

**Submission from Hong Kong NGO
to the Secretariat of the United Nations Human Rights Committee
ahead of formal private session (closed meeting) on 4 July 2022**

The Hong Kong and Mainland Legal Professional Association, an NGO established in the Hong Kong Special Administrative Region (“HKSAR”) of the People’s Republic of China (“PRC”), greatly appreciates the opportunity to provide this written submission to the Secretariat of the United Nations Human Rights Committee as a follow-up to submissions made by States parties and other parties in response to the List of Issues raised by the committee concerning the fourth periodic report on the status and application of the International Covenant on Civil and Political Rights (the “ICCPR”) in the HKSAR.

[Constitutional and legal framework within which the ICCPR is implemented]

1. The ICCPR is fully implemented in the HKSAR. Article 39 of the Basic Law of the HKSAR clearly states that:

“The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.”

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.” *(emphasis added)*

2. The Basic Law of the HKSAR is one of over two hundred national laws in full force and effect passed by the National People’s Congress (“NPC”), the highest legislature in our country, to establish the HKSAR as one of the special administrative region within, and an inalienable part of, our country. As such, whilst the Basic Law of the HKSAR is a constitutional document for the HKSAR (and should be read with the Constitution), the Basic Law does not replace the Constitution of the PRC, being the only Constitution in our country.
3. Article 33 of our country’s Constitution made clear that “All citizens of the People’s Republic of China are equal before the law. The State shall respect and protect human rights. Every citizen shall enjoy the rights prescribed by the Constitution and the law and must fulfil the obligations prescribed by the Constitution and the law”. There are many other fundamental rights (e.g. right to vote and stand for elections, freedom of speech, the press, assembly, freedom of religious belief, personal freedoms, personal dignity, gender equality etc.) of citizens of the PRC as set out in Chapter II (Fundamental Rights and Obligations of Citizens) of the Constitution. As in the case in other parts of the civilized world, such freedom are not absolute and unfettered as citizens are expected to abide by the Constitution and applicable laws. The non-absolute nature of such freedoms and rights, and clear need for exceptions thereto are set out in the ICCPR (e.g. see Articles 12, 13, 14, 17, 19, 21 and 22 of the ICCPR concerning national security and/or public order).
4. In legislating and passing the Basic Law of the HKSAR, the NPC made clear that “The Hong Kong Special Administrative Region shall be a local administrative region of the People’s Republic of China, which shall enjoy a high degree of autonomy and come directly

under the Central People’s Government” (Article 12 of the Basic Law), and that “The Central People’s Government shall be responsible for the foreign affairs relating to the Hong Kong Special Administrative Region” (Article 13 of the Basic Law). The PRC is already a signatory to the ICCPR and the HKSAR is not listed as a direct signatory. More than a dozen international human rights treaties are applicable to and fully respected in the HKSAR.

5. The implementation of the ICCPR and the protection of human rights in the HKSAR are also enshrined in local legislation, including the Bill of Rights Ordinance (“**HKBORO**”), the Sex Discrimination Ordinance, the Disability Discrimination Ordinance, the Family Status Discrimination Ordinance, the Race Discrimination Ordinance, and the Personal Data (Privacy) Ordinance. The anti-discrimination ordinances are enforced by the Equal Opportunities Commission, while the Privacy Commissioner for Personal Data, which enforces the Personal Data (Privacy) Ordinance, protects the right to privacy with respect to personal data. There are checks and balances, including judicial reviews conducted in open courts. “The courts of the Hong Kong Special Administrative Region shall exercise judicial power independently, free from any interference”, as protected under Article 85 of the Basic Law of the HKSAR.

[The 2020 National Security Law]

6. The implementation of the ICCPR and the protection of human rights in the HKSAR have not been reduced by the Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region which was adopted into law and took effect in the HKSAR from 30 June 2020 (the “**2020 National Security Law**”).
7. Article 1 of the ICCPR provides that “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”. Most countries and jurisdictions in the world have national security law to protect sovereignty and national security. It can be observed that the 2020 National Security Law filled an obvious legal vacuum in the HKSAR that is urgently needed to protect “One Country, Two Systems”, national security, the prosperity and stability of the HKSAR, to restore peace and order from the 2019 chaos and riots to protect the lawful rights and interests of all residents of the HKSAR, including lawful rights to pursue economic, social and cultural development.
8. The 2020 National Security Law, inter alia, criminalized secession of our special administrative region into a separate country or to foreign country, criminalized subversion by force or threat of force to overthrow the system established under our Constitution, criminalized terrorist activities including the use of serious violence, explosions, radioactive substances, pathogens of infectious diseases to cause grave harm or intimidate the public in order to pursue political agenda, and criminalized the act of stealing, spying, obtaining with payment, or unlawfully providing State secrets or intelligence concerning national security to a foreign country to wage a war against our country or to use force to seriously undermine the sovereignty, unification and territorial integrity of our country. This is consistent with the United Nations Charter to maintain peace and security, protect fundamental human rights, sovereign equality, mutual respect and equal rights of nations big and small.

9. More specifically, Article 4 of the 2020 National Security Law reinforces exercising laws to stipulate that human rights shall be respected and protected in safeguarding national security in the HKSAR, and reaffirms that the rights and freedoms of HKSAR residents under the Basic Law of HKSAR and the provisions of the ICCPR and the International Covenant on Economic, Social and Cultural Rights as applied to the HKSAR shall be protected in accordance with the law.
10. Article 5 of the 2020 National Security Law fully incorporates and respects human rights, the presumption of innocence, prohibition of double jeopardy and right to defence, mandating that the principle of the rule of law shall be adhered to in safeguarding national security. That law did not introduce retrospective effect which is sometimes seen in tax related laws and decrees in other common law jurisdictions. In line with Article 14 of the ICCPR, Article 41 of the 2020 National Security Law provides that trials must be conducted in open court unless State secrets is involved. This exception is fair, and features in national security laws in other jurisdictions and countries as it would be against the national security interest of a country to have to place a suspect in an open forum to potentially further disclose State secrets that may do more harm.
11. The 2020 National Security Law, like national security laws (and competition / anti-trust laws, anti-corruption laws, and laws to protect minor etc) of other jurisdictions/countries, contain provisions that expressly explain circumstances where extra-territorial application will be required (see Articles 36 to 38). These are well-founded based on international legal principles, such as the nationality principle (jurisdiction assumed based on the nationality of the crime perpetrator), passive personality principle (jurisdiction prescribed for acts committed abroad which are harmful to nationals of the forum state, and the protective principle (jurisdiction assumed for overseas acts that threaten the integrity or security of the forum state or endanger or undermine its essential government institutions or functions, or public interests). A reasonable unbiased person would generally likely not object to a country seeking to put in place laws to prevent, deter or punish very serious crimes that are being committed in that country without giving special favors due to the passport(s) held by the person committing the crime, nor require that country to, figuratively speaking, turn a blind eye to allow perpetrators to simply walk out of your national border and turn around to spray bullets from a machine gun to residents in your country or otherwise attack your national security.
12. To date, there has not been that many court hearing of national security cases prosecuted under the 2020 National Security Law, but among those that have taken place there has not been any case known to result in the local legal, business and general communities have formed any unanimous strong cry of foul play pointing to any breach of the ICCPR in the implementation of the 2020 National Security Law by the Government of the HKSAR.
13. Before the 2020 National Security Law was “put to the test”, commentators raised questions regarding designation of judges for cases under that law, noting that a plain reading of the law is that the HKSAR Chief Executive in Council may consult the Committee for Safeguarding National Security of the HKSAR and the Chief Justice in designating at different levels of court a list of judges from existing judges to hear cases concerning offences endangering national security. Some commentators suggested that the HKSAR Chief Executive in Council might try to abuse the system and appoint his/her own chosen judge to preside over a specific trial to force a specific outcome. There is simply no evidence of such having taken place, and fact is the HKSAR Chief Executive in Council

does not have power under that law to specifically choose his/her own preferred judge to hear a specific case. Perhaps such commentators could be reminded that Article 85 to 92 of the Basic Law of the HKSAR provides constitutional guarantee which ensures judicial independence, that judges are to be added to the panel list of judges who meet objective criteria such as their judicial and professional qualities to be able to objectively and fairly rule on national security law cases, and that furthermore that all judges have taken the Judicial Oath by which they swear that they will uphold the Basic Law of the HKSAR, serve the HKSAR conscientiously, dutifully, in full accordance with the law, honestly and with integrity, safeguard the law and administer justice without fear or favour, self-interest or deceit. Judges are always free to decide each of the cases in accordance with the law and evidence before them. In perhaps the first significant case under the 2020 National Security Law, the case of *Tong Ying Kit v. HKSAR* case, it is well illustrated that “There is no proper or sufficient basis to contend that, in relation to cases concerning offences under the NSL, the CE or the Government is in a position ‘to interfere in matters that are directly and immediately relevant to the adjudicative function, for example, assignment of judges, sittings of the court and court lists’, or that the liberty of any member of the Judiciary in Hong Kong ‘in adjudicating individual disputes and in upholding the law and values of the constitution’ is, or will be, interfered with by the CE exercising her power under Article 44 [of the NSL].” The mere fact that a case concerning offences endangering national security is handled by a judge added to a panel list of qualified judges under Article 44 of the 2020 National Security Law would not render the court not independent¹. Under an established mechanism, the right to a fair hearing by an impartial, independent and competent trial under the Rule of Law in the HKSAR is upheld and enshrined under the 2020 National Security Law.

[One Country, Two Systems policy, created in Beijing, is going strong]

14. As the Basic Law of the HKSAR is a national law passed by the National People’s Congress, the power of amendment of the Basic Law is naturally vested in the National People’s Congress (see also Article 159 of the Basic Law). For completeness, please take note that the PRC is a unitary state (not a federation of states in some other countries where local governments delegated-up certain powers to federal government while retaining residual powers). Local governments in our country (such as the Government of the HKSAR) operate based on delegated powers from, and are subject to supervision of, the Central People’s Government. Article 20 of the Basic Law of the HKSAR stipulates that the HKSAR may enjoy other powers delegated to it by the National People’s Congress, the Standing Committee of the National People’s Congress or the Central People’s Government.
15. Under the Constitution of our country (se Article 67), the Standing Committee of the National People’s Congress has the duty and power to interpret our country’s Constitution, and congress has made clear in Article 158 of the Basic Law that the Standing Committee of the National People’s Congress has the duty and power to interpret the Basic Law of the HKSAR, and at the same time delegated some powers to local courts in the HKSAR. The most relevant provisions of Article 158 are set out below:

¹ [2020] HKCFI 2133, see paras 55 and 64.

“The Standing Committee of the National People’s Congress shall authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region.

The courts of the Hong Kong Special Administrative Region may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People’s Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People’s Congress through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.”

16. “One Country, Two Systems” is the guiding policy advocated by the leader of the PRC and fully supported by the National People’s Congress when legislating the Basic Law of the HKSAR as a national law in accordance with Article 31 of the Constitution of the PRC. This policy was not created by another country and is not provided for in the Sino-British Joint Declaration that was signed on 19 December 1984.
17. The “One Country, Two Systems” policy has many unique advantages including ensuring peaceful reunification and stability for people from all over the world residing in our world city to not have to face any uncertainty in switching over to a socialist market economy system that one might not be familiar with in 1997, and if two systems can work well in one country then the world can have confidence that we can have a peaceful world for countries operating under different social and economic systems to peacefully co-exist, respect and learn from each other, and grow together through multilateral relationships rather than imposing any one system over all other systems with force. “One Country, Two Systems” have consistently been supported by the leaders of our country and recently reaffirmed by the leadership political party and the National People’s Congress. Peace and order restored in the HKSAR with the help of the 2020 National Security Law has strengthened, not weakened, “One Country, Two Systems” in the HKSAR.
18. Mr. SHEN Chunyao, Chairman of Legislative Affairs Commission of National People’s Congress Standing Committee, has in May 2022 reassuringly stated that the “One Country, Two Systems” principle will have to continually improve, but Hong Kong’s constitutional order will not change at 2047. Mr. SHEN said “Fifty years is only a symbolic expression. This would not change even after 50 years. The first 50 years is: we cannot change, then after 50 years that would be that we need not change, as long as we believe in One country, Two systems. Its life, its vitality would be fully expressed”.

[Emergency Powers subject to checks and balances]

19. Like many other jurisdictions/countries in the world, governments need to make use of emergency powers in accordance with local laws and international obligations to defend residents against the spread and harm of COVID-19 and other emergencies. In the HKSAR, the Emergency Regulations Ordinance (“**ERO**”) was first introduced in 1922, granting the

then Governor In Council (the Governor then is a person who is appointed by a foreign country who is not locally elected and is not subject to prosecution under local laws in Hong Kong) (and now the Chief Executive in Council (“CEIC”) who is elected locally in accordance with the Basic Law of the HKSAR) with legislative power to make any regulations considered desirable in the public interest in situations of emergency or public danger. Read together with Section 5(1) of the HKBORO, the derogation of the ERO from the HKBORO can only be justified under two conditions being (1) the existence of emergency is “officially proclaimed” and (2) any derogating measures must be strictly required by the exigencies of the situation, satisfying the proportionality test. Section 5(2) of the HKBORO also prescribed that the derogating measures must not be inconsistent with any obligation under international law that applies to the HKSAR. Given that invoking the ERO complies with the non-derogable provisions of the ICCPR, the constitutionality of the ERO is confirmed.

20. The exercise of powers under ERO is subject to effective controls. The CEIC is “subject to close judicial scrutiny and can only invoke the ERO where there is public danger.” This is instanced by the various mechanisms in place that allow for legal challenges. Statutory interpretation can be called upon to “provide interpretation for the meaning of public danger to fill the lacuna”. The ERO is also amenable subject to judicial review. The HKSAR Legislative Council Brief document, which provides necessary information related to the emergency regulations to facilitate the legal challenge, as well as the requirement to act *bona fide* according to the Padfield principle are means available to the HKSAR Legislative Council to scrutinize the validity of the emergency regulations. The effective controls under the existing constitutional framework strongly evidence that the rights and interest of the people are not infringed.

[One of the best legal aid systems in the world to provide access to justice]

21. The HKSAR is widely recognized as a world leading jurisdiction with a strong Rule of Law and disputes resolution hub. Contributing factors include her uniqueness as the only common law jurisdiction in the country, a strong and diverse legal profession with local and international lawyers, law firms, top judges, an independent judiciary, a court of final appeal being in the HKSAR rather than being in another country prior to 1 July 1997, and a world leading legal aid system.
22. In line with Article 22 of the HKBORO, the Legal Aid Department of the HKSAR is given a lot of resources (without an annual budget cap, as we understand) to ensure that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law, so that no one in the HKSAR is deprived of their right to fair access or legal representation due to financial hardship. The Legal Aid Scheme in Hong Kong provides eligible applicants with representation by a solicitor, and a barrister where necessary. The Duty Lawyer Scheme and Free Legal Advice Scheme run by the Duty Lawyer Service, and the Bar Free Legal Service Scheme are examples of free or subsidized legal service in the HKSAR. Significant increase of financial eligibility limits for legal aid for over 30% in June 2020 further improved access to justice.

[End]