ABOUT THE AUTHORS

This report was authored by a member of the TrialWatch Experts Panel. The TrialWatch Experts Panel is composed of eminent lawyers and human rights practitioners from around the world. For each trial, an Expert conducts a detailed assessment of the fairness of the trial measured against international standards and grades the trial.

ABOUT THE CLOONEY FOUNDATION FOR JUSTICE’S TRIALWATCH INITIATIVE

The Clooney Foundation for Justice (CFJ) advocates for justice through accountability for human rights abuses around the world. TrialWatch is a CFJ initiative with the mission of exposing injustice, helping to free those unjustly detained and promoting the rule of law around the world. TrialWatch monitors criminal trials globally against those who are most vulnerable — including journalists, protesters, women, LGBTQ+ persons and minorities — and advocates for the rights of the unfairly convicted. Over time, TrialWatch will use the data it gathers to publish a Global Justice Ranking exposing countries’ performance and use it to support advocacy for systemic change.

The legal assessment and conclusions expressed in this report are those of the author and not necessarily those of the Clooney Foundation for Justice or any of the author’s affiliated organizations.
In 2020, Bao Choy, a freelance documentary film producer with Radio Television Hong Kong (RTHK), investigated an attack where dozens of men attacked pro-democracy protesters, who were leaving a protest site, and other commuters. The attack took place at the Yuen Long mass transit station on July 21, 2019 and resulted in dozens of injuries. Bao Choy’s documentary investigated the alleged acquiescence and possible complicity of local officials and undercover police officers during the attack. To identify those at the scene, Bao Choy accessed Hong Kong’s vehicle registry site, as many journalists had apparently routinely done in the past. The online form asked for the purpose of the vehicle information search, and she chose the box “other traffic related matters.” The documentary was released in July 2020; on November 3, 2020, authorities arrested Bao Choy and charged her with two counts of “knowingly making a false statement” under the Road Traffic Ordinance in order to access the vehicle information. She was convicted after a one-day trial and sentenced to pay a fine of HKD 6,000 (USD $775).

RTHK, founded in 1929, has been Hong Kong’s only independent public broadcaster,
known for a range of programming including news, satire, and commentary. During the 2019 protests in Hong Kong against the proposed extradition bill and calling for other democratic reforms, RTHK reporters questioned public officials about their response to the protests including allegations of police brutality against protesters. In the leadup to Bao Choy’s arrest and conviction, RTHK underwent significant changes to its management and programming that indicated to many commentators, including staff, heightened political control over RTHK and a deliberate attempt to shape and curb its messaging. Other media outlets have also faced new pressures to self-censor in the wake of the 2020 National Security Law. In this context, Bao Choy’s prosecution and conviction—which appears to be the first such case against a journalist using this law—have been viewed by members of the media and the public as an effort to curb reporting critical of the authorities. Bao Choy has appealed her conviction; further proceedings and an ultimate resolution to this case are expected.
A. POLITICAL AND LEGAL CONTEXT

Hong Kong is an administrative region of the People’s Republic of China that has been afforded significant political autonomy under a framework known as “one country, two systems.” That legal and political architecture is increasingly under threat, given recent developments that restrict political life in Hong Kong, including changes to Hong Kong’s electoral system, introduced in March 2021. Nevertheless, it remains the framework through which laws and rights are defined and implemented in Hong Kong. Hong Kong has, for years, been an important regional and international center of the media industry in Asia, renowned for its free press. However, in conjunction with broader political developments, the authorities have also begun to crack down on media freedom in Hong Kong.

The Legal and Political Framework of Hong Kong Special Administrative Region

On the evening of 30 June 1997, the People’s Republic of China (PRC) resumed its exercise of sovereignty over Hong Kong, which had been under the colonial rule of the United Kingdom since 1842. In the years leading up to the 1997 transfer of power, the PRC and the UK negotiated over the way Hong Kong and its people would be treated by the PRC. These terms were memorialized in the Sino-British Joint Declaration of 1984 (Joint Declaration), a treaty registered with the United Nations, which designates Hong Kong as a “special administrative region” of the PRC and pledges that the Hong Kong Special Administrative Region (HKSAR) would enjoy a “high degree of autonomy” in its social and political affairs.1

After recent changes announced by the Chinese Government to Hong Kong’s electoral system, the British government stated in March 2021 that the Chinese government was “in a state of ongoing non-compliance with the Sino-British Joint Declaration.”2 The Chinese government has at times dismissed the Joint Declaration as a “historical document”3 and emphasized that the Hong Kong Basic Law should be considered the applicable instrument. Nevertheless, this document has formed the blueprint for both the political governance arrangements in Hong Kong and core rights and freedoms retained by the people of Hong Kong.

Fundamental to the Joint Declaration was the promise that the HKSAR would retain its governmental, political and economic systems for 50 years, i.e., up to 2047. In practice, this meant that certain core systems implemented by the British colonial administration – including the common law legal system, an independent judiciary, a capitalist financial system and a tradition of protecting human rights – were to remain untouched during this period. 4

In order to implement the Joint Declaration’s articles into a governing framework, a committee of 59 members selected by the Chinese government (36 from the PRC, 23 from Hong Kong) drafted a basic “mini-constitution” that would serve as the primary source of law in Hong Kong after the Handover. The resulting Basic Law, promulgated on 4 April 1990, sets out protections for fundamental rights and freedoms including freedom of speech and freedom of association, of assembly or procession and of demonstration. 5

However, it is not Hong Kong’s judiciary but rather the Standing Committee of the National People’s Congress (NPCSC) that has the ultimate voice in interpreting the Basic Law. 6 Supplementing the Basic Law, the Hong Kong Bill of Rights Ordinance (BORO) was enacted on 8 June 1991 to implement the International Covenant on Civil and Political rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) into domestic law. 7 The PRC is not a party to either of these human rights treaties, but they remain applicable to Hong Kong by virtue of the Joint Declaration and the Basic Law. 8

**The Right to Freedom of Expression in Hong Kong**

Hong Kong—but not the PRC—is a party to several core international human rights treaties, including the ICCPR and ICESCR, both of which it has incorporated into domestic law through the BORO. In particular, the BORO states, “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.” 9 Article 27 of the Basic Law further states, “Hong Kong residents shall have freedom of speech, of the press and of publication.” 10

The right to freedom of expression has likewise historically been a point of emphasis of Hong Kong’s judiciary. In 2000, Chief Justice Li of the Hong Kong Court of Final Appeal wrote in *HKSAR v Ng Kung Siu*:

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6 Id. art. 158.
8 Article 39 of the Basic Law; Annex I Part XIII of the Joint Declaration (“The provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force.”).
9 Article 16 of the BORO.
10 Article 27 of the Basic Law.
Freedom of expression is a fundamental freedom in a democratic society. It lies at the heart of civil society and of Hong Kong’s system and way of life. The courts must give a generous interpretation to its constitutional guarantee. This freedom includes the freedom to express ideas which the majority may find disagreeable or offensive and the freedom to criticize governmental institutions and the conduct of government officials.\textsuperscript{11}

In 2020, the Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (National Security Law, or NSL) was introduced. The NSL is a broad law whose full implications and uses are still emerging. The NSL was passed by the NPCSC and signed into law by President Xi Jinping on June 30, 2020, then promulgated into law the same day by Hong Kong Chief Executive Carrie Lam at 11 p.m. The law came into effect in Hong Kong at midnight on July 1, 2020. Among other things, the NSL created a range of new and broadly-defined offenses, some of which are punishable with life imprisonment, including collusion with a foreign country or with external elements, which is defined as receipt of “instructions, control, funding or other kinds of support from a foreign country or an institution, organization or individual outside the mainland, Hong Kong, and Macao” to provoke hatred against the central government or ‘seriously disrupt’ the laws and policies of the Hong Kong government.\textsuperscript{12} The NSL has been criticized by, among others, several UN human rights experts for “the express curtailment of freedoms of expression, peaceful assembly, and association; the implications of the scope and substance of the security law as a whole on the rule of law; and the interference with the ability of civil society organisations to perform their lawful function.”\textsuperscript{13}

While Hong Kong authorities maintain that this law will not impinge upon core freedoms,\textsuperscript{14} this broad and vague law has already been used to charge activists, media figures like former-Apple Daily owner Jimmy Lai and other managerial and editorial staff\textsuperscript{15}, and opposition politicians for speech critical of the government\textsuperscript{16} and appears to have had an

\textsuperscript{11} HKSAR v Ng Kung Siu, [2000] 1 HKC 117, 135.
\textsuperscript{13} Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Working Group on Arbitrary Detention; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the situation of human rights defenders; and the Special Rapporteur on minority issues. “Comments on The Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (‘National Security Law’),” OL CHN 17/2020, Sept. 1, 2020, available at https://spcommrreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25487.
\textsuperscript{16} Christy Leung, South China Morning Post, “National security law: 52 former lawmakers, activists arrested in January told to report to police on Sunday – more than a month early – with some expecting charges,”
effect on freedom of expression in Hong Kong with many journalists, academics, activists and other residents choosing to self-censor.17

**Media Freedom in Hong Kong**

Hong Kong has long had a reputation as a bastion of media freedom with “the freest press in Asia” as well as the one of the largest media industries in the world.18 The role of the press in challenging government authorities in Hong Kong is not a recent development; rather, media outlets in Hong Kong have historically played a central role in challenging government authorities—and been punished as a result. In the nineteenth century, for example, Hong Kong developed as the center of Chinese press, playing a critical oppositional role to the colonial government as Hong Kong grew as a base for political parties;19 and during the pro-communist-led protests and riots of the 1960s, for instance, the government targeted and prosecuted the Chinese-language Communist press to chill dissent.20 In post-Handover Hong Kong, some commentators have suggested that because the legislature is not directly elected, the press plays an even more critical role in ensuring accountability and public participation in political life.21


However, in recent years—and in particular, since the start of the 2019 protests—this strong record of press freedom has eroded, with escalating arrests of and attacks on journalists and heightened censorship and government control of the media, even before the introduction of the NSL in 2020. In 2019, the Hong Kong Journalists Association’s Press Freedom Index recorded its sharpest decline in press freedom since the Index was launched in 2013, citing as the cause (1) the lack of safeguards for journalists in accessing information; (2) difficulty in obtaining information needed for reporting; and (3) increased physical intimidation, threats, and violence against journalists.22 Similarly in 2020, Reporters Without Borders (RSF)’s World Press Freedom Index ranked Hong Kong at 80th place out of 180, a drop of 7 places from the prior year, citing amongst other things an intimidation campaign against Radio Television Hong Kong (RTHK).23

During the 2019 protests in Hong Kong, journalists were also subject to—and in some cases, apparently targeted for—violence by the police in the course of their reporting. Between June and November 2019, RSF recorded over two dozen incidents of violence against individual or groups of journalists, including several incidents where police appeared to be targeting journalists with tear gas, and others where journalists were arrested in the course of their reporting.24 At least four journalists were injured during the Yuen Long metro station attack on July 21, 2019.25 After a violent attack on the Epoch Times offices in April 2021 by men armed with sledgehammers, commentators suggested that government authorities’ silence was encouraging further violence against journalists.26

The larger and rapidly escalating threat to journalists and press freedom comes from the growing criminalization of freedom of expression in Hong Kong. Since the National Security Law was introduced in July 2020, the Hong Kong government has taken a more aggressive stance towards independent reporting. In the first three months after the law was introduced, two media figures—Jimmy Lai and Wilson Li—were charged under the NSL, with the offices of Lai’s Apple Daily raided by police and its assets frozen (leading to the


22 Hong Kong Journalists Association, “Hong Kong Press Freedom Index hits record low: Police obstruct news activities using violence viewed as the major reason in decline,” May 11, 2020, available at https://static1.squarespace.com/static/5cfd1ba6a7117c000170d7aa/t/5eb8b33c1be4671645f3eb22/1589162820553/press+release_eng+ver2.0.pdf. These attacks on the press from government authorities have taken a toll on media freedom. A survey from the Hong Kong Public Opinion Research Institute in April 2021 found that public confidence in the Hong Kong media was at its lowest level since records began in 1993, with 66 percent of the respondents saying they believed the local press was reluctant to criticize the Beijing government. Hong Kong Free Press, “Public perception of Hong Kong media’s independence and credibility at record low – survey,” April 8, 2021, available at: https://hongkongfp.com/2021/04/08/public-perception-of-hong-kong-medias-independence-and-credibility-at-record-low-survey/.


The same week that Bao Choy was arrested in November 2020, another journalist was arrested for “obstruction” when she filmed the arrest of two women at a protest, and a student journalist was arrested and charged with obstructing the police and resisting arrest at another protest. In June 2021, an Israel-based web server briefly removed a Hong Kong pro-democracy website after a request from the Hong Kong police, citing non-compliance with the NSL. Later that month, authorities arrested several more Apple Daily senior staff under the NSL (including editor-in-chief Ryan Law, CEO of the Apple Daily publisher Next Media, Cheung Kim-hung, and editorial writer Fung Wai-kong). In response, another pro-democracy paper, Stand News, announced it would be archiving commentary and opinion articles and stop accepting new donations to reduce potential NSL risks; six of its directors, including barrister Margaret Ng (convicted in April 2021 for participating in an ‘unauthorized’ assembly during the 2019 pro-democracy protests) accepted recommendations to resign.

Asked at a press conference how journalists could ensure their reporting did not violate the NSL, Chief Executive Carrie Lam said the law was “very well defined,” and that “normal journalism” would not breach the NSL; asked to define ‘normal journalistic’ work, Lam said journalists should “be in a position” to decide for themselves if they are breaking the law.


The lack of clarity as to what speech and reporting might violate the NSL lead the Hong Kong Journalists Association to warn that more arrests of journalists were likely under this law.\textsuperscript{34}

Chief Executive Carrie Lam had previously claimed that the Hong Kong government was the “biggest victim of fake news” in the weeks before Bao Choy’s trial;\textsuperscript{35} a week later on April 16, 2021, then-Hong Kong Police Commissioner Chris Tang told the Legislative Council that “foreign forces” were attempting to “incite hatred” through the use of “fake news and disinformation,” threatening to arrest and prosecute those who endanger Hong Kong security through fake news.\textsuperscript{36} Several days later, he stated on a television show that a fake news law would help Hong Kong but in the interim, authorities could use charges such as sedition and provisions forbidding illegal content to regulate fake news.\textsuperscript{37} Tang has since been elevated to Secretary of Security and his successor as Police Commissioner, Raymond Siu, has renewed the call for ‘fake news’ legislation for Hong Kong.\textsuperscript{38}

\textbf{Radio Television Hong Kong}

Radio Television Hong Kong (RTHK), created in 1928 and modeled after the British Broadcasting Corporation (BBC), is Hong Kong’s only independent publicly-funded broadcaster. RTHK has television channels in English, Mandarin and Cantonese as well as seven radio stations, has won numerous awards over the years for its documentary and other programming and has retained a high-level of public trust while leading investigating reporting often critical of the Beijing authorities.\textsuperscript{39}

\textsuperscript{37} Id.
In April 2020, Hong Kong authorities accused RTHK of undermining the “One China Principle” after one of its reporters questioned a World Health Organization official about Taiwan’s representation at the WHO.42 Also in April, the Communications Authority warned RTHK that its personal view show, Pentaprism, had received complaints that it incited hatred and was inaccurate following an episode that critiqued police conduct at the 2019 campus siege at Hong Kong Polytechnic University; RTHK suspended the show in August 2020.44 In May 2020, RTHK canceled a satirical program after government officials complained that the show “denigrated and insulted” the police.45 Later that month, the Hong Kong authorities announced a thorough review of RTHK’s management, to be led by civil servants.46 In September 2020, following complaints from government officials, RTHK opened an investigation into Nabela Qoser, a RTHK journalist well-known in Hong Kong for her vigorous questioning of Chief Executive Carrie Lam and others during the 2019 protests.47

In February 2021, a government report criticized RTHK for editorial “deficiencies” and a lack of “transparency and objectivity,” leading to more aggressive involvement in the running of RTHK by Hong Kong government authorities.48 Hong Kong’s imposition of a new requirement that RTHK staff (as civil servants) sign a loyalty oath, appointment of a government bureaucrat without journalism experience as the new head of RTHK and new limits on RTHK programming, imposed by the newly appointed leadership, have led to the resignation of many senior staff and broad concerns about the public broadcaster’s remaining independence.49 Indeed, shortly after his appointment to lead RTHK, Patrick Li

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Pak-chuen confirmed that he would be cancelling some of its programming and taking a stronger role in editorial management, noting there is “no freedom without restraint.”\textsuperscript{50} In April 2021, Regina Ip, a pro-government member of Hong Kong’s Executive Council, further suggested that the government might shut down RTHK’s television programming, stating that RTHK staff “just don’t want to act as government mouthpieces.”\textsuperscript{51}

On April 21, 2021, a day before Bao Choy’s verdict was announced, RTHK refused to accept an international award for the documentary Bao Choy produced.\textsuperscript{52} On April 27, 2021, after cancelling more ‘controversial’ programming, RTHK announced that Chief Executive Carrie Lam would be given a daily program to discuss Hong Kong’s electoral overhaul.\textsuperscript{53}

On May 3, 2021, RTHK announced that it would delete programming older than one year from its YouTube and Facebook pages; this would include the documentary Bao Choy produced in 2019.\textsuperscript{54} Also on May 3, 2021 (Press Freedom Day), journalist Nabela Qoser was told that her contract with RTHK would end that month.\textsuperscript{55} In early June, ahead of the annual (now banned) June 4 Tiananmen Square Vigil, journalists at RTHK (speaking anonymously) reported that they had been ordered not to report on any “political” stories.\textsuperscript{56} And on June 28, 2021, RTHK announced that further programming had been canceled and that long-time current affairs radio host Allan Au had been removed from his position after 11 years.\textsuperscript{57}

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2019 Hong Kong Protests and the Yuen Long Station Attack

Between March 2019 through November 2019, Hong Kong was gripped by near-daily protests that initially emerged in response to proposed amendments to Hong Kong’s extradition laws, which would have allowed the authorities to extradite suspects from Hong Kong to mainland China and countries with which Hong Kong did not have an extradition treaty. Concerned at this move, thousands started protesting in March 2019, with protests intensifying over the summer even as the government retreated from the proposed extradition amendments in July 2019. Protests continued throughout 2019, with the protest demands expanding to incorporate electoral reforms and protections for democratic rights in Hong Kong. These protests consumed much of central Hong Kong and, by early 2021, had led to the arrest of more than 10,000 people between the ages of 11 and 84 years old. Over 2,500 had been charged in connection with these protests, with over 600 convictions as of April 2021.

During the summer of 2019, Hong Kong police also intensified their use of force against pro-democracy protestors and bystanders, with police using chemical agents and aggressive tactics with apparent impunity. In September 2019, several UN experts raised concerns with the Hong Kong authorities’ response to the protestors, including police violence and police failure to protect protestors, stating, “We are seriously concerned by

56 The Fugitive Offenders Ordinance (FOO) (Cap 503) empowers the Hong Kong Government to enter into mutual legal assistance in criminal matters agreements and surrender of fugitive offenders agreements between the HKSAR and “the government of a place outside Hong Kong (other than the Central People’s Government or the government of any other part of the People’s Republic of China)” (s2(1)(a)(i)). At the time the amendment to the FOO was proposed, Hong Kong had entered into such agreements with respectively 32 and 20 jurisdictions. Fugitive Offender Ordinance, Cap. 503 (1997), available at https://www.elegislation.gov.hk/hk/cap503.
creditable reports of repeated instances where the authorities failed to ensure a safe environment for individuals to engage in public protest free from violence or interference."

An investigation into police use of force conducted by the Independent Police Complaints Council (a watchdog agency and part of the Hong Kong government) faltered; in December 2019, the panel of foreign experts appointed to contribute to the investigation resigned, citing the absence of investigative capabilities “necessary...to begin to meet the standards citizens of Hong Kong would likely require of a police watchdog operating in a society that values freedoms and rights.”

The final police report, issued in May 2020 and prepared solely by the domestic authorities, largely exonerated the police and was condemned by human rights groups and others for its failure to ensure accountability for police misconduct.

In early 2020, authorities instituted a series of emergency measures in connection with the growing COVID-19 pandemic, including a regulation banning public gatherings of more than four people. Many commentators saw this regulation, and its immediate use to stop and disperse pro-democracy protests, as affording an opportunity for the police to further crack down on demonstrations.

On July 21, 2019, at the height of protests, dozens of men dressed in white and armed with sticks and metal pipes, descended upon the Yuen Long metro station in Hong Kong and viciously and indiscriminately beat pro-democracy protestors, journalists and commuters at the station, injuring 45 people. The attack appeared to have been orchestrated by a group of pro-Beijing government supporters, and news reports at the time indicated that the

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72 Jeffie Lam, Danny Mok & Alvin Lum, South China Morning Post, “At least 45 injured as rod-wielding mob dressed in white rampages through Yuen Long MTR station, beating screaming protestors,” July 22, 2019,
police response was slow, suggesting complicity. While a senior Government official apologized for the police handling of the incident in its immediate aftermath, the authorities' own description of the event shifted dramatically over time, with officials eventually calling the attack a “gang fight” between two “evenly-matched” groups, and police denouncing the initial apology.

Over 60 individuals have been arrested for the Yuen Long attack on charges including riot arrests. 


day of her conviction, Bao Choy was the first and only person to be convicted in relation to the events of July 21, 2019. On May 5, 2021, Lam Cheuk-ting, a former opposition politician now facing trial on national security charges and a victim of the Yuen Long attack, dropped a civil lawsuit against the police chief for injuries sustained during the attack, citing the slow pace, significant resources needed and the seeming futility of the lawsuit.

B. THE CASE: Hong Kong v. Bao Choy

Bao Choy Yuk-ling (“Bao Choy”) is an award-winning 37-year-old investigative journalist and documentary film producer in Hong Kong. In the fall of 2019, she worked with RTHK to produce a documentary for its show “Hong Kong Connection” on the attacks against pro-democracy activists and other commuters at the Yuen Long metro station on July 21, 2019. The RTHK documentary, “7:21: Who Owns the Truth,” released in July 2020, identified several undercover police officers and other government officials at the scene, suggesting they may have been complicit in the attack and/or the police failure to rapidly respond to the victims.

To conduct her investigation, and as detailed in the documentary, Bao Choy utilized security camera footage from outside the metro station to identify the license plates of those involved in the attacks, then used a public government database to look up the vehicle owners. Her documentary showed her looking up information on the vehicle registry to identify those whose vehicles were at scene and included interviews with local politicians and others who were identified as being at the subway station before, during and after the violent attack.

Bao Choy was arrested on November 3, 2020 and charged with two counts of violating Section 111(3) of the Road Traffic Ordinance, for “knowingly mak[ing] any statement which is false in a material particular” on two applications for vehicle information through the database. The maximum sentence for this offense is a fine and imprisonment of six months. This section of the Ordinance, titled “Forgery of documents,” speaks to criminal penalties for, among other things, forging a drivers’ license or documents for showing or transferring title of a vehicle. Its apparent purpose is to sanction fraudulent acts in connection with offenses like theft, parking illegally or driving without a license.

The authorities alleged that Bao Choy sought vehicle registration information for reasons other than those that are permitted, which are listed as (1) legal proceedings, (2) sale and

82 Id.
purchase of vehicle and (3) other traffic and transport related matters. Choy selected “other traffic and transport related matter” on the web form. Previously, the database had an option where people could select “other reasons” for accessing information but it had been apparently removed in or around January 2020.

The options provided on the form for accessing vehicle data—and the form itself—are not specified by the Road Traffic Ordinance. Rather, the form was created by the Transport Department and requires the name and contact information of the applicant. At trial, it was never suggested that Bao Choy provided fraudulent or misleading information on those sections, only that she had allegedly engaged in fraud by checking the box “other traffic and transport related matters” as her reason for seeking the data.

On April 22, 2021, the Court convicted Bao Choy of making false statements in violation of the Road Traffic Ordinance and sentenced her to pay a fine of HK $6,000 (3,000 for the two times she used the database, approximately USD $775 in total). On May 5, 2021, Bao Choy announced that she would appeal her conviction; she explained her decision as a matter of public responsibility, stating her concern that “more and more voices are being extinguished, it seems Hongkongers are getting used to not being able to speak up.”

On the day of Choy’s conviction for making false statements under the Road Traffic Ordinance, it emerged that another reporter, Wong Wai-keung from the pro-Beijing Ta Kung Pao, had been arrested on February 11, 2021 for the same offence. Wong sought to have his case stayed pending Bao Choy’s appeal, but the Prosecution ultimately withdrew the charges against him in June 2021.

86 TrialWatch Monitoring, HKSAR v Bao Choy, March 24, 2021.
C. TRIAL PROCEEDINGS

Bao Choy was arrested at home on November 3, 2020; she appeared in court and posted bail the same evening. Her case was scheduled for two days of hearings in March 2021, although ultimately only one of the trial days was used by the parties.

March 24, 2021

On March 24, 2021, Bao Choy presented herself at the West Kowloon Magistrates’ Courts for trial. The hearing, conducted in Cantonese, began with the Prosecution reading out the charge and noting that it would be submitting written witness statements to the Court and the Defense. No witnesses were called by the Prosecution.

The presiding judge asked if the parties wanted to replay the documentary for which Bao Choy accessed the vehicle registry; the Prosecution did not see a need to do so but the Defense said it would provide a helpful reference point for the information search Bao Choy conducted. The Defense then argued that Bao Choy’s invocation of “other traffic and transport related matter” on the form did not constitute a false statement because the purpose of her information search was to track and report a suspected traffic-and-transport-related crime and the vehicle at issue might have been used to transport weapons and the suspected attackers to the Yuen Long station. The Prosecution argued to the contrary that investigative reporting is not an approved reason for accessing the vehicle database under the Transport Department’s form and that the legislative intent of the ordinance’s drafters was to restrict access to limited purposes. The Judge then ruled that there was a prima facie case to answer and allowed the hearing to continue.

As neither side called witnesses to testify in court, the parties next made closing submissions. The Prosecution’s submission, which took approximately half an hour, maintained that Bao Choy’s online submission had been a false statement under the Road Traffic Ordinance and that because the Register contains sensitive personal data, the ordinance should not be understood to permit disclosure for any other reasons not specified on the form, as this would lead to abuse of the system and vehicle owners’ right to privacy.

The Defense argued that the Prosecution had failed to prove beyond reasonable doubt the three essential elements of the offense, namely that the Defendant’s statements were 1) “knowingly” made, 2) about a “material particular” and 3) “false.” The Defense first argued that the defendant did not “knowingly” make a false statement as the terms used in the online form (e.g., “activities relating to traffic and transport matters”) are general and vague and so should be given the broadest interpretation. They also noted that no law or statute gives the Commissioner for Transport the authority to limit the purposes for which an information search through the public database is conducted. According to the Defense, to

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the point that Bao Choy allegedly made false statements about a “material particular,” the administrative measure requiring applicants to list their purpose when accessing the database was introduced by the Transport Department in 2003, but it was never a legal obligation. The Defense further argued that Bao Choy’s statements were not “false”; the Transport Department has provided no guidelines to users of the database, and the “activities relating to traffic and transport matters” option Bao Choy selected is broad enough to encompass what she did.

Furthermore, the Defense said, in response to the Prosecution’s argument that there was a risk of “abuse” of the database, that the public search mechanism had been in place since the 1950s with no suggestion that it needed to be reformed to limit abuse. The defense argued that balancing the public’s right to information against the right to privacy is a task for the legislature, and that despite a rise in ‘doxing,’ the legislature had yet to take action—suggesting that they did not see the latter as a great risk in this context. Indeed, to demonstrate that Bao Choy’s use of the database was consistent with prior uses to which it had been put, the Defense cited figures provided by the Transportation Department showing there were more than 50,000 applications for information in 2010; almost half of them were for the purpose of legal proceedings, and over 20,000 were made without listing the purpose (as was permitted until 2019). Of those 20,000 applications, 2,800 were made by the press.

### April 22, 2021: Verdict & Sentencing

On April 22, 2021, the Principal Magistrate hearing the case found Bao Choy guilty on both counts of “knowingly making a false statement.” The Court observed that the Defendant’s statements on the online form were “false” because she had no need of the information for litigation or another valid rationale; her purpose, the Court said, was rather “to obtain the name and address of the registered owner of the Vehicle in order to conduct interviews and reporting, which had no connection with ‘other traffic and transport related matters.’” The Court ordered Bao Choy to pay a fine of HK $3,000 for each count for a total of HK $6,000 (in USD, approximately $775).

On May 5, 2021, Bao Choy announced that she had submitted an appeal.

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93 Id.
94 Id.
95 HKSAR v. Choy Yuk-ling (Bao Choy), No. 4075 of 2020, para. 17 (April 22, 2021), Appendix B.
A. THE MONITORING PHASE

TrialWatch monitored the one-day trial on March 24, 2021, and the delivery of the verdict on April 22, 2021. The proceedings took place in Cantonese at the West Kowloon Magistrates’ Court.

B. THE ASSESSMENT PHASE

To arrive at their assessment, a TrialWatch expert panel member reviewed the results of the monitoring, the written decision in this case, and the statute under which the defendant was charged and convicted. TrialWatch staff prepared drafts of the report for his review. A member of the TrialWatch Experts Panel found that while the trial was procedurally fair, there were nevertheless significant concerns regarding the fairness of the trial: In particular, Bao Choy was charged and convicted under a vague law, raising concerns under the principle of legality, and rendering her prosecution and conviction unlawful restrictions on her right to freedom of expression. Moreover, the context in which this prosecution emerged suggests that the case was brought with improper motives.
A. APPLICABLE LAW

This report draws upon the International Covenant on Civil and Political Rights (ICCPR), made applicable to the Hong Kong Special Administrative Region by the Joint Statement and Basic Law; jurisprudence and commentary from the United Nations Human Rights Committee, tasked with interpreting and monitoring implementation of the ICCPR; and commentary from UN Special Procedures.

B. VIOLATIONS AT TRIAL & OTHER FAIRNESS VIOLATIONS

The Court in this case is to be commended for ensuring that core procedural rights were respected during this short trial—including, for example, the rights to a public hearing and a public judgment. However, Bao Choy’s prosecution and conviction reflect the misuse of a broad and vaguely worded law to penalize her speech. That is, these criminal proceedings both violated the principle of legality and give rise to significant concerns that the prosecution stemmed from political motivations to punish Bao Choy for exercising her right to seek and impart information about a matter of public interest.

Violation of the Principle of Legality

The principle of legality (known as the maxim “nullum crimen nulla poena sine lege”), at the core of criminal law, requires that offenses be clearly defined and prohibits retroactive application of a law. The principle is also embodied in Article 15 of the ICCPR, which states: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.”97

As the European Court of Human Rights has explained, the principle of legality “embodies, more generally, the principle that only the law can define a crime and prescribe a penalty,” which it must do clearly and precisely.98 The Inter-American Court of Human Rights has further elaborated on the meaning of the legality principle, noting that it requires “a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviors that either are not punishable offences or are punishable but not with imprisonment.”99 Indeed, as the Permanent Court of International Justice explained in 1935: “It must be possible for the individual to know, beforehand, whether his acts are lawful or liable to punishment.”100

The UN Human Rights Committee has further clarified that in cases implicating the right to freedom of expression, it is critical that the law must “not confer unfettered discretion

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100 Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, Advisory Opinion, 1935 PCIJ (ser. A/B) No.65 (Dec.4) at 56-57.
... on those charged with its execution,"\textsuperscript{101} as such discretion could give rise to abusive limitations on speech. For this reason, the first requirement of any restriction on speech is that the restriction be “prescribed by law.”\textsuperscript{102}

Where a State restricts the right to freedom of expression, that restriction must (i) be prescribed by law (the principle of legality), (ii) serve a legitimate objective and (iii) be necessary to achieve and proportionate to that objective.\textsuperscript{103} Regarding the legality prong, according to the UN Human Rights Committee, legislation restricting freedom of expression must be “formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.”\textsuperscript{104} As noted recently by the Special Rapporteur on Freedom of Opinion and Expression, “Vague laws confer undue discretion on executive authorities, enabling them to violate individual rights while disingenuously claiming adherence to the law.”\textsuperscript{105}

Here, the Court held that Bao Choy knowingly made false statements to procure (on two occasions) a Certificate of Particulars of Vehicle in the course of her investigation. Specifically, the authorities alleged, and the Court agreed, that Bao Choy sought vehicle registration information for reasons other than those that are permitted and that she did so knowingly—i.e., knowing that her statements on the online form were false.\textsuperscript{106} In assessing compliance with the principle of legality, we consider the way the law is being applied, which entails understanding the clarity of the vehicle registration form.

As previously noted, this form contained no guidance and broad and general terms.\textsuperscript{107} While the Court held that Bao Choy knew her purpose in accessing the database was not

\textsuperscript{101} UN Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34 (hereinafter “General Comment No. 34”), September 12, 2011, para. 25. Although the Committee in this Comment is discussing the principle of legality in the context of restrictions on the right to freedom of expression, these requirements are fundamental to the legality principle in any context.


\textsuperscript{107} The defense suggested that the terms “matters related to traffic and transportation” were general and prone to multiple good faith interpretations, pointing to a Court of Final Appeal case HKSAR v Wan Thomas (Wen Haojun), (2018) 21 HKCFAR 214, which concerned whether the appellants were misleading the authorities to refer to themselves as “friends” of prisoners they were visiting. The CFA said the prosecution had not shown the appellants knew their statement that they were “friends” was false. The Court in the present case noted that “the term ‘friend’ disputed in the Wan Thomas case can have many different meanings, and its usage is too broad and wide” but that it was “impossible to compare the term ‘friend’ in this case with the term ‘matters related to traffic and transportation’” in this case. The Court’s explanation for this was that Bao Choy knew her ultimate purpose in procuring the vehicle information was for news reporting, but that doesn’t address the issue of whether she knew checking this box for “matters related to traffic and transportation” to get information about a vehicle could definitely not be used for investigation. Nor did the Court’s verdict elucidate what the terms clearly meant to the Court or a general audience.
among those that were authorized, and so she knew her “statements” (in checking the “other traffic and transport” box) were false, in fact, the term of the box she selected—“other traffic and transport related matters”—is broad and general. Indeed, many journalists had previously procured information using this form without any sanction and even if the terms did not explicitly authorize Bao Choy’s exact use of the database, a good-faith reading of the form did not suggest her use was prohibited. As the defense noted at trial, the Transport Department has provided no guidelines to users of the database or defined “activities relating to traffic and transport matters.” In its verdict, the Court held that Bao Choy “clearly knew” the applications were made for the purposes of ‘searching,’ ‘interviewing’ and ‘reporting,’ none of which falls under the three options offered by the Transport Department.\textsuperscript{108} But while Bao Choy did not deny or hide her purpose in procuring the information from the database, nothing at trial or upon a plain reading of the statute itself suggests that Bao Choy (or any other journalist) who has used this database would know that this particular use of the database was considered fraudulent or prohibited. As discussed further in the next section, the authorities did not contest that journalists have routinely used this and other public databases in the course of their reporting and that they would not have had notice—either on the face of the law or given prior responses by the authorities—that doing so was a criminal violation.

**Abuse of Process**

The Court here did not issue the most severe sentence (imprisonment) but in arresting, convicting and fining a journalist for her use of a database in the course of her reporting, the authorities appear to be misusing this law—concerned with fraud—to restrict her from exercising her right to seek, receive and impart information. One of the purposes of the principle of legality “to provide effective safeguards against arbitrary prosecution, conviction and punishment.”\textsuperscript{109} Ambiguity, the Inter-American Court has said, allows for abuse of power.\textsuperscript{110} That is what appears to have happened here: weaponization of a vague provision to censure disfavored speech.

A prosecution brought predominantly for improper reasons is inconsistent with international standards. While the United Nations Human Rights Committee has yet to establish clear criteria for assessing such situations, it considers an arrest and/or detention for the exercise of protected rights to be arbitrary,\textsuperscript{111} and European Court of Human Rights jurisprudence is instructive. The European Court evaluates whether a legal proceeding was driven by improper motives by looking to factors such as the political

\textsuperscript{108} HKSAR v CHOY Yuk-ling, WKCC4075/2020, Reasons for Verdict, April 22, 2021, para. 60; see also HKSAR v CHOY Yuk-ling, Press Summary (Official English Translation), WKCC4075/2020, April 22, 2021.  
\textsuperscript{111} UN Human Rights Committee, Khadzhiyev v. Turkmenistan, U.N. Doc. CCPR/C/122/D/2252/2013, Apr. 17, 2018, para. 7.7; see also UN Human Rights Committee, Nasheed v. Maldives, U.N. Doc. CCPR/C/122/D/2851/2016, May 4, 2018, para. 8.7 (“The State party has not refuted the author’s allegations that the judicial proceedings against him, and the measures taken within the proceedings in 2012-2013, cumulatively, were used as a means of preventing him from campaigning for the 2013 presidential elections, such as twice arresting him to interrupt campaign trips and denying his request to be authorized to travel to other islands and abroad in connection with the political campaign.”); William Schabas, The European Convention on Human Rights: A Commentary 623 (Oxford University Press 2016).
context in which the prosecution was brought;\textsuperscript{112} whether the authorities undertook actions against the accused amidst their “increasing awareness that the practices in question were incompatible with [European] Convention standards;”\textsuperscript{113} and whether the ultimate decision was well-reasoned and based on law.\textsuperscript{114} The European Court will also consider the broader context, including whether the prosecution is in response to exercise of protected rights. Thus, for instance, in the case of \textit{Mammadov v. Azerbaijan}, the Court found a violation where it concluded that the purpose of an arrest “was to silence or punish the applicant for criticising the Government and attempting to disseminate what he believed was the true information that the Government were trying to hide.”\textsuperscript{115}

The European Court has also made clear that a legal proceeding may have both proper and improper motives; it will nevertheless find a violation where the improper motives “predominated.”\textsuperscript{116} Further, acknowledging that it is often impossible for an applicant to adduce direct evidence of the state’s bad faith, the European Court has held that proof of an illegitimate purpose may be shown by way of circumstantial evidence.\textsuperscript{117} In past cases, the European Court of Human Rights has looked to the relationship between prosecution and the exercise of rights under human rights law as one such kind of circumstantial evidence, as well as the behavior of prosecuting authorities, including delays between the arrest and the laying of charges; appearances of political interference in the case when there appears to be a correlation between hostile statements by public officials and the timing or wording of criminal charges against the applicant.\textsuperscript{118}

Further, the European Court has emphasized that in evaluating whether criminal \textsuperscript{212F39}interferes with enjoyment of a protected right. In particular, in the \textit{Kavala} case, the European Court remarked that “at the core of the applicant’s Article 18 complaint is


\textsuperscript{113} European Court of Human Rights (Grand Chamber), Navalnyy v. Russia, App. No. 29580/12, Nov. 15, 2018, para. 171.


\textsuperscript{115} European Court of Human Rights, Mammadov v. Azerbaijan (Grand Chamber), App. No. 15172/13, May 29, 2019, para. 187-89.


his alleged persecution, not as a private individual, but as a human-rights defender and NGO activist. As such, the restriction in question would have affected not merely the applicant alone, or human-rights defenders and NGO activists, but the very essence of democracy as a means of organising society, in which individual freedom may only be limited in the general interest.”

This case implicates the right to freedom of expression, which under the ICCPR, includes not only free speech but also “a right of access to information held by public bodies.” The UN Human Rights Committee has previously noted that the rights to freedom of expression (Article 19 of the ICCPR) and to take part in public affairs (Article 25 of the ICCPR), taken together, include the right of the media to access to information on public affairs and the right of the general public to receive media output. The Inter-American human rights system has noted that the right to access information is both a core part of the right to freedom of expression and a right in and of itself, crucial for “democratic participation, oversight of the State and public administration, and the monitoring of corruption.”

Further, there are substantial reasons to believe the prosecution was a response to the content of Bao Choy’s documentary—and thus a response to her exercise of her right to freedom of expression in that regard. Indeed, this prosecution was the first to seek to apply criminal penalties for accessing a public database in Hong Kong, a practice regularly undertaken by journalists in their investigations, as addressed at trial. The sudden effort to criminalize this longstanding practice directed against a journalist reporting on possible police complicity in violence against pro-democracy protestors—and several months after the offense was allegedly committed—gives the strong impression that the charges were a targeted attempt to chill critical speech.

In sum, this prosecution was (1) selective and (2) related to the defendant’s right to freedom of expression; as such, it suggests a misuse of the justice system.

1. Selective prosecution

The fact that this journalist was charged several months after the documentary was released and in what appears to be a novel use of the law suggest that the prosecution may have been driven by-improper motives and not to further the public interest.

First, Bao Choy was not arrested or charged immediately after her alleged offense took place or was disclosed during the documentary. Rather she was arrested a few months later, during which time the Hong Kong authorities had intensified their pressure on RTHK.

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120 General Comment No. 34, para. 18.
In the months leading up to Bao Choy’s arrest and the subsequent several months between her arrest and trial, authorities in Hong Kong moved to undermine RTHK’s independent coverage, suspending programming critical of the government (and the police in particular), replacing its leadership with a career bureaucrat, and censoring reporters who questioned government officials.\(^{124}\) A day after Bao Choy’s conviction, RTHK announced it was giving government media regulators internal positions at RTHK.\(^{125}\) This timing suggests that her arrest and prosecution were motivated not by the need to prevent and punish criminal conduct but rather as part of a larger effort to curb reporting critical of the police and other government authorities.

Second, as earlier noted, this appears to be the first prosecution of a journalist for use of the vehicle database in this manner. Information from the Transport Department, presented by the Defense, noted that in 2010, the Department received around 50,000 vehicle registry information requests, 20,000 submitted without listing a purpose (which was permissible at the time and only changed in 2019)—of which 2,800 were made by the press. The Prosecution did not contest evidence that others, including journalists, had routinely used the database in this manner.\(^{126}\) The decision to prosecute this particular individual for using the database to access information for her documentary on police malfeasance and possible government complicity in violence against protestors suggests an improper motive in suddenly deciding to pursue a prosecution.\(^{127}\)

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126 TrialWatch Monitoring, March 24, 2021 (where Defense cited figures provided by the Transport Department showing there were more than 50,000 applications in 2010; almost half of them were for the purpose of legal proceedings, and over 20,000 without listing the purpose—of those 20,000 applications, 2,800 were made by the press).

127 Since Bao Choy’s arrest, one other journalist—Wong Wai-keung from the pro-Beijing Ta Kung Pao—has also been charged for the same offence of making false statements under the Road Traffic Ordinance. This subsequent prosecution, however, does not take away from the political motivations for and chilling impact of Bao Choy’s prosecution. Hers was the first such arrest, initiated in the midst of other actions taken to silence reporting critical of the authorities by RTHK; the improper motives discussed in this report are not erased by a subsequent prosecution of a journalist whose employer may be more in line with the viewpoint of the Hong Kong authorities. Indeed, the subsequent decision of the Prosecution to drop the similar charges against Wong reinforces the suggestion that Bao Choy’s arrest was politically-motivated.
At trial, the primary governmental interest asserted by the Prosecution was protecting the privacy rights of those whose information might be accessed through the database. But the previous acceptance of thousands of requests that did not specify a purpose suggests this is not a sufficient justification to support criminal prosecution. Further, the Prosecution, in asserting this interest, did not show specific or possible harm from allowing individuals to use this public database for reporting. Given this history, and absent specific evidence at trial, the Prosecution’s concerns seem speculative—and give rise to concern that the real reason this provision was invoked in this way for the first time was to sanction a journalist for the content of her reporting.

Third, it is not clear that the Prosecution met its burden of proof to demonstrate Bao Choy’s intent to commit an offense. Under human rights law, the presumption of innocence places on the prosecution the burden to prove the guilt of the accused person beyond a reasonable doubt. In this case, the Prosecution’s argument was conclusory and did not prove the individual elements of the offense, in particular that Bao Choy knowingly made false statements by checking the general and broad box (“other traffic and transport related matters”) on a website. The Prosecution and Court noted that Bao Choy did not dispute that she had checked that box but it is hard to believe that the accused, were she aware that she was committing a crime, would have filmed herself using this database in this way and then released the footage. Other than the facts of what she did, which she did not dispute, the Prosecution presented no evidence that she knew her statements would be considered false. Looking at the plain language of the statute (which concerns false statements made for fraudulent purposes such as to take title of a vehicle), it is not clear that a person would think it applies to situations like the present, where there could be a reasonable and good-faith reason for using the database. Bao Choy is accused of using a public database—as others had previously done—for a purpose not explicitly authorized or intended by the administrative agency, but also not clearly prohibited; to take this as evidence of a deliberate fraud is a reach and to pursue criminal penalties.

128 Even though the punishment in this case was a fine and not the higher sanction of incarceration, as the European Court has explained, “the fact of a person’s conviction may in some cases be more important than the minor nature of the penalty imposed.” European Court of Human Rights, Stoll v. Switzerland, App. No. 69698/01, Dec. 10, 2007, para. 154.

129 Even if the privacy concerns were a live issue presented in this case, as the Venice Commission has observed, individuals’ “personality rights” will not always trump media freedom: rather, “it is up to the court to balance competing interests and decide which of them prevails in the specific circumstance of the case: the freedom of speech or any private interest which that freedom may affect.” CDL-AD(2015)015, Opinion on Media Legislation (Act CLXXXV on Media Services and on the Mass Media, Act CJV on the Freedom of the Press, and the Legislation on Taxation of Advertisement Revenues of Mass Media) of Hungary, § 26; see also CDLAD(2016)008, Opinion on the Law on the Protection of Privacy and on the law on the Protection of Whistleblowers of ‘the former Yugoslav Republic of Macedonia,’ § 22.

130 UN Human Rights Committee, General Comment no. 32, U.N. Doc. CCPR/C/GC/32, Aug. 23, 2007, para. 30, (“The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle.”). See, for example: UN Human Rights Committee, J.O. v. France, U.N. Doc. CCPR/C/101/D/1620/2007/Rev.2, Sept. 16, 2011, para. 9.6. See further Organisation for Security and Cooperation in Europe (OSCE) Office for Democratic Institutions and Human Rights (ODIHR), Legal Digest of International Fair Trial Rights (Warsaw, OSCE/ODIHR, 2012) (hereafter Legal Digest of International Fair Trial Rights), pp. 92–93.
seems a disproportionate response. That the court nevertheless convicted Bao Choy despite this dearth of evidence of her knowledge that what she was doing was wrong is also suggestive of abuse of process.

Finally, the choice to prosecute, rather than issue a warning, does not seem consistent with Hong Kong rules governing prosecution discretion. Prosecutors have significant discretion in determining which cases to pursue, discretion that is cabined by the requirement that charges are supported by facts and law and that prosecutors have considered whether prosecution supports the public interest. Among the factors to consider when the Prosecution determines whether initiating proceedings serves the public interest under applicable Hong Kong standards is “whether or not the offence is trivial, technical in nature, obsolete or obscure.”131 Hong Kong prosecutors are also expected to look to “the availability and efficacy of alternatives to prosecution, such as a caution, warning or other acceptable form of diversion.”132 Here, the offense was “obscure” (given how many journalists had previously used the database), and the authorities could clearly have applied lesser sanctions such as a warning. Indeed, in June 2021, the Prosecution dropped similar charges against a reporter for a pro-Beijing newspaper—the only other person apparently charged under this law.133 Finally, it also is worth noting, in considering prosecutorial resources and priorities, that on the date of her conviction almost two years after the Yuen Long violent attack, Bao Choy—a journalist whose reporting was intended to hold perpetrators accountable and expose potential complicity from the authorities—was the only person who had been convicted of any offense related to the attack.134

2. Prosecution for Freedom of Expression

Finally, the fact that this prosecution was brought against a journalist in connection with reporting critical of the authorities further raises concerns that her arrest, prosecution and conviction were an abuse of process. Here, and as warned against in the European Court’s Kavala decision, it appears that the goal of the prosecution was in fact to punish Bao Choy for the content of her investigation and for the exercise of her rights to freedom of expression.

Bao Choy’s use of the vehicle registry was part of her investigation into the Yuen Long attack, a matter of significant public interest, and also an exercise of her and the public’s

131 Department of Justice, Hong Kong Special Administrative Region, Prosecution Code 5.9(e), available at https://www.doj.gov.hk/en/publications/prosecution_code.html
132 Id. 5.9(n).
rights under Article 19 of the ICCPR. The right to freedom of expression under Article 19 encompasses a right to access to information held by public authorities.\textsuperscript{135}

Article 19 guarantees not only the right to hold opinions and to impart information, but also the right to receive information and ideas.\textsuperscript{136} This right to freedom of expression thus applies not only to the person providing information but also to those receiving it, and so it underpins press freedom. As the UN Human Rights Committee has observed,

A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. . . . The Covenant embraces a right whereby the media may receive information on the basis of which it can carry out its function. . . . The public also has a corresponding right to receive media output.\textsuperscript{137}

The Venice Commission has similarly explained that “where a person is prevented from communicating, or faces a fine or civil award of damages for doing so, the [] right [to freedom of expression] of both the speaker and the audience is interfered with.”\textsuperscript{138}

In \textit{Guauthier v. Canada}, the UN Human Rights Committee held that information about public and political authorities and affairs is an essential part of the right to take part in the conduct of public affairs, under Article 25 of the ICCPR.\textsuperscript{139} This right, the Committee continued, “implies a free press and other media able to comment on public issues without censorship or restraint” and “implies that citizens, in particular through the media, should have wide access to information and the opportunity to disseminate information and opinions,” particularly about public elected officials.\textsuperscript{140}

In this case, it appears that a rarely used law was activated to punish a journalist for her investigative reporting. This prosecution took place amidst mounting pressure on the press in Hong Kong, including the media company for which Bao Choy then worked, RTHK. As discussed above, since the summer of 2020 in particular, RTHK, Hong Kong’s only public broadcaster, had been under pressure from government authorities related to its coverage of the National Security Law (introduced and passed into law on June 30, 2020) and other programming critical of government authorities—particularly, the police.\textsuperscript{141} By the time of Bao Choy’s arrest in November 2020, it had already been

\textsuperscript{135}See supra.
\textsuperscript{136}ICCPR, art. 19(2).
\textsuperscript{140}Id.
pressured to cancel certain programming and replace staff deemed critical of government authorities; and when Bao Choy was arrested, senior management at RTHK said it was under significant pressure to dissuade them from providing assistance to her. In the weeks leading up to Bao Choy’s trial, RTHK underwent a leadership overhaul that many, including RTHK staff, saw as an attempt to censor and undermine the independence of the publication. Ahead of Bao Choy’s conviction, a pro-government member of Hong Kong’s Executive Council suggested that the government might shut down RTHK’s television programming, stating that RTHK staff “just don’t want to act as government mouthpieces.”

Meanwhile, accountability for the subject of Bao Choy’s documentary—the Yuen Long attack—has stalled in the courts, as has any real reckoning with the actions of the police during the 2019 protests. After independent international experts quit a government-led review of police conduct during the protests in December 2019 citing a lack of independence, the subsequent official report largely absolved police of any misconduct against protestors despite widely reported abuse. While over 10,000 protestors are

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142 Although not a significant amount of time, the more than three months between the release of the documentary and Bao Choy’s arrest raises some questions as to the cause of the delay and the timing of the arrest.


facing or have faced charges for involvement in protests, police have not faced accountability for use of force against or failure to protect members of the public. And taken with RTHK’s announcement on May 3, 2021 (Press Freedom Day) that it would be deleting programming older than one year from its YouTube and Facebook pages— including Bao Choy’s documentary—this case appears to be an attempt by the authorities to control the narrative on the Yuen Long attack, limit discussion of officials’ improper response to or possible involvement in the violence against protests and censure criticism of the police.

Looking at Bao Choy’s prosecution in this context, it appears that the criminal process was initiated to make an example of Bao Choy and chill reporting critical of the authorities.
CONCLUSION AND GRADE

TrialWatch Expert Findings:

Notwithstanding this Court’s general and laudable respect for procedural rights here, this trial presents serious concerns: first, because the defendant was convicted of obscure charges for how she filled out an online form, giving rise to concerns under the principle of legality, and second, because the prosecution itself appears to be an abuse of process, brought with improper motives to chill exercise of free expression, a protected right under international and Hong Kong law.

The impact of Bao Choy’s conviction is felt not only by Bao Choy herself but also by the press community and general public who are served by free and open reporting on matters of public concern, and in particular, on matters concerning public servants.

To be sure, in this case the Court did not give the harshest available sentence—six months in prison—which perhaps reflects its awareness that the conduct and actual harm in this case were marginal. Nevertheless, applying a criminal sanction here, seemingly for the first time, was inappropriate and suggests an abuse of the court process to advance improper motivations.

GRADE:

C
Experts should assign a grade of A, B, C, D, or F to the trial reflecting their view of whether and the extent to which the trial complied with relevant international human rights law, taking into account, *inter alia*:

- The severity of the violation(s) that occurred;
- Whether the violation(s) affected the outcome of the trial;
- Whether the charges were brought in whole or in part for improper motives, including political motives, economic motives, discrimination, such as on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,” and retaliation for human rights advocacy (even if the defendant was ultimately acquitted);
- The extent of the harm related to the charges (including but not limited to whether the defendant was unjustly convicted and, if so, the sentence imposed; whether the defendant was kept in unjustified pretrial detention, even if the defendant was ultimately acquitted at trial; whether the defendant was mistreated in connection with the charges or trial; and/or the extent to which the defendant’s reputation was harmed by virtue of the bringing of charges); and
- The compatibility of the law and procedure pursuant to which the defendant was prosecuted with international human rights law.

**Grading Levels**

- A: A trial that, based on the monitoring, appeared to comply with international standards.
- B: A trial that appeared to generally comply with relevant human rights standards excepting minor violations, and where the violation(s) had no effect on the outcome and did not result in significant harm.
- C: A trial that did not meet international standards, but where the violation(s) had no effect on the outcome and did not result in significant harm.
- D: A trial characterized by one or more violations of international standards that affected the outcome and/or resulted in significant harm.
- F: A trial that entailed a gross violation of international standards that affected the outcome and/or resulted in significant harm.

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2 ICCPR, Article 26.