

# Lawyers' Rights Watch Canada

*NGO in Special Consultative Status with the Economic and Social Council of the United Nations*  
Promoting human rights by protecting those who defend them

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Wednesday, April 24, 2019

Carrie Lam Cheng Yuet-ngor  
Chief Executive of Hong Kong  
Via email to: [ceo@ceo.gov.hk](mailto:ceo@ceo.gov.hk)

Ms Teresa Cheng Yeuk-wah,  
Secretary of Justice for Hong Kong  
Via email: [sjo@doj.gov.uk](mailto:sjo@doj.gov.uk)

Dear Chief Executive Lam and Secretary of Justice Cheng;

## **Re: Nine activists wrongfully convicted for peaceful pro-democracy advocacy**

Lawyers' Rights Watch Canada (LRWC)<sup>1</sup> writes to object to the wrongful prosecution, conviction and sentencing of the nine human rights defenders named below for peacefully exercising their internationally protected right to advocate for the right to vote and other democratic reform in Hong Kong and to request remediation.

### **1. Remedy Requested**

LRWC requests that the Government of Hong Kong comply with its international law obligations with respect to its treatment of the nine pro-democracy advocates criminally convicted on 9 April 2019, eight of whom were sentenced on 23 April 2019, namely:

- Benny Tai (Yiu Ting Tai), law professor, sentenced to 16 Months in prison;
- Chan Kin-man, sociology professor, sentenced to 16 months in prison;
- Chu Yiu-ming, Baptist minister, sentenced to 16 months in prison suspended for two years;
- Shiu Ka-chun, pro-democracy politician, sentenced to 8 months in prison;
- Tommy Cheung (Sau Yin Cheung), student, sentenced to 200 hours of community service;
- Eason Chung (Yiu Wa Chung); student leader, sentenced to 8 months in prison suspended for two years,
- Raphael Wong (Ho Ming Wong),<sup>2</sup> pro-democracy activist, sentenced to 8 months in prison; and,
- Lee Wing-tat, former lawmaker, sentenced to 8 months in prison suspended for two years. .

The sentencing of Tanya Chan, pro-democracy politician was adjourned to 10 June 2019 to allow time for surgery to remove a brain tumour.

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<sup>1</sup> LRWC is a committee of lawyers and others who promote international human rights through advocacy, education and research. LRWC has consultative status with the United Nations (UN) Economic and Social Council

<sup>2</sup> Raphael Wong was convicted and sentenced in 2016 of unlawful assembly. Originally sentenced to community service, the Court of Appeal imposed a jail term and the Court of Final Appeal set aside the sentence calling the Court of Appeal's jail term a "grave injustice"

LRWC requests that the Hong Kong Government:

1. immediately release the pro-democracy advocates sentenced to imprisonment, namely, Benny Tai , Chan Kin, Shiu Ka-chun, and Raphael Wong; and,
2. initiate proceeding to have all of the convictions and sentences overturned; and,
3. In the interim to:
  - a. suspend any action that would restrict the liberty of any of the above named pro-democracy advocates including those whose prison sentences were suspended, namely, Chu Yiu-ming, Eason Chung and Lee Wing-tat;
  - b. suspend the community service sentence imposed on Tommy Cheung;
  - c. adjourn generally sentencing of Tanya Chan.

## **2. Background**

The above named nine human rights defenders (Democracy Advocates) were convicted on 9 April and eight sentenced on 23 April 2019 by the District Court of the Hong Kong Special Administrative Region on vague and overly broad ‘public nuisance’ charges for their peaceful involvement in the 2014 Hong Kong pro-democracy protests. All were convicted solely for the peaceful exercise of their rights to freedom of expression and peaceful assembly. Each charge carries a maximum sentence of 7 years in prison. LRWC knows of no allegations of evidence of counselling or committing violence.

### **2.1 Charges**

**Benny Tai, Chan Kin-Man and Chu Yiu-Ming** were charged with conspiracy to commit public nuisance contrary to Common Law and section 159A of the Crimes Ordinance, Cap 200 and punishable under section 159C of the Criminal Procedure Ordinance Cap 221

- The particulars of offence allege that HRDs between about March 2013 and 2nd December 2014 conspired together and with other persons to cause a nuisance to the public through the unlawful obstruction of public places and roads in or in the neighbourhood of Central.

**Benny Tai, Chan Kin-Man and Chu Yiu-Ming, Tanya Chan, Shiu Ka-Chun, Tommy Cheung, Eason Chung** were charged with incitement to commit public nuisance contrary to Common Law and punishable under section 101I of the Criminal Procedure Ordinance, Cap 221

The particulars of offence allege that these seven HRDs between the 27th and 28th of September 2014 unlawfully incited persons present at Tim Mei Avenue, Admiralty to cause a public nuisance to the public by unlawfully obstructing public places and roads at and in the neighbourhood of Tim Mei Avenue.

**Raphael Wong** was charged with:

- Incitement to commit public nuisance contrary to Common Law and punishable under section 101I of the Criminal Procedure Ordinance, Cap 221

The particulars of offence allege that this HRD on 28th September, 2014, at Fenwick Pier Street, Admiralty, in Hong Kong, unlawfully incited persons present at Fenwick Pier Street, Admiralty, to cause a public nuisance to the public by unlawfully obstructing the carriageway of Fenwick Pier Street

- Incitement to incite public nuisance contrary to Common Law and punishable under section 101I of the Criminal Procedure Ordinance, Cap 221

The particulars of offence allege that this HRD on 28th September, 2014, at Fenwick Pier Street, Admiralty, in Hong Kong, unlawfully incited persons present at Fenwick Pier Street, Admiralty, to incite other persons to cause a public nuisance to the public by unlawfully obstructing the carriageway of Fenwick Pier Street.

**Lee Wing-tat** was charged with incitement to commit public nuisance contrary to Common Law and punishable under section 101I of the Criminal Procedure Ordinance, Cap 221. The particulars alleged that this HRD on 28th September, 2014, at Harcourt Road near Tim Mei Avenue, Admiralty, in Hong Kong, unlawfully incited persons present at Harcourt Road and Tim Mei Avenue, Admiralty, to cause a public nuisance to the public by unlawfully obstructing the carriageway of Harcourt Road.

### **3. International Law Obligations**

#### **3.1 Violation of the right to peaceful protest**

The international human right of individuals and groups to peacefully protest and express their dissent, individually and collectively, involves a number of internationally-protected rights, including rights to freedom of expression, opinion and belief; freedom of association and peaceful assembly; the right to participate in public affairs; bodily integrity, which includes the right to security, the right to be free from cruel, inhuman or degrading treatment or punishment, and the right to life; dignity; privacy; and an effective remedy for all human rights violations. States have an obligation to ensure all persons enjoy these fundamental rights equally and without discrimination of any kind.

All of these fundamental rights and freedoms are guaranteed under the *Universal Declaration on Human Rights* (“UDHR”) and in the *International Covenant on Civil and Political Rights* (“ICCPR”), both of which are binding on Hong Kong.<sup>3</sup>

#### ***Right to promote and protect internationally protected rights***

The individual rights comprising the right to protest are also critical to the effective exercise of the right of everyone, individually and in groups, to promote and protect internationally-protected human rights, as reflected in their reproduction in the various provisions of the *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* (“UN Declaration on Human Rights Defenders”).

The arrest, detention and conviction of the nine leaders on vague and ambiguous charges is a violation of the right to peaceful protest, including freedom of expression, which requires that restrictions or limitations must not be arbitrary or unreasonable and must not be used as a means of political censorship or of silencing criticism of public officials or public policies.<sup>4</sup> Laws imposing restrictions or limitations on rights must be accessible, concrete, clear and unambiguous, such that they can be understood by everyone and applied to everyone.<sup>5</sup> In particular, under ICCPR article 5, restrictions on the right to peaceful protest may not put in jeopardy the right itself.<sup>6</sup>

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<sup>3</sup> In 1976, the Government of the United Kingdom ratified the *International Covenant on Civil and Political Rights* with certain reservations and declarations, and extended the Covenant to 10 British dependent territories including Hong Kong. Under the Joint Declaration of the Government of the United Kingdom of Great Britain and North Ireland and the Government of the People’s Republic of China on the Question of Hong Kong (“Joint Declaration”) signed on 19 December 1984, it is provided both in Section XI of Annex I to the Joint Declaration and Article 153 of the Basic Law that international agreements to which the People’s Republic of China is not a party but which are implemented in Hong Kong may continue to be implemented in the Hong Kong Special Administrative Region from 1 July 1997. The application of the Covenant is also provided for in Article 39 of the Basic Law.

<sup>4</sup> UN, General Assembly, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/HRC/ (14/23)*, 20 April 2010, para. 79(f).

<sup>5</sup> UN, General Assembly, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/HRC/ (14/23)*, 20 April 2010, para. 79(d).

<sup>6</sup> HR Committee, *CCPR General Comment No. 34, Article 19: Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34, para. 21.

### **3.2 Violation of freedom from arbitrary arrest and detention**

The arrest, detention and convictions based on vague and ambiguous charges, including “conspiracy to commit public nuisance”, incitement to commit public nuisance” and “incitement to incite public nuisance” violate rights to freedom from arbitrary arrest and detention under ICCPR, article 9(1). Arrest or detention as punishment for the legitimate exercise of the rights as guaranteed by the ICCPR, including freedom of opinion and expression is by definition arbitrary.<sup>7</sup>

### **3.3 Convictions violate the principle of legality**

The application of vague and ambiguous charges by Hong Kong violates the principle of legality under ICCPR articles 9(1) and 15(1), which prohibit arrest, detention and punishment on grounds that are not clearly established in pre-existing law.<sup>8</sup> To be characterized as a “law” for the purposes of ICCPR articles 9(1) and 15(1), the law must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.<sup>9</sup> A detention pursuant to proceedings that are incompatible with ICCPR article 15 are necessarily arbitrary within the meaning of article 9 (1) of the Covenant.<sup>10</sup> The central importance of the principle of legality to the rule of law is highlighted by the fact that no derogation is permitted under ICCPR article 4(2). Similarly, the right to challenge the legality of detention before a court is a rule of customary international law and has acquired a status of *jus cogens*, which does not permit derogations.<sup>11</sup>

### **3.4 Sentences have no legitimate basis**

The acts complained of did not merit criminal prosecution or punishment. The HRDs were prosecuted for participation in the Occupy Central with Love and Peace, a plan to peacefully assemble in central Hong Kong over a weekend to support universal suffrage and more open elections. The protest grew into a 79-day protest involving over 1 million people (known as the Umbrella Movement) gathering in the streets of Hong Kong to peacefully signal their support for democratic reform. The Umbrella Movement was not the work of the targeted HRDs. It was likely a reaction to a number of actions by government agents including the 31 August decision of the Standing Committee of the Peoples’ Congress that dashed hopes for universal suffrage and the heavy handed reaction of police to the initial protesters. LRWC knows of no allegations or evidence that any of the HRDs planned, counseled or committed violence to persons or property. The sentences were not necessary to protect the public interest against injury.

### **3.5 Right to an adequate, effective and prompt remedy**

Under international law, everyone is entitled to an adequate, effective and prompt remedy determined by a competent authority having the power to enforce remedies for a violation of their human rights. The right to a remedy is guaranteed notwithstanding that the violation may have been caused by persons acting in an official capacity, and is available equally to all persons, without discrimination. The right to a remedy includes the right to equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms.<sup>12</sup>

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<sup>7</sup>UN Human Rights Committee, Communication No. 2252/2013, *Khadzhiyev v. Turkmenistan* (24 May 2018), UN Doc CCPR/C/122/D/2252/2013, para. 7.7; UN Human Rights Committee, Communication No. 56/2012, *Blanco v. Venezuela* (26 May 2014), A/HRC/WGAD/2012/56, para. 2(b).

<sup>8</sup>UN Human Rights Committee, Communication No. 702/1996, *McLawrence v. Jamaica* (26 April 1996), CCPR/C/60/D/702/1996, para. 5.5.

<sup>9</sup>UN Human Rights Committee, Communication No. 578/1994, *Leonardus Johannes Maria de Groot v. The Netherlands* (14 July 1995), para. 4.3.

<sup>10</sup>Human Rights Committee, Communication No. 1629/2007, *Fardon v. Australia*, Views adopted on 18 March 2010, para. 7.4 (2).

<sup>11</sup> United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, Principle 4.

<sup>12</sup> UN HRC, *Joint report of the Special Rapporteur on the rights to freedom of rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies*, 4 February 2016, A/HRC/31/66, para. 89.

### **36 State duty to promptly investigate allegations of rights violations**

States must investigate any allegations of violations of internationally protected rights promptly and effectively, through bodies that are independent and impartial. A failure to investigate allegations of violations of the ICCPR could in and of itself give rise to a separate breach of the ICCPR.<sup>13</sup>

### **3.7 Right to reparation**

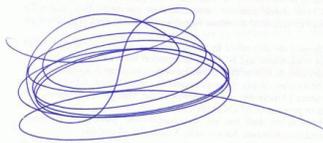
States must make reparation to individuals whose *ICCPR* rights have been violated. Reparation generally entails appropriate compensation, and can, where appropriate, involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.<sup>14</sup>

## **4. Conclusion**

The convictions and sentencing lack a legal basis and violate international human rights law obligations to respect and enable rights protected by the UDHR and the ICCPR. Accordingly, LRWC requests that the Hong Kong Government:

1. immediately release the pro-democracy advocates sentenced to imprisonment, namely, Benny Tai, Chan Kin, Shiu Ka-chun, and Raphael Wong; and,
2. initiate proceeding to have all of the convictions and sentences overturned; and,
3. In the interim to:
  - a. suspend any action that would restrict the liberty of any of the above named pro-democracy advocates including those whose prison sentences were suspended, namely, Chu Yiu-ming, Eason Chung and Lee Wing-tat;
  - b. suspend the community service sentence imposed on Tommy Cheung;
  - c. adjourn generally sentencing of Tanya Chan.

Sincerely,



Gail Davidson, Executive Director, LRWC

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<sup>13</sup> UN, HR Committee, *CCPR General Comment No. 31, Article 2 (The Nature of the General Legal Obligation Imposed on States Parties to the Covenant)*, 29 March 2004, CCPR/C/21/Rev.1/Add.13, para. 15.

<sup>14</sup> UN, HR Committee, *CCPR General Comment No. 31, Article 2 (The Nature of the General Legal Obligation Imposed on States Parties to the Covenant)*, 29 March 2004, CCPR/C/21/Rev.1/Add.13, para. 16.

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