “reasonably practicable” to make the application (Section 9(2), Schedule 4, Implementation Rules).

These overbroad surveillance powers engage the right to privacy and by extension the right to freedom of expression. Intrusive police powers that can lead to the identification and prosecution of the authors of political speech will have a chilling effect on free expression. The UN Special Rapporteur on freedom of expression has explicitly warned against State overreach with respect to online surveillance:

Yet, at the same time, the Internet also presents new tools and mechanisms through which both State and private actors can monitor and collect information about individuals’ communications and activities on the Internet. Such practices can constitute a violation of the Internet users’ right to privacy, and, by undermining people’s confidence and security on the Internet, impede the free flow of information and ideas online.

The Special Rapporteur is deeply concerned by actions taken by States against individuals communicating via the Internet, frequently justified broadly as being necessary to protect national security or to combat terrorism. While such ends can be legitimate under international human rights law, surveillance often takes place for political, rather than security reasons in an arbitrary and covert manner. For example, States have used popular social networking sites, such as Facebook, to identify and to track the activities of human rights defenders and opposition members, and in some cases have collected usernames and passwords to access private communications of Facebook users.⁶⁴

4.3. The Committee and Office on National Security

The NSL creates a number of new bodies including the Committee, which has high-level planning responsibilities regarding national security, and the Article 48 Office, which assumes jurisdiction over national security cases under certain circumstances. Both operate under significant secrecy and suffer from a serious lack of accountability.

⁶⁴ Report to the Human Rights Council of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 16 May 2011, paras. 53-54, https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf.



The Committee is comprised entirely of members of the executive and the Commissioner of Police (Article 13). It has a range of high-level responsibilities related to the policy and coordination of national security (Article 14). However, it operates in secret and without oversight. Information relating to its work “shall not be subject to disclosure” and the decisions that it makes “shall not be amenable to judicial review” (Article 14). Furthermore, as noted above, the Committee is accountable to the government of mainland China (Article 12).

An important purpose of the Office is to “assume jurisdiction” over certain national security cases, as detailed in section 3.2 of this report, while it also has a mandate to “strengthen the management” of “the organs of foreign countries” and foreign international organisations, NGOs and news agencies (Article 54). In the conduct of its operations in Hong Kong, the Office appears to operate entirely outside of Hong Kong’s jurisdiction or control. While the Office “shall abide by” the laws of Hong Kong and China (Article 50), the acts performed in the course of duty by the Office “shall not be subject” to the jurisdiction of Hong Kong (Article 60). In addition, the Office’s personnel and equipment, such as vehicles, “shall not be subject to inspection, search or detention” by Hong Kong police (Article 60). Thus, the Office can essentially operate in Hong Kong with accountability only to mainland China, creating fertile ground for human rights violations.

Recommendations

- The extensive takedown, interception and surveillance powers allocated to the police under the NSL should either be allocated to an independent body in the first place or be subject to effective and independent judicial oversight. The exercise of these powers should be restricted to situations where they are strictly necessary to protect national security, which should be narrowly and clearly defined.
- The Committee on National Security and the Office should be required to report on the measures they have taken to ensure that their activities and the consequences of those activities respect all of the international human rights standards that are in force in Hong Kong, including the ICCPR. These standards include (but are not limited to) judicial oversight and transparency.
- The Office should also be subject to the law of Hong Kong and the jurisdiction of Hong Kong police.

