

# 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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## Re: Arrest and Prosecution of pro-democracy figures contravenes international law obligations

On 18 April 2020, Hong Kong police arrested 15 high-profile pro-democracy figures including Democratic Party founder and barrister Martin Lee, former lawmaker and barrister Margaret Ng, and media tycoon Jimmy Lai. Previous and current legislative council members were also arrested. All were arrested on suspicion of organizing and participating in unauthorized protests against the Hong Kong Special Administrative Region (“HKSAR”) government’s proposed extradition bills. These protests had occurred on 18 August, 1 October, and 20 October 2019.<sup>1</sup> All those arrested were released on bail after being charged with unlawful assembly.<sup>2</sup>

Lawyers’ Rights Watch Canada (LRWC) calls on the HKSAR to immediately drop all related charges against the fifteen wrongly arrested pro-democracy leaders in accordance with its international human rights law obligations.

Charges were apparently laid under the Public Order Ordinance, section 18 of which states,

“When three or more persons assemble together, conduct themselves in a disorderly, intimidating, insulting or provocative manner intended or likely to cause any person reasonably to fear that the persons so assembled will commit a breach of the peace, or will by such conduct provoke other persons to commit a breach of the peace, they are an unlawful assembly.”<sup>3</sup>

The above noted provision cannot provide a legitimate basis for conviction or punishment as it:

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<sup>1</sup> See: *15 Hong Kong Pro-democracy Figures Arrested in Latest Police Round Up*, Rachel Wong, Hong Kong Free Press, 18 April 2020, at <https://hongkongfp.com/2020/04/18/8-hong-kong-pro-democracy-figures-arrested-in-latest-police-round-up-party-says/>

<sup>2</sup> See: *Over 30 MEPs Express Concern Over the Arrest of Hong Kong’s Pro-democracy Politicians and Advocates*, Hong Kong Watch, 23 April 2020, at <https://www.hongkongwatch.org/all-posts/2020/4/23/over-30-meps-express-concern-over-the-arrest-of-hong-kongs-pro-democracy-politicians-and-advocates>

<sup>3</sup> [https://www.elegislation.gov.hk/hk/cap245?pmc=0&xpid=ID\\_1438402885841\\_002&m=0&pm=1](https://www.elegislation.gov.hk/hk/cap245?pmc=0&xpid=ID_1438402885841_002&m=0&pm=1)

1. does not constitute a legitimate, necessary or proportionate limitation of rights guaranteed by the International Covenant on Civil and Political Rights (ICCPR)<sup>4</sup> to: freedom of expression (Art. 19); freedom of association and assembly (Art. 22); and, the right to participate “without unreasonable restrictions” in the conduct of public affairs (Art. 25).
2. lacks the clarity that would enable both foreknowledge of what constitutes an offence or non-discriminatory enforcement; and,
3. arbitrarily criminalizes the lawful exercise of internationally protected rights.

The right to engage in the conduct of public affairs by exercising rights to expression and assembly in the form of public protests is an essential means of “achieving social objectives in changing legislation, policies, decisions, actions and attitudes.”<sup>5</sup> The United Nations (UN) Office of the High Commissioner of Human Rights notes that these fundamental freedoms

enable people to share ideas, form new ones, and join together with others to claim their rights. It is through the exercise of these public freedoms that we make informed decisions about our economic and social development. It is through these rights that we can take part in civic activity and build democratic societies. To restrict them undermines our collective progress.<sup>6</sup>

The Hong Kong protests, as reported by mass media, began peacefully, and their demands for the HKSAR to comply with its international human rights obligations must be protected. The protest on 18 August was a peaceful march, and protesters were orderly. The HKSAR conceded that protests were peaceful but claimed they inconvenienced the community.<sup>7</sup> The 1 October protests saw clashes between protesters and riot police only after a police officer shot a protester with a live round.<sup>8</sup> A similar chain of events was unleashed in the course of another mass march on 20 October. This protest was a direct reaction to the anti-mask law imposed by the HKSAR in response to months of social protests in opposition to the proposed extradition bills. This march also remained peaceful until Hong Kong police deployed water cannons, projectiles and tear gas against the non-violent protesters.<sup>9</sup>

Since June 2019 when mass demonstrations were first organized against the proposed extradition bills, LRWC has repeatedly called on the HKSAR to take all measures necessary to ensure the right of

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<sup>4</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>5</sup> UN, General Assembly, *Report of the Special Representative of the Secretary-General on the situation of human rights defenders, Hina Jilani*, 13 August 2007, A/62/225, para. 7. cited in *Right to Dissent: Guide to international law obligations to respect, protect and fulfill the right of all persons to participate in public affairs by engaging in criticism, opposition and dissent*, Lois Leslie, LRWC 2017. at <https://www.lrwc.org/the-right-to-dissent-international-law-obligations-to-respect-protect-and-fulfill-the-right-to-participate-in-public-affairs-by-engaging-in-criticism-opposition-and-dissent-handbook/>

<sup>6</sup> UN OHCHR, *Civil Society Space and the United Nations Human Rights System: A Practical Guide for Civil Society*, 2014, p. 1.

<sup>7</sup> See: *Hong Kong: 1.7m People Defy Police to March in Pouring Rain*, Verna Yu and Lily Kuo, The Guardian, 18 August 2019, at <https://www.theguardian.com/world/2019/aug/18/hong-kong-huge-rally-china-condemns-us-gross-interference>

<sup>8</sup> See: *Six Months of Hong Kong Protests. How Did We Get Here?* Jin Wu, K. K. Rebecca Lai and Alan Yuhas, The New York Times, at <https://www.nytimes.com/interactive/2019/world/asia/hong-kong-protests-arc.html>

<sup>9</sup> See: *Hundreds of Thousands Defy Protest Ban in Hong Kong amid Tear Gas, Vandalism and Molotovs, as Mosque Hit by Water Cannon Dye*, Jennifer Creery, Tom Grundy and Kris Cheng, Hong Kong Free Press, at <https://hongkongfp.com/2019/10/20/thousands-defy-protest-ban-hong-kong-amid-tear-gas-vandalism-molotovs-mosque-hit-water-cannon-dye/>

protesters to voice their demands and engage in peaceful protests, rights guaranteed by the ICCPR in 1976, the Universal Declaration of Human Rights (“UDHR”) in 1948, and affirmed in 1998 by article 12 of the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (“Declaration on Human Rights Defenders”). The HKSAR continues to arrest and charge protesters in contravention of these international instruments amidst the Covid-19 pandemic.

Foreign governments, civil society organizations and international human rights monitoring bodies, including the UN Office of the High Commissioner of Human Rights, have also expressed concern in the face of Hong Kong’s violation of its international law obligations to protect and respect rights to engage in public protests. As the International Bar Association, Bar Council of England and Wales, International Bar Association Human Rights Institute, Bar of England & Wales Human Rights Committee and International Commission of Jurists recently noted, “we are gravely concerned that the arrests of senior lawyers and legislators who set out to protect human rights in a non-violent and proportionate manner, and pursuant to rights granted in both domestic and international legal frameworks, represent an assault on the rule of law itself”.<sup>10</sup>

Article 19 of the UDHR guarantees that, “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”<sup>11</sup>

The ICCPR guarantees that,

**19.** (1) Everyone shall have the right to hold opinions without interference.

(2) Everyone shall have the right to freedom of expression; this right shall include freedom 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 of his choice.

(3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.<sup>12</sup>

Under the ICCPR any restriction of the right to freedom of expression must strictly comply with requirements that the restriction be:

1. Provided by law which is clear and accessible to everyone;
2. Necessary and legitimate to protect one or more of the specified goals; and,
3. Proportionate and the least restrictive means to achieve a goal specified in Article 19 of the ICCPR.

Any law purporting to restrict freedom of expression must meet certain requirements of precision and clarity, so that individuals can foresee the consequences of their actions, and must be applied in an objective, non-discriminatory manner.

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<sup>10</sup> See: *14 Reactions to Hong Kong’s Crackdown on Democrats: ‘This Is Not the Rule of Law,’ Says Ex-governor Chris Patten*, Tom Grundy, Hong Kong Free Press, at <https://hongkongfp.com/2020/04/18/8-reactions-to-hong-kongs-crackdown-on-democrats-this-is-not-the-rule-of-law-says-ex-governor-chris-patten/>

<sup>11</sup> <https://www.un.org/en/universal-declaration-human-rights/>

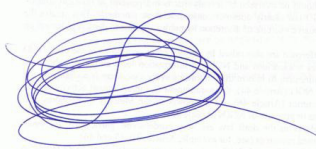
<sup>12</sup> HR Committee, Communication No. 1157/2003, *Patrick Coleman v. Australia*, Views adopted on 17 July 2006, para. 7.3.

For the purposes of *ICCPR* Article 19(3), to be characterized as a “law”, the norm must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.<sup>13</sup> Laws imposing restrictions or limitations must be accessible, concrete, clear and unambiguous, such that they can be understood by everyone and applied to everyone.<sup>14</sup> Laws imposing 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>15</sup>

Charges under the Public Order Ordinance do not meet requirements of lawfulness and therefore cannot provide a lawful justification for conviction or punishment. Use of such charges to effect arrests and initiate prosecutions can only be seen as a tool to silence criticism and to stall action on the legitimate demands of protesters.

LRWC calls on the HKSAR to immediately drop all related charges against the fifteen wrongly arrested pro-democracy leaders in accordance with its international human rights law obligations.

Sincerely,



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<sup>13</sup> HR Committee, Communication No. 578/1994, *Leonardus Johannes Maria de Groot v. The Netherlands*, 14 July 1995, para. 4.3.

<sup>14</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>15</sup> *Ibid*, para. 79(f).

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