



**Hong Kong Special
Administrative Region
v.
Bao Choy Yuk-ling**

July 2021

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

ABOUT THE AUTHORS

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

ABOUT THE CLOONEY FOUNDATION FOR JUSTICE'S TRIALWATCH INITIATIVE

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

The legal assessment and conclusions expressed in this report are those of the author and not necessarily those of the Clooney Foundation for Justice or any of the author's affiliated organizations.



A member of the TrialWatch Expert Panel assigned this trial a grade of C:

The case concerned the prosecution of journalist Bao Choy, a freelance producer with Radio Television Hong Kong (RTHK) charged with making false statements to access a public database. Bao Choy requested vehicle registration information from the Transport Department as part of her investigation into the identities of those involved in the 2019 Yuen Long mass transit station attack on pro-democracy protestors and other commuters. This case appears to be the first prosecution of this kind under the Road Traffic Ordinance and resulted in Bao Choy's conviction and a fine. Her appeal is pending.

Based on the facts as documented at trial, a review of the law at issue, and the ultimate penalty imposed, it appears that while the Court here respected the defendant's procedural rights at trial and appropriately refrained from the most severe penalty, the case nevertheless presents concerns under human rights law. First, the defendant was convicted of obscure charges simply for how she filled out an online form, routinely used by journalists and others without penalty; as such, the charges and prosecution give rise to concerns under the principle of legality. Second, given the context in which this case emerged and indeed, the decision to drop similar charges against a pro-government reporter after this case was decided, the prosecution raises concerns that it was an abuse of process, brought selectively and with improper motives to chill exercise of free expression, a protected right under international and Hong Kong law. These concerns can and should be resolved on appeal.

Because the TrialWatch monitoring of the trial and the available record show that, notwithstanding the procedural fairness guarantees provided, the substantive treatment of the defendant did not meet international standards, this trial received a grade of "C" under the methodology set forth in the Annex to this Report.

In 2020, Bao Choy, a freelance documentary film producer with Radio Television Hong Kong (RTHK), investigated an attack where dozens of men attacked pro-democracy protestors, who were leaving a protest site, and other commuters. The attack took place at the Yuen Long mass transit station on July 21, 2019 and resulted in dozens of injuries. Bao Choy's documentary investigated the alleged acquiescence and possible complicity of local officials and undercover police officers during the attack. To identify those at the scene, Bao Choy accessed Hong Kong's vehicle registry site, as many journalists had apparently routinely done in the past. The online form asked for the purpose of the vehicle information search, and she chose the box "other traffic related matters." The documentary was released in July 2020; on November 3, 2020, authorities arrested Bao Choy and charged her with two counts of "knowingly making a false statement" under the Road Traffic Ordinance in order to access the vehicle information. She was convicted after a one-day trial and sentenced to pay a fine of HKD 6,000 (USD \$775).

RTHK, founded in 1929, has been Hong Kong's only independent public broadcaster,

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

BACKGROUND INFORMATION



A. POLITICAL AND LEGAL CONTEXT

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

The Legal and Political Framework of Hong Kong Special Administrative Region

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

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

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 27 May 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," Jul. 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.").

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

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

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

The Right to Freedom of Expression in Hong Kong

Hong Kong—but not the PRC—is a party to several core international human rights treaties, including the ICCPR and ICESCR, both of which it has incorporated into domestic law through the BORO. In particular, the BORO states, "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."⁹ Article 27 of the Basic Law further states, "Hong Kong residents shall have freedom of speech, of the press and of publication."¹⁰

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

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

⁵ The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (hereinafter "the Basic Law"), 4 April 1990, available at <https://www.basiclaw.gov.hk/en/basiclaw/>.

⁶ *Id.* art. 158.

⁷ See Hong Kong Bill of Rights (hereinafter the "BORO"), (Cap. 383), June 8, 1991, available at https://www.elegislation.gov.hk/hk/cap383?xpid=ID_1438403137017_001; 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.

⁸ Article 39 of the Basic Law; Annex I Part XIII of the Joint Declaration ("The provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force.")

⁹ Article 16 of the BORO.

¹⁰ Article 27 of the Basic Law.

Freedom of expression is a fundamental freedom in a democratic society. It lies at the heart of civil society and of Hong Kong's system and way of life. The courts must give a generous interpretation to its constitutional guarantee. This freedom includes the freedom to express ideas which the majority may find disagreeable or offensive and the freedom to criticize governmental institutions and the conduct of government officials.¹¹

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

While Hong Kong authorities maintain that this law will not impinge upon core freedoms,¹⁴ this broad and vague law has already been used to charge activists, media figures like former-*Apple Daily* owner Jimmy Lai and other managerial and editorial staff¹⁵, and opposition politicians for speech critical of the government¹⁶ and appears to have had an

¹¹ *HKSAR v Ng Kung Siu*, [2000] 1 HKC 117, 135.

¹² The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region *available at* [https://www.elegislation.gov.hk/doc/hk/a406/eng_translation_\(a406\)_en.pdf](https://www.elegislation.gov.hk/doc/hk/a406/eng_translation_(a406)_en.pdf).

¹³ Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Working Group on Arbitrary Detention; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the situation of human rights defenders; and the Special Rapporteur on minority issues, "Comments on The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region ('National Security Law')," OL CHN 17/2020, Sept. 1, 2020, *available at* <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=25487>.

¹⁴ Fion Li and Vinicy Chan, *Bloomberg News*, Security Law Sends Hong Kong Residents Dashing for the Exit," May 31, 2020, *available at* <https://www.bloomberg.com/news/articles/2020-05-31/china-s-security-law-sends-hong-kong-residents-dashing-for-exit>.

¹⁵ Jessie Pang, *Reuters*, "Apple Daily editor, CEO denied bail in Hong Kong," Jun. 19, 2021, *available at* <https://www.reuters.com/world/china/crowds-gather-hearing-two-apple-daily-executives-national-security-charge-2021-06-19/>; Brian Wong, *South China Morning Post*, "National security law: Apple Daily editor-in-chief, publisher remanded in custody after arrests on collusion charge," Jun. 19, 2021, *available at* <https://www.scmp.com/news/hong-kong/politics/article/3137989/national-security-law-apple-daily-editor-chief-publisher>.

¹⁶ Christy Leung, *South China Morning Post*, "National security law: 52 former lawmakers, activists arrested in January told to report to police on Sunday – more than a month early – with some expecting charges,"

effect on freedom of expression in Hong Kong with many journalists, academics, activists and other residents choosing to self-censor.¹⁷

Media Freedom in Hong Kong

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

Feb. 26, 2021, available at <https://www.scmp.com/news/hong-kong/law-and-crime/article/3123248/national-security-law-52-former-lawmakers-activists>.

¹⁷ Reuters, “U.N. rights chief says HK security law prompts media self-censorship,” Jun. 24, 2021, available at <https://www.reuters.com/world/asia-pacific/un-rights-chief-says-hk-security-law-prompts-media-self-censorship-2021-06-24/>; Kathleen Magramo, *South China Morning Post*, “Hong Kong Book Fair organisers urge exhibitors to be ‘self-disciplined’ with national security law in place” Jun.24, 2021, available at <https://www.scmp.com/news/hong-kong/hong-kong-economy/article/3138650/hong-kong-book-fair-organisers-urge-exhibitors-be>; Helen Davidson, *The Guardian*, “They can’t speak freely’: Hong Kong a year after the national security law,” Jun. 29, 2021, available at <https://www.theguardian.com/world/2021/jun/30/they-cant-speak-freely-hong-kong-a-year-after-the-national-security-law>; Human Rights Watch, “China: New Hong Kong Law a Roadmap for Repression,” Jul. 29, 2020, available at <https://www.hrw.org/news/2020/07/29/china-new-hong-kong-law-roadmap-repression#>; Yuen Chan, Opinion, *Al Jazeera*, “In Hong Kong, freedom of expression is shrinking fast,” Feb. 14, 2021, available at <https://www.aljazeera.com/opinions/2021/2/14/in-hong-kong-freedom-of-expression-is-shrinking-fast>; Jin Wu and Elaine Yu, *The New York Times*, “What You Can No Longer Say in Hong Kong” Sept. 4, 2020, available at <https://www.nytimes.com/interactive/2020/09/04/world/asia/hong-kong-speech.html>; *Nikkei Asia*, Opinion, “Beijing’s crackdown on free speech in Hong Kong is unacceptable,” Dec. 9, 2020, available at <https://asia.nikkei.com/Opinion/The-Nikkei-View/Beijing-s-crackdown-on-free-speech-in-Hong-Kong-is-unacceptable>; Elaine Yu, *Columbia Journalism Review*, “Will Hong Kong’s Free Press Survive?” Mar. 8, 2012, available at https://www.cjr.org/special_report/hong-kong-democracy-protests-press-freedom.php.

¹⁸ See Benjamin Lotz, “Article 23 of the Hong Kong Basic Law: Whither Media Freedom?” 45 *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* No. 1 (2012); Fu Hualing, “Past and Future Offences of Sedition in Hong Kong,” in Fu Hualing, Carole J. Petersen & Simon N. M. Young (eds.), *National Security and Fundamental Freedoms* (Hong Kong University Press 2005), p. 217.

¹⁹ Elizabeth Sinn, “Emerging Media: Hong Kong and the Early Evolution of the Chinese Press,” 36 *Modern Asian Studies* 421, 422-23 (2002).

²⁰ See Carol Lai, *Media in Hong Kong: Press Freedom and Political Change 1967-2005* (Routledge 2007); Fu Hualing, “Past and Future Offences of Sedition in Hong Kong,” in *National Security & Fundamental Freedoms* edited by Fu Hualing, Carole J. Petersen, and Simon N. M. Young, (Hong Kong University Press, 2005), pp. 217-249; Jeffrey Wasserstrom & Peter Zarrow, *Times Literary Supplement*, “Publish and be damned Dangers of sedition in Old Shanghai and post-handover Hong Kong,” Apr. 1, 2016; *The New York Times*, “In 1967, Hong Kong’s Protesters Were Communist Sympathizers,” Sept. 16, 2019, available at <https://www.nytimes.com/2019/09/16/world/asia/hong-kong-1967-riots.html>.

²¹ Anne S.Y. Cheung, “One Step Forward Two Steps Back: A Study of Press Law in Post-Colonial Hong Kong,” 3 *Journalism and Communication Monograph* 89 (Winter 2002); Doreen Weisenhaus, with contributions by Jill Cottrell, and Yan Mei Ning. *Hong Kong Media Law*. HKU Press Law Series (Hong Kong University Press 2007); Richard Cullen, “Freedom of the Press and the Rule of Law,” in Tsang, Steve (ed.), *Independence and the Rule of Law in Hong Kong* (Hong Kong University Press 2001), p. 158; Joseph M.

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

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

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

Chan & Clement Y.K. So, “The Surrogate Democracy Function of the Media,” in *Journalism in Asia* (Routledge 2005), pp. 66-80.

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

²³ Reporters Sans Frontières (RSF), “Hong Kong” (accessed May 4, 2021), available at <https://rsf.org/en/hong-kong>.

²⁴ Reporters Sans Frontières (RSF), “Hong Kong: five months of violence against the press,” Nov. 22, 2019, available at <https://rsf.org/en/news/hong-kong-five-months-violence-against-press>.

²⁵ Elizabeth Cheung, *South China Morning Post*, “Hong Kong press associations ‘strongly condemn’ attacks on journalists at Yuen Long MTR station,” Jul. 22, 2019, available at <https://www.scmp.com/news/hong-kong/politics/article/3019629/hong-kong-press-associations-strongly-condemn-attacks>.

²⁶ *Hong Kong Free Press*, “Violence against Hong Kong media ‘encouraged’ by official silence over printing press sledgehammer attack, watchdog says,” Apr. 16, 2021, available at <https://hongkongfp.com/2021/04/16/violence-against-hong-kong-media-encouraged-by-official-silence-over-sledgehammer-attack-on-printing-press-watchdog-says/>.

paper's eventual closure in June 2021).²⁷ The same week that Bao Choy was arrested in November 2020, another journalist was arrested for "obstruction" when she filmed the arrest of two women at a protest,²⁸ and a student journalist was arrested and charged with obstructing the police and resisting arrest at another protest.²⁹ In June 2021, an Israel-based web server briefly removed a Hong Kong pro-democracy website after a request from the Hong Kong police, citing non-compliance with the NSL.³⁰ Later that month, authorities arrested several more *Apple Daily* senior staff under the NSL (including editor-in-chief Ryan Law, CEO of the *Apple Daily* publisher *Next Media*, Cheung Kim-hung, and editorial writer Fung Wai-kong).³¹ In response, another pro-democracy paper, *Stand News*, announced it would be archiving commentary and opinion articles and stop accepting new donations to reduce potential NSL risks; six of its directors, including barrister Margaret Ng (convicted in April 2021 for participating in an 'unauthorized' assembly during the 2019 pro-democracy protests) accepted recommendations to resign.³²

Asked at a press conference how journalists could ensure their reporting did not violate the NSL, Chief Executive Carrie Lam said the law was "very well defined," and that "normal journalism" would not breach the NSL; asked to define 'normal journalistic' work, Lam said journalists should "be in a position" to decide for themselves if they are breaking the law.³³

²⁷ ITV, "Freelance ITV News journalist Wilson Li arrested in Hong Kong under security law" Aug. 11, 2020, available at <https://www.itv.com/news/2020-08-10/freelance-itv-news-journalist-wilson-li-arrested-in-hong-kong-under-security-law>; Tom Grundy, *Hong Kong Free Press*, "Hong Kong security law: Freelancer for UK's ITN among two more arrested, as journalism watchdogs sound alarm," Aug. 10, 2020, available at <https://hongkongfp.com/2020/08/10/hong-kong-security-law-freelancer-for-uks-itn-among-two-more-arrested-as-journalism-watchdogs-sound-alarm/>; Helen Davidson & Andy Ball, *The Guardian*, "The arrested: Hongkongers caught up in Beijing's national security law," Sept. 29, 2020, available at <https://www.theguardian.com/world/ng-interactive/2020/sep/29/the-hong-kong-arrested>; Reuters, "HK's Apple Daily raided by 500 officers over national security law," Jun. 17, 2021, available at <https://www.reuters.com/world/asia-pacific/hong-kongs-apple-daily-newspaper-says-police-arrest-five-directors-2021-06-16/>; Elaine Yu, *Wall Street Journal*, "Hong Kong's Apple Daily Newspaper Prints Last Edition as Free-Press Era Ends," June 23, 2021, available at <https://www.wsj.com/articles/hong-kongs-apple-daily-will-close-after-government-choked-funds-11624437029>.

²⁸ Rhoda Kwan, *Hong Kong Free Press*, "Hong Kong police arrest journalist for 'obstruction' after she filmed arrests," Nov. 6, 2020, available at <https://hongkongfp.com/2020/11/06/hong-kong-police-arrest-journalist-for-obstruction-after-she-filmed-arrests/>.

²⁹ Kelly Ho, *Hong Kong Free Press*, "Student journalist charged with obstructing Hong Kong police and resisting arrest during mall demo," Nov. 4, 2020, available at <https://hongkongfp.com/2020/11/04/student-journalist-charged-with-allegedly-obstructing-hong-kong-police-and-resisting-arrest-during-mall-demo/>

³⁰ *The Times of Israel*, "Israeli hosting firm Wix removes Hong Kong democracy website after police order," June 5, 2021, available at <https://www.timesofisrael.com/israeli-hosting-firm-wix-removes-hong-kong-democracy-website-after-police-order/>; *The New York Times*, "In Hong Kong, Short-Lived Censorship Hints at a Deeper Standoff," June 3, 2021, available at <https://www.nytimes.com/2021/06/03/technology/hong-kong-internet-censorship.html>.

³¹ Zen Soo, *Associated Press*, "Editors of Hong Kong newspaper arrested under security law," June 17, 2021, available at <https://apnews.com/article/hong-kong-arrests-business-97e0fbed611073be258763dcf80c4b7f>; Reuters, "Hong Kong police arrest former Apple Daily journalist at airport – media," June 28, 2021, available at <https://www.reuters.com/world/china/hong-kong-police-arrest-former-apple-daily-journalist-airport-local-media-2021-06-27/>

³² Jeff Pao, *Asia Times*, "HK media erase their archives amid rising arrests," June 28, 2021, available at <https://asiatimes.com/2021/06/hk-media-erase-their-archives-amid-rising-arrests/>; Selina Cheng, *Hong Kong Free Press*, "Security law: Stand News opinion articles axed, directors resign amid reported threats to Hong Kong digital outlets," June 28, 2021, available at <https://hongkongfp.com/2021/06/28/security-law-stand-news-opinion-articles-axed-directors-resign-amid-reported-threats-to-hong-kong-digital-outlets/>.

³³ Helen Davidson, *The Guardian*, "Hong Kong leader refuses to say how media can avoid arrest in wake of Apple Daily raids," June 22, 2021, available at <https://www.theguardian.com/world/2021/jun/22/hong-kong-leader-carrie-lam-apple-daily-arrests-national-security-law>; Candice Chau, *Hong Kong Free Press*, "Hong Kong leader places national security law onus on journalists; says media must not subvert gov't," June 22, 2021, available at <https://hongkongfp.com/2021/06/22/hong-kong-leader-places-national-security-law-onus->

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

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

Radio Television Hong Kong

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

Since the 2019 protests, which RTHK covered through live-streaming, critical interviews with government authorities and reporting on police misconduct, RTHK has come under heightened government pressure and has faced attempts at “muzzling.”⁴⁰ In February 2020, RTHK indefinitely suspended its popular satirical show “Headliner,” which had aired since 1989, for mocking the police; in May 2020, RTHK issued a public apology for causing

on-journalists-says-media-must-not-subvert-govt/; *Reuters*, “Criticism of Apple Daily raid is attempt to ‘beautify’ security threats-HK leader,” June 22, 2021, available at <https://www.reuters.com/world/china/hk-leader-lam-says-action-against-apple-daily-does-not-target-press-freedom-2021-06-22/>.

³⁴ *RTHK*, “Police may have list of journalists to arrest: HKJA,” June 28, 2021, available at <https://news.rthk.hk/rthk/en/component/k2/1598060-20210628.htm>

³⁵ Kelly Ho, *Hong Kong Free Press*, “Hong Kong gov’t is the ‘biggest victim of fake news,’ Chief Exec. Carrie Lam says,” Apr. 8, 2021, available at <https://hongkongfp.com/2021/04/08/hong-kong-govt-is-the-biggest-victim-of-fake-news-chief-exec-carrie-lam-says/>.

³⁶ Kelly Ho, *Hong Kong Free Press*, “Hong Kong press club urges police chief to clarify comments about action against ‘fake news,’” Apr. 23, 2021, available at <https://hongkongfp.com/2021/04/23/hong-kong-press-club-urges-police-chief-to-clarify-comments-about-action-against-fake-news/>.

³⁷ *Id.*

³⁸ *France24*, “Hong Kong police chief calls for fake news law,” June 26, 2021, available at <https://www.france24.com/en/live-news/20210626-hong-kong-police-chief-calls-for-fake-news-law>; *South China Morning Post*, “Hong Kong’s new police chief denies force suffers from poor public image and blames ‘fake’ news for spreading lies,” June 26, 2021, available at <https://www.scmp.com/news/hong-kong/law-and-crime/article/3138873/hong-kongs-new-police-chief-denies-force-suffers-poor>; Vincent Ni, *The Guardian*, “Hong Kong needs law to tackle ‘hostility against the police’, says force’s new chief,” June 26, 2021, available at <https://www.theguardian.com/world/2021/jun/26/hong-kong-needs-law-to-tackle-hostility-against-the-police-says-forces-new-chief>.

³⁹ Michael Chan, Francis Lee & Hsuan-Ting Chen, *Digital News Report*, “Hong Kong,” 2019, available at <https://www.digitalnewsreport.org/survey/2019/hong-kong-2019/>.

⁴⁰ See *China Digital Times*, “Two Months of Turmoil at Hong Kong Public Broadcaster RTHK,” May 3, 2021, available at <https://chinadigitaltimes.net/2021/05/timeline-two-months-of-turmoil-at-hong-kong-public-broadcaster-rthk/>.

offense with the show and stopped its production.⁴¹ In April 2020, Hong Kong authorities accused RTHK of undermining the “One China Principle” after one of its reporters questioned a World Health Organization official about Taiwan’s representation at the WHO.⁴² Also in April, the Communications Authority warned RTHK that its personal view show, *Pentaprism*, had received complaints that it incited hatred and was inaccurate following an episode that critiqued police conduct at the 2019 campus siege⁴³ at Hong Kong Polytechnic University; RTHK suspended the show in August 2020.⁴⁴ In May 2020, RTHK canceled a satirical program after government officials complained that the show “denigrated and insulted” the police.⁴⁵ Later that month, the Hong Kong authorities announced a thorough review of RTHK’s management, to be led by civil servants.⁴⁶ In September 2020, following complaints from government officials, RTHK opened an investigation into Nabela Qoser, a RTHK journalist well-known in Hong Kong for her vigorous questioning of Chief Executive Carrie Lam and others during the 2019 protests.⁴⁷

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

⁴¹ RTHK, “RTHK apologises, will halt production of ‘Headliner,’” May 19, 2020, *available at* <https://news.rthk.hk/rthk/en/component/k2/1527100-20200519.htm>; *Time*, “Hong Kong’s Public Broadcaster Suspends Satirical TV Show After Complaints Over Police Portrayal,” May 20, 2020, *available at* <https://time.com/5839287/radio-television-hong-kong-press-freedom-headliner/>.

⁴² RTHK, “CE backs claim RTHK breached One China policy,” Apr. 7, 2020, *available at* <https://news.rthk.hk/rthk/en/component/k2/1519282-20200407.htm>

⁴³ Rosie Perper, *Insider*, “Behind the barricades: Hong Kong protesters share what happened during the violent clashes with police on university campuses,” Dec. 24, 2019, *available at* <https://www.insider.com/timeline-hong-kong-chinese-polytechnic-university-riot-police-pictures-interviews-2019-11>; Lily Kuo, Michael Safi, Cath Levett, Paul Scruton, Finbarr Sheehy and Simon Jeffery, *The Guardian*, “Hong Kong university siege: a visual guide” Nov. 18, 2019, *available at* <https://www.theguardian.com/world/2019/nov/18/hong-kong-university-siege-a-visual-guide>.

⁴⁴ Rachel Wong, *Hong Kong Free Press*, “China seeks ‘new world media order’ says watchdog, as Hong Kong plunges to 80th in press freedom index,” Apr. 21, 2020, *available at* <https://hongkongfp.com/2020/04/21/just-in-china-seeks-new-world-media-order-says-watchdog-as-hong-kong-plunges-to-80th-in-press-freedom-index/>.

⁴⁵ Brian Wong & Zoe Low, *South China Morning Post*, “Commerce minister calls on Hong Kong broadcaster RTHK to review internal governance after watchdog rules satire ‘denigrated’ police,” May 20, 2020, *available at* <https://www.scmp.com/news/hong-kong/politics/article/3085298/commerce-minister-calls-hong-kong-broadcaster-rthk-review>.

⁴⁶ Cannix Yau, *South China Morning Post*, “Hong Kong’s RTHK under siege: should it be a public broadcaster or government mouthpiece?” Nov. 23, 2020, *available at* <https://www.scmp.com/news/hong-kong/politics/article/3110900/hong-kongs-rthk-under-siege-should-it-be-public-broadcaster>.

⁴⁷ Tom Grundy, *Hong Kong Free Press*, “RTHK reporter who grilled Hong Kong Chief Exec. Carrie Lam investigated again, probation extended,” Sept. 27, 2020, *available at* <https://hongkongfp.com/2020/09/27/rthk-reporter-who-grilled-hong-kong-chief-exec-carrie-lam-investigated-again-probation-extended/>.

⁴⁸ Theodora Yu and Shibani Mahtani, *The Washington Post*, “Hong Kong reels in public broadcaster as media clampdown intensifies,” Feb. 19, 2021, *available at* https://www.washingtonpost.com/world/asia_pacific/hong-kong-rthk-media-freedom/2021/02/19/42397a18-7279-11eb-8651-6d3091eac63f_story.html.

⁴⁹ *South China Morning Press*, “RTHK assistant director becomes at least sixth senior employee to quit Hong Kong public broadcaster since new boss took charge,” Apr. 27, 2021, *available at* <https://www.scmp.com/news/hong-kong/society/article/3131184/rthk-assistant-director-becomes-least-sixth>

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

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

On May 3, 2021, RTHK announced that it would delete programming older than one year from its YouTube and Facebook pages; this would include the documentary Bao Choy produced in 2019.⁵⁴ Also on May 3, 2021 (Press Freedom Day), journalist Nabela Qoser was told that her contract with RTHK would end that month.⁵⁵ In early June, ahead of the annual (now banned) June 4 Tiananmen Square Vigil, journalists at RTHK (speaking anonymously) reported that they had been ordered not to report on any “political” stories.⁵⁶ And on June 28, 2021, RTHK announced that further programming had been canceled and that long-time current affairs radio host Allan Au had been removed from his position after 11 years.⁵⁷

senior-employee; *Apple Daily*, “RTHK hit with resignations as new broadcasting head takes over,” Mar. 1, 2021, available at <https://hk.appledaily.com/news/20210301/JDV52M7F7BF3JNHZPY5VAHLMKM/>; *The Standard*, “Head of RTHK’s Public and Current Affairs resigns,” Mar. 1, 2021, available at <https://www.thestandard.com.hk/breaking-news/section/4/166504/Head-of-RTHK's-Public-and-Current-Affairs-resigns>; Theodora Yu, *The Washington Post*, “Hong Kong’s latest star TV host? City leader Carrie Lam,” Apr. 29, 2021, available at <https://www.washingtonpost.com/world/2021/04/29/hong-kong-carrie-lam-china/>.

⁵⁰ RTHK, “There’s no freedom without restraint: new RTHK head,” Mar. 1, 2021, available at <https://news.rthk.hk/rthk/en/component/k2/1578055-20210301.htm>; Ng Kang-chung, *South China Morning Post*, “New boss at Hong Kong public broadcaster RTHK confirms he pulled plug on several episodes of shows and vows to take more visible management approach,” Mar. 16, 2021, available at <https://www.scmp.com/news/hong-kong/society/article/3125569/new-rthk-boss-confirms-he-pulled-plug-several-programmes-and>.

⁵¹ RTHK, “Avoid suppression claims by stopping RTHK services,” Apr. 14, 2021, available at <https://news.rthk.hk/rthk/en/component/k2/1585779-20210414.htm>.

⁵² Candice Chau, *Hong Kong Free Press*, “Hong Kong broadcaster RTHK rejects media award for TV doc about police handling of mob attack,” Apr. 21, 2021, available at <https://hongkongfp.com/2021/04/21/hong-kong-broadcaster-rthk-rejects-media-award-for-tv-doc-about-police-handling-of-mob-attack/>.

⁵³ Theodora Yu, *The Washington Post*, “Hong Kong’s latest star TV host? City leader Carrie Lam,” Apr. 29, 2021, available at <https://www.washingtonpost.com/world/2021/04/29/hong-kong-carrie-lam-china/>.

⁵⁴ Michael Shum, *The Standard*, “RTHK plan to delete content spurs online push,” May 3, 2021, available at <https://www.thestandard.com.hk/section-news/section/4/229828/RTHK-plan-to-delete-content-spurs-online-push>; Selina Chang, *Hong Kong Free Press*, “Hong Kong broadcaster RTHK deletes shows over a year old from internet as viewers scramble to save backups,” May 3, 2021, available at <https://hongkongfp.com/2021/05/03/hong-kong-broadcaster-rthk-to-delete-shows-over-a-year-old-from-internet-as-viewers-scramble-to-save-backups/>.

⁵⁵ *The Standard*, “RTHK ends Nabela Qoser contract,” May 3, 2021, available at <https://www.thestandard.com.hk/breaking-news/section/4/171290/RTHK-ends-Nabela-Qoser-contract>; *Apple Daily*, “Outspoken Hong Kong journalist fired from public broadcaster on World Press Freedom Day,” May 3, 2021, available at <https://hk.appledaily.com/news/20210503/VLBFSL6EB5AQHL47S4HE2Y6S6U/>.

⁵⁶ Helen Davidson, *The Guardian*, “‘No political story allowed’: Hong Kong broadcaster falls silent on sensitive subjects,” June 1, 2021, available at <https://www.theguardian.com/world/2021/jun/02/no-political-story-allowed-hong-kong-broadcaster-falls-silent-on-sensitive-subjects>.

⁵⁷ RTHK, “RTHK removes veteran journalist from radio show,” June 28, 2021, available at <https://news.rthk.hk/rthk/en/component/k2/1598162-20210628.htm> [accessed June 28, 2021].

2019 Hong Kong Protests and the Yuen Long Station Attack

Between March 2019 through November 2019, Hong Kong was gripped by near-daily protests that initially emerged in response to proposed amendments to Hong Kong's extradition laws,⁵⁸ which would have allowed the authorities to extradite suspects from Hong Kong to mainland China and countries with which Hong Kong did not have an extradition treaty.⁵⁹ Concerned at this move, thousands started protesting in March 2019, with protests intensifying over the summer even as the government retreated from the proposed extradition amendments in July 2019.⁶⁰ Protests continued throughout 2019, with the protest demands expanding to incorporate electoral reforms and protections for democratic rights in Hong Kong. These protests consumed much of central Hong Kong and, by early 2021, had led to the arrest of more than 10,000 people⁶¹ between the ages of 11 and 84 years old.⁶² Over 2,500 had been charged in connection with these protests, with over 600 convictions as of April 2021.⁶³

During the summer of 2019, Hong Kong police also intensified their use of force against pro-democracy protestors and bystanders, with police using chemical agents and aggressive tactics with apparent impunity.⁶⁴ In September 2019, several UN experts raised concerns with the Hong Kong authorities' response to the protestors, including police violence and police failure to protect protestors, stating, "We are seriously concerned by

⁵⁸ 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>.

⁵⁹ 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>.

⁶⁰ BBC, "Hong Kong formally scraps extradition bill that sparked protests," Oct. 23, 2021, available at <https://www.bbc.com/news/world-asia-china-50150853>; Katie Tam, *The Diplomat*, "Hong Kong Withdraws Extradition Bill That Sparked Protests," Sept. 4, 2019, available at <https://thediplomat.com/2019/09/hong-kong-withdraws-extradition-bill-that-sparked-protests/>.

⁶¹ Austin Ramzy, *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>

⁶² *South China Morning Post*, "Arrested Hong Kong protesters: how the numbers look one year on," June 11, 2020, available at <https://multimedia.scmp.com/infographics/news/hong-kong/article/3088009/one-year-protest/index.html#:~:text=HONG%20KONG%20PROTESTS-,Arrested%20Hong%20Kong%20protesters%3A%20how%20the%20numbers%20look%20one%20year,an d%20eight%20primary%20school%20pupils>.

⁶³ Ng Kang-chung, *South China Morning Post*, "Hong Kong protests: more than 10,200 arrested in connection with unrest since 2019, government tells lawmakers," Apr. 9, 2021, available at <https://www.scmp.com/news/hong-kong/politics/article/3128836/hong-kong-protests-more-10200-arrested-connection-unrest>.

⁶⁴ Shibani Mahtani, Timothy McLaughlin, Tiffany Liang & Ryan Ho Kilpatrick, *The Washington Post*, "In Hong Kong crackdown, police repeatedly broke their own rules — and faced no consequences," Dec. 24, 2019, available at <https://www.washingtonpost.com/graphics/2019/world/hong-kong-protests-excessive-force/>; Amnesty International, "Hong Kong: Arbitrary arrests, brutal beatings and torture in police detention revealed," Sept. 19, 2019, available at <https://www.amnesty.org/en/latest/news/2019/09/hong-kong-arbitrary-arrests-brutal-beatings-and-torture-in-police-detention-revealed/>.

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.”⁶⁵ An investigation into police use of force conducted by the Independent Police Complaints Council (a watchdog agency and part of the Hong Kong government) faltered; in December 2019, the panel of foreign experts appointed to contribute to the investigation resigned, citing the absence of investigative capabilities “necessary...to begin to meet the standards citizens of Hong Kong would likely require of a police watchdog operating in a society that values freedoms and rights.”⁶⁶ The final police report,⁶⁷ 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.⁶⁸

In early 2020, authorities instituted a series of emergency measures in connection with the growing COVID-19 pandemic, including a regulation banning public gatherings of more than four people.⁶⁹ Many commentators saw this regulation, and its immediate use to stop and disperse pro-democracy protests, as affording an opportunity for the police to further crack down on demonstrations.⁷⁰

On July 21, 2019, at the height of protests, dozens of men dressed in white and armed with sticks and metal pipes, descended upon the Yuen Long metro station in Hong Kong and viciously and indiscriminately beat pro-democracy protestors, journalists and commuters at the station, injuring 45 people.⁷¹ The attack appeared to have been orchestrated by a group of pro-Beijing government supporters,⁷² and news reports at the time indicated that the

⁶⁵ 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>.

⁶⁶ 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>.

⁶⁷ 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.

⁶⁸ 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>.

⁶⁹ HKSAR, Prevention and Control of Disease (Prohibition on Group Gathering) Regulation, March 28, 2020, available at <https://www.info.gov.hk/gia/general/202003/28/P2020032800720.htm>.

⁷⁰ See Mary Hui, *Quartz*, “Hong Kong police are using coronavirus restrictions to clamp down on protesters,” Apr. 1, 2020, available at <https://qz.com/1829892/hong-kong-police-use-coronavirus-rules-to-limit-protests/>; Iain Marlow & Jinshan Hong, *Time*, “Hong Kong Police Arrest Protesters for Violating Social Distancing Guidelines,” May 11, 2020, available at <https://time.com/5835103/hong-kong-protesters-coronavirus-restrictions/>; Civil Rights Observer, Twitter Post, Mar. 31, 2020, https://twitter.com/HK_CRO/status/1245180697276346368.

⁷¹ Austin Ramzy, *The New York Times*, “Mob Attack at Hong Kong Train Station Heightens Seething Tensions in City,” July 22, 2019, available at <https://www.nytimes.com/2019/07/22/world/asia/hong-kong-protest-mob-attack-yuen-long.html>.

⁷² Jeffie Lam, Danny Mok & Alvin Lum, *South China Morning Post*, “At least 45 injured as rod-wielding mob dressed in white rampages through Yuen Long MTR station, beating screaming protesters,” July 22, 2019,

police response was slow, suggesting complicity.⁷³ While a senior Government official apologized for the police handling of the incident in its immediate aftermath,⁷⁴ the authorities' own description of the event shifted dramatically over time, with officials eventually calling the attack a "gang fight" between two "evenly-matched" groups,⁷⁵ and police denouncing the initial apology.⁷⁶

Over 60 individuals have been arrested for the Yuen Long attack on charges including riot. In February 2021, the authorities brought charges against six men and were criticized by the court for the prosecution's lack of preparation with the case;⁷⁷ the trial proceeded in April and ultimately, on June 18, 2021, five were convicted.⁷⁸ As one reporter noted, on the

available at <https://www.scmp.com/news/hong-kong/law-and-crime/article/3019524/least-10-injured-baton-wielding-mob-suspected-triad>; Shibani Mahtani & Ryan Ho Kilpatrick, *The Washington Post*, "Hong Kong police resort to falsehoods in new propaganda drive: Authorities in the financial center are seeking to reshape public discourse around last year's pro-democracy protests," Aug. 27, 2020, available at https://www.washingtonpost.com/world/asia_pacific/hong-kong-police-yuen-long-attack-national-security-law-arrests/2020/08/27/370d8490-e787-11ea-bf44-0d31c85838a5_story.html. Zheng Sisi & Cai Yuling, *Stand News*, "7.21 Sourcing", July 19, 2021, available at <https://www.thestandnews.com/media/video/images/721-%E5%B0%8B%E6%BA%90>

⁷³ Lily Kuo & Verna Yu, *The Guardian*, "'Where were the police?' Hong Kong outcry after masked thugs launch attack," July 22, 2019, available at <https://www.theguardian.com/world/2019/jul/22/where-were-the-police-hong-kong-outcry-after-masked-thugs-launch-attack>; Natasha Khan, *Wall Street Journal*, "Hong Kong Police Block March Protesting Mob Attack," July 22, 2019, available at <https://www.wsj.com/articles/hong-kong-police-block-march-protesting-mob-attack-11564079606>; *Canadian Broadcasting Corporation*, "Hong Kong police criticized over failure to stop attacks on protesters," July 22, 2019, available at <https://www.cbc.ca/news/world/hong-kong-subway-train-attack-1.5219915>; Nadia Lam, *Associated Press*, "Hong Kong crisis escalates after mob attack on protesters," July 22, 2019, available at <https://apnews.com/article/china-ap-top-news-international-news-asia-pacific-hong-kong-43607d409ec84484aba9eb31d6debad2>.

⁷⁴ Holmes Chan, *Hong Kong Free Press*, "Hong Kong's chief sec. apologises over handling of Yuen Long attacks, stirring dissent from police," July 29, 2019, available at <https://hongkongfp.com/2019/07/26/hong-kongs-chief-sec-apologises-handling-yuen-long-attacks-stirring-dissent-police/>.

⁷⁵ Kelly Ho, *Hong Kong Free Press*, "Explainer: From 'violent attack' to 'gang fight': How the official account of the Yuen Long mob attack changed over a year," July 21, 2020, available at <https://hongkongfp.com/2020/07/21/from-violent-attack-to-gang-fight-how-the-official-account-of-the-yuen-long-mob-attack-changed-over-a-year/>; Timothy McLaughlin, *The Atlantic*, "How History Gets Rewritten," Sept. 8, 2020, available at <https://www.theatlantic.com/international/archive/2020/09/hong-kong-protests-propaganda/616135/>; Lo Kin-hei, *Vice News*, "Yuen Long Attack: The Day That Changed Hong Kong Forever," Aug. 27, 2020, available at <https://www.vice.com/en/article/8897x4/yuen-long-attack-hong-kong-arrests>.

⁷⁶ Kelly Ho, *Hong Kong Free Press*, "Explainer: From 'violent attack' to 'gang fight': How the official account of the Yuen Long mob attack changed over a year," July 21, 2020, <https://hongkongfp.com/2020/07/21/from-violent-attack-to-gang-fight-how-the-official-account-of-the-yuen-long-mob-attack-changed-over-a-year/>; Clifford Lo, "Second Hong Kong police union blasts chief secretary for apology over Yuen Long attack response," July 27, 2019, <https://www.scmp.com/news/hong-kong/law-and-crime/article/3020342/second-hong-kong-police-union-issues-statement>; Mary Hui, *Quartz*, "Hong Kong police are rewriting the history of an infamous thug attack on civilians," Aug. 27, 2020, available at <https://qz.com/1896368/hong-kong-police-rewrite-history-of-july-21-yuen-long-thug-attack/>.

⁷⁷ Selina Chang, *Hong Kong Free Press*, "Hong Kong police arrest another man over Yuen Long MTR mob attack," Jan. 5, 2021, available at <https://hongkongfp.com/2021/01/05/hong-kong-police-arrest-another-man-over-yuen-long-mtr-mob-attack/>; Brian Wong *South China Morning Post*, "Hong Kong protests: six men on trial for Yuen Long mob attack were wrongly identified, lawyers argue," Apr. 28, 2019, available at <https://www.scmp.com/news/hong-kong/law-and-crime/article/3131476/hong-kong-protests-six-men-trial-yuen-long-mob-attack>.

⁷⁸ Selina Chang, *Hong Kong Free Press*, "Five guilty of rioting over 'devil-like' 2019 Yuen Long mob attack," June 18, 2021, available at <https://hongkongfp.com/2021/06/18/five-guilty-of-rioting-over-devil-like-2019-yuen-long-mob-attack/>; Brian Wong, *South China Morning Post*, "Hong Kong protests: 5 found guilty of rioting for roles in 2019 Yuen Long MTR attack, 1 acquitted," June 18, 2021, available at

day of her conviction, Bao Choy was the first and only person to be convicted in relation to the events of July 21, 2019.⁷⁹ On May 5, 2021, Lam Cheuk-ting, a former opposition politician now facing trial on national security charges and a victim of the Yuen Long attack, dropped a civil lawsuit against the police chief for injuries sustained during the attack, citing the slow pace, significant resources needed and the seeming futility of the lawsuit.⁸⁰

B. THE CASE: Hong Kong v. Bao Choy

Bao Choy Yuk-ling (“Bao Choy”) is an award-winning 37-year-old investigative journalist and documentary film producer in Hong Kong. In the fall of 2019, she worked with RTHK to produce a documentary for its show “Hong Kong Connection” on the attacks against pro-democracy activists and other commuters at the Yuen Long metro station on July 21, 2019.⁸¹ The RTHK documentary, “7:21: Who Owns the Truth,” released in July 2020, identified several undercover police officers and other government officials at the scene, suggesting they may have been complicit in the attack and/or the police failure to rapidly respond to the victims.⁸²

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

Bao Choy was arrested on November 3, 2020 and charged with two counts of violating Section 111(3) of the Road Traffic Ordinance, for “knowingly mak[ing] any statement which is false in a material particular” on two applications for vehicle information through the database.⁸³ The maximum sentence for this offense is a fine and imprisonment of six months. This section of the Ordinance, titled “Forgery of documents,” speaks to criminal penalties for, among other things, forging a drivers’ license or documents for showing or transferring title of a vehicle. Its apparent purpose is to sanction fraudulent acts in connection with offenses like theft, parking illegally or driving without a license.

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

<https://www.scmp.com/news/hong-kong/law-and-crime/article/3137864/hong-kong-protests-5-found-guilty-rioting-roles-2019>.

⁷⁹ Alex Lam, Twitter Post, Apr. 22, 2021, *available at* <https://twitter.com/lwcalex/status/1385143784665600001?s=20>

⁸⁰ Lilian Cheng, *South China Morning Post*, “Former Hong Kong legislator drops lawsuit against police chief over Yuen Long attack,” May 5, 2021, *available at* <https://www.scmp.com/news/hong-kong/law-and-crime/article/3132376/former-hong-kong-legislator-drops-lawsuit-against>.

⁸¹ RTHK, “Hong Kong Connection: 7.21 Who Owns the Truth,” *previously available at* <https://www.youtube.com/watch?v=mrHywuxPMV0> (last accessed May 3, 2021).

⁸² *Id.*

⁸³ Road Traffic Ordinance, Cap. 374 of the Laws of Hong Kong, Sec. 111(3) (1984), *available at* <https://www.elegislation.gov.hk/hk/cap374>.

purchase of vehicle and (3) other traffic and transport related matters.⁸⁴ Choy selected “other traffic and transport related matter” on the web form. Previously, the database had an option where people could select “other reasons” for accessing information but it had been apparently removed in or around January 2020.⁸⁵

The options provided on the form for accessing vehicle data—and the form itself—are not specified by the Road Traffic Ordinance. Rather, the form was created by the Transport Department and requires the name and contact information of the applicant. At trial, it was never suggested that Bao Choy provided fraudulent or misleading information on those sections, only that she had allegedly engaged in fraud by checking the box “other traffic and transport related matters” as her reason for seeking the data.⁸⁶

On April 22, 2021, the Court convicted Bao Choy of making false statements in violation of the Road Traffic Ordinance and sentenced her to pay a fine of HK \$6,000 (3,000 for the two times she used the database, approximately USD \$775 in total). On May 5, 2021, Bao Choy announced that she would appeal her conviction; she explained her decision as a matter of public responsibility, stating her concern that “more and more voices are being extinguished, it seems Hongkongers are getting used to not being able to speak up.”⁸⁷

On the day of Choy’s conviction for making false statements under the Road Traffic Ordinance, it emerged that another reporter, Wong Wai-keung from the pro-Beijing *Ta Kung Pao*, had been arrested on February 11, 2021 for the same offence.⁸⁸ Wong sought to have his case stayed pending Bao Choy’s appeal, but the Prosecution ultimately withdrew the charges against him in June 2021.⁸⁹

⁸⁴ See Transport Department, Application for a Certificate of Particulars of Vehicle, available at [https://www.td.gov.hk/filemanager/common/td318\(201910\)_eng.pdf](https://www.td.gov.hk/filemanager/common/td318(201910)_eng.pdf).

⁸⁵ RTHK, “RTHK programme wins award as producer faces verdict,” Apr. 22, 2021, available at <https://news.rthk.hk/rthk/en/component/k2/1587081-20210422.htm>; Selina Chang, *Hong Kong Free Press*, “Producer of doc about police bailed on charges of making false statements to get public records,” Nov. 4, 2020, available at <https://hongkongfp.com/2020/11/04/producer-of-doc-about-police-bailed-on-charges-of-making-false-statements-to-get-public-records/>; Theodora Yu & Shibani Mahtani, *The Washington Post*, “A Hong Kong journalist exposed police failures. A court found her guilty of a crime,” Apr. 22, 2021, available at https://www.washingtonpost.com/world/asia_pacific/hong-kong-press-freedom/2021/04/22/96435292-a310-11eb-b314-2e993bd83e31_story.html.

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

⁸⁷ *Hong Kong Free Press*, “Hong Kong journalist Bao Choy appeals conviction over accessing public data for documentary,” May 5, 2021, available at <https://hongkongfp.com/2021/05/05/hong-kong-journalist-bao-choy-appeals-conviction-over-accessing-public-data-for-documentary/>.

⁸⁸ *Stand News*, “**因車牌查冊被指作虛假陳述 警拘捕起訴一男子 消息指為《大公報》記者**,” April 22, 2021, available at <https://www.thestandnews.com/politics/封殺查冊-因車牌查冊被指作虛假陳述-警二月拘一男子-消息為-大公報-記者>; Brian Wong, *South China Morning Post*, “Court denies request for trial delay by Hong Kong reporter accused of misusing government database,” May 25, 2021, available at <https://www.scmp.com/news/hong-kong/law-and-crime/article/3134696/court-denies-request-trial-delay-hong-kong-reporter>.

⁸⁹ Brian Wong, *South China Morning Post*, “Hong Kong prosecutors questioned by magistrate after letting reporter from pro-Beijing newspaper walk on same charge pursued against RTHK freelancer,” June 17, 2021, available at <https://www.scmp.com/news/hong-kong/law-and-crime/article/3137638/hong-kong-prosecutors-questioned-magistrate-after>; Wallis Wang, *The Standard*, “Double standard fear as Ta Kung Pao charge nixed,” June 18, 2021, available at <https://www.thestandard.com.hk/section-news/section/50037571/231304/double-standard-fear-as-Ta-kung-Pao-charge-nixed>.

C. TRIAL PROCEEDINGS

Bao Choy was arrested at home on November 3, 2020; she appeared in court and posted bail the same evening.⁹⁰ Her case was scheduled for two days of hearings in March 2021, although ultimately only one of the trial days was used by the parties.

March 24, 2021

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

The presiding judge asked if the parties wanted to replay the documentary for which Bao Choy accessed the vehicle registry; the Prosecution did not see a need to do so but the Defense said it would provide a helpful reference point for the information search Bao Choy conducted.⁹¹ The Defense then argued that Bao Choy's invocation of "other traffic and transport related matter" on the form did not constitute a false statement because the purpose of her information search was to track and report a suspected traffic-and-transport-related crime and the vehicle at issue might have been used to transport weapons and the suspected attackers to the Yuen Long station. The Prosecution argued to the contrary that investigative reporting is not an approved reason for accessing the vehicle database under the Transport Department's form and that the legislative intent of the ordinance's drafters was to restrict access to limited purposes. The Judge then ruled that there was a *prima facie* case to answer and allowed the hearing to continue.

As neither side called witnesses to testify in court, the parties next made closing submissions. The Prosecution's submission, which took approximately half an hour, maintained that Bao Choy's online submission had been a false statement under the Road Traffic Ordinance and that because the Register contains sensitive personal data, the ordinance should not be understood to permit disclosure for any other reasons not specified on the form, as this would lead to abuse of the system and vehicle owners' right to privacy.⁹²

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

⁹⁰ *South China Morning Post* "Why RTHK journalist was arrested, and what that could mean for future of investigative reporting in Hong Kong," Nov. 5, 2020, available at <https://www.scmp.com/news/hong-kong/politics/article/3108497/why-rthk-journalist-was-arrested-and-what-could-mean-future>; Jeff Pao, *Asia Times*, "HK reporter's arrest latest blow to press freedom," Nov. 3, 2020, available at <https://asiatimes.com/2020/11/hk-reporters-arrest-latest-blow-to-press-freedom/>.

⁹¹ TrialWatch Monitoring, HKSAR v. Bao Choy, March 24, 2021.

⁹² TrialWatch Monitoring, HKSAR v. Bao Choy, March 24, 2021.

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

Furthermore, the Defense said, in response to the Prosecution’s argument that there was a risk of “abuse” of the database, that the public search mechanism had been in place since the 1950s with no suggestion that it needed to be reformed to limit abuse. The defense argued that balancing the public’s right to information against the right to privacy is a task for the legislature, and that despite a rise in ‘doxing,’ the legislature had yet to take action—suggesting that they did not see the latter as a great risk in this context.⁹³ Indeed, to demonstrate that Bao Choy’s use of the database was consistent with prior uses to which it had been put, the Defense cited figures provided by the Transportation Department showing there were more than 50,000 applications for information in 2010; almost half of them were for the purpose of legal proceedings, and over 20,000 were made without listing the purpose (as was permitted until 2019). Of those 20,000 applications, 2,800 were made by the press.⁹⁴

April 22, 2021: Verdict & Sentencing

On April 22, 2021, the Principal Magistrate hearing the case found Bao Choy guilty on both counts of “knowingly making a false statement.” The Court observed that the Defendant’s statements on the online form were “false” because she had no need of the information for litigation or another valid rationale; her purpose, the Court said, was rather “to obtain the name and address of the registered owner of the Vehicle in order to conduct interviews and reporting, which had no connection with ‘other traffic and transport related matters.’”⁹⁵ The Court ordered Bao Choy to pay a fine of HK \$3,000 for each count for a total of HK \$6,000 (in USD, approximately \$775).

On May 5, 2021, Bao Choy announced that she had submitted an appeal.⁹⁶

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ HKSAR v. Choy Yuk-ling (Bao Choy), No. 4075 of 2020, para. 17 (April 22, 2021), Appendix B.

⁹⁶ Bao Choy, May 5, 2021, Twitter Post, *available at* <https://twitter.com/baochoy/status/1389832079345471488>; RTHK, “Bao Choy to fight conviction over Yuen Long report,” May 5, 2021, *available at* <https://news.rthk.hk/rthk/en/component/k2/1589351-20210505.htm>; Natalie Wong, *South China Morning Post*, “Hong Kong protests: former RTHK journalist Bao Choy to appeal conviction over database search, fearing lifelong regret if she gives up ‘pursuit of justice,’” May 5, 2021, *available at* <https://www.scmp.com/news/hong-kong/politics/article/3132377/hong-kong-protests-former-rthk-journalist-bao-choy-appeal>.

METHODOLOGY



A. THE MONITORING PHASE

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

B. THE ASSESSMENT PHASE

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

ANALYSIS



A. APPLICABLE LAW

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

B. VIOLATIONS AT TRIAL & OTHER FAIRNESS VIOLATIONS

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

Violation of the Principle of Legality

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

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

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

⁹⁷ United Nations International Covenant on Civil and Political Rights (ICCPR), Mar. 23, 1976, 14668 U.N.T.S. 172, art. 15.

⁹⁸ European Court of Human Rights, *Kokkinakis v. Greece*, App. No. 14307/88, May 25, 1993, para.52.

⁹⁹ Inter-American Court of Human Rights, *Castillo Petruzzi et al. v. Peru*, Series C, No. 52, May 30, 1999, para. 121.

¹⁰⁰ Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, Advisory Opinion, 1935 PCIJ (ser. A/B) No.65 (Dec.4) at 56-57.

... on those charged with its execution,”¹⁰¹ as such discretion could give rise to abusive limitations on speech. For this reason, the first requirement of any restriction on speech is that the restriction be “prescribed by law.”¹⁰²

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

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

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

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

¹⁰² UN Human Rights Committee, *Kim v. Republic of Korea*, U.N. Doc. CCPR/C/64/D/574/1994, Jan. 4, 1999, para. 12.2.

¹⁰³ See UN Human Rights Committee, *Kim v. Republic of Korea*, U.N. Doc. CCPR/C/64/D/574/1994, Jan. 4, 1999, para. 12.2; U.N. General Assembly, Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion, U.N. Doc. A/74/486, Oct. 9, 2019, para. 6.

¹⁰⁴ 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.

¹⁰⁵ Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, “Disease pandemics and the freedom of opinion and expression,” U.N. Doc. A/HRC/44/49, Apr. 23, 2020, para. 14.

¹⁰⁶ Cf. Transport Department, Application for a Certificate of Particulars of Vehicle, *available at* [https://www.td.gov.hk/filemanager/common/td318\(201910\)_eng.pdf](https://www.td.gov.hk/filemanager/common/td318(201910)_eng.pdf).

¹⁰⁷ The defense suggested that the terms “matters related to traffic and transportation” were general and prone to multiple good faith interpretations, pointing to a Court of Final Appeal case *HKSAR v Wan Thomas (Wen Haojun)*, (2018) 21 HKCFAR 214, which concerned whether the appellants were misleading the authorities to refer to themselves as “friends” of prisoners they were visiting. The CFA said the prosecution had not shown the appellants knew their statement that they were “friends” was false. The Court in the present case noted that “the term ‘friend’ disputed in the *Wan Thomas* case can have many different meanings, and its usage is too broad and wide” but that it was “impossible to compare the term ‘friend’ in this case with the term ‘matters related to traffic and transportation’” in this case. The Court’s explanation for this was that Bao Choy knew her ultimate purpose in procuring the vehicle information was for news reporting, but that doesn’t address the issue of whether she knew checking this box for “matters related to traffic and transportation” to get information about a vehicle could definitely *not* be used for investigation. Nor did the Court’s verdict elucidate what the terms clearly meant to the Court or a general audience.

among those that were authorized, and so she knew her “statements” (in checking the “other traffic and transport” box) were false, in fact, the term of the box she selected—“other traffic and transport related matters”—is broad and general. Indeed, many journalists had previously procured information using this form without any sanction and even if the terms did not *explicitly* authorize Bao Choy’s exact use of the database, a good-faith reading of the form did not suggest her use was prohibited. As the defense noted at trial, the Transport Department has provided no guidelines to users of the database or defined “activities relating to traffic and transport matters.” In its verdict, the Court held that Bao Choy “clearly knew” the applications were made for the purposes of ‘searching,’ ‘interviewing’ and ‘reporting,’ none of which falls under the three options offered by the Transport Department.¹⁰⁸ But while Bao Choy did not deny or hide her purpose in procuring the information from the database, nothing at trial or upon a plain reading of the statute itself suggests that Bao Choy (or any other journalist) who has used this database would know that this particular use of the database was considered fraudulent or prohibited. As discussed further in the next section, the authorities did not contest that journalists have routinely used this and other public databases in the course of their reporting and that they would not have had notice—either on the face of the law or given prior responses by the authorities—that doing so was a criminal violation.

Abuse of Process

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

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

¹⁰⁸ HKSAR v CHOY Yuk-ling, WKCC4075/2020, Reasons for Verdict, April 22, 2021, para. 60; see *also* HKSAR v CHOY Yuk-ling, Press Summary (Official English Translation), WKCC4075/2020, April 22, 2021.

¹⁰⁹ European Court of Human Rights, Kononov v. Latvia, App. No. 36376/04, May 17, 2010, para. 185. See also European Court of Human Rights, Kokkinakis v. Greece, App. No. 14307/88, May 25, 1993, para. 52.

¹¹⁰ Inter-American Court of Human Rights, Castillo Petruzzi et al. v. Peru, Series C, No. 52, May 30, 1999.

¹¹¹ UN Human Rights Committee, Khadzhiyev v. Turkmenistan, U.N. Doc. CCPR/C/122/D/2252/2013, Apr. 17, 2018, para. 7.7; see *also* UN Human Rights Committee, Nasheed v. Maldives, U.N. Doc. CCPR/C/122/D/2851/2016, May 4, 2018, para. 8.7 (“The State party has not refuted the author’s allegations that the judicial proceedings against him, and the measures taken within the proceedings in 2012-2013, cumulatively, were used as a means of preventing him from campaigning for the 2013 presidential elections, such as twice arresting him to interrupt campaign trips and denying his request to be authorized to travel to other islands and abroad in connection with the political campaign.”); William Schabas, *The European Convention on Human Rights: A Commentary* 623 (Oxford University Press 2016).

context in which the prosecution was brought;¹¹² whether the authorities undertook actions against the accused amidst their “increasing awareness that the practices in question were incompatible with [European] Convention standards;”¹¹³ and whether the ultimate decision was well-reasoned and based on law.¹¹⁴ The European Court will also consider the broader context, including whether the prosecution is in response to exercise of protected rights. Thus, for instance, in the case of *Mammadov v. Azerbaijan*, the Court found a violation where it concluded that the purpose of an arrest “was to silence or punish the applicant for criticising the Government and attempting to disseminate what he believed was the true information that the Government were trying to hide.”¹¹⁵

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

Further, the European Court has emphasized that in evaluating whether criminal 212F39interferes with enjoyment of a protected right. In particular, in the *Kavala* case, the European Court remarked that “at the core of the applicant’s Article 18 complaint is

¹¹² European Court of Human Rights, “Guide on Article 18 of the European Convention of Human Rights, Limitations on Use of Restrictions and Rights,” Aug. 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, Jul. 25, 2013, para. 901; European Court of Human Rights, *Nastase v. Romania*, App. No. 80563/12, Dec. 11, 2014, para. 107; European Court of Human Rights, *Rasul Jafarov v. Azerbaijan*, App. No. 69981/14, Mar. 17, 2016, paras. 159-161; European Court of Human Rights, *Mammadli v. Azerbaijan*, App. No. 47145/14, Apr. 19, 2018, para. 103; European Court of Human Rights, *Rashad Hasanov and Others v. Azerbaijan*, App. No. 148653/13, June 7, 2018, para. 124).

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

¹¹⁴ European Court of Human Rights, *Nastase v. Romania*, App. No. 80563/12, Dec. 11, 2014, para. 107.

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

¹¹⁶ 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.

¹¹⁷ 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.

¹¹⁸ 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.

his alleged persecution, not as a private individual, but as a human-rights defender and NGO activist. As such, the restriction in question would have affected not merely the applicant alone, or human-rights defenders and NGO activists, but the very essence of democracy as a means of organising society, in which individual freedom may only be limited in the general interest.”¹¹⁹

This case implicates the right to freedom of expression, which under the ICCPR, includes not only free speech but also “a right of access to information held by public bodies.”¹²⁰ The UN Human Rights Committee has previously noted that the rights to freedom of expression (Article 19 of the ICCPR) and to take part in public affairs (Article 25 of the ICCPR), taken together, include the right of the media to access to information on public affairs¹²¹ and the right of the general public to receive media output.¹²² The Inter-American human rights system has noted that the right to access information is both a core part of the right to freedom of expression and a right in and of itself, crucial for “democratic participation, oversight of the State and public administration, and the monitoring of corruption.”¹²³

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

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

1. Selective prosecution

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

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

¹¹⁹ European Court of Human Rights, *Kavala v. Turkey*, App. No. 28749/18, Dec. 10, 2019, para. 231.

¹²⁰ General Comment No. 34, para. 18.

¹²¹ UN Human Rights Committee, *Gauthier v. Canada*, U.N. Doc. CCPR/C/65/D/633/1995, May 5, 1999, para 13.4.

¹²² UN Human Rights Committee, *Mavlonov and Sa’di v. Uzbekistan* U.N. Doc. CCPR/C/95/D/1334/2004, Mar. 19, 2009, para 8.4. See generally, Maeve McDonagh, *Right to Information in International Human Rights Law*, 13 Hum. R. L. Rev. 25 (2013).

¹²³ Organization of American States, Inter-American Commission on Human Rights, Office of the Special Rapporteur for Freedom of Expression, *The right of access to information* (2009), available at http://www.oas.org/dil/access_to_information_iachr_guidelines.pdf

In the months leading up to Bao Choy's arrest and the subsequent several months between her arrest and trial, authorities in Hong Kong moved to undermine RTHK's independent coverage, suspending programming critical of the government (and the police in particular), replacing its leadership with a career bureaucrat, and censuring reporters who questioned government officials.¹²⁴ A day after Bao Choy's conviction, RTHK announced it was giving government media regulators internal positions at RTHK.¹²⁵ This timing suggests that her arrest and prosecution were motivated not by the need to prevent and punish criminal conduct but rather as part of a larger effort to curb reporting critical of the police and other government authorities.

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

¹²⁴ See Jessie Pang, Reuters, "Hong Kong signals overhaul of public broadcaster RTHK, stoking media freedom concerns," Feb. 18, 2021, *available at* <https://www.reuters.com/article/us-hongkong-security-media/hong-kong-signals-overhaul-of-public-broadcaster-rthk-stoking-media-freedom-concerns-idUSKBN2AJ09J>; Rachel Wong, *Hong Kong Free Press*, "Explainer: How the Hong Kong authorities cracked down on public broadcaster RTHK," Nov. 11, 2020, *available at* <https://hongkongfp.com/2020/11/11/explainer-how-the-hong-kong-authorities-cracked-down-on-public-broadcaster-rthk/>; Cannix Yau, *South China Morning Press*, "Hong Kong's RTHK under siege: should it be a public broadcaster or government mouthpiece?" Nov. 28, 2020, *available at* <https://www.scmp.com/news/hong-kong/politics/article/3110900/hong-kongs-rthk-under-siege-should-it-be-public-broadcaster>; Vivian Wang, *The New York Times*, "Hong Kong's Move to Overhaul Broadcaster Fans Fears of Media Crackdown," Feb. 19, 2021, *available at* <https://www.nytimes.com/2021/02/19/world/asia/hong-kong-rthk-crackdown.html>; Theodora Yu & Shibani Mahtani, *Washington Post*, "Hong Kong reels in public broadcaster RTHK as media clampdown intensifies," Feb. 19, 2021, *available at* https://www.washingtonpost.com/world/asia_pacific/hong-kong-rthk-media-freedom/2021/02/19/42397a18-7279-11eb-8651-6d3091eac63f_story.html. In the weeks surrounding Bao Choy's trial and conviction, Hong Kong authorities also warned of the danger of 'fake news' and noted that they could activate laws like the National Security Law in response. See Kelly Ho, *Hong Kong Free Press*, "Hong Kong gov't is the 'biggest victim of fake news,' Chief Exec. Carrie Lam says," Apr. 8, 2021, *available at* <https://hongkongfp.com/2021/04/08/hong-kong-govt-is-the-biggest-victim-of-fake-news-chief-exec-carrie-lam-says/>.

¹²⁵ RTHK, "Media regulator officials given new posts at RTHK," Apr. 23, 2021, https://news.rthk.hk/rthk/en/component/k2/1587339-20210423.htm?archive_date=2021-04-23.

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

¹²⁷ Since Bao Choy's arrest, one other journalist—Wong Wai-keung from the pro-Beijing *Ta Kung Pao*—has also been charged for the same offence of making false statements under the Road Traffic Ordinance. This subsequent prosecution, however, does not take away from the political motivations for and chilling impact of Bao Choy's prosecution. Hers was the first such arrest, initiated in the midst of other actions taken to silence reporting critical of the authorities by RTHK; the improper motives discussed in this report are not erased by a subsequent prosecution of a journalist whose employer may be more in line with the viewpoint of the Hong Kong authorities. Indeed, the subsequent decision of the Prosecution to drop the similar charges against Wong reinforces the suggestion that Bao Choy's arrest was politically-motivated.

At trial, the primary governmental interest asserted by the Prosecution was protecting the privacy rights of those whose information might be accessed through the database. But the previous acceptance of thousands of requests that did not specify a purpose suggests this is not a sufficient justification to support criminal prosecution.¹²⁸ Further, the Prosecution, in asserting this interest, did not show specific or possible harm from allowing individuals to use this public database for reporting. Given this history, and absent specific evidence at trial, the Prosecution's concerns seem speculative—and give rise to concern that the real reason this provision was invoked in this way for the first time was to sanction a journalist for the content of her reporting.¹²⁹

Third, it is not clear that the Prosecution met its burden of proof to demonstrate Bao Choy's *intent* to commit an offense. Under human rights law, the presumption of innocence places on the prosecution the burden to prove the guilt of the accused person beyond a reasonable doubt.¹³⁰ In this case, the Prosecution's argument was conclusory and did not prove the individual elements of the offense, in particular that Bao Choy *knowingly* made *false* statements by checking the general and broad box ("other traffic and transport related matters") on a website. The Prosecution and Court noted that Bao Choy did not dispute that she had checked that box but it is hard to believe that the accused, were she aware that she was committing a crime, would have filmed herself using this database in this way and then released the footage. Other than the facts of what she did, which she did not dispute, the Prosecution presented no evidence that she *knew* her statements would be considered false. Looking at the plain language of the statute (which concerns false statements made for fraudulent purposes such as to take title of a vehicle), it is not clear that a person would think it applies to situations like the present, where there could be a reasonable and good-faith reason for using the database. Bao Choy is accused of using a public database—as others had previously done—for a purpose not explicitly authorized or intended by the administrative agency, but also not clearly prohibited; to take this as evidence of a deliberate fraud is a reach and to pursue criminal penalties

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

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

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

seems a disproportionate response. That the court nevertheless convicted Bao Choy despite this dearth of evidence of her knowledge that what she was doing was wrong is also suggestive of abuse of process.

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

2. Prosecution for Freedom of Expression

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

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

¹³¹ Department of Justice, Hong Kong Special Administrative Region, Prosecution Code 5.9(e), *available at* https://www.doj.gov.hk/en/publications/prosecution_code.html

¹³² *Id.* 5.9(n).

¹³³ Brian Wong, *South China Morning Post*, “Hong Kong prosecutors questioned by magistrate after letting reporter from pro-Beijing newspaper walk on same charge pursued against RTHK freelancer,” Jun. 17, 2021, *available at* <https://www.scmp.com/news/hong-kong/law-and-crime/article/3137638/hong-kong-prosecutors-questioned-magistrate-after>; Wallis Wang, *The Standard*, “Double standard fear as Ta Kung Pao charge nixed” Jun. 18, 2021, *available at* <https://www.thestandard.com.hk/section-news/section/50037571/231304/double-standard-fear-as-Ta-kung-Pao-charge-nixed>.

¹³⁴ Viola Zhou, *Vice*, “The First Person Convicted Over a Mob Attack on Hong Kong Protesters Is a Reporter,” Apr. 22, 2021, *available at* <https://www.vice.com/en/article/m7ejd4/hong-kong-press-freedom-bao-choy>.

rights under Article 19 of the ICCPR. The right to freedom of expression under Article 19 encompasses a right to access to information held by public authorities.¹³⁵

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

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

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

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

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

¹³⁵ See *supra*.

¹³⁶ ICCPR, art. 19(2).

¹³⁷ General Comment No. 34, para 13. See also Paul Daudin Clavaud, Toby Mendel & Ian Lafrenière, UNESCO, FREEDOM OF EXPRESSION AND PUBLIC ORDER: TRAINING MANUAL, at 15 (2015), available at <https://unesdoc.unesco.org/ark:/48223/pf0000231305>.

¹³⁸ CDL-AD(2013)024, Opinion on the legislation pertaining to the protection against defamation of the Republic of Azerbaijan, § 21.

¹³⁹ Robert W. Gauthier v. Canada, Communication No 633/1995, U.N. Doc. CCPR/C/65/D/633/1995, para 13.4 (5 May 1999).

¹⁴⁰ *Id.*

¹⁴¹ See Nicolle Liu & Primrose Riordan, *Financial Times*, “Hong Kong’s public broadcaster faces rising pressure to self-censor,” June 19, 2020, available at <https://www.ft.com/content/9a2b3390-924c-48d9-9021-6e5852b683e1>; James Pomfret & Greg Torode, *Reuters*, “Hong Kong’s free media fears being silenced by China’s national security law,” Jun. 5, 2020, available at <https://www.reuters.com/article/us-hongkong-protests-media-insight/hong-kongs-free-media-fears-being-silenced-by-chinas-national-security-law-idUSKBN23C0J6>; Austin Ramzy & Ezra Cheung, *The New York Times*, “China’s Leash on Hong Kong Tightens, Choking a Broadcaster,” July 8, 2020; Helen Davidson, *The Guardian*, “Hong Kong official reprimands TV station over WHO interview that mentioned Taiwan,” Apr. 3, 2020, available at <https://www.theguardian.com/world/2020/apr/03/hong-kong-official-reprimands-tv-station-over-who>

pressured to cancel certain programming and replace staff deemed critical of government authorities; and when Bao Choy was arrested,¹⁴² senior management at RTHK said it was under significant pressure to dissuade them from providing assistance to her.¹⁴³ In the weeks leading up to Bao Choy's trial, RTHK underwent a leadership overhaul that many, including RTHK staff, saw as an attempt to censor and undermine the independence of the publication.¹⁴⁴ Ahead of Bao Choy's conviction, a pro-government member of Hong Kong's Executive Council suggested that the government might shut down RTHK's television programming, stating that RTHK staff "just don't want to act as government mouthpieces."¹⁴⁵

Meanwhile, accountability for the subject of Bao Choy's documentary—the Yuen Long attack—has stalled in the courts, as has any real reckoning with the actions of the police during the 2019 protests. After independent international experts quit a government-led review of police conduct during the protests in December 2019 citing a lack of independence,¹⁴⁶ the subsequent official report largely absolved police of any misconduct against protestors despite widely reported abuse.¹⁴⁷ While over 10,000 protestors are

interview-that-mentioned-taiwan; Ton Grundy, *Hong Kong Free Press*, "Exclusive: RTHK Radio 3 to play Chinese national anthem daily from mid-Nov," Nov. 5, 2020, available at <https://hongkongfp.com/2020/11/05/exclusive-rthk-radio-3-to-play-chinese-national-anthem-daily-from-mid-nov-sources/>; Foreign Correspondents Club Hong Kong, "Can RTHK Retain Its Independence?" Dec. 31, 2020, available at <https://www.fcchk.org/correspondent/can-rthk-retain-its-independence/>; *Asia Pacific Report*, "How Hong Kong authorities are gradually taking over public broadcaster RTHK," Nov. 14, 2020, available at <https://asiapacificreport.nz/2020/11/14/how-hong-kong-authorities-are-gradually-taking-over-public-broadcaster-rthk/>; Michelle Chan, *Nikkei Asia*, "Hong Kong journalists face fresh political pressures in reporting," Dec. 15, 2020, available at <https://asia.nikkei.com/Politics/Hong-Kong-journalists-face-fresh-political-pressures-in-reporting>.

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

¹⁴³ Natalie Wong, *South China Morning Post*, "Hong Kong public broadcaster under 'immense pressure' as it attempts to help arrested journalist, staff union chief says," Nov. 5, 2020, available at <https://www.scmp.com/news/hong-kong/politics/article/3108606/hong-kong-public-broadcaster-under-immense-pressure-it>.

¹⁴⁴ See *Al Jazeera*, "Hong Kong eyes significant overhaul of public broadcaster RTHK," Feb. 19, 2021, available at <https://www.aljazeera.com/news/2021/2/19/hong-kong-eyes-major-overhaul-of-public-broadcaster>; Annabelle Timsit, *Quartz*, "China's ban on the BBC is worse than it sounds," Feb. 15, 2021, available at <https://qz.com/1972313/concerns-over-media-freedom-as-hong-kong-follows-china-on-bbc-ban/>; Theodora Yu & Shibani Mahtani, *Washington Post*, "Hong Kong reels in public broadcaster RTHK as media clampdown intensifies," Feb. 19, 2021, available at https://www.washingtonpost.com/world/asia_pacific/hong-kong-rthk-media-freedom/2021/02/19/42397a18-7279-11eb-8651-6d3091eac63f_story.html; International Federation of Journalists, "Hong Kong: Former leader meddles over satirical content on public broadcaster," Feb. 18, 2021, available at <https://www.ifj.org/media-centre/news/detail/category/press-releases/article/hong-kong-former-leader-meddles-over-satirical-content-on-public-broadcaster.html>

¹⁴⁵ RTHK, "'Avoid suppression claims by stopping RTHK services'," Apr. 14, 2021, available at <https://news.rthk.hk/rthk/en/component/k2/1585779-20210414.htm>.

¹⁴⁶ *Reuters*, "Foreign experts quit Hong Kong police probe questioning its independence," Dec. 10, 2019, available at <https://www.reuters.com/article/us-hongkong-protests/foreign-experts-quit-hong-kong-police-probe-questioning-its-independence-idUSKBN1YF0AW>; *Al Jazeera*, "International experts quit Hong Kong police protest probe," Dec. 11, 2019, available at <https://www.aljazeera.com/news/2019/12/11/international-experts-quit-hong-kong-police-protest-probe>; *Hong Kong Free Press*, "Int'l experts to quit Hong Kong investigation into police handling of protests," Dec. 11, 2019, available at <https://hongkongfp.com/2019/12/11/breaking-international-experts-quit-hong-kong-investigation-police-handling-protests/>.

¹⁴⁷ *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/>; Natalie Wong, *South China Morning Post*, "Hong Kong protests: police watchdog set to release report into force's handling of last year's

facing or have faced charges for involvement in protests, police have not faced accountability for use of force against or failure to protect members of the public. And taken with RTHK's announcement on May 3, 2021 (Press Freedom Day) that it would be deleting programming older than one year from its YouTube and Facebook pages¹⁴⁸—including Bao Choy's documentary—this case appears to be an attempt by the authorities to control the narrative on the Yuen Long attack, limit discussion of officials' improper response to or possible involvement in the violence against protests and censure criticism of the police.

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

unrest within days," May 13, 2020, *available at* <https://www.scmp.com/news/hong-kong/politics/article/3084256/hong-kong-protests-police-watchdog-set-release-report>; *Deutsche Welle*, "Hong Kong protests: Watchdog clears police of wrongdoing," May 15, 2020, *available at* <https://www.dw.com/en/hong-kong-protests-watchdog-clears-police-of-wrongdoing/a-53447541>; Human Rights Watch, "Still no Accountability for Hong Kong's Police Force," Nov. 19, 2019, *available at* <https://www.hrw.org/news/2020/11/19/still-no-accountability-hong-kongs-police-force>; 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/>.

¹⁴⁸ Michael Shum, *The Standard*, "RTHK plan to delete content spurs online push," May 3, 2021, *available at* <https://www.thestandard.com.hk/section-news/section/4/229828/RTHK-plan-to-delete-content-spurs-online-push>; Selina Chang, *Hong Kong Free Press*, "Hong Kong broadcaster RTHK deletes shows over a year old from internet as viewers scramble to save backups," May 3, 2021, *available at* <https://hongkongfp.com/2021/05/03/hong-kong-broadcaster-rthk-to-delete-shows-over-a-year-old-from-internet-as-viewers-scramble-to-save-backups/>.

CONCLUSION AND GRADE



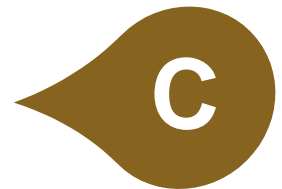
TrialWatch Expert Findings:

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

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

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

GRADE:



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.

² ICCPR, Article 26.