

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.

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

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://www.law.georgetown.edu/law-asia/wp-content/uploads/sites/31/2021/06/HongKongNSLRightToFairTrial.pdf](https://sg.news.yahoo.com/unstoppable-storm-rights-back-seat-022429844.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlMnVbS8&guce_referrer_sig=AQAAAJ9y_jKrtXD-KB-rHBXDlknqUNJTQ2Q5LtOQu_aP8MJL2lunBvB-DVY2vtFyAB8U_dtje3XQKr3YujWY_YZXEiAMG2HtOnsbj9cyOKDVHCsAuWd-D0lykhWILdKy7FGZM24zLZUZzjX5cOjheNhz2RPPx4vtb0fP3T6ndWmgbMZf; Lydia Wong, Thomas Kellogg & Eric Yan Ho Lai, Georgetown Law Center for Asian Law, <i>Hong Kong’s National Security Law and the Right to a Fair Trial</i> (2021), <i>available at</i> <a href=).

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.’”

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>.

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.

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.

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.

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 provisions¹⁵⁶; 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'),"

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

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,

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/2017/12663fondo.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

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

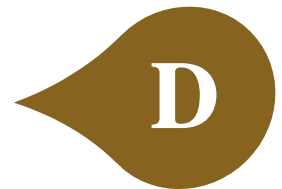


TrialWatch Expert Rebecca John's Findings

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:





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.