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### **Preliminary Comments on the Consultation Paper for the Basic Law Article 23 Legislation in Hong Kong**

Front Line Defenders hereby provides its preliminary comments in response to the consultation paper published by the Security Bureau concerning the Hong Kong government’s legislative proposals for a local law on “safeguarding national security”, under Article 23 of Hong Kong’s Basic Law.

Front Line Defenders is guided by its mandate to improve the security and protection of human rights defenders (HRDs) and organisations around the world at risk for their peaceful and legitimate human rights work. We believe, and encourage the Hong Kong government to recognise, the importance of HRDs as a key actor and ally in advancing positive social change. We advocate for legal reforms that are respectful and protective of, rather than harmful to, human rights defenders.

Our monitoring of the use of ill-defined and overbroad “national security”, “public order” and “counter-terrorism/extremism” laws and regulations around the world, including in some of the countries referenced in the consultation paper, has indicated that these legal instruments are often (mis)used to target, intimidate and punish human rights defenders for their peaceful and legitimate activities in defence of human rights.

**Front Line Defenders is of the view that the current Hong Kong government appears to have ignored or failed to comprehend clear recommendations and jurisprudence of UN human rights mechanisms concerning the human rights compatibility of national security laws and thus does not appear capable of crafting an Article 23 legislation that would be fully consistent with Hong Kong’s human rights obligations under the Basic Law and international human rights law, including the International Covenant on Civil and Political Rights (ICCPR).**

**If an Article 23 law is crafted in line with the proposals, visions and underlying objectives as outlined in the consultation paper, while the 2020 Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (HKNSL) is not repealed or significantly reformed to conform to international human rights standards, the foreseeable impact of the entire national security apparatus in Hong Kong on the protection of human rights defender and civic space will be harmful, as already evidenced by the prosecution of human rights defenders and the threats that have resulted in or contributed to the dissolution or disbandment of numerous human rights organisations and civil society entities following the introduction of the HKNSL.**

Our preliminary comments are based on our review of the following information:

- the entirety of the Article 23 consultation paper as published on 30 January 2024
- remarks made by Hong Kong members of the Chinese delegation during the Universal Periodic Review of the People’s Republic of China on 23 January 2024, and recommendations made by other governments to Hong Kong SAR and China
- remarks made by Hong Kong officials on Article 23 since the publication of the consultation paper
- legal, judicial, administrative, and police actions by the Hong Kong government against human rights defenders and other civil society actors since the HKNSL came into force on 30 June 2020
- Written or verbal responses by the Hong Kong authorities to communications from Front Line Defenders, other civil society organisations, and UN Special Procedures regarding individual cases and Hong Kong laws
- Human rights-related recommendations issued by the United Nations on Hong Kong SAR and China, including those made by the Office of the UN High Commissioner for Human Rights (OHCHR), UN treaty bodies, and UN special procedures

### **The Hong Kong government has selectively and erroneously interpreted international human rights law.**

In this consultation paper and on many other occasions, the Hong Kong government often points out that some rights “are not absolute” and “may be subject to restrictions as prescribed by law if it is necessary in the interests of national security, public safety, public order (ordre public) or the rights and freedoms of others” (paragraph 2.22 of the consultation paper). The consultation paper attempts to reassure the public that “the restrictions on the rights and freedoms of individuals will be very limited, and any limitations imposed must be reasonable, necessary and proportionate.”

However, the new or revised offences proposed by the consultation paper render this reassurance **not credible** because the definitions of these offences as proposed are overbroad, vague and ill-defined, suffering from the same defects in the HKNSL and the sedition law in the Crime Ordinance which have long been highlighted by UN human rights experts.<sup>1</sup>

<sup>1</sup> See for example communications by UN Special Procedures to Hong Kong on:

- The United Nations (Anti-Terrorism Measures) Ordinance, Cap. 575 (“Anti-Terrorism Law”)1 and Crimes Ordinance, Cap. 200, Sections 9 and 10 (“Sedition Law”), JOL CHN7/2020 (23 April 2020), available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25196>
- Proposed changes to the Hong Kong SAR’s legal system and enforcement mechanisms proposed in the Draft National Security Law, JOL CHN13/2020 (19 June 2020), available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25354>
- The Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (“National Security Law”), JOL CHN17/2020 (1 September 2020), available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25487>
- The erosion of the right to freedom of speech, education and academic freedom in the Hong Kong Special Administrative Region (HKSAR) since the enactment of the HKNSL, JAL CHN9/2021 (13 August 2021), available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=26592>
- The arrest and detention of barrister, woman human rights defender and pro-democracy activist Ms. Chow Hang-Tung along with other pro-democracy activists, who are charged with breaching the implementation rules under article 43 of the HKNSL, JUA CHN10/2021 (24 September 2021), available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=26658>
- The multiple cases filed against Jimmy Lai Chee-ying (Jimmy Lai), founder of the pro-democracy newspaper Apple Daily, under various legal provisions, including the National Security Law, JAL CHN1/2023 (17 March 2023), available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=27848>
- Provisions of the National Security Law, amendments to the Legal Aid Scheme, and proposed amendments to the Legal Practitioners Bill in Hong Kong, OL CHN2/2023 (19 April 2023), available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=27992>

The UN Human Rights Committee has consistently stated that when a government bound by the ICCPR invokes a legitimate ground for imposing restrictions on freedom of expression, the permissibility of restrictions on this freedom is not to be assessed by reference to a “margin of appreciation” and that governments do not have unfettered discretion to decide arbitrarily on its own what constitutes permissible restrictions.<sup>2</sup>

Instead, a government “must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.”<sup>3</sup> The Human Rights Committee has also said that it reserves to itself an assessment as to whether a restriction on the freedom of expression meets the principle of necessity.

The often-repeated assertion by Hong Kong government officials that international human rights law allow them to impose restrictions on the rights to freedom of the media, expression, association and assembly fails to acknowledge the Human Rights Committee’s jurisprudence on the strict parameters governing the permissible restrictions of these rights. This failure suggests a serious lack of understanding on the part of Hong Kong officials charged with designing and enforcing these restrictions. Therefore, it is highly unlikely that an Article 23 legislation drafted on the basis of the proposals in the consultation paper would conform to the principles of legality, necessity and proportionality as set out by the UN Human Rights Committee.

Front Line Defenders reminds the Hong Kong government that, in 2022, the UN Human Rights Committee has found that the enforcement of the HKNSL and its Implementation Rules for Article 43 of the HKNSL “have unduly restricted a wide range of Covenant rights”, and called for their repeal.<sup>4</sup>

**The Hong Kong government has shown a clear intention to use an Article 23 legislation to stifle and punish peaceful criticisms of the government and actions to defend human rights.**

The consultation paper states clearly that the intention of adopting an Article 23 legislation is to “achieve further convergence, compatibility and complementarity with the HKNSL” (para. 9.3). Seeking to complement an existing law that has already been found to be abusive of human rights is not a rights-based approach to safeguarding rights and national security.

This intention also contravenes the official recommendations the UN Human Rights Committee made in 2022 to the Hong Kong government. In light of the complete absence of any reference to the Committee’s recommendations in the consultation paper, it is important to reiterate here that the Committee has asked the Hong Kong government to:

1. Take concrete steps to repeal the current National Security Law and, in the meantime, refrain from applying the Law

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• The implementation of the HKNSL in Hong Kong, specifically in the 6 February 2023 start of the first trial of 47 individuals accused of crimes under the NSL; as well as the issuance of arrest warrants by the Hong Kong SAR’s National Security Police for seven individuals, all self-exiled, for crimes under the NSL, JAL CHN16/2023 (31 August 2023), available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=28323>

2 UN Human Rights Committee, General Comment No. 34, article 19: Freedoms of opinion and expression, UN Doc. CCPR/C/GC/34, para. 36 (12 September 2011), available at <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

3 Ibid, para. 35.

4 UN Human Rights Committee, Concluding observations on the fourth periodic report of Hong Kong, China, UN Doc. CCPR/C/CHN-HKG/CO/4, para. 12 (27 July 2022), available at [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FCHN-HKG%2FCO%2F4&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FCHN-HKG%2FCO%2F4&Lang=en).

2. Ensure that the legislative process for enacting a new national security law is inclusive and transparent, facilitating the free, open and meaningful participation of civil society and the public, and that it addresses the concerns relating to the current National Security Law expressed by international human rights mechanisms, including this Committee, with a view to ensuring that the new legislation fully conforms with the Covenant
3. Stop applying the National Security Law and sedition legislation against journalists, politicians, academics, human rights defenders and members of the public duly exercising their right to freedom of expression
4. Refrain from taking any action that is likely to curb the exercise of the freedom of association and ensure a safe environment for the activities of civil society organizations, including trade unions and student unions;
5. Remove all the restrictive measures imposed on trade unions and discontinue all cases against trade unionists charged in connection with their union activities;
6. Review the Societies Ordinance and other relevant legislation with a view to removing the procedural and substantive obstacles to register and run a society and bringing them in line with article 22 of the Covenant

The Committee requires the Hong Kong government to report on its implementation of these recommendations, among others, by 28 July 2025.

Front Line Defenders is highly concerned by the increasingly hostile tone the Hong Kong government has adopted and the legal and other actions it has taken, especially since 2019, against human rights defenders and organisations making genuine and reasonable criticisms of the policies and actions by the Hong Kong and Central Chinese governments.

The consultation paper stated, in paragraph 2.6(h), that: “Under guises such as so-called “fighting for rights” and “monitoring of human rights”, some external forces have carried out such projects in the HKSAR for a long time and subsidised local organisations to launch various kinds of so-called resistance activities, offering support to the Hong Kong version of “colour revolution”.

In the consultation paper and elsewhere, the Hong Kong and Chinese governments have been consistently smearing the 2019 pro-democracy protests as “black-clad violence”, while failing to mention that the protests were a legitimate response to the Hong Kong government’s ill-advised attempt to introduce legal amendments on extradition to mainland China that if adopted would have entailed serious human rights consequences. The consultation paper also fails to mention the excessive and disproportionate use of force by the Hong Kong police against protesters.<sup>5</sup>

On 20 February 2024, in response to a joint statement<sup>6</sup> opposing the legislation of Article 23 signed by over 80 civil society organisations, including many consisting of human rights defenders from Hong Kong, the Hong Kong government issued a statement<sup>7</sup> condemning, rather than recognising the legitimate concerns, of the signatories. The statement contained a veiled threat that the call by the signatories for international actions may constitute the offence of "collusion with a foreign country or with external elements to endanger national security" under Article 29 of the HKNSL.

<sup>5</sup> Front Line Defenders, Statement: Arrests of human rights defenders threaten rights to freedom of assembly and expression in Hong Kong (20 April 2020), available at: <https://www.frontlinedefenders.org/en/statement-report/arrests-human-rights-defenders-threaten-rights-freedom-assembly-and-expression-hong>; see also: UN High Commissioner for Human Rights Michelle Bachelet, “Hong Kong’s leaders have only one way out of the protest crisis – a broad, open and inclusive dialogue with the whole community”, Op-Ed in *South China Morning Post* (30 November 2019), available at: <https://www.scmp.com/comment/opinion/article/3039705/hong-kongs-leaders-have-only-one-way-out-protest-crisis-broad-open>;

<sup>6</sup> Joint Statement from Civil Society Groups on the Hong Kong Government’s Consultation for Article 23 Legislation (19 February 2024), available at <https://www.hongkongwatch.org/all-posts/2024/2/19/over-80-organisations-sign-joint-statement-on-the-hong-kong-governments-consultation-for-article-23-legislation>

<sup>7</sup> Government of the Hong Kong SAR, Statement on Article 23 condemned (20 February 2024), available at [https://www.news.gov.hk/eng/2024/02/20240220/20240220\\_181118\\_275.html](https://www.news.gov.hk/eng/2024/02/20240220/20240220_181118_275.html)

The consultation paper’s proposal to ensure extraterritorial application of an Article 23 law further raises the risk of transnational repression against human rights defenders outside of Hong Kong.

The Hong Kong government’s 20 February statement and the consultation paper attempt to reassure the public that “making reasonable and genuine criticisms of government polices based on objective facts, pointing out issues or offering views for improvement will not violate offences relating to sedition intention”. However, these reassurances are **not credible** in light of the application of the HKNSL and other laws to target and intimidate human rights defenders and media outlets, including those residing abroad, who are exercising their fundamental freedoms and the right to defend human rights.

The prosecution of human rights defenders Chow Hang-tung, Lee Cheuk-yan and Albert Ho<sup>8</sup>; the prosecution of executives or editors of media outlets Stand News and Apple Daily<sup>9</sup>; and the mass trial of 47 pro-democracy advocates and the issuance of 13 arrest warrants in 2023 against individuals who are exiled or based abroad, including many human rights defenders<sup>10</sup>, under the HKNSL make it clear that expressing reasonable and genuine criticisms of the government can and are being criminalised. These cases are emblematic examples of the application of an abusive law that went beyond the permissible limit of legitimate restrictions on human rights, in violations of the ICCPR.

## Recommendations

In light of the above, Front Line Defenders is of the view that the Hong Kong government should not introduce an Article 23 legislation. Instead, it should focus its energy on repealing the HKNSL in coordination with the central Chinese government, adequately review and revise all existing local laws and regulations to ensure their alignment with international human rights law, and ensure that Hong Kong officials at all level in charge of drafting, enforcing and interpreting these laws receive relevant human rights education to as to enable them to discharge their duties in full compliance with Hong Kong’s international human rights obligations.

We recommend the central Chinese government in Beijing to repeal the Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region of 2020.

We recommend the Hong Kong government to:

1. Between now and until at least July 2025 (when it has to report back to the UN Human Rights Committee), re-purpose the public consultation on the legislation of Article 23 and transform it into a transparent, participatory, safe, and meaningful legal reform process, in genuine consultation with civil society and human rights defenders, to review and revise existing laws and regulations with a view to align them with Hong Kong’s obligations under international human rights law and standards, including but limited to the following local laws:

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8 Front Line Defenders Urgent Appeal on the prosecution of the Hong Kong Alliance and its former executive members: <https://www.frontlinedefenders.org/en/case/Inciting%20subversion-trial-unlikely-to-commence-before-November-2024>

9 UN Special Procedures, Press Release: Hong Kong SAR: UN experts urge authorities to drop all charges against Jimmy Lai, call for his release (22 January 2024), available at: <https://www.ohchr.org/en/press-releases/2024/01/hong-kong-sar-un-experts-urge-authorities-drop-all-charges-against-jimmy-lai>

10 UN Special Procedures, Press Release: China/Hong Kong SAR: UN experts concerned about ongoing trials and arrest warrants under National Security Legislation (9 October 2023), available at: <https://www.ohchr.org/en/press-releases/2023/10/chinahong-kong-sar-un-experts-concerned-about-ongoing-trials-and-arrest>

- a) 2020 Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (HKNSL) and the Implementation Rules for Article 23 of the Law
  - b) Crimes Ordinance (Cap. 200), particularly the sedition provision
  - c) Official Secrets Ordinance (Cap. 521)
  - d) Public Order Ordinance (Cap. 245)
  - e) Societies Ordinance (Cap. 151)
2. Engage in sustained and meaningful dialogues with, and actively seek the assistance and input from, OHCHR, UN treaty bodies, and UN Special Procedures mandate holders in the capacity building of government officials, members of the Legislative Council and of the judiciary on the domestication of international human rights law; the review of existing laws and law enforcement practices; and the introduction of new laws that have potential impact on human rights in general and the protection of human rights defenders more specifically
  3. Study closely the jurisprudence and recommendations issued by UN treaty bodies and UN Special Procedures mandate holders, not only those aimed at Hong Kong and China, but also those issued to some of the other countries referenced in the consultation paper<sup>11</sup>, regarding human rights deficiencies in laws and regulations concerning national security, sedition, espionage, and foreign interferences, with a view to genuinely understand the precise standards that international human rights law place on permissible restrictions on certain derogable human rights and how the HKNSL and the proposals for the Article 23 legislation fall far short of these standards. For ease of reference, we have included the hyperlinks to some of these jurisprudence and recommendations in the footnotes of this submission.

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11 See for example:

- UN Special Procedures joint comments on Canada’s Anti Terror Act, AL CAN 1/2015 (27 April 2015), available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=14575>
- UN Human Rights Committee, Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland, UN Doc. CCPR/C/GBR/CO/7 (17 August 2015), available at: <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsg%2FOk3H8qae8NhIDi53MecJ8Es8JxwwaL1HQ8hgVMkgor%2Ba2BnDTW%2FHC6BlyM8TPJNF%2F6qe%2Bcdb0NBnXp%2BA57rBA17cvjmBwuiV2D2gq5FYEj>
- UN Special Procedures joint comments on Australia’s the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, OL AUS 2/2018 (15 February 2018), available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=23659>
- UN Special Rapporteur on the right to freedom of expression and of opinion comments on the UK’s Counter Terrorism and Border Security Bill, OL GBR 6/2018 (17 July 2018), available at: <https://www.ohchr.org/sites/default/files/Documents/Issues/Opinion/Legislation/OL-GBR-6-2018.pdf>
- UN Special Procedures joint comments on Singapore’s Comments on the Foreign Interference (Countermeasures) Bill, OL SGP 1/2021 (8 December 2021), available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=26699>
- UN Special Procedures joint comments on New Zealand’s Counter-Terrorism Legislation Act 2021, OL NZL 1/2021 (19 January 2022), available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=26910>
- UN Human Rights Committee, Concluding observations on the fifth periodic report of the United States of America, UN Doc. CCPR/C/USA/CO/5 (7 December 2023), available at: <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhshjKy20sgGcL5yqccX0g1nmPktAvQAVvIMyUsPeDoeyafIDzMsRP6yowg2baDSl601SRDez4EGyfcT8dtZm4ncYL5vhsRnyt5WLSRW4GxHpV>