Hong Kong Special Administrative Region v. Tong Ying-kit

December 2021

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TRIALWATCH FAIRNESS REPORT

A CLOONEY FOUNDATION FOR JUSTICE INITIATIVE

ABOUT THE AUTHORS

Rebecca Mammen John was Designated as a Senior Advocate in 2013 and has been practising exclusively on the criminal side in the Supreme Court of India, High Court of Delhi and in the Trial Courts of Delhi for more than three decades. She has conducted a wide range of criminal trials and argued appeals dealing with offences under the Indian Penal Code, Unlawful Activities (Prevention) Act, Prevention of Corruption Act and other special statutes. Over the years, she has represented accused persons as well as victims. She has successfully defended individuals accused of terror crimes in India including the Marxist ideologue Kobad Ghandy and a former student from Kashmir, Mohd. Rafeeq Shah, and is presently representing human rights activists in trials arising out of the 2020 Delhi Riots. Amongst the other cases to her credit are the Jain Hawala case of 1996, the 2G spectrum case, the Aarushi Talwar murder case, the Shreesanth IPL match fixing case, the Hashimpura massacre case - where she appeared for the families of 44 Muslim men who were shot dead by the Provincial Armed Constabulary of the Uttar Pradesh Police, in one the worst cases of custodial violence in India. More recently, she successfully defended Priya Ramani - a journalist who had made allegations against her former editor during the #MeToo India movement in October 2018 - in a criminal defamation complaint filed against her. She has been appointed as the Special Public Prosecutor, in the Ankit Saxena murder trial - involving the brutal murder of a young man, for being in a relationship with a woman from another community. She is a member of the Internal Complaints Committee of the Delhi High Court dealing with complaints under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. She is also a statutory member of the Delhi High Court Legal Services Committee. Ms. John was assisted in her review by Chinmay Kanojia from her Chambers. TrialWatch staff provided drafts of this report for Ms. John to review.

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.

EXECUTIVE SUMMARY

Rebecca John, a member of the TrialWatch Expert panel, assigned this trial a grade of D on the following grounds:

The trial of Tong Ying-kit, the first trial under the 2020 National Security Law in Hong Kong, undermined Tong Ying-kit's fair trial and other human rights through (a) violations of the right to an independent and impartial tribunal; (b) violations of the principle of legality; and (c) abuse of process. Further, this trial evidenced an abuse of process where political motivations underpinned the decision to charge and prosecute this individual under the National Security Law.

In accordance with the grading methodology, the above violations resulted in a D grade for this trial. These violations resulted in a guilty verdict and significant sentence for the defendant in this case, Tong Ying-kit, now sentenced to nine years in prison. Tong Ying-kit has appealed his conviction and sentence, and the violations of his rights may be cured on appeal, which is also an opportunity for the judicial system to provide more clarity, guidance and limits on the interpretation of terms in the National Security Law.

The defendant in this case, Tong Ying-kit, is a 24-year-old resident of Hong Kong and the first person to be prosecuted under Hong Kong's National Security Law. On July 1, 2020, the day the law came into effect, Tong Ying-kit was arrested for allegedly driving his motorcycle while flying a black flag with words in white "光復香港時代革命" ("Liberate Hong Kong Revolution of Our Times") into a group of police officers during a demonstration to protest the new law. He was charged with "terrorist activities" under Article 24 and "inciting secession" under Articles 20 and 21 of the National Security Law and, as an alternative count, "dangerous driving" under the Road Traffic Ordinance. Held in detention and denied bail under the new strict bail standard from July 6, 2020 until his trial in June 2021, Tong Ying-kit was denied a jury and tried by a panel of three national security judges, appointed by the Chief Executive of Hong Kong, in a 15-day trial. On July 27, 2021, the Court convicted Tong Ying-kit of both National Security Law offences, terrorist activities and incitement to secession (not reaching the alternative grounds), subsequently sentencing him to a total of nine years in prison (six and a half for the secession charge, eight and a half for the terrorism charge, to be served partly concurrently). On August 17, 2021, Tong Ying-kit filed an appeal.

Tong Ying-kit's trial—the first under the 2020 National Security Law—raises significant problems under international human rights law including stemming from (a) concerns regarding the independence of the tribunal; (b) violations of the principle of legality; (c) violations of the right to freedom of expression; and (d) abuse of process given the political motivations underpinning this case. In particular, the defendant in this case, Tong Ying-kit, was charged under this new law on its first day in effect, when many in Hong Kong had not yet seen it; the offences for which he was convicted—terrorist activities and incitement to secession—were facially broad and often vague, and made broader by the Court's interpretation of them.

Certainly, the Court here did respect some core procedural trial rights and appropriately declined to remove this case from the protections of the Basic Law. However, the overwhelming effect—and perhaps intent—of this trial was to transform some generic conduct into severe national security offences and chill protected speech. The judgment does not give the public clear lines on when political expression or even a traffic accident could become a "national security threat" punishable by imprisonment. But what it does do is send a clear and chilling message to the public that this national security law can and will be used broadly. The Court examining whether the popular protest slogan, "Liberate Hong Kong Revolution of Our Times," widely used for years in Hong Kong, held that was 'incitement to secession,' relying on the "the natural and reasonable effect of displaying the flag in the particular circumstances." Accordingly, the Court held that the Defendant had formed the "specific intent" to incite secession on the day he drove his motorcycle demonstrating the slogan around the city. The Court also convicted Tong Ying-kit of 'terrorist activities' from his collision with police—a collision that, according to the testimony of one prosecution expert, the defendant had attempted to avoid.

While this trial and the use of the NSL was novel in Hong Kong, the prosecution and verdict here reflect a broader international trend whereby states adopt, expand, and misuse anti-terrorism laws to get higher penalties and sanction protected speech and conduct. From the political context surrounding this case, it appears that authorities purposefully took advantage of the new law and its different, indeed less-protective criminal procedures and rules in order to secure a more punitive result. That Hong Kong's authorities have used this law so transparently in its first test not only suggests an abuse of process in this trial but also sets up a dangerous precedent and implicates the courts in this expansion of criminal law.

A. POLITICAL AND LEGAL CONTEXT

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

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.[1] After recent changes announced by the Chinese Government to Hong Kong's electoral system, the British government stated in March 2021 that the Chinese government was "in a state of ongoing non-compliance with the Sino-British Joint Declaration."[2] (The Chinese government has at times dismissed the Joint Declaration as a "historical document"[3] and emphasized that the Hong Kong Basic Law should be considered the applicable instrument.) Nevertheless, 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. [4]

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[1] 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 May 27, 1985, *available at* https://treaties.un.org/doc/Publication/UNTS/Volume%201399/v1399.pdf.

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

[3] *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.")

[4] 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 April 4, 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.[5] Supplementing the Basic Law, the Hong Kong Bill of Rights Ordinance ("BORO")[6] was enacted on June 8, 1991 to implement the International Covenant on Civil and Political Rights (ICCPR)[7] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[8] into domestic law.[9] 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.[10]

Hong Kong has a strong history of judicial independence, and under the Basic Law, its judiciary is expected to operate "independently, free from any interference."[11] Unlike the judicial system in the PRC, which is based on a civil law tradition, Hong Kong is a common law jurisdiction with many laws and procedures inherited from the British colonial system. Under the Basic Law, Hong Kong may invite judges from other common law jurisdictions to sit on its courts[12] and refer to precedents from other common law jurisdictions.[13] This strong tradition of independence has recently come under threat with senior judges raised concerns about the judiciary's continued impartiality[14] and at least one report of a judicial candidate withdrawing her nomination based on pressure from pro-Beijing lawmakers in the Legislative Council ("LegCo").[15] And in June 2021, Zheng Yanxiong, the director of the Office for Safeguarding National Security (created in 2020 to investigate alleged offences and initiate

[5] Article 158 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (hereinafter "the Basic Law"), Apr. 4, 1990, *available at* www.basiclaw.gov/hk/en/basiclaw/.
[6] Hong Kong Bill of Rights ("BORO") (Cap. 383), June 8, 1991, *available at* https://www.elegislation.gov.hk/hk/cap383?xpid=ID_1438403137017_001.
[7] United Nations International Covenant on Civil and Political Rights (ICCPR), Mar. 23, 1976, 14668 U.N.T.S. 172.
[8] United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR), Jan. 3, 1967, 993 U.N.T.S. 3.
[9] 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-InductoryChapterandBooklet-Eng.pdf.
[10] 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.").
[11] Article 85 of the Basic Law.
[12] Articles 82 & 92 of the Basic Law.
[13] Article 84 of the Basic Law.
[14] Greg Torode & James Pomfret, *Reuters*, "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/.
[15] 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.

prosecutions under the National Security Law[16]), warned that Hong Kong's "independent judiciary's power is authorised by the National People's Congress. It must highly manifest the national will and national interest, or else it will lose the legal premise of the authorisation," further noting that attention to national security is critical to rule of law in Hong Kong: "Once national security falls, the city will then be dominated by ideas of independence, mutual destruction and self-determination. How can we then secure 'two systems' when 'one country' is gone?"[17]

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[18] 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.[19] 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.[20]

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[21] between the ages of 11 and 84 years old;[22] over 2,500 have been charged in connection

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[16] *See* Articles 48-61 of 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 (hereinafter "NSL") (2020), *available at* https://www.elegislation.gov.hk/doc/hk/a406/eng_translation_(a406)_en.pdf.

[17] Lilian Cheng & Chris Lau, *South China Morning Post*, "Hong Kong's judiciary should uphold country's will, advance its interests, says Beijing's national security chief in city," June 29, 2021, *available at* https://www.scmp.com/news/hong-kong/politics/article/3139203/hong-kongs-judiciary-should-uphold-countrys-will-advance.

[18] 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.

[19] *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.

[20] *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.

[21] 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.

[22] *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-

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.[23]

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.[24] 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."[25] 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."[26] The final police report,[27] issued in May 2020 and prepared solely by the domestic authorities, largely exonerated the police and was condemned by human rights groups and others for its failure to ensure accountability for police misconduct.[28]

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.[29] Many commentators saw this regulation, and its immediate use to stop

protest/index.html#:~:text=HONG%20KONG%20PROTESTS,Arrested%20Hong%20Kong%20protesters%3A%20how%20the%20numbers%20look%20one%20year,and%20eight%20primary%20school%20pupils.

[23] 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/.

[24] Shibani Mahtani et al., *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/.

[25] 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.

[26] 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.

[27] 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.

[28] 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.

[29] HKSAR, Prevention and Control of Disease (Prohibition on Group Gathering) Regulation, Mar. 28, 2020, *available at* https://www.info.gov.hk/gia/general/202003/28/P2020032800720.htm.

and disperse pro-democracy protests, as providing an opportunity for the police to further crack down on demonstrations.[30]

The 2020 Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region ("National Security Law" or "NSL")

1. Background: Article 23 of the Basic Law and the Introduction of the NSL

Article 23 of the Basic Law requires Hong Kong to 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."[31]

Until 2020, however, attempts to introduce any such legislation in Hong Kong had stalled and met with opposition to the creation of new or redefined national security offenses. During pre-Handover deliberations on a national security bill (1996-1997), the legislature's Bill Committee noted that the legal profession and other delegations opposed the creation of a new 'subversion' offence, noting that the Public Order Ordinance already protected public order and addressed 'subversion' and 'secession' offences. The Hong Kong Journalists Association opposed the creation of both 'subversion' and 'secession' offenses as a serious threat to the freedom of expression.[32] Furthermore, the Bill Committee, unanimously opposing the creation of the offenses of secession of subversion, concluded that "no case has been made for an immediate need to add such offences in the statute," and "full and searching discussions in the Bills Committee have failed to reveal any formulation of these offences which does not endanger the rights and freedom of Hong Kong people."[33]

Post-Handover, in 2003, legislators again attempted to introduce Article 23 national security legislation that would have defined and enacted a number of security-related offences, including treason, subversion, secession, and sedition.[34] The proposed bill and the rapid process by which it was introduced were extremely unpopular in Hong Kong, with many concerned that the new laws would erode fundamental rights, suppress dissent, and restrict

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[30] *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, *available at* https://twitter.com/HK_CRO/status/1245180697276346368; Democratic Party 民主黨, Twitter Post, Mar. 31, 2020.

[31] Article 23 of the Basic Law.

[32] Report of the Bills Committee on the Crimes (Amendment) (No. 2) Bill 1996 (Papers) June 13, 1997, LegCo Paper No. CB(2)2638/96-97, paras. 9-10, *available at* https://www.legco.gov.hk/yr96-97/english/bc/bc56/papers/report!!.htm#8.

[33] *Id*. para. 13.

[34] *See* Elson Tong, *Hong Kong Free Press*, "Reviving Article 23 (Part I): The rise and fall of Hong Kong's 2003 national security bill," Feb. 18, 2018, *available at* https://hongkongfp.com/2018/02/17/reviving-article-23-part-i-rise-fall-hong-kongs-2003-national-security-bill/; Human Rights Watch, A Question of Patriotism: Human Rights and Democratization in Hong Kong (2004), *available at* https://www.hrw.org/legacy/backgrounder/asia/china/hk0904/index.htm

access to information.[35] In response, on July 1, 2003, approximately 500,000 people took to the streets to protest the proposed law, which the government ultimately shelved.[36]

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."[37] 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.[38] 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.[39]

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)[40] 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, bypassing Hong Kong's legislature. The law came into effect in Hong Kong at midnight on July 1, 2020. The text of the law was not available to the public until it went into effect.[41] Between July 1, 2020 and July 1, 2021 (the first year the law was in effect), approximately 117 people[42] were arrested under the NSL, of whom four-fifths were accused for speech or

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[35] Klaudia Lee, *South China Morning Post*, "Most people oppose security bill, poll shows," June 28, 2003; RTHK, *The Pulse*, "Audrey Eu and Elsie Leung on political reform, Basic Law teaching materials controversy," May 15, 2015, *available at* https://podcast.rthk.hk/podcast/item.php?pid=205&eid=54201&lang=en-US; *CNN*, "Huge protest fills HK streets," July 2, 2003, *available at* edition.cnn.com/2003/WORLD/asiapcf/east/07/01/hk.protest/;.

[36] *See* Elson Tong, *Hong Kong Free Press*, "Reviving Article 23 (Part I): The rise and fall of Hong Kong's 2003 national security bill," Feb. 18, 2018, *available at* https://hongkongfp.com/2018/02/17/reviving-article-23-part-i-rise-fall-hong-kongs-2003-national-security-bill/; HKSAR v Lai Chee Ying, 24 HKCFAR 33, Feb. 9, 2021 (discussing the previous attempts to introduce a NSL).

[37] "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.

[38] Article 23 of the Basic Law, *available at* https://www.basiclaw.gov.hk/en/basiclaw/chapter2.html.

[39] Article 18 of the Basic Law, *available at* https://www.basiclaw.gov.hk/en/basiclaw/chapter2.html

[40] 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 (hereinafter "NSL"), (2020) *available at* https://www.elegislation.gov.hk/doc/hk/a406/eng_translation_(a406)_en.pdf.

[41] The law was only provided in a Chinese text as the authoritative source. Both Chinese and English are used as official legal languages in Hong Kong.

[42] 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," June 28, 2021, *available at* https://sg.news.yahoo.com/unstoppable-storm-rights-back-seat-022429844.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAJ9y_jKrtXD-kB-rHBXDlknqUNJTQ2Q5LtOQu_aP8MJL2IunBvB-DVy2vtFyAB8U_dtje3XQKr3YujWY_YZXEiAMG2HtOnsbj9cyOKDVHCsAuWd-D0IykhWlLdKy7FGZM24zLZUZzjX5cOjheNhz2RPPx4vtb0fP3T6ndWmgbMZf; *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

expression-related conduct.[43] National security police have also arrested many others not formally charged under the NSL, and it appears some of the NSL procedures may also be applied to these individuals.[44]

2. Provisions of the 2020 National Security Law

The National Security Law marks a dramatic change in Hong Kong law, creating new offences, novel trial procedures, and expanded police investigatory authority. While the NSL did not replace related laws such as the colonial-era sedition statute and the Public Order Ordinance, nor does it replace the Basic Law and the BORO—all of which remain in force—where the NSL conflicts with the Basic Law and other Hong Kong laws, it is the NSL that has priority.[45] Although the NSL contains provisions that acknowledge the right to a fair trial,[46] some commentators have observed that procedural due process rights have already been severely restricted by this law, even before the first trial started.[47]

With respect to NSL procedures, the NSL authorises the Chief Executive to designate 'national security judges' who can be removed if they make statements or take actions that "endanger national security."[48] It further created a significantly higher standard for bail,[49] upheld by the Court of Final Appeal.[50] Under the NSL, a trial can be closed to the public if it

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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.

[43] Iain Marlow, *Bloomberg News*, "How China's Security Law Changed Hong Kong Forever in Just 12 Months," June 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.

[44] For example, the case of radio host and former legislator Tam Tak-chi, who is facing sedition charges, has been assigned to national security-designated judges even though he is not facing charges under the NSL.

[45] Article 62 of the NSL ("This Law shall prevail where provisions of the local laws of the Hong Kong Special Administrative Region are inconsistent with this Law.").

[46] The NPC Standing Committee has also stated that the NSL "fully reflects the internationally-practised rule-of-law principles such as conviction and punishment of crimes as prescribed by law, presumption of innocence, protection against double jeopardy, protection of parties' rights in litigation and to fair trial." Address at the Twentieth Session of the Standing Committee of the Thirteenth National People's Congress (30 June 2020) by Mr Li Zhanshu (6 July 2020), *cited by* HKSAR v Lai Chee Ying, 24 HKCFAR 33, Feb. 9, 2021, para. 22. *See also* Article 5 of the NSL ("A person is presumed innocent until convicted by a judicial body. The right to defend himself or herself and other rights in judicial proceedings that a criminal suspect, defendant, and other parties in judicial proceedings are entitled to under the law shall be protected. No one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in judicial proceedings."").

[47] *See generally*, 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=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAJ9y_jKrtXD-kB-rHBXDlknqUNJTQ2Q5LtOQu_aP8MJL2IunBvB-DVy2vtFyAB8U_dtje3XQKr3YujWY_YZXEiAMG2HtOnsbj9cyOKDVHCsAuWd-D0lykhWlLdKy7FGZM24zLZUZzjX5cOjheNhz2RPPx4vtb0fP3T6ndWmgbMZf; Lydia Wong, Thomas Kellogg & Eric Yan Ho Lai, Georgetown Law Center for Asian Law, *Hong Kong's National Security Law and the Right to a Fair Trial* (2021), *available at* https://www.law.georgetown.edu/law-asia/wp-content/uploads/sites/31/2021/06/HongKongNSLRightToFairTrial.pdf.

[48] Article 44 of the NSL.

[49] Article 42 of the NSL ("No bail shall be granted to a criminal suspect or defendant unless the judge has sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security.").

[50] The CFA has, in particular, opined on the new bail standard as defined under section 42(2) of the NSL and explained its test at HKSAR v Lai Chee Ying, 24 HKCFAR 33, Feb. 9, 2021, para. 70:
"In applying NSL 42(2) when dealing with bail applications in cases involving offences endangering national security, the judge must first decide whether he or she 'has sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security.'"

involves "State secrets or public order,"[51] and all HKSAR courts are required to obtain a certificate from the Chief Executive that certifies "whether an act involves national security and whether the relevant evidence involves State secrets."[52] The law also significantly expands the police investigatory authority,[53] and allows the Office for Safeguarding National Security (NSO) to remove a case from the HKSAR courts' jurisdiction and to exercise jurisdiction itself if the case is "complex due to the involvement of a foreign country or external elements"; a "serious situation" makes the HKSAR government unable to enforce the NSL," or there is a "major and imminent threat" to national security.[54]

Another significant change under the NSL is its provision allowing the Secretary for Justice to deny a defendant trial by jury "on the grounds of, among others, the protection of State secrets, involvement of foreign factors in the case, and the protection of personal safety of jurors and their family members."[55] In such circumstances, a defendant will be tried by a panel of three judges instead of by a jury. The High Court, reviewing an appeal by the defendant in this case on the denial of a jury trial, held that while a jury trial is the standard trial procedure in Hong Kong, it is not an absolute right despite its strong precedent in Hong Kong.[56]

The NSL created a range of new and broadly-defined offences, some of which are punishable with life imprisonment, including 'secession' and 'subversion.' Under the NSL, 'subversion' is 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."[57] The NSL also created the offense of '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.[58]

In February 2021, considering a challenge to the NSL's presumption against bail, Hong Kong's highest court, the Court of Final Appeal (CFA), emphasized that courts cannot review the constitutionality or validity of provisions of the NSL:

> [T]legislative acts of the NPC and NPCSC leading to the promulgation of the NSL as a law of the HKSAR, done in accordance with the provisions of the Basic Law

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- "The judge should take the reference to 'acts endangering national security' to mean acts of that nature capable of constituting an offence under the NSL or the laws of the HKSAR safeguarding national security."
- "If, having taken into account all relevant material, the judge concludes that he or she does not have sufficient grounds for believing that the accused will not continue to commit acts endangering national security, bail must be refused."
- "If, on the other hand, the judge concludes that taking all relevant material into account, he or she does have such sufficient grounds, the court should proceed to consider all other matters relevant to the grant or refusal of bail, applying the presumption in favour of bail."

[51] Article 41 of the NSL.
[52] Article 47 of the NSL.
[53] See Articles 42 & 44 of the NSL.
[54] Article 55 of the NSL.
[55] Article 46(1) of the NSL.
[56] In the Appeal of Tong Ying-kit and Secretary for Justice, [2021] HKCA 912, June 22, 2021.
[57] Article 22 of the NSL.
[58] Articles 29-30 of the NSL.

> and the procedure therein, are not subject to review on the basis of any alleged incompatibility as between the NSL and the Basic Law or the ICCPR as applied to Hong Kong.[59]

Moreover, the ultimate authority to interpret the NSL lies not with Hong Kong courts but with the Standing Committee of the National People's Congress.[60]

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.[61] 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.[62]

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).[63] The UN Human Rights Committee has criticised the Public Order Ordinance (POO) and other Hong Kong law, such as the sedition provisions of the Crimes Ordinance, as posing excessive restrictions on the rights to freedom of expression and assembly.[64] As TrialWatch recently documented in the trial of nine individuals accused of organizing a peaceful assembly in 2019 to protest police

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[59] HKSAR v Lai Chee Ying, 24 HKCFAR 33, Feb. 9, 2021, para 37.
[60] Article 65 of the NSL.
[61] Basic Law 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."); BORO Article 16.
[62] *HKSAR v Ng Kung Siu*, [2000] 1 HKC 117, 135.
[63] Public Order Ordinance ("POO") (Cap. 245) (1967), *available at* 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.
[64] 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; UN Human Rights Committee: Concluding Observations: Hong Kong Special Administrative Region, 15 November 1999, CCPR/C/79/Add.117; UN Human Rights Committee, Concluding Observations, Hong Kong Special Administrative Region, CCPR/C/HKG/CO/2, Apr. 21, 2006, para. 14; UN Human Rights Committee, Concluding observations on the third periodic report of Hong Kong, China (2013); Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; 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, OL CHN 7/2020, Apr. 23, 2020.

brutality, the POO authorises imprisonment for failure to comply with an administrative authorisation scheme and, as such, is incompatible with human rights protections for peaceful assembly.

The 2020 National Security Law, first used in this case against Tong Ying-kit, provides express protections for freedom of expression and professes continued respect for the ICCPR.[65] However, in light of the significant sentences this law imposes (including life in prison), its broad language, and expansive application of the law, 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."[66]

B. THE CASE: HONG KONG v. TONG YING-KIT

This case, the first to proceed to trial under the NSL and against the first person charged under the law, stems from a protest that took place on the first day of the NSL's enactment. According to the Prosecution, on July 1, 2020, the day that the National Security Law went into effect in Hong Kong, Defendant Tong Ying-kit rode his motorcycle at a protest against the law, flying a black flag with words in white "光復香港時代革命" and "LIBERATE HONG KONG REVOLUTION OF OUR TIMES." The State contended that he refused to stop despite repeated attempts by the police to intervene and eventually rammed into the police officers at a checkline on the road, injuring three police officers as well as himself. It further contended that the words on the flag connote separation between Hong Kong and the PRC or "Hong Kong independence."

During the collision, Tong Ying-kit fractured his ankle and incurred other injuries from the collision and after being hit by police batons; three police officers sustained some injuries including to their hands. One police witness testified at trial that they continue to have follow-up medical appointments every three months for numbness and pain in their wrist. This officer was the only one to sustain injuries that required follow up apart from the Defendant, who was required to spend the night in the hospital (the other two injured officers were released from hospital immediately and testified that they had fully recovered).[67] Tong Ying-

[65] Article 4 of the NSL ("Human rights shall be respected and protected in safeguarding national security in the Hong Kong Special Administrative Region. The rights and freedoms, including the freedoms of speech, of the press, of publication, of association, of assembly, of procession and of demonstration, which the residents of the Region enjoy under the Basic Law of the Hong Kong Special Administrative Region and 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 be protected in accordance with the law.").

[66] 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?gId=25487.

[67] Holmes Chan, *Stand News*, " 'I had a feeling' Tong Ying-kit meant to flee after crashing, says injured policeman," *available at* https://www.thestandnews.com/english/i-had-a-feeling-tong-ying-kit-meant-to-flee-after-crashing-says-injured-policeman.

kit meanwhile remained in hospital from July 1 through July 6– his first appearance in court, appearing in court in a wheelchair for his first appearance.[68]

Tong Ying-kit was arrested on July 1, 2020; the Chief Magistrate, a national security law-designated judge, denied bail at his first appearance on July 6, 2020. He has been in custody ever since. Now 24-years-old, Tong Ying-kit was charged with (a) incitement to secession, in violation of Articles 20 and 21 of the NSL; (b) terrorist activities, in violation of Article 24 of the NSL; and (c) an alternative count of causing grievous bodily harm by dangerous driving, contrary to section 36A of the Road Traffic Ordinance.[69] He pled not guilty to all three charges.

Under Article 21 of the NSL, it is a crime punishable by five to 10 years in prison to incite others to commit the offense of secession.[70] The offence of 'secession' is defined by Article 20 of the NSL, which states:

> A person who organises, plans, commits or participates in any of the following acts, whether or not by force or threat of force, with a view to committing secession or undermining national unification shall be guilty of an offence:
>
> (1) separating the Hong Kong Special Administrative Region or any other part of the People's Republic of China from the People's Republic of China;
> (2) altering by unlawful means the legal status of the Hong Kong Special Administrative Region or of any other part of the People's Republic of China; or
> (3) surrendering the Hong Kong Special Administrative Region or any other part of the People's Republic of China to a foreign country.[71]

The Prosecution contended that Tong Ying-kit had violated these articles by displaying a flag with a slogan that advocated Hong Kong independence from the People's Republic of China and, by driving around the protests and throughout Hong Kong openly displaying this slogan, was inciting the public.

Tong Ying-kit was also accused of "terrorist activities" under Article 24 of the NSL, which states:

> A person who organises, plans, commits, participates in or threatens to commit any of the following terrorist activities causing or intended to cause grave harm to the society with a view to coercing the Central People's Government, the Government of the Hong Kong Special Administrative Region or an international organisation or intimidating the public in order to pursue political agenda shall be guilty of an offence:

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[68] Brian Wong, *South China Morning Post*, "Hong Kong national security law: first person charged under legislation remanded after bail application rejected," July 6, 2020, *available at* https://www.scmp.com/news/hong-kong/law-and-crime/article/3091990/hong-kong-national-security-law-first-person-charged.

[69] Cap 374 Road Traffic Ordinance, Section 36A, *available at* https://www.elegislation.gov.hk/hk/cap374!en. This alternative charge was introduced with leave of the court on June 7, 2021.

[70] Article 21 of the NSL.

[71] Article 20 of the NSL. A "principal offender" under this article can be sentenced to a minimum of 10 years imprisonment or a maximum of life imprisonment; someone who "actively participates" can be sentenced to three to 10 years imprisonment, and others may be sentenced to up to three years in prison.

(1) serious violence against a person or persons;
(2) explosion, arson, or dissemination of poisonous or radioactive substances, pathogens of infectious diseases or other substances;
(3) sabotage of means of transport, transport facilities, electric power or gas facilities, or other combustible or explosible facilities;
(4) serious interruption or sabotage of electronic control systems for providing and managing public services such as water, electric power, gas, transport, telecommunications and the internet; or
(5) other dangerous activities which seriously jeopardise public health, safety or security.

A person who commits the offence causing serious bodily injury, death or significant loss of public or private property shall be sentenced to life imprisonment or fixed-term imprisonment of not less than ten years; in other circumstances, a person who commits the offence shall be sentenced to fixed-term imprisonment of not less than three years but not more than ten years.[72]

Specifically, Tong Ying-kit was accused of causing "grave harm to the society" for acts involving "serious violence" against persons or "other dangerous activities."

Finally, Section 36A of the Road Traffic Ordinance states that a person convicted of causing "grievous bodily harm" to another person due to "dangerous driving" can face up to seven years in prison for a first such offense.[73]

C. PRE-TRIAL PROCEEDINGS

During the almost 12 months between Tong Ying-kit's arrest and his trial, the courts considered several issues in his, the first NSL, case as described below.

Detention proceedings

Tong Ying-kit was arrested on July 1, 2020 and was denied bail at his first appearance before the Chief Magistrate on July 6, 2020. On August 3, 2020, he filed a motion for habeas corpus and for bail review to the Court of First Instance, which refused both in a pair of decisions issued on August 21 and August 25, 2020, respectively. In its bail decision, the Court held that it need only look to traditional risk factors to deny bail rather than consider Article 42 of the NSL and denied the request for bail in a redacted decision.[74]

The habeas motion raised several additional issues, including the constitutionality of the presumption against bail; the threat to judicial independence from the designation of national security judges appointed by the Chief Executive; and the fact that the NSL text was introduced in Chinese with no English translation, thus making it inaccessible to some of Tong Ying-kit's legal team.

In denying the habeas motion, the Court of First Instance reiterated its "duty to protect the fundamental rights accorded by the Basic Law and Hong Kong Bill of Rights," insisted that

[72] Article 24 of the NSL.
[73] Cap 374 Road Traffic Ordinance, Section 36A.
[74] Between HKSAR and Tong Ying-kit, HCCP 463/2020, [2020] HKCFI 2196, Aug. 25, 2020, *available at* https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=130396&currpage=T

Article 42 should not be read as a presumption against bail let alone a prohibition on bail, and rejected the Prosecution's argument that the Court could not use common law interpretation methods on a NPSCC law—i.e., a civil law.[75] On the issue of judicial independence, the Court stated that were no evidence or suggestion that the Chief Magistrate was not independent and while 'perceived independence' is also important, it held, "We do not believe that a reasonable, fair-minded and well-informed observer would think that those judges are, or may be, no longer be independent of the Government."[76] Finally, it denied that the law was inaccessible because not provided in an authoritative English version and observed that Tong Ying-kit, himself a Chinese-speaker, had other counsel and could have chosen as primary counsel a lawyer who spoke Chinese.[77]

Notably, while not impacting the denial of bail and habeas corpus in the present case, in February 2021, the Court of Final Appeal weighed in on the bail issue addressed in Tong Ying-kit's case in another NSL case (against Jimmy Lai) and held that the Court of First Instance had erred in its interpretation of Article 42.[78] In *Tong*, the Court of First Instance had held that the Article 42 restriction on bail was "a narrow one."[79] Article 42(2) states: "No bail shall be granted to a criminal suspect or defendant unless the judge has sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security."[80]

The Court of Final Appeal held that this misinterpreted the NSL bail provision as creating a "positive requirement that the court has to be satisfied that there *do* exist grounds to believe that the accused *will* continue to commit acts endangering national security as a basis for *refusing* bail."[81] (emphasis in the original). In so doing, the CFA held, the lower court "erroneously re-writes NSL 42(2) and eliminates the more stringent threshold requirement it intentionally imposes as a specific exception to the general principles regarding bail."[82] That is, the Court of Final Appeal decision holds that the NSL does, in fact, create a presumption against bail.

Denial of Jury Trial

On February 5, 2021, the Secretary for Justice, exercising their authority under Article 46 of the NSL, issued a certificate directing that Tong Ying-kit's criminal case would be tried without a jury, by a panel of three designated national security judges. Specifically, the Secretary for Justice's certificate contended that the denial of a jury trial was necessary both for the "[p]rotection of personal safety of jurors and their family members" and because a

[75] Between HKSAR and Tong Ying-kit, HCAL 1601/2020, [2020] HKCFI 2133, Aug. 21, 2020, paras. 42, 48 & 49, *available at* https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=130336&QS=%2B&TP=JU&ILAN=en.
[76] *Id*. at para. 58.
[77] *Id*. at paras. 69-77.
[78] HKSAR v Lai Chee Ying, 24 HKCFAR 33, Feb. 9, 2021, *available at* https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=133491&currpage=T
[79] Between HKSAR and Tong Ying-kit, HCAL 1601/2020, [2020] HKCFI 2133, para. 37.
[80] Article 42(2) of the NSL.
[81] HKSAR v Lai Chee Ying, 24 HKCFAR 33 at para. 73
[82] *Id*. at 74.

jury trial in this case would lead to a "real risk that the due administration of justice might be impaired."[83]

Tong Ying-kit challenged the denial of a jury trial, raising as one argument his constitutional right to a jury where an indictment proceeds in the Court of First Instance, as in the present case. He also argued that the Certificate was vague and provided insufficient reasons for denial of a jury. The Court rejected his arguments,[84] as did the High Court on appeal, observing that the right to a jury trial was not absolute and that the decision of the Secretary for Justice to issue a certificate under NSL 46(1) is a prosecutorial decision, made in its sole discretion, and so "is only amenable to judicial review on the limited grounds of dishonesty, bad faith and exceptional circumstances as explained in the case law."[85] This decision, denying the appeal, was issued on June 22, 2021, a day before trial commenced.

Expert Evidence

In April 2021, the Court of First Instance heard arguments on the inclusion of an expert report, provided by the Prosecution, to opine on the meaning of the words on the flag on Tong Ying-kit's motorcycle. The Court accepted the portions of the report that addressed "the origin and development, both historical and recent, of the meaning of the words 'Liberate Hong Kong Revolution of Our Times' whether in Chinese, English or both" but rejected other sections of the report that, it said, inappropriately opined on the NSL statutory language.[86]

Additional Criminal Charge & Jurisdiction

On June 7, 2021, the Court also heard arguments challenging the Prosecution's inclusion of the dangerous driving charge, which Tong Ying-kit objected to on the grounds that a court consisting of national security-designed judges did not have jurisdiction over this charge. The Court rejected this argument as well, finding it would not be in the interests of justice to separate out the charges, that the panel's jurisdiction was not exclusive to NSL charges, and there was no prejudice to the defendant with the late addition of the charge.[87]

D. TRIAL PROCEEDINGS

June 23-July 20, 2021

On June 23, 2021, the Court of First Instance of the High Court in Hong Kong[88] started the trial proceedings. At the outset of the first day's proceedings, the Court reprimanded members of the public who had taken photographs inside the courtroom and reminded the

[83] Teresa Cheng, SC, Secretary for Justice, Certificate re Tong Ying Kit, Feb. 5, 2021, cited by the Court of First Instance in Between Tong Ying-kit and Secretary for Justice, HCAL 473/2021, [2021] HKCFI 1397, May 20, 2021, *available at* https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=135853&currpage=T.
[84] Tong Ying-kit and Secretary for Justice, HCAL 473/2021, [2021] HKCFI 1397, May 20, 2021
[85] In the Appeal of Tong Ying-kit and Secretary for Justice, [2021] HKCA 912, June 22, 2021, at para.71.
[86] Between HKSAR and Tong Ying-kit HCCC 280/2020, [2021] HKCFI 946, Apr. 9, 2021, *available at* https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=134817&currpage=T.
[87] Between HKSAR and Tong Ying-kit, HCCC 280/2020, [2021] HKCFI 1644, June 7, 2021, *available at* https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=136416&currpage=T.
[88] The High Court has both an appellate court and the Court of First Instance, which has original jurisdiction over the most serious criminal cases in Hong Kong. *See generally* Hong Kong Judiciary, Court Services & Facilities, *available at* https://www.judiciary.hk/en/court_services_facilities/hc.html.

public that this could be an offence under the Summary Offences Ordinance (Cap. 228). The Court then proceeded with the Prosecution's opening presentation of the case, which included video clips of the July 1, 2020 protest. The Prosecution initially listed numerous witnesses to be examined at trial; ultimately, after the Court directed that this be reduced and the Prosecution and Defence agreed on certain facts, approximately 15 were called to testify. The Defence presented three witnesses (two experts and the defendant's employer) and also called a Prosecution witness, Dr Tsang Cheuk-nam, who the Prosecution chose not to call to the stand.

Over the first five days of trial**,** the Prosecution presented its case in chief, starting with police witnesses present, and in some cases injured, at the protest and during the collision with the defendant's motorcycle. One of the key questions was whether the defendant had intentionally or recklessly driven into the police or whether it had been an accident.

The second prosecution witness, a police officer stationed at one of dozens of checkpoints across the demonstration zone, testified that they had ordered the defendant to stop his motorcycle as the police were in "imminent danger" from the accelerating speed of his driving. The third prosecution witness testified that 50-60 individuals on the footbridge near the scene of the crash applauded the defendant, which according to the prosecution was relevant to the defendant's intent. On cross-examination, he agreed with the defence attorney that had the defendant wanted to drive his motorcycle directly into the police officers stationed at his checkpoint, he could have done so. On the third day, during cross-examination of this officer, the Defence presented a dashcam video (from the car the defendant overtook) of the moment the defendant's motorcycle collided with police. The Defence suggested that the police officer in the video had thrown his police shield at or near the defendant, which led to the defendant's crash; the police witness on the stand refused to speculate on the reasons for the crash. On the fifth day of police officer testimony, a witness for the prosecution testified that he had raised his hand with the police shield towards the defendant but said that it was to protect himself from the defendant, who was accelerating, and said the collision was deliberate.

A later witness (who produced a report for the Prosecution but was only called upon by the Defence) was a forensic scientist who testified that the motorcycle was traveling at 20km per hour when it approached the police (which is slower than the 50km estimated by other Prosecution witnesses) and that the defendant had applied the brake before the collision, probably when he perceived danger to the police.[89]

Another fact question was whether the police had beaten the defendant and whether the defendant had sought to flee the scene. On the third day, the Defence showed video footage of police officers beating the defendant, lying on the ground after the crash, with batons; the officer testified that he could not see the defendant being hit by anything.[90] A subsequent prosecution witness testified to the injuries to his wrist from the crash and stated that the defendant intended to flee the scene, as evidenced by the way he moved his arms and legs on the ground, and testified that the colleagues who raised batons to the defendant did not appear to hit him.

[89] TrialWatch Monitoring, July 6, 2021.

[90] According to *Stand News*, the Defence asked the witness: "If the shield had hit [Tong] or had distracted him, then this would just be an accident?" Grossman asked, immediately drawing an objection from prosecutor Anthony Chau. Grossman said he was simply asking whether it was possible. "I am not going to speculate on the reason for the crash," Ho replied. *Stand New*s, "Role of police arm shield in Tong Ying-kit crash under question in court," June 25, 2021; TrialWatch monitoring, June 25, 2021.

On July 2, 2021, the Prosecution presented its expert witness—an expert on Chinese history—who testified over the next three days on the meaning of the slogan at the center of the case. The expert for the Prosecution, Lau Chi-pang, Professor of History and Associate Vice President of Lingnan University, testified that the words "光復香港" have the meaning of recovering the HKSAR, which has fallen into enemy hands, and so implies that the PRC is an outside and enemy regime.[91] Specifically, according to the expert witness, the slogan means to 'take back" Hong Kong through 'violent means.' He further testified that the slogan had been used more recently by politician Edward Leung, who used it in his 2016 political campaign, throughout the 2019 Anti-Extradition Bill protests, and routinely as a matter of 'customary usage' throughout the whole of China (with the same meaning of overthrowing the government). In his report for the trial, the Defence noted, the expert agreed that his understanding of the slogan might not be the same as the defendants, and while the expert disagreed with the Defence experts' reading of the slogan, he took no view as to whether the Defence experts' view was also correct. Questioned by the Defence as to his own attendance at a 2019 rally with the slogan "Reclaim Yuen Long," the expert agreed that "reclaim" (which shares the same Chinese characters as the slogan — gwong fuk 光) could mean 'restore' and not necessarily 'secede.'[92]

The Court subsequently summarised the Prosecution expert's testimony as follows:

> "Having considered the customary usage of the words or compound words from a historical perspective and the context in which they were used, Professor Lau was of the opinion that at the material time on 1 July 2020, as a whole, the fundamental agenda and meaning of the Chinese Slogan was "to cause the consequence of separating the territory of residence from the State sovereignty; in the context of Hong Kong's political language, these words were raised necessarily for the objective of separating the HKSAR from the PRC."

The Prosecution's next witness to testify, Senior Inspector Eddie Cheung, was a former police investigator who was called upon to produce a police research report that examined over 800 videos of protests and the use of the slogan alongside other messaging that might be 'secessionist' or 'subversive' and incidents of violence or unlawful acts. He testified that there was a 'sharp increase' in the use of the slogan in June 2020.

Finally, the Prosecution presented a police officer to testify to the contents of the defendant's wallet upon arrest—specifically, that he had a card with the slogan in his wallet. This item could not be produced by the Prosecution, however. The court held that ultimately the card held little if any probative value since Tong's understanding of the slogan could be determined by the video evidence. It further held that the fact that the item went missing did not imply any impropriety on the part of the lawyers for the defence, the police or the correctional services department.

On July 8, 2021, the Defence presented arguments that there was no case to answer. They observed that, for the secession charge, the Prosecution had presented no evidence that use of the slogan (which had multiple meanings) showed 'specific intent' to incite people to

[91] HKSAR v. Tong Ying Kit, [2021] HKCFI 2200, July 27, 2021 at para. 103.
[92] TrialWatch Monitoring, July 6, 2021; Stand News, "Trial debates Tong Ying-kit's perception of 'Liberate Hong Kong' slogan" July 7, 2021, *available at* https://www.thestandnews.com/english/trial-debates-tong-ying-kits-perception-of-liberate-hong-kong-slogan.

take particular 'secessionist' actions. Regarding the terrorism charge, the Defence argued that the defendant's conduct was not terrorist activity as he had attempted to avoid the police on his motorcycle and there was no serious violence or serious risk of harm to public safety or security. The Court observed that under the NSL, it could be a dangerous activity to ignore a police order to stop. The Prosecution responded that the context of the defendant's actions must be taken into account, including the meaning of the slogan, the defendant's decision to drive through an area frequented by protestors, and the date of the protest. On the following day, the Court ruled against the Defence, noting that for each of the three counts, the prosecution's evidence was not of such a tenuous character that a properly directed tribunal of fact or jury could not find the defendant guilty.

The Defence then presented its first witness, an expert witness and professor of political science testifying to the meaning of the slogan on the flag. This witness and the subsequent Defence witness, a communications professor, co-wrote an expert report for the Defence based on empirical surveys they conducted prior to the defendant's arrest (and so not for the Defence). The Prosecution initially objected to their testimony on relevance grounds, as neither expert was a historian but the Court rejected this argument, noting that the Prosecution had also stated that multiple perspectives could be useful.[93]

The first Defence expert, Professor Eliza W.Y. Lee from the Department of Politics and Public Administration, University of Hong Kong, testified that the term 光復 frequently means (and was translated in English) as 'reclaim' or 'recover' in community actions and further rejected that it necessarily meant 'liberate' or that 'liberate' had only one meaning. In response to a question from the Court about protestors waiving the colonial flag and whether returning Hong Kong to colonial rule meant severing it from China, the expert opined that the protestors may have wanted to return to a way of life rather than colonial rule and, as there was no realistic way to return to colonial life, stated that the protestors probably just wanted to vent frustration.

On cross-examination, when asked by the Prosecution whether they agreed with the Prosecution's expert witness that the slogan advocated Hong Kong's independence, the expert noted that this is one interpretation and that some people may associate the slogan with independence but that this was not the Defence experts' view. They further noted, responding to a question as to whether 'reclaiming sovereignty' meant to overthrow the Hong Kong regime, that Hong Kong has never been an independent country so it cannot 'reclaim' sovereignty. Asked by the Prosecution about the Edward Leung speech and whether his use of the slogan in his campaigning materials meant 'Hong Kong independence,' the first Defence Expert stated that Leung was probably speaking dramatically but also that he was a lawful candidate running for a lawful election at the time—conduct that did not suggest a desire to overthrow the government—and that if he won, he and his party would only have had one seat.

Finally, in response to questions about the report, the first Defence expert testified that their survey showed that the use of the slogan at issue in this case increased dramatically after the July 2019 violence against protestors at the Yuen Long mass transit station and correlated with protests against police brutality. (The Prosecution by contrast argued that the slogan was associated with a protest at the Liaison Office—the same day as the Yuen

[93] *Stand News*, "Prosecutors' view on language too rigid, media scholar says at Tong Ying-kit trial," July 14, 2021, *available at* https://www.thestandnews.com/english/prosecutors-view-on-language-too-rigid-media-scholar-says-at-tong-ying-kit-trial; TrialWatch monitoring, July 14, 2021.

Long attack on pro-democracy demonstrators—where the government flag and emblem were defaced).

The second expert witness for the Defence, Professor Francis L.F. Lee of the School of Journalism and Communication, Chinese University of Hong Kong testified that the Prosecution's expert provided an 'untenable' and overly rigid interpretation of the slogan language. They further testified that one cannot conclude all protesters at the same protest share a common goal or share a view beyond dissatisfaction with the government (at the Anti-Extradition protests, for example) and that there was no evidence that the meaning of the slogan evolved to mean one thing only. Their section of the Defence expert report focused on the correlation of the slogan with 'Hong Kong independence' based on social media posts and online conversations; they rejected the police expert argument (and Professor Lau's reliance on it) that the slogan is closely associated with Hong Kong independence, in part because the police investigator only examined videos that included both phrases.

The third and final witness for the Defence was the defendant's employer who testified that on the day of the protest, they were scheduled to have lunch with the defendant, and that Tong Ying-kit had provided first aid to individuals injured during the 2019 protests. The Prosecution questioned the witness as to whether text messages between the defendant and the witness, before and after the defendant's arrest, had been deleted.

On July 20, 2021, the Prosecution presented its closing argument. On the first charge of inciting secession, the Prosecution argued that the focus should be on how the defendant deliberately ran past the police checklines, which goes to his overall conduct in rejecting the sovereignty of the PRC over the HKSAR. It argued that the defendant's state of mind was demonstrated by his choice to display the flag while covering a large area of the island to show it to supportive onlookers. It further suggested that the defendant knew what the slogan meant as evidenced by his background, including his long-term residence in Hong Kong and his education background including his secondary education in Chinese, English and Chinese History. The Prosecution further pointed to the fact that he had an item with the slogan in his possession and so knew its meaning.

On the charge of terrorist activities, the Prosecution stated that the defendant repeatedly disregarded police warnings to stop, which was itself an act of "serious violence" against police officers and that his use of a motorcycle and his speeding and acceleration towards the police demonstrated this serious violence. It further argued that the defendant committed dangerous activities by speeding past police checkpoints and because displaying a large flag would impede the safety of other road users (and so is 'inherently dangerous'). These violent and dangerous acts, the Prosecution argued, were targeted at coercing the government. For the final count of dangerous driving, the Prosecution submitted that it was undisputed that the collision caused bodily harm to three police officers.

The Defence closed by first observing that the Prosecution's expert on the slogan concluded their expert report by saying "my view may not represent those of the defendant in this case," and pointing out that it cannot be said beyond a reasonable doubt that the defendant shared the Prosecution expert's understanding of the slogan. Indeed, the Defence said, even if the defendant had an underlying understanding of the meaning of the slogan as supporting independence, that does not mean that everyone else who saw it read or understood it the same way. The Court observed that the test is not whether the slogan "must" mean one thing but rather whether it was *capable* of inciting others to secession. The Defence noted

in response that whether there was a doubt as to what the slogan meant or whether its use amounts to or was capable of incitement, the defendant should receive the benefit of that doubt. The Court responded that if there is any doubt as to whether slogan is *capable* of incitement to secession, then the benefit of that doubt should go in favour of accused—but that the court must determine whether in light of all the evidence, the phrase was capable of inciting secession.

On the incitement prong, the Defence noted, there was no incitement to participate in any specific act and that it was immaterial that the defendant drove past some of the many people who were dissatisfied with the police and the government. Nothing had previously suggested that holding a banner to the public constitutes incitement, they argued, especially given the number of flags and banners that were flown in Hong Kong over the years.

On the second charge, the Defence noted that the defendant avoided the police officers, rather than targeting them and braked before the collision, and that the witness testimony on whether the defendant was accelerating or slowing down varied across witnesses. The Defence further observed that it could not be that an accident with police officers or hitting police officers demonstrates a person is challenging the sovereignty of the PRC.

Verdict July 27, 2021

On July 27, 2021, the Court of First Instance read its verdict out in court, finding Tong Ying-kit guilty on the two NSL charges, namely "incitement to secession" under Articles 20 and 21 and "terrorist activities" under Article 24 of the NSL. This was the first trial under the NSL and thus the first opportunity for a court to expound on the interpretation of and necessary elements of the offences under this law.

At the outset of the decision, the Court noted that "although this is a case presided over by a panel of three judges, the legal principles such as the burden of proof, the standard of proof, the presumption of innocence, the right of silence and the right to a fair trial, apply in this case as much as they apply in any criminal case tried in the Court of First Instance with a jury."[94]

1. Incitement to Secession (Count 1)

The secession charge centered on the meaning of the slogan "光復香港 時代革命 Liberate Hong Kong Revolution of our Times," which was on the flag flown on Tong Ying-kit's motorcycle on July 1, 2020.

While the Court accepted that there may be multiple meanings and understandings of the slogan, it stated that all the experts (including the Defence) acknowledged that one meaning of the slogan was for "Hong Kong Independence" and, as such, it was capable of having a secessionist meaning (i.e., to separate the HKSAR from the PRC).[95] Rejecting the Defence argument that the slogan had multiple meanings, the Court affirmed that it was concerned with "not whether the Slogan meant one and only one thing . . . but whether the Slogan, when taken as a whole after considering all the relevant circumstances, was capable of inciting others to commit secession."[96]

[94] HKSAR v. Tong Ying Kit, [2021] HKCFI 2200, Reasons for Verdict, July 27, 2021 at para. 7.
[95] *Id*. at paras. 137-139.
[96] *Id*. at para. 137.

Addressing whether the Defendant was inciting secession, the Court stated: "we have to ask ourselves this: having regard to the natural and reasonable effect of displaying the flag with the slogan on it in the particular circumstances of this case and when viewed as a whole, is such display of the slogan capable of inciting others to commit secession under Article 20 of the NSL?"[97] The Court noted the date of the protest (July 1st—the anniversary of resumption of sovereignty over Hong Kong by the PRC and also the first day the NSL was in effect), the defendant's conduct in driving around the island with the flag in plain view of the public, and his refusal to obey instructions from law enforcement and found that the context further supported a finding that the slogan was capable of inciting secession.[98]

As to the Defendant's state of mind and whether he actually meant to 'incite' secession, the Court looked at several (including some of the same) factors—his choice to publicly display the flag on this particular date, his mentioning of a "safe spot" in text exchanges, and his "repeated challenge to the police checklines, a symbol of law and order, a clear illustration of his determination to attract as much public attention as possible and to leave a great impact and a strong impression on the people." Taken together, it said:

> [W]e are sure that, as evidenced by the convoluted route he chose, the Defendant was out there deliberately displaying the flag. We are also sure that the Defendant fully understood the Slogan to bear the meaning of Hong Kong Independence and by displaying, in the manner he did, the flag bearing the Slogan, the Defendant intended to convey the secessionist meaning of the Slogan as understood by him to others and he intended to incite others to commit acts separating the HKSAR from the PRC.[99]

To the Defence argument that the Prosecution produced no evidence as to how the offence would be carried out, the Court observed that this was "immaterial" as there is no obligation to prove that the incitee carried out the offence, nor does incitement require "parity of mens rea on the part of the incite."[100]

Accordingly, the Court found Tong Ying-kit guilty of inciting secession.

2. Terrorist Activities: Acts Causing Grave Harm to the Society (Count 2)

The Court stated that under Article 24, the Prosecution has the burden to show that a person accused of terrorist activities participated in or threatened to commit any of the offences (1) listed under Article 24, such as "serious violence" or "dangerous activities threatening public safety"; (2) "which causes grave harm to the society or which is intended by the defendant to cause such harm"[101]; and (3) to "intimidate[e] the public in order to pursue political agenda."[102]

With respect to the first prong, the Court held that the Defendant engaged in "dangerous activities" as evidenced by the manner of his driving (allegedly endangering police officers

[97] *Id*. at para. 34.
[98] *Id* at paras. 40-41.
[99] *Id*. at para. 150.
[100] *Id*. at para. 144.
[101] *Id*. at para. 37.
[102] *Id*. at para. 171.

and the public), his refusal to obey orders, and the collision with the police.[103] The Court also accepted the Prosecution's contention that "serious violence against persons does not mean serious *injuries* caused to the persons"[104] (emphasis added).
The second prong—"grave harm to the society"—similarly does not require physical harm, according to the Court.[105] The Court held that the Defendant's actions targeted the police as an institution and as such threatened serious harm to society:

> In our view, a blatant and serious challenge mounted against the police force which is charged with the responsibility of maintaining public safety and security, and thus a symbol of law and order, will certainly instill a sense of fear amongst the law-abiding members of the public, in particular, apprehension of a breakdown of a safe and peaceful society into a lawless one.[106]

Finally, the Court considered whether the Defendant's dangerous driving actions were conducted in order to intimidate the public and pursue a political agenda. Here again, the slogan ("光復香港 時代革命 Liberate Hong Kong Revolution of our Times") became relevant, the Court found, because if it was capable of meaning 'Hong Kong Independence,' then the Court must next consider whether Tong Ying-kit's conduct on the day of the July 1, 2020 protest "was carried out with a view to coerce the CPG/HKSARG or to intimidate the public in order to pursue political agenda within the meaning of Article 24 of the NSL."[107] The Court held that given the Defendant's "understanding" of the slogan and his manner of displaying it on public thoroughfares, "we are sure that the Defendant's intention was to arouse public attention on the agenda of separating the HKSAR from the PRC, which clearly is a political agenda."[108]

The Court found Tong Ying-kit guilty of terrorist activities under Article 24 and declined to address the alternate ground of dangerous driving under the Road Traffic Ordinance.[109]

Mitigation July 29, 2021

At 10:00am, July 29, 2021, the Court of First Instance in the High Court heard mitigation evidence and arguments for the Defendant. The Defence argued that, regarding the incitement offence, there was no direct communication between the Defendant and an incitee or any specific directions to do something; moreover, they argued, there was no evidence of any impact aside from some clapping at the scene and no serious injuries caused by the crash. They also argued that the two offences—terrorism and incitement—"melded into one"—an argument the Court rejected, noting that the two offences had distinct elements even if they stemmed from the same facts.

The Prosecution observed that the Court here should look to guidance from the PRC law on the sentencing issue of fixed-term imprisonment and stated that the Prosecution had

[103] *Id*. at paras. 152, 158, 160
[104] *Id*. at para. 159.
[105] *Id*. at para. 161.
[106] *Id*. at para 162.
[107] *Id*. at para. 48.
[108] *Id*. at para. 164.
[109] *Id*. at paras. 171-172.

submitted commentaries and legal tests of PRC law.[110] Under PRC law, the Prosecution noted, general circumstances cannot reduce a person's sentence below the minimum provided by statute. The Court however stated that it would follow traditional rules of statutory interpretation under Hong Kong law to determine the sentence and would not consider outside authorities.

Sentencing July 30, 2021

In its reasons for sentencing, the Court announced a sentence of 6.5 years for the charge of inciting secession and 8 years for the charge of terrorist activities—a total of 9 years with 2.5 of the years for the terrorism charge running consecutively with the secession charge.

Starting with the offence of secession: the Court began by noting that HKSAR's legal status as a part of the PRC, and as explained under Articles 1 and 12 of the Basic Law, is a fundamental provision of the Basic Law:

> Accordingly, in our view, any person in the HKSAR who commits secession or carries out any act undermining national unification or inciting other persons to do so must be suitably punished for contravening such fundamental provisions in the Basic Law. Moreover, the punishment must have as its aim a general deterrent effect on the community as a whole, as well as a specific deterrent effect on the individual in question.[111]

The Court held that the Defendant "deliberately challenged a number of police checklines in order to attract as much attention to the secessionist message on the flag as possible and to leave a great impact and a strong impression on people."[112] As to the Defence argument that the defendant was not inciting a particular person to take a specific act, the Court held that "the criminality of the offence of incitement does not depend on the incitee actually acting upon the incitement to commit the offence but on the incitor who seeks to influence another to commit an offence."[113] The date of the protest was also significant, the Court held, and taking these factors together, it found that the offence was sufficiently serious to warrant a sentence of not less than five years.[114] However, because the defendant acted alone and without a particular plan ("the Slogan was a general call for the separation of the HKSAR from the PRC"),[115] it set the starting point at six and a half years on this charge.

On the charge of terrorist activities, the Court found that the defendant's actions were pre-planned[116] and "created a very dangerous situation for the road users and which indeed caused injuries to three police officers."[117] The Court, after observing that the police injuries were not serious bodily harm, stated that it must take its finding that the Defendant's activities were secessionist into account[118] and held: "whoever carries out terrorist activities with a view to intimidating the public in order to pursue political agenda, whatever that is,

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[110] According to Stand News, the source material is 《刑法條文理解適用與司法實務全書》.
https://www.thestandnews.com/court/國安法首案-不斷更新唐英傑兩罪罪成今求情-法院保安明顯加強
[111] HKSAR v. Tong Ying-kit, [2021] HKCFI 2239, Reasons for Sentence, July 30, 2021, para. 15.
[112] *Id*. at para. 22.
[113] *Id*. at para. 21.
[114] *Id*. at para. 24.
[115] *Id*. at para.25.
[116] *Id*. at para. 33.
[117] *Id*. at para. 32.
[118] *Id*. at para. 36.

should be condemned and punished, but when the political agenda is secessionist in nature, it is our view that there is an added criminality in that such an agenda is seeking to undermine national unification."[119] It held the starting point for this charge to be 8 years.

The Court next held that despite the Defendant's expressions of remorse, "the greatest manifestation of such remorse" would have been pleading guilty, which he did not do.[120] Moreover "in the face of serious offences as the two counts in this case, his good character is not of any mitigating value"[121] and the evidence that he is the main family bread-winner and of the ill-health of his family "are matters which the Defendant should have thought about before embarking on his criminal acts."[122]

The Court then determined that while consecutive sentences would be appropriate, "considering the totality principle" it ordered partly consecutive and partly concurrent sentences such that "2½ years of the sentence for count 2 are to run consecutively to that of count 1, the rest to run concurrently, resulting in a total term of 9 years. We consider that this overall term should sufficiently reflect the Defendant's culpability in the two offences and the abhorrence of society, at the same time, achieving the deterrent effect required."[123]

On August 17, 2021, Tong Ying-kit filed an appeal of his conviction and sentence.

[119] *Id*. at para. 37.
[120] *Id* at para. 40.
[121] *Id*. at para.41
[122] *Id*. at para. 42.
[123] *Id*. at para. 43.

METHODOLOGY

A. THE MONITORING PHASE

TrialWatch monitored the trial proceedings in Hong Kong from June 23 through July 20, 2021, as well as the verdict which took place on July 27, 2021. TrialWatch compiled the pretrial decisions as well as the High Court's decisions on the verdict and sentence. Proceedings generally took place in English with some witnesses testifying in Cantonese.

B. THE ASSESSMENT PHASE

Rebecca John, a member of the TrialWatch Expert Panel, reviewed the results of the monitoring and the Court's written decisions on the pretrial matters, the verdict, and the sentence, in addition to reviewing the criminal statutes under which the defendants were charged. TrialWatch staff prepared drafts of the report that Ms. John reviewed and which facilitated her legal conclusions and grading of the trial.

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. Where Prosecution evidence was discovered to be missing, the Court appropriately limited questioning related to or any reliance on that evidence. The Court issued public rulings on both its verdict and its reasoning behind the sentence imposed; and each written decision appropriately included the Court's factual and legal conclusions. In this first NSL trial, moreover, the panel of three judges took pains to reiterate that Hong Kong's Basic Law still applied and rejected the Prosecution's attempt to apply PRC law to the sentencing.

Nevertheless, even as many critical procedural rights were respected in this case, the trial raises significant questions as to the trial's substantive fairness, stemming from (a) concerns regarding the independence of the tribunal; (b) violations of the principle of legality; and (c) abuse of process. In particular, the defendant in this case, Tong Ying-kit, was charged under a new law, on the day it came into effect, when many in Hong Kong had not yet seen it, and under offenses that were broad and often vague, and were made broader by the Court's interpretation of them.

Violations of the Right to an Independent Tribunal

Under the ICCPR, "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."[124] As explained by the UN Human Rights Committee (HRC), the body that interprets and enforces the ICCPR, this requirement of competence, independence and impartiality "is an absolute right that is not subject to any exception."[125]

[124] ICCPR, art. 14(1).
[125] Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 19

Judicial Independence

The HRC has held that the requirement of judicial independence encompasses:

> the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature.[126]

The HRC has further noted that a "situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal."[127] As the Special Rapporteur on the Independence of Judges and Lawyers has observed, "undermining [judges'] independence jeopardizes most judicial guarantees."[128]

The Basic Principles on the Independence of the Judiciary further provide that "[a]ny method of judicial selection shall safeguard against judicial appointments for improper motives."[129] Likewise, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa provide that "[a]ny method of judicial selection shall safeguard the independence and impartiality of the judiciary"[130] and encourages transparency and accountability in judicial selection. In addition to these protections on the front end, human rights law requires that judges be protected by conditions of tenure that insulate them from removal or interference based on their rulings. The UN Human Rights Committee has said that judges should only be removed or suspended on "serious grounds of misconduct or incompetence."[131] Similarly, the UN Basic Principles on Judicial Independence note that any decisions in removal proceedings "should be subject to an independent review."[132] Further, Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe states, "[j]udges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office."[133] The UN Human Rights Committee has, for instance, criticised a five-year term for judges to the Central Court in the Democratic People's Republic of Korea, which it considered endangered the independence of the judiciary.[134]

Tong Ying-kit was the first person to be tried under the National Security Law and, as provided for under that law, his trial was presided over by a panel of three specially-designated judges appointed by the Chief Executive. The procedure by which these judges are appointed and their conditions of tenure raise significant concerns regarding the

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[126] *Id*.
[127] *Id*.; Human Rights Committee, Oló Bahamonde v. Equatorial Guinea, U.N. Doc. CCPR/C/49/D/468/1991, November 10, 1993, para. 9.4.
[128] Report of the Special Rapporteur on the Independence of Judges and Lawyers, Aug. 12, 2008, UN Doc. A/63/271, para 36.
[129] UN Basic Principles on the Independence of the Judiciary, Principle 10, *available at* https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx.
[130] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Section A(4)(h).
[131] HRC General Comment 32, para 20.
[132] UN Basic Principles on the Independence of the Judiciary, Principle 20.
[133] Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe, Principle 1(3).
[134] HRC Concluding Observations: Democratic People's Republic of Korea, U.N. Doc CCPR/CO/72/PRK (2001), para 8.

independence of these judges from the Executive branch and thus may imply to a reasonable observer that these judges may not be fully impartial in the trials they oversee.

Article 44 of the NSL states:

> The Chief Executive shall designate a number of judges … to handle cases concerning offence endangering national security. Before making such designation, the Chief Executive may consult the Committee for Safeguarding National Security of the Hong Kong Special Administrative Region and the Chief Justice of the Court of Final Appeal. The term of office for the aforementioned designated judges shall be one year. A person shall not be designated as a judge to adjudicate a case concerning offence endangering national security if he or she has made any statement or behaved in any manner endangering national security. A designated judge shall be removed from the designation list if he or she makes any statement or behaves in any manner endangering national security during the term of office.[135]

This regime for the appointment and removal of NSL judges presents several concerning elements. First, there is no public information at this point on the criteria by which the Chief Executive selects national security judges, but the text of the law suggests that there are no checks or limiting principles. While appointment by the Executive may not in and of itself be evidence of a violation, here, given the highly politicized nature of the law and in light of the lack of transparency, an objective observer would have serious grounds for concern. The UN Special Rapporteur on the Independence of Judges and Lawyers has observed that "a non-transparent and subjective case-assignment system is vulnerable to manipulation and corruption."[136] This process raises similar concerns.

Article 44 also provides expansive grounds for removal. While stating a designated judge can be removed for statements or acts endangering 'national security,' it does not explain who can make that discretionary decision and based on what standard. Indeed, given the inclusion of this provision in the NSL, one might assume that Article 44 covers speech or actions that do not constitute national security *offences* and yet still implicate national security—but there is no clarity on what that difference entails.[137] This lack of clarity and the apparently discretionary nature of decisions on removal suggest that national security judges do not have the requisite independence and, troublingly, also suggests that the speech and actions of judges will be closely monitored and policed. Moreover, not only can national security-designated judges be removed, but they only serve in this capacity for one year, which like the five-year regime criticized by the UN may not provide sufficient length of tenure to insulate them from political pressure.

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[135] NSL, Article 44, *available at*: https://www.gld.gov.hk/egazette/pdf/20202448e/egn2020244872.pdf.
[136] Report of the Special Rapporteur on the Independence of Judges and Lawyers, Aug. 13, 2012, UN Doc. A/67/305, para 65.
[137] Absent further clarity on what speech or conduct is prohibited, this provision may also infringe on the judges' own rights to freedom of expression. As the UN Basic Principles on the Independence of the Judiciary state, "In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary." UN Basic Principles on the Independence of the Judiciary, Principle 8.

Impartiality

Article 14 of the ICCPR also requires that courts be impartial. This has two components: "First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial."[138] The first component of this test is subjective—referring to the individual judge and whether their conduct or bias might impact their decision-making in a specific case. The second component is objective and is tied to the principle that "[n]ot only must Justice be done; it must also be seen to be done."[139] If there is evidence that gives rise to justifiable doubts in the mind of this reasonable observer as to the court's impartiality, that court cannot be deemed impartial.[140]

In this case, even without any specific allegation that any of the three judges presiding were motivated by personal bias or prejudice, the lack of structural judicial independence surrounding their appointment and terms of tenure could give a reasonable observer the impression that this panel could not be expected to act impartially.

Adding to this, the political context in which these charges were filed and this case was presented contributes to a reasonable impression that judges assigned to the national security cases may not be impartial. First, over the last year, there have been mounting concerns raised regarding infringements on the independence of the judiciary in Hong Kong. For example, in April 2020 even before the NSL went into effect, 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.[141] In subsequent months, judges in Hong Kong have been criticized in pro-Beijing publications for ruling in favour of individuals facing charges for participation in political protests in Hong Kong.[142]

Second, there has been significant public discussion of the concern that the PRC will exert control over criminal justice in Hong Kong, in particular by bringing cases under the NSL which also makes the PRC Standing Committee the ultimate interpreter of the law.[143] For

[138] Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 21. *See also* Human Rights Committee, Karttunen v. Finland, U.N. Doc. CCPR/C/46/D/387/1989, November 5, 1992, para. 7.2.

[139] R v Sussex Justices, ex parte McCarthy ([1924] 1 KB 256, [1923] All ER Rep 233

[140] ECtHR Incal v Turkey (1998), para 71.

[141] *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/.

[142] *See e.g.,* Kelly Ho, *Hong Kong Free Press*, "Hong Kong judiciary dismisses complaints against magistrate over 6 protest rulings," Oct. 8, 20220, *available at* https://hongkongfp.com/2020/10/08/hong-kong-judiciary-dismisses-complaints-against-magistrate-over-6-protest-rulings/; *Associated Free Press*, "Beijing loyalists target Hong Kong judges after protester acquittals," Nov. 8, 2020; Zen Soo, *Associated Press*, "Hong Kong's top judge cautious on calls for judicial reform," Jan. 5, 2021, *available at* https://apnews.com/article/hong-kong-54a6a1a2d3611dae2411188d30358013 (noting that "In recent weeks, Chinese officials and state-owned media have accused the semi-autonomous city's courts of misinterpreting Hong Kong's mini-constitution, the Basic Law, in rulings relating to last year's pro-democracy protests.")

[143] Article 65 of the NSL; *see* Primrose Riordan and Nicolle Liu, *Financial Times*, "Hong Kong's independent judiciary braced for Beijing onslaught," Nov. 25, 2020, *available at* https://www.ft.com/content/d08b540f-f124-437b-976c-013c431f61cc; Mary Hui, *Quartz*, "Beijing is breaching Hong Kong's final line of defense: its

instance, one legal professional was quoted as saying that the PRC is "trying to make everything the national security law."[144]

Further, even if the judges in this case did not exhibit personal bias and did not appear to have prejudged it based on any statements they had made, they were hand-picked by the Chief Executive and she has called those opposing the NSL "the enemy of the people" and said they were "colluding with foreign forces" and undermining security.[145] Even beyond demonstrations related to the NSL, the Chief Executive had warned that some protests in Hong Kong were "terrorist" acts and serious security threats.[146] Such comments from the political official who appointed the judges in this case—without any oversight or transparency--could leave the public with the impression that the opinions and biases of the Executive may influence the panel or the selection of the judges included therein, thus undermining the impartiality of the tribunal.

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Finally, the impression that this Court was not sufficiently independent and impartial is exacerbated by the absence of a jury. Although juries are not an "absolute" right,[147] a jury trial has been a standard and central feature in Hong Kong criminal trials and is described by the Hong Kong judiciary's website as "[o]ne of the most important features" of the legal system.[148] Under Article 46 of the NSL, the Secretary of Justice may determine that a case is to be heard by a panel of judges with no jury "on the grounds of, among others, the protection of State secrets, involvement of foreign factors in the case, and the protection of personal safety of jurors and their family members."[149] The High Court, reviewing a challenge from Tong Ying-kit to the denial of a jury, held that this decision is not reviewable by courts and is in the sole discretion of the Prosecution.[150] The denial of a jury in this particular trial is troubling, taken together with these other novel and extraordinary changes in criminal procedure, because it suggests that normal fair trial protections might be sidestepped because of the nature of the charges. In this case, it is further problematic because so much of the case, as described in the next section, is about the impact of the

judiciary," Dec. 29, 2020, *available at* https://qz.com/1944464/hong-kongs-judges-are-its-final-line-of-defense-from-beijing/

[144] Mary Hui, *Quartz*, "Beijing is breaching Hong Kong's final line of defense: its judiciary," Dec. 29, 2020, *available at* https://qz.com/1944464/hong-kongs-judges-are-its-final-line-of-defense-from-beijing/

[145] *Reuters*, "Hong Kong leader says opponents of security law are 'enemy of the people,'" June 15, 2020, *available at* https://www.reuters.com/article/us-hongkong-protests/hong-kong-leader-says-opponents-of-security-law-are-enemy-of-the-people-idUSKBN23N08U

[146] *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; *The Times*, "Hong Kong politician condemns protest violence as 'terrorism,' echoing Beijing," May 26, 2020, *available at* https://www.thetimes.co.uk/article/china-defends-new-hong-kong-security-laws-as-protests-return-f7bb85kxx; Anthony Dapiran, *AsiaLink*, "Hong Kong's Alarming New Reality: Peaceful Protest as Terrorism," July 29, 2020, *available at* https://asialink.unimelb.edu.au/insights/Hong-Kongs-Alarming-New-Reality-Peaceful-Protest-as-Terrorism.

[147] In the Appeal of Tong Ying-kit and Secretary for Justice, [2021] HKCA 912, June 22, 2021.

[148] Hong Kong Government, Judiciary, Guide to Court Services *available at* https://www.judiciary.hk/en/jury/jury.html (accessed September 15, 2021); *See also* Section 41(2), Criminal Procedure Ordinance (Cap 221); The Law Reform Commission of Hong Kong, *Criteria for Service of Jurors*, (2009-2010) at para. 7, *available at* https://www.legco.gov.hk/yr09-10/english/panels/ajls/papers/aj0628-sum100623-e.pdf ("The jury is most commonly used in criminal trials. All criminal trials in the Court of First Instance must be held with a jury.")

[149] Article 46 of the NSL.

[150] In the Appeal of Tong Ying-kit and Secretary for Justice, [2021] HKCA 912, June 22, 2021.

slogan and Tong Ying-kit's collision on the public and because this was the first test for how this law should be interpreted.[151] Having a jury comprised of the public may have been helpful not only to show justice being done but also to guide how these charges should be understood.

Again, the Court is to be commended for ensuring a public hearing and verdict so that the public as well as the Defendant can understand what happened at trial and the basis for the Court's decision. Nevertheless, the absence of a jury in this, the first NSL trial in Hong Kong, before a court where judges are selected by the Chief Executive, could certainly give a reasonable observer the impression that the decision-making process in this courtroom was not impartial or independent.

Violations of the Principle of Legality

The principle of legality, at the core of criminal law and the rule of law overall, requires that offenses be clearly defined and prohibits retroactive application of a law. This ensures that a person is not punished for an act or omission they would not have known to be a crime at the time and protects against arbitrary application of the law. The principle is embodied in Article 15 of the ICCPR, which states: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."[152]

As the European Court of Human Rights has explained, the principle of legality "embodies, more generally, the principle that only the law can define a crime and prescribe a penalty," which it must do clearly and precisely.[153] The Inter-American Court of Human Rights has further elaborated on the meaning of the legality principle, noting that it requires "a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviors that either are not punishable offences or are punishable but not with imprisonment."[154] Indeed, as the Permanent Court of International Justice explained in 1935: "It must be possible for the individual to know, beforehand, whether his acts are lawful or liable to punishment."[155]

The Court convicted Tong Ying-kit of two offenses under the National Security Law, namely, inciting secession and terrorist activities. This law was criticized by human rights experts when it was introduced for the overbreadth and vagueness of its provisions[156]; its application

[151] Indeed, one Hong Kong judge speaking anonymously said that juries are particularly useful for giving a common-place understanding of things like political slogans. Holmes Chan, *Vice*, "Inside the Surreal Trial of the 'Most Benevolent Terrorist in the World,'" September 20, 2021, *available at* https://www.vice.com/en/article/93y47p/hong-kong-national-security-trial-tong-ying-kit

[152] United Nations International Covenant on Civil and Political Rights (ICCPR), Mar. 23, 1976, 14668 U.N.T.S. 172, art. 15.

[153] ECtHR, Kokkinakis v. Greece, App. No. 14307/88, May 25, 1993, para. 52.

[154] Inter-American Court of Human Rights, Castillo Petruzzi et al. v. Peru, Series C, No. 52, May 30, 1999, para. 121.

[155] Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, Advisory Opinion, 1935 PCIJ (ser. A/B) No.65 (Dec.4) at 56-57.

[156] 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')),"

in this first case is of significant concern under the principle of legality given this overbreadth and the lack foreseeability in how it was in fact applied. Further, this case implicates the principle of legality because the charges themselves and as applied undercut the right to freedom of expression.

1. Incitement to Secession

This case, and the charge of inciting secession in particular, centers on the meaning of a slogan commonly used in protests in Hong Kong: "光復香港 時代革命," translated in English as "Liberate Hong Kong Revolution of Our Times." This phrase, which was printed on a flag attached to the Defendant's motorcycle at the July 1, 2020 protest, had been used at numerous different protests over the years. By contrast, 'secession' is a new crime in Hong Kong, and the court's novel and broad legal ruling, which piled inferences on top of inferences, was not foreseeable at the time of the offence, which was also the day the NSL took effect.

Because the charge is not secession but rather *incitement* to secession, this case is at its core a speech case and as such, raises further concerns under the principle of legality because of the overbreadth of the law on its face and as applied and the potential criminalization of political expression.

(a) *Overbreadth and Issues of Foreseeability*

The European Court of Human Rights has observed that the principle of legality embodies the requirement that a criminal law "must not be extensively construed to an accused's detriment, for instance by analogy."[157] All elements of a law must be proven, including any "mental link" embodied in the offence, not just assumed. In the *Case of G.I.E.M. S.R.L. and others v. Italy*, for example, the Grand Chamber of the European Court held that under the principle of legality, any punishment "requires the existence of a mental link through which an element of liability may be detected in the conduct of the person who physically committed the offence."[158]

Here, the Court made a series of inferences regarding what the slogan meant (separation of the HKSAR from the PRC by force), then what its use meant (incitement to secession), assigning criminal liability and a six-and-a-half year sentence in prison to the Defendant without seeking to show what the slogan meant *to the Defendant* or what the likely impact of displaying this flag—a common fixture at protests—would be. This expansive interpretation allowed the Court to sidestep a more critical inquiry into whether all the elements of the offence were either clear or actually met. In so doing, the Court absolved the Prosecution of needing to prove intent; rather, it could be assumed from the underlying conduct, based on a series of inferences.

OL CHN 17/2020, Sept. 1, 2020, available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25487.

[157] ECtHR, Vasiliauskas v. Lithuania, Application no. 35343/05, Oct. 20, 2015, para. 154.

[158] Case of G.I.E.M. S.R.L. and others v. Italy, Applications nos. 1828/06 and 2 others, June 28, 2018, para.242; *see generally,* European Court of Human Rights, *Article 7: The "quality of law" requirements and the principle of (non-)retrospectiveness of the criminal law under Article 7 of the Convention* (2019), *available at* https://www.echr.coe.int/Documents/Research_report_quality_law_requirements_criminal_law_Art_7_ENG.PDF.

As regards the meaning of the slogan: the Court said it had "no difficulty in coming to the sure conclusion that the Slogan as at 1 July 2020 was capable of carrying the meaning of separating the HKSAR from the PRC and was capable of inciting others to commit secession."[159] In its verdict, the Court did not dispute that the slogan had multiple possible interpretations; rather, it held that so long as *one* interpretation was "capable of" meaning "Hong Kong Independence"—which in turn the Court held was "capable of" meaning the separation of HKSAR from the PRC—the Court could then look to the surrounding circumstances to determine whether the use of the slogan was "capable of" inciting secession.

This stretch—that something is *capable of* meaning one thing and so no other meanings are relevant—is problematic from a principle of legality standpoint in that it provides no guidance or limiting principle to the public as to what is prohibited. Indeed, it suggests that anything *might* be prohibited. This is not a strict liability offence and the Court acknowledges that 'incitement' does require proof of *mens rea*.[160] But rather than proving that this specific individual used this specific slogan in order to incite secession, or knowing that its use would have such an impact, the verdict relies on the fact that this political slogan was displayed at a public political protest to demonstrate that he had the requisite intent for this offence. One is left with the impression that almost any political speech at a political protest *could* have secessionist meaning, in which case the context might mean that intent to incite secession could also be inferred.

Again, this was a slogan displayed at many protests, and the Prosecution presented no evidence that the slogan had or was likely to incite secession. The Court said that the *impact* on those potentially incited does not need to be evidenced; but surely, the plausibility of the impact should be relevant when an accused person is facing criminal liability and the elements of the offense are so broad.

The principle of legality protects against "arbitrary prosecution, conviction and punishment."[161] Although courts have an inevitable role in clarifying the law through judicial interpretation, they must ensure that any such development and construal is both consistent with the essence of the offence and also could reasonably be foreseen.[162] Foreseeability is critical to guard against arbitrary application of the law[163] and is particularly important the first time the courts interpret a new law.[164]

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[159] Reasons for Verdict, para. 141.

[160] The "capable of" language and the leap to assigning liability for such a serious offence without proving this was the intention of the accused may also implication the presumption of innocence. 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. This right further guarantees that an accused has the benefit of the doubt in a criminal trial. 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.

[161] ECtHR, S.W. v. the United Kingdom, 22 November 1995, para. 34, Series A no. 335-B; ECtHR, C.R. v. the United Kingdom, 22 November 1995, para. 32, Series A no. 335-C; ECtHR, Case of Del Rio Prada v. Spain, Application No. 42750/09, Oct. 21, 2013, para. 77

[162] ECtHR, Vasiliauskas v. Lithuania, Application no. 35343/05, Oct. 20, 2015, para. 155; *S.W. v. the United Kingdom*, 22 November 1995, para. 36, Series A no. 335-B; *C.R. v. the United Kingdom*, 22 November 1995, para. 34, Series A no. 335-C; Case of Del Rio Prada v Spain, Application No. 42750/09, Oct. 21, 2013, para. 93.

[163] ECtHR, Case of Del Rio Prada v Spain, Application No. 42750/09, Oct. 21, 2013, para. 93.

[164] *See* ECtHR, Jorgic v. Germany, Application no. 74613/01, July 12, 2007, para. 109; *see generally* European Court of Human Rights, Guide on Article 7 of the European Convention.
on Human Rights (April 2021) p.16, *available at* https://www.echr.coe.int/Documents/Guide_Art_7_ENG.pdf

In this case, the first under the NSL, it was simply not foreseeable that displaying a flag with a slogan commonly used at Hong Kong protests that did not call for violence would constitute "inciting secession" and be a national security offence under this new law. Put differently: even if the Defendant or the general public did not associate the slogan with a call for secession, the court finds that his decision to display the flag at one of many protests in Hong Kong on July 1, 2020 meant he intentionally sought to incite secession. This broad application of the law violates the principle of legality.

(b) *Freedom of Expression*

Article 19 of the ICCPR states that everyone has the right to freedom of expression, including the "freedom to seek, receive and impart information and ideas of all kinds,"[165] including views considered to be "offensive."[166] Where the speech at issue is political, concerning public officials and public institutions, the UN Human Rights Committee has said, "the value placed by the Covenant upon uninhibited expression is particularly high."[167]

Indeed, political speech is one of the most protected forms of speech under international human rights law because of the central role it plays in democratic governance. The European Court of Human Rights has held that freedom of expression protects ideas and speech that may "offend, shock or disturb the state or any section of the population"[168] or is "provocative or insulting"[169] to government authorities. (Hong Kong law similarly recognises this important protection for free expression including speech critical of the government.[170])

For these reasons, the UN Human Rights Committee has stated that in cases implicating the right to freedom of expression, it is critical that the law must not "confer unfettered discretion … on those charged with its execution,"[171] as this could give rise to abusive limitations on speech. Thus, the first requirement of any restriction on speech is that the restriction be "prescribed by law."[172] According to the Committee, this means that legislation restricting freedom of expression must be "formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly."[173]

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[165] ICCPR, art. 19.
[166] General Comment No. 34
[167] General Comment No. 34, para. 38.
[168] ECtHR, Handyside v. UK, Application no. 5493/72, 7 December 1976, para. 49.
[169] ECtHR, Özgür Gündem v. Turkey, Application no. 23144/93, 16 March 2000, para. 60 ("The Court reiterates that the dominant position enjoyed by the State authorities makes it necessary for them to display restraint in resorting to criminal proceedings. The authorities of a democratic State must tolerate criticism, even if it may be regarded as provocative or insulting.")
[170] HKSAR v Ng Kung Siu, [2000] 1 HKC 117, 135 ("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").
[171] UN Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34 (hereinafter "General Comment No. 34"), September 12, 2011, para. 25. Although the Committee in this Comment is discussing the principle of legality in the context of restrictions on the right to freedom of expression, these requirements are fundamental to the legality principle in any context.
[172] UN Human Rights Committee, Kim v. Republic of Korea, U.N. Doc. CCPR/C/64/D/574/1994, Jan. 4, 1999, para. 12.2.
[173] General Comment No. 34, para. 25. See also U.N. General Assembly, Report of the Special Rapporteur on the promotion and protection of freedom of expression, U.N. Doc, A/74/486, Oct. 9, 2019, para 6.

Where speech may be criminalized in the name of national security or terrorism, it is more, not less, important to specify what speech is restricted.[174] Background political violence does not justify criminalizing speech even if some limited restrictions may be permissible for speech that incites violence.[175] Further, in specific cases, the authorities must "demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat."[176]

The European Court has explained that even speech or ideas that implicate territorial integrity should not be restricted by the government unless they include incitement to violence.[177] Words such as "liberation" or "struggle" are not sufficient in and of themselves to constitute incitement to violence.[178] For example, in *Gerger v. Turkey*, the European Court of Human Rights found that an individual's conviction for a public message read out at a commemoration service that invoked the "liberation" of the Kurdish people was "disproportionate," particularly in light of the one year and eight month sentence he received, and not "necessary in a democratic society."[179] Authorities cannot simply claim that words implicitly support or induce violence but rather have the burden of showing that the words would plausibly incite violence.[180]

Under the Johannesburg Principles on National Security, expression may only be punished as a threat to national security "if the government can demonstrate that: (a) the expression is intended to incite imminent violence; (b) it is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence."[181] On the contrary, under the Johannesburg Principles, speech that "advocates non-violent change of government policy or the government itself" is protected expression.[182]

When the NSL was introduced, several UN human rights experts raised concerns with the law on its face because of its "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."[183] Although the NSL states that human rights

[174] *See* ECtHR, Başkaya and Okçuoğlu v. Turkey, Applications nos. 23536/94 and 24408/94, 8 July 1999, para. 62.
[175] *See* ECtHR, Sürek and Özdemir v. Turkey, Applications nos. 23927/94 and 24277/94, 8 July 1999, para. 61.
[176] General Comment No. 34, para. 35.
[177] ECtHR, Sürek v. Turkey (No. 4), Application no. 24762/94, 8 July 1999, paras. 55-60; ECtHR, Ceylan v. Turkey, Application no. 23556/94, 8 July 1999, paras. 33-36.
[178] ECtHR, Gerger v. Turkey, Application no. 24919/94, 8 July 1999, para. 50 ("even though it contained words such as "resistance", "struggle" and "liberation", it did not constitute an incitement to violence, armed resistance or an uprising; in the Court's view, this is a factor which it is essential to take into consideration.")
[179] *Id*. at paras. 51-52.
[180] *See, e.g.*, ECtHR, Hogefeld v. Germany, Application. no. 35402/97, 20 January 2000; ECtHR, Zana v. Turkey, Case no. 69/1996/688/880, 25 November 1997, paras. 57-62. *See generally* OSCE Office for Democratic Institutions and Human Rights, COUNTERING TERRORISM, PROTECTING HUMAN RIGHTS: A MANUAL (2007) at 223.
[181] The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information, U.N. Doc. E/CN.4/1996/39 (1996), Principle 6.
[182] The Johannesburg Principles, Principle 7.
[183] 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

including freedom of speech "shall be respected and protected,"[184] the offence of secession under the NSL does not require "force or threat of force,"[185] nor does 'incitement to secession.' Further, from the way the offense was interpreted by the Court, it is clear that it does not even require significant proof of intent or knowledge of likely effect. This renders the offence overbroad.

Moreover, in this specific case, the conduct Tong Ying-kit is accused of—waving a flag—is a public profession of political opinion.[186] It is, as such, protected speech. The Court acknowledged that the Defendant's conduct was not the "worst of its kind." Instead, the Court considered that "the Slogan was a general call for the separation of the HKSAR from the PRC, without an elaborate plan being conveyed to the public at the same time,"[187] thus making clear that it was focused on the *speech* and not any actual act of secession.

This case is thus similar to *Parmak and Bakir v. Turkey*, in which the European Court of Human Rights found a violation of the principle of legality in a case where a Turkish court convicted two individuals of membership in a terrorist organization. Among other factors, the European Court took issue with the fact that "there is no indication in the case-file that the organisation in question, beyond the mere proclamation of certain goals, had adopted any concrete preparatory steps or indeed any form of action with a view to carrying out violent acts."[188]

Moreover, in this specific case, in assessing whether displaying the flag constituted incitement to secession, the Court cites several factors— "the date, the time, the place and the manner" in which the flag was shown, all "deliberately picked for attracting public attention"[189]—that are a description of a public assembly, which is protected under human rights law. That is, the Court transforms the publicity and political salience of speech into an aggravating circumstance.

Taken together with the inferential leaps described in the prior section, this renders the application of the offense insufficiently precise to satisfy the requirements for restrictions on freedom of expression.

Further**,** by the same logic, because the authorities have not demonstrated that the defendant had the intent to or that the slogan had plausible potential to incite violence, the

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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?gId=25487.

[184] NSL Article 4.

[185] NSL Article 20. *See also* Reasons for Verdict, para. 11 ("In our ruling delivered orally on 29 April 2021, we pointed out Article 20 clearly provides that the use of force or a threat to use force is not a necessary element of the offence. We do not consider any further explanation is required on this point given the unambiguous words used.").

[186] Although not addressed or relevant to the Court's verdict in this specific case, it is notable that the Prosecution's expert witness, Professor Lau, also said that a political candidate who used this slogan in his campaign "made this vote equivalent to a weapon" and said that "to a certain degree he was using the vote to achieve his purpose of overthrowing this regime." TrialWatch monitoring, July 2, 2021; *StandNews*, "Tong Ying-kit's slogan is about 'taking Hong Kong back from the enemy', professor tells court," July 2, 2021, *available at* thestandnews.com/English/tong-ying-kits-slogan-is-about-taking-back-hong-kong-from-enemy-professor-tells-court.

[187] Reasons for Sentencing paras. 24-25.

[188] EctHR, Parmak and Bakir v Turkey, Application no. 22429/07, Dec. 3, 2019, at para. 72..

[189] Reasons for Sentencing para. 22.

application of a severe punishment—six and a half years in prison—is neither necessary nor a proportionate response to speech that the authorities disfavor.[190]

2. Terrorist Activities

Tong Ying-kit's conviction for "terrorist activities" and the resulting 8-year sentence presents similar principle of legality concerns stemming from the statute's overbreadth and the seemingly conclusory manner in which the Court found liability. As addressed in the previous section, the principle of legality requires that criminal offences and their elements be clearly constructed to protect against arbitrary conviction and punishment[191] and requires that a criminal law "must not be extensively construed to an accused's detriment, for instance by analogy."[192] In all cases, but in particular in those concerning "terrorist" offences where the potential punishment is severe and the risk to fair trial rights is acute, courts must ensure that the conduct charged is consistent with the essence of the offence and that the application and interpretation of the law to this conduct could reasonably be foreseen.[193]

Recognizing that cases involving terrorism charges are often those that most test fair trial rights, the Council of Europe's Consultative Council of European Judges (CCJE) urges judges overseeing these cases to ensure that the offence of "terrorism" meets the legislative goal of the statute and prosecutions for terrorism do not exceed or abuse the scope of the offence.[194] As the European Court of Human Rights observed in *Parmak and Bakir v. Turkey*, even if terrorist offences may be difficult to define given shifting terrorist tactics, domestic courts must respect the principle of legality and impose reasonable limits on novel judicial interpretations.[195]

In this case, the Court held that the Defendant had committed "terrorist activities" within the meaning of the NSL—again, which came into effect on the same day as the events in question—and that each element of the offence was met. However, the elements in Article 24 of the NSL are broad, which made it possible for the Court to assert that the Defendant's conduct and intent met the statutory requirements while pointing to factors that should not give rise to criminal liability (such as political speech at a public protest).

Article 24 defines "terrorist activities" as follows:

> A person who organises, plans, commits, participates in or threatens to commit any of the following terrorist activities causing or intended to cause grave harm to the society with a view to coercing the Central People's Government, the Government of the Hong Kong Special Administrative Region or an international

[190] At trial, the Prosecution witness Professor Lau testified that historically, the conventional understanding of the slogan would imply that Hong Kong be taken back "by violent means." TrialWatch Monitoring June 23, 2021.
[191] *S.W. v. the United Kingdom*, 22 November 1995, para. 34, Series A no. 335-B; *C.R. v. the United Kingdom*, 22 November 1995, para. 32, Series A no. 335-C; Case of Del Rio Prada v Spain, Application No. 42750/09, Oct. 21, 2013, para. 77
[192] ECtHR, Vasiliauskas v. Lithuania, Application no. 35343/05, Oct. 20, 2015, para. 154.
[193] ECtHR, Vasiliauskas v. Lithuania, Application no. 35343/05, Oct. 20, 2015, para. 155; ECtHR, *S.W. v. the United Kingdom*, 22 November 1995, para. 36, Series A no. 335-B; ECtHR, *C.R. v. the United Kingdom*, 22 November 1995, para. 34, Series A no. 335-C; ECtHR, Case of Del Rio Prada v Spain, Application No. 42750/09, Oct. 21, 2013, para. 93.
[194] CCJE, The role of judges in the protection of the rule of law and human rights in the context of terrorism, Opinion no. 8 prov. (2006), Strasbourg, 8-10 November 2006.
[195] EctHR, Parmak and Bakir v Turkey 22429/07 25195/07 Dec. 3, 2019, at para. 77.

organisation or intimidating the public in order to pursue political agenda shall be guilty of an offence:

(1) serious violence against a person or persons;
(2) explosion, arson, or dissemination of poisonous or radioactive substances, pathogens of infectious diseases or other substances;
(3) sabotage of means of transport, transport facilities, electric power or gas facilities, or other combustible or explosible facilities;
(4) serious interruption or sabotage of electronic control systems for providing and managing public services such as water, electric power, gas, transport, telecommunications and the internet; or
(5) other dangerous activities which seriously jeopardise public health, safety or security.

The components of this offence, on its face, are already broad and duplicative at times but as applied to Tong Ying-kit are particularly problematic because the authorities refer to activity that could be a lesser offence—like dangerous driving—or no offence—like free speech—to conclude that he engaged in terrorist activity.

The facts, at least as found by the Court, are that Tong Ying-kit deliberately drove into police during a protest on a motorcycle displaying a secessionist flag: his "failure to stop at all the police checklines, eventually crashing into the police, was a deliberate challenge mounted against the police, a symbol of Hong Kong's law and order" and as such his conduct constituted "acts involving serious violence against persons and/or were dangerous activities which seriously jeopardised public safety or security" that "caused grave harm to the society" and were effected "with a view to intimidating the public in order to pursue political agenda" as evidenced by the fact he carried a slogan capable of a secessionist meaning.[196]

This assessment is built on numerous interrelated inferences that are problematic from a rule of law perspective. First, as previously discussed, the slogan at issue is protected political speech under international law. While the Court held that its use demonstrated that the Defendant acted in order to "intimidate" the public or to "coerce" the government, this is asserted rather than proven. But this again ignores the lack of evidence as to the Defendant's appreciation of the slogan, which admittedly had multiple meanings, or knowledge of its likely effect. And yet it appears that the "terrorist activities" charge would not exist without the use of the slogan.

On the "grave harm" element, the Court held that "a blatant and serious challenge mounted against the police force" even without physical harm would constitute "grave harm" because the police force is "a symbol of law and order."[197] This implies that any criticism of or challenge to the police could be considered "grave harm" even though under human rights law, speech critical of government authorities is protected.[198]

The Court cites other subsections of Article 24 that identify examples of non-physical harm, such as sabotaging electrical services. But these examples are of a more significant and quite different nature in their impact than what is at issue here (non-serious physical

[196] Reasons for Verdict, para. 171.
[197] Reasons for Verdict, para. 162.
[198] *See* General Comment No. 37, para 32 ("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.")

injuries).[199] The sub-sections of Article 24 under which Tong Ying-kit was charged, namely 24(1) prohibiting "serious violence against a person or persons" and/or 24(5), "other dangerous activities which seriously jeopardise public health, safety or security," are overbroad—the "dangerous activities" language in particular appears to be a catch-all that could, as here, be abused to encompass conduct that doesn't otherwise seem like terrorist activity.

Neither the statute nor the Court's decision define or give more clarity to the terms "serious violence" or "dangerous activities," and the Court declined to reach the third charge against the Defendant (dangerous driving), so how "dangerous driving" differs from "dangerous activities" has been left for another day. The Court accepted the Prosecution argument that "serious violence" does not mean "serious injuries"[200] but rather says that "driving the way he did"[201] and driving a motorcycle, which "is potentially a lethal weapon,"[202] is sufficient to show serious violence from the fact of a collision alone.[203] This seems an implausibly overbroad reading of the Article; does any dangerous driving now constitute a terrorist offence when accompanied by political sloganeering?

Again it is the Defendant's use of a political slogan that seems to do the work: transforming a road accident[204] or dangerous driving into a terrorist offence under the NSL.[205] In *Parmak*, the European Court of Human Rights found a violation of the principle of legality where a Turkish court convicted two individuals of membership in a terrorist organization on the grounds that distributing political materials constituted "moral coercion." In its ruling, finding a violation of the principle of legality, the European Court observed that "the domestic courts did not explain how the concept of moral coercion relates to the constitutive elements of the offence, including with respect to the degree of coercion and the severity it must attain to warrant the conclusion that it amounts to terrorism."[206]

Here similarly, the verdict relies upon the slogan and its use at an event critical of government authorities to define the Defendant's actions as terrorism and essentially prove the other constituent elements of the offence when coupled with what otherwise might be anodyne criminal or negligent activity. This is an overreach that cannot comport with the principle of legality insofar as it means that any political messaging or motive, even if it is not intended to cause or is expected to actually cause significant violence, coupled with another offense, however ordinary, is now a terrorist offence. Such an overbroad use of the law as here is not foreseeable or compliant with the principle of legality.

Tong Ying-kit's case could have been tried under the Road Traffic Ordinance of HKSAR which was equipped to deal with the offence of rash and dangerous driving. Almost all anti-

[199] Reasons for Verdict, para. 166.
[200] Reasons for Verdict, para. 159.
[201] Reasons for Verdict, para. 157.
[202] Reasons for Verdict, para. 158.
[203] Reasons for Verdict, para. 160.
[204] Without opining on the merits of the Defence evidence that the collision was an accident, it is worth noting with regard to the Defence argument that Tong Ying-kit's collision with the police was an accident—possibly precipitated by the police attempts to stop him with their shields—that one of the Prosecution's experts opined that the Defendant was slowing down, not accelerating as he approached the police. The expert estimated that the Defendant was driving at 20 km and applied the break as he approached the police. The Court did not discuss this evidence in its verdict.
[205] The Court, noting that it was not 'double-counting' to rely on the secessionist speech in finding the Defendant guilty of the terrorism offence, observed that "when the political agenda is secessionist in nature, it is our view that there is an added criminality in that such an agenda is seeking to undermine national unification." Reasons for Sentencing, paras. 37-38.
[206] ECtHR, Parmak and Bakir v Turkey 22429/07 25195/07 Dec. 3, 2019, at para. 75.

terror laws across the world require that the acts must be committed with a specific intent to bring them within the ambit of these laws. The trial and conviction of Tong Ying-kit did not establish this specific intent and was based on a hypothetical intent attributed to him by the prosecution. In this way the prosecution was able to manufacture criminality for the purpose of invoking the NSL.

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The vague and overbroad language used in Articles 20 and 21 for 'inciting secession' and under Article 24 for committing a 'terrorist activity' can lead to arbitrary and wrongful arrest, trial and ultimately conviction. Given the fact that anti-terror laws carry stringent sentences and severe stigma, they require robust procedural safeguards to ensure that innocent people are not wrongly punished.

It may be that the lack of foreseeability in the interpretation and use of this law is not a design flaw or reflective of unavoidable confusion as the law gets interpreted but is rather the purpose of this law. Given the expansive use and interpretation of the NSL in this first case, it will undoubtedly have a further chilling effect on the public, preventing people in Hong Kong from exercising their rights out of fear that any routine and protected conducted could be reinterpreted as a serious threat to national security based on political views they may be expressing at the time.

Abuse of Process and Proportionality

Finally, this first prosecution under the NSL for terrorist offences and national security offences—a prosecution against a young man without a political network, based on indirect allegations of an ideology and with no indication of significant violence[207]—suggests that the authorities used this first case not to punish serious criminal conduct but as an exemplar to chill speech and conduct by the general public. That is, there are substantial grounds to find that the prosecution was an abuse of process.

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[208]—European Court of Human Rights jurisprudence is instructive. The European Court evaluates whether a legal proceeding was driven by improper motives, with regard to a range of factors: the political context in which the prosecution was brought;[209] whether the authorities undertook actions against the

[207] *See* Reasons for Sentencing at 24-25

[208] 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.")

[209] 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

accused amidst their "increasing awareness that the practices in question were incompatible with [European] Convention standards;"[210] and whether the ultimate decision was well-reasoned and based on law.[211] The Court will also consider the broader context, including any pattern of politicised arrests and prosecutions.[212]

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."[213] Further, acknowledging that it is often impossible for an applicant to adduce direct evidence of the state's bad faith, the European Court has held that proof of an illegitimate purpose may be shown by way of circumstantial evidence.[214] In past cases, the European Court of Human Rights has looked to the relationship between prosecution and the exercise of rights under human rights law as one such kind of circumstantial evidence, as well as the behaviour of prosecuting authorities, including delays between the arrest and the laying of charges; and appearances of political interference in the case when there appears to be a correlation between hostile statements by public officials and the timing or wording of criminal charges against the applicant.[215]

In this case, the appearance of an abuse of process comes first, from the use of the NSL to criminalize political speech and the intended chilling effect this law and its use has had, and second, from the political environment in which this case was pursued.

1. Freedom of Expression and Abuse of Process

The European Court has emphasized 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 the *Kavala* case, the European Court remarked that:

> [A]t 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

19, 2018, para. 103; European Court of Human Rights, Rashad Hasanov and Others v. Azerbaijan, App. No. 148653/13, June 7, 2018, para. 124).

[210] European Court of Human Rights (Grand Chamber), Navalnyy v. Russia, App. No. 29580/12, November 15, 2018, para. 171.

[211] European Court of Human Rights, Nastase v. Romania, App. No. 80563/12, December 11, 2014, para. 107

[212] European Court of Human Rights, Mammadov v. Azerbaijan (Grand Chamber), App. No. 15172/13, May 29, 2019, para. 187-89.

[213] 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.

[214] 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.

[215] See European Court of Human Rights, Kavala v. Turkey, App. No. 28749/18, Dec. 10, 2019, paras 223-229; European Court of Human Rights, Demirtas v. Turkey (No 2), App. No. 14305/17, Nov. 20, 2018, para 170 (2018); European Court of Human Rights, Ismayilova v. Azerbaijan (No 2), App. No. 30778/15, Feb. 27, 2020, para. 14.

> a means of organising society, in which individual freedom may only be limited in the general interest.[216]

The right to free expression guarantees not only the right to hold opinions but also to impart and receive information and ideas.[217] The Venice Commission has similarly explained that "where a person is prevented from communicating, or faces a fine or civil award of damages for doing so, the [] right [to freedom of expression] of both the speaker and the audience is interfered with."[218]

Further, the UN Human Rights Committee has observed that the fact that political speech takes place at a public forum extends more protection to that assembly:

> 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.[219]

The charge against Tong Ying-kit for "inciting secession" based on the use of a political slogan (which similarly underpins the "terrorist activities" charge) punishes speech that is critical of or oppositional to government authorities, even without any showing that it was intended or was likely to incite violence or the use of force. Given that this slogan of "Liberate Hong Kong Revolution of Our Times" was repeatedly used at different protests over the years, the choice to criminalize its use now, and as a national security offence, appears designed to send a chilling message to the general public. The political nature of the speech was central to the offence as was its use at a public protest; but under human rights law, the fact the speech was political means it is entitled to more protection, not less.

Furthermore, beyond the concerns with the overbreadth and lack of foreseeability of the NSL offences at issue, this case will have a likely chilling effect on free speech and on any form of dissent in Hong Kong, a trend that will not abate in the foreseeable future in light of this Court's decision. As previously discussed, laws that impermissibly limit free expression and political speech in particular violate human rights law. The Chilling Effect doctrine is a well-established concept even under ECHR law. In *Baka v Hungary* (2016), the Grand Chamber of the European Court of Human Rights held the chilling effect from sanctions on legitimate speech and expression not only impacts the proportionality of the punishment but also such an effect "works to the detriment of society as a whole."[220] The Inter-American system shares this concern that a chilling effect that comes from criminal penalties on speech will violate the right to freedom of expression, with a broader impact on society

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[216] European Court of Human Rights, Kavala v. Turkey, App. No. 28749/18, Dec. 10, 2019, para. 231.
[217] ICCPR, art. 19(2).
[218] CDL-AD(2013)024, Opinion on the legislation pertaining to the protection against defamation of the Republic of Azerbaijan, § 21.
[219] 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.").
[220] European Court of Human Rights (Grand Chamber), Baka v. Hungary, Application no. 20261/12, June 23, 2016, para. 167. *See also* European Court of Human Rights, Kövesi v. Romania, App. 594/19, May 8, 2020, para. 209; European Court of Human Rights (Grand Chamber), Navalny v. Russia, App. No. 29580/12, November 15, 2018; European Court of Human Rights, Wille v. Liechtenstein, Application no. 28396/95, Oct. 28, 1999, para. 50.

beyond the harm to the individual defendant.[221] Customary international law practice across jurisdictions also denounce the chilling effect that the threat of court process has on freedom of speech and expression. The Supreme Court of India, for example, has held that "the law should not be used in a manner that has chilling effects on the `freedom of speech and expression.'"[222] Earlier, the UK House of Lords in *Derbyshire County Council vs Times Newspapers Ltd.* similarly held that the threat of court process has a chilling effect on the freedom of speech and expression.[223]

In this case, the Court has given significant custodial sentences—six and a half years for the incitement to secession charge alone—for political speech, which will certainly chill others in Hong Kong from exercising their rights to freedom of expression. Of deep concern, and as addressed below, this chilling effect appears to be the objective of the NSL and the decision in this case.

2. Politicization of the Judicial Process

On the politicization of the process: the manner in which this case was brought and pursued—from Tong Ying-kit's arrest on July 1, 2020 until his trial nearly a year later—suggests that the primary motive in this trial was to chill activity and speech critical of government authorities. Tong Ying-kit was arrested the first day the NSL was in effect, when most people still had not seen the law or learned of its provisions. He was the first to be subject to a range of new criminal procedures under the NSL including the more stringent bail standard, and he was tried in a novel procedure, pursuant to the NSL, by a panel of judges handpicked by the Executive who could be removed for speech that threatens national security.

The Chief Executive was not only closely involved with the introduction and enactment of the NSL but in the beginning of 2020 had already spoken of illegal protests and "hate speech" as threats to national security,[224] and the then-Secretary of Security (promoted in June 2021 to Chief Secretary) referred to growing "terrorism" in Hong Kong while the anti-government protests continued.[225] Since the 2019 anti-government protests in Hong Kong,

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[221] Inter-American Court of Human Rights, Case of Herrera-Ulloa v. Costa Rica, July 2, 2004, para. 133 (finding a violation of the right to freedom of expression in a criminal prosecution that had a "deterrent, chilling and inhibiting effect" on others and "in turn, obstructs public debate on issues of interest to Society." *See generally*, Inter-American Commission on Human Rights, Tulio Álvarez v. Venezuela, Report No. 4/17, Jan. 26, 2017, para. 84, *available at* http://www.oas.org/en/iachr/decisions/court/2017/12663fondoen.pdf. CASE 12.663,

[222] S. Khushboo vs Kanniammal, 2010 (V) SCR 322 (citing another decision, S. Rangarajan Vs. P. Jagjivan Ram & Ors., (1989) 2 SCC 574, as laying down the appropriate approach in determining the scope of `reasonable restrictions' that can be placed on the Freedom of Speech and Expression)

[223] *Derbyshire County Council vs Times Newspapers Ltd*, [1993] 1 All ER 1011, [1993] 2 WLR 449, [1993] UKHL 18, [1993] AC 534, *citing New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964).

[224] *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.

[225] 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; 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-

over 10,000 people have been charged for participation in the protests.[226] According to Hong Kong authorities, as of May 2021, 80 percent of the 1500 completed cases resulting in convictions, and some form of legal consequences, including sentences of imprisonment.[227]

This first case, charged on the day the NSL was first in effect, has proved an opportunity for the Executive to demonstrate the might of the law. Although the Chief Executive had previously claimed the law would be applied to only "an extremely small number of people,"[228] around 117 people have already been charged under this law in its first year, starting with Tong Ying-kit, an individual whose alleged offense again was not considered to be "the worst of its kind."[229] In April 2021, Luo Huining, the most senior representative of the PRC in Hong Kong, stated publicly that, "For all who endanger national security, hard resistance should be stricken down by law, soft resistance should be regulated by law."[230] The NSL has been lauded by the Chief Executive Carrie Lam and other government authorities for 'restoring order'[231] and Lam urged the public "not find excuses for the perpetrators of violence."[232]

Tong Ying-kit's was the first trial presided over by judges appointed by the Chief Executive. Adding to the impression that the Chief Executive kept a close watch if not a hand on the trial, on the day Tong Ying-kit's sentence was handed down, the Chief Executive posed for a photo with Professor Lau, the Prosecution's expert witness on the meaning of the slogan.[233] Several others have since been charged under the NSL, and despite assurances

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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.

[226] 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.

[227] 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/.

[228] James T. Areddy & Chun Han Wong, *The Wall Street Journal*, "China's Security Law Tightens Vise on Hong Kong" June 30, 2020, *available at* https://www.wsj.com/articles/as-china-national-security-law-looms-hong-kong-activists-disband-11593528117

[229] Reasons for Sentencing, para. 24.

[230] Candice Chau, *Hong Kong Free Press*, "National Security Education Day: China will teach interfering foreign forces a lesson, says Beijing's top man in Hong Kong", April 15, 2021, *available at* https://hongkongfp.com/2021/04/15/national-security-education-day-china-will-teach-interfering-foreign-forces-a-lesson-says-beijings-top-man-in-hong-kong/

[231] Zen Soo, *Associated Press*, "Hong Kong leader lauds new security law despite criticism," Nov. 25, 2020, *available at* https://apnews.com/article/beijing-hong-kong-national-security-carrie-lam-aab8a9a0aff5aea4b190b93d1b72224f; Claire Huang, *The Strait Times*, "Carrie Lam vows to continue national security push in Hong Kong," July 2 2021, *available at* https://www.straitstimes.com/asia/east-asia/hong-kongs-acting-chief-executive-says-freedoms-guaranteed-under-security-law.

[232] *Global Times*, "Nine arrested for planning bomb attacks, as HK chief urges society to openly condemn terrorism," July 6, 2021, *available at* https://www.globaltimes.cn/page/202107/1227931.shtml.

[233] Twitter Post, Timothy McLaughlin, July 30, 2021, *available at* https://twitter.com/TMclaughlin3/status/1421084874966896642?s=20 (accessed September 18, 2021).

that the law would not be applied retroactively, recent arrests suggests that it might in fact be applied in this manner, suggesting a further expansion of this broad legislation.[234]

Taking these facts together, the political environment in which this case was tried and the political utility of this trial suggests that its underlying purpose was not to bring this particular Defendant to trial but to further broader political goals of silencing dissent and providing authorities with an even stronger tool than its others (in particular, the Public Order Ordinance and the recently-revived sedition law) to criminalize protected political speech.

[234] Owen Churchill, *South China Morning Post*, "Hong Kong leaders apply national security law retroactively, US congressional panel hears," Sept. 9, 2021, *available at* https://www.scmp.com/news/china/article/3148072/hong-kong-leaders-apply-national-security-law-retroactively-us; ARTICLE19, "A year of creeping darkness under the National Security Law in Hong Kong," June 29, 2021, https://www.article19.org/resources/darkness-under-national-security-law-hong-kong/.

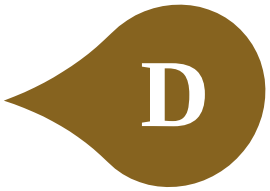
CONCLUSION AND GRADE

TrialWatch Expert Rebecca John's Findings

Based on a review of the TrialWatch monitoring materials and the Court's decisions on the verdict and sentence, it appears that the trial of Tong Ying-kit was marred by violations of the defendant's rights, including his right to an impartial and independent tribunal and his right to freedom of expression. The charged offences at issue in this trial—'incitement to secession' and 'terrorist activities'—raise significant concerns under the principle of legality in their overbreadth and lack of foreseeability. These concerns were not alleviated but rather aggravated by the Court's interpretation of these offences and the severe nine-year prison sentence the Court issued to Tong Ying-kit in this, the first test of the National Security Law. Furthermore, the political context in which this case emerged and the use of this novel law and its new criminal procedures suggests that the prosecution was an abuse of process, brought to curb protected speech and set a chilling example to the public more generally.

Without real and clear limits in how this law will be applied and to whom, the judgment in this case (which does not address freedom of expression) provides no guidance to the people of Hong Kong as to what forms of political speech and protest remain protected and which can result in significant penalties—in violation of international law. Indeed, a close review of this trial and the Court's decisions suggests that this prosecution was opportunistic, and the trial's defects may only amplify the chilling effect of the verdict. Tong Ying-kit has appealed his conviction and sentence and thus, some of the concerns raised in this evaluation may be cured on appeal. As it stands, however, this trial evidences significant concerns under international human rights law and receives a grade of D under the methodology in the Annex of this report.

GRADE:



ANNEX

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,"[2] 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.