



**Hong Kong  
Special Administrative Region**

**v.**

**Lai Chee Ying,  
Lee Cheuk Yan,  
Ng Ngoi Yee Margaret,  
Leung Kwok Hung,  
Ho Sau Lan Cyd,  
Ho Chun Yan,  
Leung Yiu-Chung,  
Lee Chu Ming Martin, *and*  
Au Nok-hin**

**July 2021**

*Timothy Otty QC*

**TRIALWATCH FAIRNESS REPORT**  
**A CLOONEY FOUNDATION FOR JUSTICE INITIATIVE**

## ABOUT THE AUTHORS

**Timothy Otty QC** is a Queen's Counsel and Professor of Law. He practises primarily in public international law and international human rights law and has been called to the Bar of England and Wales, Ireland, Belize, the British Virgin Islands and Gibraltar.

## ABOUT THE CLOONEY FOUNDATION FOR JUSTICE'S TRIALWATCH INITIATIVE

TrialWatch is an initiative of the Clooney Foundation for Justice. Its mission is to expose injustice, help to free those unjustly detained and promote 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.



## **Timothy Otty, QC, a member of the TrialWatch Experts Panel, assigned this trial a grade of D:**

This case concerned the prosecution of nine individuals—all well-known pro-democracy figures in Hong Kong—under the Public Order Ordinance (1967, 1997 rev). The prosecutions were for knowingly participating in, and organising, an unauthorised but peaceful assembly in Hong Kong on August 18, 2019. Based on the facts presented at trial and a review of the law at issue, there can be no substantive criticism of the approach of the Court or the trial in terms of procedural fairness. This case nevertheless raises significant concerns with respect to the defendants' rights to freedom of peaceful assembly, as the individuals in this case were prosecuted, convicted, and sentenced to terms of imprisonment based on their participation in a peaceful assembly. Whether or not the POO would be consistent with international human rights law were it to provide purely administrative penalties, the scheme is difficult to justify on its face due to the severity of the potential penalties of imprisonment. Ultimately, the decision to ban the protest and then arrest, prosecute, and sentence the defendants to prison has not only restricted the rights of the defendants to peaceful assembly but operates as a troubling message to all the people of Hong Kong that participating in speech and events critical of the authorities, despite the protections of human rights law, can and will result in imprisonment.

Taking into account the political context, the delay in prosecution and the choice then to pursue such severe sanctions against the defendants, with the inevitable risk of a chilling effect on others, there are also concerns that the Prosecution's decision to prosecute was tainted and constituted an abuse of process or, adopting a different form of analysis, that the prosecution and sentences were disproportionate on this basis also. A further concern arises out of public statements made by members of the executive prior to the commencement of the proceedings which threatened the presumption of innocence. Because TrialWatch monitoring and the available record show that, notwithstanding the procedural fairness guarantees provided, the substantive treatment of the Defendants did not meet international standards, this trial received a grade of "D" under the methodology set forth in the Annex to this Report.

It should, however, be noted that the concerns addressed above may be capable of being addressed to some extent on appeal and an overall view of the treatment of these defendants and the question of compliance with international standards should await the outcome of any appeal process.

The nine defendants in this case—Lai Chee Ying (Jimmy Lai), Lee Cheuk Yan, Ng Ngoi Yee Margaret (Margaret Ng), Leung Kwok Hung, Ho Sau Lan Cyd (Cyd Ho), Ho Chun Yan (Albert Ho), Leung Yiu-chung, Lee Chu Ming Martin (Martin Lee) and Au Nok-hin—are all well-known pro-democracy figures in Hong Kong. Martin Lee, SC, known as the 'father of Hong Kong democracy,' helped write the city's 'mini constitution'—the Basic Law—in 1980. Lee Cheuk Yan is a veteran labor leader and a former member of Hong Kong's Legislative

Council (LegCo). Jimmy Lai is an entrepreneur and founder of the media company Next Digital and the *Apple Daily*, one of the most popular daily newspaper in Hong Kong. Margaret Ng is a barrister, journalist, and former member of the LegCo. Cyd Ho is also a former member of the LegCo, a founding member of the Labour Party, and an activist for social justice causes including LGBTQ+ rights. Leung Kwok Hung, known as “Long Hair,” is also a former member of the LegCo and a pro-democracy activist. Albert Ho is a human rights lawyer and another former member of the LegCo. Leung Yiu-chung is also a former member of the LegCo and social activist. Au Nok-hin is also a former member of the LegCo, a doctoral student, and a former convenor of the Civil Human Rights Front.

On April 18, 2020, these nine individuals were arrested and charged with knowingly participating in and organising an unlawful assembly in violation of the Public Order Ordinance. The assembly in question took place on August 18, 2019—eight months earlier—in Hong Kong during a summer of pro-democracy protests, initially sparked by the Hong Kong government’s proposed extradition bill. The August 18 event was organised to protest police brutality and reiterate the five core demands of pro-democracy activists in Hong Kong. In accordance with Hong Kong law, the organisers notified the police of their intent to hold a meeting and subsequent procession ahead of time.

Although the public meeting organised by the Civil Human Rights Front (a coalition of pro-democracy civil society organisations) was authorised, a subsequent procession out of the meeting area (Victoria Park in Central Hong Kong) was objected to by the police. The public meeting on August 18 ended peacefully, with hundreds of thousands of people filing out of the park and walking through central Hong Kong. Eight months later, the nine defendants in this case were arrested and charged with violating the Public Order Ordinance for participating in and organising an unauthorised procession.

By the time this 20-day trial took place, starting in February 2021, after months of comments from senior government officials referring to the protests as “riots,” Hong Kong had introduced a sweeping National Security Law and further restricted public gatherings under emergency measures, introduced in response to the COVID-19 crisis.

Two of the defendants pleaded guilty before trial; on April 1, 2021, the District Court convicted the seven others and subsequently, on April 16, 2021, sentenced all nine to prison terms ranging from 8 months to 18 months (with two prison terms suspended). Theirs were among the few recent convictions for a peaceful if unauthorised assembly that have resulted in prison terms (as opposed to a fine) in Hong Kong. Jimmy Lai Chi-ying, Albert Ho Chun-yan, and Martin Lee Chu-ming have appealed both the verdict and the sentence they received in this case. After the verdict was issued, defendants facing similar charges in two other cases pled guilty. On April 16, 2021, the Court sentenced two of the defendants in the August 18 case, Jimmy Lai and Lee Cheuk Yan, and a third member of the “Democracy 15,” Yeung Sam to 8 months, 6 months and a suspended sentence of 8 months, respectively, for leading a protest march and vigil on August 31, 2019. On May 28, 2021, the Court sentenced 10 individuals for their role in a protest on October 1, 2019, ordering the sentences to be served consecutively with the 18 August 2019 protest sentences for five of the individuals (Lee Cheuk Yan, Leung Kwok Hung, Cyd Ho, Albert Ho and Jimmy Lai).

While the trial for the August 18, 2019 assembly generally comported with international fair trial standards, the conviction and imprisonment of these pro-democracy lawmakers for

their participation in a peaceful demonstration violated their rights to freedom of peaceful assembly under international law. Further, the political context in which this case was brought, the unexplained delay in bringing the charges, and the pursuit of criminal sanctions for the exercise of a protected right suggests a troubling abuse of process in this case.

# BACKGROUND INFORMATION

## A. POLITICAL AND LEGAL CONTEXT

Hong Kong is an administrative region of the People's Republic of China that been afforded significant political autonomy under a framework known as "one country, two systems."

### *Hong Kong Political and Legal Framework*

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.<sup>1</sup> 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."<sup>2</sup> (The Chinese government has at times dismissed the Joint Declaration as a "historical document"<sup>3</sup> and emphasized that the Hong Kong Basic Law should be considered the applicable instrument.) Nevertheless, until recently this document 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.<sup>4</sup>

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<sup>1</sup> Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong ("Joint Declaration"), entered into force 27 May 1985, *available at* <https://treaties.un.org/doc/Publication/UNTS/Volume%201399/v1399.pdf>.

<sup>2</sup> Government of the United Kingdom, "Radical changes to Hong Kong's electoral system: Foreign Secretary's statement," March 13, 2021, *available at* <https://www.gov.uk/government/news/foreign-secretary-statement-on-radical-changes-to-hong-kongs-electoral-system>.

<sup>3</sup> *Reuters*, "China says Sino-British Joint Declaration on Hong Kong no longer has meaning," June 30, 2017, *available at* <https://www.reuters.com/article/us-hongkong-anniversary-china/china-says-sino-british-joint-declaration-on-hong-kong-no-longer-has-meaning-idUSKBN19L1J1>; see also Permanent Mission of the People's Republic of China, "Statement by the Permanent Mission of China to the United Nations," May 28, 2020, *available at* <http://chnun.chinamission.org.cn/eng/hyyfy/t1783532.htm> ("The legal basis for the Chinese government's administration of Hong Kong is the Chinese Constitution and the Basic Law of the HKSAR, not the Sino-British Joint Declaration."). *But see* Consulate-General of the People's Republic of China in Lagos, "UK cannot question HK security law," July 14, 2020, *available at* <http://lagos.china-consulate.org/eng/zlgxw/t1797659.htm> ("The Chinese government has acknowledged the legal status of the Joint Declaration as a legally binding treaty.")

<sup>4</sup> Clement Shum. 1998. *General Principles of Hong Kong Law*. 3rd Edition. Hong Kong: Longman, 21.

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. 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 this law.<sup>5</sup> Supplementing the Basic Law, the Hong Kong Bill of Rights Ordinance ("BORO")<sup>6</sup> was enacted on 8 June 1991 to implement the International Covenant on Civil and Political Rights (ICCPR)<sup>7</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>8</sup> into domestic law.<sup>9</sup> 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.<sup>10</sup>

### ***The 2019 Anti-Extradition Bill/ Pro-Democracy Protests in Hong Kong***

Between March and December 2019, Hong Kong was affected by near-daily protests that initially emerged in response to proposed amendments to Hong Kong's extradition laws<sup>11</sup> that 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.<sup>12</sup> Concerned at this move, significant numbers of demonstrators started protesting in March 2019, with protests intensifying over the summer even as the government retreated from the proposed extradition amendments in July 2019.<sup>13</sup>

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<sup>5</sup> Article 158 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (hereinafter "the Basic Law"), 4 April 1990, *available at* [www.basiclaw.gov/hk/en/basiclaw/](http://www.basiclaw.gov/hk/en/basiclaw/).

<sup>6</sup> Hong Kong Bill of Rights ("BORO") (Cap. 383), June 8, 1991, *available at* [https://www.elegislation.gov.hk/hk/cap383?xpid=ID\\_1438403137017\\_001](https://www.elegislation.gov.hk/hk/cap383?xpid=ID_1438403137017_001).

<sup>7</sup> United Nations International Covenant on Civil and Political Rights (ICCPR), Mar. 23, 1976, 14668 U.N.T.S. 172.

<sup>8</sup> United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR), Jan. 3, 1967, 993 U.N.T.S. 3.

<sup>9</sup> Constitution and Mainland Affairs Bureau, Government of Hong Kong Special Administrative Region of the People's Republic of China, *An Introduction to Hong Kong Bill of Rights Ordinance*, *available at* [https://www.cmab.gov.hk/doc/en/documents/policy\\_responsibilities/the\\_rights\\_of\\_the\\_individuals/human/BORO-IndustryChapterandBooklet-Eng.pdf](https://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/the_rights_of_the_individuals/human/BORO-IndustryChapterandBooklet-Eng.pdf).

<sup>10</sup> 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.").

<sup>11</sup> 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>.

<sup>12</sup> *Reuters*, "Timeline: Key dates in Hong Kong's anti-government protests," May 29, 2020, *available at* <https://www.reuters.com/article/us-hongkong-protests-timeline/timeline-key-dates-in-hong-kongs-anti-government-protests-idUSKBN23608O>.

<sup>13</sup> *BBC News*, "Hong Kong formally scraps extradition bill that sparked protests," Oct. 23, 2019, *available at* <https://www.bbc.com/news/world-asia-china-50150853>.

Protests continued throughout 2019, with the protest demands expanding to incorporate electoral reforms and protections for democratic rights in Hong Kong. These protests occupied much of central Hong Kong and led to the arrest of more than 10,000 people<sup>14</sup> between the ages of 11 and 84 years old;<sup>15</sup> over 2,500 have been charged in connection with these protests, with, according to the Hong Kong security chief, 80 percent of the 1500 completed cases resulting in convictions, and some form of legal consequences, including sentences of imprisonment.<sup>16</sup>

During the summer of 2019, police also intensified their use of force in this context, with reported use of chemical agents and aggressive tactics with apparent impunity.<sup>17</sup> In September 2019, several UN experts raised concerns at the Hong Kong authorities' response to the protestors, including alleged police violence and police failure to protect protestors, stating, "We are seriously concerned by credible 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."<sup>18</sup> An investigation into police use of force conducted by the Independent Police Complaints Council (a watchdog agency and part of the Hong Kong government) ran into difficulties; 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."<sup>19</sup> The final police report,<sup>20</sup> issued in May 2020 and prepared solely by the domestic

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<sup>14</sup> Candice Chau, *Hong Kong Free Press*, "10,250 arrests and 2,500 prosecutions linked to 2019 Hong Kong protests, as security chief hails dip in crime rate," May 17, 2021, available at <https://hongkongfp.com/2021/05/17/10250-arrests-and-2500-prosecutions-since-2019-hong-kong-protests-as-security-chief-hails-fall-in-crime-rate/>; *The New York Times*, "Hundreds in Rare Hong Kong Protest as Opposition Figures Are Charged," Mar. 1, 2021, available at <https://www.nytimes.com/2021/03/01/world/asia/hong-kong-protest.html>; Kong Tsun-gan, "Arrests and trials of Hong Kong protesters," Dec. 1, 2019, available at <https://kongtsunggan.medium.com/arrests-and-trials-of-hong-kong-protesters-2019-9d9a601d4950#:~:text=Arrests%20and%20trials%20of%20political%20and%20protest%20leaders&text=58%20have%20been%20charged%20in,have%20been%20sentenced%20to%20prison.>

<sup>15</sup> *South China Morning Post*, "Arrested Hong Kong protesters: how the numbers look one year on," June 11, 2020, available at <https://multimedia.scmp.com/infographics/news/hong-kong/article/3088009/one-year-protest/index.html#:~:text=HONG%20KONG%20PROTESTS,Arrested%20Hong%20Kong%20protesters%203A%20how%20the%20numbers%20look%20one%20year,and%20eight%20primary%20school%20pupils.>

<sup>16</sup> Candice Chau, *Hong Kong Free Press*, "10,250 arrests and 2,500 prosecutions linked to 2019 Hong Kong protests, as security chief hails dip in crime rate," May 17, 2021, available at <https://hongkongfp.com/2021/05/17/10250-arrests-and-2500-prosecutions-since-2019-hong-kong-protests-as-security-chief-hails-fall-in-crime-rate/>.

<sup>17</sup> Shibani Mahtani, Timothy McLaughlin, Tiffany Liang and Ryan Ho Kilpatrick, *The Washington Post*, "In Hong Kong crackdown, police repeatedly broke their own rules — and faced no consequences," Dec. 24, 2019, available at <https://www.washingtonpost.com/graphics/2019/world/hong-kong-protests-excessive-force/>; Amnesty International, "Hong Kong: Arbitrary arrests, brutal beatings and torture in police detention revealed," Sept. 19, 2019, available at <https://www.amnesty.org/en/latest/news/2019/09/hong-kong-arbitrary-arrests-brutal-beatings-and-torture-in-police-detention-revealed/>.

<sup>18</sup> OHCHR, "China/Hong Kong SAR\*: UN experts urge China to respect protesters' rights," Sept. 12, 2020, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24979&LangID=E.>

<sup>19</sup> Natasha Khan, *Wall Street Journal*, "Foreign Panel Steps Down From Probe of Hong Kong Police," Dec. 10, 2019, available at <https://www.wsj.com/articles/foreign-panel-steps-down-from-probe-of-hong-kong-police-11576018800>.

<sup>20</sup> Independent Police Complaints Council, A Thematic Study by the IPCC on the Public Order Events arising from the Fugitive Offenders Bill Since June 2019 and the Police Actions in Response (2020), available at [https://www.ipcc.gov.hk/en/public\\_communications/ipcc\\_thematic\\_study\\_report.html](https://www.ipcc.gov.hk/en/public_communications/ipcc_thematic_study_report.html).



authorities, largely exonerated the police and was condemned by human rights groups and others for its failure to ensure accountability for police misconduct.<sup>21</sup>

With the arrival and spread of the novel coronavirus (COVID-19), which was detected in Hong Kong in early 2020, authorities in Hong Kong introduced a number of measures to curb the spread of the pandemic, including a regulation banning public gatherings of more than four people.<sup>22</sup> Many commentators saw this regulation, and its immediate use to stop and disperse pro-democracy protests, as providing an opportunity for the police to further crack down on demonstrations.<sup>23</sup>

In October 2019, Hong Kong Chief Executive Carrie Lam bypassed the city legislature to impose a blanket ban on masks in an effort to curb protests.<sup>24</sup> (Masks had been an important measure of protection for protesters by permitting them to remain anonymous.) And yet, as coronavirus spread and public health experts called on people to wear masks, while the Court of Appeal overturned the blanket ban on masks, it nevertheless permitted its application at public gatherings.<sup>25</sup>

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<sup>21</sup> Iain Marlow, *Time*, “Hong Kong’s Police Watchdog Largely Exonerates Officers and Blames Protesters,” May 15, 2020, available at <https://time.com/5837300/hong-kong-police-ipcc-report/>; Amnesty International, “Hong Kong: Impotent and biased IPCC report into protests fails to bring justice any closer,” May 15, 2020, available at <https://www.amnesty.org/en/latest/news/2020/05/hong-kong-impotent-and-biased-ipcc-report-into-protests-fails-to-bring-justice-any-closer/>; Helen Davidson, *The Guardian*, “Anger as Hong Kong watchdog clears police over protest response,” May 15, 2020, available at <https://www.theguardian.com/world/2020/may/15/hong-kong-police-watchdog-clears-force-protest-response>

<sup>22</sup> HKSAR, Prevention and Control of Disease (Prohibition on Group Gathering) Regulation, March 28, 2020, <https://www.info.gov.hk/gia/general/202003/28/P2020032800720.htm>.

<sup>23</sup> See Mary Hui, *Quartz*, “Hong Kong police are using coronavirus restrictions to clamp down on protesters,” Apr. 1, 2020, available at <https://qz.com/1829892/hong-kong-police-use-coronavirus-rules-to-limit-protests/>; Iain Marlow & Jinshan Hong, *Time*, “Hong Kong Police Arrest Protesters for Violating Social Distancing Guidelines,” May 11, 2020, available at <https://time.com/5835103/hong-kong-protesters-coronavirus-restrictions/>; Civil Rights Observer, Twitter Post, Mar. 31, 2020, [https://twitter.com/HK\\_CRO/status/1245180697276346368](https://twitter.com/HK_CRO/status/1245180697276346368); Democratic Party 民主黨, Twitter Post, Mar. 31, 2020.

<sup>24</sup> Shibani Mahtani & Timothy McLaughlin, *The Washington Post*, “Hong Kong leader invokes colonial-era emergency powers to ban masks, sparking more protests,” Oct. 4, 2019, available at [https://www.washingtonpost.com/world/hong-kong-leader-invokes-colonial-era-emergency-powers-to-ban-masks-as-protests-swell/2019/10/04/8c11f2d0-e5e6-11e9-b0a6-3d03721b85ef\\_story.html](https://www.washingtonpost.com/world/hong-kong-leader-invokes-colonial-era-emergency-powers-to-ban-masks-as-protests-swell/2019/10/04/8c11f2d0-e5e6-11e9-b0a6-3d03721b85ef_story.html); Elizabeth Law, *The Strait Times*, “Hong Kong leader Carrie Lam says no plans to use emergency powers for other laws, doesn’t rule out China intervention,” Oct. 8, 2019, available at <https://www.straitstimes.com/asia/east-asia/hong-kong-leader-carrie-lam-says-no-plans-to-use-emergency-powers-for-other-laws>; *The Economist*, “Carrie Lam invokes emergency laws in Hong Kong,” Oct. 4, 2019, available at <https://www.economist.com/china/2019/10/04/carrie-lam-invokes-emergency-laws-in-hong-kong>.

<sup>25</sup> HongKong Court of Final Appeal, *Kwok Wing Hang & 23 Others v. Chief Executive in Council and Others*, (2020) 23 HKCFAR 518, available at <https://www.hkii.hk/eng/hk/cases/hkcfa/2020/42.html>. The Court of Appeal also held that the city’s use of the colonial-era Emergency Regulations Ordinance (ERO), activated to impose the mask ban, was constitutional in time of “public danger.” Chris Lau, *South China Morning Post*, “Hong Kong mask ban constitutional for all public meetings and processions, top court rules, backing use of colonial-era law,” Dec. 21, 2020, available at <https://www.scmp.com/news/hong-kong/politics/article/3114741/hong-kong-mask-ban-constitutional-all-public-meetings-and>; Jessie Pang, *Reuters*, “Hong Kong court rules that blanket ban on masks is unconstitutional” Apr. 9, 2020, available at <https://www.reuters.com/article/us-hongkong-protests-masks/hong-kong-court-rules-that-blanket-ban-on-masks-is-unconstitutional-idUSKCN21R193>; Helen Davidson, *The Guardian*, “Hong Kong face masks ban largely upheld despite coronavirus,” Apr. 9, 2020, available at <https://www.theguardian.com/world/2020/apr/09/hong-kong-court-upholds-face-masks-ban-despite-coronavirus>; Nicolle Liu and Alice Woodhouse, *Financial Times*, “Hong Kong court rules part of mask ban ‘unconstitutional,’” Apr. 9, 2020, available at <https://www.ft.com/content/d7d17784-9b80-4d38-a665-aad016167eb4>; Amnesty International, “Mask Ban in Hong Kong for Unauthorized Protests is Absurd and

In May 2020, after a year of pro-democracy protests in Hong Kong, China's legislature, the National People's Congress (NPC), authorised its Standing Committee (NPCSC) to adopt and apply laws "to establish and improve the HKSAR legal system and enforcement mechanisms for the protection of national security."<sup>26</sup> NPC Vice Chairman Wang Chen, explaining the need for this legislation, cited alleged violence in connection with the 2019 protests, "obstruction and interference from anti-China forces disrupting Hong Kong," and Hong Kong's failure itself to pass national security legislation.<sup>27</sup> (Under the Basic Law, certain national (i.e., PRC) laws, which are listed in Annex III of the Basic Law, are applicable to Hong Kong. Article 18 provides for the authority of the NPCSC to add additional laws "relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the Region" to this list.)

The new law, entitled 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 passed by the NPCSC and signed into law by President Xi Jinping on June 30, 2020, then promulgated into law by Hong Kong Chief Executive Carrie Lam at 11pm that same day. 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 offences, some of which are punishable with life imprisonment, including 'subversion,' defined as "seriously interfering in, disrupting, or undermining the performance of duties and functions in accordance with the law by the body of central power of the People's Republic of China or the body of power of the Hong Kong Special Administrative Region," and 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.<sup>28</sup> It also provided for the designation of 'national security judges' by the Chief Executive and created a presumption against bail (upheld as nonreviewable by the Court of Final Appeal<sup>29</sup>), among other law enforcement provisions.<sup>30</sup>

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Dangerous," Apr. 9, 2020, *available at* <https://www.amnestyusa.org/press-releases/mask-ban-in-hong-kong-for-unauthorized-protests-is-absurd-and-dangerous/>.

<sup>26</sup> "Decision of the National People's Congress on Establishing and Improving the Legal System and Enforcement Mechanisms for the Hong Kong Special Administrative Region to Safeguard National Security," unofficial English translation, May 28, 2020, *available at* <https://www.elegislation.gov.hk/hk/A215>.

<sup>27</sup> Article 23 of the Basic law provides that "The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies." A prior effort to introduce such a law in 2003 was unsuccessful given significant public protest.

<sup>28</sup> The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region *available at* [https://www.elegislation.gov.hk/doc/hk/a406/eng\\_translation\\_\(a406\)\\_en.pdf](https://www.elegislation.gov.hk/doc/hk/a406/eng_translation_(a406)_en.pdf).

<sup>29</sup> HKSAR v Lai Chee Ying, 24 HKCFAR 33, Feb. 9, 2021.

<sup>30</sup> The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region at Articles 42 & 44.

Over the past year, approximately 117 people<sup>31</sup> have been arrested under the NSL (including two of the defendants in this case), of whom four-fifths were accused for speech or expression-related conduct.<sup>32</sup> The NSL has been criticised by, among others, several UN human rights experts for the “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.”<sup>33</sup>

With a cabinet reshuffle in June 2021, Secretary of Security John Lee who led the inter-departmental response to the protests, and Chris Tang Ping-keung, who served as police commissioner during the protests, were promoted to senior roles in the Hong Kong government—Chief Secretary and Secretary of Security, respectively.<sup>34</sup> Lee has stated that the NSL has restored social and political stability to Hong Kong in the wake of the 2019 protests.<sup>35</sup>

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<sup>31</sup> Pak Yiu & Anand Katakam, *Reuters*, “In one year, Hong Kong arrests 117 people under new security law,” June 29, 2021, available at <https://www.reuters.com/article/us-hongkong-security-arrests/in-one-year-hong-kong-arrests-117-people-under-new-security-law-idUSKCN2E608X>; Xinqi Su, *AFP*, “Unstoppable storm: rights take back seat under Hong Kong security law,” Jun. 28, 2021, available at [https://sg.news.yahoo.com/unstoppable-storm-rights-back-seat-022429844.html?guccounter=1&guce\\_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLnNvbS8&guce\\_referrer\\_sig=AQAAAJ9y\\_jKrtXD-kB-rHBXDIknqUNJTQ2Q5LtOQQu\\_aP8MJL2lunBvB-DVY2vtFyAB8U\\_dtje3XQKr3YujWY\\_YZXEiAMG2HtOnsbj9cyOKDVHCsAuWd-D0lykhWILdKy7FGZM24zLZUZzjX5cOjheNhz2RPPx4vtb0fP3T6ndWmgbMZf](https://sg.news.yahoo.com/unstoppable-storm-rights-back-seat-022429844.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLnNvbS8&guce_referrer_sig=AQAAAJ9y_jKrtXD-kB-rHBXDIknqUNJTQ2Q5LtOQQu_aP8MJL2lunBvB-DVY2vtFyAB8U_dtje3XQKr3YujWY_YZXEiAMG2HtOnsbj9cyOKDVHCsAuWd-D0lykhWILdKy7FGZM24zLZUZzjX5cOjheNhz2RPPx4vtb0fP3T6ndWmgbMZf); see generally Candice Chau, *Hong Kong Free Press*, “10,250 arrests and 2,500 prosecutions linked to 2019 Hong Kong protests, as security chief hails dip in crime rate,” May 17, 2021, available at <https://hongkongfp.com/2021/05/17/10250-arrests-and-2500-prosecutions-since-2019-hong-kong-protests-as-security-chief-hails-fall-in-crime-rate/>; Lydia Wong & Thomas Kellogg, *ChinaFile.com*, “Individuals Arrested under the Hong Kong National Security Law or by the National Security Department,” June 22, 2021, available at <https://www.chinafile.com/reporting-opinion/features/new-data-show-hong-kongs-national-security-arrests-follow-pattern>.

<sup>32</sup> Iain Marlow, *Bloomberg News*, “How China’s Security Law Changed Hong Kong Forever in Just 12 Months,” Jun. 29, 2021, available at <https://www.bloomberg.com/news/articles/2021-06-29/how-china-s-security-law-changed-hong-kong-forever-in-12-months>.

<sup>33</sup> 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://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=25487>.

<sup>34</sup> James Pomfret, *Reuters*, “China promotes security officials to senior roles in Hong Kong,” June 24, 2021, available at <https://www.reuters.com/article/us-hongkong-security-lam-idAFKCN2E10BX>; *The New Indian Express*, “Hong Kong’s top security official named as city’s chief secretary amid clampdown,” June 25, 2021, available at <https://www.newindianexpress.com/world/2021/jun/25/hong-kongs-top-security-official-named-as-citys-chief-secretaryamid-clampdown-2321301.html>; Selina Chang, *Hong Kong Free Press*, “Security chief John Lee to become Hong Kong’s no. 2; police chief to head up security,” June 25 2021, available at <https://hongkongfp.com/2021/06/25/breaking-security-chief-john-lee-to-become-hong-kongs-no-2-police-chief-to-head-up-security-report/>; Natalie Wong, *South China Morning Post*, “Hong Kong cabinet reshuffle: new No 2 official John Lee dismisses concerns over policy experience, cites superior grasp of government work,” June 26, 2021, available at <https://www.scmp.com/news/hong-kong/politics/article/3138857/hong-kong-cabinet-reshuffle-new-no-2-official-john-lee>.

<sup>35</sup> Zen Soo, *Associated Press*, “Hong Kong bans handover protest as official defends law” July 1, 2021, available at <https://apnews.com/article/hong-kong-laws-31172585bd47515ac8d42a269512293d>; *The Standard*, “HK will rebound with political stability restored, says John Lee” July 1, 2021, available at

## ***The Rights to Freedom of Expression and Peaceful Assembly in Hong Kong***

As discussed above, Hong Kong—but not the PRC—has international human rights obligations under the ICCPR and ICESCR. The rights to freedom of expression, peaceful assembly, and association are protected under Articles 27 and 39 of the Basic Law and through Articles 16 and 17 of the BORO, which incorporate and repeat the language of Articles 19 and 21 of the ICCPR.<sup>36</sup> 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*:

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 criticise governmental institutions and the conduct of government officials.<sup>37</sup>

Despite these protections for free expression and peaceful assembly under Hong Kong law, authorities have cracked down on public demonstrations critical of the government, in particular through the colonial-era Public Order Ordinance (1967).<sup>38</sup> The Public Order Ordinance emerged in the wake of the 1967 riots in Hong Kong, which started as a labour dispute and escalated into a larger series of anti-colonial demonstrations that were largely organised by ‘leftists’ of the Communist Party.<sup>39</sup>

This law, which operates through a system of prior restraint, has been repeatedly criticised for its over-broad restrictions on peaceful assembly and for allowing police to criminalise

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<https://www.thestandard.com.hk/breaking-news/section/4/175815/HK-will-rebound-with-political-stability-restored,-says-John-Lee>.

<sup>36</sup> Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (“Basic Law”) (1990), Articles 39 (incorporating the ICCPR & ICESCR into Hong Kong law) and 27 (“Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike.”), available at [https://www.basiclaw.gov.hk/en/basiclawtext/chapter\\_3.html](https://www.basiclaw.gov.hk/en/basiclawtext/chapter_3.html); Hong Kong Bill of Rights (“BORO”) (Cap. 383), Art. 16, June 8, 1991, available at [https://www.elegislation.gov.hk/hk/cap383?xid=ID\\_1438403137017\\_001](https://www.elegislation.gov.hk/hk/cap383?xid=ID_1438403137017_001).

<sup>37</sup> *HKSAR v Ng Kung Siu*, [2000] 1 HKC 117, 135.

<sup>38</sup> Public Order Ordinance (“POO”) (Cap. 245) (1967), available at [www.elegislation.gov.hk/hk/cap245](http://www.elegislation.gov.hk/hk/cap245). See generally, Janice Brabyn, *The Fundamental Freedom of Assembly and Part III of the Public Order Ordinance*, 32 HONG KONG L.J. 279 (2002); Hong Kong Bar Association, *The Bar’s Submissions on the Right of Peaceful Assembly or Procession*, Nov. 25, 2000, available at <https://www.hkba.org/node/14200>.

<sup>39</sup> See HKSAR, “Public meetings and processions,” Dec. 19, 2012, available at <https://www.info.gov.hk/gia/general/201212/19/P201212190442.htm>; *Hong Kong Lawyer*, “Inside the Public Order Kaleidoscope: Should Hong Kong Revise its Definition of Riot?,” July 10, 2020, available at <http://www.hk-lawyer.org/content/inside-public-order-kaleidoscope-should-hong-kong-revise-its-definition-riot>; Simpson Cheung, *South China Morning Post*, “Protesters say Public Order Ordinance restricts their rights,” Nov. 9, 2021, available at <https://www.scmp.com/news/hong-kong/article/1078885/protesters-say-public-order-ordinance-restricts-their-rights>; *The Economist*, “A lengthy jail term sends a message to Hong Kong’s rebellious youth,” June 14, 2018, available at <https://www.economist.com/china/2018/06/14/a-lengthy-jail-term-sends-a-message-to-hong-kongs-rebellious-youth>; Hong Kong Watch, *A Tool of Lawfare: Abuse of Hong Kong’s Public Order Ordinance Since 2014* (2019), available at <https://static1.squarespace.com/static/58ecfa82e3df284d3a13dd41/t/5ce7d19253450a5fe8fe860a/1558696339084/Public+Order+Ordinance+briefing.pdf>.

protestors.<sup>40</sup> Indeed, the UN Human Rights Committee has warned that this Ordinance can operate as an “excessive restriction”<sup>41</sup> on the right to freedom of assembly and has said it is out of step with article 21 of the ICCPR,<sup>42</sup> and several UN experts have said that the law’s authorization process is “contrary to international human rights standards.”<sup>43</sup> Further, in its most recent General Comment on the right to peaceful assembly, the UN Human Rights Committee explicitly held that “[a] failure to notify the authorities of an upcoming assembly, where required, does not render the act of participation in the assembly unlawful, and must not in itself be used as a basis for dispersing the assembly or arresting the participants or organisers, or for imposing undue sanctions.”<sup>44</sup> It also held that “[w]here authorisation regimes persist in domestic law, they must in practice function as a system of notification, with authorisation being granted as a matter of course.”<sup>45</sup>

### ***The Public Order Ordinance***

The Public Order Ordinance (POO) is the law at issue in this case. Enacted in 1967, the law was revised in 1995 and again in 1997 but in each iteration has given the police the authority to prohibit public assemblies. Further, each version of the POO has permitted the imposition of criminal penalties, including imprisonment, for those who violate its terms.<sup>46</sup>

Under the POO, any person planning to hold a public meeting<sup>47</sup> or public procession<sup>48</sup> in Hong Kong is required to notify the Commissioner of Police (CP) in advance and secure the CP’s ‘non-objection’ to the meeting or procession.<sup>49</sup> Pursuant to this law, a public gathering or procession may only take place if the CP has been notified and not

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<sup>40</sup> See e.g., Amnesty International, *Beijing’s ‘Red Line’ in Hong Kong: Restrictions on Rights to Peaceful Assembly and Freedom of Expression and Association* (2019), available at <https://www.amnesty.org/download/Documents/ASA1709442019ENGLISH.PDF>; Hong Kong Universal Periodic Review Committee, *Submission to the United Nations Human Rights Committee for General Comment on Article 21 (Right of Peaceful Assembly)* (2019), available at [https://www.ohchr.org/Documents/HRBodies/CCPR/GC37/HongKong\\_UPR\\_Coalition.pdf](https://www.ohchr.org/Documents/HRBodies/CCPR/GC37/HongKong_UPR_Coalition.pdf); OHCHR, Press Statement, “Hong Kong urged not to silence peaceful protest with criminal charges,” May 13, 2020, available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25880&LangID=E>.

<sup>41</sup> UN Human Rights Committee, Concluding observations on the third periodic report of Hong Kong, China, UN Doc. CCPR/C/CHN-HKG/CO/3, Apr. 29, 2013, para 10.

<sup>42</sup> UN Human Rights Committee: Concluding Observations: Hong Kong Special Administrative Region, UN Doc. CCPR/C/79/Add.117, Nov. 15, 1999, para 19.

<sup>43</sup> OHCHR, Press Statement, “Hong Kong urged not to silence peaceful protest with criminal charges,” May 13, 2020, available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25880&LangID=E>.

<sup>44</sup> UN Human Rights Committee, General Comment No. 37 (2020) on the right of peaceful assembly (article 21) [hereinafter General Comment No. 37], UN Doc. CCPR/C/GC/37, Sept. 17, 2020, para 71.

<sup>45</sup> *Id.* para 73.

<sup>46</sup> See generally Hong Kong Legislative Council, Official Record of Proceedings, Dec. 21, 2000, available at <https://www.legco.gov.hk/yr00-01/english/counmtg/hansard/001221fe.pdf>.

<sup>47</sup> A “public meeting” is defined as “any meeting held or to be held in a public place.” Public Order Ordinance [hereinafter POO], Cap. 245, Sec. 2(1) (1967), available at [https://www.elegislation.gov.hk/hk/cap245?xid=ID\\_1438402885716\\_002](https://www.elegislation.gov.hk/hk/cap245?xid=ID_1438402885716_002).

<sup>48</sup> A “public procession” is defined in Section 2(1) of the POO as “any procession in, to or from a public place.” A “public place” is defined in Section 2(1) of the POO as “any place to which for the time being the public or any section of the public are entitled or permitted to have access, whether on payment or otherwise, and, in relation to any meeting, includes any place which is or will be, on the occasion and for the purposes of such meeting a public place.”

<sup>49</sup> Sections 6-8, 13A-14 of the POO.

objected.<sup>50</sup> Further, the CP is authorised to “control and direct the conduct of all public gatherings” in situations where they “reasonably consider it to be necessary” to prevent an “imminent threat” to national security, public safety, public order or the protection of the rights and freedoms of others.<sup>51</sup>

The Court of Final Appeal in *HKSAR v Leung Kwok Hung* observed that the “statutory legitimate purposes of ‘public safety’, ‘public order (ordre public)’ and ‘the protection of the rights and freedoms of others’ must be interpreted in the same way as under the ICCPR,”<sup>52</sup> and that the CP’s discretion to restrict a public assembly is circumscribed by a proportionality test, mandated by the ICCPR’s necessity requirement.<sup>53</sup> Nevertheless, the discretion afforded to the CP in this scheme is, at its default, broader than the UN Human Rights Committee’s most recent guidance on the right to peaceful assembly, which states that any restriction must “be the *least intrusive* among the measures that might serve the relevant protective function” (emphasis added) and requires that the restriction “must be proportionate, which requires a value assessment, weighing the nature and detrimental impact of the interference on the exercise of the right against the resultant benefit to one of the grounds for interfering.”<sup>54</sup>

Under the process specified by the POO, anyone wishing to hold a public procession must apply no less than 7 days prior to the intended procession for a “notice of no objection” from the CP.<sup>55</sup> The CP can object, issue a letter of no-objection, or impose conditions on the public gathering where the CP “reasonably considers it necessary in the interest of national security or public safety, public order or for the protection of the rights and freedom of others.”<sup>56</sup>

Under Section 17A of the POO, a public meeting or procession is “unauthorised” when it takes places in contravention of the POO’s rules requiring notification of the CP *and* non-objection to the public gathering or procession; or when it involves “3 or more people taking part in or forming part of a public gathering [who] refuse or willfully neglect to obey an order” issued under the POO. Anyone who “without lawful authority or reasonable excuse, knowingly takes or continues to take part in” or “holds” or “organises” an unauthorised meeting or procession is subject to criminal prosecution and penalties of up to five years’ imprisonment.<sup>57</sup> The POO also assigns criminal liability for “unlawful” assemblies where “3 or more persons, assembled together, conduct themselves in a

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<sup>50</sup> Sections 7, 13 of the POO.

<sup>51</sup> Section 6(1),(2) of the POO. The phrase “reasonably considers...to be necessary” is the litmus test as to whether the CP can legitimately exercise their powers.

<sup>52</sup> *HKSAR v Leung Kwok Hung* [2005] 3 HKLRD 164, para. 50, available at [https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=45653&currpage=T](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=45653&currpage=T)

<sup>53</sup> *HKSAR v Leung Kwok Hung* [2005] 3 HKLRD 164, paras. 33-36, 57-58.

<sup>54</sup> General Comment No. 37, para. 40. By comparison, pursuant to *HKSAR v Leung Kwok Hung* [2005] 3 HKLRD 164, the reasonableness of the CP’s decision is measured against the ICCPR’s necessity and proportionality requirement for restrictions on the right to peaceful assembly. The Court of Final Appeal has characterized that test as looking at the following four factors:

1. Whether the intrusive measure pursues a legitimate aim;
2. If so, whether it is rationally connected with advancing that aim;
3. Whether the measure is no more than necessary for that purpose; and
4. Whether a reasonable balance has been struck between the societal benefits of the encroachment and the inroads made into the constitutionally protected rights of the individual, asking in particular whether pursuit of the societal interest results in an unacceptably harsh burden on the individual.

<sup>55</sup> Sections 8, 13-15 of the POO.

<sup>56</sup> Sections 14(1)-15(2) of the POO.

<sup>57</sup> Section 17A(3) of the POO.

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.”<sup>58</sup> The penalty for an unlawful assembly, where the participants must have engaged in some disorderly or potentially harmful conduct, is the same as the penalty for an “unauthorised” assembly—a maximum of five years’ imprisonment.<sup>59</sup>

In 2018, the Court of Final Appeal (CFA) held that when considering large-scale ‘public disorder’, the sentencing judge should give proportionately more attention to the matters of punishment and deterrence; by contrast, it concluded that the fact that the offense was committed in the exercise of constitutional rights should be given limited weight as mitigation.<sup>60</sup> The use of the POO against unauthorised events has increased in recent years and in particular, during and in response to the 2019 protests. That said, the convictions in the present case are among the first since the CFA’s decision. According to one recent study by *Apple Daily*, between 2003-2013, there were 18 convictions for unauthorised assembly, none of which resulted in imprisonment.<sup>61</sup>

As discussed during the trial that is the subject of the present report,<sup>62</sup> the LegCo debated the POO’s compliance with the Basic Law in 2000, ultimately rejecting an amendment to it.<sup>63</sup> At that time, the Hong Kong Bar Association and many legislators (including some of the defendants and their counsel in the present case) urged that the law be amended because its authorisation system restricted core rights such as the freedom of peaceful assembly. The Secretary for Security noted during that debate that “no prosecution has been made to date in respect of any unauthorised assemblies” but that the law authorised prosecutions in the future.<sup>64</sup> Margaret Ng, then a member of the LegCo and a defendant in this case, argued that “nowhere in the world does non-notification result in turning a peaceful assembly, which is a right, into a criminal offence” and that the POO violated the ICCPR by denying people their right to peaceful assembly for non-compliance with an administrative measure.<sup>65</sup> (Indeed, as discussed in greater detail elsewhere in this report, the UN Human Rights Committee has previously held that “[w]here authorisation regimes persist in domestic law, they must in practice function as a system of notification, with authorisation being granted as a matter of course.”<sup>66</sup>)

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<sup>58</sup> Section 18(1) of the POO.

<sup>59</sup> Section 18(3) of the POO.

<sup>60</sup> Court of Final Appeal, *Between Secretary of Justice and Wong Chi Fung*, FACC Nos. 8, 9 and 10 of 2017, [2018] HKCFA 4, paras. 69, 116, 120 *available at* [https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=113535](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=113535).

<sup>61</sup> *Apple Daily*, “和平集會有罪 越罰越重 自簽\$500 變囚一年半,” May 17, 2021, *available at* <https://hk.appledaily.com/local/20210517/BNCWB4ZUAZEYHJEJFMXIWSJLF4/> (accessed June 7, 2021). I

<sup>62</sup> *Chinafile*, “I Stand the Law’s Good Servant, but the People’s First’ Former Legislator Margaret Ng’s Statement at Her Sentencing Hearing for Unlawful Assembly in Hong Kong,” Apr. 23, 2021, *available at* <https://www.chinafile.com/reporting-opinion/viewpoint/i-stand-laws-good-servant-peoples-first>.

<sup>63</sup> Hong Kong Legislative Council, Official Record of Proceedings, Dec. 21, 2000, *available at* <https://www.legco.gov.hk/yr00-01/english/counmtg/hansard/001221fe.pdf>,

<sup>64</sup> *Id.* at 2353.

<sup>65</sup> *Id.* at 2285-2289. In her statement before sentencing in the present case, barrister Margaret Ng referenced her 2000 statements on the fate of civil disobedience if the POO remained without amendment. *See id.* at 2289 (“The more the Government insists on shutting out rational discussion by refusing to reconsider or consider reform, the further it drives its critics towards civil disobedience. By its recalcitrance, the Government was in danger of creating the very conditions which make civil disobedience inevitable and justifiable”); *Chinafile*, “I Stand the Law’s Good Servant, but the People’s First’ Former Legislator Margaret Ng’s Statement at Her Sentencing Hearing for Unlawful Assembly in Hong Kong,” Apr. 23, 2021, *available at* <https://www.chinafile.com/reporting-opinion/viewpoint/i-stand-laws-good-servant-peoples-first>.

<sup>66</sup> General Comment No. 37, para. 73.

Although litigants have challenged the constitutionality of this authorisation procedure as an unlawful restriction on the right to protest, the Hong Kong Court of Final Appeal in 2005 upheld these requirements for notification and found that the Commissioner of Police's discretion to limit the right to assembly for public order purposes was constitutional.<sup>67</sup>

## **B. THE CASE: Hong Kong v. The “Democracy 15”: August 2019 Anti-Police Brutality Procession**

The Civil Human Rights Front (“CHRF”) is a coalition of civil society organizations and political parties founded in 2002 to coordinate human rights activities, lobbying, and organizing in Hong Kong.<sup>68</sup> Among their activities, the CHRF has organised rallies and marches in Hong Kong. This has historically included an annual pro-democracy march on July 1, which was prohibited by Hong Kong authorities in 2020 despite the fact that there had been no objection to its occurrence for the 17 prior years.<sup>69</sup> While this trial was underway, the Hong Kong police launched an investigation into the CHRF's financing and registration, which has been viewed by many commentators as an attempt by authorities to abolish the CHRF.<sup>70</sup> It is certainly the case that following this recent investigation, as well as the arrest of its high-profile leaders in this and other cases, some civil society groups have retreated from collaboration with the CHRF.<sup>71</sup>

In August 2019, following over two months of pro-democracy protests in Hong Kong and rising reports of police mistreatment of protestors,<sup>72</sup> the CHRF planned a rally and

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<sup>67</sup> *HKSAR v Leung Kwok Hung* [2005] 3 HKLRD 164; 郭卓堅及另一人 v 警務處處長盧偉聰先生及另一人 [2019] HKCFI 2557. This case concerned a procession of 90 persons, the organizers of which did not notify the police prior to the assembly; those convicted were sentenced to a fine. The lone dissenting opinion in that case held that while the notification system was constitutional, the CP's powers of prior restraint and the criminal sanctions under this scheme were unconstitutional. See generally Legislative Council Panel on Security:

The Court of Final Appeal's Judgment on *Leung Kwok Hung & Others v. HKSAR*, LC Paper No. CB(2)192/05-06(05), Nov. 1, 2005, available at <https://www.legco.gov.hk/yr05-06/english/panels/se/papers/se1101cb2-192-5e.pdf>

<sup>68</sup> See Civil Human Rights Front, *NGO Submission to Committee Against Torture on List of issues prior to the submission of the fifth periodic report of the Hong Kong Special Administrative Region* (2015), available at [https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/HKG/INT\\_CAT\\_ICO\\_HKG\\_19976\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/HKG/INT_CAT_ICO_HKG_19976_E.pdf)

<sup>69</sup> Jennifer Creery, Hong Kong Free Press, “Hong Kong police ban annual pro-democracy demo for first time in 17 years,” June 27, 2020, available at <https://hongkongfp.com/2020/06/27/breaking-hong-kong-police-ban-annual-pro-democracy-demo-for-first-time-in-17-years/>; Natalie Lung, *Bloomberg*, “Hong Kong Bans Biggest Protest After China Passes Security Law,” June 30, 2020, available at <https://www.bloomberg.com/news/articles/2020-06-30/hong-kong-bans-biggest-protest-after-china-passes-security-law>.

<sup>70</sup> Selina Cheng, *Hong Kong Free Press*, “Premier Hong Kong protest coalition comes under fire from pro-Beijing and state media, leader vows to continue,” Mar. 19, 2021, available at <https://hongkongfp.com/2021/03/19/premier-hong-kong-protest-coalition-comes-under-fire-from-pro-beijing-and-state-media-leader-vows-to-continue/>; Chris Lau, *South China Morning Post*, “Hong Kong protests: Civil Human Rights Front refuses to cooperate with police investigation into its activities,” May 4, 2021, available at <https://www.scmp.com/news/hong-kong/politics/article/3132242/hong-kong-protests-civil-human-rights-front-refuses>.

<sup>71</sup> *Global Times*, “HK Civil Human Rights Front is disbanding amid probe into sources of funding,” Mar. 15, 2021, available at <https://www.globaltimes.cn/page/202103/1218453.shtml>.

<sup>72</sup> Office of the High commissioner for Human Rights (OHCHR), “Press briefing note on Hong Kong, China,” Aug. 13, 2019, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24888&LangID=E>; Amnesty International, *Hong Kong: Arbitrary arrests, brutal beatings and torture in police detention revealed* (Sept.



procession for August 18, 2019. The focus of the event would be to protest police mistreatment and to reiterate “five demands” articulated by pro-democracy protesters, namely that the Hong Kong government:

1. Unconditionally withdraw the Extradition Bill;
2. Convene a commission to look into allegations of police brutality during the 2019 protests;
3. Cease referring to protesters as “rioters”;
4. Declare amnesty for all protesters; and
5. Realize universal suffrage for election of the Hong Kong Chief Executive and the Legislative Council (LegCo).<sup>73</sup>

In accordance with Hong Kong law, on August 12, 2019, the CHRF applied to the Hong Kong Police Force (“HKPF”) for a “letter of no-objection” to their march.<sup>74</sup> In response, the HKPF approved the holding of a rally at Hong Kong’s Victoria Park in Causeway Bay from 10:00 am to 11:00 pm but objected to the march on the grounds that the event may lead to “the possible gathering of dissidents due to the nature of the event and which may lead to breach of peace or to other unlawful activities.”<sup>75</sup>

On August 18, 2019, tens of thousands of people convened at the Causeway Bay area; by early afternoon, the six football pitches of Victoria Park were full, causing attendees to spill out onto streets in and around Victoria Park and the Causeway Bay area.<sup>76</sup> Organisers reported that the event attracted approximately 1.7 million participants; police estimates put the figure at around 120,000.<sup>77</sup>

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2019), available at <https://www.amnesty.org/en/latest/news/2019/09/hong-kong-arbitrary-arrests-brutal-beatings-and-torture-in-police-detention-revealed/>; Human Rights Watch, “Still no Accountability for Hong Kong’s Police Force,” Nov. 19, 2020, available at <https://www.hrw.org/news/2020/11/19/still-no-accountability-hong-kongs-police-force>; Shibani Mahtani, Timothy McLaughlin, Tiffany Liang and Ryan Ho Kilpatrick, *Washington Post* “In Hong Kong crackdown, police repeatedly broke their own rules — and faced no consequences,” Dec. 24, 2019, available at <https://www.washingtonpost.com/graphics/2019/world/hong-kong-protests-excessive-force/>.

<sup>73</sup> Kris Cheng, *Hong Kong Free Press*, “Explainer: Hong Kong’s Five Demands – amnesty for all arrested protesters,” Dec. 25, 2019, available at <https://hongkongfp.com/2019/12/25/explainer-hong-kongs-five-demands-amnesty-arrested-protesters/>; Tara John, *CNN*, “Why Hong Kong is protesting: Their five demands listed,” Aug. 30, 2019, available at <https://www.cnn.com/2019/08/13/asia/hong-kong-airport-protest-explained-hnk-intl>.

<sup>74</sup> TrialWatch Monitoring, *HKSAR v. Lai Chee Ying et al.*, Feb. 18, 2021.

<sup>75</sup> Jennifer Creery, “Hongkongers ignore protest restrictions, threats from Beijing as thousands join peaceful rally against gov’t” Aug. 18, 2019, available at <https://hongkongfp.com/2019/08/18/hongkongers-ignore-protest-restrictions-threats-beijing-tens-thousands-rally-govt/>

<sup>76</sup> Austin Ramzy & Raymond Zhong, *The New York Times*, “Hong Kong Protesters Defy Police Ban in Show of Strength After Tumult” Aug. 18, 2019, available at <https://www.nytimes.com/2019/08/18/world/asia/hong-kong-protest.html>; Jennifer Creery, *Hong Kong Free Press*, “Hongkongers ignore protest restrictions, threats from Beijing as thousands join peaceful rally against gov’t,” Aug. 18, 2019, available at <https://hongkongfp.com/2019/08/18/hongkongers-ignore-protest-restrictions-threats-beijing-tens-thousands-rally-govt/>.

<sup>77</sup> Alice Su & Ryan Ho Kilpatrick, *Los Angeles Times*, “Hong Kong protests: Hundreds of thousands spill out of pro-democracy rally and march across the city,” Aug. 18, 2019, available at <https://www.latimes.com/world-nation/story/2019-08-18/hong-kong-protests-continue-as-organizers-call-for-peaceful-rally>; Verna Yu & Lily Kuo, *The Guardian*, “Hong Kong: 1.7m people defy police to march in pouring rain,” Aug. 18, 2019, available at <https://www.theguardian.com/world/2019/aug/18/hong-kong-huge-rally-china-condemns-us-gross-interference>; Kris Cheng, *Hong Kong Free Press*, “Organisers say 1.7 million joined Hong Kong pro-democracy rally against police use of force, as protesters reiterate 5 demands,” Aug. 18, 2019, available at <https://hongkongfp.com/2019/08/18/breaking-organisers-say-1-7-million-joined-hong-kong-pro-democracy-rally-police-use-force-protesters-reiterate-5-demands/>.

At around 3pm, under heavy rainfall, the gathered protesters began to leave the overflowing park grounds, continuing along the originally planned route from Causeway Bay toward Chater Gardens in the area of Central, Hong Kong.<sup>78</sup> The event ended peacefully, and no one was arrested in connection with the August 18, 2019 protest and subsequent departure by participants until eight months later, on April 18, 2020.

Prior to the arrest of the defendants in this case, the Hong Kong authorities began referring to the 2019 protests as a threat to the rule of law and national security.<sup>79</sup> Days before the arrests, the China Liaison Office, the most senior representative of the Chinese government in Hong Kong, stated that it was not bound by the Basic Law's restriction against interference in local affairs, rebuked opposition politicians for "malicious filibustering," and called for the rapid introduction of a national security law in Hong Kong in light of the 2019 protests.<sup>80</sup> That same week, a report from *Reuters* cited concerns from senior judges in Hong Kong that their independence was under significant political threat and referred to statements in state-controlled media in the PRC warning judges in Hong Kong against "absolv[ing]" protesters arrested in the 2019 demonstrations.<sup>81</sup>

A few days after these developments and reports, on April 18, 2020, Hong Kong police conducted a series of arrests, targeting 15 pro-democracy activists (the "Democracy 15") for their alleged roles in organising several separate pro-democracy protests in 2019.<sup>82</sup> The charges in the three cases that subsequently went forward (although they differ by defendant), are (1) organising an unauthorised assembly,<sup>83</sup> (2) knowingly participating in an unauthorised assembly,<sup>84</sup> and, in some (but not the present case), (3) incitement to knowingly take part in an unauthorised assembly.<sup>85</sup>

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<sup>78</sup> Young Post Team, *South China Morning Post*, "Hong Kong protests: Live updates from mass anti-government rally and march on August 18," Aug. 18, 2019, available at <https://www.scmp.com/yp/discover/news/hong-kong/article/3065894/hong-kong-protests-live-updates-mass-anti-government>; Alice Su & Ryan Ho Kilpatrick, *Los Angeles Times*, "Hong Kong protests: Hundreds of thousands spill out of pro-democracy rally and march across the city," Aug. 18, 2019, available at <https://www.latimes.com/world-nation/story/2019-08-18/hong-kong-protests-continue-as-organizers-call-for-peaceful-rally>; Helen Regan et al., *CNN*, "Hong Kong protests enter 11th consecutive weekend," Aug. 18, 2019, available at <https://www.cnn.com/asia/live-news/hong-kong-protest-aug-18-intl-hnk/index.html>.

<sup>79</sup> RTHK, "Violence, hate speech threaten national security: CE," Apr. 15, 2020, available at <https://news.rthk.hk/rthk/en/component/k2/1520716-20200415.htm>.

<sup>80</sup> Jessie Pang, *Reuters*, "Top China official in Hong Kong urges national security law 'as soon as possible,'" Apr. 14, 2020, available at ; *Hong Kong Free Press*, "Explainer: Beijing's 5-day crackdown on Hong Kong's opposition during covid-19," Apr. 20, 2020, available at <https://hongkongfp.com/2020/04/20/explainer-beijings-5-day-crackdown-on-hong-kongs-opposition-during-covid-19/>.

<sup>81</sup> *Reuters*, Greg Torode & James Pomfret, "Hong Kong judges battle Beijing over rule of law as pandemic chills protests," Apr. 14, 2018, available at <https://www.reuters.com/investigates/special-report/hongkong-politics-judiciary/>.

<sup>82</sup> *The Guardian*, "Police in Hong Kong arrest 15 activists amid autonomy warnings," Apr. 18, 2020, available at <https://www.theguardian.com/world/2020/apr/18/police-in-hong-kong-arrest-14-activists-amid-autonomy-warnings>; *Al Jazeera*, "Hong Kong activists arrested over last year's mass protests," Apr. 18, 2020, available at <https://www.aljazeera.com/news/2020/4/18/hong-kong-activists-arrested-over-last-years-mass-protests>; *Reuters*, "Arrests show Beijing sees Hong Kong crackdown as priority: activist," Apr. 18, 2020, available at <https://www.reuters.com/article/us-hongkong-protests-arrests/arrests-show-beijing-sees-hong-kong-crackdown-as-priority-activist-idUSKBN221036>.

<sup>83</sup> Section 17A(3)(b)(i) of the POO, Cap. 245.

<sup>84</sup> Section 17A(3)(a) of the POO, Cap. 245.

<sup>85</sup> Section 17E(2)(b) of the POO, Cap. 245.

With respect to the August 18, 2019 protest, the nine individuals charged were Lee Cheuk-yan, Cyd Ho, Albert Ho, Martin Lee, Leung Kwok Hung, Leung Yiu-chung, Jimmy Lai, Margaret Ng, and Au Nok-hin.

All nine were convicted on April 1, 2021 (with two having pleaded guilty). They were sentenced individually to terms of imprisonment ranging from 8 to 18 months, with two individuals receiving suspended sentences. Three of the defendants—Jimmy Lai, Martin Lee, and Albert Ho—have appealed the verdict and sentences in this case, and it is anticipated that their appeals will also have implications for the other defendants.<sup>86</sup>

On April 27, 2021, Hong Kong police announced an investigation into CHRFF's funding and alleged failure to register under the Societies Ordinance, further requiring the group to explain why it co-signed a petition to the UN, on the 70th anniversary of International Human Rights Day, calling for an investigation into police brutality.<sup>87</sup> The CHRFF subsequently refused to participate in the investigation.<sup>88</sup>

Since the conviction of these activists on April 1, 2021, the same Court has handed down two further sentencing decisions against the “Democracy 15” who were arrested on April 18, 2020, with the defendants pleading guilty after their constitutional challenge and other defences were unsuccessful in the prior case.

With respect to these three additional cases:<sup>89</sup> On April 16, 2021, the Court sentenced Jimmy Lai to 8 months' imprisonment, Lee Cheuk Yan to 6 months, and Yeung Sam to a suspended sentence of 8 months for leading a protest march and vigil on August 31, 2019; the three had pleaded guilty to participating in and organising an unauthorised assembly following the April 1 decision. The Court held that the prayer vigil and march that these three defendants had led, and which passed by police headquarters, “was deliberately provocative and inflammatory, in light of the prevailing social unrest and previous attacks on the Police Headquarters to specifically march there.”<sup>90</sup>

On May 28, 2021, the Court sentenced 10 individuals for their role in a protest on October 1, 2019, suspending sentences for two of the accused (Sin Chung Kai and Richard Tsoi) and ordering the sentences to be served consecutively with the August 18 2019 protest

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<sup>86</sup> *Stand News*, “[10.1 case] Sin Chung-kai, Tsoi Yiu-cheong received suspended sentences, Sin: Unprecedentedly tough sentencing, some defendants contemplating appeal” (【10.1 案】單仲偕、蔡耀昌獲判緩刑 單：判刑史無前例嚴重 部分被告考慮上訴刑期) May 28, 2021, available at <https://beta.thestandnews.com/politics/10-1-案-單仲偕-蔡耀昌獲判緩刑-單-判刑史無前例嚴重-部分被告考慮上訴刑期>.

<sup>87</sup> Lilian Cheng and Natalie Wong, *South China Morning Post*, “Hong Kong civil rights group unlikely to survive police investigation into funding, activities, analysts say,” Apr. 27, 2021, available at <https://www.scmp.com/news/hong-kong/politics/article/3131315/hong-kong-civil-rights-group-unlikely-survive-police>.

<sup>88</sup> Chris Lau, *South China Morning Post*, “Hong Kong protests: Civil Human Rights Front refuses to cooperate with police investigation into its activities,” May 4, 2021, available at <https://www.scmp.com/news/hong-kong/politics/article/3132242/hong-kong-protests-civil-human-rights-front-refuses>.

<sup>89</sup> See generally 泛民 15 人涉 4 遊行案 一文看清各案進展 一人將在最後一案出現), May 28, 2021, available at <https://www.hk01.com/社會新聞/630419/泛民15人涉4遊行案一文看清各案進展一人將在最後一案出現>.

<sup>90</sup> *HKSAR v. Lai Chee Ying, Yeung Sum & Lee Cheuk Yan*, DCCC 537/2020 [2021] HKDC 447, Apr. 16, 2021, para. 54, available at [https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=135000&currpage=T](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=135000&currpage=T).

sentences for five of the individuals (Lee Cheuk Yan, Leung Kwok Hung, Cyd Ho, Avery Ng and Jimmy Lai). Four of the defendants in this (October protest) case had pleaded guilty to the charge of inciting an unauthorised assembly.

In both cases, the Court held that the defendants had deliberately broken the law and that, even if the events themselves were peaceful, the assemblies took place at a time of heightened social unrest in Hong Kong. The Court noted that it did have the authority to take into account acts of violence during the events in question in sentencing the defendants, even if the defendants repeatedly called for peaceful protest and were not personally involved in any violence themselves.<sup>91</sup> In its sentencing decision on the October 1 (China Day) protest case, the Court stated that the defendants “did call for a peaceful, rational and non-violent procession but how naive and unrealistic was that considering what was happening on a daily basis was the opposite. This is not with hindsight. The risk was very real every day at that time.”<sup>92</sup> Further, the Court held that imprisonment was the appropriate punishment as it served a necessary deterrent function, even where the accused otherwise had clear criminal records and positive mitigation.<sup>93</sup>

The final case in this group of four cases is scheduled for trial on August 19, 2021; the case stems from the October 20, 2019 event protesting Hong Kong’s ban on wearing masks.<sup>94</sup> The seven defendants in that case face charges including incitement to participate, knowingly participating in, and organising an unauthorised assembly; three of

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<sup>91</sup> HKSAR v. Chan Ho Wun, Lee Cheuk Yan, Leung Kwok Hung, Ho Chun Yan, Yeung Sum, Ho Sau Lan Cyd, Ng Man Yuen Avery, Lai Chee Ying, Sin Chung Kai, Tsoi Yiu Cheong Richard, DCCC 534/2020 [2021] HKDC 645, May 28, 2021, para. 29 (“Even if there is no actual violence, the court should take into consideration the threat and imminent risk of violence and actual breach of peace caused by criminal acts”) & para. 97, available at [https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=136087&currpage=T](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=136087&currpage=T); HKSAR v. Lai Chee Ying, Yeung Sum & Lee Cheuk Yan, DCCC 537/2020 [2021] HKDC 447, paras. 44-47. The Court referred to a recent Court of Appeal decision in an *unlawful* (not unauthorized) assembly case in Hong Kong, holding that it would be permissible to hold someone not engaged in violence responsible for inciting others to a breach of the peace involving violence. See Secretary for Justice v Tong Wai Hung et al., CASJ 1/2020 [2021] HKCA 404 March 25, 2021, para 80 (when someone “becomes involved in the violence or the threat of violence or, using the language of sections 18 and 19 of the POO, a breach of peace, he crosses the line separating legally protected peaceful assembly and demonstration from unlawful activity, which is subject to legal sanctions and constraints: Chow Nok Hang, *ibid*. He ceases to be a peaceful demonstrator or by-stander or onlooker and should be held liable for his crime. Depending on the actual circumstances and evidence, he may be involved in the violence or threat of violence as (a) a principal or (b) an accessory or a party to a joint enterprise.”), available at [https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=134508&QS=%2B&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=134508&QS=%2B&TP=JU). See also Secretary of Justice v. Chung K ho, CAAR 4/2020, [2020] HKCA 990, Dec. 3, 2020, available at [https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=132229&QS=%2B&TP=JU&ILAN=en](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=132229&QS=%2B&TP=JU&ILAN=en).

<sup>92</sup> HKSAR v. Chan Ho Wun, Lee Cheuk Yan, Leung Kwok Hung, Ho Chun Yan, Yeung Sum, Ho Sau Lan Cyd, Ng Man Yuen Avery, Lai Chee Ying, Sin Chung Kai, Tsoi Yiu Cheong Richard, DCCC 534/2020, [2021] HKDC 645, May 28, 2021, para. 36, available at [https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=136087&currpage=T](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=136087&currpage=T).

<sup>93</sup> *Id.* at paras 25, 32-33, 59; HKSAR v. Lai Chee Ying, Yeung Sum & Lee Cheuk Yan, DCCC 537/2020 [2021] HKDC 447, paras. 36, 49, 50.

<sup>94</sup> *Hong Kong Free Press*, “Hundreds of thousands defy protest ban in Hong Kong amid tear gas, vandalism and Molotovs, as mosque hit by water cannon dye,” Oct. 20, 2019, available at <https://hongkongfp.com/2019/10/20/thousands-defy-protest-ban-hong-kong-amid-tear-gas-vandalism-molotovs-mosque-hit-water-cannon-dye/>.

the October 20 defendants (Leung Kwok Hung, Cyd Ho Sau Lan, Albert Ho Chun Yan) are defendants in the case at issue in this report.<sup>95</sup>

In the weeks since the first three sets of sentences were issued, authorities have prohibited other public assembly events, notably the annual June 4 Tiananmen Square vigil.<sup>96</sup> According to one May 2021 news report, Hong Kong's then-Secretary for Security John Lee (since promoted to Chief Secretary) said that he anticipated protests in Hong Kong would resume as the COVID pandemic recedes; however, he reportedly stated that with the courts' clear ruling that even peaceful unauthorised protests were illegal, the city would return to "rationality."<sup>97</sup>

## C. PRE-TRIAL PROCEEDINGS

TrialWatch monitored the first mention at West Kowloon Magistrates' Court on May 18, 2020. Although the defendants were charged in three separate cases, with some defendants charged in all cases and others just in one or two, the first mention hearing addressed each case consecutively with defendants required to confirm for each that they understood the charges against them. The Hong Kong Department of Justice (DOJ), which was prosecuting the cases, requested that the hearings be adjourned until June 2020 so the DOJ could apply for the cases to be transferred to the District Court, where the possible penalties for a conviction are higher (five years' imprisonment compared to two years for this offence).<sup>98</sup>

The Magistrate agreed to the adjournment and granted bail to the defendants pending the next hearing on June 15, 2020. At the June 15, 2020 hearing, the Prosecution said it was within its discretion to request the transfer to the District Court, in light of the number of witnesses and defendants, the severity of the offences, and the complexity of the case. The Defence maintained that a transfer for this type of case—on charges of unauthorised assembly and exposing the accused to more than two years in prison—was 'unprecedented.'<sup>99</sup> The defendants requested, and were granted, a further four-week adjournment to prepare for their application for judicial review of the Prosecution's application to transfer the cases to the District Court.<sup>100</sup> At the same hearing, the Prosecution also requested that additional bail conditions be imposed on some of the defendants on the grounds that they had "committed further offences." (Some of them had been arrested for intervening actions in connection with a different alleged

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<sup>95</sup> HKSAR v. Figo Chan Ho Wun, Leung Kwok Hung, Cyd Ho Sau Lan, Albert Ho Chun Yan, Raphael Wong Ho Ming, Yeung Sum, Avery Ng Man Yuen, DCCC 535/2020 (to start Aug. 19, 2021).

<sup>96</sup> Christy Leung & Clifford Lo, *South China Morning Post*, "Tiananmen vigil: Hong Kong police to put 3,000 anti-riot officers on standby, promising swift action against any unauthorised June 4 gatherings," June 2, 2021, available at <https://www.scmp.com/news/hong-kong/law-and-crime/article/3135665/hong-kong-police-put-3000-anti-riot-officers-standby>.

<sup>97</sup> *Apple Daily*, "We will pursue you for life, Hong Kong warns wanted activists abroad," May 19, 2021 [accessed May 21, 2021], available at <https://hk.appledaily.com/news/20210519/5LXXQW4VMBCAJF7AV4LI2MYAHM/>.

<sup>98</sup> In Hong Kong, the District Court is an intermediate court where judges sit alone without a jury when hearing proceedings. This Court hears summary offences that are transferred from the Magistrates' Court, and its criminal jurisdiction is confined to offenses with penalties of imprisonment of no more than seven years. See Hong Kong Government. 2018. *Commencement of jurisdictional rise of District Court and Small Claims Tribunal* (Oct. 25, 2020), available at <https://www.info.gov.hk/gia/general/201810/25/P2018102400397.htm>; District Court Ordinance (Cap. 336), section 82(2)(a).

<sup>99</sup> TrialWatch Monitoring, HKSAR v. Lai Chee Ying et al., June 15, 2020.

<sup>100</sup> *Id.*

unauthorised assembly, the Tiananmen Square annual vigil and demonstration on June 4, 2020).<sup>101</sup> The Magistrate refused the additional conditions.

On June 26, 2020, the police applied for search warrants for the phones and the material contained thereon of three of the defendants in this case—Martin Lee, Albert Ho, and Au Nok-hin—plus two other members of the Democracy 15, Sin Chung Kai and Yeung Sum, who faced charges in connection with other protests. The defendants applied to the High Court for an injunction against the warrants, which was granted temporarily on July 4, 2020 with a further hearing set for July 10, 2020.<sup>102</sup> On July 10, 2020, lawyers for the city’s police commissioner sought to lift the previous injunction, insisting the search would not infringe the defendants’ right to privacy; the defendants argued that there were no safeguards to limit the scope of the search, and the Court extended the injunction.<sup>103</sup>

On July 15, 2020, before Principal Magistrate Peter Law, the Prosecution announced that the defendants had agreed to withdraw their petition for judicial review of the Prosecution’s application to have the case transferred to the District Court. The Magistrate Judge approved the transfer.

On July 30, 2020, now before Chief District Court Judge Justin Ko, the defendants (still sitting as all 15 with the distinct protest cases not separated) presented their pleas.<sup>104</sup> At this stage, only Au Nok-hin pleaded guilty to the two offences (in connection with the August 18, 2019 protest). With the case now before the District Court the Prosecution requested a change in bail conditions, citing the concern that the defendants were now more of a flight risk given the exposure to higher penalties if convicted. The Court denied this request. The Court also discussed the constitutional challenge to the POO and its application in these cases that all defendants except Au Nok-hin intended to present; it was agreed that this would be raised during rather than ahead of trial.<sup>105</sup>

On September 18, 2020, the Prosecution requested that all the cases against the “Democracy 15” be tried together, to ensure consistency across the common issues and for efficiency, with defendants agreeing to a common set of facts.<sup>106</sup> With several of the defendants opposing this proposal, the District Court rejected it, observing that the Prosecution’s proposal treated the preliminary hearing like a judicial review and not taking into account the different facts in each case.<sup>107</sup> The Court did agree, however, that the cases could be heard sequentially by the same judge, starting with the trial of those involved in the August 18, 2019 public assembly (which is the subject of this report) followed by the August 31 and October 1 assembly cases.<sup>108</sup> As discussed above, the last of the cases is now set to be heard next month by the same judge.

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<sup>101</sup> *Id.*

<sup>102</sup> Chris Lau, *South China Morning Post*, “Hong Kong protests: five opposition figures get temporary court order to stop police accessing their phones,” July 4, 2020, *available at* <https://www.scmp.com/news/hong-kong/politics/article/3091846/hong-kong-protests-five-opposition-figures-get-temporary>.

<sup>103</sup> Jasmine Siu, *South China Morning Post*, “Hong Kong court extends injunction to opposition politicians to prevent police from accessing their phones,” July 10, 2020, *available at* <https://www.scmp.com/news/hong-kong/politics/article/3092648/hong-kong-court-extends-injunction-opposition-politicians>

<sup>104</sup> TrialWatch Monitoring, *HKSAR v. Lai Chee Ying et al.*, July 10, 2020.

<sup>105</sup> *Id.*

<sup>106</sup> TrialWatch Monitoring, *HKSAR v. Lai Chee Ying et al.*, Sept. 18, 2020.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

## D. TRIAL PROCEEDINGS

### February 16-March 18, 2021 Trial

The trial took 20 days, starting February 16 and ending March 18, 2021.

The Prosecution's case was that after the CHRF had made a request to the Commissioner of Police (CP) on August 12, 2019 to hold a public meeting and a public procession on August 18, 2019, with the CP 'not objecting' to the former but denying permission for the latter, the defendants had led participants in the protest along the exact route they had proposed for the procession.<sup>109</sup>

The defence case, in essence, was that in leading the rally participants out of the overcrowded park at the end of the approved rally, they had sought to facilitate the exit of crowds from Victoria Park. This was, alternatively, an argument that the prosecution had not met its burden or that they could avail themselves of a defence of necessity.<sup>110</sup> The defence also argued that the POO was unconstitutional on its face and as applied—in particular, that arresting them eight months after a peaceful protest was a disproportionate response.

At the beginning of the trial, defence counsel for some of the accused requested leave to present an expert witness, Professor Clifford Stott, to testify by video on the reasonableness of police operations in Hong Kong. (Stott was one of several experts who withdrew from an international panel appointed by Hong Kong authorities to investigate police conduct during the 2019 protests.<sup>111</sup>) Counsel for Albert Ho and Martin Lee argued that Stott would provide expert testimony on crowd control, crowd psychology, and crowd management. They argued that this was relevant to their argument that arrest was a disproportionate response to their actions (in particular, because the defendants alleged that the police had either foreseen the way protesters might exit Victoria Gardens or had tolerated it, by withdrawing from the area) and, relatedly, that the defendants had a

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<sup>109</sup> *HKSAR v. Lai Chee Ying et al.*, DCCC 536/2020, Reasons for Verdict, 1 April 2021, at para 15 (“It is the prosecution’s case that the defendants deliberately flouted the law and knowingly ignored the ban by the police by organising and also taking part in an unauthorized public procession that started from Victoria Park and ended at Chater Road that day.”); *cf. id.* at 17 (describing prosecution view that the defendants’ explanation that they sought to facilitate an orderly exist as a “disingenuous excuse to flout the law by describing their actions as a dispersal plan”), available at [https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=134671&curpage=T](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=134671&curpage=T).

<sup>110</sup> The POO specifically defines participation in an unauthorized assembly or procession as requiring that the participation be “without reasonable excuse.” POO section 17(3)(a). *Cf. HKSAR v. Lai Chee Ying et al.*, DCCC 536/2020, Reasons for Verdict, at para 10; *id.* para 24 (describing defence argument to the effect that “CHRF had to implement their own dispersal plan because the police deliberately did not implement any crowd management control plan. It was done out of reasonable excuse and necessity. The police tacitly consented to the plan that CHRF would arrange the dispersal of the crowds.”).

<sup>111</sup> *South China Morning Post*, “British expert claims Hong Kong police turned protesters into radicals and drove them to increasing levels of violence,” Nov. 19, 2020, available at <https://www.scmp.com/news/hong-kong/law-and-crime/article/3110496/british-expert-claims-hong-kong-police-turned>; Foreign Correspondents Club of Hong Kong, “British policing expert who resigned from IPCC probe into Hong Kong protests wouldn’t ‘feel safe’ returning to city,” June 11, 2020, available at <https://www.fchkg.org/british-policing-expert-who-resigned-from-ipcc-probe-into-hong-kong-protests-wouldnt-feel-safe-returning-to-city/>; Human Rights Watch, “Still no Accountability for Hong Kong’s Police Force” Nov. 19, 2020, available at <https://www.hrw.org/news/2020/11/19/still-no-accountability-hong-kongs-police-force#>.

“reasonable excuse” for their actions. The Court denied the request, finding the request had not been made in a timely manner and that Stott’s expertise was not relevant.<sup>112</sup>

The Prosecution then proceeded with its case, beginning with the factual predicate. They began by explaining that the CP had denied permission for the procession on the grounds that there had been escalating levels of violence over the summer, including vandalism, and that “police had reason to believe that some participants of the protest will digress from the planned route beyond the applicant’s control.” (This decision was subsequently upheld by the Appeals Board).<sup>113</sup>

The Prosecution also cited the transcript from the police press conference before the event, at which the police urged the public not to participate in an illegal procession and showed several videos of the police announcing their decision to prohibit the procession. The Prosecution also presented video footage of the demonstration and the defendants chanting slogans, such as “Free Hong Kong!”, holding a banner, and exiting Victoria Park. (Video footage also showed the organisers of the protest calling for “protestors [to] be totally peaceful.”)

The Prosecution argued that the defendants had led the group exiting Victoria Park “at the front” and that one of the defendants had said that they would “lead people away from Victoria Park so more people can come into Victoria Park and join the public assembly.” This was the principal evidence of their ‘organisational’ role in the alleged procession.

Over the next two weeks, the Prosecution and Defence questioned several police officers presented by the Prosecution as witnesses. These witnesses explained the various public security and risk assessments the police had undertaken ahead of August 18, 2019 and provided details regarding the on-site response during the demonstration. According to the testimony from police at different levels of authority, the police had not deployed officers along the route the CHRF had requested to use for the procession (on the basis that this would help to avoid confrontations) and did not call for or see the need for any police reinforcements even as the number of attendees at the rally swelled (because of their confidence of the peaceful nature of the demonstration). The various officers further testified that while some advised the event leaders about possible exit options or the growing crowds at Victoria Park, none registered any incidents in the police incident log, conducted any arrests, provided clear guidance to attendees on how or where to leave the park after the rally, or advised the leaders that anyone at the rally or that their manner of exit (the ensuing ‘procession’) was risking criminal charges.<sup>114</sup>

In particular, one of the key issues that emerged from the testimony was the question of how participants in the (authorised) protest were supposed to leave Victoria Gardens without participating in an (unauthorised) procession. Several defence lawyers in their questioning suggested that the police had not prepared any contingency plans for the safe dispersal of the crowds in Victoria Park. For instance, one police witness testified that they anticipated that a procession would take place (despite the fact that it had been forbidden), but the Defence argued that the police had not then prepared for this

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<sup>112</sup> TrialWatch Monitoring, HKSAR v. Lai Chee Ying et al., Feb. 17, 2021.

<sup>113</sup> *Id.*; Reasons for Verdict at paras. 6-7.

<sup>114</sup> TrialWatch Monitoring, HKSAR v. Lai Chee Ying et al., Feb 22, 2021 & Feb. 24, 2021.



eventuality.<sup>115</sup> By contrast, the Prosecution sought to elicit testimony that the organisers of the event disregarded instructions or advice on how best to exit Victoria Gardens.<sup>116</sup>

The “water flow” approach to managing crowds, which both prosecution and defence appear to have accepted as reasonable, anticipated that people would queue at entry points and, when the space was at capacity, some inside would be encouraged to leave to allow those in the queues to enter. The Defence sought to elicit testimony to the effect that the CHRF organisers had been clear in the run-up to the event that leaders would lead participants away from Victoria Gardens to facilitate ‘water flow.’<sup>117</sup> For instance, one police witness testified that “what the CHRF marshals did in leading crowds away from the venue was part of the HKPF’s plan.” The witness said he “hoped and expected that the crowd acted as directed by the CHRF because then the objectives of public order and public safety in the Operation Order can be achieved.”<sup>118</sup>

Yet police witnesses also testified that they had not watched the CHRF press conference in advance, at which organisers had discussed leading participants away (this despite the fact that this video was one of those played by the Prosecution at trial), and they disclaimed knowledge of this approach to exiting Victoria Park.<sup>119</sup> (Some witnesses also testified that they did not know what “water flow” meant). Further, there were disputes regarding the extent of the overcrowding at relevant times<sup>120</sup> and whether some of the Mass Transit Railway (MTR) stations were closed, which would have been relevant to the Defence theory that the defendants had been managing an orderly exit.<sup>121</sup>

Moreover, throughout the testimony, it was undisputed that there was no violence during the rally or subsequent exit of the crowd along Causeway; the only allegation of such misconduct presented by the Prosecution, in their closing submission, was the apparently minor suggestion that a protestor had kicked a traffic cone (disputed by the Defence and unsubstantiated by video or other evidence).<sup>122</sup>

On Sunday, February 28, 2021, Hong Kong police arrested 47 opposition leaders and activists in Hong Kong, including Leung Kwok Hung, the fourth defendant in this case, and charged them under the 2020 National Security Law. The following day, March 1, 2021, Leung Kwok Hung appeared in court for the unauthorised assembly case; the judge

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<sup>115</sup> Cf. HKSAR v. Lai Chee Ying et al., Reasons for Verdict at para 61 (discussing decision to withdraw police from traffic duty due to alleged verbal abuse from protesters).

<sup>116</sup> *Id.* at para. 71 (“PW6 [Prosecution Witness 6] gave Figo Chan what she called ‘advice’ but in reality, it was instructions or directions to CHRF.”).

<sup>117</sup> See also *id.* at para 8 (“The CHRF held several press conference and interviews after that. On 17 August 2019 they said the police had not arranged for the dispersal of crowds from Victoria Park therefore, pro-democracy legislators and influential people would be assisting the crowds to disperse safely.”); cf. *id.* at para 143 (summarizing defence argument that “[t]he police knowingly tolerated this procession and tacitly consented to CHRF organising the dispersal in this manner”).

<sup>118</sup> See also *id.* at 33 (“PW1 [Prosecution Witness 1] did agree the duties of CHRF marshals in leading or directing crowds away from the venue was part of the police solution to the possible overcrowding hazard.”).

<sup>119</sup> Cf. *id.* at para 145 (“It was described as implausible that the police witnesses did not hear of or understand the meaning of this water flow dispersal plan when it was mentioned on so many occasions.”).

<sup>120</sup> *Id.* at para 54 (summarizing one witness as saying “[s]he did not agree in cross examination that the hazard of overcrowding in Victoria Park had materialised by 2pm.”).

<sup>121</sup> Cf. *id.* at para 77 (“She repeated her advice and gave him specific instructions on which walking routes to tell the crowds to take to go to those 2 designated MTR stations. He even challenged her and said it was not feasible to use the 2 MTR stations.”).

<sup>122</sup> See TrialWatch Monitoring, HKSAR v. Lai Chee Ying et al. Feb. 22, 2021, March 18, 2021.

immediately asked how they should proceed and whether Leung Kwok Hung wanted to leave one of his attorneys in court to participate in the ongoing unauthorised assembly trial while he attended his bail hearing in the NSL case.<sup>123</sup> The barrister for Leung Kwok Hung, Hectar Pun SC, explained that his client had not slept since attending the police station the previous afternoon and they were still waiting for a consultation room and opportunity to review the NSL charges; however, his client did not want to waive his right to be present in court on the unauthorised assembly charges. The Court agreed to adjourn the proceedings, which reconvened four days later after lengthy bail proceedings in the NSL case (taking place in the same court building) had concluded.<sup>124</sup>

Starting on day 15 of trial, as part of the closing submissions from each side, the parties addressed the defendants' constitutional challenges to the charges; these arguments and the Prosecution's response lasted five days. The defendants argued that the notification regime and related criminal penalties under the Public Order Ordinance violated the defendants' rights to freedom of expression and freedom of peaceful assembly. In particular, the defendants argued that the five-year prison term they faced if convicted was disproportionate.

The Prosecution, responding first to the written submissions from the Defence, argued that the constitutionality of the POO had already been raised and affirmed by the Court of Final Appeal in Hong Kong in the 2005 *LEUNG Kwok-hung* case. The Prosecution asserted that this precluded further review by any lower court. Further, on the merits of the challenge, the Prosecution argued that any restrictions on freedom of expression must be "not more than necessary," but the test as to whether restrictions were proportionate must take into account the unique "local circumstances" in Hong Kong.<sup>125</sup> In this regard, the Prosecution argued that the legislative history of the POO showed that the legislature thought the provision struck an appropriate balance between the right to free expression and the need for public order, and that the Ordinance (and its notification requirement) served an important deterrent and preventative function--ensuring that peaceful protests did not turn violent.<sup>126</sup> The Prosecution maintained that this deterrent role was critical because "[t]here is no simple dichotomy between peaceful and violent protesters."<sup>127</sup>

The Prosecution also argued that the authorities' response in this specific case had been proportionate, and in particular, by arguing that because the police had not intervened to disperse the assembly, the defendants' right to freedom of expression and peaceful assembly had been more fully respected.

Finally, the Prosecution rejected the defendants' argument that they had a "reasonable excuse" for leading the procession out of the rally area to provide a safe way for the large crowd to disperse.<sup>128</sup>

The defendants' respective counsel made separate arguments but each maintained that the present case was distinguishable from those cited by the prosecution, in particular because the defendants' conduct in this case was undisputed as peaceful. Counsel for Jimmy Lai also argued that the police gave no order to those participating in the rally and

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<sup>123</sup> TrialWatch Monitoring, *HKSAR v. Lai Chee Ying et al.*, March 1, 2021.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* on March 17, 2021.

<sup>126</sup> *Id.* on March 11, 2021.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* on March 12, 2021.

subsequent exit that they needed to disperse or else face a prison sentence; by contrast, the police had ample notice of the rally and failed to provide a reasonable pathway and manner in which the rally participants could safely disperse.<sup>129</sup> Moreover, Jimmy Lai’s Counsel argued, the long lapse of time between the August 18, 2019 rally and the defendants’ arrest in April 2020 suggested some tolerance for the alleged procession that should go to the courts’ analysis of the proportionality of the prosecution—and gave grounds for believing it might be an abuse of process.<sup>130</sup>

### April 1, 2021 Verdict

On April 1, 2021, the Court found all of the defendants guilty of both ‘participating in’ and ‘organising’ an unauthorised assembly. The Court rejected the defendants’ constitutional challenge, finding that the restrictions on free speech and peaceful assembly contemplated by the POO were proportionate: “Hong Kong people do enjoy the same freedoms of assembly, speech, procession and demonstration as other advanced and free societies worldwide. ... That means Hong Kong people are obliged to respect the laws that are in force even those that restrict these rights.”<sup>131</sup> In particular, it held, the Court of Appeal had already reviewed the POO—and the discretionary power it gave the police under the POO’s notification scheme—and had found it constitutional. The court went on to note that the Court of Final Appeal must also be taken to have considered and taken into account the maximum penalties available under this law, and thus could be understood to have held that those were not unconstitutional by reference to the severity of the penalties either.

The Court also accepted the Prosecution’s argument that, while the jurisprudence which the defendants submitted from European courts could be considered, “[w]here matters of disruption to public order are concerned, Hong Kong is unique with its high-density, crowded districts, very different locality issues and even cultural considerations when compared.”<sup>132</sup>

The Court also observed that even if the procession in this case did not involve any violence, it did cause “major traffic disruption”<sup>133</sup>; and anyway, the Court held:

[I]t cannot be right that to arrest and prosecute is disproportionate in this case because no actual violence broke out. That would give the law no teeth and make a mockery of it. It cannot be right for an offender to argue that although his act was unauthorised, (unauthorised because the legitimate aim behind it is public order) but because it was ultimately peaceful and there was no violence he should not be arrested, prosecuted or convicted.<sup>134</sup>

Finally, the Court rejected the defendants’ operational proportionality challenge—essentially arguing that only the police actions on the day itself were relevant<sup>135</sup> and noting

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<sup>129</sup> *Id.* on March 11 & 17, 2021.

<sup>130</sup> Monitoring, HKSAR v. Lai Chee Ying et al., March 17, 2021.

<sup>131</sup> *HKSAR v. Lai Chee Ying et al.*, DCCC 536/2020, [2021] HKDC 398, Reasons for Verdict, paras. 219-220.

<sup>132</sup> *Id.* at para. 279.

<sup>133</sup> *Id.* at para. 229.

<sup>134</sup> *Id.* at para. 267.

<sup>135</sup> *Id.* at para. 304 (“With respect, I reject the submission that any subsequent arrest is a restriction on a fundamental right.”).

that “essentially only in extremely rare situations would a court find a prosecutorial decision unconstitutional.”<sup>136</sup>

On the facts, because it found that there was insufficient evidence of a hazard at the relevant time,<sup>137</sup> and noting the alleged ‘instructions’ given by the police regarding the means of egress,<sup>138</sup> the Court concluded that “it was not a dispersal plan born out of necessity but an unauthorised public procession as defined by the POO.”<sup>139</sup> The Court also said that “[i]f the defendants were only there to assist with dispersal to ensure public safety and avoid overcrowding, then it does beggar belief they needed such a large banner that took so many of them to carry it.”<sup>140</sup>

### **April 16, 2021 Sentencing**

On April 16, 2021, the District Court sentenced the nine defendants and issued its reasoning for each sentence, considering the facts and mitigation presented by the defendants. Au Nok-hin had plead guilty to both charges—organizing an unauthorised assembly (Charge 1) and knowingly participating in an unauthorised assembly (Charge 2) before trial; Leung Yiu-chung pleaded guilty to the second charge before trial, and the Prosecution did not pursue the organising charge against him. For both defendants, their pleas were considered in the sentencing calculation.

As to the group of defendants as a whole, the Court reiterated that “the defendants deliberately defied the law and circumvented the [procession] ban”<sup>141</sup> and that their course of action in leading the public out of the park “was not a dispersal plan implemented with the assistance of the defendants but a planned unauthorised assembly to challenge the authority of the Police.”<sup>142</sup> The Court further acknowledged that “there are no prevailing guidelines or tariffs for sentences for the present charges” and that, “[t]he great majority of the past cases with similar offences either involve a bind over order or a financial penalty.” However, it held, “none of those cases . . . [emanated] from the social unrest and turmoil of 2019 or anything like it.”<sup>143</sup> The Court said its decision reflected that this was “an unauthorised not an unlawful assembly” but that the “relentless” and “violent” nature of the social unrest in Hong Kong during the summer of 2019 must also be taken into account.<sup>144</sup>

Although this procession was peaceful, the Court held, there had been a likelihood that it would turn violent,<sup>145</sup> and these defendants, as influential people in Hong Kong,<sup>146</sup> set an example for other citizens:

The fact that these particular defendants made a conscious decision to break the law and challenge public order in this manner during such volatile

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<sup>136</sup> *Id.* at para. 307.

<sup>137</sup> *Id.* at para. 161 (finding that there “was no evidence that exit routes were inaccessible or problematic before 3pm”)

<sup>138</sup> *Id.* at para 162 (“[T]here was evidence from PW6 that she had given express instructions to the person in charge, Figo Chan that were deliberately ignored.”)

<sup>139</sup> *Id.* at para. 160.

<sup>140</sup> *Id.* at para. 168.

<sup>141</sup> *Id.* at para. 8.

<sup>142</sup> *Id.* at para 10.

<sup>143</sup> *Id.* at para. 37.

<sup>144</sup> *Id.* at, para. 50.

<sup>145</sup> *Id.* at para. 55.

<sup>146</sup> *Id.* at para. 58.

times was serious. That I find an aggravating factor or the gravamen of these facts I found proved. Actions have consequences for everyone irrespective of who they are. This is more so when I have a duty in sentencing to ensure public order.<sup>147</sup>

The maximum sentence available in this case was five years in prison, with the Court having discretion to determine the exact sentence—a fine or term of imprisonment up to five years. Here, the Court set a starting sentencing point of 18 months for organizing an unauthorised assembly and 12 months for participating in an unauthorised assembly.

For each defendant, the Court considered the defendant's age, prior record and, where relevant, their health, before making sentencing decisions and decided as follows:<sup>148</sup>

*For Jimmy Lai:* The Court reduced the possible sentence by three months on each count and sentenced him to 12 months' imprisonment for Charge 1 and 9 months imprisonment for Charge 2, to be served concurrently. In total, Lai's sentence was set to 12 months' imprisonment.

*For Lee Cheuk-yan:* The Court reduced his sentence by three months, from 18 months on Charge 1 and 12 months on Charge 2 (also to be served concurrently), and then further reduced the sentence by six months in light of his service to workers' rights. He thus received a sentence of 12 months total.

*For Margaret Ng:* After reducing her sentence on each charge by three months to a total of 12 months, in light of her age and public service, the Court suspended imprisonment for 24 months, in light of her "exceptional and obvious commitment over decades to public service" and her character and role as an altruist.<sup>149</sup>

*For Leung Kwok Hung:* The Court stated that it considered his advanced age and understood his heart condition to be under control with medication. It further observed that he had prior convictions, which were not held against him, but weighed against reducing his sentence in this case. The Court then sentenced him to 18 months' imprisonment for Charge 1 and 12 months' imprisonment for Charge 2, for a total of 18 months' imprisonment.

*For Cyd Ho:* The Court reduced her sentence by three months based on age and record and then reduced it a further four months in light of her years of public service and good character. She was sentenced to a total of 8 months' imprisonment (8 months' imprisonment for Charge 1 and five months imprisonment for Charge 2, to be served concurrently).

*For Albert Ho,* the Court first reduced his sentence by three months given his age and record and then, in recognition of his years of public service and good character, suspended his 12-month imprisonment sentence for 24 months.

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<sup>147</sup> *Id.* at para 59.

<sup>148</sup> See Annex B for a chart listing all the sentences issued to date for defendants in the "Democracy 15" cases, of which this was the first trial.

<sup>149</sup> *HKSAR v. Lai Chee Ying et al.*, [2021] HKDC 457, Reasons for Sentence, 16 April 2021, para. 80, available at [https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=135155&currpage=T](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=135155&currpage=T).

*For Leung Yiu-chung*, who plead guilty to Charge 2 in February 2021 but “not at the earliest opportunity,” the Court reduced his sentence 25 percent with a further reduction for his age to 8 months’ imprisonment. However, taking into account his “uncompromising dedication to the community as a legislator” and his impressive record as an advocate on numerous social justice causes, the Court suspended that sentence for 12 months.

*For Martin Lee*, the oldest of the defendants (83 years old), the Court issued an 11-month sentence with imprisonment suspended for 24 months because of his long history of service to Hong Kong.

And finally, for the youngest defendant, *Au Nok-hin* (age 33), who pleaded guilty long before trial, the Court reduced his sentence by one third and then provided a further two months’ reduction in light of his record of service. He was sentenced to 10 months’ imprisonment for Charge 1 and 6 months’ imprisonment for Charge 2, to be served concurrently, for a total of 10 months’ imprisonment.

# METHODOLOGY



## **A. THE MONITORING PHASE**

TrialWatch monitored the proceedings from May 18, 2020 through the conclusion of trial on April 1, 2021. Proceedings generally took place in English with some witnesses testifying in Cantonese.

## **B. THE ASSESSMENT PHASE**

Timothy Otty, QC, a member of the TrialWatch Expert Panel, reviewed the charge sheet, monitoring of the pretrial proceedings through the trial, and the District Court's written decisions on the verdict and sentence, in addition to reviewing the criminal statutes under which the defendants were charged. TrialWatch prepared drafts of the report that Mr. Otty reviewed and which facilitated his legal conclusions and grading of the trial. Mr. Otty noted that the trial had been conducted throughout in an open manner and that the trial judge had been scrupulous in ensuring that all defendants were properly represented and able to advance such arguments as they wished to. He also noted that all rulings were given in public and were fully reasoned. He nevertheless concluded that the defendants' convictions for participating in and organising an unauthorised assembly, and particularly the related criminal sanctions including sentences of imprisonment, violated their rights to freedom of assembly under international human rights law. Moreover, Mr. Otty also expressed the view that the unexplained 8-month delay between the protest in issue and the decision to prosecute gave rise to concerns at abuse of process on the part of the Prosecution.

# ANALYSIS



## 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 CONCERNS

The District Court ensured that core procedural rights were respected throughout this trial, including the right to a public hearing, the right to be present, and the right to a public judgment. Interpreters were provided where necessary for the defendants and witnesses. When one defendant needed to be absent from the trial to participate in another criminal proceeding, the Court appropriately paused the proceedings to respect his right to be present. The Court issued public rulings on both its verdict and its reasoning behind the sentences imposed on each defendant in the trial; and each written decision appropriately included the Court's factual and legal conclusions.

While there can be no substantive criticism of the approach of the Court or the trial in terms of procedural fairness this case nevertheless raises significant concerns with respect to the defendants' rights to freedom of peaceful assembly. Moreover, taking into account the political context, the delay in prosecution and the choice then to pursue such severe sanctions against the defendants, which will undoubtedly have a chilling effect on others, there are inevitable concerns that the Prosecution's decision to prosecute was tainted and constituted an abuse of process.

### Violations of the Right to Freedom of Peaceful Assembly

#### *The Right to Freedom of Peaceful Assembly Under Human Rights Law*

Freedom of expression and of peaceful assembly are core human rights under international human rights and Hong Kong law.<sup>150</sup> They are also interrelated insofar as an assembly may be a vehicle for expressing political criticism. Indeed, the UN Human

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<sup>150</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III) (UDHR), art. 19 ("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."); UDHR art. 20 ("Everyone has the right to freedom of peaceful assembly and association."); ICCPR art. 19(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."); U.N. Human Rights Committee, General Comment No. 34: Freedoms of Opinion and Expression, U.N. Doc. CCPR/C/GC/34, Sept. 12, 2011, para 11, [hereinafter General Comment No. 34]; ICCPR art. 21 ("The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.").



Rights Committee, the body that interprets and fosters compliance with the ICCPR, has explained that “the right of peaceful assembly, as guaranteed under article 21 of the Covenant, is a fundamental human right that is essential for the public expression of one’s views and opinions.”<sup>151</sup>

Specifically, Article 21 of the ICCPR, which is applicable to Hong Kong and also reflected in domestic law, states:

The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.<sup>152</sup>

The UN Human Rights Committee has explained that freedom of assembly “constitutes the very foundation of a system of participatory governance based on democracy, human rights, the rule of law and pluralism.”<sup>153</sup> Any restrictions on this right must be “for one of the legitimate purposes set out in the second sentence of article 21 of the Covenant” (i.e., national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others). Further, any restriction must be necessary and proportionate under international law, meaning that any restriction must be the “least restrictive means” of achieving the asserted objective and must be balanced against the interests of those participating in an assembly. As a result, the prohibition of a particular assembly “can be considered only as a measure of last resort.”<sup>154</sup> Where authorities do impose administrative or criminal penalties on those involved in “unlawful conduct” during a peaceful assembly, the UN Human Rights Committee has likewise confirmed, any such sanctions must be “proportionate” and cannot “suppress conduct protected under the Covenant.”<sup>155</sup>

Under the first limb of the test (that any restriction be justified), authorities cannot issue blanket prohibitions, nor can they prohibit assemblies based on an “unspecified risk of violence, or the mere possibility that the authorities will not have the capacity to prevent or neutralize the violence emanating from those opposed to the assembly.”<sup>156</sup> Rather, to justify restricting a public gathering or procession, “the State must be able to show, based on a concrete risk assessment, that it would not be able to contain the situation, even if significant law enforcement capability were to be deployed.”<sup>157</sup> With respect to authorisation schemes similar to the one in the POO, the UN Human Rights Committee has held that “[e]ven in case of an unauthorised assembly, any interference with the right of peaceful assembly must be justified under the second sentence of article 21.”<sup>158</sup> That

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<sup>151</sup> UN Human Rights Committee, *Tatyana Severinets v. Belarus*, UN Doc. CCPR/C/123/D/2230/2012, Aug. 14, 2018, para. 8.5.

<sup>152</sup> ICCPR art. 21.

<sup>153</sup> General Comment No. 37, para 1.

<sup>154</sup> *Id.* at para. 37.

<sup>155</sup> *Id.* at paras. 67, 71.

<sup>156</sup> *Id.* at para. 52.

<sup>157</sup> *Id.* at para. 52.

<sup>158</sup> UN Human Rights Committee, *Insenova v. Kazakhstan*, U.N. Doc. CCPR/C/126/D/2542/2015, Aug. 7, 2019, para 9.6. See also *id.* para 9.7 (“The Committee observes, that the State party relied only on the provisions of the law on public events, which requires a 10-day request and a permission of the local executive authorities for a peaceful assembly, which already in itself restricts the right of peaceful assembly. The State party has not attempted to demonstrate that the apprehension, trial and imposition of a sanction

means that the fact of a lack of authorisation, standing alone, is not sufficient to justify a restriction—there must a specific state interest being served by the restriction.

With respect to the necessity and proportionality requirement, international bodies have explicitly rejected the approach taken by the domestic court in this case—i.e., declining to consider subsequent arrest and the potential penalties that the criminal charges could entail as restrictions on the right to peaceful assembly. For example, in a case involving Belarus, the UN Human Rights Committee considered the applicant’s conviction for failure to comply with an authorisation scheme under the Committee’s necessity and proportionality rubric and held that the State had violated the applicant’s rights with this disproportionate sanction (in that case, a fine).<sup>159</sup>

On the merits, international human rights bodies have stressed that criminal penalties are generally not a necessary or proportionate responses—especially to the kinds of breaches of domestic law at issue here (i.e., non-compliance with a notice-and-authorisation scheme, where the actual conduct of the assembly entailed only minor disruptions and no violence).<sup>160</sup> The UN Human Rights Committee has, furthermore, been clear that a State cannot transform a peaceful assembly into criminal conduct simply by alleging a failure to comply with domestic regulations. As the Committee has explained, “If the conduct of participants in an assembly is peaceful, the fact that certain domestic legal requirements pertaining to an assembly have not been met by its organisers or participants does not, on its own, place the participants outside the scope of the protection of article 21.”<sup>161</sup> This is consistent with the jurisprudence of the European Court of Human Rights.<sup>162</sup>

### ***Freedom of Assembly and the Public Order Ordinance***

As already explained, Hong Kong’s Public Order Ordinance (POO) not only requires event organisers to notify the CP prior to holding a public gathering or procession but it also empowers the CP, in the CP’s discretion, to object to a public gathering or procession before it takes place.<sup>163</sup> Failure to secure the CP’s consent or notice of non-objection triggers criminal penalties under the POO.

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on the author for organization of a peaceful assembly was necessary in a democratic society and proportionate to the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others, as required under article 21 of the Covenant. The Committee therefore concludes that the State party has violated article 21 of the Covenant.”).

<sup>159</sup> UN Human Rights Committee, *Tatyana Severinets v. Belarus*, UN Doc. CCPR/C/123/D/2230/2012, Aug. 14, 2018, para. 8.9 (“The Committee notes that the State party has failed to demonstrate that the conviction and fine imposed on the author following a spontaneous and peaceful street procession were necessary in a democratic society and were proportionate to the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others as required by article 21 of the Covenant.”).

<sup>160</sup> *Cf.* European Court of Human Rights (Grand Chamber), *Navalny v. Russia*, App. Nos. 29580/12 and 4 others, Nov. 15, 2018, para. 145 (“a peaceful demonstration should not, in principle, be rendered subject to the threat of a criminal sanction and notably to deprivation of liberty.”).

<sup>161</sup> General Comment No. 37, para. 16.

<sup>162</sup> European Court of Human Rights (Grand Chamber), *Navalny v. Russia*, App. Nos. 29580/12 and 4 others, Nov. 15, 2018, para. 99 (“the question of whether a gathering falls within the autonomous concept of ‘peaceful assembly’ in paragraph 1 of Article 11 and the scope of protection afforded by that provision is independent of whether that gathering was conducted in accordance with a procedure provided for by the domestic law.”)

<sup>163</sup> Sections 6-8, 13 of the POO.

While a notification system where event organisers must inform authorities ahead of a scheduled public assembly is not always problematic, a system which (a) requires *authorisation* (in this case, ‘non-objection’) by government officials, (b) provides the authorities nearly unfettered discretion to withhold that authorisation for broadly-worded reasons, and (c) results in criminal penalties where the procedures are not followed will be likely to restrict the right to public assembly in a manner not permitted under human rights law.

As the UN Human Rights Committee has explained, “[w]here authorisation regimes persist in domestic law, they must in practice function as a system of notification, with authorisation being granted as a matter of course, in the absence of compelling reasons to do otherwise.”<sup>164</sup> Such a system, relying on prior restraints, is particularly problematic in a democratic society because it may empower authorities to censure speech critical of the government.<sup>165</sup> The UN Human Rights Committee has also observed that even if participants and organisers fail to follow the notification procedures for an assembly, this “does not render the act of participation in the assembly unlawful, and must not in itself be used . . . for imposing undue sanctions, such as charging the participants or organizers with criminal offences.”<sup>166</sup>

Here, the POO has been used both as a prior restraint on a peaceful assembly and then to convict and imprison some participants with no allegation of violence perpetrated by anyone involved in or present at the August 18 event. On both bases, it fails the test set forth by the UN Human Rights Committee because not only does it facilitate prior restraints, but it also permits unnecessary and disproportionate responses.

Shortly after the arrest of the defendants in this case in 2020, several UN experts called for the charges to be dropped, noting that the POO “establishes an authorisation process for assemblies, contrary to international human rights standards” and maintaining that “[n]obody should be subjected to administrative or criminal sanctions for taking part in a peaceful protest, even if the regime governing protests requires an authorisation.”<sup>167</sup> The UN Human Rights Committee has likewise already addressed the compatibility of the POO with human rights standards: Indeed, it expressed concern that some of the provisions of the POO “may facilitate excessive restriction to the Covenant rights” and, in its application, that this and other laws have been used in the “increasing number of arrests of and prosecutions against demonstrators” in Hong Kong.<sup>168</sup>

In its decision explaining the verdict and rejecting the defendants’ constitutional challenge to the POO, the Court, relying on *HKSAR v Leung Kwok Hung*, observed that the POO

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<sup>164</sup> General Comment No. 37, para.73.

<sup>165</sup> See General Comment No. 37, para. 37 (States should also consider allowing an assembly to take place and deciding afterwards whether measures should be taken regarding possible transgressions during the event, rather than imposing prior restraints in an attempt to eliminate all risks.); OSCE and Venice Commission, Guidelines on Freedom of Peaceful Assembly, paras. 132 and 220–222 (2010), *available at* <https://www.osce.org/files/f/documents/4/0/73405.pdf>.

<sup>166</sup> General Comment No. 37, para. 71.

<sup>167</sup> OHCHR, Press Statement, “Hong Kong urged not to silence peaceful protest with criminal charges,” May 13, 2020, *available at* <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25880&LangID=E>.

<sup>168</sup> UN Human Rights Committee, Concluding observations on the third periodic report of Hong Kong, China, UN Doc. CCPR/C/CHN-HKG/CO/R.3, Mar. 19, 2013, para. 10; UN Human Rights Committee: Concluding Observations: Hong Kong Special Administrative Region, UN Doc. CCPR/C/79/Add.117, Nov. 15, 1999, para 19.

already took the ICCPR protections into account because under the law, the CP must make decisions in light of necessity and proportionality principles. But as this case demonstrates, the law permits the CP enormous discretion to prohibit proposed assemblies, without meaningful safeguards, even leaving aside the concerns already referred to as the timing of the decision to prosecute. Whether or not the POO would be consistent with international human rights law were it to provide purely administrative penalties, the scheme is difficult to justify on its face due to the severity of the potential penalties of imprisonment.

### ***The August 18 Demonstration and Procession***

As the District Court made clear, the defendants in this specific case were convicted of an “unauthorised” but not “unlawful” procession, that took place despite the objection of the police but involved no violence or arrests. They were convicted and sentenced to prison terms (some suspended, in light of mitigation) on the grounds that their peaceful procession did not comply with the POO’s authorisation regime. While it is noted that the Court did not apply the most severe (five year) prison sentence available under the law and took obvious care to give individual consideration to the position of each defendant, the convictions under this problematic law and the punishments in fact imposed—prison terms ranging from 8 months (for Cyd Ho) to 18 months (for Leung Kwok Hung)—are nevertheless irreconcilable with international human rights standards.

It was not disputed by either side at trial that the August 18 rally was authorised but that the Hong Kong police had rejected the request for a procession; nor was it disputed that the rally and procession were both peaceful with no incidents of violence and no arrests on the day or in the subsequent days. The Prosecution argued at trial that the potential for violence not only supported the police decision to reject the procession, but also should be taken into account in assigning criminal liability to the defendants.<sup>169</sup>

The Prosecution, supporting the severe criminal penalties at issue if the defendants were convicted, further argued that there could be no strict dichotomy between peaceful and violent protests;<sup>170</sup> but the UN Human Rights Committee, acknowledging that this clear line may not always exist, observed that “there is a presumption in favour of considering assemblies to be peaceful” and acts of violence by some participants should not be imputed to others or the organisers.<sup>171</sup> In this case, where there is no suggestion that the assembly (at Victoria Park and the continued procession beyond the Park) was anything but peaceful, and the only disruption was to traffic, it was not compatible with international human rights standards for the authorities to punish participants and organisers of an event with significant criminal sanctions because they did not have a required permit.<sup>172</sup> As the

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<sup>169</sup> TrialWatch Monitoring, *HKSAR v. Lai et al*, March 15, 2021.

<sup>170</sup> *Id.*

<sup>171</sup> General Comment No. 37, para. 17. The peaceful intentions of organizers and participants in an assembly are to be presumed, absent strong and convincing evidence that organizers or participants intend to use or incite imminent violence at an assembly. See, for example, European Court of Human Rights, *Saghatelyan v. Armenia*, App. No. 23086/08, Sept. 20, 2018, paras. 230-233; European Court of Human Rights, *Karpyuk and others v. Ukraine*, App. Nos. 30582/04 and 32152/04, Oct. 6, 2015, paras. 198-207, 224 and 234. See Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai (Funding of associations and holding of peaceful assemblies), UN Doc. A/HRC/23/39, Apr. 24, 2013, para. 50. See also Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai (Best practices that promote and protect the rights to freedom of peaceful assembly and of association), UN Doc. A/HRC/20/27, May 21, 2012, para. 25.

<sup>172</sup> The authorities relied on the fact that there had been some incidents of violence reported at other protests. Yet the Court also noted that PW3 had conceded that “She agreed in cross examination that the

UN Human Rights Committee has previously made clear “[a]n assembly that remains peaceful while nevertheless causing a high level of disruption” should be tolerated unless “disruption is ‘serious and sustained.’”<sup>173</sup> Here, there was no allegation that there was a ‘serious and sustained’ disruption. For these reasons, the Hong Kong response—prosecution, conviction, and imposition of terms of imprisonment—was clearly neither necessary nor proportionate. Again, this conclusion is justified without regard to the additional concern referred to above relating to the delay in the decision to prosecute itself.

Moreover, in convicting peaceful protestors for their role in leading and joining an unauthorised procession, the Court appears to have punished the defendants for exercising their wider rights as protected under the ICCPR. The UN Human Rights Committee has made clear that this is inconsistent with international human rights standards. Indeed, restrictions must not be put in place to “suppress conduct protected under the Covenant.”<sup>174</sup> As discussed in the next section, however, it appears that this enforcement of the POO was not content-neutral but may indeed have been a deliberate choice by the authorities to chill protests critical of the government. Further, the District Court’s verdict and sentencing decisions reference the fact that the rally and procession were organised to protest police conduct. If this was intended to support the reasonableness of the police decision to object it would give rise to further concerns. The fact that these activities were being organised in order to protest the conduct of public servants like the police and restrictions on political freedoms in Hong Kong should, under human rights law, justify more, not less, legal protection and should have given rise to more intense scrutiny of any measures taken to criminalise those involved.

As the UN Human Rights Committee observes:

Given that peaceful assemblies often have expressive functions, and that political speech enjoys particular protection as a form of expression, it follows that assemblies with a political message should enjoy a heightened level of accommodation and protection.<sup>175</sup>

Ultimately, the decision to ban the protest and then arrest, prosecute, and sentence the defendants to prison has not only restricted the rights of the defendants to peaceful assembly but operates as a troubling message to all the people of Hong Kong that participating in speech and events critical of the authorities, despite the protections of human rights law, can and will result in imprisonment.

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police have said that CHRF have adopted a peaceful, rational and nonviolent approach to their events in the past and that they have cooperated well with the police.” Whatever may have happened at other events organized by other entities should not have been reflected on this assembly. Nor can it be the case that the police only had two choices: an unregulated assembly or objecting to it entirely. See General Comment 37 para. 76 (“Where the presence of law enforcement officials is required, the policing of an assembly should be planned and conducted with the objective of enabling the assembly to take place as intended”). As PW3 said, CHRF had “cooperated well with the police” (Reasons for Verdict, para. 40) and indeed the CHRF had led annual assemblies in Hong Kong for many years.

<sup>173</sup> General Comment No. 37, para. 85.

<sup>174</sup> General Comment No. 37, para. 67.

<sup>175</sup> General Comment No. 37, para 32; see *also* General Comment No. 34 on the freedoms of opinion and expression, UN Doc. CCPR/C/GC/34, Sept. 12, 2011, paras. 34, 37–38 and 42–43. See also UN Human Rights Committee, Concluding observations on the initial report of the Lao People’s Democratic Republic, UN Doc. CCPR/C/LAO/CO/1, Nov. 23, 2018, para. 33; General Comment No. 37, para 48 (“Central to the realization of the right is the requirement that any restrictions, in principle, be content neutral, and thus not be related to the message conveyed by the assembly.”).

## Abuse of Process and Proportionality

Starting with the arrest of these prominent activists in April 2020, this case has been seen as a symbolic and cautionary story with far-reaching implications not only for the individual defendants but also for the people of Hong Kong. A number of factors, including the political context and events leading up to the charges, the timing of the arrests, and the pursuit by the Prosecution of a prison sentence for participation in a peaceful event, give rise to inevitable concerns that this case may have been influenced more by political considerations than a non-discriminatory desire to enforce public-order rules.

While the UN Human Rights Committee has yet to establish clear criteria for assessing such situations—although it has made clear, for instance, that it considers detention for the exercise of protected rights to be arbitrary<sup>176</sup>—European Court of Human Rights jurisprudence is instructive. That Court evaluates whether a legal proceeding was driven by improper motives, having regard to a range of factors: the political context in which the prosecution was brought;<sup>177</sup> whether the authorities undertook actions against the accused amidst their “increasing awareness that the practices in question were incompatible with [European] Convention standards;”<sup>178</sup> and whether the ultimate decision was well-reasoned and based on law.<sup>179</sup> The Court will also consider the broader context, including any pattern of politicised arrests and prosecutions.<sup>180</sup>

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.”<sup>181</sup> Further, acknowledging that it is very 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 leading to

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<sup>176</sup> UN Human Rights Committee, *Khadzhiyev v. Turkmenistan*, UN Doc CCPR/C/122/D/2252/2013, Apr. 17, 2018, para 7.7; see also UN Human Rights Committee, *Nasheed v. Maldives*, UN 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.”)

<sup>177</sup> European Court of Human Rights, “Guide on Article 18 of the European Convention of Human Rights, Limitations on Use of Restrictions and Rights”, August 31, 2018, para. 57 (citing European Court of Human Rights, *Merabishvili v. Georgia*, App. No. 72508/13, November 28, 2017, para. 322; European Court of Human Rights, *Khodorkovskiy v. Russia*, App. No. 5829/04, May 31, 2011, para. 257; European Court of Human Rights, *Khodorkovskiy and Lebedev v. Russia*, App. Nos. 11082/06 and 13772/05, July 25, 2013, para. 901; European Court of Human Rights, *Nastase v. Romania*, App. No. 80563/12, December 11, 2014, para. 107; European Court of Human Rights, *Rasul Jafarov v. Azerbaijan*, App. No. 69981/14, March 17, 2016, paras. 159-161; European Court of Human Rights, *Mammadli v. Azerbaijan*, App. No. 47145/14, April 19, 2018, para. 103; European Court of Human Rights, *Rashad Hasanov and Others v. Azerbaijan*, App. No. 148653/13, June 7, 2018, para. 124).

<sup>178</sup> European Court of Human Rights (Grand Chamber), *Navalnyy v. Russia*, App. No. 29580/12, November 15, 2018, para. 171.

<sup>179</sup> European Court of Human Rights, *Nastase v. Romania*, App. No. 80563/12, December 11, 2014, para. 107

<sup>180</sup> European Court of Human Rights, *Mammadov v. Azerbaijan* (Grand Chamber), App. No. 15172/13, May 29, 2019, para. 187-89.

<sup>181</sup> European Court of Human Rights, *Merabishvili v. Georgia* (Grand Chamber), App. No. 72508/13, Nov. 28, 2017, para. 305. The fact that restrictions to protected rights fit into a pattern of arbitrary arrest and detention can both contribute to circumstantial evidence of an illegitimate purpose and signal a broader context inimical to the fundamental ideals and values of the ECHR. European Court of Human Rights, *Ibrahimov & Mammadov v. Azerbaijan*, App. No. 63571/16, Feb. 13, 2020, para. 151; European Court of Human Rights, *Aliyev v. Azerbaijan*, App. Nos 68762/14 & 71200/14, Sept. 20, 2018, para. 223.

inferences about primary facts.<sup>182</sup> In past cases, the European Court of Human Rights relied on the following elements as circumstantial evidence of a state's bad faith: the fact that the acts giving rise to the defendant's arrest and detention are protected under human rights law;<sup>183</sup> the behaviour of prosecuting authorities, including delays between the arrest and the laying of charges;<sup>184</sup> appearances of political interference in the case, when there appears to be a correlation between hostile statements by public officials,<sup>185</sup> and the timing or wording of criminal charges against the applicant.<sup>186</sup>

As noted at the outset, the District Court here did respect core procedural rights of the defendants, issuing a written decision that considered the Defence challenges, including the argument that the decision to arrest and prosecute these individuals was disproportionate and abuse of process. Moreover, when the case was before the Magistrate Court, the Magistrate rejected attempts by the Prosecution to seize some of the defendants' phones; and, at both the Magistrate and District Court levels, the Courts rejected attempts by the Prosecution to impose additional bail restrictions on the defendants pending trial. Despite this there remain a number of areas of concern relating to abuse of process and proportionality in relation to the conduct of the proceedings.

*First*, the timing of the arrests in this case is of concern in two respects: The defendants were charged shortly after an array of public figures urged a crackdown on protesters; and the defendants were only charged 8 months after the events in question. At trial, the defendants repeatedly questioned the reasons for delay. Defence counsel for Jimmy Lai, for instance, noted that the conduct of the authorities in arresting the defendants and searching their homes eight months after the rally was akin to bringing "a sledgehammer to a nut" and would "cause people to fear participating in lawful assemblies."<sup>187</sup> The Defence further noted that the eight-month delay undermined the proportionality of the subsequent arrest and prosecution. The Prosecution responded not with an explanation

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<sup>182</sup> European Court of Human Rights, *Merabishvili v. Georgia* (Grand Chamber), App. No. 72508/13, Nov. 28, 2017, paras. 316-317; European Court of Human Rights, *Ibrahimov & Mammadov v. Azerbaijan*, App. No. 63571/16, Feb. 13, 2020, para. 147.

<sup>183</sup> See European Court of Human Rights, *Kavala v. Turkey*, App. No. 28749/18, Dec. 10, 2019, paras. 223-224 (2019) ("[T]he prosecution documents refer to multiple and completely lawful acts that were related to the exercise of a Convention right and were carried out in cooperation with Council of Europe bodies or international institutions (exchanges with Council of Europe bodies, helping to organise a visit by an international delegation). They also refer to ordinary and legitimate activities on the part of a human-rights defender and the leader of an NGO, such as conducting a campaign to prohibit the sale of tear gas to Turkey or supporting individual applications." (citations omitted)).

<sup>184</sup> See European Court of Human Rights, *Kavala v. Turkey*, App. No. 28749/18, Dec. 10, 2019, paras. 225-228 (2019) (finding relevant the four-year time lapse between the alleged and events and the criminal prosecution when most evidence procured early in the investigation and the authorities failed to provide any justification for the delay); European Court of Human Rights, *Demirtas v. Turkey* (No 2), App. No. 14305/17, Nov. 20, 2018, paras. 271- 273 (authorities "pursued the predominant ulterior purpose of stifling pluralism and limiting freedom of political debate" in detaining applicant).

<sup>185</sup> See European Court of Human Rights, *Kavala v. Turkey*, App. No. 28749/18, Dec. 10, 2019, paras. 229-230 (finding it significant that the authorities brought charges shortly after speeches by the President of Turkey, naming the applicant); European Court of Human Rights, *Ismayilova v. Azerbaijan* (No 2), App. No. 30778/15, Feb. 27, 2020, para. 117 (finding relevant the 'stigmatising' statements of officials at time of arrest of the accused).

<sup>186</sup> See European Court of Human Rights, *Ismayilova v. Azerbaijan* (No 2), App. No. 30778/15, Feb. 27, 2020, paras.114-120 (2020) (finding a violation of Article 18 where accused was initially charged on a false claim of coercion and arrested and charged in a way similar to other human rights defenders).

<sup>187</sup> TrialWatch Monitoring, *HKSAR v. Lai et al.*, March 16, 2021.

for the delay but rather by noting that its decision to prosecute was based on the evidence and the prosecution code.<sup>188</sup>

The defendants were arrested on April 18, 2020. In the days preceding the arrest of these pro-democracy legislators and activists, China's Liaison Office in Hong Kong made an unprecedented statement that it was not bound by the Basic Law's restriction against interference in local affairs, called for the rapid introduction of a national security law in Hong Kong, and criticised opposition politicians in the legislative council (LegCo).<sup>189</sup> Days before the arrests, Hong Kong's Chief Executive, Carrie Lam, referred to the 2019 protests as a threat to the rule of law and national security,<sup>190</sup> Chinese media called for Hong Kong's judges to hold participants in the 2019 protests responsible, and senior judges raised concerns about the judiciary's continued impartiality.<sup>191</sup>

While perhaps less specific, these statements bear a resemblance to the kind of public statements by the authorities that the European Court has found demonstrate political motives.<sup>192</sup> The timing and content of these statements also raise concerns as to whether

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<sup>188</sup> *Id.*

<sup>189</sup> *Al Jazeera*, "Hong Kong activists arrested over last year's mass protests," April 18, 2020, available at <https://www.aljazeera.com/news/2020/4/18/hong-kong-activists-arrested-over-last-years-mass-protests>; *Reuters*, "Arrests show Beijing sees Hong Kong crackdown as priority: activist," Apr. 18, 2020, available at <https://www.reuters.com/article/us-hongkong-protests-arrests/arrests-show-beijing-sees-hong-kong-crackdown-as-priority-activist-idUSKBN221036>; Alvin Lum & Tony Cheung, *South China Morning Post*, "Hong Kong's pan-democrats condemn wave of arrests of veterans as a bid to silence dissent but authorities say it's for unlawful protests," Apr. 18, 2020, available at <https://www.scmp.com/news/hong-kong/politics/article/3080529/least-12-hong-kong-opposition-veterans-arrested-police-over>; Helen Davidson, *The Guardian*, "China's top official in Hong Kong pushes for national security law," Apr. 15, 2020, available at <https://www.theguardian.com/world/2020/apr/15/china-official-hong-kong-luo-huining-pushes-national-security-law>; Li Bingcun, *China Daily*, "Liaison office: Opposition distorting Basic Law," Apr. 18, 2020, <https://www.chinadailyhk.com/article/127959#Liaison-office:-Opposition-distorting-Basic-Law>; Gary Cheung & Natalie Wong, *South China Morning Post*, "Hong Kong in midst of tussle over 'tricky' relationship between liaison office, Basic Law, and daily running of the city," Apr. 21, 2020, available at <https://www.scmp.com/news/hong-kong/politics/article/3080777/suddenly-question-hong-kong-government-finds-defining>.

<sup>190</sup> RTHK, "Violence, hate speech threaten national security: CE," Apr. 15, 2020, available at <https://news.rthk.hk/rthk/en/component/k2/1520716-20200415.htm>.

<sup>191</sup> *Reuters*, Greg Torode & James Pomfret, "Hong Kong judges battle Beijing over rule of law as pandemic chills protests," Apr. 14, 2018, available at <https://www.reuters.com/investigates/special-report/hongkong-politics-judiciary/>; see also Primrose Riordan & Nicolle Liu, *Financial Times*, "Hong Kong pro-Beijing legislators intervene in judicial appointment," June 23, 2021, available at <https://www.ft.com/content/56de7f6d-c89a-4857-b2f9-5d184fa3d096>.

<sup>192</sup> European Court of Human Rights, *Kavala v. Turkey*, App. No. 28749/18, Dec. 10, 2019, para. 229 ("It is also significant that those charges were brought following the speeches given by the President of the Republic on 21 November and 3 December 2018. On 21 November 2018 the President stated: "Someone financed terrorists in the context of the Gezi events. This man is now behind bars. And who is behind him? The famous Hungarian Jew G.S. This is a man who encourages people to divide and to shatter nations. G.S. has huge amounts of money and he spends it in this way. His representative in Turkey is the man of whom I am speaking, who inherited wealth from his father and who then used his financial resources to destroy this country. It is this man who provides all manner of support for these acts of terror..." On 3 December 2018 the President openly cited the applicant's name and stated as follows: "I have already disclosed the names of those behind Gezi. I said that its external pillar was G.S., and the national pillar was Kavala. Those who send money to Kavala are well known ..." The Court cannot overlook the fact that when these two speeches were given, the applicant, who had been held in pre-trial detention for more than a year, had still not been officially charged by the prosecutor's office. In addition, it can only be noted that there is a correlation between, on the one hand, the accusations made openly against the applicant in these two public speeches and, on the other, the wording of the charges in the bill of indictment, filed about three months after the speeches in question. (See, *a contrario*, ECtHR, *Merabishvili v Georgia*, Application no.



the presumption of innocence was adequately respected in this case. Under Article 14(2) of the ICCPR, everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to law;<sup>193</sup> this right further guarantees that an accused has the benefit of the doubt in a criminal trial.<sup>194</sup> As the United Nations Human Rights Committee has explained, the presumption of innocence places a duty on all public officials “to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused.”<sup>195</sup> This duty applies not only to the court but to all public authorities.<sup>196</sup> Here, in the leadup to the defendants’ trial, Hong Kong’s Chief Executive spoke of illegal protests and “hate speech” as threats to national security;<sup>197</sup> and both immediately before the April 18, 2020 arrests and during the pretrial hearings, the Secretary of Security referred to the growing “terrorism” in Hong Kong as protests continued.<sup>198</sup> The gravity of these statements, coming from senior government officials, and their proximity to the defendants’ arrest, even if not specifically naming the individuals in this case, at least raises a concern as to whether their right to the presumption of innocence was respected.

Moreover, as already pointed out, the arrests occurred eight months after the August 2019 rally. At trial, the Defence argued that the eight-month delay in arresting the defendants suggested that the authorities had condoned their peaceful procession, which thus undercut the proportionality of their subsequent arrest and prosecution.<sup>199</sup> The Court rejected this argument on the grounds that the arrest was lawful, made under a constitutional law, and noted that it would only second-guess a decision to prosecute if “it can either be demonstrated that the Department of Justice acted in bad faith or in obedience to a political instruction.”<sup>200</sup>

But the timing would appear difficult to reconcile with the Court’s view that the POO could be justified on public order grounds and it was unsatisfactory that the Prosecution offered no explanation for the delay despite an express challenge by the Defence to do so. As the Court explained, the defendants’ procession was widely publicized—if the arrests and

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72508/13, Nov. 28, 2017, cited above, § 324, and *Tchankotadze v. Georgia*, no. 15256/05, § 114, June 21, 2016).”).

<sup>193</sup> ICCPR, art. 14(2).

<sup>194</sup> UN Human Rights Committee, General Comment 32 Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32, Sept. 12, 2011, para. 30.

<sup>195</sup> *Id.*

<sup>196</sup> European Court of Human Rights, *Alenet de Ribemont v. France*, App. No. 15175/89, Feb. 10, 1995, para. 36.

<sup>197</sup> *RTHK*, “Violence, hate speech threaten national security: CE,” Apr. 15, 2020, available at <https://news.rthk.hk/rthk/en/component/k2/1520716-20200415.htm>; Helen Davidson, *The Guardian*, “China’s top official in Hong Kong pushes for national security law,” Apr. 15, 2020, available at <https://www.theguardian.com/world/2020/apr/15/china-official-hong-kong-luo-huining-pushes-national-security-law>.

<sup>198</sup> Jessie Pang, *Reuters*, “Top China official in Hong Kong urges national security law ‘as soon as possible,’” Apr. 14, 2020, available at <https://www.reuters.com/article/us-china-hongkong-security/top-china-official-in-hong-kong-urges-national-security-law-as-soon-as-possible-idUSKCN21X0BY>; *XinhuaNet*, “Hong Kong’s law enforcement departments call on public to protect national security,” Apr. 15, 2020, available at [http://www.xinhuanet.com/english/2020-04/15/c\\_138979273.htm](http://www.xinhuanet.com/english/2020-04/15/c_138979273.htm); CNBC News, “Hong Kong’s security chief warns of growing ‘terrorism’ in the city as government backs Beijing’s proposed laws,” May 24, 2020, <https://www.cnbc.com/2020/05/25/hong-kong-official-warns-of-terrorism-government-backs-beijings-security-laws.html>; *Al Jazeera*, “Crackdown as HK security chief warns of growing ‘terrorism’” May 25, 2020, available at <https://www.aljazeera.com/news/2020/5/25/crackdown-as-hk-security-chief-warns-of-growing-terrorism>.

<sup>199</sup> Monitoring, *HKSAR v. Lai Chee Ying et al.*, March 16, 2021.

<sup>200</sup> *HKSAR v. Lai Chee Ying et al.*, DCCC 536/2020, [2021] HKDC 398, Reasons for Verdict, para. 305.

prosecution were meant to dissuade others from ‘violating public order,’ and even accepting the police argument that acting on August 18, 2019 itself would have caused more disorder, why would the authorities have waited eight months to take action? In this sense, too, the timing appears inconsistent with the justifications offered for the arrests and prosecution—in particular, the deterrence rationale referred to both by the prosecution and the Court.<sup>201</sup> Indeed, this case falls within at least some of the parameters elucidated in the European Court of Human Rights’ decision in the *Kavala v. Turkey* case. There, the authorities waited four years to charge the applicant, without explanation, and the Court found that “the various points examined above [e.g., the lapse of time]. . . could corroborate the applicant’s argument that his initial and continued detention pursued an ulterior purpose.”<sup>202</sup> The authorities in the present case waited to pursue charges for 8 months, until after the accused in this case and many others in Hong Kong had participated in similar public assemblies.

Further, if anything, the political environment had deteriorated further by the time the court rendered its verdict. By the time this trial took place in February 2021, Hong Kong had adopted and begun to apply a National Security law (July 2020), under which 100 people had been charged by March 2021,<sup>203</sup> legislative elections had been canceled (September 2020), and during the trial, 47 opposition lawmakers and activists, including two of the defendants in this case, were arrested under the national security law (February 2021). While around 10,000 people had been charged for participation in protests by February 2021, no police had been held accountable for excessive use of force against protestors (the subject of the August 2019 rally).<sup>204</sup> This provides further context giving rise to concerns of a political dimension to the case and its selective prosecution.<sup>205</sup> As the

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<sup>201</sup> *HKSAR v. Lai Chee Ying et al.*, DCCC 536/2020, [2021] HKDC 457, Reasons for Sentencing, paras. 50, 52, 66, 74. While this report concerns the first of the three trials against the Democracy 15, it is worth noting that the same Court later referred to their conviction in this case (and related participation in these protests) in its sentencing decisions, in a manner that seemed to undercut mitigation they presented on their good character. See *HKSAR v. Lai Chee Ying, Yeung Sum & Lee Cheuk Yan*, DCCC 537/2020 [2021] HKDC 447, April 16, 2021; *HKSAR v. Chan Ho Wun, Lee Cheuk Yan, Leung Kwok Hung, Ho Chun Yan, Yeung Sum, Ho Sau Lan Cyd, Ng Man Yuen Avery, Lai Chee Ying, Sin Chung Kai, Tsoi Yiu Cheong Richard*, DCCC 534/2020 [2021] HKDC 645, May 28, 2021. But at the time of the other protest events (on August 31, October 1, and October 20, 2019, respectively), the defendants had not been arrested, charged, or convicted of the charges in the August 18 case.

<sup>202</sup> European Court of Human Rights, *Kavala v. Turkey*, App. No. 28749/18, Dec. 10, 2019, para. 230.

<sup>203</sup> *Bloomberg*, “Hong Kong Makes 100th Arrest Using National Security Law,” Mar. 3, 2021, *available at* <https://www.bloomberg.com/news/articles/2021-03-03/hong-kong-makes-100th-arrest-using-china-drafted-security-law>.

<sup>204</sup> Candice Chau, *Hong Kong Free Press*, “10,250 arrests and 2,500 prosecutions linked to 2019 Hong Kong protests, as security chief hails dip in crime rate,” May 17, 2021, *available at* <https://hongkongfp.com/2021/05/17/10250-arrests-and-2500-prosecutions-since-2019-hong-kong-protests-as-security-chief-hails-fall-in-crime-rate/>; *The New York Times*, “Hundreds in Rare Hong Kong Protest as Opposition Figures Are Charged,” Mar. 1, 2021, *available at* <https://www.nytimes.com/2021/03/01/world/asia/hong-kong-protest.html>; Kong Tsun-gan, “Arrests and trials of Hong Kong protesters,” Dec. 1, 2019, *available at* <https://kongtsunggan.medium.com/arrests-and-trials-of-hong-kong-protesters-2019-9d9a601d4950#:~:text=Arrests%20and%20trials%20of%20political%20and%20protest%20leaders&text=58%20have%20been%20charged%20in,have%20been%20sentenced%20to%20prison>.

<sup>205</sup> Further, the Prosecution’s decision to take this case to trial—and pursue harsh penalties—does not appear consistent with Hong Kong rules governing the administration of justice. In determining whether to initiate proceedings, prosecutors must consider not only whether the evidence supports the charges but also whether the “general public interest . . . require[s] that the prosecution be conducted. Government of the Hong Kong Special Administrative Region, Department of Justice, Prosecution Code, Ch. 5, [https://www.doj.gov.hk/en/publications/prosecution\\_ch5.html](https://www.doj.gov.hk/en/publications/prosecution_ch5.html). See also Office of the High Commissioner for Human Rights, *UN Guidelines on the Role of Prosecutors*, Guideline 11 (1990), *available at*

European Court has previously explained, where there is a “a pattern of arbitrary arrest and detention of government critics, civil society activists and human rights defenders through retaliatory prosecutions and misuse of criminal law,” that is relevant to a finding of an abuse of process.<sup>206</sup> Thus, taken together, the environment and timing give rise to significant concerns regarding abuse of process.

Second, the charges were brought and pursued despite clear indications from international bodies that the use of the POO in this way violated human rights standards. The UN Human Rights Committee has observed that arrest or imprisonment for the exercise of a protected right constitutes arbitrary detention.<sup>207</sup> The European Court of Human Rights has observed that even where a political trial proceeds through a procedurally fair trial, respecting all due process guarantees, an illegitimate purpose (to punish protected conduct) may nevertheless amount to the misuse of power that Article 18 of the European Convention seeks to prohibit.<sup>208</sup>

The European Court has emphasised that in evaluating whether criminal proceedings constituted an abuse of process, it is relevant whether the prosecution interferes with enjoyment of a protected right. In particular, in the *Kavala* case, the European Court remarked that “at the core of the applicant’s Article 18 complaint is 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.”<sup>209</sup>

Here, the prosecution of these high-profile activists and the pursuit of severe criminal penalties against them gives rise to inevitable concerns that they were prosecuted both for

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[https://www.ohchr.org/en/professionalinterest/pages/roleofprosecutors.aspx#:~:text=Prosecutors%20shall%2C%20in%20accordance%20with,13; Rome Statute of the International Criminal Court, A/CONF.183/9 of 17 July 1998 \(in force on 1 July 2002\), Art. 53, available at https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf](https://www.ohchr.org/en/professionalinterest/pages/roleofprosecutors.aspx#:~:text=Prosecutors%20shall%2C%20in%20accordance%20with,13; Rome Statute of the International Criminal Court, A/CONF.183/9 of 17 July 1998 (in force on 1 July 2002), Art. 53, available at https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf) (“In deciding whether to initiate an investigation, the Prosecutor shall consider whether . . . Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.”); International Association of Prosecutors, *Standards of professional responsibility and statement of the essential duties and rights of prosecutors*, adopted April 23, 1999, available at [https://www.iap-association.org/getattachment/Resources-Dokumentation/IAP-Standards-\(1\)/English.pdf.aspx](https://www.iap-association.org/getattachment/Resources-Dokumentation/IAP-Standards-(1)/English.pdf.aspx) (prosecutors shall “always serve and protect the public interest,” at 1(g), and “give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally or diverting criminal cases . . . from the formal justice system, with full respect for the rights of suspects and victims, where such action is appropriate”). Here, it is hard to see how the charges would have been understood as furthering the public interest. As discussed above, to the extent the ‘public interest’ was public safety, it is hard to see how waiting eight months made the proceedings a more effective deterrent. On the other side of the ledger, it is quite clear that pursuing criminal sanctions for a peaceful demonstration could not but have a chilling effect on Hong Kongers’ exercise of their protected right to freedom of assembly

<sup>206</sup> European Court of Human Rights, *Ismayilova v. Azerbaijan* (No 2), App. No. 30778/15, Feb. 27, 2020, para 113; European Court of Human Rights, *Ibrahimov & Mammadov v. Azerbaijan*, App. No. 63571/16, Feb. 13, 2020, paras 151-152; European Court of Human Rights, *Demirtas v. Turkey* (No 2), App. No. 14305/17, Nov. 20, 2018, para 264.

<sup>207</sup> UN Human Rights Committee, *Khadzhiyev and Muradova v. Turkmenistan*, U.N. Doc. CCPR/C/122/D/2252/2013, 2018, para. 7.7; UN Human Rights Committee, *Nasheed v. Maldives*, U.N. Doc. CCPR/C/122/D/2851/2016, 2018, para. 8.7; William Schabas, *The European Convention on Human Rights: A Commentary* 623 (Oxford University Press 2016).

<sup>208</sup> European Court of Human Rights, *Merabishvili v. Georgia* (Grand Chamber), App. No. 72508/13, Nov. 28, 2017, Concurring Opinion of Judge Yudkivska, para. 7.

<sup>209</sup> European Court of Human Rights, *Kavala v. Turkey*, App. No. 28749/18, Dec. 10, 2019, para. 231.

engaging in protected conduct under the ICCPR and also as an example to the general public, to chill participation in public protests.

As previously discussed, under international human rights law, states cannot criminalise exercise of the right to peaceful assembly. In its most recent General Comment on the right to peaceful assembly, the UN Human Rights Committee explicitly stated that “[a] failure to notify the authorities of an upcoming assembly, where required, does not render the act of participation in the assembly unlawful, and must not in itself be used as a basis for dispersing the assembly or arresting the participants or organisers, or for imposing undue sanctions.”<sup>210</sup> In this case, the defendants were prosecuted and convicted for their alleged role in a peaceful assembly on the basis of their failure to comply with Hong Kong’s assembly authorisation scheme. As previously noted, this scheme is itself a problematic prior restraint on the right to peaceful assembly and in this case, the defendants were sentenced to prison for participation in a peaceful event. None of the conduct alleged fell outside of the protection of Article 21 of the ICCPR.<sup>211</sup>

Furthermore, the Court seemed particularly concerned by the theme of the August 18 assembly—namely, police misconduct and police brutality—and apparently took this into account in the instant case as well as the two cases it subsequently considered.<sup>212</sup> But under human rights law, an event remains “peaceful” even if it includes conduct that annoys or may offend some groups, including the authorities.<sup>213</sup> But the prosecution of and judgment in this case suggest that the defendants’ participation in events critical of

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<sup>210</sup> General Comment No. 37, para. 71.

<sup>211</sup> *Id.* at para. 16 (“If the conduct of participants in an assembly is peaceful, the fact that certain domestic legal requirements pertaining to an assembly have not been met by its organizers or participants does not, on its own, place the participants outside the scope of the protection of article 21. Collective civil disobedience or direct action campaigns can be covered by article 21, provided that they are non-violent.”), citing UN Human Rights Committee, Concluding observations on the initial report of Macao, China, UN Doc. CCPR/C/CHN-MAC/CO/1, Apr. 29, 2013. See also European Court of Human Rights, *Frumkin v. Russia*, App. No. 74568/12, Jan. 5, 2016, para. 97; European Court of Human Rights, *Christians against Racism and Fascism v. the United Kingdom*, App. No. 8440/78, July 16, 1980, pp.148-149.

<sup>212</sup> It is also grounds for concern that the Court rejected the defendants’ request to call an expert witness who could have testified to their ‘reasonable excuse’ argument. The Court appeared to reject this expert in part due to their hostility to the Hong Kong police. Moreover, the Court’s language in its decision suggested that part of its impetus for rejecting the ‘reasonable excuse’ theory was because of the political valence the defendants bore. *HKSAR v. Lai Chee Ying et al.*, DCCC 536/2020, [2021] HKDC 398, Reasons for Verdict, para 174 (“It is common knowledge that CHRF is an organisation that is affiliated with almost all pan-democratic groups in Hong Kong. It is significant that the organisers issued an invite to influential people known for their pro-democratic stance because of who they were and what they stood for to lead a procession to defy the ban.”).

<sup>213</sup> European Court of Human Rights, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, App. Nos. 29221/95 and 29225/95, Oct. 2 2001, para. 86; European Court of Human Rights, *Plattform “Ärzte für das Leben” v. Austria*, App. No. 10126/82, June 21, 1988, para. 32. Similarly, the European Court of Human Rights has often stated that, subject to Article 10(2), freedom of expression “...is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society.’” *Handyside v. The United Kingdom*, App. No. 5493/72, Dec. 7 1976, para. 49. See also European Court of Human Rights, *Bayev and Others v. Russia*, App. Nos. 67667/09, 44092/12 and 56717/12, June 20, 2017, para. 70 (“The Court reiterates that it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority”); *Terminiello v. City of Chicago*, 337 U.S. 1, 4-5 (1949) (“[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.”).

government authorities were themselves problematic, even if no violence or significant disruption ensued from the assembly in question. As explained above, the fact that the demonstrations related to matters of obvious public concern should have called for heightened scrutiny of any prosecution in relation to them.

In its judgment, the Court here referred to “an unhealthy wind [] blowing in Hong Kong” and escalating during the 2019 protests.<sup>214</sup> It dismissed any suggestion that this case would have a significant chilling effect on the public’s exercise of the right to peaceful assembly, citing the 884 authorised public meetings and processions that went forward in 2019.<sup>215</sup> That events were authorised in 2019 (including the rally at issue in this case) is not dispositive of the potential chilling effect from this prosecution and sentence, however, in light of the changed political circumstances described above. Indeed, it is not unreasonable to speculate that the conviction and incarceration of these individuals for unauthorised assembly, and similar charges and convictions handed down in recent months against other activists and opposition politicians may already have had an impact on the public’s willingness to participate in peaceful assemblies, despite their right to do so under human rights law.<sup>216</sup> Given the overall context, there is inevitable concern that this was the intention, not a mere byproduct, of this prosecution and imprisonment of well-known activists.

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<sup>214</sup> *HKSAR v. Lai Chee Ying et al.*, DCCC 536/2020, [2021] HKDC 398, Reasons for Verdict, para. 221.

<sup>215</sup> *Id.* at para. 280.

<sup>216</sup> See *Stand News*, “Eric Cheung: the court’s use of unlawful assembly standards in sentencing August 18 and August 31 cases and jailing peaceful protesters is discouraging the public from being peaceful, rational and non-violent” (張達明：法院以非法集結標準判 8.18、8.31 案 和平示威者遭收監 等同不鼓勵民眾「和理非」), Apr. 19, 2021, available at <https://beta.thestandnews.com/court/張達明-法院以非法集結標準判-8-18-8-31-案-和平示威者遭收監-等同不鼓勵民眾-和理非>; *South China Morning Post*, “Hong Kong marathon commemorating Tiananmen Square crackdown proceeds in diminished form,” May 27, 2021, available at <https://www.scmp.com/news/hong-kong/politics/article/3133664/hong-kong-marathon-commemorating-tiananmen-square-crackdown>; *New York Times*, “Hong Kong Protests, Silenced on the Streets, Surface in Artworks” May 20, 2021, available at <https://www.nytimes.com/2021/05/20/world/asia/hong-kong-protests-art.html>; *Hong Kong Free Press* “Up to 5 years prison for attending Tiananmen Massacre vigil, Hong Kong gov’t warns – 1 year jail for publicising it,” May 29, 2021, available at <https://hongkongfp.com/2021/05/29/up-to-5-years-prison-for-attending-tiananmen-massacre-vigil-hong-kong-govt-warns-1-year-jail-for-publicising-it/>; *Apple Daily*, “We will pursue you for life, Hong Kong warns wanted activists abroad,” May 19, 2021 [accessed May 21, 2021], available at <https://hk.appledaily.com/news/20210519/5LXXQW4VMBCAJF7AV4LI2MYAHM/>; .

## CONCLUSION AND GRADE



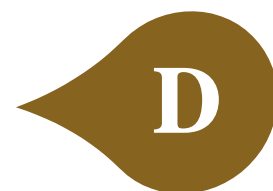
### TrialWatch Expert Timothy Otty QC's Findings:

Based on the facts presented at trial and a review of the law at issue, there can be no substantive criticism of the approach of the Court or the trial in terms of procedural fairness. This case nevertheless raises significant concerns with respect to the defendants' rights to freedom of peaceful assembly, as the individuals in this case were prosecuted, convicted, and sentenced to terms of imprisonment based on their participation in a peaceful assembly. Whether or not the POO would be consistent with international human rights law were it to provide purely administrative penalties, the scheme is difficult to justify on its face due to the severity of the potential penalties of imprisonment.

Taking into account the political context, the unexplained 8-month delay between the protest in issue, and the choice then to pursue such severe sanctions against the defendants, with an inevitable chilling effect on others, there are also concerns that the Prosecution's decision to prosecute was tainted and constituted an abuse of process or, adopting a different form of analysis, that the prosecution and sentences were disproportionate on this basis also. A further concern arises out of public statements made by members of the executive prior to the commencement of the proceedings which threatened the presumption of innocence. These concerns may be capable of being addressed to some extent on appeal, and so an overall view of the treatment of these defendants and the question of compliance with international standards should await the outcome of any appeal process.

Based on the TrialWatch monitoring in this case and the Court's decisions on its verdict and sentences, the substantive treatment of the defendants did not meet international standards, notwithstanding the procedural fairness guarantees provided. As a result, this trial received a grade of "D" under the methodology set forth in the Annex to this Report.

**GRADE:**



# ANNEX A



## GRADING METHODOLOGY

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,”<sup>2</sup> 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.

# ANNEX B

## TABLE OF SENTENCES FOR 'DEMOCRACY 15' CASES

<b>'Democracy 15' Cases -- Table of Sentences</b>					
 = Pled guilty  = Pled not guilty A maximum discount of 25% for guilty plea ( <i>HKSAR v Ngo Van Nam CACC 418/2014</i> )					
Name of Defendant	Term of imprisonment served consecutively				Total term of imprisonment
	DCCC 536/2020 <sup>217</sup> (August 18, 2019 protest)	DCCC 537/2020 <sup>218</sup> (August 31, 2019 protest)	DCCC 534/2020 <sup>219</sup> (October 1, 2019 protest)	DCCC 535/2020 (October 20, 2019 protest) <i>[Trial yet to commence]</i>	
<b>Jimmy Lai Chi Ying</b>	<u>D1</u> : 12 months	<u>D1</u> : 2 months (out of 8 months)	<u>D8</u> : 6 months (out of 14 months)		20 months
<b>Lee Cheuk Yan</b>	<u>D2</u> : 12 months	<u>D3</u> : 2 months (out of 6 months)	<u>D2</u> : 6 months (out of 18 months)		20 months
<b>Margaret Ng Ngoi Yee</b>	<u>D3</u> : 12 months				
<b>Leung Kwok Hung</b>	<u>D4</u> : 18 months			<u>D2</u>	22 months
<b>Cyd Ho Sau Lan</b>	<u>D5</u> : 8 months		<u>D6</u> : 0 months	<u>D3</u>	14 months

<sup>217</sup> *HKSAR v. Lai Chee Ying et al.*, [2021] HKDC 457, Reasons for Sentence, April 16, 2021, available at [https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=135155&currpage=T](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=135155&currpage=T)

<sup>218</sup> *HKSAR v. Lai Chee Ying, Yeung Sum & Lee Cheuk Yan*, DCCC 537/2020 [2021] HKDC 447, April 16, 2021, available at [https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=135000&currpage=T](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=135000&currpage=T)

<sup>219</sup> *HKSAR v. Chan Ho Wun, Lee Cheuk Yan, Leung Kwok Hung, Ho Chun Yan, Yeung Sum, Ho Sau Lan Cyd, Ng Man Yuen Avery, Lai Chee Ying, Sin Chung Kai, Tsoi Yiu Cheong Richard*, DCCC 534/2020, [2021] HKDC 645, May 28, 2021, available at [https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=136087&currpage=T](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=136087&currpage=T).



			(out of 14 months)		
<b>Albert Ho Chun Yan</b>	<u>D6</u> : 12 months Suspended for 24 months		<u>D4</u> : 18 months (out of 18 months)	<u>D4</u>	18 months
<b>Leung Yiu Chung</b>	<u>D7</u> : 8 months Suspended for 12 months				
<b>Martin Lee Chu Ming</b>	<u>D8</u> : 11 months Suspended for 24 months				
<b>Au Nok Hin</b>	<u>D9</u> : 10 months				
<b>Yeung Sum</b>		<u>D2</u> : 8 months Suspended for 12 months	<u>D5</u> : 14 months (out of 14 months)	<u>D6</u>	14 months
<b>Figo Chan Ho Wun</b>			<u>D1</u> : 18 months	<u>D1</u>	18 months
<b>Avery Ng Man Yuen</b>			<u>D7</u> : 14 months	<u>D7</u>	14 months AND 14 days
<b>Sin Chung Kai</b>			<u>D9</u> : 14 months Suspended for 24 months		Sentence suspended (14 months Suspended for 24 months)
<b>Richard Tsoi Yiu Cheong</b>			<u>D10</u> : 14 months Suspended for 24 months		Sentence suspended (14 months Suspended for 24 months)
<b>Raphael Wong Ho Ming</b>				<u>D5</u>	

